

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BARLEY FROM AUSTRALIA
(DS598)

**THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Australia’s Claims Concerning the AD Agreement.....	1
	A. Article 6.8 and Annex II of the AD Agreement.....	1
	B. Article 6.10 of the AD Agreement	5
III.	Australia’s Claims Regarding the SCM Agreement.....	7
	A. Article 12.7 of the SCM Agreement	7
	B. Article 1.1(a) of the SCM Agreement.....	9
	C. Article 1.1(b) of the SCM Agreement	11
	D. Articles 2.1(c) and 2.4 of the SCM Agreement.....	12
IV.	Claims Regarding Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement	15
V.	Claims Regarding Article 5 of the AD Agreement and Article 11 of the SCM Agreement.....	16
VI.	Claims Related to Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement.....	18
VII.	Conclusion	19

TABLE OF REPORTS

Short Form	Full Citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>China - Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R, adopted 20 September 2011
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012
<i>EC – Bed Linen (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/ RW, adopted 8 April 2003
<i>EC – Countervailing Measures on DRAM Chips (Panel)</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Fasteners (China) (Panel)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R, adopted 28 July 2011
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Large Civil Aircraft (Panel)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002

Short Form	Full Citation
<i>Guatemala – Cement I (Panel)</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, p. 3797
<i>Korea – Stainless Steel Bars</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R, circulated to WTO Members 30 November 2020, appealed by Korea 22 January 2021
<i>Mexico – Anti-Dumping Measures on Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Anti-Dumping Measures on Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>US – Anti-Dumping and Countervailing Duties (Panel)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011
<i>US – Carbon Steel (India) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Coated Paper (Indonesia)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia</i> , WT/DS491/R, adopted 22 January 2018
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Measures (China) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – Hot Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001

Short Form	Full Citation
<i>US – Lamb (AB)</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
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<i>US – Softwood Lumber IV (Panel)</i>	Panel Report, <i>United States Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R, adopted 17 February 2004
<i>US – Softwood Lumber V (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Steel Plate from India</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Tyres (China)(AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).

II. Australia’s Claims Concerning the AD Agreement

A. Article 6.8 and Annex II of the AD Agreement

2. To calculate the dumping margins in its investigation, China’s Ministry of Commerce (“MOFCOM”) relied entirely on facts available, rather than the information supplied by the Australian respondents.¹ Accordingly, the United States focuses its comments on the facts available requirements of the AD Agreement – i.e., the circumstances in which an investigating authority may resort to facts available and the information it may use as facts available.

3. Australia argues that, in relying upon facts available to calculate the dumping margin determined for the investigated Australian respondents, China breached its obligations under Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement.² Specifically, Australia argues that MOFCOM (i) lacked a basis to resort to facts available because “necessary” information was not missing from the record, and the Australian respondents did not fail to provide such information in response to MOFCOM’s requests;³ (ii) failed to specify in detail the information it required from the respondents;⁴ (iii) failed to take into account record information that was timely supplied and verifiable;⁵ (iv) failed to inform the Australian respondents why it did not accept their information or permit them to provide further explanations to the extent that information was deficient;⁶ and (v) selected facts that had no logical relationship with the record evidence.⁷

4. China argues that MOFCOM (i) did not actually use facts available for some of the investigated companies (i.e., the twelve traders), even though it determined the same dumping margin for them as for the other investigated respondents;⁸ (ii) did not receive from the Australian respondents certain information that was “necessary” to establish normal value and export price;⁹ (iii) satisfied the requirements of Annex II for requesting information from the Australian respondents, and then rejecting the information they submitted in response to its

¹ See Australia FWS, 67.

² Australia FWS, paras. 70-73.

³ Australia FWS, paras. 98-148.

⁴ Australia FWS, paras. 149-159.

⁵ Australia FWS, paras. 160-197.

⁶ Australia FWS, paras. 198-213.

⁷ Australia FWS, paras. 214-259.

⁸ China FWS, paras. 41-45.

⁹ China FWS, paras. 46-63.

requests;¹⁰ and (iv) satisfied the requirements of Annex II to replace the purportedly missing, necessary information.¹¹

5. The United States wishes to provide several observations on the proper legal interpretation of Article 6.8 and Annex II of the AD Agreement.

6. Article 6.8 provides that:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7. Accordingly, Article 6.8 of the AD Agreement enables investigating authorities to make determinations in defined circumstances. Article 6.8 permits recourse to facts available when an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Absent one of these bases, MOFCOM would not be justified in resorting to facts available.

8. The “facts available” refer “to those facts that are in the possession of the investigating authority and on its written record.”¹² The extent to which the investigating authority must evaluate the possible facts available, and the form that evaluation may take, “depend[s] on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation.”¹³ The United States also observes that “necessary information” comprises information that is “necessary”, not information that is merely requested.¹⁴ The distinction lies in the fact that “necessary information” is information that an investigating authority requires to make its determination.¹⁵

9. As applied here, the United States considers that information that is needed to calculate the dumping margin pursuant to Article 2 is likely to be “necessary” because normal value and export price are central to an investigating authority’s determination. At the same time, information that is “necessary” must be requested by the administering authority. This aspect of necessary information flows from the relationship between “necessary information” and an investigating authority’s use of facts available, where the authority is required to arrive at an

¹⁰ China FWS, paras. 96-178.

¹¹ China FWS, paras. 179-226.

¹² *US – Carbon Steel (India) (AB)*, para. 4.417.

¹³ *US – Carbon Steel (India) (AB)*, para. 4.421 (The “nature and extent” of the explanation and analysis of a particular “facts available” determination “will necessarily vary from determination to determination.”).

¹⁴ *Egypt – Steel Rebar (Panel)*, paras. 7.150-7.151.

