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

(DS603)

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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), the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

II. CHINA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

2. As a threshold matter, the United States notes that China's AD claims pertain to two original investigations, stainless steel sinks and wind towers, that according to Australia were superseded by later expiry reviews.[1] Australia argues that those original investigations, which relied upon different legal bases than the original investigations, are outside the Panel's terms of reference.[2] If the Panel finds that China's claims arising from the steel sinks and wind towers investigations concern measures that ended before the Panel was established, then it should accordingly find that those claims are outside its terms of reference.

3. The Panel has not yet made findings on this issue and some of China's AD claims also appear to pertain to a third AD proceeding (railway wheels). Thus, for completeness, the United States will comment on certain interpretive issues arising from China's Article 2 claims.

A. Article 2.2 of the AD Agreement

4. China argues that Article 2.2 of the AD Agreement required Australia's investigating authority (the ADC) to use the cost of production of the country of origin to determine normal value.[3] In particular, China argues that "the literal meaning" of the phrase "*cost of production in the country of origin*" in Article 2.2 prevents an investigating authority from "the use of a surrogate cost, even if it has some connection with the exporting country."[4] Even so, China acknowledges that Article 2.2 does not specify the evidence that an investigating authority may use, which could include out-of-country information that is "adapted" to the exporting country.[5]

5. Australia argues that Article 2.2 of the AD Agreement does not preclude the use of out-of-country data in determining the cost of production, as long as the out-of-country data is a suitable substitute.[6] As explained by Australia, the ADC determined that it was appropriate, based on the facts of the original investigation, to calculate the cost of production using out-of-

[1] *See*, *e.g.*, Australia's First Written Submission ("Australia FWS"), paras. 22-23.
[2] Australia FWS, paras. 23-139 (Australia explains, for example, that the expiry reviews were conducted in accordance with Article 11.3 of the AD Agreement, which China did not include in its claims, and that China relied in its first written submission on duties that were removed in the expiry reviews).
[3] China's First Written Submission ("China FWS"), para. 73.
[4] China FWS, para. 97 (emphasis added by China).
[5] *See* China FWS, paras. 101, 103 (arguing that even if "adaptation" could in some cases be a relevant consideration, it was not appropriately applied by the ADC).
[6] Australia FWS, para. 278.

country data, and that the out-of-country data used was suitable to determine the cost of production in China.[7]

6. Article 3.2 of the DSU[8] directs a WTO adjudicator to apply customary rules of interpretation of public international law in examining the applicability of a covered agreement. Such rules are reflected in Article 31 of the Vienna Convention on the Law of Treaties, which provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Accordingly, the task of interpreting a treaty provision begins with the specific words of that provision.[9]

7. 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.

8. 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.[10]

9. 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.*"[11] To understand what a "proper comparison" entails, it is important to understand

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[7] Australia FWS, para. 278, 282. Railway wheels is the original investigation in question. As explained above, Australia argues that the other two investigations were superseded by later expiry reviews and therefore are not within the Panel's terms of reference.

[8] Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[9] *Japan –Alcoholic Beverages II (AB)*, pp. 12, 18*; US – Offset Act (Byrd Amendment) (AB)*, para. 281.

[10] The text of Article 2.2 permits an investigating authority to determine which of the two alternatives is appropriate in a particular proceeding. The provision's use of the term "or" makes clear that an investigating authority may choose to use either of the two available data sources. *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2012 (defining "or," in part, as "Introducing the second of two, or all but the first or only the last of several, alternatives").

[11] AD Agreement, Article 2.2 (emphasis added).

the framework of Article VI:1 of the GATT 1994, which establishes the framework for Article 2 of the Anti-Dumping Agreement.

10. 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.[12] 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).[13]

11. 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".

12. 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

[12] GATT 1994, Art. VI:1 ("For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the *comparable* price, *in the ordinary course of trade*, for the like product when destined for consumption in the exporting country …") (emphasis added).

[13] Normal value may be based on costs determined in accordance with Article VI and the Anti-Dumping Agreement. Where input prices are not based on normal commercial principles, and thus are not themselves comparable prices in the ordinary course of trade, those prices (costs) would not be suitable to establish a normal value based on those costs. *See, e.g.*, *EU – Biodiesel (Argentina) (AB*) ("In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through 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. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy.").

