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

**(DS603)**

## RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

**March 24, 2023**

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| *Argentina – Poultry Anti-Dumping Duties (Panel)* | Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003 |
| *EC – Approval and Marketing of Biotech Products* | Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006 |
| *EC – Chicken Cuts (AB)* | Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1 |
| *EC – Selected Customs Matters (AB)* | Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006 |
| *US – Clove Cigarettes (AB)* | Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R, adopted 24 April 2012 |

**1. In its first written submission, Australia argues that, in order to challenge an investigating authority's conduct in a five-year expiry review, a complainant must cite Article 11.3 of the Anti Dumping Agreement in its panel request. Please respond.**

**U.S. Response to Question 1:**

1. The United States understands the Panel's question to be asking whether a definitive duty imposed or remaining in force pursuant to a expiry review may be found to be inconsistent with a Member's WTO obligations absent a claim of inconsistency with Article 11.3 of the AD Agreement when the legal basis for the claim is alleged inconsistency with other provisions of the AD Agreement. To challenge a measure as inconsistent with the obligations of Article 11.3, the complainant would need to cite Article 11.3.

2. Article 6.2 of the DSU sets forth the requirements for a request for the establishment of a panel to bring a "matter" (in the terms of Article 7.1 of the DSU) within a panel's terms of reference. In relevant part, Article 6.2 of the DSU provides that a request to establish a panel:

> [S]hall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3. In turn, when the DSB establishes a panel, its terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. The relevant text of Article 6.2 is that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

4. According to the text, two basic requirements in Article 6.2 are that the panel request (i) identify the specific measures at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. To provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the WTO provisions that it considers are breached by the identified measure.

5. A separate question is whether China has sufficiently articulated and advanced its challenge through the course of its arguments in its submissions. Australia notes in its first written submission that, in this regard, "China's approach is incoherent and cannot be reconciled".[1] Where China has not clearly explained its argument, it is not for the Panel to do that work for the complainant.

[1] Australia first written submission, para. 95.

**2. With respect to China's CVD claims, Australia argues that the relevant measure is no longer in effect. Could the third parties please identify what precisely is the relevant "measure" in this context? Is it, for example: (a) a CVD order; (b) a particular level of CVDs imposed by Australia; or (c) something else?**

**U.S. Response to Question 2:**

6. At the outset, the United States considers that it would be helpful to clarify that the term "measure" appears to be used by the parties and the Panel interchangeably to refer to a number of different things. As noted in the U.S. third party submission,[2] the United States understands China's complaint to relate solely to a finding (or determination) by Australia's investigating authority in its stainless steel sinks investigation that the provision of grade 304 stainless steel cold rolled coil for less than adequate remuneration constitutes a countervailable subsidy program ("Program 1"). All of China's CVD claims concern that program. Indeed, in its request for the establishment of a panel, China stated that its "legal claims with respect to the countervailing measures relate to the measures concerning stainless steel sinks, and only with regard to the alleged Program 1."[3] In response to the Panel's question, the United States understands China's panel request to refer to both the definitive countervailing duty on stainless steel sinks as a "measure" and Program 1 as a "measure."[4]

7. It is important that the Panel correctly identify the specific measure at issue because, as represented by Australia, a measure terminated before the Panel was established[5] is outside the Panel's terms of reference. Australia argues that Program 1 terminated following the original investigation. Because China's panel request states that its "claims [are] with respect to the countervailing measures . . . concerning stainless steel sinks," it would appear the measure at issue is the countervailing duty. The findings on Program 1 would then form part of the basis for that measure through a subsidy rate and corresponding amount of countervailing duty. However, if as Australia argues, Australia ceased to countervail Program 1 because of the termination of that program, then that aspect of the countervailing duty measure would no longer exist.

8. When the DSB establishes a panel, its terms of reference under Article 7.1 of the DSU are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2 of the DSU, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[6] In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon to examine under

[2] U.S. third-party submission, paras. 34-39.

[3] China request for the establishment of a panel, pp. 4 (emphasis added).

[4] China request for the establishment of a panel, pp. 4.

[5] *See* Australia request for preliminary finding, paras. 1-2, 4-12; Australia first written submission, paras. 565-566.

[6] As the report observed 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." *EC – Chicken Cuts (AB)*, para. 156.

Article 7.1 of the DSU.[7] Both concluded that, under the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "at the time of establishment of the Panel." It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel must make findings.

