BEFORE THE WORLD TRADE ORGANIZATION

PANEL PROCEEDINGS

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

(DS603)

AUSTRALIA'S SECOND WRITTEN SUBMISSION

Business Confidential Information
REDACTED

19 May 2023

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Argentina – Import Measures	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
Argentina – Textiles and Apparel	Panel Report, *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
Australia – Anti-Dumping Measures on Paper	Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper,* WT/DS529/R and Add.1, adopted 28 January 2020
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Broiler Products	Panel Report, *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
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union,* WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
EC – Bananas III	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
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165

Short Title	Full Case Title and Citation
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EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Argentina)	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
EU – Biodiesel (Argentina)	Panel Report, *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
EU – Biodiesel (Indonesia)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EU – Footwear (China)	Panel Report*, European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
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Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *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*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Russia – Railway Equipment	Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R and Add.1, adopted 5 March 2020
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)	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
Ukraine – Ammonium Nitrate	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
Ukraine – Ammonium Nitrate	Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate,* WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R, DSR 2019:X, p. 5339
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report*, United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:, p. 10127
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Carbon Steel (India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189
US – Carbon Steel (India) (Article 21.5 – India)	Panel Report, United States – *Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India,* WT/DS436/RW and Add.1, circulated to WTO Members 15 November 2019, appealed on 18 December 2019
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751

Short Title	Full Case Title and Citation
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Corrosion-Resistant Steel Sunset Review	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
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R, DSR 2015:I, p. 183
US – Countervailing Measures (China) (Article 21.5 – China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW and Add.1, adopted 15 August 2019, DSR 2019:IX, p. 4737
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018, DSR 2018:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report*, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Pipes and Tubes (Turkey)	Panel Report*, United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed on 25 January 2019
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R, DSR 2015:III, p. 1341

Short Title	Full Case Title and Citation
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
US – Softwood Lumber VII	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
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States,* WT/DS381/RW/USA and Add.1 / United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/RW2 and Add.1, adopted 11 January 2019, as upheld by Appellate Body Report WT/DS381/AB/RW/USA / WT/DS381/AB/RW2, DSR 2019:III, p. 1315
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Washing Machines	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Wool Shirts and Blouses	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
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
304 SS CRC	grade 304 stainless steel cold rolled coil
AD	Anti-dumping
ADC	Anti-Dumping Commission
ADRP	Anti-Dumping Review Panel
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201
Australia's additional PRR comments	Australia's comments on China's PRR Response, filed on 12 January 2023
BCI	Business Confidential Information
CBSA	Canadian Boarder Services Agency
CCME	China Chamber of Commerce for Import and Export of Machinery and Electronic Products
China's panel request	Request for the establishment of a panel by China, WT/DS603/2
Comsteel	Commonwealth Steel Company Pty Ltd
Expiry Review 487	Expiry review into the alleged anti-dumping measures imposed on wind towers from China and Korea
Expiry Review 517	Expiry review into the alleged anti-dumping and countervailing measures imposed on stainless steel sinks from China
CTMS	cost to make and sell
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401
GAAP	Generally accepted accounting principles
GATT 1994	Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994)
GOC	Government of China
Guangdong Metals	Guangdong Metals and Minerals Import & Export Co., Ltd
Investigation 198	Investigation into the alleged dumping of steel plate from China and four other WTO Members
Investigation 221	Investigation into the alleged dumping of wind towers from China and Korea
Investigation 238	Investigation into the alleged dumping and subsidisation of stainless steel sinks from China

Abbreviation	Full Form or Description
Investigation 466	Investigation into the alleged dumping of railway wheels from China and France and the alleged subsidisation of railway wheels from China
Jiabaolu	Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd.
Masteel	Maanshan Iron & Steel Co., Ltd.
MCC	Model Control Code
MEPS	MEPS (International) Ltd, a price data agency
OCOT	ordinary course of trade
Primy	Primy Corporation Limited
PRR	Australia's Preliminary Ruling Request, filed on 16 December 2022
PRR Response	China's response to Australia's PRR, filed 4 January 2023
Rhine Sinkwares	Rhine Sinkwares Manufacturing Ltd Hui Zhou
SBB	Steel Bulletin Board, a price data agency
SCM Agreement	Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14
SEF	Statement of Essential Facts
SG&A	Selling, general and administrative
SIE	State-invested enterprise
SOE	State-owned enterprise. Any company or enterprise that is wholly or partially owned by the GOC as defined above (either through direct ownership or through association). In previous investigations and correspondence, the GOC has advised that the use of the term 'SOE' is declining in China and that these enterprises are now referred to with terms such as SIE as defined above. For the purpose of this submission, stated-owned enterprise and state-invested enterprise are together referred to as SOE.
stainless steel sinks	deep drawn stainless steel sinks
TSP	Shanghai Taisheng Wind Power Equipment Co.
Valdunes	MG-Valdunes SAS
VAT	value-added tax
WTO	World Trade Organization
Zhuhai Grand	Zhuhai Grand Kitchenware Co. Ltd.

LIST OF EXHIBITS

Exhibit No.	Exhibit Name	Short Title
AUS-1 (BCI)	[redacted]	[redacted]
AUS-2	Email and letter from the ADC to MOFCOM, receipt of application requesting publication of dumping notice, dated 13 August (personal information redacted)	*Email and letter from the ADC to MOFCOM, dated 13 August 2013*
AUS-3	ADC letter to TSP, application for extension of time for submission, dated 27 September 2013 (public record)	*ADC letter to TSP, dated 27 September 2013*
AUS-4	ADC emails to MOFCOM, regarding initiation of investigation, dated 27 and 28 August 2013 (personal information redacted)	*ADC emails to MOFCOM, dated 27 and 28 August 2013*
AUS-5	ADC email to MOFCOM, attaching GOC questionnaire for Wind Towers Investigation 221, dated 29 October 2013 (personal information redacted)	*ADC email to MOFCOM, dated 29 October 2013*
AUS-6	ADC email to MOFCOM, ADC seeking update on GOC questionnaire response, dated 10 December 2013 (personal information redacted)	*ADC email to MOFCOM, dated 10 December 2013*
AUS-7	GOC Questionnaire – Wind Towers exported from the People's Republic of China and the Republic of Korea – 1 January 2012 to 30 June 2013 (due 5 December 2013)	*Wind Towers Investigation 221 – GOC Questionnaire*
AUS-8	Anti-Dumping Commission Electronic Public Record (EPR) webpage, EPR 221 – Wind towers from China, Korea, Investigation (public record)	*EPR 221 – Wind towers from China, Korea*
AUS-9	ADRP Report No. 22 – Deep Drawn Stainless Steel Sinks from the People's Republic of China – 11 September 2015 (published 11 September 2015) (public record)	*Stainless Steel Sinks Review Panel Report – No. 22*
AUS-10	*Customs Act 1901* – Notice under section 269ZZM(4) – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 12 October 2015 (published 16 October 2015)	*Stainless Steel Sinks Review 2015/22 – Public Notice – Minister's Decision*
AUS-11	*Customs Act 1901* – Part XVB – Certain Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China – Notice under subsection 269ZHD(4) of the *Customs Act 1901* – 3 July 2019	*Stainless Steel Sinks Continuation 517 Initiation - ADN No. 2019/86*

Exhibit No.	Exhibit Name	Short Title
AUS-12 (BCI)	[redacted]	[redacted]
AUS-12	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018 (published 6 June 2018)) (public record)	*Railway Wheels – Masteel Questionnaire*
AUS-13	Stainless Steel Sinks – Komodo Hong Kong Limited, Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014 (extended to 8 May 2014)) (published 21 May 2014) (public record)	*Stainless Steel Sinks Sinks – Komodo Questionnaire*
AUS-14	Zhuhai Grand Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014) (published 16 May 2014) (public record)	*Stainless Steel Sinks – Zhuhai Grand Questionnaire*
AUS-15	Stainless Steel Sinks – Primy Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014 (extended to 5 May 2014)) (published 20 May 2014) (public record)	*Stainless Steel Sinks – Primy Questionnaire*
AUS-16	Statement of Essential Facts (SEF) No. 466 – Alleged dumping of certain railway wheels exported from the `People's Republic of China and France, and alleged subsidisation of certain railway wheels exported from the People's Republic of China, 11 October 2018 (published 11 October 2018) (public record)	*Railway Wheels Investigation 466 – SEF*
AUS-17	Statement of Essential Facts (SEF) No. 238 – Alleged dumping and subsidisation of deep drawn stainless steel sinks exported from the People's Republic of China, 23 December 2014 (published 23 December 2014) (public record)	*Stainless Steel Sinks investigation 238 –SEF*
AUS-18	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)) (published 12 June 2018) (public record)	*Railway Wheels Investigation 466 – GOC Questionnaire*

Exhibit No.	Exhibit Name	Short Title
AUS-19	Preliminary Affirmative Determination (PAD) No. 466 and imposition of securities, ADN No. 2018/99, Railway wheels exported from the People's Republic of China and France, 18 June 2018 (published 18 June 2018) (public record)	*Railway Wheels Investigation 466 – PAD*
AUS-20	Note for File – Meeting between China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME), Masteel and the Anti-Dumping Commission on 4 September 2018 (public record)	*Note for File – Meeting between CCCME, Masteel and the Anti-Dumping Commission*
AUS-21	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Attachment A-4-3-2 – Maanshan Iron & Steel Company Limited – 2017 Auditors Report" (extract)	*Railway Wheels – Masteel Questionnaire*, "Attachment A-4-3-2 - Masteel - 2017 Auditors Report"
AUS-22 (BCI)	[redacted]	[redacted]
AUS-22 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix 13 – Raw Material Purchases"	*Railway Wheels – Masteel Questionnaire*, "Appendix 13 – Raw Material Purchases"
AUS-23	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 1 – 13th Five Year Plan for the Steel Industry"	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 1 – 13th Five Year Plan for the Steel Industry"
AUS-24	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020)" (extract)	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 16 – The 13th Five-Year Plan for Economic and Social Development of the PRC"

Exhibit No.	Exhibit Name	Short Title
AUS-25	H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry", in L. Song et al. (ed.), *China's New Sources of Economic Growth, Reform, Resources and Climate Change Vol.1*, (ANU Press, 2016), pp. 337-358.	H. Liu and L. Song, "Issues and Prospects for the Restructuring of China's Steel Industry"
AUS-26	European Commission (EC), *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations* (Brussels, 20 December 2017) (extract)	EC, *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China*
AUS-27	OECD, *OECD Economic Surveys: China 2017* (Paris, March 2017) (extract)	OECD, *OECD Economic Surveys: China 2017*
AUS-28	L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*, (Center on Globalization, Governance & Competitiveness, Duke University, September 2016)	L. Brun, *Overcapacity in Steel – China's Role in a Global Problem*
AUS-29	United States Department of Commerce, *China's Status as a Non-Market Economy* (Washington D.C., 26 October 2017) (extract)	United States Department of Commerce, *China's Status as a Non-Market Economy*
AUS-30	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 15 – 12th Five-Year Plan for National Economic and Social Development" (extract)	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 15 – 12th Five-Year Plan for National Economic and Social Development"
AUS-31	Government of China Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 30 December 2017 (due 25 May 2018 (extended to 11 June 2018)), "Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc. "	*Railway Wheels Investigation 466 – GOC Questionnaire*, "Attachment 10 – Taxes and tariffs for railway wheels, steel billet etc."
AUS-32	Anti-Dumping Commission, *Analysis of Steel and Aluminium Markets – Report to the Commissioner of the Anti-Dumping Commission* (Canberra, August 2016) (extract)	Anti-Dumping Commission, *Analysis of Steel and Aluminium Markets*

Exhibit No.	Exhibit Name	Short Title
AUS-33	Customs Act 1901 – Part XVB – Report No. 301 – Alleged dumping of Steel Rod in Coils exported from the People's Republic of China – 29 March 2016 (published 22 April 2016) (public record) (extract)	*Steel Rod in Coils Investigation 301 Report*
AUS-34	Maanshan Iron & Steel Company – Articles of Association – 22 December 2017 (extract)	*Railway Wheels – Masteel Articles of Association 2017*
AUS-35 (BCI)	[redacted]	[redacted]
AUS-35 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix – Ma Steel Limited – 466", tab "12-Subsidy List 2017" (extract)	*Railway Wheels – Masteel Questionnaire*, "Appendix – Ma Steel Limited – 466", tab "12-Subsidy List 2017"
AUS-36 (BCI)	[redacted]	[redacted]
AUS-36 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Appendix – Ma Steel Limited – 466", tab "16-Income Tax" (extract)	*Railway Wheels – Masteel Questionnaire*, "Appendix – Ma Steel Limited – 466", tab "16-Income Tax"
AUS-37 (BCI)	[redacted]	[redacted]
AUS-37 (BCI redacted)	Masteel Questionnaire – Railway wheels exported from the People's Republic of China – 1 January to 31 December 2017 (due 25 May 2018), "Exhibit I-3 – Income Tax Return and Payment"	*Railway Wheels – Masteel Questionnaire,* "Exhibit I-3 – Income Tax Return and Payment"
AUS-38	Maanshan Iron & Steel Company Annual Report 2015 (extract)	*Railway Wheels – Masteel Annual Report 2015*

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

Exhibit No.	Exhibit Name	Short Title
AUS-44	Government of China Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 5 May 2014) (published 22 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – GOC Questionnaire*
AUS-45	Email from the ADC to Corrs Chambers Westgarth, confirms MOFCOM's engagement of Corrs Chambers Westgarth and raises government questionnaire, dated 14 April 2014 (personal information redacted)	See *Email from the ADC to Corrs Chambers Westgarth, dated 14 April 2014*
AUS-46	Email from the ADC to Corrs Chambers Westgarth, request for extension granted, dated 2 May 2014 (personal information redacted)	*Email from the ADC to Corrs Chambers Westgarth, dated 2 May 2014*
AUS-47	Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD – Comments of the Government of China concerning "particular market situation" in PAD 238, 19 September 2014 (published 19 September 2014) (public record)	*Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD*
AUS-48	Preliminary Affirmative Determination (PAD) No. 238 – Report concerning Deep Drawn Stainless Steel Sinks Exported to Australia from the People's Republic of China – August 2014 (published 13 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – PAD*
AUS-49	Statement of Essential Facts (SEF) No. 238 – Report Concerning the Alleged Dumping and Subsidisation of Deep Drawn Stainless Steel Sinks Exported to Australia from the People's Republic of China – 23 December 2014 (published 23 December 2014) (public record)	*Stainless Steel Sinks Investigation 238 – SEF*
AUS-50	Canada Border Services Agency (CBSA) Statement of Reasons concerning the making of final determinations with respect to the dumping and subsidizing of certain stainless steel sinks originating in or exported from the People's Republic of China, 4214-32 AD/1392, 4218-31 CVD/129, 9 May 2012, "Non-Confidential Attachment C-1.1.1 of the application" (public record)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, Certain Stainless Steel Sinks, "Non-Confidential Attachment C-1.1.1"

Exhibit No.	Exhibit Name	Short Title
AUS-51	Canada Border Services Agency (CBSA), Statement of Reasons Concerning the Making of Final Determinations with respect the Dumping and Subsidizing of Certain Pup Joints Originating in or Exported from the People's Republic of China, 27 March 2012 (public record)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – CBSA Statement of Reasons*, Certain PUP joints, "Non-Confidential Attachment C-1.1.3"
AUS-52 (BCI)	[redacted]	[redacted]
AUS-52 (BCI redacted)	Application for the publication of dumping and/or countervailing duty notices – Certain Deep Drawn Stainless Steel Sinks – exported from China – Attachment C-1.1.4 (April 2013)	*Stainless Steel Sinks Investigation 238 - Domestic Industry Application – MetalBulletin Research Report* "Confidential Attachment C-1.1.4"
AUS-53	International Stainless Steel Forum (ISSF), *Stainless Steel in Figures* (2014)	*ISSF Stainless Steel Figures 2014 Report*
AUS-54	Stainless Steel Sinks – Elkay (China) Kitchen Solutions, Co. Ltd. Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 24 April 2014) (published 20 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Elkay (China) Kitchen Solutions Questionnaire*
AUS-55	Stainless Steel Sinks – Franke (China) Kitchen System Co., Ltd Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013 (due 8 May 2014) (published 20 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Franke (China) Kitchen System Co., Ltd Questionnaire*
AUS-56	Stainless Steel Sinks – Zhongshan Jiabaolu Kitchen & Bathroom Products Co., Ltd, Exporter Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China (4 May 2014) (published 21 May 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Jiabaolu Questionnaire*

Exhibit No.	Exhibit Name	Short Title
AUS-57	Stainless Steel Sinks Investigation 238 – Komodo Submission Response on PMS – "submission on particular market situation in China", 22 July 2014 (published 5 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PMS*
AUS-58	Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PAD – "submission on preliminary determination", 18 August 2014 (published 18 August 2014) (public record)	*Stainless Steel Sinks Investigation 238 – Komodo Submission Response to PAD*
AUS-59	Letter from AllBright Law Offices on behalf of Zhuhai Grand Kitchenware Company., Ltd to the Anti-Dumping Commission dated 3 November 2014 (published 6 November 2014)	*Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd re Visit Report*
AUS-60 (BCI)	[redacted]	[redacted]
AUS-60	Stainless Steel Sinks Continuation 517 Report Confidential attachment 16, Primy Domestic Sales, tab D-2 (public record) (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 16, Primy Domestic Sales, tab D-2
AUS-61 (BCI)	[redacted]	[redacted]
AUS-61	Stainless Steel Sinks Continuation 517 Report – Primy export sales worksheet response to Exporter Questionnaire, Primy Export Sales Summary, tab B-2, revised exhibit (public record) (extract)	*Stainless Steel Sinks Continuation 517 Report* – Primy Export Sales Summary, tab B-2
AUS-62 (BCI)	[redacted]	[redacted]

Exhibit No.	Exhibit Name	Short Title
AUS-62 (BCI redacted)	Stainless Steel Sinks Continuation 517 Report – Confidential attachment 15, Primy Domestic Sales, worksheet (b) Domestic CTMS Summary (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 15, Primy Domestic Sales
AUS-63 (BCI)	[redacted]	[redacted]
AUS-63 (BCI redacted)	Stainless Steel Sinks Continuation 517 Report – Confidential attachment 17, Primy Normal Value, tab (f) AU Accessories (extract)	*Stainless Steel Sinks Continuation 517 Report* – Confidential attachment 17, Primy Normal Value, tab (f) AU Accessories
AUS-64	Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd, 5. Profit Calculation, 12 January 2015 (published 13 January 2015)	*Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd*
AUS-65	Email from ADC to MOFCOM, requesting completion of questionnaire, dated 31 March 2014 (personal information redacted)	*Email from ADC to MOFCOM, dated 31 March 2014*
AUS-66	Email from Corrs to ADC, including China's response to the GOC questionnaire, dated 19 May 2014 (personal information redacted)	*Email from Corrs Chambers Westgarth to ADC, dated* 19 May 2014
AUS-67 (BCI)	[redacted]	[redacted]
AUS-67 (BCI redacted)	Stainless Steel Sinks – Zhuhai Grand Kitchenware Company Limited, Visit – Investigation 238 Alleged Dumping and Subsidisation of certain deep drawn stainless steel sinks exported from the People's Republic of China, Data provided by Zhuhai during visit, "Steel Purchases" (extract)	*Stainless Steel Sinks – Zhuhai Grand Verification Visit*, "Steel Purchases"

Exhibit No.	Exhibit Name	Short Title
AUS-68	Email Correspondence, MOFCOM to ADC, MOFCOM to respond to countervailing duty notice for sinks during the investigation, 15 February 2014 (personal information redacted)	*Email from MOFCOM to ADC, 15 February 2014*
AUS-69	Email Correspondence, MOFCOM to ADC, MOFCOM confirm no consultations to be held before investigation initiated, sent on 24 February 2014 (personal information redacted)	*Email from MOFCOM to ADC, 24 February 2014*
AUS-70	*Customs Act 1901* - Part XVB – Report No. 193 – Alleged subsidisation of zinc coated steel exported from the People's Republic of China – 28 June 2013 (published 5 August 2013)	*Aluminium Zinc Coated Steel Investigation 193 Report*
AUS-71 (BCI)	[redacted]	[redacted]
AUS-71 (BCI redacted)	*Stainless Steel Sinks Continuation 517* – Exporter Evidence of Termination: Subsidy calculation of Guangdong Cresheen; Rhine; Zhuhai Grand; residual rate; exporter rate (extracts)	*Stainless Steel Sinks Continuation 517* – Exporter Evidence of Subsidy Termination
AUS-72 (BCI)	[redacted]	[redacted]
AUS-72 (BCI redacted)	Stainless Steel Sinks Continuation 517 – Confidential Attachment, Primy Exporter Questionnaire Response, worksheet "G-3 Domestic CTMS" (extract)	*Stainless Steel Sinks Continuation 517 – Primy Questionnaire*, "G-3 Domestic CTMS"
AUS-73 (BCI)	[redacted]	[redacted]
AUS-73 (BCI redacted)	Stainless Steel Sinks Continuation 517 – Confidential attachment 17, Primy Normal Value, worksheets: "(a) OCOT Sales", "(a) TAC(1) NV", " (f) AU Accessories" (extract)	*Stainless Steel Sinks Continuation 517 – Primy*, Confidential attachment 17 – worksheets

Exhibit No.	Exhibit Name	Short Title
AUS-74 (BCI)	[redacted]	[redacted]
AUS-74 (BCI redacted)	Stainless Steel Sinks Continuation 517 – Confidential attachment 14, Primy Export Price, worksheets: "(a) Export sales" and "Acc Packs" (extract)	*Stainless Steel Sinks Continuation 517 – Primy*, Confidential attachment 14 – worksheets
AUS-75 (BCI)	[redacted]	[redacted]
AUS-75 (BCI redacted)	Wind Towers Investigation 221 Report – Confidential Appendix 2, "Steel uplift"	*Wind Towers Investigation 221* – Confidential Appendix 2
AUS-76	*Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86	*Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86
AUS-77	Emails from Percival Legal to ADC, confirming Masteel's instructions on profit calculation, dated 14 April 2014 (personal information redacted)	See *Emails from Percival Legal to ADC, dated 9 June 2018 to 11 June 2018*
AUS-78 (BCI)	[redacted]	[redacted]
AUS-78 (BCI redacted)	Jiabaolu Exporter Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China (4 May 2014) Part B-2, Q2(e) (public record) (extract)	*Stainless Steel Sinks Investigation 238 – Jiabaolu Questionnaire*, Confidential Part B-2, 2(e)
AUS-79 (BCI)	[redacted]	[redacted]

Exhibit No.	Exhibit Name	Short Title
AUS-79 (BCI redacted)	Rhine Questionnaire – Deep Drawn Stainless Steel Sinks exported from the People's Republic of China – 1 January – 31 December 2013, Part H-3, Q3(b) (public record) (extract)	*Stainless Steel Sinks Investigation 238 – Rhine Questionnaire*, Confidential Part H-3, Q3(b)
AUS-80	Oxford Dictionaries online, definition of "base" https://www.oed.com/view/Entry/15856 (accessed 5 May 2023)	Oxford Dictionaries online, definition of "base"

I. INTRODUCTION

1. China's case remains, as it began, without merit.

2. In this second written submission, Australia focuses on China's arguments, as developed in China's oral submissions at the first Panel meeting and through its written answers to the Panel's questions. Australia will not repeat all the points from its earlier submissions. Where necessary, to give context to the discussion, Australia will briefly summarise the development of arguments and counter arguments up to this point.

3. All of China's claims relating to the wind towers and stainless steel sinks anti-dumping measures and the stainless steel sinks countervailing measure are outside the scope of the Panel's terms of reference. Only China's claims related to the railway wheels anti-dumping measures are properly before the Panel. With respect to these claims, as the record shows, Australia has fully complied with its obligations under the Anti-Dumping Agreement.

4. The repeated recasting by China of its various lines of argument, seemingly in an effort to remedy its flawed panel request, unnecessarily obfuscates the terms of reference issues raised by Australia in its PRR dated 16 December 2022 and first written submission. Australia's position is straight-forward and is summarised as follows:

a) all of China's claims under the SCM Agreement are directed at countervailing measures that were no longer in effect at the time of the Panel's establishment (that is, measures related to Program 1);

b) original investigations and expiry reviews are distinct and separate proceedings. The anti-dumping duties that were in place at the time of China's panel request (and remain in place today) were imposed on the basis of the expiry reviews, not the original investigations. Except for AD claims 6.b.ii and 6.b.iii, all of China's claims under the Anti-Dumping Agreement concerning wind towers and stainless steel sinks are directed at measures that were no longer in effect at the time of Panel establishment;

c) China did not cite Article 11.3 of the Anti-Dumping Agreement or Article 21.3 of the SCM Agreement in its panel request and, accordingly, any claims against the wind towers and stainless steel sinks expiry reviews fall outside the Panel's terms

of reference because China's failure to cite the relevant international treaty provision means that it failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU; and

d) the subsequent justifications and arguments advanced by China cannot cure the fundamental defects in its panel request.

5. In this submission, Australia highlights that China's changing positions in relation to the terms of reference issues are both incoherent and lack merit. Accordingly, China's various attempts to salvage its flawed panel request must fail.

6. Australia asks that the Panel rule on the terms of reference issues before the second meeting of the Panel. The terms of reference issues have been thoroughly ventilated. China has had a full opportunity to present its views. An early ruling at this stage of the dispute would still provide meaningful efficiencies, by avoiding the need for the Panel, the WTO Secretariat, and the parties to spend further time engaging on the substance of claims that fall wholly outside the Panel's terms of reference.

7. Australia notes with disappointment that in China's written responses to the Panel's questions following the first meeting with the parties it seeks to advance entirely new claims under Article 11.2 of the Anti-Dumping Agreement, and Article 21.2 of the SCM Agreement. These claims were not identified in the panel request, nor were they advanced in China's first written submission, or in any of China's oral or written submissions at the first Panel's meeting. China's conduct is clearly inconsistent with the requirements of both Article 6.2 of the DSU and paragraph 3.1 of the Panel's Working Procedures.

8. Australia's view is that the terms of reference issues it has put before the Panel are compelling. Nevertheless, if the Panel were, *arguendo,* to consider the substantive claims made by China in relation to stainless steel sinks and wind towers are properly within its terms of reference, those claims should be rejected in their entirety.

9. In respect of China's claims pertaining to the railway wheels investigation, the investigatory record and final determination show that the ADC's conduct and decisions were consistent with Australia's WTO obligations. Contrary to China's submissions, an unbiased and

objective investigating authority could have reached the same conclusions as the ADC, particularly given the Government of China's serious and pervasive levels of intervention in the domestic steel industry and resulting distortions in Chinese steel market.

10. Setting aside for the moment China's duplicative consequential claims, it is apparent that China's case concerning the railway wheels investigation relies almost entirely on three legally unsound interpretations of the Anti-Dumping Agreement. In each instance China postulates additional legal obligations, purportedly undertaken by Australia, that have no basis in the text of the Agreement, and then complains that the ADC did not meet China's confected standards.

11. First, China's AD claim 1 is predicated on an argument that it is never permissible for an investigating authority to use out-of-country data to determine the cost of production in the country of origin under Article 2.2 of the Anti-Dumping Agreement. This argument is incompatible with the text of Article 2.2, which imposes no such limitation either expressly or by implication. Moreover, the Appellate Body has rejected this very contention.