¹⁵ *Korea – Stainless Steel Bars (Panel)*, para. 7.185

affirmative or negative finding based on facts available because information it requested is not on the record.¹⁶

10. Australia also argues that MOFCOM failed to specify the information required from certain respondents and to ensure that those parties were aware of the consequences of not providing the requested information.¹⁷ An investigating authority may not assign a margin based on facts available when the authority has not requested the information, indicating that it is “necessary”, in the first place.¹⁸ The panel report in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.¹⁹ Accordingly, the Panel should evaluate whether MOFCOM specified in sufficient detail the information that it required from them.

11. Annex II of the AD Agreement (albeit through non-mandatory guidance) clarifies circumstances and procedures for an investigating authority which may justify resort to facts available. By following the procedures elaborated in Annex II, investigating authorities are able to select information [that is considered the “best information available”] consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations.

12. Australia raises challenges under paragraphs 1, 3, 5, 6, and 7 of Annex II. Paragraph 1 provides that an investigating authority “should specify in detail the information required from any interested party”²⁰. Paragraph 1 also clarifies that an investigating authority should ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available:²¹

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

¹⁶ *Korea – Stainless Steel Bars (Panel)*, para. 7.185

¹⁷ Australia FWS, para. 103.

¹⁸ Article 6.1 of the AD Agreement provides context for Article 6.8 by establishing that the investigating authorities must indicate to the interested parties the information that they require: “All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.” Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer “in the antidumping investigation” cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and “appear.” Rather, the investigating authority must affirmatively reach out and “give notice” of the information that it requires.

¹⁹ *Mexico – Anti-Dumping Measures on Rice (Panel)*, n.211.

²⁰ AD Agreement, Annex II, para. 1.

²¹ *US – Hot-Rolled Steel (AB)*, para. 79 (stating that paragraph 1 of Annex II “is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available . . .”).

13. Article 6.8 and Annex II, paragraph 1, together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.²²

14. Paragraph 3 of Annex II to the AD Agreement states that:

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

15. Thus, a party will not have failed to provide necessary information, or have significantly impeded the investigation, if information submitted meets the conditions in paragraph 3 of being “verifiable,” “appropriately submitted so that it can be used without undue difficulties,” and “supplied in a timely fashion.”²³ Investigating authorities are also not entitled to reject information submitted if it is “in a medium or computer language requested by the authorities.” Past reports have considered that information is verifiable when “the accuracy and reliability of the information can be assessed by an objective process of examination”²⁴ and “undue difficulties” are difficulties “beyond what is otherwise the norm in an antidumping investigation.”²⁵

16. Paragraph 5 of Annex II additionally provides that “[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.” The language in the provision stipulates that investigating authorities should not disregard information submitted by interested parties, unless there is evidence that the party failed to act to the best of its ability.

17. Paragraph 6 further states that if the evidence or information is not accepted, the supplying party should be informed and “should have the opportunity to provide further explanations within a reasonable period If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.”

18. Finally, according to paragraph 7 of Annex II, an investigating authority that relies on information from a secondary source may reach a result “less favourable” to an interested party if that party “does not cooperate and thus relevant information is being withheld” from the

²² *Argentina – Ceramic Tiles (Panel)*, para. 6.55 (providing that the inclusion in Annex II, paragraph 1, of a requirement to specify in detail the information required “strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.”). See also *China – GOES (Panel)*, para. 7.393 (observing that China’s failure to notify the “all other” exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement).

²³ *US – Hot-Rolled Steel (AB)*, para. 81.

²⁴ *US – Steel Plate (Panel)*, para. 7.71 and n.67.

²⁵ *US – Steel Plate (Panel)*, para. 7.72.

authority.²⁶ An authority that “ha[s] to base its findings ... on information from a secondary source ... should do so with special circumspection,” or “caution, care”.²⁷

19. Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use information submitted to the extent that it can be used.²⁸ In this way, Annex II reflects that an investigating authority’s ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority’s role in conducting an investigation in accordance with the AD Agreement, provided certain conditions are met.

20. In sum, the Anti-Dumping Agreement provides that when an interested party refuses access to, or otherwise does not supply necessary information, or significantly impedes the investigation, the investigating authority may resort to the facts available to make its determination. However, an interested party will not have failed to provide necessary information, or have significantly impeded the investigation, where information is provided that is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and, where applicable, supplied in the requested medium; instead, this information should be taken into account.

21. Unless MOFCOM’s investigation satisfied each of the foregoing circumstances and requirements – including specifying in detail the information required of an interested party and determining that “necessary” information was missing from the record – China will have acted inconsistently with Article 6.8 of the AD Agreement.

B. Article 6.10 of the AD Agreement

22. Australia argues that MOFCOM breached Article 6.10 of the AD Agreement because it did not calculate an individual dumping margin for each known exporter or producer.²⁹ Instead, Australia notes, MOFCOM assigned the same dumping margin to every Australian respondent, whether it was listed individually or placed in an “All Others” category.³⁰

23. China argues that MOFCOM was permitted to assign the same dumping margin to each Australian respondent because under Article 6.10: (i) the use of the word “or” means the investigating authority need not “calculate individual dumping margin for each of the known exporters ‘and’ producers”³¹ and (ii) the requirement to calculate an “*individual*” dumping

²⁶ See also *US – Hot-Rolled Steel (AB)*, para. 99 (discussing paragraph 7 of Annex II of the AD Agreement and noting that non-cooperation on the part of an interested party may lead to an outcome that is less favorable to the interested party).

²⁷ Oxford English Dictionary, “circumspection” (second definition: “circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness”) (available at oed.com).

²⁸ *US – Zeroing (EC) (AB)*, para. 459.

²⁹ Australia FWS, para. 343.

³⁰ Australia FWS, para. 348.

