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

(DS603)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

March 8, 2023

Madam Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. Our statement today will focus on the interpretation of three provisions of the Anti-Dumping Agreement (AD Agreement): (1) Article 17.6(ii) and its application to the claims in this dispute; (2) the phrase "proper comparison" as it appears in the context of Article 2.2; and (3) the modifiers in the first sentence of Article 2.2.1.1, which dictate when "normal value" should not be calculated based on the cost reported in the records kept by the exporter or producer under investigation.

3. Before turning to the arguments on these issues, a threshold question is whether entire claims of China's concern measures that are outside the Panel's terms of reference.[1] China's AD claims pertain to determinations made in two original investigations, stainless steel sinks and wind towers, that according to Australia were superseded by later expiry reviews that relied upon different legal bases and were completed before the Panel was established.[2] Similarly, the United States understands China's CVD claims to pertain to a determination made in the original investigation of stainless steel sinks that terminated before the Panel was established.[3]

4. Articles 7.1 and 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) set out a panel's terms of reference. Specifically, under Article 7.1, when the Dispute Settlement Body (DSB) establishes a panel, the panel's terms of reference,

[1] U.S. third-party submission, paras. 2-3, 34-39.
[2] *See, e.g.*, Australia's first written submission, paras. 22-23.
[3] *See* Australia's first written submission, paras. 564-568.

unless otherwise decided, are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."[4] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he 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."[5]

5. Here, Australia has provided evidence that, before the Panel was established, the specific measures at issue had in fact ended.[6] In that case, the measures underlying China's claims lie outside the Panel's terms of reference and need not be addressed further.[7]

I. Article 17.6(ii) of the AD Agreement

6. The United States first comments on the proper understanding of Article 17.6(ii) of the AD Agreement and how it applies to China's claims in this dispute. As Australia noted in its first written submission, Article 17.6(ii) governs where a provision has more than one "permissible" interpretation.[8]

7. At the end of the Uruguay Round negotiations, Article 17.6(ii) was key to the acceptance of the other provisions of the AD Agreement. The existence of such a provision confirms that Members were aware that the text of the AD Agreement could pose particular interpretive

[4] *See US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.
[5] *EC – Chicken Cuts (AB)*, para. 156.
[6] *See, e.g.*, Australia's first written submission, paras. 23-139, 564-568.
[7] *See* U.S. third-party submission, para. 38.
[8] Australia's first written submission, para. 12, n.11.

challenges, at least in part because it was drafted to cover varying and complex anti-dumping regimes and long-standing differences concerning methodology. WTO Members agreed, therefore, that it would be a *legal error* not to respect a permissible interpretation of the AD Agreement.

8. The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. As the United States has explained for years, "permissible" means just that: a meaning that *could be* reached under the Vienna Convention.[9] Article 17.6(ii) itself confirms that provisions of the AD Agreement may "admit[] of more than one permissible interpretation."

9. Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel must find the measure to be in conformity with the AD Agreement. As one panel report stated, "[I]n accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."[10]

10. The recent award by the arbitrators in *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands (DS591),* provides an exemplar. The arbitrators in that dispute seriously engaged with the text of Article 17.6(ii) and appropriately recognized that the subparagraphs of Article 17.6 "must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement."[11]

[9] *See, e.g.*, US DSB Statement (February 2009) (WT/DSB/M/265) at paras. 77-79.
[10] *Argentina – Poultry*, para. 7.45.
[11] Arbitrator's award, para. 4.12.

11. That analysis addressed directly the nature of treaty interpretation under the Vienna Convention and explained that a proper "approach assumes, as the second sentence does, that different treaty interpreters applying the same tools of the Vienna Convention may, in good faith and with solid arguments in support, reach different conclusions on the 'correct' interpretation of a treaty provision."[12]

12. The arbitrators in that dispute went on to note favorably the observation that the Vienna Convention rules "are facilitative not disciplinary and do not 'instruct the treaty interpreter to find a single meaning of the treaty' as a former Appellate Body member has written."[13]

13. In prior reports, the Appellate Body simply asserted "the rules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results."[14] That assertion was unsupported. The ordinary meaning of "permissible" is "allowable" or "permitted" – that is, an interpretation that *could be* reached under customary rules of interpretation.