12. Second, China's AD claim 3 is predicated on an argument that there is a mandatory requirement in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement for express affirmative findings to be made under the first and second conditions before an investigating authority can make a finding under "normally". There is no basis in the text of the Anti-Dumping Agreement for such a sequencing obligation, nor is there any support for this position from the structure and purpose of Article 2.2.1.1.

13. Third, China's AD claim 6 is predicated on an argument that Article 2.4 of the Anti-Dumping Agreement not only permits, but mandates, an investigating authority to make adjustments in order to reverse the effects of properly made decisions concerning the construction of normal value under Article 2.2 of the Anti-Dumping Agreement. This has no basis in law, and would lead to perverse and irrational outcomes.

14. For these reasons, and those set out in the balance of Australia's submissions, China's claims concerning the railway wheels investigation should be dismissed.

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

15. Australia takes note of the Panel's communication of 14 April 2023 requesting further input with respect to Australia's terms of reference challenges[1] and is ready to assist the Panel. In addition to the arguments in this second written submission,[2] Australia directs the Panel's attention to its previous submissions on these issues, including:

a) Australia's PRR dated 16 December 2022;

b) Australia's additional PRR comments dated 12 January 2023;

c) Australia's first written submission;[3]

d) Australia's opening statement at the first substantive meeting;[4]

e) Australia's closing statement at the first substantive meeting;[5]

f) Australia's responses to the Panel's questions.[6]

16. Despite the number of submissions from both parties, and notwithstanding China's contorted arguments to cure the defects in its panel request, the terms of reference issues remain straightforward.

17. All of China's claims against the wind towers and stainless steel sinks anti-dumping measures and the stainless steel sinks countervailing measure are outside the scope of the Panel's terms of reference. At the time of China's "as applied" panel request there were (and remain) no countervailing measures being applied with respect to Program 1. The anti-dumping and countervailing duties that were in place at the time of China's panel request were imposed on the basis of the expiry reviews, not the original investigations. China did not cite Article 11.3 of the Anti-Dumping Agreement or Article 21.3 of the SCM Agreement in its panel request and, accordingly, any claims against the wind towers and stainless steel sinks

[1] Panel's communication of 14 April 2023.
[2] Australia's second written submission, paras.15-136.
[3] Australia's first written submission, paras. 22-139 and 657-666.
[4] Australia's opening statement, paras. 15-41.
[5] Australia's closing statement, paras. 4-12.
[6] A number of responses in Australia's response to Panel's questions, particularly questions 6-10 and 42-60.

expiry reviews now advanced by China in its submissions, fall outside this Panel's terms of reference.

18. China failed to satisfy the requirements of Article 6.2 of the DSU that a panel request "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[7] The only claims properly within the Panel's terms of reference in this dispute are China's anti-dumping claims in section B.1 of China's panel request related to the railway wheels investigation.

19. Notwithstanding these deficiencies, China contends that its panel request is sufficient under the DSU. China offers three primary arguments:

a) that the specific measures at issue are some combination of measures listed in the appendix to China's panel request;

b) that the measures at issue continue to exist under Australian law; and

c) that it is not necessary for a complainant to cite the relevant legal basis when challenging an anti-dumping expiry review.

20. These arguments are without merit. Below, Australia demonstrates that China's revised definition of the measure at issue is nothing more than an improper attempt to re-write its panel request through subsequent submissions; that China has provided no evidence to support its assertions about Australian law; and that under Article 6.2 of the DSU China cannot challenge an expiry review without citing the relevant legal basis for that claim, Article 11.3 of the Anti-Dumping Agreement or Article 21.3 of the SCM Agreement.

21. None of the subsequent justifications and arguments advanced by China, including in its second written submission, can cure the fundamental defects in its panel request. Australia notes that where there is a question regarding a panel's jurisdiction to examine and make findings and recommendations with respect to a specific matter raised by a complainant, a panel has a duty to address that issue.[8]

[7] Article 6.2 of the DSU.
[8] See the Appellate Body Report in *Mexico – Corn Syrup (Article 21.5 – US)* at para. 36, which 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."

22. For the reasons cited above, Australia respectfully asks that the Panel rule on the procedural issues prior to the second Panel meeting.

A. ALL OF THE CVD CLAIMS ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

23. China's CVD claims in section B.2 of its panel request relate only to the countervailing measures associated with Program 1. China intentionally limited its "as applied" claims to "the countervailing measures… only with regard" to Program 1.[9]

24. With very limited exceptions, measures that are no longer in existence at the time of panel establishment cannot be the subject of dispute settlement,[10] particularly in an "as applied" dispute.[11] The DSU does not vest panels with the authority to opine on measures that are expired, terminated or otherwise non-existent.[12]

25. At the time that China filed its panel request, no measure related to Program 1 had been in existence for nearly two years.[13] This is because in Expiry Review 517, which superseded the original determination, the ADC found that no exporter received a benefit in respect of Program 1. As a consequence, there was no subsidy and, in turn, no countervailing duties have been applied to any imports of stainless steel sinks from China relating to Program 1 since 27 March 2020.[14] All of China's claims in section B.2.1 through B.2.5 of its panel request are thus with respect to measures that are no longer in existence at the time the Panel was established. Accordingly, consistent with Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU and decades of previous panel and Appellate Body reports, Australia submits that China's claims are outside the Panel's terms of reference.

26. China's arguments in response have continuously changed. In the context of the CVD claims, in an apparent effort to salvage its flawed claims, China now advances several

[9] China's panel request, section B.2.

[10] See Appellate Body Report, *EC – Chicken Cuts*, para. 156 ("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*." Emphasis added).

[11] See e.g. Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.105-7.106.

[12] PRR, paras. 4-12. See also the discussion in Australia's second written submission, paras. 68-72.

[13] It is clear, based on a plain reading of China's panel request, that the countervailing measures challenged by China are only those related to Program 1, namely the original determination and any resulting duties: Australia's response to Panel question no. 7, paras. 9-14.

[14] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85; *Evidence of Termination of Program 1*, (Exhibit AUS-71).

misconceived contentions. These arguments involve, among others: (1) the identity of the measures specifically challenged in section B.2; (2) the nature of its claims in sections B.2.1 through B.2.5; and (3) the extent to which measures related to Program 1 may be revived or reappear in the future. Each of China's arguments are addressed below.

1. China's attempt to redefine the challenged measures from its own panel request

27. The measures at issue are those identified by a complainant in their request for panel establishment. Yet, throughout this dispute, China has repeatedly attempted to amend the measures being challenged long after its panel request.

28. Prior to the PRR, China appeared to accept that the measure was the original determination. This is apparent from China's first written submission and in its PRR Response, where China confirmed that the challenged measure in section B.2 of its panel request was the original determination by unambiguously stating "China challenges that determination."[15]

29. However, at and following the Panel's first meeting with the parties, China started advancing two new and contradictory definitions of the measures at issue in section B.2. First, China argues that section B.2 does not specify the measures at issue.[16] Second, China argues that the measure at issue is one "connected set of measures" comprised of instruments no. 8-23 in the panel request's Appendix.[17] Both are addressed below.

(a) China argues that it did not intend to identify the measures at issue in section B.2

30. First, China makes the logic-defying argument that the first sentence of section B.2 of China's panel request was not intended to identify or limit the challenged measures. Specifically, in paragraph 12 of China's opening statement, China "rejects" Australia's assertion that "China unambiguously states that it is only challenging the countervailing measures associated with Program 1."[18] In response to Panel question no. 7, China describes section B.2

[15] PRR Response, para. 53; China's first written submission, para. 17.
[16] China's opening statement, para. 12.
[17] China's opening statement, para. 12.
[18] China's opening statement, paras. 11-12.

as "[t]he legal basis for China's claim – *which is not to limit the measure or measures that are at issue*."[19]

31. Australia does not understand how China can credibly advance this argument. The plain text of China's panel request makes clear that China's "*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')."[20] The statements by China directly contradict the text of its own panel request.

32. Moreover, Article 6.2 of the DSU requires that a complainant "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[21] The Appellate Body has interpreted this as requiring that a panel request "must plainly connect the challenged measures(s) with provision(s) of the covered agreements claimed to have been infringed."[22] If China did not intend to connect its legal claims to the specific measures at issue in section B.2, notwithstanding the express statement connecting the two, then China's request would be in clear breach of the requirement to "plainly connect" under Article 6.2 of the DSU. On that basis as well, China's claims would be outside the Panel's terms of reference.[23]

33. The text of the first sentence of section B.2 of China's panel request is clear. China challenged "the countervailing measures… only with regard to alleged Program 1." If China had wished to challenge measures other than those related to Program 1, it could have done so by reframing its request. It may be that China now wishes it had done so. But, as China itself stated in response to Panel question no. 5, "[i]t is up to a Member to determine which specific aspect of a measure it challenges under the DSU."[24] Having only challenged measures related to Program 1, China cannot redefine the measure at issue now.

[19] China's response to Panel question no. 7, para. 22 (emphasis added).
[20] China's panel request, section B.2.
[21] Article 6.2 of the DSU.
[22] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review,* para. 162.
[23] See Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.236 (where the panel found certain measures to be outside its terms of reference on the ground that the complainant had not plainly connected the relevant claim with those measures).
[24] China's response to Panel question no. 5, para. 19.

(b) China argues the measures at issue are one "connected set of measures", including the original determination, the interim reviews and the expiry review

34. At the first Panel meeting, China advanced a new argument regarding the identity of the "specific measures at issue" in section B.2 of its panel request. In its opening statement, China argued that the measures at issue were not just those related to Program 1 but, rather, one "connected set of measures" including all instruments listed in no. 8 through 23 of the panel request's appendix.[25] Australia strongly disagrees. This assertion amounts to another attempt by China to reconfigure its panel request in the course of this proceeding.

35. A complainant that wishes to establish that separate legal instruments comprise part of an overarching measure bears the burden of establishing this before the Panel.[26] The complainant must provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.[27] Panels do not "simply assume" that different instruments form part of a single measure, "[o]therwise, the requirement to examine whether a complainant has established the precise content of a measure may well be superfluous."[28] One of the considerations panels take into account in assessing whether separate instruments can be considered as one or separate measures is the respondent's position.[29]

36. In Panel question no. 38, the Panel specifically asks China the extent to which it is challenging a "single measure" and whether it has provided any evidence of "how the different components operate together as part of a single measure exists as distinct from its components" consistent with the Appellate Body in *Argentina—Import Measures*. China failed, or chose not, to meaningfully respond to this question.[30] China presented no evidence for why these separate measures should be considered together and how a countervailing duty order taken as a whole, is distinct from its parts, consistent with *Argentina—Import*

[25] China's opening statement, para. 12.
[26] Appellate Body Report, *Russia – Railway Equipment*, para. 5.239.
[27] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[28] Panel Report, *US – Softwood Lumber VII,* para. 7.756.
[29] Panel Report, *US – COOL,* para. 7.50.
[30] China's response to Panel question no. 38, para. 118(c).

Measures. The burden is on China to do so. Merely stating that separate measures are "a continuous set of measures" does not fulfil this burden.

37. Under both WTO law and Australia's domestic law, several of the instruments listed at no. 8-23 of the panel request's appendix are separate processes with separate obligations. For example, original investigations and expiry reviews are distinct processes, with different purposes, both under WTO rules[31] and under Australia's domestic law. As Australia explained in its response to Panel question no. 48, under Australia's domestic system the expiry review wholly replaces the original determination.[32]

38. Moreover, even if the Panel were to find or assume that all of the instruments listed in no. 8-23 of the panel request's appendix operated together as a connected and distinct measure from its components, the question would be whether this single, connected measure was in breach of Australia's WTO obligations *at the time of panel establishment*.[33] In arguing for its "continuous measure" theory, China conspicuously leaves out the fact that in Expiry Review 517 the ADC found that Program 1 was no longer countervailable because there was no benefit ascribed to any exporter, and the ADC terminated any duties associated with Program 1. China cannot have it both ways. It cannot attempt to include some aspects of no. 8-23 but ignore others.[34] Despite its new arguments regarding a single measure, whether defined separately or taken together, China cannot show that there were any measures related to Program 1 in existence *at the time of panel establishment* – because there were not.

2. China's attempts to reinvent its claims in section B.2 of its panel request should be rejected

39. China attempts to completely reinvent its claims under section B.2 and drastically expand the scope of this dispute by advancing two arguments: (1) China argues that its claims are with respect to the *methodology* used by the ADC to assess Program 1, such that those

[31] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 105-107.
[32] Australia's response to Panel question no. 48, para. 142.
[33] Australia also notes that in China's chart, which is provided in China's response to Panel question no. 37, China clarifies that it is not seeking any findings in respect of the expiry review for section 2.B.5 of its panel request, but is seeking findings in respect of section 2.B.2 through 2.B.4. In so stating, China contradicts its statements where it argues that all of the claims in section B.2 represent one connected measure that includes instruments no. 8 through 23. If China is only seeking findings and recommendations with respect to the original determination for one of its claims, then clearly not even China believes that no. 8-23 comprise a single continuous measure.
[34] China's opening statement, para. 14.

claims extend to any use of that methodology in future reviews, and (2) China seeks assurances that Program 1 will never be considered by the ADC in future reviews. The first amounts to an inappropriate attempt to convert China's "as applied" claims in sections B.2.1-B.2.5 to "as such" challenges. The second set of arguments amounts to a request for an advisory opinion from the Panel with respect to future, speculative measures. Both arguments are addressed below.

40. First, in defending section B.2 of its panel request, China asserts that its claims in sections B.2.1-B.2.5 are with respect to "the erroneous foundational assumptions and methodologies that are common to and are perpetuated throughout" the measures and that it is the "application of the methodology that is at issue in this dispute."[35] China goes on to suggest in response to Panel question no. 40 that "the application and continued application by the investigating authority of methodology and practices inconsistent with the SCM Agreement" is having a continued effect on exporters.[36]

41. Yet, in its panel request, China make no "as such" claims, nor does China challenge an ongoing practice or methodology used by the ADC in this investigation. China's narrow claims in section B.2.1 through B.2.5 of its panel request only relate to specific findings made by the ADC related to Program 1 in the context of the original determination. To this end, Australia notes that all of the countervailable subsidy programs currently subject to duties relate to tax incentives and grant programs. The methodologies used by the ADC with respect to these subsidy programs are completely unrelated to the methodology applied by the ADC in respect of Program 1 in the original determination.[37]

42. Article 6.2 of the DSU prevents a complainant from amending its claims part-way through the proceedings. If China wished to challenge the ADC's methodology in assessing the remaining subsidy programs it could have done so when it drafted its panel request but, having decided not to do so, cannot challenge that methodology now.

43. Second, China inappropriately requests that the Panel ask Australia to "assure the Panel that the program [1] would not thereafter be included in a review of the countervailing

[35] See China's response to Panel questions no. 38 and 54, paras. 118(a) and 141.
[36] China's response to Panel question no. 40, para. 123.
[37] For completeness, it is noted that China's own arguments do not, in substance, address these other subsidy programs.

duties… in a future duty review or expiry review."[38] Australia objects to this request. Besides being irrelevant to the question of whether Program 1 ceased to exist as a consequence of Expiry Review 517, WTO rules do not permit panels to issue advisory opinions on future, speculative measures.[39] Of course, the mere possibility that a subsidy program could be countervailed in the future does not make it challengeable in WTO dispute settlement. Any alleged subsidy program, whether countervailed in the past or not, *might* be countervailed in the future. However, in an "as applied" challenge, WTO rules require a Member to wait until a measure is actually imposed. It is only at that point that it would be appropriate to request consultations and, subsequently if the dispute remained unresolved, request the establishment of a panel.

3. China's assertions that countervailing measures related to Program 1 exist are baseless

44. In its PRR Response and in its responses to the Panel's questions, China asserted that countervailing measures related to Program 1 still exist. China makes this argument despite the fact that the ADC found that Program 1 was no longer a countervailable subsidy and terminated all duties. These assertions are simply wrong. As a matter of Australian law, no countervailing measures related to Program 1 have been in existence since 27 March 2020. Previous WTO panels have considered analogous claims by complainants before and determined to not make any findings in relation to such claims.[40] Nevertheless, as China continues to baselessly assert that Program 1 continues to exist, Australia addresses each of the elements of China's assertions in support of its hypothesis below.

(a) China incorrectly asserts that the ADC will reconsider Program 1 in future reviews

45. First, China alleges that Program 1 still exists because, in its view, the ADC will reconsider Program 1 in future reviews.[41] As Australia has repeatedly explained in this dispute,

[38] PRR Response, para. 55(b).
[39] See Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.39; *Argentina – Textiles and Apparel*, para. 6.13; Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19..
[40] See e.g. Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.105-7.106.
[41] See China's response to Panel question no. 9, para. 26; PRR Response, para. 75.

the fact that the ADC previously considered Program 1 does not mean that the ADC would be required to reconsider Program 1 in a future review.[42]

46. The ADC would consider an allegation of a countervailable subsidy in relation to the provision of raw materials for less than adequate remuneration (LTAR) in a future review if the ADC was provided with evidence indicating the likely existence of such a program – but that would be true for any alleged subsidy program and in the context of any countervailing duty proceeding, regardless of whether that program had been previously considered by the ADC or not.

47. Furthermore, any future examination of Program 1 by the ADC would involve a different period of investigation, different facts, different evidence, and different interested parties (including different producers, manufacturers, exporter, and government entities). The ADC also could make different legal findings with respect to public body, financial contribution, and/or benefit.

48. Australia strongly objects to China's baseless and unsupported assertions that Program 1 still exists because the ADC may conduct a future review. It is simply not true.

(b) China incorrectly asserts that in the expiry review the ADC found that Program 1 was a countervailable subsidy

49. Second, although China agrees that no duties are currently being applied to Chinese exporters in relation to Program 1, China mistakenly asserts that this is because those rates were temporarily adjusted to zero as part of a "variable factors" calculation and not because the ADC determined that Program 1 was no longer a countervailable subsidy.[43]

50. Both WTO rules and Australian law provide that there can be no subsidy unless there is a benefit. Article 1.1(b) of the SCM Agreement requires that "a subsidy shall be deemed to exist if… a benefit is thereby conferred." As no exporter received a benefit during the relevant

[42] See PRR, fn. 49; Australia's additional PRR comments, paras. 21-22; Australia's response to Panel question no. 8, para. 20.
[43] See China's response to Panel question no. 8, para. 23; PRR Response, para. 21.

period of investigation established by the ADC, by definition Program 1 is no longer a subsidy.[44] Evidence on the public record demonstrates this was the case.[45]

51. Furthermore, as Australia noted in its response to the Panel question no. 8, China's entire discussion of "variable factors" is irrelevant to the present dispute.[46] The concept of "variable factors" would only be relevant in a situation where one (or some) of the other exporters were no longer receiving a countervailable subsidy, but at least one of the exporters was continuing to receive a countervailable subsidy.[47] In that case, the subsidy rate for those not receiving the subsidy would be zero, but the subsidy program would remain countervailable with respect to the other exporters as a consequence of the one (or more) exporters receiving a countervailable subsidy. Such a scenario is completely different from what occurred in the expiry review. In Stainless Steel Sinks Expiry Review 517 Report, the ADC determined that there was no evidence of a financial contribution conferring a benefit in respect of *any* of the exporters.[48] As a consequence, Program 1 was removed in its entirety from the scope of the measure on 27 March 2020.

(c) China incorrectly asserts that typographical errors are evidence that Program 1 exists

52. Third, in its response to Panel question no. 4, China alleges that Australia's statement that there are typographical errors in Stainless Steel Sinks Expiry Review 517 Report "is not credible".[49] Despite the seriousness of China's allegation, to the effect that Australia has misled the Panel, no evidence is offered in support of it aside from speculation about what China imagines would have been the "thinking" of the ADC. It is an inappropriate allegation that should not have been made.

53. China offers no evidence in support of its arguments. Rather, China states that the typographical errors are "clear evidence that Program 1 remains with the scope of the CVD

[44] China also does not dispute that as of 27 March 2020, no Chinese exports of stainless steel sinks have been subject to countervailing duties on the basis of Program 1.
[45] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85.
[46] Australia's response to Panel question no. 8, paras. 15-20.
[47] See the example in PRR Response, paras. 57-72.
[48] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85; *Evidence of Termination of Program 1*, (Exhibit AUS-71).
[49] China's response to Panel question no. 4, para. 9.

order". Australia does not understand how two erroneous references could serve as evidence that Program 1 remains in existence.

54. China further argues that "[t]he continued inclusion of the alleged Program 1 in the expiry review demonstrates the ADC's continued assumption that it has the elements of a countervailable subsidy and *that it delivers* and is capable of delivering *an amount of benefit*."[50] These extraordinary assertions are entirely disconnected from the ADC's actual findings. As Australia previously demonstrated, the ADC found in the expiry review, that there was no benefit associated with any of the exporters.[51]

55. China's response then moves on to a statement that "such mentions" represent an "institutionalised belief that [Program 1] exists and is subject to the countervailing measure in place".[52] Australia does not understand what is meant by this submission. It is not comprehensible from China's submission what it means by "such mentions", nor what reasonable meaning could be given to China's reference to an "institutionalised belief" in the context of this proceeding.

56. As explained in Australia's additional PRR comments,[53] there were two errors in Stainless Steel Sinks Expiry Review 517 Report. Although unfortunate, these errors had no legal or practical impact on, nor were reflective of, the outcome of the expiry review. This is clear from the record when it is read as a whole. In particular, Australia refers to the various confidential attachments provided to the Panel in the document: Evidence of the Termination of Program 1.[54] These attachments outline the calculation of the countervailing duties by the ADC during the expiry review. These attachments demonstrate that Program 1 did not contribute to any countervailing duties imposed on Chinese exporters in the expiry review and has not done so since 27 March 2020. China's answer to the question does not engage with this evidence, and instead resorts to intemperate speculation.

[50] China's response to Panel question no. 4, para. 10 (emphasis added).
[51] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 82-83, 85; *Evidence of Termination of Program 1*, (Exhibit AUS-71).
[52] China's response to Panel question no. 4, para. 10.
[53] Australia's additional PRR comments, para. 25.
[54] Exhibit AUS-71.

(d) Duties would have been imposed on other programs in the expiry review regardless of Program 1

57. In response to Panel question no. 40, China submitted that if Program 1 had not been found to be a countervailable subsidy in the original determination, Chinese exporters would not currently be subject to countervailing duties.[55] This submission is factually incorrect.

58. Australia addressed this argument of China previously in paragraphs 29-30 of its additional PRR comments and in response to Panel question no. 49.[56] To reiterate, if Program 1 was not found to be a countervailable subsidy in the original determination, duty (unrelated to Program 1) would have still been imposed on uncooperative exporters. Consequently, there would have been a continuation of duty, regardless of Program 1.

4. Conclusion

59. Consistent with Australia's previous submissions and the reasons stated above, Australia respectfully requests that the Panel find that all of China's claims contained in section B.2 of its panel request 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 ruling on this matter before the second meeting with the parties.

B. ALL OF THE AD CLAIMS ARE OUTSIDE THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

60. China's anti-dumping claims concerning both the stainless steel sinks and wind towers investigations in section B.1 of its panel request are outside the Panel's terms of reference for two reasons.

61. First, nearly all of China's claims concerning wind towers and stainless steel sinks in section B.1.1 through B.1.8 relate almost exclusively to the original determinations in both investigations. As the original determinations for stainless steel sinks and wind towers were

[55] China's response to Panel question no. 40, para. 123.
[56] Australia's response to Panel question no. 49, paras. 143-146.

superseded by expiry reviews at the time of panel establishment, they cannot constitute "measures at issue" for the purposes of Article 6.2 of the DSU.[57]

62. Second, to the extent that China sought to challenge the expiry reviews, China failed to cite the relevant provision of the WTO Agreements related to expiry reviews, which is Article 11.3 of the Anti-Dumping Agreement. It therefore failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU. As the Appellate Body emphasized in *Korea – Dairy*, the identification of the applicable treaty provisions is always necessary for the purposes of defining the terms of reference of a panel and for informing the respondent of the legal claims as required by basic principles of due process and international law.[58]

63. Australia considers that the procedural flaws in China's anti-dumping claims under section B.1 of China's panel request are straight-forward. Australia has addressed these claims in detail in its first written submission, opening statement, closing statement, and response to panel questions.[59] Yet, despite the obvious flaws in China's panel request related to both the stainless steel sinks and wind towers investigations, China objects to Australia's request that the Panel find that these claims are outside its terms of reference. China's arguments are three-fold.

64. First, with respect to China's failure to identify a "measure at issue" in accordance with Article 6.2 of the DSU, China argues that it has not challenged the original determination but rather one "indivisible" and "continuous" measure comprised of instruments no. 8-23 in its panel request appendix for stainless steel sinks and no. 1-7 for wind towers.

65. Second, in making this argument, China also attempts to retroactively amend its 'as applied' claims in sections B.1.1-B.1.8, which were directed at specific findings in the wind towers and stainless steel sinks original investigations, and argue instead that it levied a much broader challenge against the ADC's methodology, including "foundational errors" in the original investigations.

[57] See Australia's first written submission, paras. 54-79.
[58] Appellate Body Report, *Korea - Dairy*, para. 124 (in which the Appellate Body found that "Identification of the treaty 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.").
[59] Australia's second written submission, para. 15.

66. Finally, with respect to whether China has provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with the specificity requirements of Article 6.2 of the DSU, China argues that WTO Members are not required to cite Article 11.3 of the Anti-Dumping Agreement when challenging an expiry review. These arguments are without merit.

1. The anti-dumping original investigations are outside the scope of the panel's terms of reference

67. Australia has already made extensive submissions demonstrating that the original investigations in wind towers and stainless steel sinks were superseded by the expiry reviews prior to the Panel's establishment and are therefore outside the scope of the Panel's terms of reference.[60] In this section Australia will respond to new arguments advanced by China following its first written submission.

(a) The "specific measures at issue" under Article 6.2 of the DSU must be in existence at the time of panel establishment

68. Article 6.2 of the DSU requires that a complainant identify the "specific measures at issue" in its request for panel establishment.[61] A measure that is expired, terminated, or otherwise no longer in existence at the time of panel establishment is not a "specific measure at issue" in accordance with Article 6.2 of the DSU.[62] As the Appellate Body recognized in *EC – Chicken Cuts,* "[t]he term 'specific measure 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*."[63]

69. China states that if the Panel finds certain measures are expired, the Panel is nevertheless able to issue findings and recommendations with respect to those expired measures.[64] In support of this proposition, China cites a number of Appellate Body Reports

[60] Australia's first written submission, paras. 54-79 and 131-134.
[61] Article 6.2 of the DSU.
[62] Appellate Body, *EC – Chicken Cuts*, para. 156; Australia notes none of the limited exceptions to this general rule apply in this case (See for example the Appellate Body Report, *US – Upland Cotton*). Australia further notes that China has advanced no arguments that the original anti-dumping investigations should fall within any of those exceptions. China has simply chosen not to address the legal standard the Panel should use in evaluating whether measures that expired prior to panel establishment are within its terms of reference.
[63] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (emphasis added).
[64] China's response to Panel's question no. 59, para. 151.

including *EU – PET (Pakistan)*, *EU – Fatty Alcohols (Indonesia),* and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*.[65] But all of the cases cited by China involve measures that expired after panel establishment. In other words, these cases relate to a completely different situation: they are instances in which the challenged measure *was* in existence at the time of panel establishment but expired before the Panel issued its final report.