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[14];
- a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale[15];
- 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[16]; 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.[17]

13. 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.[18] 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.[19]

14. 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

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[14] *US – Hot-Rolled Steel (AB)*, para 142 ("We note that determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price.").

[15] *US – Hot-Rolled Steel (AB)*, paras. 141, 143 n. 106 (noting a liquidation sale is one example of a sale between independent parties that might be considered not in the ordinary course of trade, because it "may not reflect 'normal' commercial principles.").

[16] *US – Hot-Rolled Steel (AB)*, para. 141, 143 (noting that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price" (italics original)).

[17] *EU – Biodiesel (AB)*, para. 6.41 (finding that in applying the second condition of Article 2.2.1.1, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine … whether non-arms-length transactions or other practices affect the reliability of the reported costs"); *US – Oil Country Tubular Goods (Korea) (Panel)*, paras. 7.192-7.198.

[18] *See* Australia FWS, para. 278.

[19] *See*, *e.g.*, *EU – Biodiesel (AB)*, para. 6.70 (observing that when, for example, an investigating authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin). The report in *EU – Biodiesel (AB)* also observed that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin.").

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.

B. Article 2.2.1.1 of the AD Agreement

15. China argues that the ADC breached the second condition of the first sentence of Article 2.2.1.1 of the AD Agreement in utilizing a "reasonably reflect competitive market costs" test to determine that Chinese exporters' costs should not be calculated on the basis of their records.[20] China argues that the second condition of Article 2.2.1.1 prevents investigating authorities from rejecting those records "based on notions external to the reasonableness of the *reflection of their costs* in *their cost records*."[21] In other words, China argues, investigating authorities may only evaluate whether recorded costs are GAAP-consistent and reflect the costs actually incurred; they may not evaluate whether the costs themselves are "reasonable".[22]

16. Australia argues that China's claims are misplaced because the ADC's methodology relied upon the adverb "normally" in the first sentence of Article 2.2.1.1, not the second condition in the first sentence of Article 2.2.1.1 of the AD Agreement as argued by China.[23] Australia argues that "normally" modifies the verb "shall" to qualify the obligation in Article 2.2.1.1 that investigating authorities calculate costs on the basis of exporter or producer records.[24]

17. As an initial matter, the United States agrees with Australia that the adverb "normally" must be understood in a manner that does not render it "inutile and redundant."[25] 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."[26] 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.[27]

18. 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

[20] China FWS, para. 186.
[21] China FWS, para. 187.
[22] *See* China FWS, paras. 200-203.
[23] *See*, *e.g.*, Australia FWS paras. 175-181.
[24] Australia FWS, para. 184.
[25] Australia FWS, para. 189.
[26] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940.
[27] *US – Clove Cigarettes (AB)*, para. 273 (finding that the use of the term 'normally" … indicates that the rule … admits of derogation under certain circumstances").

sentence of Article 2.2.1.1. Consistent with the principle of effectiveness,[28] 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."

19. 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."[29] In this case, Australia has highlighted where in its determination the ADC explained its departure from the norm.[30] 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.

20. 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, which provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records . . . reasonably reflect the costs associated with the production and sale of the product under consideration.[31]

21. The phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated pursuant to 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."[32]

22. China, apparently, would read this second condition as meaning that the "records . . . reflect the amounts actually paid by the producer for a particular input."[33] This interpretation, however, does not reflect the text.