14. Thus, the Panel's task under Article 17.6(ii) is to determine whether Australia's investigating authority relied upon an interpretation that *could be* reached under customary rules of interpretation – and not whether Australia's interpretation is the same as the one the Panel might reach first.

[12] Arbitrator's award, para. 4.13.
[13] Arbitrator's award, para. 4.15, n.43.
[14] *See, e.g., US – Continued Zeroing (AB)*, para. 273.

15. With this standard in mind, Australia's first written submission demonstrates that the interpretations underlying the challenged AD and CVD determinations, at a minimum, satisfied that Article 17.6(ii) standard. For example, as explained in the U.S. third-party submission[15] and elaborated today, Australia's investigating authority employed an interpretation of Articles 2.2 and 2.2.1.1 of the AD Agreement that is based on the text of those provisions, and under the customary rules of interpretation reflects a permissible interpretation.

II. The Phrase "Proper Comparison" in Article 2.2 of the AD Agreement

16. We now turn to Article 2.2 of the AD Agreement – in particular, the phrase "proper comparison." As Japan[16] and the United Kingdom[17] point out in their third-party submissions, there is a substance to the term "normal value." This substance is embodied in Article 2.1 of the AD Agreement, which says that "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."[18]

17. The phrase "proper comparison" first appears in Article 2.2 of the AD Agreement as part of the sentence clause, "when … such sales do not permit a proper comparison." The "such sales" referenced in this clause are, according to Article 2.1, the sales to which an investigating authority must look first to determine "normal value."[19]

[15] U.S. third-party submission, paras. 4-33.
[16] Japan third-party submission, paras. 6-11.
[17] UK third-party submission, paras. 16-17.
[18] AD Agreement, Art. 2.1 (italics added).
[19] AD Agreement, Art. 2.1; *see also* AD Agreement, Art. 2.2 n.2.

18. Article 2.2 describes two circumstances when "such sales" of the like product in the ordinary course of trade in the home market do not permit a "proper comparison."

19. A low volume of these sales is one set of circumstances. But even then, such sales "should [still] be acceptable [for the calculation of normal value] where the evidence demonstrates that the domestic sales … are nonetheless of sufficient magnitude to provide for a proper comparison."[20]

20. In other words, a problem does not exist with respect to the sales themselves, just with how many sales there are and whether, from an illustrative standpoint, sufficient data points exist to determine whether "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value."[21]

21. A "particular market situation" is another set of circumstances for when "such sales" do not permit a "proper comparison."

22. Investigating authorities "must exclude, from the calculation of normal value, *all* such sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation … would distort what is defined as '*normal* value'."[22]

23. When an investigating authority must construct normal value, Articles 2.2 and 2.2.1.1 of the AD Agreement do not preclude it from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under

[20] AD Agreement, Art. 2.2 n.2.
[21] AD Agreement, Art. 2.1.
[22] *US – Hot-Rolled Steel (AB)*, para. 145 (italics original).

consideration, or from using such information or evidence to determine a respondent's cost of production in the country of origin. China interprets Article 2.2 to forbid investigating authorities from resorting to out-of-country information, citing what it labels the "literal meaning" of the phrase "cost of production in the country of origin."[23]

24. To the contrary, once an investigating authority determines that a respondent's records do not reasonably reflect the costs associated with the production and sale of a manufacturing input, it is entirely appropriate under Articles 2.2 and 2.2.1.1 for the authority to resort to external data that reflects real, market-based costs "in the country of origin."

III. The Conditions Set Out in the First Sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

25. Furthermore, we disagree with China's argument that Australia's investigating authority breached Article 2.2.1.1 by evaluating anything other than whether recorded costs are GAAP-consistent and reflect costs actually incurred.[24] China argues that the Panel should effectively remove the conjunction "provided that," the introductory phrase "[f]or the purpose of paragraph 2," and the adverb "normally" from the first sentence of Article 2.2.1.1 of the AD Agreement and interpret this sentence to ensure that "[c]osts shall … [always] be calculated on the basis of records kept by the exporter or producer under investigation."