70. In those, quite different situations, WTO panels and the Appellate Body have been wary of efforts by a party to circumvent the panel process by withdrawing a WTO-inconsistent measure in order to moot a dispute before the issuance of an adverse panel ruling, while leaving an opening to reinstate the challenged measure as soon as the dispute is terminated.[66] Australia agrees that where a measure has expired *after* panel establishment, panels have adopted varying approaches with respect to making findings and recommendations in order to prevent "moving target" abuses of the panel process. However, that is not the situation before the Panel in this dispute, where the measures being challenged were no longer in effect and had been superseded when the Panel was constituted.

71. Rather, the question before the Panel is straightforward: can measures that expired *prior* to panel establishment be considered "measures at issue" in accordance with Article 6.2 of the DSU? This question is addressed in a completely different set of prior panel and Appellate Body reports to those cited by China. The panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, for example, recently recalled the importance of the distinction between cases in which the measures in question had been withdrawn before or only after the panel's establishment by the DSB.[67] While panels often make findings (but no recommendations) on measures which expired after panel establishment, "in respect of measures withdrawn before panel establishment," the panel found that "panel practice appears to *heavily lean against making any findings*."[68]

[65] China's response to Panel's question no. 59, fns. 83-86.
[66] Appellate Body Report, *Chile – Price Band System*, para. 144 ("We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'.")
[67] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.468.
[68] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.469 (emphasis added).

72. As China has not addressed the legal question actually before the Panel, Australia considers that the only question before this Panel now is a factual one: were the challenged measures in existence at the time of panel establishment? They were not. Rather, the stainless steel sinks and wind towers original investigations were superseded by the expiry reviews *prior* to the Panel's establishment on 28 February 2022. The cases cited by China are irrelevant to the issue at hand. Pursuant to the reasons set out in Australia's first written submission and PRR, the original investigations are not a "specific measure at issue" under Article 6.2 of the DSU and are outside the scope of the Panel's terms of reference.

(b) China misunderstands the relationship between original investigations and expiry reviews

73. China stated that a WTO Member cannot "bury" an underlying WTO violation by claiming it was ended via an expiry review and that there is no "statute of limitations" in the WTO.[69] Australia is not arguing that a member can "bury" a WTO violation. However, China's argument fails to take into account that panel practice heavily leans against making findings on measures that expired before panel establishment.[70] WTO Members did not vest Panels with the authority to issue findings in respect of superseded, terminated, or otherwise non-existent measures.

74. The purpose of the WTO dispute settlement is not to issue advisory opinions or "make law".[71] Based on the plain text and context of Article 11.3 of the Anti-Dumping Agreement, it is clear that members intended that anti-dumping measures would expire after five years, at which point they would either cease to have effect or be replaced with new measures.[72]

75. China was entitled to challenge the original investigations for the five year period in which those investigations were the legal basis for the imposition of duties. To the extent any alleged violation was replicated or explicitly incorporated into the expiry reviews, China was entitled to challenge such violation as part of a properly made claim against the expiry reviews as the current measure in place. But China chose to do neither.

[69] China's response to Panel's question no. 10, para. 27.
[70] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.469.
[71] Australia's first written submission, paras. 70-73.
[72] Australia's first written submission, paras. 80-101; see also Australia's second written submission, paras. 81-84.

76. To resolve this dispute the Panel does not need to make a general finding that an expiry review always supersedes an original determination for all WTO Members or, as a consequence, that an original determination can never be challenged where there is an expiry review. The only thing the Panel needs to determine is that in the context of these particular investigations and Australia's domestic framework, the expiry reviews had superseded the original investigations at the time China filed its panel request. The evidence is clear that the expiry reviews wholly replaced the original investigations as the legal basis for the imposition of duties prior to the Panel's establishment. Accordingly, those original investigations are outside the Panel's terms of reference.

(c) China has presented no evidence that investigations and expiry reviews, which are subject to distinct evidentiary and legal standards, are a single "indivisible, continuous measure"

77. In an effort to salvage its flawed panel request, China has sought to redraft the challenged measures in section B.1 of its panel request as a "one indivisible, continuous measure" in which the original determinations are the "foundational error".[73] Having made no such arguments in its first written submission, China, for the first time at the first Panel meeting, argued that the measures at issue in section B.1 of its panel request are not the original determinations but, rather, two single "indivisible, continuous measures" comprised of instruments no. 1-7 and no. 8-23 of its panel request appendix for wind towers and stainless steel sinks, respectively.[74] In other words, China argues that despite the fact that its claims in section B.1 are almost all focused on the original determinations, the measures China actually meant to challenge are all of those instruments listed in its appendix, including expiry reviews.

78. As the Appellate Body has previously said, where a complainant attempts to challenge multiple measures as a single measure, the burden is on the complainant to provide evidence of "how the different components operate together as part of a single measure and how a single measure exists as distinct from its components."[75] Panels do not "simply assume" that different instruments form part of a single measure, "[o]therwise, the requirement to

[73] China's opening statement, paras. 14 and 19.
[74] China's opening statement, para. 14; China's response to Panel's question no. 38, para. 118.
[75] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

examine whether a complainant has established the precise content of a measure may well be superfluous."[76] One of the considerations panels take into account in assessing whether separate instruments can be considered as one or separate measures is the respondent's position.[77]

79. In response to question no. 38, the Panel specifically asked China to explain the extent to which it was arguing that the challenged measures comprise a single measure and, therefore, China was required to provide "evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components" consistent with the Appellate Body's decision in *Argentina—Import Measures.*[78]

80. Instead of answering the Panel's question, or offering any evidence in support of its arguments, as to "how the different components operate together as part of a single measure and how a single measure exists as distinct from its components"[79] China simply asserted that the challenged measures are no. 1 through 7 and no. 8 through 23 of the panel request appendix in respect of wind towers and stainless steel sinks, respectively.[80]

81. 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 measures should be taken together as a single measure for purposes of WTO dispute settlement. The WTO system treats original determinations and expiry reviews as separate and distinct measures, and they are addressed through separate and distinct provisions of the Anti-Dumping Agreement. The Appellate Body has stated clearly that original investigations and expiry reviews are distinct processes with different purposes.[81]

82. Under WTO rules, the evidentiary and legal standard required in expiry reviews are fundamentally different from those in original investigations. Unlike original investigations, expiry reviews are prospective in focus, and the key legal finding is a determination that the "expiry of the duty would likely lead to continuation or recurrence of dumping and injury" or "subsidization and injury" under Article 11.3 of the Anti-Dumping Agreement and Article 21.3

[76] Panel Report, *US—Softwood Lumber VII,* para. 7.756.
[77] Panel Report, *US—COOL,* para. 7.50.
[78] China's response to Panel's question no. 38, para. 118.
[79] Appellate Body Report, *Argentina – Import Measures*, para. 5.108.
[80] China's response to Panel's question no. 38, para. 118.
[81] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 105-107.

of the SCM Agreement, as opposed to findings of current dumping and/or subsidization, injury, and causation in an original investigation. The Appellate Body has stated clearly that original investigations and expiry reviews are distinct processes with different purposes.

83. As the Appellate Body noted in *US – Corrosion-Resistant Steel Sunset Review,* Article 11.3 imposes a temporal limitation on the imposition of anti-dumping duties, with an exception to continue the measures if certain criteria are met:

> Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition 'unless' the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury. If any one of these conditions is not satisfied, the duty must be terminated.[82]

84. In other words, under express WTO rules, there is a hard stop on duties collected based on an original investigation after five years, and any new duties must be justified afresh with a new set of factual and legal findings, applying a different legal standard. China's attempt to coalesce expiry reviews and original investigations into a single measure is directly at odds with the express terms of the Anti-Dumping Agreement.

85. Australia further notes that having argued for a single measure, China goes on to explain in response to question no. 37 that it is only seeking findings in respect of certain apparently divisible aspects of the alleged "indivisible" measure.[83] For example, in response to question no. 37, China makes clear that it is seeking findings and recommendations in respect of the stainless steel sinks expiry review for AD claims 6.b.ii an 6.b.iii but not the original determination or interim review.[84] This approach is both internally inconsistent and contradictory. China cannot argue for one "indivisible" measure for purposes of bringing in the original determinations but, on the other hand, pick and choose when it would like to challenge the interim and expiry reviews.

[82] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104.
[83] China's response to Panel question no. 37, paras. 112-116.
[84] China's response to Panel question no. 37, paras. 116.

86. Australia disagrees with China's baseless assertion that each of the instruments listed in no. 1-7 and no. 8-23 of the appendix to China's panel request comprise single "indivisible" measures as a matter of either Australian domestic law or WTO rules. But even considered together, at the time of China's panel request, the original determinations had already been superseded by the expiry reviews as the legal basis for the anti-dumping duties.

(d) China's reliance on so-called "foundational errors" is misplaced

87. Presumably in an attempt to resuscitate its claims against the superseded original investigations, China refers repeatedly to the alleged "foundational errors" in the original investigations in its responses to the Panel's questions.[85] On China's view, these foundational errors are allegedly "remade in new instances, but there has been no change in the investigating authority's thinking, principles, legal views or assumptions."[86]

88. The purpose of China's repeated references to alleged "foundational errors" is unclear. To the extent this relates to the single "indivisible, continuous measure" concept, this has been addressed in detail above.[87] To the extent China is now advancing 'ongoing conduct' or 'as such' claims, they would be outside the Panel's terms of reference. Australia reiterates that China made no 'as such' or 'ongoing conduct' claims in its panel request or related arguments in its first written submission. China only brought 'as applied' claims against three separate investigations, two of which have been superseded.

89. In addition, China's assertion that there has been "no change" in the investigating authorities approach is clearly wrong. China itself acknowledged that in the wind towers expiry review the ADC "revised its normal value determination for the only cooperative exporter, TSP" and then listed the "*changes* of relevance" to the methodology under AD claim 1.[88] This included applying the cost adjustment only in relation to plate steel (and not flanges) and indexing the costs from the original investigation by reference to movements in the Steel Bulletin Board (Platts) benchmark.[89] In the stainless steel sinks original investigation, the ADC

[85] China's response to Panel's questions no. 3, 7, 37, 41, paras. 8, 21, 115 and 129.
[86] China's response to Panel's questions no. 4, 37, 38, 57, paras. 15, 114, 118 and 147.
[87] Australia's second written submission, paras. 77-86.
[88] China's first written submission, para. 82. (emphasis added)
[89] China's first written submission, para. 82.

employed the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices.[90] In the expiry review, the ADC employed a separate reference point: the SBB Platts Benchmark.[91]

90. Even aside from the expressly different findings made by the ADC, the assessment in both the stainless steel sinks and wind towers expiry review is not the same as the original investigations. Unlike the original investigations, expiry reviews are prospective in focus, and the key legal finding is a likelihood determination. The Appellate Body has stated clearly and repeatedly that original investigations and expiry reviews are distinct processes with different purposes.[92]

91. If, *arguendo*, there were any so called "foundational errors" in the original investigations (and Australia disagrees strongly with China's imputation that there were), they have been wholly superseded by the different factual evidence, legal findings and recommendations in the expiry reviews. As a result, in essence, China has effectively sought an advisory opinion on findings in original investigations that no longer provide the basis for the imposition of any duties. If China wished to challenge an ongoing practice or methodology, it should have done so in its initial panel request. But China cannot use subsequent submissions to expand its claims for the purpose of avoiding a terms of reference challenge or for the purpose of expanding the scope of the findings and recommendations that it seeks from the Panel.

92. The expiry reviews have superseded and wholly replaced the original investigations. To the extent China wishes to challenge the basis of current duties, it should have done so by making a proper claim against the expiry reviews (which would require the citation of Article 11.3 of the Anti-Dumping Agreement in its panel request).

[90] China's first written submission, paras. 7, 10, 87-89, 114, 180, 243, 400.
[91] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 52-54; *Stainless Steel Sinks Review 352 Report*, (Exhibit CHN-17), p. 14; *Stainless Steel Sinks Review 459* Report, (Exhibit CHN-22), p. 15; *Stainless Steel Sinks Review 461 Report*, (Exhibit 461), p. 23.
[92] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 105-107.

(e) China's reliance on the Australian domestic court decision of Siam (No. 2) is misplaced

93. In both its opening statement[93] and in response to the Panel's questions,[94] China has referred to an Australian Federal Court decision *Siam Polyethelene Co. Ltd v Minister of State for Home Affairs (No 2) (Siam No. 2)*.[95] In the context of explaining the relationship between expiry reviews and original investigations in Australia's domestic framework, China states that this decision "emphasised the inextricable legal linkages between an original determination and the notice imposing duties, and the continuation of those duties."[96] Relying on the decision, China alleges that if an expiry review finds that the subsidisation or the dumping will recur, it continues the original order[97] and that this "has been strongly held to be the case by Australian domestic courts."[98]

94. The Federal Court's decision in *Siam No. 2* is not relevant to the issues in dispute, nor does it lend support to China's argument. This particular case did not deal with the issues presently before the Panel in these WTO dispute proceedings. In the paragraphs cited by China, the primary judge opined on the statutory scheme for the limited purpose of determining the proper construction of material injury provisions which are not at issue here. The ultimate decision of the primary judge that China cited was overturned on appeal.[99]

95. China's citation of one Federal Court of Australia decision that was overturned on appeal does not establish a settled legal principle. The decision of the primary judge cannot be labelled either as authoritative or reflective of a consistent or strongly held view of Australian domestic courts. It is also not relevant as it examined different domestic legal issues that are not in dispute in this WTO dispute settlement proceeding.

(f) Conclusion

96. The anti-dumping original investigations are outside the Panel's terms of reference as they had ceased to provide the legal basis for the duties imposed when the Panel and its

[93] China's opening statement, para. 17.
[94] China's response to Panel question no. 10, para. 27.
[95] *Siam Polyethelene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838, (Exhibit CHN-75).
[96] China's opening statement, para. 17.
[97] As Australia previously noted (in footnote 13 of its response to the Panel's questions) the term 'order' is not used in Australia's domestic framework.
[98] China's response to Panel question no. 10, para. 27
[99] *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86, (Exhibit AUS-76).

terms of reference were established. Pursuant to Articles 3.2, 3.4, 3.7, 6.2, 7.1 and 19.1 of the DSU, the Panel should not rule on these historic measures that were superseded before the panel request was filed. Even if the Panel decided to review the original investigations, it should not make any recommendations relating to these expired or superseded measures.

2. The anti-dumping expiry reviews are outside the scope of the panel's terms of reference

97. Australia has already made extensive submissions demonstrating that the expiry reviews in wind towers and stainless steel sinks are outside the scope of the Panel's terms of reference.[100] Australia responds to new arguments from China below.

(a) A complainant must cite Article 11.3 of the Anti-Dumping Agreement in order to challenge expiry reviews

98. To the extent that China now seeks to challenge the expiry reviews in the stainless steel sinks and wind towers, China has failed to cite to Article 11.3 of the Anti-Dumping Agreement in section B.1 of its panel request and, therefore, failed to provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU. For this reason, any of China's legal claims in section B.1 that are related to the expiry reviews are outside the Panel's terms of reference.[101]

99. Article 6.2 of the DSU requires that a complainant's panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[102] 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.[103]

100. A complainant's omission of the key treaty provision in its panel request constitutes a fundamental procedural failure to provide a clear summary of the legal basis for that matter, as required by Article 6.2 of the DSU. As a result, claims for which a complainant has failed to

[100] Australia's first written submission, paras. 80-101 and 135-136.
[101] Australia considers that the only claims for which China challenged the expiry review are AD claims 6.b.ii and 6.b.iii. Nevertheless, China's failure to cite Article 11.3 of the Anti-Dumping Agreement means that any of China's claims in section B.1 related to the expiry review would be outside the Panel's terms of reference.
[102] Article 6.2 of the DSU.
[103] Appellate Body Report, *Korea – Dairy*, para. 124.

cite the relevant provision are outside a panel's terms of reference.[104] A faulty request may not be subsequently "cured" in a first written submission or in any other submission or statement made later in the panel proceeding,[105] since it fails fundamental requirements of due process.

101. There is no dispute between the parties that China did not include a reference to Article 11.3 of the Anti-Dumping Agreement in its panel request. Rather, China argues that it was not required to include a reference to Article 11.3 of the Anti-Dumping Agreement in panel requests as it is not a legal requirement but, rather "reflects the choices of the complainants in various disputes."[106] Thus, the only question before the Panel is a legal one: are complainants required to cite Article 11.3 of the Anti-Dumping Agreement in challenging an expiry review? Australia, along with third parties in this dispute, consider that the answer must be yes.[107]

102. In response to Panel question no. 58, China could not name a single instance in which a complainant challenged an expiry review without citing Article 11.3 of the Anti-Dumping Agreement.[108] WTO members have not attempted to challenge expiry reviews without citing Article 11.3 as it is well-understood by WTO Members that in order to challenge an expiry review, a complainant must cite the "legal basis for such reviews".[109] Australia included a long (but not exhaustive) list of examples where complainants did correctly cite these articles in their panel requests at paragraph 99 of its first written submission. China's request that the Panel allow it to challenge an expiry review without citing the relevant treaty provision invites the Panel to disregard the clear terms of Article 6.2 of the DSU, in a step never contemplated by a past panel, and in the face of express pronouncements by the Appellate Body that identification of the treaty provisions claimed to have been violated is "always necessary" and "a minimum prerequisite".

103. Australia does not ask the Panel to opine as to whether it is necessary to quote Article 11.3 of the Anti-Dumping Agreement for each individual claim relating to expiry reviews or

[104] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.14-7.15.
[105] Appellate Body Report, *EC – Bananas III*, para. 143.
[106] China's response to Panel question no. 58, para. 148.
[107] Japan's response to Panel question no. 1, paras. 1-5; European Union's response to Panel question no. 1, paras. 1-5.
[108] China's response to Panel question no. 58, paras. 148-150.
[109] China's opening statement, para. 33.

whether it may be sufficient to quote Article 11.3 of the Anti-Dumping Agreement only *once* in a panel request in order to satisfy the requirements of Article 6.2 of the DSU and basic due process.[110] In the present case, China failed to make *any* reference to Article 11.3 of the Anti-Dumping Agreement in its panel request. This means that China's claims relating to the expiry reviews are not within the Panel's terms of reference.

(b) China's reference to Article 2 of the Anti-Dumping Agreement does not cure its failure to reference Article 11.3

104. China has argued that it was unnecessary to reference Article 11.3 in challenging the ADC's findings in its expiry reviews in wind towers and stainless steel sinks because "panels and the Appellate Body have confirmed that a violation of Article 2 is to be examined directly where the parties have raised errors concerning the determinations of dumping or likelihood of dumping, citing other provisions of the Anti-Dumping Agreement."[111] Article 2 of the Anti-Dumping Agreement sets out an investigating authority's obligations and permitted methodologies in making dumping calculations in the context of an original investigation.[112]

105. Citing the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, China contends that a violation of Article 2 can be examined directly where parties have raised errors concerning the determination of dumping in an expiry review.[113] A closer examination shows, however, that *US – Corrosion-Resistant Steel Sunset Review* is inapposite, since the complainant explicitly invoked Article 11.3 in its panel request.[114] By contrast, in this case, China made no reference to Article 11.3 in its panel request and limited its challenge to the original investigation. As a result, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* only made a finding of inconsistency of Article 2.4 *in the context of, and in addition to,* a finding of inconsistency with Article 11.3 of the Anti-Dumping Agreement. In both *EU-Footwear (China)* and *US – Corrosion-Resistant Steel Sunset Review*, the complainant, unlike

[110] See also European Union's response to Panel question no. 1, para. 5.
[111] China's response to Panel question no. 58, at para. 150.
[112] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107.
[113] China's response to Panel question no. 58, para. 150.
[114] Request for the establishment of a panel by Japan, WT/DS244/4.

China here, cited Article 11.3 in its panel request and thus ensured the panel's jurisdiction to examine Article 2 in its determination with respect to the expiry review.

106. As the Appellate Body noted in *US – Oil Country Tubular Goods Sunset Review*, the requirements in Article 3.1 of the Anti-Dumping Agreement can be relevant to likelihood determinations under Article 11.3, but the necessity of conducting such an analysis would arise from Article 11.3, not Article 3.1:[115]

> This is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3. Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a "reasoned conclusion" … But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3 -not Article 3- that a likelihood-of-injury determination rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions".

107. In other words, while Article 11.3 can incorporate elements of Articles 2 and 3, they acquire legal force in an expiry review only by virtue of their incorporation in Article 11.3 and even this depends on the provision involved.

108. China argues that Article 11.3 does not govern or provide guidance on the determination of dumping in an expiry review and that this is governed by Article 2 of the Anti-Dumping Agreement.[116] However, the panel in *EU – Footwear (China)* found that Article 2 of the Anti-Dumping Agreement was "not directly applicable to a determination under Article 11.3" and that it would not make findings as to whether dumping determinations in the expiry review were inconsistent with Article 2 per se.[117]

109. Another analogous example is the panel report in *US – Carbon Steel (India)*.[118] In that case, India failed to cite Article 21.3 of the SCM Agreement in its panel request. In addressing India's claims that the expiry reviews were inconsistent with Article 15 of the SCM Agreement[119] and noting the parallels to the Anti-Dumping Agreement, the panel found that

[115] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 284.
[116] China's response to Panel question no. 5, para. 16.
[117] Panel Report, *EU—Footwear (China)*, paras. 7.157-7.158.
[118] Panel Report, *US – Carbon Steel (India)*, para. 7.387-7.391.
[119] Panel Report, *US – Carbon Steel (India)*, para. 7.388-7.391.

a determination of the likelihood of continuation or recurrence of injury in an expiry review is governed by Article 21.3 of the SCM Agreement and that this is different from a determination of injury in an original investigation which is governed by Article 15 of the SCM Agreement.[120] The panel found that India's claims under Article 21.3 were outside the panel's terms of reference due to India's failure to cite this provision in its panel request.[121] As a result, the panel declined to make findings or recommendations on the WTO-consistency of the new U.S. injury determination in the expiry review as it was outside the panel's jurisdiction.[122]

110. China also argues that applying Australia's logic, Articles 5 and 6 of the Anti-Dumping Agreement must be cited in order to challenge dumping determinations in original investigations.[123] This is wrong and is not Australia's position. This is because Article 2 of the Anti-Dumping Agreement directly governs the determination of dumping in an original investigation. That is not in dispute. Article 5 deals with the initiation of an original investigation. Article 6 deals with evidence and procedure in original investigations and expiry reviews.[124]

111. While both initiation and procedure are connected to the determination of dumping, in a broad sense, Articles 5 and 6 do not govern the making of the dumping determination.[125] Unless those obligations are actually in issue (i.e. the complainant is challenging the decision to initiate an anti-dumping investigation, the administering authority's collection of evidence, or procedures employed in an investigation), there is no need to cite Articles 5 or 6 of the Anti-Dumping Agreement in order to challenge a dumping calculation in an original investigation. This is because Article 2 is directly applicable and governs such calculations.

112. By contrast, Article 11.3 of the Anti-Dumping Agreement expressly governs the determinations that must be made in an expiry review (a 'likelihood of continuation or recurrence of dumping and injury' determination'). If there is a finding that dumping will

[120] Panel Report, *US – Carbon Steel (India)*, para. 7.389.
[121] Panel Report, *US – Carbon Steel (India)*, para. 7.387.
[122] Panel Report, *US – Carbon Steel (India)*, para. 7.391.
[123] China's response to Panel question no. 5, para. 18.
[124] Article 11.4 of the Anti-Dumping Agreement.
[125] Although, of course, in particular cases where the error in the dumping determination arose directly from a procedural violation of an Article 6 obligation it may well be necessary to cite the relevant part of Article 6. For example, where the error in the dumping determination arose in part or in full from a violation in the recourse to facts available under Article 6.8, then Article 6.8 would need to be cited. But China's suggestion that if Australia's argument is accepted that there would be a need to cite Article 6, and presumably Article 6.8, where there was no issue about recourse to facts available is nonsensical.

continue or recur, elements of Articles 2 and 3 may well indirectly be relevant. However, ultimately, Article 11.3 is the treaty provision directly governing the determination that would be allegedly violated. If it is omitted, no legal claim has been made against the expiry review, and the complainant has failed "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" as required by the DSU.

113. China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request is decisive. This failure alone means that all of China's claims against the stainless steel sinks and wind towers expiry reviews are outside the scope of the Panel's terms of reference.

(c) China's claims and arguments are contradictory and incoherent

114. China's attempts to locate its wind towers and stainless steel sinks claims within the Panel's terms of reference has changed several times throughout this dispute, as China has repeatedly sought to reshape its arguments in the face of the obvious jurisdictional problems it faces. In this section Australia highlights the changes that have occurred, and demonstrates that a number of the positions that China has taken, on the same issue, are mutually inconsistent with each other. Contradictory positions have been adopted without any explanation.

115. On their face, most of the claims in China's panel request were directed at the original investigations in stainless steel sinks and wind towers. The focus of the description of the measures were the original duties. There was no reference at all to Article 11.3 of the Anti-Dumping Agreement or Article 21.3 of the SCM Agreement. China did list a series of separate legal instruments and measures relating to stainless steel sinks and wind towers in the appendix of the panel request that included the expiry reviews, but did not specify that its claims were directed at those separate measures, which were simply described as "other legal instruments that were subsequently published with respect to those instruments [that imposed the original duties]".

116. Then, in its first written submission, China cited Article 11.3 of the Anti-Dumping Agreement and 21.3 of the SCM Agreement for the first time, as – in China's own view – the

legal basis for the instruments "concerning expiry review of anti-dumping / countervailing duties".[126]

117. China's understanding of the relevance of the expiry reviews, and whether they were the subject of its claims, was vague and inconsistent throughout its first written submission. In China's submission, the "Panel's focus should largely remain fixed on the original investigations in each of the wind towers and stainless steel sinks cases",[127] because the original investigations were described as the "roots" and the expiry reviews were diminished as later "branches" that provide context.[128] No explanation was provided of what China meant the Panel should do by remaining "largely" fixed on the original investigations, either in a practical or jurisdictional sense.

118. Despite China's request to the Panel to "remain largely fixed" on the original measures, China made clear that it did make at least some claims solely against the expiry review. As China explained it, "[t]hat said, AD claims 6.b.ii and 6.b.iii do relate to failures to comply with the Anti-Dumping Agreement that occurred in procedures subsequent to the original investigations."[129] It might have been thought from that statement that the *only* claim China was supposedly bringing directly against the expiry reviews were AD claim 6.b.ii and 6.b.iii against the stainless steel sinks expiry review. But at other parts of its first written submission China included citations to, and commentary on, the findings of the expiry reviews in relation to some wind towers AD claims (but not all), with no explanation of the relevance or purpose of such submissions.[130]

119. But then, China changed its position again at the first meeting of the Panel, stating for the first time that "there is only one indivisible, continuous measure in each respect".[131] No explanation was offered as to how China reconciled this new conception of its case with its *own* first written submission, where it described the original measures as the "directly relevant legal measures at issues in this dispute", which it distinguished from the "other legal instruments [that] relate to subsequent procedures".[132] China itself said the latter were

[126] China's first written submission, para. 32.
[127] China's first written submission, para. 35.
[128] China's first written submission, para. 35.
[129] China's first written submission, para. 35.
[130] See, e.g., China's first written submission, paras. 272-279.
[131] China's opening statement, para. 14.
[132] China's first written submission, paras. 30 and 32.

imposed pursuant to Articles 11.2, 11.3 and 13 of the Anti-Dumping Agreement, and Articles 21.2, 21.3 and 23 of the SCM Agreement.[133] Nor was an explanation offered as to how China's surprising conception of a single "indivisible, continuous measure" can be reconciled with the plain text of the Anti-Dumping Agreement and SCM Agreement.

