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

(DS603)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

April 6, 2023

I. Article 17.6(ii) of the AD Agreement

1. As Australia noted in its first written submission, Article 17.6(ii) governs where a provision has more than one "permissible" interpretation. 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 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.

2. 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. Article 17.6(ii) itself confirms that provisions of the AD Agreement may "admit[] of more than one permissible interpretation." If that is the case and 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."

3. 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." 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." 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."

4. The ordinary meaning of "permissible" is "allowable" or "permitted" – that is, an interpretation that could be reached under customary rules of interpretation. 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. 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 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. Claims Concerning the AD Agreement

5. To begin with, the text of the Article 2.2 of the AD Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

6. Notably, Article 2.2 of the AD Agreement specifies that alternatives to domestic market prices may be used to find normal value when, because of a "particular market situation" or a "low volume of . . . sales in the domestic market of the exporting country," the domestic prices "do not permit a proper comparison." Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits. A key phrase in Article 2.2 is "proper comparison," and the placement of this phrase in Article 2.2 reinforces that normal value must be based on prices (or costs) that "permit a *proper comparison.*" To understand what a "proper comparison" entails, it is important to understand the framework of Article VI:1 of the GATT 1994, which establishes the framework for Article 2 of the Anti-Dumping Agreement.

7. Understood correctly, Article VI:1 of the GATT 1994 establishes that the dumping comparison requires comparable prices or costs. Article VI:1(a) establishes that dumping occurs when the price of an exported product "is less than the *comparable* price, *in the ordinary course of trade*, for the like product" in the home market. This suggests that "determining price comparability" under Article VI:1 refers first to determining whether there *is* such a "comparable price, in the ordinary course of trade." Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which include prices between input suppliers and the exporter or producer under investigation).

8. The AD Agreement is, as its title suggests, an agreement on the application of Article VI of the GATT 1994 and, through Article 2, implements the principle of comparability set forth in Article VI:1. For example, Article 2.1 of the AD Agreement establishes 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 being 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." This text is nearly identical to Article VI:1 (specifically, the second sentence and subparagraph (a)). Article 2.1 thus retains the key elements from Article VI:1 for domestic prices or costs to be used to calculate normal value. Specifically, there must be a "comparable price, in the ordinary course of trade".

9. Thus, contrary to China's position, the text of Article 2.2 does not require that normal value be constructed using the cost of production in the country of origin. To the contrary, the "proper comparison" text of Article 2.2 of the AD Agreement reflects that establishing normal value requires a "comparable price, in the ordinary course of trade," and cannot be interpreted as preventing an investigating authority from evaluating evidence that government interference affects the "proper comparison" of prices or costs. Several examples from prior disputes also reflect that domestic price, third-country export price, and cost of production may be considered *not* "a comparable price, in the ordinary course of trade," when the evidence of record indicates they do not reflect normal commercial principles: a price for a sale may not reflect the criteria of the marketplace; a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale; a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect normal commercial principles; or a price for the sale of an input used in the production of the product under consideration may not be consistent with an arm's-length transaction price or reflect normal commercial principles.

10. The above examples indicate that where normal commercial conditions do not prevail in the marketplace, prices may not be "comparable". In these instances, Article 2.2 does not prohibit the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs, when formulating the appropriate cost for an individual producer. Indeed, prior DSB reports have come to similar conclusions, and have not excluded the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin. Accordingly, the text of Article 2.2 does not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration. The text likewise does not preclude the investigating authority from using such information or evidence to determine an exporter's or producer's cost of production in the country of origin. That the ADC evaluated sources outside China concerning the costs associated with the production of the products under consideration is not inconsistent with Article 2.2 of the AD Agreement.

11. The United States agrees with Australia that the adverb "normally" must be understood in a manner that does not render it "inutile and redundant." Specifically, the adverb "normally" immediately follows the verb "shall" in the Article 2.2.1.1 phrase "costs shall normally be calculated." In the context of a treaty provision, the verb "shall" is understood to indicate 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." As such, the adverb "normally" moderates the obligation established 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 need *not* be calculated on the basis of these records.