23. Given that the use of costs under Article 2.2.1.1 must be capable of generating an appropriate proxy to allow for a proper comparison, the term "cost" refers to costs that reflect

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[28] *See US – Gasoline (AB)*, p. 23.
[29] *China – Broiler Products*, paras. 7.161, 7.164, 7.175 (to depart from the "norm … to use a respondent's books and records," an investigating authority would need "to explain why it departed from the norm" and "to justify its decision on the record of the investigation and/or in the published determinations.").
[30] *See*, *e.g.*, Australia FWS, paras. 175-181, 192-249 (outlining the ADC's determination, and supporting record evidence, that certain home market costs were not normal and ordinary).
[31] AD Agreement, Article 2.2.1.1.
[32] *EU – Biodiesel (Argentina) (AB)*, para. 6.24, citing *Thailand – H-Beams (Panel)*, para. 7.112, and *US – Softwood Lumber V (Panel)*, para. 7.278.
[33] *See*, *e.g.*, China FWS, para. 311.

normal commercial principles associated with producing the product in the exporting country and not simply the "cost" reflected, for example, in an invoice price.[34]

24. 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.[35] To suggest otherwise would oblige investigating authorities to accept, for example, artificial transfer prices between related parties – amounts that have no economic meaning. No WTO Member could seriously advocate such an interpretation.[36] The AD Agreement in other circumstances similarly indicates that an investigating authority should be concerned with real, economically meaningful data. For example, export prices may be disregarded where the authority is concerned the price is "unreliable,"[37] and the domestic industry may refer to "the rest of the producers" where certain producers are related to exporters or importers.[38]

25. In addition, given that Article 6 of the AD Agreement addresses, in part, the examination of the records of an investigated firm, it would be superfluous to read Article 2.2.1.1 as addressing the exact 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."[39] 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."[40] 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."[41] Therefore, 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

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[34] *See EU – Biodiesel (Argentina) (Panel)*, paras. 7.229-7.232.

[35] "Associate" or "associated" is typically defined, in part, as being "placed or found in conjunction with another." The NEW SHORTER OXFORD ENGLISH DICTIONARY, vol. 1, p. 132 (1993 ed.). Where the AD Agreement requires costs to be amounts actually incurred, it states 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. AD Agreement, Art. 2.2.2(i). Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." AD Agreement, Art. 2.2.2(ii).

[36] As described above, the term "normally" also indicates that there may be situations in which costs should *not* be calculated based on an investigated firm's records (even when the two conditions outlined in the first sentence are satisfied). *See China – Broiler Products*, paras. 7.161, 7.164, 7.175.

[37] AD Agreement, Art. 2.3 ("In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed …").

[38] AD Agreement, Art 4.1(i) ("when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers").

[39] AD Agreement, Art. 6.6. In this regard, the first condition identified in the first sentence of Article 2.2.1.1 specifies that records are to be kept in accordance with GAAP, which in addition to specifying certain accounting standards, necessarily requires the accurate recordation of actual costs.

[40] AD Agreement, Art. 6.7.

[41] AD Agreement, Art. 6.8.

requiring an investigating authority to accept a reported cost just because it matches such records wrongly reduces this condition to redundancy or inutility.[42]

26. 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.

27. 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.[43] 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."[44]

28. Similar to a non-arm's-length sale, State interference by an exporting Member in the marketplace may generate producer or exporter 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 of the AD Agreement. When the normal value cannot be determined on the basis of domestic sales, the costs calculated pursuant to 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.[45] Therefore, 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".[46]

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[42] *US – Gasoline (AB)*, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."); *see Canada – Dairy (AB)*, para. 133.

[43] *See US – Oil Country Tubular Goods (Korea) (Panel)*, para. 7.197 ("when the transactions between the exporter or producer and an associated or non-independent entity are found not to be at arm's length, the costs reflected in the exporter's or producer's records cannot be said to be 'accurate or reliable' or 'suitably and sufficiently correspond' to, i.e. reasonably reflect, the costs associated with production and sale of the product under consideration").

[44] *EU – Biodiesel (Argentina) (AB)*, para. 6.22; *see also EU – Biodiesel (Argentina) (AB)*, paras. 6.26, 6.30, 6.56.

[45] *EU – Biodiesel (Argentina) (AB)*, para. 6.24, citing *Thailand – H-Beams (Panel)*, para. 7.112, and *US – Softwood Lumber V (Panel)*, para. 7.278.

[46] *See US – Hot-Rolled Steel (AB)*, para. 141 (emphasis original).

29. 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 instance, 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."[47] Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers."[48] Given the express language utilized 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.