120. Nothing China has said at the first substantive meeting or in responses to the Panel's questions can "cure" the fundamental deficiencies in its panel request. On the face of the panel request alone, it is clear that all of China's claims regarding stainless steel sinks and wind towers expiry reviews are outside of the scope of the Panel's terms of reference.

(d) Conclusion

121. Pursuant to Articles 6.2 and 7.1 of the DSU, the expiry reviews are outside the Panel's terms of reference due to China's failure to cite Article 11.3 of the Anti-Dumping Agreement in its panel request. Under Article 6.2 of the DSU, identification of the treaty provisions claimed to have been violated is "always necessary" and "a minimum prerequisite" if the legal basis of the complaint is to be presented at all.[134]

C. CHINA'S REVISION OF THE SCOPE OF ITS CASE IN RESPONSE TO QUESTION 37 IS INCONSISTENT WITH THE DSU AND THE PANEL'S WORKING PROCEDURES

122. In its response to Panel question no. 37, China summarises the findings and recommendations it now seeks for stainless steel sinks and wind towers. Through this answer China seeks to agitate entirely new claims not mentioned in its panel request or any prior written or oral submission. The response also reveals an obvious contradiction with China's own conception of its case advanced in earlier submissions.

123. By way of brief summary, China explained for wind towers that it is seeking findings regarding the original investigation and expiry reviews for all AD claims.[135] For stainless steel sinks, China is seeking findings against the original investigation, interim reviews and expiry review for most AD and CV claims.[136] For AD claims 6.b.ii and 6.b.iii, China is only seeking findings against the expiry review.[137] For CV claim 5, China is only seeking findings against the

[133] China's first written submission, para. 32.
[134] Appellate Body Report, *Korea – Dairy*, para. 124.
[135] China's response to Panel question no. 37, para. 116.
[136] China's response to Panel question no. 37, para. 116.
[137] China's response to Panel question no. 37, para. 116.

original investigation.[138] This summary table contradicts China's panel request, first written submission and even its more recent formulation that there is one "continuous set of measures".[139]

1. The stainless steel sinks interim reviews are outside the scope of the Panel's terms of reference

124. China has stated for the very first time that it is challenging the separate stainless steel sinks interim reviews under all AD and CV claims (except AD claims 6.b.ii and 6.b.iii and CV claim 5).[140] These new claims are outside the scope of the Panel's terms of reference for the same reasons that China's claims against the expiry reviews are outside the scope of the Panel's terms of reference.[141]

125. China failed to cite Article 11.2 of the Anti-Dumping Agreement in its panel request. Article 11.2 of the Anti-Dumping Agreement is the foundational provision governing and underpinning interim reviews (similar to Article 11.3 of the Anti-Dumping Agreement and expiry reviews). China describes the interim review as an "Article 11.2 based review" in its first written submission.[142] In response to the Panel's questions, China says the interim review "is a reference to a procedure of the type described in Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement".[143]

126. Article 6.2 of the DSU requires, *inter alia*, that a panel request provide a brief summary of the legal basis of the complaint (or claim) sufficient to present the problem clearly. Identification of the treaty 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.[144]

127. It follows that a complainant's omission of a key treaty provision in its panel request constitutes a failure to provide a brief summary of the legal basis for that matter, as required by Article 6.2 of the DSU. As a result, the matter complained of is not within the scope of the

[138] China's response to Panel question no. 37, para. 116.
[139] China's response to Panel question no. 37, para. 114.
[140] China's response to Panel question no. 37, para. 116
[141] See Australia's first written submission, paras. 80-101.
[142] China's first written submission, para. 137; see also China's first written submission, para. 32.
[143] China's response to Panel's question no. 1, para. 3
[144] Appellate Body Report, *Korea – Dairy*, para. 124.

dispute.[145] A faulty request may not be subsequently "cured" in a first written submission or in any other submission or statement made later in the panel proceeding.[146]

128. The panel in *US – Shrimp II (Viet Nam)* held that the nature of an investigating authority's determination in a review conducted pursuant to Article 11.2 is the same as in a expiry review conducted pursuant to Article 11.3.[147] In *US – DRAMS* the panel held that "there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews".[148]

129. On this basis, Australia relies on the extensive submissions regarding its Article 11.3 jurisdictional arguments. Those submissions apply with equal force, *mutatis mutandis*.[149] China's claims against the interim reviews, which were raised late and only explicitly confirmed after the first Panel meeting, are therefore also outside the scope of the Panel's terms of reference.

2. Contrary to the Working Procedures, China did not make arguments under certain claims in its first written submission that it now seeks to advance

130. Despite what it says in the table in response to Panel question no. 37, China did not present *arguments* relating to the wind towers and stainless steel sinks expiry reviews under all the AD claims in its first written submission.

131. China has not advanced any arguments in its first written submission under AD claims 1, 3, 4 and 7(a) relating to the interim reviews and Expiry Review 517 in stainless steel sinks. China makes no reference to the interim reviews or Expiry Review 517 at all in its first written submission on AD claims 1, 3, 4, and 7(a).[150] Further, in framing AD claims 1, 3, 4, and 7(a), China contests the use of one type of out-of-country price data as a reference point only: the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American

[145] Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.14-7.15.
[146] Appellate Body Report, *EC – Bananas III*, para. 143.
[147] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.375.
[148] Panel Report, *US – DRAMS*, para. 6.48, fn. 494.
[149] Australia's first written submission, paras. 80-101.
[150] For AD claim 1: China's first written submission, paras. 7, 86-90, 114. For AD claims 3 and 4: China's first written submission, paras. 10, 13, 174-181, 199, 208, 220-224, 229, 238, 242-245, 251-254. For AD claim 7(a): China's first written submission, paras. 16, 398-401, 417-419.

and European prices.[151] The ADC employed this reference point only for Investigation 238. In the interim reviews and Expiry Review 517, the ADC employed a separate reference point: the SBB Platts Benchmark.[152]

132. Similarly, with respect to wind towers, China only discussed and advanced arguments regarding the wind towers original investigation under AD 6.a.[153] However, now China is seeking findings under AD claim 6.a against the separate expiry review despite not advancing any arguments or evidence that the wind towers expiry review was inconsistent with Article 2.4 of the Anti-Dumping Agreement in its first written submission. The absence of any submissions from China on matters of either law or fact relating to the expiry reviews under a number of AD claims means that China has not established a *prima facie* case and the Panel must dismiss these claims.

133. Paragraph 3(1) of this Panel's Working Procedures requires the parties to present the "facts of the case and its arguments" *before* the first substantive meeting of the Panel. Even if China's new claims were within the Panel's terms of reference, it is inconsistent with the Working Procedures – and fundamentally unfair to Australia – for arguments concerning entirely new claims to be advanced for the first time after the first Panel meeting.

134. China's 'moving target' case continues to shift in order to preserve its jurisdictionally flawed claims. China has only confirmed for the first time that it is seeking a number of explicit findings against the stainless steel sinks and wind towers expiry reviews following the first substantive meeting. This is despite saying the opposite in its first written submission and not advancing any arguments or evidence against the expiry reviews under a number of AD claims in that submission. This is procedurally unfair and is inconsistent the Panel's Working Procedures.[154]

[151] China's first written submission, paras. 7, 10, 87-89, 114, 180, 243, 400.
[152] *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), pp. 52-54; *Stainless Steel Sinks Review 352 Report*, (Exhibit CHN-17), p. 14; *Stainless Steel Sinks Review 459* Report, (Exhibit CHN-22), p. 15; *Stainless Steel Sinks Review 461 Report*, (Exhibit 461), p. 23.
[153] China's first written submission, para. 328.
[154] Article 3(1) of the Working Procedures.

3. Conclusion

135. China's claims regarding stainless steel sinks and wind towers are outside of the scope of the panel's terms of reference. No matter how China has, or may seek to, reframe or recast its case, it cannot avoid or cure the jurisdictional limits imposed by its panel request.

D. CONCLUSION

136. Australia respectfully requests that the Panel find that the stainless steel sinks and wind towers anti-dumping measures and stainless steel sinks countervailing measure are not within its terms of reference and are outside its jurisdiction. The issues have now been thoroughly discussed. China has had ample opportunity to make a case but its repeated attempts to cure the defects in its panel request cannot be sustained. Australia asks that the Panel rule on the procedural issues prior to the second Panel meeting.

III. RESPONSE TO AD CLAIMS: RAILWAY WHEELS

A. INTRODUCTION

137. China's claims with respect to the railway wheels investigation are the only ones within the Panel's terms of reference.

138. China makes six claims regarding the ADC's findings in the railway wheels investigation. In this section, Australia addresses the key issues claim-by-claim that have emerged from the submissions to date.

139. Each of China's claims is without merit, and almost all are consequential upon China's AD claims 3 and 1. For the reasons set out below and in Australia's earlier submissions, all China's claims with respect to the railway wheels investigation must fail.

B. CHINA'S AD CLAIM 3

140. China's basis for AD claim 3 has shifted in the course of this dispute.

141. AD claim 3 began as a complaint that the ADC had made an improper finding under the second condition of Article 2.2.1.1 because the Railway Wheels Investigation 466 Report contained the phrase "reasonably reflects competitive market costs."[155] China fundamentally misunderstood the ADC's findings. Specifically, as Australia has explained, the ADC's decision to depart from Masteel's records in calculating its steel billet costs was based on an explicit finding under the "normally" clause in Article 2.2.1.1, not a finding under that Article's "second condition".

142. China's claim has since changed. Now China argues that the ADC was not entitled to make a finding on the basis of "normally" because the ADC should first have made affirmative findings under the first and second conditions of Article 2.2.1.1.[156] This purported requirement for a mandatory order of analysis within the first sentence of Article 2.2.1.1 has no basis in the Anti-Dumping Agreement.

[155] China's first written submission, paras. 226-228.
[156] China's opening statement, para. 71. See also China's closing statement, paras. 11-12.

1. China's original complaint of a wrongful determination under the second condition of Article 2.2.1.1 is inconsistent with the record

(a) The ADC's decision to depart from the exporter's records was not made pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement

143. In China's first written submission, the sole basis for China's AD claim 3 was that the ADC erred because it applied the wrong test in making a finding that the second condition had not been satisfied.[157] Australia explained in its first written submission that this claim was entirely without merit, because, *inter alia*, China fundamentally misunderstood the ADC's findings in Railway Wheels Investigation 466 with respect to Article 2.2.1.1.[158] That is, the ADC's decision to depart from the exporter's records for a single cost item—steel billet—was *not* pursuant to the second condition of Article 2.2.1.1. Rather, the ADC expressly found that the circumstances in which Masteel's costs were formed were not normal or ordinary,[159] under the "normally" clause in Article 2.2.1.1. As such, China's original claim with respect to the second condition of Article 2.2.1.1 is fatally flawed and should be rejected by the Panel.

(b) China's original complaint fundamentally misunderstood the ADC's findings with respect to "competitive market costs"

144. China's original claim also relied on an assertion that the findings made by the ADC by reference to "competitive market costs" were findings for the purpose of the second condition of Article 2.2.1.1.[160] This was incorrect. As Australia explained in its first written submission, at the first Panel meeting, and consistent with the panel's findings in *Australia - Anti-Dumping Measures on Paper,* the ADC's "competitive market costs" analysis (specifically

[157] China's first written submission, para. 186:
> Australia's application of a "reasonably reflect competitive market costs" test in the above three investigations is inconsistent with and is incapable of meeting the kind of examination that is called for by the second condition of the first sentence of Article 2.2.1.1. An investigating authority is required to examine whether an exporter's cost records "reasonably reflect the costs associated" with its production and sale of the product concerned. In using a "reasonably reflect competitive market costs" test in place of the considerations required by Article 2.2.1.1, Australia wrongly applied the requirement to determine whether the relevant exporters' "records… reasonably reflect[ed] the costs associated" with their production and sale of the product referred to in Article 2.2.1.1, and wrongly determined that the costs of the exporters should not be calculated on the basis of their records.

[158] Australia's first written submission, paras. 177-181.

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

[160] China's written submission, paras. 226-228.

regulation 43(2), formerly regulation 180(2)) is "different from that required under the second condition of Article 2.2.1.1, first sentence."[161] Furthermore, as Australia explained in its closing statement at the first Panel meeting,[162] it is clear from the text of regulation 43(2),[163] that the legal effect of this regulation is narrow: where its criteria are met, the records of an exporter must be used. A finding under regulation 43(2) is incapable of constituting a decision to reject records based on the second condition of Article 2.2.1.1.

145. To the extent that China maintains its assertion that the references to "competitive market costs" were findings to reject records based on the second condition of Article 2.2.1.1, this allegation is inconsistent with the record and China has failed to make a *prima facie* case that there was any contravention.

2. There is no mandatory order of analysis or decision making in the first sentence of Article 2.2.1.1

146. At the first Panel meeting, China's case shifted from a complaint about the *way* in which the ADC had made its determination under the second condition of Article 2.2.1.1, to a complaint that the ADC was not entitled to consider "normally" because it had not first made affirmative determinations that the first and second conditions of Article 2.2.1.1 were satisfied.[164] Australia agrees that although the ADC did make an affirmative finding under the first condition, it did not make a finding (affirmative or otherwise) under the second condition in Railway Wheels Investigation 466 Report.

147. Australia disagrees, however, with China's purported requirement for a mandatory order of analysis within the first sentence of Article 2.2.1.1. The proposition that Article 2.2.1.1 requires an investigating authority to follow a mandatory order of analysis has no basis in the

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[161] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.103.

[162] Australia's closing statement, para. 24.

[163] See *Customs (International Obligations) Regulation 2015, (Exhibit CHN-41)*, p. 36. Regulation 43(2) states that if:

(a) an exporter or producer of like goods keeps records relating to the like goods; and
(b) the records:
  (i) are in accordance with generally accepted accounting principles in the country of export; and
  (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;

the Minister must work out the amount by using the information set out in the records.

[164] China's opening statement, para. 71,

> …there is no determination in any of the investigation reports that any of the exporters' records did or did not reasonably reflect the costs associated with the exporters' production and sale of the subject goods. The correct order of analysis was not followed. Thus, as was the case in *Australia –Paper* case, Australia accepts that it did not examine and determine both of the two explicit conditions in any of the three cases at hand. Thus, it did not carry out or complete the correct examination called for by Article 2.2.1.1.

See also China's closing statement, paras. 11-12.

Anti-Dumping Agreement. There is nothing in the text of Article 2.2.1.1 that suggests, let alone mandates, a particular order of analysis. Accordingly, no contravention can be demonstrated from the fact that a "normally" finding was made in the absence of an anterior affirmative finding under the second condition of Article 2.2.1.1.

148. Australia will address China's assertion that such a mandatory order of analysis exists in the first sentence of Article 2.2.1.1 by reference to its text, structure and purpose, and with reference to prior Appellate Body and panel reports. In short, China's advocation for a mandatory order of analysis is baseless and must be rejected.

(a) Nothing in the text of Article 2.2.1.1 suggests, or mandates, a particular order of analysis within the first sentence

149. The Panel must interpret each term of Article 2.2.1.1 in good faith and in accordance with their ordinary meaning.[165] The first sentence of Article 2.2.1.1 provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.[166]

150. The text of Article 2.2.1.1 first sentence does not suggest, much less mandate, a required sequence of analysis by an investigating authority.[167] Interpreting Article 2.2.1.1 in good faith and in accordance with its ordinary meaning, read as a whole, it is evident that Article 2.2.1.1 articulates an obligation on investigating authorities to employ exporters' records for the purpose of calculating the cost of production.[168] Article 2.2.1.1 explicitly makes clear that this obligation only applies in specified circumstances. Where those circumstances

[165] Article 31 of the *Vienna Convention on the Law of Treaties* (1969).
[166] Article 2.2.1.1 of the Anti-Dumping Agreement.
[167] Contrary to China's interpretation, Article 2.2.1.1 does not expressly, or impliedly, require an investigating authority to make an affirmative finding under the first and second conditions before considering, or making, a finding on the basis of "normally".
[168] The first sentence of Article 2.2.1.1 is prefaced with the phrase, "For the purposes of paragraph 2," clarifying that Article 2.2.1.1 applies in the context of calculating constructed normal value. See, e.g., Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.14, "Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, in turn, further elaborate on various aspects of Article 2.2." See also, Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.131-7.132.

do not arise, the investigating authority may, therefore, depart from the exporters' records to construct normal value.

151. In the text of Article 2.2.1.1, the first mentioned circumstance where this general obligation does not apply is where circumstances are not "normal": the first sentence of Article 2.2.1.1 establishes that an investigating authority "shall normally" use the records kept by the exporter as the basis for the calculation of costs of production. The term "normally" is an adverb that modifies the verb "shall… be calculated," and thus qualifies the obligation as a whole by limiting the circumstances in which that obligation has to be given effect.[169]

152. Previous Appellate Body and panel reports have explained, by reference to dictionary definitions, that the term "normally" means "under normal or ordinary conditions; as a rule".[170] Moreover, the Appellate Body and previous panel reports have observed that the word "normally" must, and does, have meaning in the proper interpretation of the first sentence of Article 2.2.1.1.[171] Therefore, the evident effect of "normally" in the first sentence is that where circumstances are not normal or ordinary, the investigating authority may, in calculating the cost of production, depart from the exporters' records.

153. The second mentioned circumstance is where records are not in accordance with GAAP principles of the export country. The third mentioned circumstance is where records do not reasonably reflect the costs associated with the production and sale of the product under consideration. These two circumstances appear following the phrase "provided that", which indicates that if either is not satisfied, then the obligation to use the records does not apply.[172]

154. In sum, Article 2.2.1.1 read as a whole, 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:

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[169] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.
[170] Appellate Body Report, *US – Clove Cigarettes*, para. 273; See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.65; Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.
[171] See, for e.g., Panel Report, *China – Broiler Products,* para. 7.161; Panel Report, *EU – Biodiesel (Argentina),* para. 7.227.
[172] In the rest of this section, Australia will use the term "first, second and third circumstances" to refer to the three circumstances identified in the first sentence of Article 2.2.1.1, as in Australia's view, that is more appropriate terminology for the purpose of this discussion in this section of the purported existence of a mandatory order of analysis. Australia is aware that the latter two circumstances are sometimes colloquially referred to as the "first and second condition". These labels originated in 2013 in Panel Report, *China – Broiler Products*, para. 7.133 when the Panel relayed the arguments of the applicant. Historically, however, previous panels have used the phrasing of "provisos" (in 1999 in Panel Report, *US – DRAMS*, para. 6.66) or "elements" (in 2002 in Panel Report, *Egypt – Steel Rebar*, para. 7.393). In other parts of this submission, however, for the Panel and Secretariat's ease of understanding, Australia uses the colloquial terminology of "first and second condition" to refer to the second and third circumstances given that is the language China uses in its submissions.

a) circumstances are normal;

b) the records are in accordance with GAAP of the export country; and

c) the records reasonably reflect the costs associated with the production and sale of the product under consideration.

155. Each of the three circumstances described above serves as an independent exception to the obligation in Article 2.2.1.1. If any one of the above circumstances is not present, then an investigating authority may rely on a basis outside of the exporters' records to compute the cost element of constructed normal value.

156. The three circumstances are not mutually exclusive, nor are they contingent on one another. In a practical sense, an investigating authority that finds one of the circumstances is not satisfied, could decide to conclude its analysis at that point, on the basis that any further consideration of the other circumstances would be redundant. However, such an approach is neither mandated, nor prohibited, in the text of Article 2.2.1.1.

157. There is nothing in the foregoing analysis, nor in the text of Article 2.2.1.1, that suggests, let alone mandates, a particular order of analysis within Article 2.2.1.1. This is unremarkable: it would be unusual for an order of analysis to be mandated to an investigating authority for three independent exceptions to a general obligation. Such a sequencing would serve no meaningful purpose. If the parties to the Anti-Dumping Agreement had intended such a mandatory sequencing, then they would have said as much.[173]

158. Accordingly, interpreting Article 2.2.1.1 in good faith and in accordance with its ordinary meaning, leads to the conclusion that an investigating authority may calculate costs based on information other than the exporters' records in circumstances that are not normal or ordinary. This applies irrespective of whether the remaining circumstances are satisfied, and irrespective of whether the authority made anterior findings about those circumstances.

[173] If the Panel were to search Article 2.2.1.1 for any indication of an anticipated ordering, the sole, but weak, indicator of a potential sequence is that the adverb "normally" is the first to appear in the Article. Its location at the start of the sentence means that its grammatical effect in the sentence is to modify the balance of what follows: if circumstances are not normal and ordinary, the obligations and exceptions in the balance of the sentence have no operation. While Australia does not contend that it follows from this that there is a mandatory obligation to consider whether conditions are "normal" *first*, it is a further factor weighing against China's contention that "normally" must be considered *last*.

(b) Where the Anti-Dumping Agreement requires a particular order within an article, it is set out expressly

159. If the parties to the Anti-Dumping Agreement had anticipated that there should be a mandatory order of analysis within Article 2.2.1.1, they could—and would—have said so clearly. Where the Anti-Dumping Agreement requires there to be a particular order of analysis within an article, that is set out expressly. In contrast to Article 2.2.1.1, the following provisions clearly mandate a sequence of analysis or order of process:

a) *the first and second sentences of Article 2.2.2*. The first sentence clearly mandates that costs and profits be based on actual data, as evidenced by the use of the unqualified verb "shall."[174] It is only if the amounts "cannot" be determined on this basis, that an investigating authority may resort to an alternative method of calculating costs. It follows that before resorting to the alternative methods of determining those amounts, an investigating authority must first conclude that the amounts cannot be determined using the method set out in the first sentence; and

b) *Articles 5.1, 5.3, 5.4 and 5.5*. Article 5.1 mandates that, aside from identified circumstances, an investigation may be initiated only after a written application has been submitted by or on behalf of the domestic industry. Articles 5.3 and 5.4 set out what an investigating authority must do after receipt of that application, and the determinations they must make before either initiating an investigation or rejecting the application. Article 5.5 specifies that the application for initiation of investigation shall not be publicised until after a decision to initiate has been made. A clear sequence of steps that an investigating authority has to undertake is expressly set out in these paragraphs.

160. In each above case, it is clear from the express text of the Articles that their requirements can only be met if the sequence set out in the specific Articles is followed. This contrasts with Article 2.2.1.1, which contains no such sequencing requirement.

[174] The lack of qualification to the verb "shall" is a key point of distinction with Article 2.2.1.1, where "shall" is preceded by "normally."

(c) The reasoning of the panel in Australia-Anti-Dumping Measures on Paper with respect to sequencing should not be followed

161. As China noted at the first Panel meeting,[175] the panel in *Australia-Anti-Dumping Measures on Paper* found that there is a mandatory order of analysis within Article 2.2.1.1. That approach should not be followed as it is inconsistent with the plain text of the Anti-Dumping Agreement.

162. The course of reasoning that led the panel in *Australia-Anti-Dumping Measures on Paper* to identify a requirement for sequencing within Article 2.2.1.1 can be summarised in the following four steps:

a) the term "normally" is defined as "under normal or ordinary conditions; as a rule, ordinarily"; "in a normal manner, in the usual way". The term "normally" suggests that the obligation to use the records kept by an exporter to calculate the costs, admits of derogation under certain circumstances;[176]

b) Article 2.2.1.1 should not be read in a way that renders the word "normally" redundant, as this would be inconsistent with the principle that "interpretation must give meaning and effect to all the terms of a treaty";[177]

c) the term "normally" indicates that even where an exporter's records satisfy the second and third circumstances in Article 2.2.1.1, first sentence, there are still circumstances in which the investigating authority may depart from its obligation to use those records;[178]

d) before an investigating authority can rely on the flexibility provided by the term "normally", it has to consider whether the records satisfy the second and third circumstances - and find that those conditions are satisfied. This is because the obligation to "normally" use the records does not apply when the second or third circumstance is not satisfied. [179]

[175] China's opening statement, para. 71. See also China's closing statement, paras. 11-12.
[176] Panel Report, *Australia-Anti-Dumping Measures on Paper*, para. 7.111.
[177] Panel Report, *Australia-Anti-Dumping Measures on Paper*, paras. 7.112 - 7.114 (fns. omitted).
[178] Panel Report, *Australia-Anti-Dumping Measures on Paper*, para. 7.115.
[179] Panel Report, *Australia-Anti-Dumping Measures on Paper*, paras. 7.110, 7.117, 7.126.

163. Australia agrees with the first three steps in the panel's reasoning set out above but disagrees with the fourth conclusory step.

164. The panel's reasoning in that fourth step appears to be that because a finding under "normally" would be redundant if one of the two other circumstances is not met, an investigating authority may not make a finding under "normally" unless both are satisfied.[180] The logic of this finding is unsound.

a) First, while it is true that a finding under "normally" may be practically redundant if one of the two other circumstances has not been satisfied, it is *equally* true, that if a finding is made that circumstances are not "normal", then going on to make findings under the other two circumstances would be redundant. In either case, the subsequent findings would be redundant because there was already a finding to the effect that the obligation to use the exporter's records in the first sentence of Article 2.2.1.1 did not apply. Subsequent findings on the other circumstances, whether affirmative or negative, could not change that outcome.

b) Second, the fact that a finding that any one of the three circumstances has not been met could lead to findings with respect to the other two being practically redundant does not logically lead to the conclusion that there is a legally mandatory sequence of analysis. At most it might have practical implications for how an investigating authority might choose to conduct its analysis.

165. Similarly, while it is accurate, as that panel observed, that the obligation to use the records kept by the exporter is only operative if the second and third circumstances are expressly satisfied,[181] it is equally accurate that the obligation to use the exporters' records is only operative if circumstances are normal and ordinary. It is clear from Article 2.2.1.1 that the second and third circumstances qualify the obligation to calculate costs "on the basis of records kept by the exporter". They do not qualify the operation of the separate circumstance of "normally".

166. A proper reading of Article 2.2.1.1 permits an investigating authority to rely on the flexibility provided by the term "normally" if the circumstances are "not normal and ordinary"

[180] Panel Report, *Australia-Anti-Dumping Measures on Paper*, paras. 7.117 - 7.118.
[181] Panel Report, *Australia-Anti-Dumping Measures on Paper*, para. 7.117.

irrespective of whether the two other circumstances are satisfied.[182] For the reasons set out above, a requirement to sequence this analysis has no basis in the Anti-Dumping Agreement. The effect an investigating authority can give to "normally" is not unconstrained – there must be a proper basis for doing so on the evidentiary record. But whether a proper consideration of the evidentiary record warrants a sequenced evaluation is a choice that is left to the discretion of the investigating authority.

167. Australia notes, for completeness, that the issue of whether Article 2.2.1.1 contains any sequencing requirement, or any other precondition for recourse to "normally", arose late in *Australia - Anti-Dumping Measures on Paper*. The focus of the parties' submissions was on the anterior issue of Indonesia's submission that no effect should be given to the word "normally" beyond the requirements of the second and third circumstances. As a result, the panel made its finding that there was a sequencing requirement without the benefit of full arguments on the issue from the parties and third parties.