[23] China's first written submission, para. 97.
[24] *See* China's first written submission, paras. 186-187, 200-203.

26. As Brazil,[25] the EU,[26] Japan,[27] and the UK[28] all underscore, these modifiers – particularly the adverb "normally" – must be given meaning.

27. Specifically, the first sentence of Article 2.2.1.1 includes three modifiers that enable an investigating authority, following an examination of the record, to calculate costs *not* on the basis of the records kept by the exporter or producer under investigation.

28. One modifier, the compound subordinate conjunction "provided that," introduces two conditions with respect to the cost records kept by the exporter or producer: The records must be "in accordance with the generally accepted accounting principles of the exporting country" and they must "reasonably reflect the costs associated with the production and sale of the product under consideration."[29]

29. These conditions, if met, do not require an investigating authority to use the costs reported in the records absent further consideration.[30] The reasoning in *EU – Biodiesel (Argentina)* correctly reflects this understanding, noting that an investigating authority may examine such costs to see if they "have a genuine relationship with the production and sale of the product under consideration."

30. Another (second) modifier is introduced by the phrase, "[f]or the purpose of paragraph 2." This phrase indicates that the first sentence of Article 2.2.1.1 must be read in conjunction

[25] Brazil third-party submission, paras. 10-12.
[26] EU third-party submission, paras. 31-55.
[27] Japan third-party submission, paras. 17-19.
[28] UK third-party submission, paras. 3-11.
[29] AD Agreement, Art. 2.2.1.1.
[30] U.S. Third-Party Submission, paras. 15-33.

with the requirements set out in Article 2.2. This phrase underscores that the duties of an investigating authority under Article 2.2 do not change under Article 2.2.1.1: The investigating authority must exclude from the calculation of normal value *all* costs that if included would distort what is defined as "normal value."

31. A third modifier is introduced by the adverb "normally," which appears immediately after the verb "shall." In the context of a treaty provision, the term "shall" is understood as indicating a mandatory obligation or commitment. The adverb "normally" is generally defined as, "[i]n a regular manner; … [u]nder normal or ordinary conditions; as a rule, ordinarily."[31]

32. The adverb "normally" moderates the obligation in the first sentence of Article 2.2.1.1, because while "normally" confirms that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation," it also directs that where conditions are demonstrated to be *not* normal or *not* ordinary, costs should *not* be calculated on the basis of these records.[32]

33. The adverb "normally" thus anticipates the two conditions to the first sentence of Article 2.2.1.1 introduced by the conjunction "provided that," as well as reflects that certain costs may be deemed unsuitable through the introductory phrase "[f]or the purpose of paragraph 2." It provides for a degree of flexibility and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should *not* calculate costs on the basis

[31] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940.
[32] *US – Clove Cigarettes (AB)*, para. 273.

of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that."

34. We recall that under Article 2.1, normal value is found through the comparable price, in the ordinary course of trade, for the like product in the domestic market of the exporting country. The costs calculated pursuant to Article 2.2 must therefore be capable of generating "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales."[33] For this reason, "[t]he costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy."[34]

35. Finally, as noted in the U.S. third-party submission, China's interpretation of Articles 2.2 and 2.2.1.1 is not only inconsistent with the plain language of those provisions, but also with the practice of China's own investigating authority.[35] The Panel would need to bear in mind this inconsistency in evaluating China's claims under Article 2.

IV. Conclusion

36. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views and looks forward to responding to the Panel's questions.

[33] *EU – Biodiesel (AB)*, para. 6.24, citing *Thailand – H-Beams (Panel)*, para. 7.112, and *US – Softwood Lumber V (Panel)*, para. 7.278.
[34] *EU – Biodiesel (AB)*, para. 6.24.
[35] *See* U.S. third-party submission, para. 33.