30. China's reliance on past DSB reports is also misplaced. For example, the report in *EU – Biodiesel (Argentina)* recognized that investigating authorities have leeway under Article 2.2.1.1 to reject or adjust recorded costs under certain situations. It specifically rejected the argument that "'no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do.'"[49] As the report observed, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or under-stated; and whether non-arm's-length transactions or other practices affect the reliability of the reported costs".[50] In particular:

> [R]ecords that are GAAP-consistent may … be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length.[51]

31. 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.[52] The United States understands that Australia determined that there are "structural and systemic imbalances and distortive conditions in the Chinese steel market."[53] Based on this finding, Australia concluded the market for steel and raw material inputs in China, in which Masteel's steel billet costs were formed, reflected significant structural and systemic imbalances.[54]

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[47] AD Agreement, Art. 2.2.2(i).
[48] AD Agreement, Art. 2.2.2(ii).
[49] *EU – Biodiesel (Argentina) (AB)*, para. 6.40 (citation omitted).
[50] *EU – Biodiesel (Argentina) (AB)*, para. 6.41 (quoting *EU – Biodiesel (Argentina) (Panel)*, para. 7.242 n.400) (emphasis added).
[51] *EU – Biodiesel (Argentina) (AB)*, para. 6.33 (footnotes omitted).
[52] AD Agreement, Art. 17.6(i); *see also* Australia FWS, para. 12.
[53] Australia FWS, para. 7.
[54] *See*, *e.g.*, Australia FWS, paras. 178-179.

32. 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."[55] Australia had a sufficient basis to examine whether input prices distorted by State interference resulted in a distorted steel market that rendered domestic market steel prices unfit for a proper comparison under Article 2.2. 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.[56] As explained, those costs, to be used, must be capable of generating an "appropriate proxy" for the price of the like product "in the ordinary course of trade."

33. Furthermore, the United States notes that China's erroneous interpretation of Article 2 of the AD Agreement contradicts the practice of its own investigating authority. In its antidumping practice, China's investigating authority 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.[57] 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.[58]

III. CHINA'S CLAIMS REGARDING THE SCM AGREEMENT

34. 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.[59]

35. However, 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.

A. Australia's Preliminary Ruling Request Regarding China's Claims

36. Australia requests a preliminary ruling that all of China's claims concerning the SCM Agreement are outside the Panel's terms of reference. Australia argues that those claims pertain to a program, raw materials for less than adequate remunerations, that was countervailed in the ADC's original investigation but that terminated on March 27, 2020, two years before the Panel

[55] *EU – Biodiesel (AB)*, para. 6.22.
[56] *See EU – Biodiesel (AB)*, para. 6.24.
[57] For example, since 2020 China's investigating authority has used this practice in antidumping investigations concerning U.S. exports of n-propanol, polyphenylene sulfide, ethylene propylene diene monomer, and polyvinyl chloride. Public versions of the determinations in these investigations are available at https://etrb.mofcom.gov.cn.
[58] China's investigating authority based these determinations on so-called "non-market situations", which lack any factual or legal basis (e.g., neither the term nor its basis under Chinese antidumping law have been defined).
[59] *See* Australia FWS, paras. 564-568.

was established.[60] Because the measure terminated, Australia argues, it cannot be a "measure at issue" under Article 6.2 of the DSU and therefore lies outside the Panel's terms of reference.[61]

37. In its comments on Australia's request, China does not appear to dispute that a measure that has been terminated before the Panel is established is outside the Panel's terms of reference.[62] Instead, China argues that, even though the measure in question has been terminated, the relevant "measure" continues to exist under Australian law and that the issue is not ripe for a preliminary ruling.[63]

38. 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. 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."[64] 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 Article 7.1 of the DSU.[65] 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.