(d) The panel in Australia - Anti-Dumping Measures on Paper misunderstood the findings in Ukraine -Ammonium Nitrate

168. The panel in *Australia - Anti-Dumping Measures on Paper* said that it found support for its interpretation of the first sentence of Article 2.2.1.1 in the reasoning of the panel in *Ukraine - Ammonium Nitrate* at paragraphs 7.72 to 7.80.

169. Australia disagrees that these paragraphs support an implied requirement of mandatory sequencing. The panel in *Ukraine - Ammonium Nitrate* did not consider whether the first sentence of Article 2.2.1.1 contained a sequencing requirement. The finding made by that panel concerning "normally" was only that Ukraine's arguments were an *ex post facto* rationalisation. One factor that the panel found, which supported its conclusion that Ukraine's arguments were *ex post facto,* was that Ukraine's investigating authority had not "for example" found that although the second and third circumstances were met, it would nevertheless reject the cost.[183]

[182] An investigating authority certainly has the discretion to sequence their analysis by first considering whether the two other conditions are satisfied, and then considering "normally" only if they are satisfied. However, there is no requirement that investigating authorities take this approach.
[183] Panel Report, *Ukraine-Ammonium Nitrate*, para. 7.80.

170. That panel did not find that the second and third circumstances were *required* to be satisfied before recourse to normally was permitted. The panel only opined that a finding that the other two circumstances were satisfied, would be an "example" of the findings an investigating authority might be expected to have made before having recourse to "normally". That panel's reference to this being just an "example", necessarily implies that the panel understood that this "example" was only one way an investigating authority could have recourse to "normally".

(e) The Appellate Body in Ukraine-Ammonium Nitrate did not find that there was a mandatory sequencing requirement in Article 2.2.1.1

171. In its closing statement at the first Panel meeting, China asserted that Australia has ignored "the order of analysis of Article 2.2.1.1 as ruled by the Appellate Body" in *Ukraine - Ammonium Nitrate.*[184] This is incorrect: the Appellate Body did not refer to a mandatory order of analysis.

172. China's argument is based on a misreading of the Appellate Body's decision in that case. In the relevant paragraph that China cited, the Appellate Body merely recognised that the inclusion of the term "normally" in the first sentence of Article 2.2.1.1 admits a derogation from the general obligation to use exporters' records where circumstances are not normal:

> We observe that the first sentence of Article 2.2.1.1 requires that costs "normally" be calculated on the basis of records kept by the exporter or producer under investigation, provided that the two conditions set out in that sentence are met. In other words, when these two conditions are met, investigating authorities are "normally" to use the records of the exporter or producer under investigation. The word "normally" may be defined as "under normal or ordinary conditions; as a rule". Read in conjunction with the words "provided that", which introduce the two conditions of the first sentence of Article 2.2.1.1, the word "normally" indicates that when these two conditions are met, "under normal or ordinary conditions" or "as a rule", records shall be used. The Appellate Body has held that "the qualification of an obligation with the adverb 'normally' does not, necessarily, alter the characterization of that obligation as constituting a 'rule' … [r]ather, … the use of the term 'normally' … indicates that the rule … admits of derogation under certain circumstances."

[184] China's closing statement, para. 12.

> *Given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply*.[185]

173. The Appellate Body's observation says nothing about a mandatory order of analysis. Further, the final sentence of the above paragraph confirms that the Appellate Body read the "normally" derogation to apply broadly and to extend to "circumstances other than those in the two conditions set out in that sentence." This only emphasises that the "normally" flexibility built into Article 2.2.1.1 is overarching and is not confined to being considered only after the second and third circumstances in Article 2.2.1.1 have been satisfied.

(f) Nothing in the wider context of Article 2 supports the existence of a sequencing requirement

174. There is nothing in the wider context of Article 2, including the text, structure, or purpose of Article 2 that suggests the first sentence of Article 2.2.1.1 contains the mandatory order of analysis that China contends exists.

175. By way of brief overview, Article 2.1 defines dumping.[186] Article 2.2 governs how the margin of dumping is to be determined when, relevantly, there are "no sales of the like product in the ordinary course of trade in the domestic market of the exporting country." In such a situation, there are two alternative methods: (a) by comparison with a third country like product, or (b) by constructing normal value. Article 2.2.1.1 then stipulates that for the purpose of constructing normal value under Article 2.2, costs will be calculated on the basis of records kept by the exporter or producer, as long as the three circumstances are met.

176. Put in this context, it is apparent that Article 2.2.1.1 addresses a situation that is an "exception to an exception" in how normal value is calculated, where the primary mechanisms for determining normal value are not available. In that situation, Article 2.2.1.1 then imposes a qualified obligation on how costs should be calculated, but one that only arises where all

[185] Appellate Body Report, *Ukraine-Ammonium Nitrate*, para. 6.87 (emphasis added).

[186] Article 2.1 of the Anti-Dumping Agreement:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

three circumstances are met. There is nothing, expressed or implied, anywhere in Article 2 that suggests an investigating authorities' consideration of whether all three circumstances arise must occur in a particular order.

(g) China's arguments seeking to establish the existence of a mandatory order of analysis lack merit

177. Till date China has not presented any arguments in support of its construction of a mandatory order of analysis in the first sentence of Article 2.2.1.1. China has only cited the Panel's decision in *Australia - Anti-Dumping Measures on Paper*, and mistakenly relied on the Appellate Body's findings in *Ukraine - Ammonium Nitrate*. Each is addressed above.

178. In its response to Panel question no. 62, China repeated its reliance on previous decisions. It made no textual or other arguments in support of its position aside from the passing assertion that:

> Any attempt by an investigating authority to implement an interpretation of *"normally"* that permits the rejection of an exporter's cost record, whether the record does or does not comply with the first and second conditions of the first sentence, because the investigating authority does not wish to recognise the costs of an exporter as formed in the markets of the exporting Member concerned, would be *non-contextual* and *unbounded*.[187]

179. This is a "straw" argument that is irrelevant to the issues before the Panel. Australia does not argue or suggest that an investigating authority is entitled to reject an exporter's cost record because it "does not *wish* to recognise the costs" – either by reason of the meaning to be given to the term "normally", or by reason of the absence of a mandatory order of analysis.

180. In sum, the sole support for China's position on the interpretation of Article 2.2.1.1 is from a panel report that misinterprets the text of the Anti-Dumping Agreement.

3. Aside from sequencing, China has not challenged the ADC's finding on "normally"

181. In its first written submission,[188] Australia set out in detail the ADC's finding, as an objective and unbiased authority, that the circumstances in which Masteel's costs were formed were not normal and ordinary because (a) there were systemic and structural

[187] China's response to Panel question no. 62, para. 165 (original emphasis).
[188] Australia's first written submission, paras. 193-229.

imbalances that permeated the Chinese steel and steel input markets; (b) these circumstances were attributable to the Government of China's serious and pervasive influence in those markets; and (c) these market distortions translated to Masteel's costs. The ADC provided a reasoned and adequate explanation as to how the evidence supported its factual findings and how those factual findings supported its determination.

182. China has not presented any arguments, or submitted any evidence, to suggest that the ADC's establishment of the facts was not proper or that the ADC's evaluation was biased or not objective.[189]

183. Accordingly, it appears that the only contested issue before the panel under China's AD claim 3 is whether there is a mandatory order of analysis that the ADC had to follow before making a finding relying on "normally" in Railway Wheels Investigation 466. For all of the reasons above and in Australia's earlier submissions, the ADC properly relied on "normally" in Article 2.2.1.1.

4. The ADC's interpretation of "normally" is permissible

184. Even if China had challenged in this dispute the ADC's reliance on "normally" as the basis for its findings in Railway Wheels Investigation 466, the record shows that the ADC's finding was permissible under Article 2.2.1.1 and consistent with the actions of an unbiased and objective investigating authority. [190]

185. The ADC found that there were systemic and structural imbalances in China's steel and steel input markets, owing to the Government of China's serious and pervasive influence.[191] The ADC found that these circumstances translated to Masteel's records – and Masteel's steel billet costs in particular.[192] On this basis, the ADC found that the circumstances in which Masteel's costs were formed were not normal or ordinary, and relied on information other than the exporter's records when calculating the cost of production of steel billet for the purpose of constructing normal value of railway wheels.

[189] Australia's first written submission, paras. 11-21.
[190] Article 11 of the DSU, and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement; Panel Report, *US – Softwood Lumber VI,* para. 7.15. Further, where the Panel finds that a relevant provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. *See* Article 17.6(ii) of the Anti-Dumping Agreement.
[191] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.
[192] *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), pp. 24, 80, 95.

186. An unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, *could* have reached the ADC's findings that these circumstances were not "normal" and therefore warranted reliance on cost data external to Masteel's records.

5. The relevance of information provided by the exporter to a determination under Article 2.2.1.1

187. In its response to Panel question no. 14, China stated that the determination under Article 2.2.1.1 concerns "the information provided by the exporters, and the ability for such exporter's information to be verified." Australia agrees that the question of whether information provided by exporters is accurate, reliable, and verifiable falls within the scope of Article 2.2.1.1. However, Australia does not agree that the verifiability of the respondents' submitted information is the sole consideration targeted by Article 2.2.1.1.

188. Australia considers any such reading to be unjustifiably narrow and at odds with the text itself. If Article 2.2.1.1 was confined only to the question of verification, Article 2.2.1.1 would have been drafted in those terms. Interpreting Article 2.2.1.1 in this way would duplicate the task under Article 6.6 of the Anti-Dumping Agreement, which requires investigating authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

189. China also seems of the view that the only material an investigating authority may consider in relation to Article 2.2.1.1 is "the information provided by the exporters." There is nothing expressed, or implied, in Article 2.2.1.1 (or elsewhere in the Anti-Dumping Agreement) that confines the material an investigating authority can consider under Article 2.2.1.1 to the records provided by the exporter. The focus of the first sentence of Article 2.2.1.1 is on whether an exporter's records must be used for the calculation of costs but nothing requires that assessment to be confined to the information provided by the exporter. On the contrary, the second sentence of Article 2.2.1.1 instructs that "[a]uthorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer."

190. Accordingly, to the extent China seeks to argue that the ADC could not properly have sought, or had regard to, information from the Chinese government for the purpose of the assessment under the first sentence of Article 2.2.1.1, such argument is clearly unsustainable.

6. Conclusion

191. The ADC acted consistently with Article 2.2.1.1 of the Anti-Dumping Agreement in departing from the exporter's records when calculating the cost of steel billet in Railway Wheels Investigation 466. The Panel should therefore reject China's AD claim 3.

C. CHINA'S AD CLAIM 1

192. 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".[193] This proposition is inconsistent with the text of the Anti-Dumping Agreement and runs afoul of the findings of the Appellate Body.

193. Given the facts and circumstances before the ADC in Railway Wheels Investigation 466, it was entirely permissible under 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. Having determined that recourse to French data was appropriate in the circumstances, 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.

1. China interpretation of Article 2.2 is incorrect

194. China takes the view that Article 2.2 unconditionally requires investigating authorities to use in-country costs, leaving no room for alternatives in circumstances where those costs are not suitable for calculating a dumping margin.[194] For the reasons set out in Australia's previous submissions, China's interpretation is irreconcilable with the text of Article 2.2 and is inconsistent with the observations of the Appellate Body in *EU - Biodiesel (Argentina)*.[195]

[193] China's opening statement, paras. 45-46.
[194] China's opening statement, paras. 45-46, 64-65.
[195] Australia's first written submission, paras. 279-283; Australia's opening statement paras. 61-63; Australia's closing statement, paras. 17-21; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70:

> We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources

195. In its opening statement, China sought to falsely attribute certain "straw" arguments to Australia, contending that Australia had argued that the phrase "cost of production in the country of origin" in Article 2.2 should be "given no meaning at all," and that, according to Australia, "the cost of production in the country of origin can be any cost in any country".[196] China then indignantly criticised what amounted solely to its own contrived argument. The Panel should not ascribe any credibility to China's misrepresentation of Australia's position. Rather, the Panel should focus on the careful analysis conducted by the ADC in Railway Wheels Investigation 466.[197]

196. As previously explained, the ADC found that Masteel's recorded steel billet costs were not usable for purposes of determining normal value.[198] The ADC instead calculated these costs with reference to Valdunes' data. This was because Valdunes' data could establish a reasonable proxy for the cost of production of steel billet in China. As the Railway Wheels Investigation 466 Report explains, the ADC reached this conclusion because, *inter alia*: (a) Valdunes' purchases were of the particular grade of micro alloyed steel used 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 market imbalances that impacted Masteel's costs at various stages of the production process. As such, Valdunes' steel billet costs were a well-tailored and appropriate proxy for Masteel's costs in China for the same input.[199] The ADC then adapted Valdunes' data to Masteel's circumstances. The ADC's approach was therefore consistent with Australia's obligations under Article 2.2.

197. The record also shows that the ADC did not select Valdunes' data in a vacuum. Rather, the ADC considered a range of options to determine the cost of production in China, including in-country data (other than Masteel's own costs) such as private domestic prices for steel billets and the import prices of steel billet in China. [200] The ADC concluded that this data likewise could not be employed to calculate normal value because they reflected the

of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country.

[196] China's opening statement, para. 65.
[197] Australia's first written submission, paras. 284-288; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102.
[198] Australia's first written submission, paras. 284, 230-233.
[199] Australia's first written submission, paras. 286-288.
[200] Australia's first written submission, paras. 298-306; *Railway Wheels Investigation 466 Report*, (Exhibit CHN-3), p. 102.

structural and systemic imbalances prevalent in the Chinese steel and steel input markets, and because insufficient information was provided by the Government of China for the ADC to determine that this data was not impacted by these imbalances. As the Panel alluded to in its question 21,[201] it would be nonsensical—through the choice of reference data under Article 2.2—to reintroduce the very same distortions that the ADC legitimately excluded under Article 2.2.1.1.

198. As addressed extensively in Australia's first written submission, Article 2.2 permits the use of "out-of-country" data to calculate the "cost of production in the country of origin" as long as the data is adapted to the circumstances in the country of origin.[202]

2. The ADC properly adjusted Valdunes' cost data to Masteel's circumstances

199. In its opening statement at the first Panel meeting, China argued that (a) the ADC acted unreasonably by adjusting Valdunes' cost with reference to another European steel producer's selling expense;[203] and (b) Australia would not have been faced with a situation of insufficient information to make further adjustments had it accepted the exporter's recorded steel billet costs.[204] In China's words, Australia "did not have information to achieve something that was not necessary to achieve".[205] Both of these arguments are meritless.

200. As to the first point, the ADC acted consistently with the requirements under Article 2.2 by seeking to adapt the out-of-country reference data to Masteel's circumstances as an integrated steel producer in China. The ADC's first step was to analyse the data available that could serve as a basis for the ADC's cost calculation. The ADC selected contemporaneous and verified cost data for this purpose from a manufacturer of like merchandise that sourced the same micro alloyed steel used to manufacture railway wheel products, like those manufactured by Masteel's.[206] The ADC recognised that Masteel was an integrated producer.

[201] Panel question no. 21,

> **To both parties** - If non-Chinese surrogate costs were properly used by the ADC to construct normal values, consistent with Articles 2.2.1.1 and 2.2, would the adjustments that China advocates have led the ADC to essentially revert back to the exporters' actual costs to construct normal values? Would such a result make legal or practical sense? Please explain.

[202] Australia's first written submission, paras. 279-283. See also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70, 6.73.
[203] China's opening statement, para. 61.
[204] China's opening statement, para. 64.
[205] China's opening statement, para. 64.
[206] Australia's first written submission, paras. 284-288.

However, recognising that the data selected as a reference point by the ADC was not from an integrated producer, the ADC made appropriate adjustment to reflect these different distinct production scenarios.

201. In order to account for the fact that Masteel would not have incurred certain purchasing expenses as an integrated producer, the ADC removed these expenses from the reference cost data. The ADC's decision to make this adjustment against the SG&A expenses of a separate steel company, ArcelorMittal, was appropriate in the circumstances because (a) Masteel itself provided this data for this purpose; (b) ArcelorMittal's core business was the production and sale of steel products; and (c) the amount of ArcelorMittal's SG&A expenses as a proportion of revenue was readily identifiable in its financial statements.[207] In other words, the relevant expenses were both identifiable in ArcelorMittal's finances and could serve as a reasonable proxy in light of ArcelorMittal's business and operations. The alternative comparison entities for which Masteel provided information were either more diversified businesses (in the case of Thyssenkrupp), or their SG&A expenses were not readily identifiable in their financial statements (in the case of the Schmolz+Bickenbach group).[208]

202. China's second argument—that the ADC could have simply used Masteel's own billet costs, and made no adjustment—amounts to nothing more than a reiteration of China's arguments under AD claim 3 concerning the ADC's decision to depart from Masteel's recorded costs for steel billet. China ignores and thus fails to address the underlying evidence providing the basis for the ADC's decision.

3. Conclusion

203. The ADC acted consistently with Article 2.2 of the Anti-Dumping Agreement in determining an appropriate cost of production in the country of origin. The Panel should, therefore, reject China's AD claim 1 in its entirety.

D. CHINA'S AD CLAIM 5

204. China argues, through AD claim 5, that Australia did not properly determine the exporter's cost of production, when, "Australia considered and used a cost of an input, being a purchase cost of steel billet, where the exporter did not have such a cost in its financial

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

records because steel billet was self-made by the exporter from raw materials."[209] For the reasons set out in this section, China's claim 5 must fail.

1. China's AD claim 5.d with respect to Article 2.2 is duplicative of its claim 1

205. To the extent that China's AD claim 5.d relates to Australia's obligation under Article 2.2 to assess costs of production in the country of origin, it is not apparent from China's submission or China's response to the Panel's questions,[210] that AD claim 5 raises legal issues distinct from AD claim 1.

206. The Panel presented China with an opportunity to explain the distinction between its AD claims 1 and 5.d as they pertain to Railway Wheels Investigation 466. In response to the Panel's question, China re-summarised its objection to the ADC's use of Valdunes' adjusted steel billet costs in place of Masteel's own billet input and manufacturing costs. China therefore confirmed that its complaint in AD claim 5.d. is the same argument already made in relation to AD claims 1 and 3.

207. Australia already addresses its obligations under Article 2.2.1.1 in its submissions under AD claim 3 and it addresses its obligations under Article 2.2 in its submissions on AD claim 1.

208. In Australia's view, this aspect of China's AD claim 5.d is entirely subsumed in China's prior claims, and the Panel does not need to consider this aspect of AD claim 5 separately.

2. China's AD claim 5.d with respect to Article 2.2.1.1 is misguided

209. China's first written submission argues that the portion of AD claim 5 related to Article 2.2.1.1 "deals with the issue of what a 'cost' is, in the records of an exporter, for the purposes of answering the question of whether the records 'reasonably reflect the costs associated with the production' of the product concerned' under Article 2.2.1.1."[211] Australia explained in its first written submission that this argument has no merit as it rests on the second condition of Article 2.2.1.1, which was not the basis for the ADC's decision.[212] The ADC

[209] China's panel request, section B.1.5.
[210] China's response to Panel questions nos. 15-16, paras. 49-60.
[211] China's first written submission, para. 308.
[212] Australia's first written submission, paras. 258, 175-181.

resorted to information external to Masteel's records pursuant to a finding under the "normally" clause of Article 2.2.1.1.

210. China's position seems to have shifted in its response to Panel question no. 15 at the first Panel meeting. China now argues that the ADC failed to discharge its obligation under Article 2.2.1.1 by calculating a cost (of steel billet) that was not genuinely related to Masteel's production and sales of railway wheels.[213]

211. In response to Panel question no. 15, China was asked to respond to Australia's submission that AD claim 5 lacked a clear legal basis. In response, China asserted that it "maintains Australia did not properly determine Masteel's costs of production," and then cited its own opening statement,[214] which emphasises the text of the second condition of Article 2.2.1.1. As such, it remains unclear to Australia what relevance the second condition of Article 2.2.1.1 has to AD claim 5, given that the ADC did not make a finding under the second condition.

212. China appears to take the view that because the second condition of Article 2.2.1.1 uses the phrase " the costs associated with the production and sale of the product" 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 being considered. This is likely China's ultimate complaint. China provided no coherent explanation as to the basis for this purported obligation. Given that China appears to contend that this obligation exists even where the records of the exporter are not being relied upon, and irrespective of the reason why they are not being relied upon, it obviously has potential to lead to nonsensical results, such as where the records are not GAAP compliant.

213. Further, and in any event, China's argument cannot succeed because it is clear from the facts of Railway Wheels Investigation 466 that there was a genuine relationship between Masteel's cost of steel billet and the production and sale of railway wheels.[215]

214. The ADC, in deciding to assess Masteel's records at the level of steel billet, was guided by Masteel's presentation of its own cost records. Masteel provided a breakdown, on a cost basis, of the most significant production steps involved in manufacturing the finished goods

[213] China's response to Panel's question no. 15, paras. 49-54.
[214] China's opening statement, paras. 84-85.
[215] Australia's first written submission, paras. 260-265.

as follows: (a) steel billet cost of manufacture; (b) blank wheel cost of manufacture; and (c) finished wheel cost of manufacture.[216] Masteel's questionnaire response specifically identified the steel billet cost for the goods exported to Australia, and stated "[t]he costs of steel billets and blank wheels are the actual costs incurred."[217] Additionally, the steel billet cost was listed as the primary input into the finished goods. As Australia explained in its own first written submission,[218] it would not have been practicable or appropriate for the ADC to assess costs at the level of upstream inputs, given the manner in which Masteel reported its cost data for the production of the goods exported to Australia, and the prevalence of SOE involvement in the upstream markets.

3. Conclusion

215. The ADC properly evaluated the record evidence and acted in an objective and unbiased manner when determining that calculating costs at the level of steel billet was appropriate for the purpose of constructing normal value of railway wheels. The Panel should reject China's AD claim 5.d.

E. CHINA'S AD CLAIM 6.A

216. China claims that the ADC failed to make due allowances to ensure a fair comparison between the export price and constructed normal value. China's claim arises from the methodology used by the ADC to construct normal value under Article 2.2, a methodology already the subject of China's AD claims 3 and 1. China's AD claim 6.a argues for adjustments to be made under Article 2.4 that would reverse the outcome of the methodology used to construct normal value under Articles 2.2 and 2.2.1.1. This is not the purpose of Article 2.4.[219] China's approach is legally impermissible and makes no practical sense.

217. On this basis, China's AD claim 6.a is in part consequential on its AD claims 3 and 1. If China fails on AD claim 3 or 1, China must also fail on AD claim 6.a. Even if China succeeds on

[216] Australia first written submission, paras. 260-265; [[, (Exhibit AUS-39 (BCI))]].
[217] Australia first written submission, paras. 260-265; [[(Exhibit AUS-39 (BCI))]].
[218] Australia's first written submission, paras. 266-269.
[219] Panel Report, *EU – Biodiesel (Argentina),* para. 7.296; Panel Report, *Egypt – Steel Rebar,* para. 7.333; Panel Report, *EU – Footwear (China)*, para. 7.263.

AD claims 3 and 1, then AD claim 6.a must still fail; or the Panel may exercise judicial economy and decline to make findings with respect to AD claim 6.a.

1. China's AD claim 6.a is legally impermissible and makes no practical sense

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

219. Through its AD claim 6.a, China advocates for adjustments under Article 2.4 to address an alleged disparity between the constructed normal value and export price. [220]. China does not specify how or where adjustments under Article 2.4 could have been made to address this alleged disparity.

220. It is apparent that China advocates for due allowance adjustments that would have had the effect of adjusting the constructed normal value to a quantum identical to that which would have been calculated using Masteel's unadjusted recorded costs (at least part of which, the ADC had found reflect market distortions). So much is evident from China's opening statement at the first Panel meeting where it stated that "due allowance that reverses the margin calculation's non-compliance with the requirements of Articles 2.1, 2.2 and 2.4 would be perfectly fitting."[221]

221. Adjustments made for the sole purpose of reversing the outcome of the methodology used to construct normal value is not the purpose of Article 2.4.[222] Article 2.4 is not a vehicle through which normal value is constructed—that is done through Article 2.2. Nor is Article 2.4 a vehicle through which the very adjustments made in the construction of normal value under Article 2.2 are to be reversed. It would be nonsensical for the Anti-Dumping Agreement to contain a provision directed at reversing a decision properly made under another provision.

222. Rather, Article 2.4 is concerned with differences that affect price comparability between the normal value and export price.

[220] China's opening statement, para. 89.
[221] China's opening statement, para. 93.
[222] Panel Report, *EU – Biodiesel (Argentina),* para. 7.296; Panel Report, *Egypt – Steel Rebar,* para. 7.333; Panel Report, *EU – Footwear (China)*, para. 7.263.

223. In response to Panel question no. 21, about whether China's proposed adjustments would "make legal or practical sense," China reiterated its AD claim 3 and AD claim 1 arguments. China did not, however, offer an explanation as to why its purported adjustments would "make legal or practical sense" in the event its arguments in support of AD claim 3 and AD claim 1 fail, as they must.[223] Even China's own understanding of its case suggests that it regards AD claim 6.a as consequential or redundant.

2. China's response to question 20 is incorrect

224. Australia explained in its first written submission that China's arguments had already failed before a previous WTO panel.[224] In response to Panel question no. 20, China argues that "the Appellate Body in *EU - Biodiesel (Argentina)* disagreed with the panel's view that differences arising from methodology applied in establishing normal value cannot be challenged under Article 2.4."[225]

225. However, the Appellate Body's disagreement with the panel was on a separate legal issue.[226] The Appellate Body expressly chose to exercise judicial economy and did not make a determination about the issue of whether differences arising from methodology applied in establishing normal value can be challenged under Article 2.4. [227]

3. Conclusion

226. The ADC did not act inconsistently with Australia's obligations under Article 2.4. The Panel should, therefore, reject China's AD claim 6.a.

F. CHINA'S AD CLAIM 7.B

227. Australia refers to its first written submission at paragraphs 332-343 (inclusive) and draws upon its written responses to Panel questions no. 31 and 32.

228. The ADC used Masteel's actual sales data to calculate the profit component of the constructed normal value using the data that included sales figures of all railway wheels from Masteel's "Wheels Division" as its basis.[228] For the reasons explained in Australia's response

[223] China's response to Panel question no. 21, paras. 78-87.
[224] Australia's first written submission, paras. 318-325; Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.301, 7.305.
[225] China's response to Panel question no. 20, para. 76.
[226] Appellate Body Report, *EU - Biodiesel (Argentina)*, paras. 6.86,6.87.
[227] Appellate Body Report, *EU-Biodiesel (Argentina)*, para. 6.89.
[228] Australia's first written submission, paras. 337-341.

to Panel question no. 31, this data was the verified information available to the ADC.[229] Moreover, the record shows that Masteel had suggested that the ADC use this data for this purpose.[230] Masteel was provided with opportunities to comment on the ADC's profit calculation and did not raise any concerns or propose that any alternative approach be taken.

229. China's further allegation that Australia improperly applied the profit ratio to an out-of-country cost of production is entirely consequential on China's earlier claims, in particular AD claim 1.[231] Because no error can be demonstrated in relation to those earlier claims, this claim must also fail.