³¹ China FWS, paras. 280-282.

margin for each known exporter or producer does not require calculating “different” dumping margin for each.³²

24. The United States provides several comments on the proper interpretation of Article 6.10 of the AD Agreement. Article 6.10 establishes that “as a rule” an authority “shall determine an individual margin of dumping for each known exporter or producer.” This language (“as a rule”) therefore sets out an obligation that applies “normally” or “generally”.³³ The provision then sets out circumstances in which the rule would not apply. The authority may limit its examination where the number of exporters or producers is so large as to make a determination of individual margins of dumping for all exporters or producers “impracticable.” Article 6.10 therefore allows Members to determine individual margins of dumping for a “reasonable number” of exporters and producers, and does not require the determination of an individual margin of dumping for all exporters and producers where a large number of exporters and producers is involved. In other words, Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation.³⁴

25. In this regard, the United States notes that certain positions expressed by China are not consistent with the text of Article 6.10 of the AD Agreement. Specifically, the ability of an investigating authority to exclude producers or exporters is at the point of determining to limit examination, as described in the second sentence of Article 6.10.³⁵ The article reads:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.³⁶

26. Thus, to the extent sentence two of Article 6.10 permits the investigating authority to depart from the rule expressed in sentence one (i.e., to “determine an individual margin of

³² China FWS, paras. 274-275 (emphasis original).

³³ Oxford English Dictionary, “rule” (Phrases: (h) “As a rule”: “normally, generally”) (available at oed.com).

³⁴ AD Agreement, Art. 6.10 (second sentence: “In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.” See, e.g., *EC – Salmon (Norway) (Panel)*, para. 7.188 (emphasis original).

³⁵ See China FWS, paras. 278-282 (arguing that Article 6.10 “does not impose an obligation on the investigation authority to calculate [an] individual dumping margin for each of the known exporters “and” producers.”). China FWS, para. 280 (emphasis original).

³⁶ Article 6.10 (emphasis added).

dumping for each known exporter or producer concerned”), it is at the point of “limit[ing] their examination”.

27. China’s reliance on a passage from the *EC – Salmon* panel report³⁷ is similarly misplaced because the passage concerned “the starting point for selection of interested parties investigated” – namely, whether the authority may limit its examination to “known exporter[s]” or to “known producer[s]”.³⁸ Indeed, the same panel refuted precisely the argument raised by China here: “By including both the exporter and the producer in the investigation, Article 6.10 would dictate that an individual margin of dumping would have to be calculated for each entity.”³⁹ China’s position that an authority may decline to determine an individual margin of dumping for each known exporter or producer, even where the conditions of the second sentence of Article 6.10 are not satisfied, is at odds with both the text of the provision and the panel report China cites.

28. It should also be noted that China’s position contrasts with its representations to other panels. For example, China represented to the panel in *EC – Salmon* that the first sentence of Article 6.10 “requires investigating authorities, as a rule, to calculate an individual margin of dumping for each exporter/foreign producer of the allegedly dumped imports . . . sampling is the only exception to [this] rule”⁴⁰

29. Accordingly, to the extent MOFCOM did not calculate an individual dumping margin for each known Australian respondent, the Panel should evaluate whether MOFCOM complied with Article 6.10 by limiting the examination “to a reasonable number of interested parties or products” “[i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable”.

III. AUSTRALIA’S CLAIMS REGARDING THE SCM AGREEMENT

A. Article 12.7 of the SCM Agreement

30. Australia argues that MOFCOM breached Article 12.7 of the SCM Agreement in relying upon facts available for its determinations of benefit and specificity.⁴¹ For both determinations, Australia argues that the conditions to resort to facts available under Article 12.7 were not met because (i) no necessary information was missing from the record and (ii) the supposedly missing information did not exist and therefore could not have been supplied (and, in the case of specificity, was not relevant in the first instance).⁴²

³⁷ China FWS, para. 281 (misleadingly citing *EC – Salmon (Norway) (panel)* for the proposition that an investigating authority need not calculate individual dumping margins for both known exporters and known producers).

³⁸ *EC – Salmon (Norway) (Panel)*, para. 7.163.

³⁹ *EC – Salmon (Norway) (Panel)*, para. 7.167 (emphasis added).

⁴⁰ *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Panel)*, para. 7.51 (summarizing China’s arguments).

⁴¹ Australia FWS, paras. 419-440, 512-534.

⁴² Australia FWS, paras. 419, 513-516, 517-519. For benefit, Australia also argues that MOFCOM did not consider information “nonetheless submitting within a reasonable period” or “notify interested parties it was making determinations on the basis of facts available.” Australia FWS, para. 419.

31. In response, China argues that certain Australian respondents (i.e., traders or producers) did not submit complete questionnaire responses, meaning the record lacked “crucial necessary information concerning the subsidies granted on the manufacture or production of subject merchandise.”⁴³ China argues that the Government of Australia similarly failed to provide certain information that was necessary to determine whether the programs benefited barley producers and were specific to barley producers.⁴⁴

32. Article 12.7 is drafted almost identically to Article 6.8 of the AD Agreement.⁴⁵ For that reason, the United States refers the Panel to its exposition of Article 6.8 above. Unlike the AD Agreement, the SCM Agreement does not contain an Annex with clarifications on circumstances in which resort to facts available is appropriate because a party has failed to provide necessary information or significantly impeded an investigation. However, these AD Agreement provisions may be considered as context in interpreting Article 12.7 of the SCM Agreement in light of the virtually identical text of the obligation (Articles 6.8 and 12.7).

33. For a facts available determination to be consistent with Article 12.7, the investigating authority would need to conduct an evaluation that satisfies the foregoing – both in justifying the use of facts available and in selecting the facts used to replace any missing, necessary information. The evaluation is fact-specific and must take appropriate account of whether the information was verifiable, timely submitted, and can be used without undue difficulty (i.e., the “nature, quality, and amount of the evidence on the record”),⁴⁶ which includes the information supplied by the Australian respondents and any other relevant record information.

34. As to MOFCOM’s benefit determination, the United States notes that under Article 12.7 a determination “cannot be made on the basis of non-factual assumptions or speculation”,⁴⁷ and will “depend on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record”.⁴⁸ As an illustrative example, consider the record evidence which, according to Australia, showed that Australian barley producers are non-irrigated “dryland” producers,⁴⁹ but that at least one of the three countervailed programs was irrigation-based.⁵⁰ The Panel would need to evaluate whether, despite such evidence, the “particular circumstances” of the case nonetheless supported the determination using facts available that the Australian barley producers benefited from the programs in question.