12. By contrast, an interpretation that "normally" only refers to the two conditions in the first sentence of Article 2.2.1.1 would render the adverb inutile and redundant. Together, the verb "shall" and the conjunction "provided that" sufficiently reference the two conditions in the first sentence of Article 2.2.1.1. Consistent with the principle of effectiveness, it is redundant for the

adverb "normally" to do so as well. It is clear that the presence of the adverb "normally" instills a degree of flexibility to the first sentence of Article 2.2.1.1 and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should *not* calculate costs on the basis of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that." If an investigating authority pursuant to Article 2.2.1.1 decided not to use a respondent's books and records, it would need to "explain why it departed from the norm" and "justify its decision on the record of the investigation and/or in the published determinations." In this case, Australia has highlighted where in its determination the ADC explained its departure from the norm. China has offered no argument as to how that explanation and supporting record evidence failed to explain the ADC's departure, or how it breached the "normally" condition of the first sentence of Article 2.2.1.1. In addition, the United States disagrees with China's interpretation of the second condition in the first sentence of Article 2.2.1.1 of the AD Agreement.

13. "For the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated under Article 2.2 must 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." Given that the costs under Article 2.2.1.1 must be capable of generating an appropriate proxy to allow for a proper comparison, "cost" refers to costs that reflect normal commercial principles associated with producing the product in the exporting country and not simply the "cost" reflected, for example, in an invoice price. That the costs are "*associated with* the production and sale of the product under consideration" also supports a commercial conception of costs, because the term "associated with" suggests a substantive connection between real economic costs and the production or sale of the product under consideration. To suggest otherwise would oblige investigating authorities to accept, for example, artificial transfer prices between related parties – amounts that have no economic meaning. Given that Article 6 addresses the examination of the records of an investigated firm, it would be superfluous to read Article 2.2.1.1 as addressing the same issue. Article 6.6 provides that investigating authorities "shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Article 6.7 provides investigating authorities with the ability to "verify information provided or to obtain further details … [by] carry[ing] out investigations in the territory of other Members as required." Article 6.8 provides that the absence of necessary information, which assuredly includes accurate and actual data, may leave investigating authorities to make a determination "on the basis of facts available." Since Article 6 provides for the examination of the costs reported in the records kept by an investigated firm, interpreting the second condition of Article 2.2.1.1 as also requiring an investigating authority to accept a reported cost just because it matches such records reduces this condition to redundancy or inutility.

14. In sum, Article 2.2.1.1 of the AD Agreement, properly interpreted, does not mean that the costs reported in the records kept by the exporter or producer under investigation must always be used absent any consideration. To the contrary, an investigating authority may examine such records. That examination may include, *inter alia*, a consideration of whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" real, economically meaningful data associated with the production and sale of the product under consideration. In such a situation, an unbiased and objective investigating authority would have a basis under the

AD Agreement to reject or adjust a cost that does not reflect normal commercial principles, so long as its determination was based on a reasoned and adequate explanation.

15. A non-arm's-length sale illustrates one type of transaction where an investigating authority may look beyond the four corners of a respondent's records and determine whether the transaction does not "reasonably reflect" all costs incurred in respect of the production and sale of the product, because the reported price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. The authority under Article 2.2.1.1 to reject a non-arm's-length transaction from a respondent's records thus makes clear that "costs" that are "associated with" the production and sale of a product must be understood as costs that "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."