G. CHINA'S AD CLAIM 8

230. China's claim under Article 9.3 of the Anti-Dumping Agreement is entirely consequential on the Panel finding the ADC acted inconsistently with Article 2 with respect to the ADC's determination of normal value for railway wheels exported by Masteel to Australia.[232] For the reasons set out above, and in Australia's first written submission, no error in the determinations made under Article 2 can be demonstrated, and accordingly this claim must fail.

H. CONCLUSION

231. For the foregoing reasons, and for the reasons set out in Australia's earlier submissions, Australia respectfully requests that the Panel reject all of China's claims under the Anti-Dumping Agreement concerning Railway Wheels Investigation 466.

[229] Australia's response to Panel question no. 31, paras. 88-93.
[230] See *Emails from Percival Legal to ADC, dated 9 June 2018 to 11 June 2018*, (Exhibit AUS-77).
[231] China's first written submission, paras. 431-432; China's opening statement, para. 126. Australia has responded to China's claims in Australia's first written submission, paras. 333 and 343.
[232] Australia's first written submission, para. 344.

IV. CONDITIONAL RESPONSE TO AD CLAIMS: STAINLESS STEEL SINKS

A. INTRODUCTION

232. Australia's primary submission is that the Stainless Steel Sinks Investigation 238 Report, the interim reviews, and Stainless Steel Sinks Expiry Review 517 Report are all outside the Panel's terms of reference.[233] Australia makes the following submissions on a conditional basis only, since they need only be considered if the Panel were to find against Australia's primary submission.

233. In this section, Australia addresses the key issues claim-by-claim that have emerged from the submissions to date.

234. For the reasons set out below and in Australia's earlier submissions, all China's AD claims with respect to stainless steel sinks must fail.

B. CHINA'S AD CLAIM 3

1. Regulation 180(2) is not the second condition of Article 2.2.1.1

235. The sole argument advanced by China in its first written submission in relation to AD claim 3 was that the ADC's findings in Stainless Steel Sinks Investigation 238 Report are inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement because the findings made in that Report for the purposes of regulation 180(2) were also findings made for the purposes of the second condition of Article 2.2.1.1.[234] This argument is without merit:

a) regulation 43(2) / regulation 180(2) say nothing about, and provide no basis to depart from records.[235]

b) as the panel in *Australia – Anti-Dumping Measures on Paper* observed, references to "reasonably reflect competitive market costs" made under regulation 43(2) /

[233] Australia's second written submission, paras. 60-121.
[234] Australia's second written submission, para. 144. See, also, Australia's submission with respect to Railway Wheels Investigation 466 above.
[235] Australia's closing statement, para. 24; Australia's first written submission, para. 149. See *Customs (International Obligations) Regulation 2015*, (Exhibit CHN-41), pp. 36-37.

regulation 180(2) are not the same as findings made under the second condition of Article 2.2.1.1.[236]

236. It appears that China may accept that its original argument was wrong. China has not pressed its original argument in any of its submissions in response to Australia's first written submission.[237] Rather it now appears that China contends that the ADC *did not make* any second condition finding in Stainless Steel Sinks Investigation 238 Report.[238] For that reason, in China's view, the Report is inconsistent with Article 2.2.1.1.[239]

237. In this revised approach, China's principal objection appears to be that the ADC did not follow a purportedly mandatory sequence of analysis called for in Article 2.2.1.1.[240] But that issue does not arise in relation to Stainless Steel Sinks Investigation 238. As explained in response to Panel question no. 61[241] and below, in Stainless Steel Sinks Investigation 238 Report the ADC properly departed from the exporters' records in accordance with the second condition of Article 2.2.1.1.

2. The ADC's second condition finding in Stainless Steel Sinks Investigation 238 Report

238. As reflected in the Report, and in accordance with the Australian domestic framework, the ADC considered, first, whether there were any domestic sales in China available for comparison in accordance with Article 2 of the Anti-Dumping Agreement.[242] The ADC found there were sufficient domestic sales in the OCOT for a small number of models exported by Zhuhai Grand to Australia.[243] Accordingly, the ADC used those sales.[244] For the remaining Zhuhai Grand models and for the other selected exporters, the ADC determined that there were insufficient domestic sales in the OCOT.[245] The ADC therefore turned to constructed normal value.

[236] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.102-7.103.
[237] See China's opening statement, paras. 69-73; China's closing statement, para. 17. See Australia's closing statement, para. 24.
[238] China's opening statement, paras. 69-72.
[239] China's opening statement, paras. 69-72.
[240] China's opening statement, paras. 68-72.
[241] Australia's response to Panel question no. 61, para. 194.
[242] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 39.
[243] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 39.
[244] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 39.
[245] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 39.

239. The ADC's first step in calculating the cost of production of stainless steel sinks in China was to conduct the threshold assessment under regulation 180(2).[246] Under regulation 180(2), where the evidence shows that an exporter's records are (a) consistent with GAAP, and (b) reflect "competitive market costs", then the ADC *must* use the exporter's recorded costs. The ADC has no discretion not to use the records if these two criteria are met. But regulation 180(2) does not provide any basis to *depart from* records, only a narrow positive obligation that records must be used where the prescribed criteria apply.[247]

240. The ADC found that the criteria in regulation 180(2) were not met.[248] The ADC therefore conducted a further evaluation of whether to use the exporters' records under Article 2.2.1.1.[249]

241. In this evaluation, the ADC found that the second condition was not met. The operative finding is on page 42 of the Stainless Steel Sinks Investigation 238 Report.[250] The ADC considered that the exporters' recorded costs for 304 SS CRC did not reasonably reflect the actual costs of 304 SS CRC associated with the production and sale of stainless steel sinks. This was because the records were not an accurate and reliable reflection of the costs of 304 SS CRC actually incurred. This finding was based on the ADC's finding that 304 SS CRC prices in China were affected by the Government of China's influences in the iron and steel industry, which had a distorting effect on the 304 SS CRC market.[251] A further discussion of the ADC's assessment of the evidence underpinning these findings appears at pages 134 to 136 of the Stainless Steel Sinks Investigation 238 Report.[252]

242. The finding on page 42 did not include an express reference to Article 2.2.1.1 of the Anti-Dumping Agreement.[253] However, it is clear from the discussion that appears later in the Report, at page 146, that in making that finding the ADC expressly considered the specific

[246] See regulation 43(2), which is in terms equivalent to regulation 180(2): *Customs (International Obligations) Regulation 2015*, (Exhibit CHN-41), pp. 36-37.
[247] Australia's closing statement, para. 24; Australia's first written submission, para. 149.
[248] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 42.
[249] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 134-136, 146-147.
[250] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 42.
[251] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 40-42, 134-136.
[252] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 134-136.
[253] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 42.

terms of the second condition of Article 2.2.1.1, as distinct from its consideration of its obligations under regulation 180(2).[254]

243. China's misunderstanding of the Report may arise from the fact the finding under regulation 180(2) and then the subsequent wider evaluation under Article 2.2.1.1 were made close to each other in the Report.[255] No error can be demonstrated from the co-location of the findings. That co-location is unremarkable given the nature of the analyses called for under regulation 180(2) and Article 2.2.1.1.

244. The analyses required to evaluate the criteria under regulation 180(2) and Article 2.2.1.1 of the Anti-Dumping Agreement are legally and conceptually distinct. Nevertheless, they both can and often do involve evaluation of a broadly similar evidence base since both enquiries are directed at exporters' records.

3. China mischaracterises Australia's case

245. China presents an additional "straw" argument, incorrectly alleging that Australia has argued that the ADC's analysis in Stainless Steel Sinks Investigation 238 amounted to an assessment of whether the costs are competitive market costs or, in other words, whether the costs themselves were "reasonable".[256] China's argument is at odds with Australia's explanation of the ADC's analysis to-date.[257]

246. As described in the prior section, the ADC did not consider whether the costs themselves were "reasonable". Stainless Steel Sinks Investigation 238 Report reflects the ADC's determination that the *recorded costs*—i.e. the costs recorded in the exporter's records—did not reasonably reflect the costs associated with the production and sale of the stainless steel sinks. This was because the *recorded costs* were *not an accurate and reliable reflection* of the costs actually incurred.

[254] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 146.
[255] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 42.
[256] China's opening statement, para. 76.
[257] See Australia's first written submission, para. 367.

4. The investigation record is relevant to the Panel's consideration of the ADC's finding

247. Finally, Australia's discussion above on the relevance of information from the Government of China to the first sentence of Article 2.2.1.1 apply equally to AD claim 3 with respect to Stainless Steel Sinks Investigation 238.[258]

248. The Panel's task with respect to this claim is to determine whether an unbiased and objective investigating authority, in light of the investigation record, could have reached the ADC's conclusion that the exporters' recorded costs did not reasonably reflect the true 304 SS CRC costs associated with the production and sale of the product under consideration consistent with Article 2.2.1.1.[259]

249. In Stainless Steel Sinks Investigation 238 Report, the record evidence demonstrated that the Government of China's influence in the 304 SS CRC market in China distorted the market overall.[260] The information sought from the Government of China was relevant to potentially rebut, clarify, contextualise, or support that record evidence. Instead of providing the information requested, the Government of China chose not to respond to the specific sections of the questionnaire concerning the stainless steel sinks and cold-rolled stainless steel markets in China.[261] The Government of China's response to the questionnaire and Preliminary Affirmative Determination 238 consisted of generalised objections to any suggestion of distortion without any new or updated evidence.[262]

250. The investigation record thus shows that the ADC properly determined that the weight of the evidence favoured the ADC's finding.

5. China's AD claim 3 must fail

251. For all the above reasons, and for the reasons already set forth in Australia's earlier submissions, China's AD claim 3 must fail. Australia has demonstrated that an unbiased and

[258] Australia's second written submission, paras. 187-190.
[259] See Australia's first written submission, para. 12.
[260] Australia's first written submission, paras. 376-378.
[261] Australia's first written submission, paras. 355-359. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 30, 128; *Stainless Steel Sinks Investigation 238 – GOC Questionnaire*, (Exhibit AUS-44); *Email from Corrs Chambers Westgarth to ADC, dated 19 May 2014*, (Exhibit AUS-66), pp. 11-12, 34-36.
[262] Australia's first written submission, paras. 359-360. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 30, 128; *Email from Corrs Chambers Westgarth to ADC, dated 19 May 2014*, (Exhibit AUS-66), pp. 11-12, 34-36; *Stainless Steel Sinks Investigation 238 – GOC Submission Response to PAD*, (Exhibit AUS-47).

objective authority could have reached the conclusions of the ADC in Stainless Steel Sinks Investigation 238.

C. CHINA'S AD CLAIM 1

1. China's legal and factual mischaracterisations

252. There are at least two critical flaws in China's case for AD claim 1 with respect to Stainless Steel Sinks Investigation 238.

253. First, China appears to argue that Article 2.2 prohibits investigating authorities outright from selecting and adapting out-of-country data.[263] As addressed above, and in Australia's prior submissions, this view is inconsistent with a proper interpretation of Article 2.2.[264]

254. Second, China mischaracterises the ADC's analysis and findings in Stainless Steel Sinks Investigation 238 Report as a "crystal clear and undisputed…simple substitution of the Chinese exporters' stainless steel costs with a cost of 304 SS CRC derived from data pertaining to Europe and North America".[265] In doing so China ignores the Report, which records that:

a) The ADC departed from the exporters' records with respect to the cost of 304 SS CRC because the records reflected 304 SS CRC costs that were distorted by conditions in the 304 SS CRC market in China. Due to the identified market distortions, the 304 SS CRC cost item in the exporters' records could not generate an appropriate proxy for the cost of production in the country of origin.[266]

b) Considering these distortions, the ADC sought to avoid reintroducing the very same distortions in determining the cost of production in the country of origin under Article 2.2 that had led to the ADC's decision to depart from the exporters' recorded 304 SS CRC costs in the first place.[267]

[263] China's opening statement, paras. 45, 64-65.
[264] Australia's second written submission, paras. 194-198; Australia's first written submission, paras. 279-283, 383-384; Australia's opening statement, para. 64; Australia's closing statement paras. 17-21.
[265] China's opening statement, paras. 55-56.
[266] Australia's first written submission, paras. 366, 377-379, 385.
[267] Australia's first written submission, para. 386.

c) The ADC sought to arrive at an appropriate proxy for the cost of production in China.[268] Based on the record evidence, the ADC reasonably selected the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices as reference data.[269] The ADC tailored that data to determine the cost of production in the country of origin.[270]

255. The above demonstrates that, there was no "simple substitution" of Chinese data for European data.[271] To the contrary, the ADC's analysis resulted in an appropriate and tailored alternative constructed cost. The ADC selected and adapted out-of-country data to determine the cost of production in the country of origin in accordance with Article 2.2 of the Anti-Dumping Agreement.[272]

2. The ADC selected and adapted the data based on the available record evidence

256. In its response to Panel question no. 13, China contends Australia's submission on the participation of the Government of China and certain exporters is legally irrelevant to the Panel's consideration of the ADC's analysis.[273] In China's view, the obligations imposed in Article 2.2 are not qualified or "dependent upon participation of a foreign government or certain exporters."[274]

257. China's submission misses the point. At no stage of this dispute has Australia suggested that a lack of participation by an interested party absolves Australia of its obligations under Article 2.2. Australia's submission is simply that the central question for the Panel, of whether an unbiased and objective investigating authority *could* have reached the same decision as the ADC, is properly informed by the investigation record. This record includes the fact that the Government of China failed to provide certain relevant information. The relevance of the absence of that information is clear from the investigation record, including Stainless Steel Sinks Investigation 238 Report.[275]

[268] Australia's first written submission, para. 394.
[269] Australia's first written submission, paras. 395-397.
[270] Australia's first written submission, paras. 398-405.
[271] China's opening statement, paras. 55-59.
[272] Australia's first written submission, paras. 383-386.
[273] China's response to Panel question no. 13, para. 41.
[274] China's response to Panel question no. 13, para. 41.
[275] Australia's first written submission, paras. 388-390, 395, 399-403. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 128, 207-208, 212-214, 217.

258. Having regard to the record evidence, the ADC conscientiously sought to select suitable reference data capable of arriving at an appropriate proxy for the cost of production in China.

259. To that end, the ADC first considered whether it could use in-country data. However, the record evidence indicated that in-country data would have reintroduced the distortions identified in the 304 SS CRC market in China that had informed the ADC's decision to depart from the exporters' recorded 304 SS CRC costs.[276]

260. Second, the ADC considered seven potential out-of-country sources of reference data that were on the record.[277] The ADC sorted through the available data and arrived at an appropriate proxy that was: (a) limited to the steel grade in question (304 SS CRC);[278] (b) not overly narrow (e.g., sourced from a single buyer purchasing the input predominantly from a single supplier);[279] (c) derived from independent sources;[280] and (d) unaffected by distortions in the 304 SS CRC market in China.[281] Ultimately, the ADC determined that the MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices was suitable for its purpose.[282]

261. Third, the ADC did not "simply substitute" this reference data. Informed by the record evidence, the ADC adapted the data to arrive at an appropriate proxy for the cost of production in China. It incorporated the verified delivery costs of 304 SS CRC in China and the verified per tonne slitting cost, where that cost had been incurred by exporters when purchasing 304 SS CRC.[283]

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[276] Australia's first written submission, paras. 387-391. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 207-208; *Stainless Steel Sinks Investigation 238 – PAD,* (Exhibit AUS-48), p. 28; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), pp. 182-183; [[(Exhibit AUS-52 (BCI)) .]]

[277] Australia's first written submission, paras. 392-393. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 209-217.

[278] Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 213.

[279] Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 215.

[280] Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 216.

[281] Australia's first written submission, para. 394. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 213.

[282] Australia's first written submission, paras. 395-397. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 217.

[283] Australia's first written submission, paras. 398-405. See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 42, 217-219.

3. China's AD claim 1 must fail

262. The above, and Australia's earlier submissions, demonstrate that an unbiased and objective authority could have reached the conclusions of the ADC in Stainless Steel Sinks Investigation 238. China's AD claim 1 must fail.

D. CHINA'S AD CLAIMS 2 AND 4

263. Australia understands that AD claim 2 is consequential on AD claim 1 with respect to Stainless Steel Sinks Investigation 238 and, AD claim 4 is consequential on AD claim 3 with respect to Stainless Steel Sinks Investigation 238.[284] Therefore, China's AD claims 2 and 4 must fail because Australia has demonstrated that the contraventions alleged in China's AD claims 1 and 3 did not occur with respect to Stainless Steel Sinks Investigation 238.

264. China's response to question no. 2 from the Panel confirms that AD claim 4 is consequential on AD claim 3. On the other hand China contends that AD claim 2 is "not dependent on the outcome" of AD claim 1.[285] Australia does not presently understand the basis on which China takes this view. China's position in this regard appears inconsistent with the way China has advanced its case to date:

a) in China's first written submission it explained that "AD claim 2 is based on the same reasoning as AD claim 1"[286]; and

b) in China's opening statement at the first Panel meeting, it presented its arguments under claims 1 and 2 together and asserted that both claims could be answered by the Panel answering one "simple" question.[287]

265. In any event, setting aside China's conflicting characterisation of its claims, it is clear from the nature of the issues raised that AD claim 2 is consequential on AD claim 1. There is no factual dispute between the parties regarding the ADC's approach to determining the

[284] Australia's first written submission, paras. 407-411; Australia's response to Panel question no. 2, para. 2. In the interests of clarity, Australia uses the descriptions consequential and dependent to mean the same thing: that if no contravention were established under one claim, then the other claim must likewise fail as it depends on the success of the anterior claim. See Australia's response to Panel question no. 12, para. 29.
[285] China's response to Panel question no. 2, paras. 6-7. Australia understands that while China uses the description "dependent", China uses that description to refer to the same concept as "consequential" discussed the above footnote, i.e. if a contravention were established under one claim, then it would automatically follow that a contravention would be established for the other claim.
[286] China's first written submission, para 8.
[287] China's opening statement, para. 46.

below-cost sales in the OCOT in Stainless Steel Sinks Investigation 238 Report. The ADC's OCOT determination deployed the "cost of production in the country of origin" established in accordance with Article 2.2. This is the same cost of production that China seeks to impugn in AD claim 1. Further, Australia understands that the parties agree that costs determined under Article 2.2 apply to the OCOT determination in Articles 2.1 and 2.2.1. For this reason, China's AD claim 2 appears to be entirely consequential on AD claim 1.[288]

266. If China intended to press AD claim 2 on some other basis, that basis has not been articulated.[289]

E. CHINA'S AD CLAIM 6.A

267. As in the case of Railway Wheels Investigation 466, China's AD claim 6.a impermissibly conflates the calculation of the normal value with fair comparison under Article 2.4. Australia will not reproduce the submissions addressed above, as they apply with equal force in the context of China's challenge to Stainless Steel Sinks Investigation 238 Report. For all the same reasons provided in relation to Railway Wheels Investigation 466, AD claim 6.a is an impermissible attempt to challenge the basis of the cost of production.[290]

268. If China fails on AD claims 1 and 3, China must fail also on AD claim 6.a. If China succeeds on AD claims 1 and 3, AD claim 6.a must nevertheless fail.

F. CHINA'S AD CLAIM 6.B.I

1. China does not engage with Australia's response and relies on an inaccurate view of the investigation record and the legal standard

269. Australia's detailed response to AD claim 6.b.i is set out in its first written submission[291] and in response to Panel question no. 27.[292] Yet, China continues to present submissions based on an inaccurate view of the investigation record. China also misstates the

[288] See China's opening statement, paras. 55-59, 66(b) and 66(c). In particular at paras. 66(b) and 66(c), China identifies clearly that the crux of its complaint with respect to stainless steel sinks in AD claims 1 and 2 is the use of "European and North American costs" in Australia's normal value determination under Article 2.2 and the below-cost OCOT test under Article 2.2.1. With respect to AD claims 3 and 4, see China's opening statement, para. 79.
[289] See Working Procedures, 21 October 2022, para. 3(1).
[290] Australia's second written submission, paras. 216-226.
[291] Australia's first written submission, paras. 415-435.
[292] Australia's response to Panel's question no. 27, paras. 78-82; First Substantive Hearing Day 1, Australia's oral response to question no. 27.

legal standard under Article 2.4 of the Anti-Dumping Agreement, with respect to both investigating authorities' obligation to determine the impact of price comparability, and their obligation to make due allowance for taxation.[293]

270. China's case in support of AD claim 6.b.i ultimately turns on two propositions. First, the ADC calculated the VAT adjustment without evidence to show that differences in taxation impacted price comparability.[294] Second, that in China's view, even if the ADC had such evidence the calculated due allowance adjustment was not warranted.[295]

271. For the following reasons, both propositions are without merit and AD claim 6.b.i must fail.

2. The ADC relied on clear evidence that differences in taxation impacted price comparability

272. China contends there was no evidence before the ADC that "the difference in the VAT recoverability rate had any impact on the price comparability," and consequently, that adjustments the ADC calculated were made without evidence.[296] In doing so China ignores Australia's clear explanation in its first written submission that relevant exporters, including Zhuhai Grand, provided evidence to the ADC that the difference in VAT treatment of export transactions affected comparison with the normal value.[297]

273. In light of this evidence, it is clear that (a) there was a difference in the VAT liability for export sales, and (b) this difference would *likely* have an impact on the price of the transaction.[298] Further, evidence from the exporters confirmed that prices were set by factoring in market conditions and costs.[299] On this basis, the ADC understood that exporters

[293] See China's opening statement, paras. 98-104.
[294] China's opening statement, para. 100; China's response to Panel question no. 27, paras. 96-97; China's first written submission, paras. 353, 356.
[295] China's opening statement, paras. 101-102; China's response to Panel question no. 27, para. 97(b); China's first written submission, paras. 354-356.
[296] China's response to Panel question no. 27, para. 97(b); see also China's opening statement, para. 100; China's first written submission, paras. 353, 356.
[297] Specifically, Australia's first written submission extensively presented the evidence on the investigation record at paras. 427-431.
[298] The parties appear to agree that the relevant standard is whether the difference would *likely* have an impact. See Appellate Body Report, *US – Zeroing (EC)*, para. 157, China's first written submission, para. 332, Australia's first written submission, para. 427.
[299] *Stainless Steel Sinks – Zhuhai Grand Questionnaire*, (Exhibit AUS-14), B-3: *"…Zhuhai Grand will negotiate price with customers according to market conditions."*, and H-1, 4(h): *"The pricing of Zhuhai Grand was determined by market and its costs…"*; [[, (Exhibit AUS-78)(BCI):

would have factored in the non-refundable VAT liability (cost) for export sales, into the export price for the stainless steel sinks. Accordingly, the difference in VAT liability would have impacted price comparability.

274. The ADC's assessment was consistent with the requirements of Article 2.4. That is, after considering evidence provided by relevant exporters of the difference in VAT liability between the export price and normal value, the ADC then made an appropriate due allowance for differences in taxation.

3. The ADC's approach to calculating the due allowance adjustments was well-founded

275. China further contends that, even if there were proof that the distinct VAT treatment of domestic market and export sales actually impacted price comparability, the ADC's calculation of the associated adjustment was not merited.[300]

276. China contends that the ADC imputed an artificially high amount of VAT cost difference by adding 8 per cent to the unadjusted normal value amount in circumstances where the normal value amount had been constructed with the replacement cost of 304 SS CRC adapted under Articles 2.2 and 2.2.1.1 (i.e. the constructed normal value at issue in AD claims 1 and 3).[301] Australia addressed these contentions in paragraphs 432-435 of its first written submission, and explained that under Article 2.4 investigating authorities have discretion to decide the methodology by which they satisfy their obligation to ensure a fair comparison.[302]

277. In sum, the ADC's method for calculating due allowance adjustments for taxation consistently with Article 2.4 is as follows:[303]

[redacted]]; *Stainless Steel Sinks – Primy Questionnaire*, (Exhibit AUS-15), Part H-3, Q3(b): *There is no Government of China involvement in the prices setting of Primy. The prices are determined by Primy itself based on market conditions;* [[[redacted] (Exhibit AUS-79)(BCI): [redacted]]].

[300] China's response to Panel question no. 27, para. 97(b). See also, China's opening statement, paras. 103-104.
[301] China's opening statement para. 104; China's response to Panel question no. 27, para. 97(a).
[302] Australia's first written submission, para. 435, citing Panel Report, *EU — Fatty Alcohols (Indonesia)*, para. 7.60.
[303] See Australia's first written submission, paras. 424-431.

a) The record showed that there was a non-refundable VAT liability for *export* sales.[304] The non-refundable VAT liability was a percentage of the export selling price. There was no such liability for domestic transactions.

b) This difference affected price comparability, regardless of whether the normal value was derived from a domestic selling price or a constructed amount used as a proxy for a domestic selling price.

c) The adjustment was calculated based on the rate of the non-refundable VAT liability for export sales. Accordingly, a rate-based adjustment was made to the *normal value*, for fair comparison to export sales.[305]

278. China further complains that the VAT rate due allowance adjustment was applied to constructed costs, arguing that this rate was applied to an elevated basis. But, were China's submission to be accepted and the adjustment to be computed by application to the exporters' record costs, the adjustment would then be affected by the very same distortions excluded in the ADC's calculation of constructed normal value. This approach would incorrectly disconnect the VAT adjustment from the comparison being undertaken. The ADC's approach was consistent with the Anti-Dumping Agreement.

4. AD claim 6.b.i must fail

279. AD claim 6.b.i is without merit. An unbiased and objective authority could have made the VAT adjustment in Stainless Steel Sinks Investigation 238. China has failed to identify any violation through AD Claim 6.b.i. and the claim must fail.

G. CHINA'S AD CLAIM 6.B.II

1. The ADC's adjustments for accessories were logical and reasoned

280. The ADC's adjustments to Primy's normal value in Expiry Review 517 were consistent with Article 2.4.[306]

[304] Australia's first written submission, para. 424.
[305] The ADC considered Zhuhai Grand's submission concerning the mathematical formula to be applied to the normal value, but decided not to adopt it. See Australia's first written submission, paras. 429-430; *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 150.
[306] As explained in Australia's first written submission, paras. 437-455, and in Australia's response to Panel's question no 25, paras. 47-71.

281. As a threshold matter, Australia and China agree that a due allowance was needed to address differences in the accessories accompanying sinks that were sold in the domestic and export markets.[307] However, China takes issue with two aspects of the ADC's calculation of these needed adjustments for exporter Primy: first the ADC's calculation of adjustments for externally purchased accessories,[308] and second, the ADC's averaging of accessory costs at an MCC level.[309]

282. For the following reasons, China's concerns regarding the ADC's calculations are baseless and AD claim 6.b.ii must fail.

2. The ADC's calculation of adjustments for externally produced accessories was non-discriminatory and calculated in accordance with available evidence

283. China contends that the adjustments for sinks accessories were calculated incorrectly because the ADC did not have evidence to justify its approach.[310]

284. Australia addressed these contentions at paragraph 442 of its first written submission,[311] with reference to the evidence relied on for Primy's profit adjustments detailed in both the Expiry 517 and Review Panel reports.[312] In sum:

a) Externally sourced accessories were deemed to have been purchased at market price and therefore inclusive of profit. The ADC accordingly did not add an additional profit amount to these accessories.[313]

b) Internally produced accessories (faucets) did not to include a profit amount. The ADC therefore added an amount for SG&A and profit to Primy's cost of production to derive a market price for these accessories. [314]

[307] China's opening statement, para. 105.
[308] China's first written submission, paras. 371-372; China's opening statement, paras. 106-108; China's response to Panel's question no. 23, paras. 93-94.
[309] China's first written submission, paras. 366, 373; China's opening statement, paras. 110-111; China's response to Panel's question no. 23, para. 94.
[310] China's opening statement para. 108; China's response to Panel's question no. 23, para. 93-94; China's first written submission, paras. 371-372.
[311] Australia's first written submission, para. 442.
[312] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), p. 11, para. 25; quoting *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 59.
[313] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), p. 11, para. 25; quoting *Stainless Steel Sinks Continuation 517 Report*, (Exhibit CHN-36), p. 59.
[314] See detailed explanation in Australia's response to Panel's question no. 25, paras. 47-71.

c) The profit rate applied was derived from Primy's domestic sales of like goods sold in the OCOT.