⁴³ See China FWS, paras. 291-296 (internal quotations omitted).

⁴⁴ See, e.g., China FWS paras. 303-304.

⁴⁵ SCM Agreement, Art. 12.7 (“In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.”).

⁴⁶ AD Agreement, Annex II, para. 3; see *US – Carbon Steel (India) (AB)*, para. 4.421 (evaluation should consider “the “nature, quality, and amount of the evidence on the record”).

⁴⁷ *US – Countervailing Measures (China) (AB)*, para. 4.178 (quoting *US – Carbon Steel (India) (AB)*, para. 4.417).

⁴⁸ *US – Carbon Steel (India) (AB)*, para. 4.421; see also *US – Countervailing Duties (China) (AB)*, para. 4.179 (citing *US – Carbon Steel (India) (AB)*, para. 4.421) (“the nature and extent of the explanation and analysis required will necessarily vary from determination to determination”).

⁴⁹ See, e.g., Australia FWS, para. 390.

⁵⁰ See, e.g., Australia FWS, paras. 387-389.

35. As to MOFCOM’s specificity determination, China purports to catalogue the bases for MOFCOM’s use of facts available in a table listing the information it considered necessary but that the Government of Australia failed to supply.⁵¹ However, to the extent China is arguing that these specific deficiencies supported MOFCOM’s determination to use facts available, it does not indicate where in its final determination these reasons were set forth. Furthermore, taking the first item in China’s list as an example, it leaves unexplained how “annual or periodic reports on implementation” were in fact “necessary” in order to determine whether there was limited or predominant use of the programs by certain enterprises.

B. Article 1.1(a) of the SCM Agreement

36. Australia argues that MOFCOM’s financial contribution determinations breached Article 1.1(a) of the SCM Agreement because they either consisted of payments from one government entity to another, and thus lacked a “recipient”, or were improperly treated as “direct transfers of funds” under Article 1.1(a)(i).⁵² Of relevance to Australia’s claims, in its financial contribution determinations MOFCOM did not resort to facts available (unlike its benefit and specificity determinations).⁵³ Instead, MOFCOM purported to rely on the information supplied by the interested parties.⁵⁴

37. China does not contest Australia’s argument that a financial contribution must entail a benefit conferred on a “recipient”, rather than transferred between two government entities, or that its determinations were based upon the “direct transfer of funds” to those recipients.⁵⁵ Rather, China argues that the funds could ultimately have been conferred on recipients “in the agricultural industries” even if such further transfers are not reflected in the record information.⁵⁶ China also argues that “a direct transfer of funds” under Article 1.1(a)(i) is broader than Australia’s interpretation.⁵⁷

38. The United States comments on Article 1.1(a)(1) and its application to the positions expressed by the parties. Article 1.1 of the SCM Agreement provides in relevant part that “a subsidy shall be deemed to exist if”:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

⁵¹ China, FWS, paras. 396-397.

⁵² See, e.g., Australia FWS, paras. 395-396.

⁵³ See Australia FWS, paras. 397-406, 512.

⁵⁴ See China FWS, paras. 329-335 (in contrast to its arguments concerning benefit and specificity, not citing facts available with respect to its findings concerning financial contribution). See also Exhibit CHN-4, pp. 7, 9, 10 (identifying the bases for MOFCOM’s financial contribution determinations).

⁵⁵ See China FWS, paras. 329-330.

⁵⁶ See China FWS, paras. 329-330. China appears to place the burden on the Government of Australia to prove the negative that such transfers did not occur. See China FWS, para. 331.

⁵⁷ See China FWS, paras. 333-334.

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . .⁵⁸

39. Thus, the first question in any subsidy analysis is whether there is a financial contribution by a government or a public body.

40. The United States considers that a financial contribution necessarily involves a recipient, as distinct from the “government or public body” that is making the financial contribution, as is suggested by the title and text (“benefit to the recipient”) of Article 14.⁵⁹ According to China, in its CVD investigation, MOFCOM countervailed the programs in question because they involved “a direct transfer of funds” from the government or public body” to the recipients in question – i.e., barley producers.⁶⁰ In explaining the factual basis for this determination, China cites the absence of “record evidence that the state and territory governments . . . did not distribute the funds under the programs further to recipients.”⁶¹ China asserts that the Government of Australia’s questionnaire responses “made it clear” that the recipients of the direct transfers of funds were the “agricultural industries” rather than the government itself; however, China does not point to any record evidence supporting that finding.⁶² Therefore, it is difficult to see how an objective and unbiased investigating authority could have concluded, based on the record evidence as summarized by MOFCOM, that a financial contribution was made.

41. If MOFCOM did not base its determination on the record information supplied by the interested parties, it is not apparent how it could have reached an affirmative determination without resorting to fact available – even though China argues that MOFCOM did not rely on facts available. As a general matter, to the extent the investigating authority is resorting to facts available as opposed to the information supplied by the respondents, the investigating authority would need to satisfy the obligations described above. Furthermore, as Australia observes,⁶³ an investigating authority must in the first instance satisfy the notice and explanation requirements of Articles 22.3 and 22.5 of the SCM Agreement. For example, as elaborated below, Article 22.3 requires that the public notice set forth “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.”

⁵⁸ Footnote omitted.

⁵⁹ The text of Article 14, which relates to calculating “the benefit to the recipient conferred pursuant to paragraph 1 of Article 1,” also distinguishes the “government” and its financial contribution from the “firm receiving” the loan (subparagraph (b)) or loan guarantee (subparagraph (c)).

⁶⁰ See, e.g., China FWS, paras. 325-326, 330-331, 389, 391. China also broadly refers to the recipients as “parties in the agricultural industries”. China FWS, paras. 330-331.

⁶¹ China FWS, para. 331.

⁶² See China FWS, para. 330.