16. Similar to a non-arm's-length sale, State interference by an exporting Member in the marketplace may generate records that do not reasonably reflect costs associated with the production and sale of the product under consideration within the meaning of the second condition of Article 2.2.1.1. When the normal value cannot be determined on the basis of domestic sales, the costs calculated under Article 2.2.1.1 must 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. Like the situation in which parties to a transaction are related, where a State intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own commercial interests, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace". The context provided by other provisions in Article 2.2 also undermines China's suggested interpretation. Where the AD Agreement refers to costs "actually incurred by producers," it does so explicitly. For administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 cannot be read to limit "costs" to those actually incurred in the way envisioned by China.

17. For the above reasons, the focus of the Panel's inquiry in this matter should be on whether Australia's findings for rejecting input costs, based on the facts and circumstances of its investigation, is one that could have been reached by an objective and unbiased investigating authority. An investigating authority may examine whether a respondent's recorded costs "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration." It would be incongruous to consider that Australia was prohibited from examining whether those same steel costs reasonably reflect the costs associated with the production and sale of the product under consideration for purposes of constructing normal value under Article 2.2.1.1.

18. The United States notes that China's erroneous interpretation of Article 2 contradicts the practice of its own investigating authority. In its antidumping practice, it has resorted to out-of-country cost information to establish normal value. It has done so without regard to the exporting respondents' reported price and cost information in the exporting country, and on the basis of purported government intervention in the exporting country. That China's positions

before the Panel conflict with the practice of its investigating authority underscores that those positions are not consistent with the text of Articles 2.2 or 2.2.1.1.

II. Claims Concerning the SCM Agreement

19. From Australia's request for a preliminary ruling, the United States understands China's claims to concern CVD measures on stainless steel sinks that terminated before the Panel was established, and that therefore are outside the Panel's terms of reference. For completeness, the United States will also briefly comment on China's claims regarding Article 2.1(c) and 14(d) of the SCM Agreement, which rely upon incorrect interpretations of those provisions.

20. Article 14(d) of the SCM Agreement reflects that an investigating authority has scope in selecting an appropriate benchmark to consider the particular circumstances presented in an investigation. Although an investigating authority should first consider proposed in-country prices for the good in question, it would not be appropriate to rely on such prices if, as a result of government intervention in the market, they are not market-determined. Government intervention may distort in-country prices in a variety of ways – e.g., by administratively setting the price, through the government's participation as a buyer or seller, or where the government is the predominant supplier of a good. In this regard, it is not surprising that an investigating authority might rely on out-of-country benchmarks to calculate the benefit from inputs provided by the Government of China for less than adequate remuneration. The reliability of Chinese in-country prices was of sufficient concern to Members that China's Accession Protocol recognizes that such prices within China might not always be appropriate benchmarks. Specifically, Article 15(b) states, "if there are special difficulties in [applying the relevant provisions of the SCM Agreement], the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks." The text of Article 14(d) contradicts China's position that the ADC was not permitted, in evaluating the extent of benefit, from comparing Chinese prices to an appropriate out-of-country benchmark.

21. China's argument that the ADC was required to identify a formal "subsidy program" implemented through a plan or scheme is not supported by the text of Article 2.1 of the SCM Agreement. Specifically, nothing in the text of Article 2.1(c) requires an investigating authority to identify a "subsidy program" that is formally set out in a plan or scheme. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." As China points out, in the original CVD investigation, the ADC identified in its specificity analysis the "program" at issue. China argues that the systematic granting of financial contribution to a limited group of producers of subject merchandise, as outlined by the ADC, did not suffice under Article 2.1(c) because it did not evince a plan or scheme of some kind. However, China identifies neither the additional evidence of a "plan or scheme" that the ADC was required to cite nor the basis under Article 2.1(c) for such a requirement. China does not identify a basis for the Panel to find that ADC's *de facto* specificity determination was inconsistent with the text of Article 2.1(c). If the Panel reaches the substance of China's claim (i.e., determines the claim to be within its terms of reference, despite the measure having been terminated), then it would need to evaluate whether an unbiased and objective investigating authority could have reached the conclusion that the subsidies conferred to the Chinese producers in question were limited in use.