285. The ADC received no evidence during the Expiry Review to indicate that Primy's internal costing of self-produced accessories ascribed a profit to these products. The Anti-Dumping Review Panel confirmed there was no such evidence on the record.[315] In the absence of such evidence, the ADC determined that Primy would seek to make a profit on activities where it added value, and to recover the cost of items at market value price.[316]

286. The methodology applied by the ADC was non-discriminatory. It applied equally to the downwards and upwards adjustments, with the net effect of the adjustments for accessories being made to reduce the dumping margin. This methodology was reasonable on the basis of the record. It reflected the actions of an unbiased and objective investigating authority.

3. The ADC's methodology for adjustments was objective and justified

287. China contends that the ADC's calculation of the cost difference attributable to accessory differences by averaging accessory costs for each MCC was incorrect and inflated Primy's dumping margin.[317]

288. Australia has already explained the factual circumstances and available evidence that led the ADC to calculate the cost difference by averaging accessory costs for each MCC.[318]

289. Further, while the calculations of costs of accessories used for the downwards and upwards adjustments were not identical, the calculations were based on record evidence and were non-discriminatory. The ADC made adjustments for differences in accessories that affected price comparability. Contrary to China's assertions, those adjustments reduced the normal value ascertained and therefore Primy's dumping margin.

[315] For completeness, Australia refers to footnote 1 in China's response to the Panel's questions, where they claim the ADRP "[…]is not independent of the investigating authority". Australia strongly objects to China's mischaracterisation of the ADRP, which is independent and impartial of the ADC. *Stainless Steel Sinks Review Panel Report* (Exhibit CHN-47), para. 41; Australia's response to Panel's question no. 25, para. 47.
[316] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), para. 42-43.
[317] China's first written submission, paras. 366, 373; China's opening statement paras. 110-111.
[318] Australia's first written submission, paras. 445-452; Australia's response to Panel's question no. 25, paras. 47-71.

4. AD claim 6.b.ii must fail

290. For the reasons set out above and in Australia's previous submissions, an unbiased and objective investigating authority could have employed the adjustments made by the ADC, including with respect to the ADC's calculation of adjustments for externally produced accessories, and averaging of accessory costs at an MCC level. Accordingly, AD claim 6.b.ii must fail.

H. AUSTRALIA MADE THE SPECIFICATION ADJUSTMENT CONSISTENTLY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT – CHINA'S AD CLAIM 6.B.III

1. China ignores the clear and necessary specification adjustments the ADC made

291. Australia has made detailed submissions to explain the components of the MCC methodology the ADC applied to make specification adjustments.[319]

292. Australia agrees with China that that differences in physical characteristics between the export and the domestic model should be quantified. Australia also agreed that due allowances must be made to ensure price comparability based on the differences in the cost of production of those products.[320]

293. The point of contention is China's assertion that the ADC's MCC methodology failed to account for certain product differences between domestic and export sales.[321] Contrary to China's submissions, the ADC's calculations clearly accounted for the difference between export and domestic products.[322]

294. For the following reasons, China's propositions are without merit and AD claim 6.b.iii must fail.

[319] Australia's first written submission, paras 456-463; Australia's response to Panel's question no. 26.
[320] China's first written submission, para. 386; Australia's first written submission, para. 417-418.
[321] China's first written submission, para. 390; Australia's first written submission, para. 459.
[322] Australia's first written submission, paras. 456-463; c.f. China's Opening Statement, para. 113.

2. The ADC's approach to calculating adjustments for differences in product specifications

295. The ADC's approach to calculating adjustments for differences in product specifications is clarified below, with reference to the example of Zhuhai Grand, which China selected in its first written submission:[323]

a) The ADC's adjustment for specification differences challenged by China concerned four of Zhuhai Grand's MCCs where there was an insufficient volume of domestic sales in the OCOT.[324]

b) MCC "1BWL-2DB-A" was one of the four MCCs for which there were an insufficient volume of domestic sales in the OCOT.

c) MCC "1BWL-1DB-A" was the surrogate MCC adopted as having sufficient volumes of domestic sales of like products. Domestic selling prices of "1BWL-1DB-A" were used as the basis of the normal value.

d) The physical difference between the selected MCC "1BWL-2DB-A" and the surrogate "1BWL-1DB-A", was the number of "draining boards":

   (i) MCC "1BWL-2DB-A" (the exported model for which a normal value had to be determined) had two draining boards.

   (ii) Surrogate MCC "1BWL-1DB-A" (sold on the domestic market and exported to Australia), had only one draining board.[325]

e) Zhuhai Grand provided sales and cost of production data for domestic and export sales of deep drawn stainless steel sinks in its response to the Exporter Questionnaire.[326]

f) The ADC compared the production costs of export MCC "1BWL-2DB-A", having two draining boards, with the production cost of export MCC "1BWL-1DB-A", having only one draining board.[327]

[323] See examples in China's first written submission, paras. 381-383, 388-390. Note: for further explanation, see *Stainless Steel Sinks Review Panel Report* (Exhibit CHN-47), paras. 75-77.
[324] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), para. 68.
[325] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), paras. 69, 75.
[326] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), para. 76.
[327] *Stainless Steel Sinks Review Panel Report*, (Exhibit CHN-47), para. 77.

g) The difference between the two MCCs formed the basis of the adjustment made to the domestic selling prices of the surrogate MCC with one draining board.

h) The ADC was therefore able to quantify, by reference to the exporter's production cost data, the incremental cost of the additional draining board. This cost differential, to which a profit adjustment was then added, was then carried over by way of an adjustment to the domestic selling prices of the sink with a single draining board (the surrogate).

296. Thus, this methodology ensured a fair comparison between a product sold on the domestic market and the product sold on the Australian market.

3. AD claim 6.b.iii must fail

297. The above, and Australia's earlier submissions, demonstrates that the ADC carefully considered and properly assessed the specification adjustment for Zhuhai Grand. The adjustments for due allowance were consistent with Article 2.4, China's AD claim 6.b.iii must fail.

I. CHINA'S AD CLAIM 7.A

1. AD claim 7.a is derivative of AD claims 1 and 3

298. With respect to Stainless Steel Sinks Investigation 238 Report, Australia set out in its first written submission that it understands China's AD claim 7.a to be derivative[328] of AD claims 1 and 3.[329] China, on the other hand, contends that AD claim 7.a is not derivative of any AD claim.[330]

299. Australia understands China's AD claim 7.a to consist of two limbs. The first limb concerns the ADC's assessment of what sales are in the OCOT. The second limb concerns the ADC's use of these OCOT sales to calculate a constructed value profit rate (percentage), and

[328] In the interests of clarity, Australia uses the description derivative to refer to the link or overlap between aspects of one claim and aspects of another claim, such that where there are findings made on the linked or overlapping aspects of one claim, it follows logically that equivalent findings must be made on the linked or overlapping aspects of the other claim. This is not the same as a consequential claim. A consequential claim is, at a basic level, derivative of another claim. However, in a consequential claim the effect of the derivation is such that if a contravention were established under one claim, then it would automatically follow that a contravention would be established for the other claim. See Australia's response to Panel question no. 12, para. 29.
[329] Australia's first written submission, para. 473.
[330] China's opening statement, para. 121.

then the ADC's application of that rate to the "cost of production in the country of origin" to arrive at a profit amount (dollar value) for normal value.[331]

300. The first limb is derivative of AD claims 2 and 4, which are in turn consequential on AD claims 1 and 3. This is because the ADC determined sales in the OCOT by reference to the adjusted costs resulting from the ADC's decision to depart from the exporters' recorded 304 SS CRC cost item (addressed in AD claim 3) and to replace those costs with a "cost of production in the country of origin" derived under Article 2.2 (addressed in AD claim 1). Therefore, the ADC determined sales in the OCOT by reference to certain costs outside of the exporters' records (addressed in AD claim 4), and instead deployed the replacement "cost of production in the country of origin" in the records (addressed in AD claim 2).[332] For the reasons outlined above, and in Australia's earlier submissions, the first limb of China's AD claim 7.a must fail for the same reasons AD claims 1-4 must fail.

301. The second limb is derivative of AD claims 1 and 3. This is because, as far as Australia understands it, China's position is that these OCOT sales, identified in light of the analyses targeted by AD claims 1-4, cannot ever constitute "actual data" for the purposes of the chapeau of Article 2.2.2.[333]

302. To be clear, Australia does not consider AD claim 7.a to be a consequential claim in the sense that success or failure of AD claim 7.a as a whole would *automatically* follow the success or failure of AD claims 1-4. But multiple elements of it are derivative, in the sense of being directly linked to, or reiterations of, earlier arguments.

2. China ignores the terms of Article 2.2.2: "based on actual data"

303. The fatal error in the second limb of China's AD claim 7.a is China's interpretation of the chapeau of Article 2.2.2. China's error is evidenced in paragraph 117 of its opening statement at the first Panel meeting:

> The question that the Panel should ask in assessing China's AD claim 7.a is therefore very simple – did Australia determine the profit using actual data pertaining to production and sales in the ordinary course of trade by the Chinese producer?

[331] China's first written submission, paras. 401, 417-420.
[332] China's first written submission, para. 401(a).
[333] China's first written submission, para. 401(b).

304. This question as formulated by China ignores that the chapeau of Article 2.2.2 provides that an amount for profits "shall be *based on* actual data pertaining to production and sales in the ordinary course of trade" (emphasis added). Therefore, if the Panel asked itself the question posed by China, the Panel would fall into error.

305. Australia considers that the words "based on" must be given meaning and effect, founded on its ordinary meaning, in its context and in light of the object and purpose of the Anti-Dumping Agreement.[334] China gives the words "based on" no meaning. Instead China omits them from the question it invites the Panel to answer, and from its submissions more broadly. The ordinary meaning of "based" is "[t]o make, lay, or form a foundation for" or "[t]o place *on* (also *upon*) a foundation, fundamental principle, or underlying basis" (original emphasis).[335] It follows that, read in context, and contrary to China's submissions, the chapeau of Article 2.2.2 does not require the wholesale adoption of the raw data in the exporters' records without exception, such that an investigating authority is precluded from assessing, processing or evaluating that raw data consistent with the disciplines of Articles 2.2.1.1 and 2.2.[336]

306. China contends its interpretation is supported by Appellate Body and panel reports.[337] However, the reports cited by China are distinguishable from the present matter before the Panel. These reports do not consider the interpretation of "based on actual data" in the chapeau of Article 2.2.2 where an investigating authority has declined to use the exporters' records in accordance with Article 2.2.1.1 and has instead replaced certain of the exporters' recorded costs with an externally derived cost of production in the country of origin.

307. In particular:

a) the Article 2.2.2 claims at issue in *EU – Biodiesel (Indonesia)* and *EU – Biodiesel (Argentina)* concerned only Article 2.2.2(iii), not the chapeau;[338]

[334] There are no past panel or Appellate Body reports that especially interpret the words "based on" in the chapeau of Article 2.2.2.
[335] Oxford Dictionaries online, definition of "base", (Exhibit AUS-80).
[336] China's opening statement, paras. 115-117, 119-123; c.f. Australia's first written submission, para. 465.
[337] China's opening statement, para. 120; China's first written submission, paras. 402-411.
[338] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 1.3, 1.6(iv), 6.34; Panel Report, *EU – Biodiesel (Argentina)*, paras. 3.1(b)(v), 7.307; Panel Report, *EU – Biodiesel (Indonesia)*, paras. 3.1(c), 7.35, 7.101; c.f. China's first written submission, paras. 406-407, 411 and China's opening statement, para. 120.

b) in *EC – Tube or Pipe Fittings*, the Appellate Body considered solely whether the chapeau of Article 2.2.2 excluded the use of low volume sales in the OCOT.[339] The panel in *EC – Salmon (Norway)* focused on whether the chapeau of Article 2.2.2 must include the use of such low volume sales.[340] That is, the claims at issue focused on the "OCOT" element in the chapeau, not the "based on" text; and

c) the same issue arose in *US – OCTG (Korea)* with respect to the use of low volume sales and the "OCOT" element in the chapeau.[341] In addition, the panel focused on the investigating authority's alleged failure to provide sufficient reasons in the determination why no actual data was available.[342] The panel also considered claims under Articles 2.2.2(i) and 2.2.2(iii), separate from the chapeau.[343] In other words, none of the Article 2.2.2 claims concerned the "based on" language in the chapeau; and

d) China relies on paragraphs of the Appellate Body report in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that concern China's complaint about the scope of the Article 2.2.2 claim in the panel request rather than any claim under the chapeau of Article 2.2.2 itself.[344]

308. China's narrow interpretation of Article 2.2.2 fails to give effect to the phrase "based on actual data" and, therefore, must be rejected.[345]

[339] See Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 101-102; c.f. China's first written submission, paras. 403, 411.
[340] See Panel Report, *EC – Salmon (Norway)*, paras. 3.1(iii)(d), 7.304, 7.318; c.f. China's first written submission, paras. 405, 411.
[341] Panel Report, *US – OCTG (Korea)*, paras. 3.1(b)(i), 7.47; c.f. China's first written submission, paras. 408-409, 411.
[342] Panel Report, *US – OCTG (Korea)*, para. 7.53.
[343] Panel Report, *US – OCTG (Korea)*, paras. 3.1(b)(ii)-(iv), 7.60, 7.75-7.76, 7.95-7.96, 7.108.
[344] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 4.1(a)(i), 5.2, 5.24-5.27, 5.34; c.f. China's first written submission, paras. 404, 410-411 citing paras. 5.25 and 5.27 of the Appellate Body report. The jurisdictional issue in *China – HP-SSST (Japan) / China – HP-SSST (EU)* was whether the description in the panel request that "China did not determine the amounts for [SG&A] costs and for profits on the basis of records and actual data by the exporters or producers under investigation" was limited to a claim about "actual data", or encompassed a claim about "actual data pertaining to production and sales in the ordinary course of trade".
[345] Australia notes that, relevant to the Panel's consideration of the evidentiary record in its evaluation of AD claim 7.a the exporter Zhuhai Grand requested the approach that is now impugned by China. Australia's first written submission, paras. 466-471. See *Stainless Steel Sinks Investigation 238 Submission - Zhuhai Grand Kitchenware Company., Ltd re Visit Report*, (Exhibit AUS-59), p. 6; *Stainless Steel Sinks Investigation 238 – SEF*, (Exhibit AUS-49), pp. 37-38. Moreover, no other selected exporter objected to the approach set out in the SEF and adopted ultimately in the Stainless Steel Sinks Investigation 238 Report. Australia's first written submission, paras. 470-471. See *Stainless Steel Sinks Investigation 238 Submission - Zhongshan Jiabaolu Kitchen and Bathroom Products Co., Ltd*, (Exhibit AUS-64), pp. 8-9; *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 43-44.

3. China's AD claim 7.a must fail

309. The foregoing, and Australia's earlier submissions, demonstrate that an unbiased and objective authority could have reached the conclusions of the ADC in Stainless Steel Sinks Investigation 238 with respect to the profit amount. China's AD claim 7.a must fail.

J. CHINA'S AD CLAIM 8

310. AD claim 8 with respect to Stainless Steel Sinks Investigation 238 is consequential on the Panel finding inconsistency with Article 2 with respect to the ADC's determination of "normal value" concerning stainless steel sinks.[346] For the foregoing reasons and as set out in Australia's earlier submissions, China has not demonstrated any error in the ADC's determination. Accordingly, China's AD claim 8 must also fail.

K. CONCLUSION

311. For the above reasons, and the reasons set out in Australia's earlier submissions, Australia requests that the Panel reject all of China's claims under the Anti-Dumping Agreement concerning stainless steel sinks.

[346] China's first written submission, paras. 465, 469, 474-475, 477-479.

V. CONDITIONAL RESPONSE TO AD CLAIMS: WIND TOWERS

A. INTRODUCTION

312. Australia's primary submission is that all of China's claims regarding the wind towers measures are outside the scope of the Panel's terms of reference. Australia makes the following submission on a conditional basis only, since they need only be considered if the Panel were to find against Australia's primary submission.

313. Even if, *arguendo*, the Panel were to find that Investigation 221 and/or Expiry Review 487 were within the scope of its terms of reference, it should proceed to find that China's AD claims fail to make a *prima facie* case that the wind towers measures are inconsistent with the Anti-Dumping Agreement.[347] Accordingly, China's claims should be wholly rejected.

314. The vast majority of the arguments China has presented in support of its claims concerning wind towers have been either addressed in the first written submissions or wholly overlap with legal issues already addressed in the preceding parts of this second written submission concerning the railway wheels and stainless steel sinks investigation. Accordingly, in this section, Australia includes cross-references to the corresponding sections but does not repeat its responses. Australia instead only addresses the handful of new and distinct points made by China.

B. CHINA HAS NOT MADE A PRIMA FACIE CASE THAT THE WIND TOWERS MEASURES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. China's AD claim 3

315. China failed to make a *prima facie* case under AD claim 3 in relation to wind towers.[348] As Australia set out in its first written submission, China mischaracterised or misunderstood Australia's domestic framework,[349] and fundamentally misunderstood the relevant factual findings made by the ADC.[350]

316. The sole argument advanced by China in its first written submission in relation to AD claim 3 was that the ADC's findings in *Wind Towers Investigation 221 Report* were

[347] Australia's first written submission, paras. 475-562.
[348] Australia's first written submission, paras. 492-498.
[349] Australia's first written submission, paras. 493.
[350] Australia's first written submission, paras. 494.

inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. There, China mistook the references to "competitive market costs" and regulation 180(2) as a finding under the second condition. This was wrong, since regulation 180(2) says nothing about, and provides no basis for, the rejection of records, and is not the same as findings made under the second condition of Article 2.2.1.1.[351]

317. It appears from its opening statement at the first Panel meeting that China accepts that its original argument was wrong.[352] Its argument has shifted to being a complaint that there was no finding under the second condition, and that accordingly the ADC made findings without following the sequencing requirement outlined in *Australia – Anti-Dumping Measures on Paper*.[353] But this new argument is similarly flawed: the ADC's decision was made on the basis of the second condition. Accordingly, sequencing is irrelevant as an alleged basis for showing any contravention of Article 2.2.1.1 in respect of wind towers.

2. China's AD claim 1

318. China has failed to make a *prima facie* case under AD claim 1 in relation to wind towers.[354] At the first Panel meeting and in response to Panel questions, China continues to state that the "uplift ratio" was based on the differences between price values associated with a Chinese plate steel producer in a different investigation and "the values associated with Korean and Chinese Taipei plate steel producers."[355] Australia has already demonstrated in its first written submission[356] and in response to Panel questions,[357] that Korean and Chinese Taipei plate steel prices had no role in the ADC's calculation of the normal value of wind towers in Investigation 221. This is confirmed in *Confidential Appendix 2 – Wind Towers Investigation 221 Report* which was exhibited in response to Panel question no. 42(a).[358]

[351] Australia's second written submission, para. 235-237.
[352] China's opening statement, paras. 69-73; China's closing statement, para. 17. See Australia's closing statement, para. 24.
[353] China's opening statement, para. 71. See also Australia's second written submission, paras. 143-148.
[354] Australia's first written submission, paras. 499-519.
[355] China's response to Panel question no. 11, para. 31. See also China's opening statement, paras. 48-49.
[356] Australia's first written submission, paras. 502-516.
[357] Australia's response to Panel question no. 42, paras. 106-107.
[358] [[(Exhibit AUS-75 (BCI))]].

3. China's AD claim 5.c

319. China has failed to make a *prima facie* case under AD claim 5 in relation to wind towers.[359]

320. The legal basis for China's arguments is unclear. To the extent that it is predicated on Article 2.2, this claim appears to be wholly subsumed under China's AD claim 1. While China's supporting arguments are framed differently, the legal issues are ultimately identical. China is entitled to bring duplicative, redundant or consequential claims if it wishes, but in Australia's view repetitive determinations either to accept or reject such claims do not assist in the resolution of the dispute.

321. To the extent that China's AD claim 5 is based on the second condition of Article 2.2.1.1, then there may be a separate aspect of the claim, but there does not appear to be any legal basis for it.[360] It appears to Australia that China's ultimate complaint is that because the second condition of Article 2.2.1.1 uses the phrase " the costs associated with the production and sale of the product", that when an investigating authority engages in a construction of normal value it must only—unequivocally, according to China—have regard to costs of the exporter being considered. No coherent explanation has been provided by China for the legal basis for this purported obligation.

322. In any event, even if a legal basis for AD claim 5.c had been articulated, China's arguments are based on a fundamental misunderstanding of the basis of the ADC's decision. Korean and Chinese Taipei plate steel prices had no role in the ADC's calculation of the normal value of wind towers in Investigation 221.[361]

4. China's AD claim 6.a

323. China has failed to make a *prima facie* case under AD claim 6.a in relation to wind towers.[362]

[359] Australia's first written submission, paras. 520-530.
[360] Australia's response to Panel question no. 16, paras. 35-36.
[361] Australia's first written submission, paras. 502-516.
[362] Australia's first written submission, paras. 531-536.

324. As Australia explained in its above submissions about the corresponding claim under railway wheels,[363] AD claim 6.a is either consequential on, or a variant on, China's AD claims 3 and 1 concerning Australia's cost calculation in its construction of normal value.

325. The only non-consequential component of China's AD claim 6.a is China's argument that adjustments should be made under Article 2.4 that would effectively reverse the methodology used to construct normal value under Articles 2.2 and 2.2.1.1. The purpose of Article 2.4 is not to reverse the outcomes of properly undertaken constructions of normal value.[364] Such a proposition makes no legal or practical sense.

326. On this basis, the only legally coherent part of China's AD claim 6.a is a claim that is wholly consequential on its AD claims 3 and 1. If China fails on AD claims 3 or 1, China must fail also on AD claim 6.a. Even on China's own submissions, if China succeeds on AD claims 1 and 3, the Panel may choose to exercise judicial economy and decline to determine AD claim 6.a.[365]

5. China's AD claim 7.a

327. China has failed to make a *prima facie* case under AD claim 7.a in relation to wind towers.[366]

328. Australia understands that China is not challenging the calculation of the wind towers rate of profit that was based on the exporter's actual cost data. Rather, China is challenging the multiplication of this actual profit rate to the "uplifted cost of production" which it alleges was not "the cost of production in the country of origin".[367]

329. Since China has failed to make a *prima facie* under AD claim 1, then this claim must also necessarily fail. This is because if the calculated cost of production is the correct amount for a "cost of production in the country of origin", then applying an *uncontested actual profit rate* to that amount would result in a "reasonable amount for…profits" that would be consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. Australia also refers

[363] Australia's second written submission, paras. 216-226.
[364] Panel Report, *EU – Biodiesel (Argentina),* para. 7.296; Panel Report, *Egypt – Steel Rebar,* para. 7.333; Panel Report, *EU – Footwear (China)*, para. 7.263.
[365] China's response to Panel question no. 20, para 77.
[366] Australia's first written submission, paras. 537-544.
[367] China's first written submission, paras. 412-416.

the Panel to Australia's submissions in response to China's claim 7.a with respect to stainless steel sinks.[368]

6. China's AD claim 7.c

330. China failed to make a *prima facie* case under AD claim 7.c in relation to wind towers.[369] Australia refers to its responses to Panel questions nos. 29 and 30.[370]

7. China's AD claim 8

331. China has failed to make a *prima facie* case under AD claim 8 in relation to wind towers.[371] China's AD claim 8 is entirely contingent on the Panel finding that Australia acted inconsistently with Article 2 of the Anti-Dumping Agreement under its earlier claims. As outlined above, there is no basis for such a finding, as China has failed to make a *prima facie* case for all of its earlier AD claims relating to wind towers. Therefore, China has failed to make a *prima facie* case under AD claim 8 as well.

C. CONCLUSION

332. Australia respectfully requests that the Panel find that the wind towers measures are not within its terms of reference. The jurisdictional issues have now been thoroughly ventilated. China has had full and ample opportunity to present its views. Australia asks that the panel rule on these issues prior to the second Panel meeting.

333. If the Panel finds that Investigation 221 and/or Expiry Review 487 are within its terms of reference, China has nevertheless failed to make a *prima facie* case. China has submitted insufficient evidence to demonstrate that the ADC's establishment of the facts was not proper or that the ADC's evaluation was biased or not objective. In Australia's view, the Panel should not make any recommendations relating to the wind towers measures as there would be no utility in doing so.

[368] Australia's second written submission, paras. 298-309.
[369] Australia's first written submission, paras. 545-549.
[370] Australia's response to Panel question nos. 29 and 30, paras. 83-87.
[371] Australia's first written submission, paras. 550-553.

CLAIMS UNDER THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

VI. CONDITIONAL RESPONSE TO SCM CLAIMS: STAINLESS STEEL SINKS

A. INTRODUCTION

334. For the reasons set out in paragraphs 23 through 59, above, as well as Australia's PRR, Australia's additional PRR Comments and Australia's first written submission, all of China's claims under the SCM Agreement in section B.2 of its panel request are directed at measures that were no longer in effect at the time of the Panel's establishment and, in turn, are outside the Panel's terms of reference.

335. While Australia submits that China's claims under the SCM Agreement are outside the Panel's terms of reference, even if the Panel were, *arguendo*, to consider China's substantive claims in section B.2 of its panel request, the ADC's determination in the original countervailing duty investigation with respect to Program 1 is entirely consistent with the SCM Agreement. China's claims are without merit. China chose not to advance any arguments relating to section B.2.1 of its panel request. For the claims where it did advance arguments, Australia addressed them in paragraphs 563 through 707 of its first written submission and further below.

B. CHINA'S CVD CLAIMS 2 AND 3

336. The ADC's determination in respect of benefit was fully consistent with Australia's obligations under Articles 1.1(b) and 14(d) of the SCM Agreement. Nevertheless, in its opening statement and in its response to Panel question no. 33, China continues to incorrectly allege that the ADC was not entitled to disregard in-country prices of 304 SS CRC and questions the out-of-country benchmark chosen by the ADC and the associated adjustments made.

337. Australia addressed the majority of these arguments and explained how the ADC complied with the requirements of Articles 1.1(b) and 14(d) of the SCM Agreement at paragraphs 571-617 of its first written submission. In particular, Australia has explained that:

a) in accordance with the text of Article 14(d) and previous decisions of the Appellate Body, particularly the Appellate Body's findings in *US – Carbon Streel*

(India), the ADC correctly disregarded in-country prices of 304 SS CRC due to government intervention in the market;

b) the ADC adopted an out-of-country benchmark that was the best available representation of the market-determined price of 304 SS CRC in China; and

c) the ADC adjusted this benchmark for prevailing market conditions in China.