⁶³ See, e.g., Australia FWS, para. 940.

Similarly, Article 22.5 requires “all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures.” These requirements would not be satisfied if an investigating authority fails to identify the basis for a financial contribution determination – whether that determination is based on facts available or otherwise.

42. Furthermore, because China represents that barley producers or certain “agriculture industries” were the recipients⁶⁴ and that MOFCOM based financial contribution on “a direct transfer of funds”,⁶⁵ the Panel should evaluate whether MOFCOM adequately demonstrated that those identified recipients received a direct transfer of funds as defined under Article 1.1(a)(1)(i). In this regard, the United States agrees with Australia that “a direct transfer of funds” or “potential direct transfers of funds or liabilities” under Article 1.1(a)(1)(i) are distinct from the other types of financial contribution listed under (ii) through (iv).⁶⁶ Given MOFCOM’s stated basis for financial contribution, it would need to demonstrate that the government or public body in question directly transferred funds, which under Article 1.1(a)(1)(i) could include grants, loans, equity infusions, and loan guarantees. Evidence concerning a different subparagraph of Article 1.1(a)(1), such as the provision of goods or services, would not support MOFCOM’s determination under Article 1.1(a)(1)(i). Accordingly, the Panel should evaluate whether MOFCOM adequately demonstrated that the recipients (as identified by MOFCOM, barley producers) received a direct transfer of funds as defined under Article 1.1(a)(1)(i).

C. Article 1.1(b) of the SCM Agreement

43. Australia argues that MOFCOM breached Article 1.1(b) because the programs in question did not confer a benefit or “advantage” (in this case, a direct transfer of funds) to any recipients.⁶⁷ In addition, Australia argues that, in resorting to facts available, MOFCOM failed to satisfy the requirements outlined above and therefore breached Article 12.7.⁶⁸

44. In response, China refers to the same arguments it made concerning financial contribution, and generally argues that certain deficiencies in the responses by the Government of Australia allowed MOFCOM to resort to facts available in determining benefit.⁶⁹

45. Article 1.1(b) of the SCM Agreement sets out the second step of the subsidy analysis, an inquiry into whether the financial contribution identified under Article 1.1(a) confers “a benefit.” The term “benefit” is not defined by the SCM Agreement. Based on the ordinary meaning of this term⁷⁰ and the context provided by Article 14, a “benefit” arises when the recipient has received from a financial contribution something that makes the recipient better off (an “advantage, profit, gain”) than it would otherwise have been absent that financial contribution.⁷¹

⁶⁴ See China FWS, paras. 330-331.

⁶⁵ See, e.g., China FWS, para. 332; see also Exhibit CHN-4, pp. 7, 9, 11.

⁶⁶ See Australia FWS, paras. 397-402.

⁶⁷ See, e.g., Australia FWS, para. 408.

⁶⁸ See Australia FWS, paras. 419-481.

⁶⁹ See China FWS, paras. 338-346.

⁷⁰ Oxford English Dictionary, “benefit” (third definition: “a. Advantage, profit, good.” “d. Pecuniary advantage, profit, gain.”) (available at oed.com).

⁷¹ SCM Agreement, Art. 14(b) (benefit for a loan is the difference between the amount paid on a government loan versus the amount the firm would pay on a comparable commercial loan on the market); Art. 14(c) (benefit for a

The focus of the inquiry is on the “benefit to the recipient” rather than the cost to the government.⁷²

46. Article 14 of the SCM Agreement governs the method by which an investigating authority calculates the amount of the benefit and is directly relevant context given the textual cross-reference to calculating “the benefit to the recipient conferred pursuant to paragraph 1 of Article 1”⁷³

47. For grants, under the benefit-to-the-recipient approach, the recipient is made better off by the unencumbered access to the financial contribution. Thus, “the act of identifying the ‘benefit’ (under Article 1.1) is normally the same as the act of measuring the ‘benefit’ (under Article 14).”⁷⁴ As the panel in *EC – Large Civil Aircraft (Panel)* observed: “[I]n the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant.”⁷⁵

48. Accordingly, the Panel should evaluate whether MOFCOM adequately demonstrated the “benefit to the recipient” – i.e., that Australian barley producers benefited from direct transfers of funds, as defined under Article 1.1(a)(1)(i). As represented by China, this determination relied upon the use of facts available, as opposed to the information supplied by the Australian respondents.⁷⁶ Thus, in addition to the foregoing, the Panel should evaluate whether MOFCOM’s determinations of benefit satisfied all of the requirements of Article 12.7 outlined above.

D. Article 2.1(c) and Article 2.4 of the SCM Agreement

49. Australia argues that China failed to substantiate its specificity determinations using positive evidence or to “conform to the principles governing an assessment of specificity set out in Article 2.1 of the SCM Agreement.”⁷⁷ Australia also argues that the conditions of Article 12.7 were not satisfied (e.g., “necessary” information was not missing from the record), so MOFCOM had no basis to rely upon facts available for its specificity determinations.⁷⁸

50. China argues that because its specificity determinations were based on the “other factors” under Article 2.1(c), it was not required to examine the conditions of Articles 2.1(a) or (b).⁷⁹ It also argues that because the Government of Australia did not supply certain information relevant

loan guarantee is the difference between the amount that the firm pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee). See *Canada – Aircraft (AB)*, para. 157; *EC – Large Civil Aircraft (AB)*, para. 973; *US – Carbon Steel (India) (AB)*, para. 4.123.

⁷² SCM Agreement, Art. 14 (“Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient”); see *Canada – Aircraft (AB)*, para. 154. See also *US – Carbon Steel (India) (AB)*, para. 4.123.

⁷³ SCM Agreement, Art. 14.

⁷⁴ *US – Lead and Bismuth II (Panel)*, para. 122.

⁷⁵ *EC – Large Civil Aircraft (Panel)*, para. 7.1969, fn. 5724.

⁷⁶ See China FWS, para. 346.