**3. Could the third parties please offer their views on the proper way to describe the relationship between an original AD/CVD order issued as a result of an original investigation and the continuation of that order as a result of a five-year expiry review? Specifically, please address the following issues:**

**a. Is it appropriate to think of the continuation of an original order by a five-year expiry review as wholly replacing the original order even if the alleged underlying problem identified by a complainant in WTO dispute settlement with the original order persists after the expiry review? If the answer is yes, please explain why this should be in light of the fact that expiry reviews' purpose is different than that of an original investigation.**

**U.S. Response to Question 3:**

9. It is difficult to describe with sufficient completeness all aspects of the relationship between an order, an original investigation, and the continuation of an order following a five-year review. Thus, it is not necessarily appropriate to think of the continuation of an original order by a five-year expiry review as "wholly replacing" that order in all respects. As noted in the Panel's question, original reviews and expiry reviews have different purposes – as well as common purposes. One purpose of a five-year review is to consider whether dumping or subsidization, and injury, would be likely to continue or recur if an order were revoked or a suspended investigation were terminated. A five-year review is not identical to a new order.

**4. Australia argues at paragraph 691 of its first written submission that in deciding whether to initiate an investigation, an investigating authority is not limited to considering the evidence in the application. Please respond to this argument.**

**U.S. Response to Question 4:**

10. The United States agrees with Australia. The text of Article 11 of the SCM Agreement does not prevent an investigating authority from considering other evidence when evaluating whether to initiate an investigation based upon an application.

[7] *See*, *e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456.

11. Article 11.2 sets out reasonably available information that an application must include (*e.g.*, the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant). In turn, Article 11.3 requires authorities to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation." Nothing in Article 11.3 suggests that in reviewing the accuracy and adequacy of that evidence the investigating authority is confined to the four corners of the application; for example, an investigating authority's own expertise and experience may be brought to bear when making that assessment.

12. Whereas Article 11.2 specifically outlines the information content that an application must contain, Article 11.3 is general and does not prescribe the types of information that the investigating authority may refer to in evaluating the application. Instead, Article 11.3 simply requires that the authority "review the accuracy and adequacy of the evidence provided in the application".

**5. Could the third parties please comment on the United States' statements made in section I of its third party statement at the first meeting regarding Article 17.6(ii) of the Anti-Dumping Agreement, and how such statements may bear on any interpretation of how the word "normally" functions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement?**

**U.S. Response to Question 5:**

13. The text of Article 17.6(ii) of the AD Agreement has direct bearing on the proper interpretation of "normally" in the first sentence of Article 2.2.1.1. Here, in particular, Australia has demonstrated that its investigating authority employed a "permissible" interpretation of that provision (Article 2.2.1.1). Accordingly, even if China provided an alternative, permissible interpretation of the same provision (which it did not), the Panel would still need to respect Australia's interpretation in order to abide by Article 17.6(ii).

14. As explained in more detail in the U.S. third-party submission,[8] the text of Article 17.6(ii) underscores the WTO Members' agreement that it would be a *legal error* not to respect a permissible interpretation of the AD Agreement. 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."

15. 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] The ordinary meaning of

[8] U.S. oral statement, paras. 6-15.

[9] *See, e.g.*, U.S. DSB Statement (February 2009) (WT/DSB/M/265) at paras. 77-79.

[10] *Argentina – Poultry*, para. 7.45.

"permissible" is "allowable" or "permitted" – that is, an interpretation that *could be* reached under customary rules of interpretation.

16. For the proper interpretation of "normally" in the first sentence of Article 2.2.1.1 of the AD Agreement, 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 – not whether Australia's interpretation is the same as the one the Panel might reach first.

17. Australia's first written submission demonstrates that the interpretations underlying the challenged AD and CVD determinations, at a minimum, satisfied the Article 17.6(ii) standard. As explained in the U.S. third-party submission[11] and oral statement, the adverb "normally" must be understood in a manner that does not render it "inutile and redundant."[12] 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."[13] 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.[14]

18. In its first written submission, China provided no arguments that Australia's interpretation of "normally" in the context of Article 2.2.1.1 is not a permissible interpretation.[15] Instead, China has provided arguments that (i) conflict with the text of Article 2.2.1.1, in particular the use of the adverb "normally",[16] (ii) are contrary to the understanding of nearly all third parties to this dispute,[17] and (iii) belie the practice of its own investigating authority.[18]

[11] U.S. third party submission, paras. 16-20; U.S. oral statement, paras. 25-35.

[12] Australia first written submission, para. 189.

[13] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940.

[14] *US – Clove Cigarettes (AB)*, para. 273 (finding that the use of the term 'normally" … indicates that the rule … admits of derogation under certain circumstances").

[15] *See*, *e.g.*, China first written submission, paras. 138-148; *see also* U.S. third party submission, para. 10.

[16] *See* U.S. third-party submission, paras. 15-33 (explaining why Australia's interpretation of "normally" and the first sentence of Article 2.2.1.1 accords with the text, and China's does not).

[17] *See*, *e.g.*, Brazil third-party submission, paras. 10-12; EU third-party submission, paras. 31-55; Japan third-party submission, paras. 17-19; Mexico oral statement, paras. 4-10; Norway oral statement, paras. 14-19; UK third-party submission, paras. 3-11; and U.S. third-party submission, paras. 15-33.

[18] *See* U.S. third-party submission, para. 33 and n.57; U.S. oral statement, para. 35.