338. In this submission, Australia addresses the flawed arguments, including factual and legal errors, advanced by China in its opening statement and in its response to Panel question no. 33.

1. The ADC disregarded in-country prices consistently with WTO law

339. In challenging the ADC's decision to disregard in-country prices of 304 SS CRC, China advances a number of arguments that are unsupported by the text of the SCM Agreement or the facts in this case.

(a) China incorrectly argues that an investigating authority needs evidence that in-country prices have a direct impact on the price of the good

340. China argues that in order for an investigating authority to disregard in-country prices consistently with the guidelines in Article 14(d), an investigating authority needs to "explain" how government intervention has a direct impact on the price of the good in question.[372]

341. If accepted, China's position would effectively amount to an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative analysis of in-country prices. No such obligation is imposed by the SCM Agreement. The guidelines set out in Article 14 do not require investigating authorities to adopt a particular style of analysis or methodology in every investigation. Rather, Article 14(d) simply provides:

> The provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy

[372] China's opening statement, para. 139.

> of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).[373]

342. Moreover, China's view is inconsistent with previous findings of the Appellate Body, which said on a number of occasions that a determination of whether in-country prices are distorted must be established on a case-by-case basis.[374] For example, in *US – Carbon Steel (India)*, the Appellate Body acknowledged that "the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information".[375] One such circumstance where the type of the analysis may vary is where "investigating authorities cannot verify necessary market or pricing information".[376]

343. In other words, contrary to China's submissions, the ability of investigating authorities to disregard in-country prices in the context of individual investigations will vary on a case-by-case basis. There is no mandatory requirement on an investigating authority to "explain" that government intervention had a direct impact on the price of the good in question before resorting to out-of-country prices.[377]

(b) China adopts contradictory arguments in relation to the process of analysis adopted by the ADC

344. China has sought to demonstrate error in the ADC's analysis that led to it disregarding in-country prices, through multiple arguments that contradict one another. In its opening statement China alleged that the ADC relied on "facts available" to determine that in-country prices were distorted,[378] but then in its response to Panel question no. 33 states the analysis undertaken by ADC was nothing more than a "comparison between the benefit benchmark and in-country prices to justify its finding that there was a distortion".[379] Neither of these statements are correct.

[373] Article 14(d) of the SCM Agreement.
[374] See e.g., Appellate Body Report, *US – Softwood Lumber IV*, para. 102; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156.
[375] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.
[376] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.
[377] See also Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5)*, para. 5.250.
[378] China's opening statement, para. 140.
[379] China's response to Panel question no. 33, para. 102.

345. To be clear, the ADC did not have recourse to facts available to determine whether 304 SS CRC was provided for less than adequate remuneration. No such finding is made or suggested in Stainless Steel Sinks Investigation 238 Report.

346. In a practical sense, the choices that were open to the ADC in conducting this evaluation were limited by the decision of the Government of China not to provide a complete response to the ADC's questionnaire.[380] Australia cannot exclude the possibility that a different course of analysis might have been undertaken had a complete questionnaire response been available. But no contravention of the SCM Agreement can be shown from the bare fact that the ADC did not have perfect information before it. A dispute settlement proceeding is not the occasion for China to seek to revisit the choices it made not to participate in the original investigation.[381]

347. With respect to China's second line of argumentation, the ADC did not just compare domestic prices of 304 SS CRC with an out-of-country benchmark. Rather, the ADC considered evidence from the Australian industry and exporters, as well as evidence collected during previous investigations.[382] In these previous investigations, the ADC considered numerous policies, plans and implementing measures of the Government of China, and found that there was substantial government intervention in the Chinese steel industry and in the manufacture and production of similar steel products to 304 SS CRC.[383]

348. The ADC undertook a comprehensive process of analysis to identify whether there were similarities between these previously investigated products and 304 SS CRC, as the ADC summarised in Stainless Steel Sinks Investigation 238 Report:

> The Commission has undertaken research into the manufacturing process of 304 SS CRC and has *found significant similarities between the raw materials and manufacturing process* of stainless steel, and the raw materials and manufacturing processes of hot rolled plate steel, steel slab and hot-rolled coil (HRC). These are the raw materials for deep drawn stainless steel sinks, aluminium zinc coated steel, galvanised steel and wind towers. Specifically, HRC, hot rolled plate and 304 SS CRC are each manufactured from steel slab that is hotrolled in a rolling mill to the desired thickness. The steel slabs used are made either using an electric arc furnace

[380] See Australia's first written submission, para. 594.
[381] See also Australia's response to Panel question no. 34, paras. 95-98.
[382] A complete summary of the information collected is outlined at fn. 764 of Australia's first written submission.
[383] See *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 220-222.

> process (using scrap carbon steel as they key raw material) or through a fully integrated steelmaking process (using coking coal, iron ore, and scrap carbon steel as the key raw materials). Stainless steel coil, HRC and plate steel manufacturers may either produce their own slabs for later rolling or purchase them already made from a steel supplier.[384]

349. In light of the significant similarities, the ADC considered that numerous policies, plans and implementing measures examined by the ADC in these previous investigations would be "likely to extend to manufacturers of 304 SS CRC, or to their upstream suppliers of steel and steel raw materials."[385] Additionally, the ADC considered that the Government of China's measures targeted at the iron and steel industry identified during these investigations would also extend to manufacturers of 304 SS CRC and their upstream manufacturers of steel and steel inputs.[386] This was on the basis that these entities would fall within the definitions used in these policies and measures.[387]

350. Overall, given this substantial evidence of intervention and influence by the Government of China in the Chinese steel sector, which included manufacturers of 304 SS CRC and their upstream manufacturers of steel and steel inputs, the ADC appropriately found the following:

> In establishing a benchmark price for 304 SS CRC reflecting adequate remuneration, the Commissioner has first considered whether prices from private enterprises in China were an appropriate basis for this benchmark.
>
> However, the Commission's assessment of the Chinese stainless steel market has found the entire market for stainless steel in China to be affected by significant influence by the GOC during (and prior to) the investigation period…
>
> It is considered that these GOC influences on the Chinese 304 SS CRC market have had a distorting effect on the market overall, and hence have distorted prices throughout the entire market, whether they be from SIEs or private enterprises. For this reason, the Commissioner considers that all prices of 304 SS CRC in China (regardless of whether the material was manufactured by an SIE or not) to not be suitable in determining adequate remuneration for 304 SS CRC in China, as both private and SIE prices are distorted.

[384] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 135.
[385] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 135.
[386] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 136.
[387] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 136.

> The distortions observed in the Chinese 304 SS CRC market as a result of GOC influence makes private domestic prices unsuitable for determining adequate remuneration, hence providing for the use of external benchmarks.[388]

351. In summary, the ADC correctly identified that prices of 304 SS CRC were distorted based on the evidence before it and in accordance with a process of analysis accepted by the Appellate Body.

(c) An investigating authority can have recourse to out-of-country benchmarks in situations other than where in-country prices are distorted

352. Finally, Australia takes note of China's continued assertion that under WTO law, "recourse to out-of-country prices can only occur where in-country prices are distorted."[389] This appears to be an attempt by China to inappropriately expand the scope of this dispute.

353. As Australia already noted in its first written submission, the circumstances in which an investigating authority can resort to out-of-country benchmarks is not before this panel as, in this case, the ADC determined that the prices of 304 SS CRC were distorted.[390] Therefore, the Panel need not opine on other circumstances in which investigating authorities may resort to out-of-country prices.

354. However, as China continues to present baseless assertions on this matter, Australia once again notes that China's interpretation is inconsistent with the text of the SCM Agreement and the views of the Appellate Body in *US – Carbon Steel (India)*. Specifically, the Appellate Body noted:

> We do not see any findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that indicate that the Appellate Body was foreclosing the possibility that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark… In the light of the Appellate Body's findings in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, we are not persuaded by India's assertion that the Appellate Body has established

[388] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 207.
[389] China's opening statement, para. 138.
[390] Australia's first written submission, fn. 729.

that the only situation in which out-of-country prices may be used to determine a benchmark is where in-country prices are distorted by governmental intervention in the market. While the Appellate Body has clarified that recourse to out-of-country prices is exceptional, the Appellate Body has not, in previous disputes, addressed the issue of whether there are other circumstances in which Article 14(d) permits the use of out-of-country prices and, if so, what those other circumstances are. [391]

2. The benchmark adopted by the ADC reflected prevailing market conditions

355. China also makes a number of legally and factually incorrect statements in relation to the ADC's selection of an out-of-country benchmark.

356. Article 14(d) of the SCM Agreement requires that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." China argues that the ADC failed to connect the benchmark price to the Chinese market consistent with Article 14(d) and that the benchmark was only chosen due to "its lack of connection to the Chinese market".[392] There are four flaws with China's statement.

357. First, this allegation is entirely disconnected from the factual record. While the benchmark was chosen to ensure it did not incorporate the very distortions that resulted in domestic prices being disregarded, it is highly misleading to say that the reason it was chosen was a "lack of connection to the Chinese market".

358. Second, China's comments on this point ignore the meaning of the phrase "prevailing market conditions" in the text of Article 14(d) of the SCM Agreement. As the Appellate Body has said, "proposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they *deviate from a market-determined price as a result of governmental intervention* in the market".[393] Accordingly, when the ADC says in Stainless Steel Sinks Investigation 238 Report that it is seeking to avoid prices influenced by the intervention

[391] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4-185-4.186.
[392] China's opening statement, para. 141.
[393] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (emphasis added).

of the Government of China,[394] the ADC is stating that it is trying to ensure the benchmark does not deviate from market-determined prices.

359. Third, Stainless Steel Sinks Investigation 238 Report records that the ADC considered in-country prices in the first instance. The ADC specifically asked the Government of China for relevant information in this regard.[395] However, as noted above, the Government of China failed to meaningfully respond to the questionnaire.

360. Fourth, China's comment also ignores the multiple other reasons given by the ADC in Stainless Steel Sinks Investigation 238 Report for why it selected adjusted MEPS European and North American 304 SS CRC prices as a benchmark. This reasoning is explained in paragraphs 612-613 of Australia's first written submission. For summary purposes the other factors included ensuring the benchmark:

a) was only limited to 304 SS CRC prices and not other irrelevant products;[396]

b) did not derive from narrow data sets;[397] and

c) was derived from independent sources.[398]

361. Additionally, the ADC did adjust the benchmark to take into account the factors identified in Article 14(d), including delivery costs for which China provided relevant information. The ADC also considered whether adjustments to the benchmark were appropriate for quality, availability, marketability and comparative advantage.[399] In particular, the ADC considered any comparative advantage. As the ADC explained:

> In certain areas where China has developed (or is developing) a comparative advantage in producing 304 SS CRC, this has been heavily influenced by GOC activities in the Chinese iron and steel markets (by way of policies, plans and implementing measures). The Commissioner considers that, in this way, at least some of whatever comparative advantage Chinese 304 SS

[394] See e.g. *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 213, 216.
[395] See Australia's first written submission, paras. 593-594.
[396] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 213.
[397] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 215.
[398] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 216.
[399] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 217-219.

CRC producers may have, is likely to have been created by GOC influence (and hence should not be adjusted for in any case).[400]

362. Overall, Australia submits that ADC took the necessary steps in the circumstances to select an out-of-country benchmark that reflected prevailing market conditions.

3. Conclusion

363. The ADC acted consistently with Article 1.1(b) and 14(d) of the SCM Agreement. The ADC disregarded domestic prices of 304 SS CRC and adopted an out-of-country benchmark in a manner consistent with the SCM Agreement.

364. As such, the Panel should reject China's CVD claims 2 and 3.

C. CHINA'S CVD CLAIM 4

365. In its CVD claim 4, China argues that the ADC failed to properly establish that Program 1 was specific, in accordance with Articles 1.2 and 2.1(c) of the SCM Agreement.

366. These arguments are without merit. Australia has addressed most of China's arguments related to specificity under Articles 1.2 and 2.1(c) in paragraphs 618-670 of its first written submission. This submission addresses two additional points that China raised in its opening statement. These are:

a) China's mistaken contention that the ADC did not correctly identify a "subsidy programme" and only identified the "mere fact" that financial contributions had been provided;[401] and

b) China's mistaken contention that the ADC did not take into account the two factors listed in the third sentence of Article 2.1(c) of the SCM Agreement.[402]

1. The ADC correctly identified a "subsidy programme"

367. As outlined at paragraphs 638 and 652-653 of Australia's first written submission, the ADC identified a systematic series of actions that involved the granting of a financial contribution conferring a benefit to a limited group of particular enterprises engaged in the

[400] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 218.
[401] China's opening statement, paras. 143-145.
[402] China's opening statement, paras. 146-147.

manufacture of downstream products including stainless steel sinks (demonstrated by Zhuhai Grand from the sampled exporters).[403]

368. In the investigation, the ADC identified that Guangdong Metals regularly provided 304 SS CRC for less than adequate remuneration by considering relevant financial data. From this data, the ADC quantitatively identified there was a systematic pattern of 304 SS CRC being provided to Zhuhai Grand (as evidenced by [[**BCI**: [redacted]]]) for less than adequate remuneration.[404]

369. This systematic series of actions was *not* just the mere provision of financial contributions to certain enterprises. The provision of 304 SS CRC for less than adequate remuneration occurred in the wider context of systemic subsidisation and associated policies of the Government of China within the Chinese steel market. It was not an isolated series of transactions.

370. This analysis was interwoven within the wider identification of subsidisation and economic distortions in Stainless Steel Sinks Investigation 238 Report.[405] Such an approach is entirely consistent with the findings of the Appellate Body in *US — Countervailing Measures (China)*, where the Appellate Body said:

> In any event, we recall that the existence of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is specific. It stands to reason, therefore, that *the relevant "subsidy programme", under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1*.[406]

371. Accordingly, the ADC correctly identified a "subsidy programme" in accordance with the legal standard articulated in *US — Countervailing Measures (China)*. China's arguments are completely without merit.

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[403] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), pp. 169-170. See also Australia's first written submission, paras. 638, 652-653.
[404] [[[redacted](Exhibit AUS-67 (BCI))]].
[405] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), Appendixes 4, 8, 14.
[406] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144 (emphasis added).

2. The ADC took into account the two factors listed in the third sentence of Article 2.1(c) of the SCM Agreement

(a) China mischaracterises the requirements of the third sentence of Article 2.1(c) of the SCM Agreement

372. In arguing that the ADC failed to take into account "the extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy programme has been in operation", China mischaracterises the requirements of the third sentence of Article 2.1(c) of the SCM Agreement.

373. China alleges that an investigating authority's report must explain how the two factors are considered[407] and that "the Appellate Body has explained, that consideration [of the two factors] needs to be active and meaningful".[408] This summary of the legal standard is incorrect. In particular, it ignores the key phrase in the third sentence of Article 2.1(c) that "account shall be taken" of the two factors.

374. As the compliance panel in *US — Carbon Steel (India)* (*Article 21.5)* noted, "While 'taking account' of these factors is mandatory, this term does not prescribe a specific result or require a Member to conform to or act in accordance with a particular matter".[409] Accordingly, investigating authorities have significant flexibility as to how they take account of these factors.

375. Relevantly, for the ADC's consideration of the two factors in this situation, that compliance panel noted, building on previous panel findings, that:

a) "it can be sufficient for other aspects of a determination to demonstrate that 'account was taken' of the matter";[410] and

b) taking into account the two factors need not be done explicitly, "so long as there is some indication in the determination that the factors had been considered implicitly".[411]

[407] China's opening statement, para. 146.
[408] China's opening statement, para. 147. It is noted China's refers to the Appellate Body, but only cites a panel report, namely: Panel Report, *US – Washing Machines,* para. 7.252.
[409] Panel Report, *US — Carbon Steel (India) (Article 21.5 – China)*, para. 7.209.
[410] Panel Report, *US — Carbon Steel (India) (Article 21.5 – China)*, para. 7.210.
[411] Panel Report, *US — Carbon Steel (India) (Article 21.5 – China)*, para. 7.211.

376. In simple terms, this means an investigating authority can implicitly consider the two factors, so long as there is some indication in the investigation report that the factors had been considered implicitly. The investigating authority will comply with this obligation, even if the "indication" is in a part of the report not directly discussing specificity.

(b) Contrary to China's submissions, the ADC correctly considered the two factors

377. Contrary to the submissions of China, the ADC complied with the requirements of the third sentence of Article 2.1(c) of the SCM Agreement. Specifically, the ADC took into account both factors and this consideration is indicated in Stainless Steel Sinks Investigation 238 Report.

378. In terms of the "length of time" factor, the ADC found that Program 1 had been in place for a significant period of time – before the commencement of the investigation. This is clear from the following quote, where the ADC said, when discussing private prices in the domestic market, "the Commission's assessment of the Chinese stainless steel market has found the entire market for stainless steel in China to be affected by significant influence by the Government of China *during (and prior to) the investigation period*".[412]

379. The ADC's assessment of the extent of economic diversification of China was implicit in the final determination. The Chinese economy is large and diverse and China's cold-rolled stainless steel industry, was (and is) still a very small fraction of its economy. This consideration is indicated in the ADC's statement, made in the context of assessing the first part of Article 2.1(c), that "*only* enterprises engaged in the manufacture of [downstream] products would benefit from Program 1."[413]

3. Conclusion

380. The ADC acted consistently with Articles 1.2 and 2.1(c) of the SCM Agreement. In particular, the ADC correctly identified a "subsidy programme" and considered the two factors in the third sentence of Article 2.1(c) of the SCM Agreement.

381. The panel should reject China's CVD claim 4 in its entirety.

[412] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 207 (emphasis added).
[413] *Stainless Steel Sinks Investigation 238 Report*, (Exhibit CHN-2), p. 169 (emphasis added).

D. CHINA'S CVD CLAIM 5

382. China's CVD claim 5 contends that the ADC's initiation of the stainless steel sinks CVD investigation was inconsistent with Article 11.1, 11.2 and 11.3 of the SCM Agreement. In particular, China alleges the ADC's decision to initiate an investigation into the alleged countervailable subsidisation (which the applicant identified as 'Program 1') was inconsistent for two reasons:

a) the application filed by the applicant did not directly discuss how Program 1 was specific; and

b) there was a temporal gap between the period covered by one piece of evidence supporting initiation and the period investigated by the ADC.[414]

383. In its previous submissions, Australia has addressed both these allegations. Particularly, Australia has demonstrated that the ADC had sufficient evidence that Program 1 was specific to initiate the investigation and that a temporal gap between the period covered by one piece of evidence supporting initiation and the period investigated would not prevent the ADC from concluding there was sufficient evidence to initiate.[415]

384. In its responses from questions from the Panel and in its opening statement, China seeks to expand on its first written submission. Specifically, China appears to:

a) consider its claim under Article 11.1 is consequential on its Article 11.2 claim;[416]

b) contend that information outside the application cannot be taken into account by an investigating authority when determining whether there is sufficient information to initiate;[417]

c) question whether the ADC actually considered information external to the application because it does not state so in the Stainless Steel Sinks Investigation 238 Consideration Report;[418]

[414] China's first written submission, paras. 579-591.
[415] Australia's first written submission, paras. 671-707.
[416] China's response to Panel question no. 63, paras. 167-168.
[417] China's response to Panel question no. 35, paras. 103-111.
[418] China's response to Panel question no. 35, paras. 108-109; China's opening statement, para. 150.

d) consider the evidence from previous investigations in relation to specificity to be irrelevant to the investigation;[419] and

e) contends that a temporal gap in one piece of evidence means the ADC could not find there was sufficient evidence.[420]

385. These contentions are without merit. Australia addresses each in turn.

1. China has failed to establish a *prima facie* case of a violation of Article 11.1

386. In its response to Panel question no. 63, China seeks to advance, for the first time, its claim under Article 11.1 by asserting that a violation of Article 11.1 is consequential on a violation of Article 11.2.[421]

387. China has not offered any evidence or arguments showing a connection between a breach of Article 11.1 and Article 11.2. As China itself explained in paragraph 570 of its first written submission, Article 11.1 is directed at the form of an application, whereas Article 11.2 explains its content. It is not contentious that an application was in fact filed. Accordingly, for China's argument for a consequential violation to succeed, even potentially, it would need to demonstrate not only that the application did not meet the requirements of Article 11.2, but that the application in fact filed was so far removed from the requirements of Article 11.2 that it could not even properly be called an "application" within the meaning of Article 11.1. No such arguments have been made, nor could they succeed.

388. Accordingly, in the absence of any evidence and legal argument, China has failed to make a *prima facie* case of a violation of Article 11.1. It follows that the Panel should reject the claim.

2. An investigating authority is entitled to consider information other than in the application

389. In its response to Panel question no. 35, China appears to contend that the consideration of information outside the scope of the application by an investigating authority is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.[422] In particular, China

[419] China's opening statement, paras. 151-152.
[420] China's response to Panel question no. 35, para. 109(f).
[421] China's response to Panel question no. 63, paras. 167-168.
[422] China's response to Panel question no. 35, paras. 103-111.

submits an investigating authority cannot "supplement the application".[423] Australia disagrees.

390. The ADC, acting as an objective and unbiased investigating authority, properly determined that it had sufficient evidence to justify initiating the investigation. In particular, the ADC properly determined that it had sufficient evidence in relation to the nature of the subsidy (i.e., that it was specific) in light of the evidence and its previous findings into similar subsidy programs in the past.[424]

391. As Australia explained in its response to Panel question no. 35, an investigating authority is not limited to considering the evidence in the application.[425] To expand on that answer, Australia makes two additional points.[426]

392. First, based on a plain reading of Article 11, there is no limitation on the use of other information expressed anywhere in the Article. Nor has China identified such a limitation. Indeed, Article 11.6 of the SCM Agreement provides:

> If, in special circumstances, the authorities concerned decide to initiate an investigation *without having received a written application by or on behalf of a domestic industry* for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.[427]

393. It would be an absurd result if an investigating authority was permitted to gather its own information to initiate an investigation entirely on its motion under Article 11.6 of the SCM Agreement, but was forbidden from having regard to other information in the case of an application under Articles 11.1 and 11.2.

394. Second, it would be highly artificial to require an investigating authority to disregard relevant information that is readily available to it, simply because it was not in the application. Such a requirement might lead to an investigation authority initiating, or deciding not to

[423] China's response to Panel question no. 35, para. 107.
[424] *Hot Rolled Plate Steel Investigation 198 Report*, (Exhibit CHN-33), p. 10; *Aluminium Zinc Coated Steel Investigation 193 Report*, (Exhibit AUS-70), p. 48.
[425] Australia's response to Panel question no. 35, paras. 99-103.
[426] Under DSU, Article 3.2, the Covered Agreements are to be interpreted in accordance with the customary rules of interpretation of public international law as set forth in the VCLT: see Appellate Body Report, *US — Gasoline*, p. 17.
[427] Article 11.6 of the SCM Agreement (emphasis added).

initiate an investigation, where it knew the opposite decision was the correct one on the basis of all the information available to it.

3. The ADC considered information outside the application when considering specificity

395. In its opening statement and in response to Panel question no. 35,[428] China questions whether the ADC actually considered information external to the application because it does not state so directly in Stainless Steel Sinks Investigation 238 Consideration Report. For example, China states Stainless Steel Sinks Investigation 238 Consideration Report "does not refer to the investigations Australia has now cited."[429] This suggestion has no basis in the record.

396. The notice requirements for initiation are outlined in Article 22.2 of the SCM Agreement.[430] Article 22.2 states a public notice is required to contain, or otherwise make available through a separate report, adequate information in relation to a list of limited matters. Specificity is not included in the list. As previous panels have noted, "the SCM Agreement does not require an investigating authority to make any findings or explain its understanding of key issues (such as… specificity) when initiating an investigation".[431] In other words, despite China's unsupported conjecture about the requirements of the SCM Agreement, the ADC was not required to provide a detailed discussion of its specificity assessment with respect to initiation in Stainless Steel Sinks Investigation 238 Consideration Report.

397. Regardless, as explained in Australia's response to Panel question no. 36, the ADC explicitly referenced the previous investigations on page 25 of Stainless Steel Sinks Investigation 238 Consideration Report and incorporated these findings into the CVD initiation findings on pages 30 and 38.[432] Additionally, as China acknowledges,[433] the Stainless Steel Sinks Investigation 238 Consideration Report explicitly discusses the requirements of specificity when it states section 269TAAC of the *Customs Act 1901* (Cth) "provides that, in

[428] China's opening statement, para. 150; China's response to Panel question no. 35, paras. 108-109.
[429] China's opening statement, para. 150.
[430] For completeness, it is noted that China has not brought any claims under Article 22.2 of the SCM Agreement.
[431] Panel Report, *US – Countervailing Measures (China)*, para. 7.25.
[432] Page 38 states "Refer to Section 5.4.2 for further discussion of these points." Section 5.4.2 encompasses the analysis on page 25 of the *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59).
[433] China's response to Panel question no. 35, para. 109(c).

order for a subsidy to be countervailable, it must also be specific."[434] The previous investigations were clearly considered by the ADC and described in Stainless Steel Sinks Investigation 238 Consideration Report.

4. The previous investigations and their associated evidence were highly relevant to the ADC's decision to initiate the investigation

398. Furthermore, at paragraphs 151-152 of its opening statement, China inappropriately suggests that these previous investigations are not relevant for the purposes of initiating an investigation in this case.

399. This is clearly incorrect. It would have the potential to lead to absurd results in practice, by requiring an investigating authority to close its eyes to relevant evidence available to it.

400. As explained on pages 134-136 of Stainless Steel Sinks Investigation 238 Report, there were substantial similarities in terms of the relevant input products being provided for less than adequate remuneration and the economic and regulatory environment in which these products are manufactured. Given the quality of evidence required at the initiation stage of an investigation is not the same as that of a final determination,[435] such similar evidence was entirely appropriate for identifying specificity.

5. The temporal gap for one piece of evidence does not mean the ADC has insufficient information to justify initiation

401. At paragraph 109(f) of its response to Panel question no. 35 and in its first written submission China alleges that there wasn't "sufficient evidence" for the ADC to justify initiation due to a gap between the period covered by one piece of evidence (supporting initiation) and the subsequent period investigated by the ADC.[436]

402. China's argument is premised on a misunderstanding of the facts. China disregards all other evidence considered by the ADC during initiation and focuses exclusively on the CBSA Statement. The wide variety of additional evidence considered by the ADC, including speciality industry reports, relevant legislation and decrees of the Government of China, is outlined in

[434] *Stainless Steel Sinks Investigation 238 Consideration Report*, (Exhibit CHN-59), p. 34.
[435] Panel Report, *China – GOES*, para. 7.56.
[436] China's first written submission, paras. 583-585, 589.

paragraph 699 of Australia's first written submission. China ignores the fact that much of this evidence covered the period of investigation.[437]

6. Conclusion

403. China has failed to make a *prima facie* case of a violation of Article 11.1. It follows that the Panel should find the ADC has acted consistently with Article 11.1 of the SCM Agreement in this case.

404. The Panel should also find that the ADC acted consistently with Articles 11.2 and 11.3 of the SCM Agreement. China's limited arguments in relation to these provisions are premised on a misunderstanding of the SCM Agreement and the facts in this case.

405. For these reasons, the Panel should reject China's CVD claim 5 in its entirety.

[437] Australia's first written submission, para. 700

VII. CONCLUSION

406. For the foregoing reasons, Australia respectfully requests that the Panel reject China's claims in their entirety.