⁷⁷ Australia FWS, para. 486.

⁷⁸ Australia FWS, paras. 512-513.

⁷⁹ China FWS, para. 384.

to the Article 2.1(c) “other factors”, MOFCOM was entitled to find *de facto* specificity using facts available.⁸⁰

51. Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is “specific in accordance with the provisions of Article 2.” Article 2.1 “sets out a number of principles for determining whether a subsidy is specific by virtue of its limitation to an enterprise or industry or group of enterprises or industries (‘certain enterprises’).”⁸¹ Accordingly, the “central inquiry” under Article 2.1 is to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to “certain enterprises” within the jurisdiction of the granting authority.⁸²

52. Article 2.1(c) establishes that, “notwithstanding any appearance of non-specificity” resulting from application of subparagraphs (a) and (b), a subsidy may nevertheless be “in fact” specific. Application of Article 2.1(c) is a fact-driven, context-dependent exercise. In conducting its analysis under Article 2.1(c), an investigating authority “may” consider “other factors” – i.e., the four factors set out in the second sentence of Article 2.1(c): use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. An authority need not examine all four factors when conducting its analysis.⁸³ The third sentence of Article 2.1(c) sets out two additional considerations to be taken into account when conducting a *de facto* specificity analysis: 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.”

53. The analysis in Article 2.1 is informed by the obligation in Article 2.4 that any specificity determination “shall be clearly substantiated on the basis of positive evidence.” In this regard, the panel in *US – Antidumping and Countervailing Duties (China)* observed that “it is the duty of a panel reviewing an investigating authority’s determination to conduct a “critical and searching” examination, based on the information contained in the record and the explanations given by the authority in its published report.”⁸⁴

54. Accordingly, the Panel should evaluate whether MOFCOM evaluated the programs in question, satisfied each condition set forth under Article 2.1(c), and did so in a manner that was “clearly substantiated on the basis of positive evidence.” The United States offers comments on certain textual interpretations argued by the parties.

55. First, in identifying the basis for MOFCOM’s specificity determinations, China indicates that it was based on MOFCOM’s “reason to suspect that the barley industry is a major user of the funds.”⁸⁵ Although the first sentence of Article 2.1(c) refers to “reasons to believe that the subsidy may in fact be specific”, it is as the precondition for the investigating authority to

⁸⁰ China FWS, paras. 393-398.

⁸¹ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364.

⁸² *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

⁸³ *US – Softwood Lumber IV (Panel)*, para. 7.123.

⁸⁴ *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.50.

⁸⁵ *See, e.g.*, China FWS, paras. 389-391 (citing Exhibit CHN-4, p. 8).

“[consider] other factors”. The “reasons to believe” are not a basis for the investigating authority to find *de facto* specificity, a determination which must satisfy the requirements of Articles 2.1(c) and 2.4, outlined above.

56. Second, in purporting to identify the “other factors” relied upon by MOFCOM, China relies upon text that is not found in Article 2.1(c). Specifically, China refers to two “other factors”: that barley is a major crop “in terms of the cultivated areas, yield and output value” and that “the Australian Government gives priority to agriculture.”⁸⁶ These are not among the four “other factors [that] may be considered” in evaluating *de facto* specificity under Article 2.1(c).⁸⁷

57. Elsewhere China does refer to “predominant use of certain enterprises”⁸⁸ and “use of a subsidy programme by a limited number of certain enterprises”,⁸⁹ two factors identified under Article 2.1(c). However, China simply equates those factors with different factors which are absent from Article 2.1(c). China asserts that “giv[ing] priority to agriculture . . . was explicitly relating to a factor provided for in Article 2.1(c), *i.e.*, ‘use of a subsidy programme by a limited number of enterprises.’”⁹⁰ Similarly, China asserts that the fact that barley is a major crop “constituted factual basis that barley industry was predominant user of the subsidies under the program.”⁹¹ These arguments would effectively substitute factors that, as noted above, were not included in Article 2.1(c) for factors that were. If an investigating authority bases its *de facto* specificity determination on a factor that is not provided for under Article 2.1(c), that determination would be inconsistent with the SCM Agreement.

58. Third, assuming *arguendo* that MOFCOM based its specificity determinations on one of the Article 2.1(c) factors China now cites – *i.e.*, “predominant use by certain enterprises” or “use . . . by a limited number of certain enterprises” – the Panel would need to evaluate whether MOFCOM clearly substantiated on the basis of positive evidence that such use was limited to “certain enterprises”. Here, although China suggests that the “certain enterprises” identified by MOFCOM were barley producers, the limitations it identifies are with respect to (i) the entire agriculture industry or (ii) a collection of different crops, one of which is barley, that “accounted for 80% of all crops in terms of the cultivated area, yield, and output value.”⁹² For the two factors identified by China, to satisfy the requirements of Articles 2.1(c) and 2.4, an investigating authority would need to identify how the subsidy is limited to or predominately used by the “certain enterprises” it identified.

⁸⁶ See, *e.g.*, China FWS, para. 392. China cites these factors with respect to one of the three subsidy programs in question. It indicates that “[s]imilar languages” underpin the *de facto* specificity determinations for the other two.

⁸⁷ The four factors are:

“use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.

⁸⁸ China FWS, para. 391.

⁸⁹ China FWS, para. 390.

⁹⁰ China FWS, para. 390 (emphasis added).

⁹¹ China FWS, para. 391.

⁹² See China FWS, paras. 389, 391. Specifically, it refers to Australia’s “barley industry”.

59. Finally, the United States notes that many of China’s arguments pertain to MOFCOM’s reliance on facts available. As outlined above, MOFCOM would need to satisfy the requirements for recourse to facts available under Article 12.7 of the SCM Agreement.

IV. CLAIMS REGARDING ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT AND ARTICLES 15.1 AND 15.5 OF THE SCM AGREEMENT

60. Australia argues that MOFCOM breached Articles 3.1 and 3.5 of the AD Agreement and Articles 15.1 and 15.5 of the SCM Agreement because it did not conduct a proper non-attribution analysis with respect to certain “known” factors, including the role of Chinese government support policies to producers of wheat and corn, the uncompetitive production costs of the domestic industry, qualitative differences between subject Australian and domestically produced barley, and non-subject imports during the period of investigation.⁹³

61. China argues that MOFCOM properly examined and dismissed the first three factors and that the interested parties failed to provide “evidence[] that third country non-subject imports were injuring the domestic industry at the same time as subject imports.”⁹⁴

62. The second sentences of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require an investigating authority to examine “all relevant evidence” before it both to ascertain whether there was a causal link between the dumped and subsidised imposts and the injury experienced by the domestic industry and to examine whether factors other than the dumped or subsidised imports were also causing injury. The third sentences of Articles 3.5 and 15.5 require an authority to examine “any known factors other than the [dumped or subsidised] imports which at the same time are injuring the domestic industry” to ensure that “the injuries caused by these other factors must not be attributed to the [dumped or subsidised] imports.” A non-attribution analysis is therefore necessary if (i) there are one or more other known factors other than the dumped or subsidised imports that (ii) are injuring the domestic industry (iii) at the same time.

63. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis.⁹⁵ The question of whether an investigating authority’s analysis is consistent with Article 3 of the AD Agreement and Article 15 of the SCM Agreement should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1 and Article 15.1.⁹⁶

64. Based on the above discussion, the United States observes that the Panel must determine if the investigating authority demonstrated in its investigation that it examined other “known

⁹³ See Australia FWS, paras. 673-695.

⁹⁴ See China FWS, paras. 518-543.

⁹⁵ *US – Hot-Rolled Steel (AB)*, para. 224; see also *US – Tyres (AB)*, para. 252 (stating, in safeguard proceedings conducted under the China Accession Protocol, “[t]he extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case”).

⁹⁶ *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.272-7.273 (citing *US-Hot-Rolled Steel (AB)*, paras. 192-193).

factors” within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, and based its causation analysis on an examination of all relevant evidence. The conclusions must be those an unbiased and objective investigating authority could have reached.⁹⁷

V. CLAIMS REGARDING ARTICLE 5 OF THE AD AGREEMENT AND ARTICLE 11 OF THE SCM AGREEMENT

65. Australia contends that China breached Article 5.1, 5.2, 5.3, and 5.4 of the AD Agreement and Articles 11.1, 11.2, 11.3, and 11.4 of the SCM Agreement because at the initiation stage neither MOFCOM nor the petitioning entity, the China International Chamber of Commerce (CICC) “identified a single Chinese barley producer or association of producers”.⁹⁸ For this defect, among others, Australia also argues that MOFCOM acted inconsistently with Article 5.8 of the AD Agreement and Article 11.8 of the SCM Agreement by failing to reject the petitions.⁹⁹

66. China argues that the AD and CVD applications were excepted from the requirement to provide a list of all known producers of the like product for two reasons: China’s barley industry is “fragmented . . . with exceptionally large number of producers”¹⁰⁰ and:

Since the domestic industry on behalf of which the applications were made is the Chinese barley industry with all Chinese barley producers, and there are numerous barley growers, the list of known producers was not relevant to the definition of the scope of the domestic industry.¹⁰¹

67. The United States provides several comments on the proper interpretation of the requirements Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement, and the degree to which China’s arguments disregard those requirements. The chapeau to Article 5.2 and paragraph (i) of that Article provide that the petition “shall contain such information as is reasonably available to the applicant on the following:

Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known producers of the like product (or associations of the like product) and to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers.¹⁰²

⁹⁷ See AD Agreement, Art. 17.6. See also, e.g., *US – Countervailing Measures on Certain EC Products (21.5 – EC)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn (Panel)*, as well as other reports concerning the AD Agreement, and observing that its role was to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner.”).

⁹⁸ See Australia FWS, paras. 759-775.

⁹⁹ See Australia FWS, para. 761 (arguing that MOFCOM also failed to properly examine the degree of support or opposition to the applications).

¹⁰⁰ China FWS, para. 555.

¹⁰¹ See China FWS, paras. 553-560.

¹⁰² Emphasis added. Article 11.2 of the SCM Agreement contains parallel language on countervailing duty investigations.

68. Accordingly, Article 5.2(i) of the AD Agreement and Article 11.8(i) of the SCM Agreement require that written applications requesting the initiation of anti-dumping or countervailing duty investigations contain, among other things, “the identity of the applicant” and, where “on behalf of the domestic industry,” a “list of all known domestic producers of the like product (or associations of domestic producers of the like product)” It also requires a “description of the volume and value of the domestic production of the domestic like product by the applicant.”

69. As the panel report observed in *US – Softwood Lumber V*, and both Australia and China note, these provisions “oblige the applicant to provide reasonably available information of the relevant matters.”¹⁰³

70. In turn, Article 5.3 of the AD Agreement and Article 11.3 of the SCM Agreement, require authorities to “examine the accuracy and adequacy of the evidence provided in the [applications] to determine whether there is sufficient evidence to justify the initiation of an investigation.” The panel report in *Guatemala – Cement I* observed that while “the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination,” the term “sufficient evidence” nevertheless required “a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement.”¹⁰⁴

71. China does not dispute Australia’s statement that the applications in question failed to “identif[y] a single Chinese barley producer or association of producers” or that no such producer or association was “reasonably available”.¹⁰⁵ China appears to concede both points. Instead, China argues that the list of known producers (or associations) required under Articles 5.2(i) and 11.2(i) “was not relevant” because their “specific purpose was to ‘identify the industry on behalf of which the application is made’”, and the “domestic industry on behalf of which the applications were made is the Chinese barley industry with all barley producers.”¹⁰⁶ However, China appears to omit that one of the ways in which the application “shall identify the industry on behalf of which the application is made” is “by a list of all known producers of the like product”¹⁰⁷ Contrary to China’s argument, that requirement is explicit and mandatory.

72. In addition, China argues that “[i]t would be unimaginable that the numerous farmers could be expected to individually express their opinions directly to MOFCOM.”¹⁰⁸ However, nothing in the text of Article 5.2(i) of the AD Agreement or Article 11.8(ii) of the SCM

¹⁰³ *US – Softwood Lumber V*, para. 7.54. See also Australia FWS, para. 746; China FWS, para. 568.

¹⁰⁴ *Guatemala – Cement I (Panel)*, para. 5.36. See also *EC – Bed Linen (Panel)*, para. 6.199 (considering that the only basis upon which a panel can review an authority’s examination of the accuracy and adequacy of information filed in a petition is by reference “to the determination that examination is in aid of – the determination whether there is sufficient evidence to justify initiation”, which is itself primarily based on an examination of the information contained in the relevant petition).

¹⁰⁵ See China FWS, paras. 558-560.

¹⁰⁶ China FWS, para. 560.

¹⁰⁷ AD Agreement, Art. 5.2(i) (emphasis added).

¹⁰⁸ See China FWS, para. 554.

Agreement would require that. Rather, what these provisions require is “a list of all known producers of the like product.”

73. The only text cited by China in support of its position is the footnote under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement, a separate set of provisions that directs authorities to undertake “an examination of the degree of support for, or opposition to” petitions, allows authorities to evaluate the standing of applicants using “statistically valid sampling techniques” in the case of “fragmented industries.”¹⁰⁹ To the extent China is arguing that this footnote under a different provision exempted CICC from filing a list of all known producers with their applications, and obviated the need for MOFCOM to request and review such a list, a plain reading of Article 5.2(i) and Article 11.8(ii) reveals no such exemptions.

74. China does argue that CICC annexed a list of “[r]elevant organizations” in six provinces in the proprietary version of the applications, and that MOFCOM duly determined that these organizations accounted for “more than 50%” of total domestic production of barley.¹¹⁰ However, China does not appear to argue that this confidential list, whatever it contains, satisfied the requirement to list all known domestic barley producers that were reasonably available to the CICC.

75. With the above considerations in mind, the Panel should evaluate whether an unbiased and objective authority could have concluded that there was sufficient information in the applications concerning all domestic barley producers known to the petitioner to justify initiation of the investigations.¹¹¹ As part of this evaluation, the Panel should assess whether the written applications on behalf of the domestic barley industry included a list of all known domestic producers of like product (or associations) based on reasonably available information.

VI. CLAIMS RELATED TO ARTICLES 12.2 AND 12.2.2 OF THE AD AGREEMENT AND ARTICLES 22.3 AND 22.5 OF THE SCM AGREEMENT

76. Australia argues that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement by failing to publish all relevant information on matters of fact, law, and reasons concerning the dumping, subsidy, injury, and causation determinations.¹¹²

77. China argues that it properly identified the bases and information sources for the findings in its dumping, countervailing duty, and injury determinations.¹¹³ China also argues that because Australia did not “engag[e] in any meaningful discussion based on the specific languages in the Final Determinations [it] could not discharge its burden of proof for substantiating its claim of violation.”¹¹⁴ This argument echoes China’s assertions throughout its submission that Australia

¹⁰⁹ China FWS, para. 555.

¹¹⁰ See China FWS, para. 550.

¹¹¹ See Australia FWS, para. 754.

¹¹² See Australia FWS, paras. 940-958.

¹¹³ See China FWS, paras. 684-696.

¹¹⁴ China FWS, para. 696.

did not establish a *prima facie* case or that Australia improperly seeks for China to “self-substantiate” Australia’s claims with respect to the findings in MOFCOM’s determinations.¹¹⁵

78. Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require authorities to provide “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material” by the investigating authority, and “all relevant information on matters of fact and law” leading to the imposition of definitive measures. These provisions require an authority to disclose the facts, law, and reasons that led to the imposition of anti-dumping or countervailing duties, so as to enable interested parties to, among other things, “pursue judicial review of a final determination.”¹¹⁶

79. The United States observes that the analyses contained in the final anti-dumping and subsidy determinations (as appended to the parties’ written submissions) are very brief. They are often lacking in evidentiary support concerning key elements of the dumping, subsidy, injury, and causation determinations.¹¹⁷ In some cases it is difficult even to discern the basis for MOFCOM’s conclusions.¹¹⁸ The Panel will need to determine whether China could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement based on the content of such abbreviated, unsubstantiated, and indecipherable analyses.

80. With respect to China’s claim that Australia did not establish a *prima facie* case or improperly seeks for China to “self-substantiate” the findings,¹¹⁹ the United States notes Australia’s catalogue of numerous areas in which it argues that it could not discern the relevant information, or MOFCOM simply did not provide it.¹²⁰ In making its findings, the Panel should consider whether MOFCOM should benefit from its own failure to provide notice or explanation of relevant information by using those failures to argue that the complainant did not meet its burden of proof. Such an outcome would not appear appropriate under these important provisions that require an authority to disclose, in sufficient detail, the facts, law, and reasons that led to the imposition of anti-dumping or countervailing duties.

VII. CONCLUSION

81. The United States thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

¹¹⁵ See, e.g., China FWS, paras. 231, 438, 484, 512, 654-662, 696.

¹¹⁶ China – GOES (AB), paras. 240-241, 258.

¹¹⁷ See Exhibit CHN-1 (Final Anti-Dumping Determination) and Exhibit CHN-4 (Final Countervailing Duty Determination). Australia’s submission identifies examples concerning the basis for the countervailable duty determination, the calculation of normal value and export price, and the injury determination. See, e.g., Australia FWS, paras. 940-958.

¹¹⁸ See Exhibit CHN-1 (Final Anti-Dumping Determination) and Exhibit CHN-4 (Final Countervailing Duty Determination).

¹¹⁹ See, e.g., China FWS, paras. 231, 438, 484, 512, 654-662, 696.

¹²⁰ See, e.g., Australia FWS, para. 940.