39. If, as Australia represents, the measure at issue (i.e., raw materials for less than adequate remuneration) was terminated and ceased to have legal effect before the Panel was established, then it is outside the Panel's terms of reference. Such an issue is ripe for a preliminary ruling by the Panel

B. Article 14(d) of the SCM Agreement

40. China argues that the ADC breached Article 14(d) of the SCM Agreement because in determining that Chinese producers received an input (steel coil) for less than adequate remuneration, the ADC used third-country prices in the place of Chinese prices.[66] China recognizes that an investigating authority may "[u]se [] external prices to determine a benefit benchmark . . . where government intervention causes distortion of prices to the extent that

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[60] Australia's request for preliminary finding ("Australia PRR"), paras. 1-2.
[61] Australia PRR, paras. 4-12.
[62] *See* China's comments on Australia's request for preliminary finding ("China PRR comments"), paras. 1-5.
[63] *See* China PRR comments, paras. 12-14, 33.
[64] 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.
[65] *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.
[66] China FWS, para. 533. As a consequence, China argues, the ADC also breached Article 1.1(b) of the SCM Agreement when it identified a "benefit" conferred. China FWS, para. 528.

prices are not market determined."[67] However, it argues that a "comparison between the benchmark and in-country prices is unable to evidence" such distortion.[68]

41. Apart from underlining that China's claim concerns a terminated measure, Australia argues *arguendo* that the ADC based its determination on detailed evidence demonstrating the Government of China's intervention in and distortion of the domestic steel market.[69] Australia also summarizes the steps ADC undertook to determine an appropriate benchmark and to adjust for prevailing market conditions in China.[70]

42. Article 14 of the SCM Agreement concerns the calculation of a subsidy "in terms of the benefit to the recipient". The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient . . . shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained." The text establishes that the subparagraphs lay out "guidelines", such that an investigating authority may consider approaches given the facts of particular investigated transactions.

43. The second sentence of Article 14(d) of the SCM Agreement specifies that "adequacy of remuneration" must be determined "in relation to prevailing market conditions . . . in the country of provision."[71] Such conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[72] The phrase "in relation to" in the second sentence of Article 14(d) does not denote a rigid comparison, but rather implies a broader sense of "relation, connection, reference."[73] Likewise, the reference to "any" method in the chapeau of Article 14 implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.[74]

44. Article 14(d) of the SCM Agreement thus 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 – for example, by administratively

[67] China FWS, para. 511.
[68] China FWS, para. 525.
[69] Australia FWS, paras. 608-609.
[70] *See* Australia FWS, paras. 611-614.
[71] Emphasis added.
[72] *US – Carbon Steel (India) (AB)*, para. 4.150. Accordingly, "the primary benchmark, and therefore the starting point of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision." *US – Carbon Steel (India) (AB)*, para. 4.154 (emphasis original). *See also US – Softwood Lumber IV (AB)*, para. 90.
[73] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 89).
[74] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 91).

setting the price, through the government's participation as a buyer or seller, or where the government is the predominant supplier of a good.[75]

45. 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."[76]

46. Accordingly, the text of Article 14(d) of the SCM Agreement 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. 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 in-country private prices were unreliable benchmarks.

C. Article 2.1(c) of the SCM Agreement

47. China argues that the ADC's *de facto* specificity determination breached Article 2.1(c) of the SCM Agreement because it did not "identify a subsidy programme" or "take into account the two factors listed in the final sentence of Article 2.1(c). . . ."[77] In particular, China argues that the ADC simply referred to the program as a "subsidy program" rather than considering whether the subsidies were conferred under a plan or scheme.[78]

48. Apart from underlining that China's claim concerns a terminated measure, Australia argues *arguendo* that the record contained evidence that the Chinese respondents systematically received the input for less than adequate remuneration[79] and that the final determination adequately indicated that the ADC did take into account the diversification of economic activities and length of time.[80]

49. Article 2.1 of the SCM Agreement sets out "principles" for determining whether a subsidy, identified according to Article 1, is "specific" to "an enterprise, industry, or group of

[75] In such cases, the government "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align." *US – Carbon Steel (India) (AB)*, para. 4.155 (referring to *US – Softwood Lumber IV (AB)*, para. 90). "[T]he government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular." *US – Softwood Lumber IV (AB)*, para. 93.
[76] *See* China's Accession Protocol.
[77] China FWS, paras. 552-553.
[78] China FWS, para. 553 (citing *US – Pipes and Tubes (Turkey)*, para. 7.153).
[79] Australia FWS, paras. 639-640, 652-653.
[80] Australia FWS, paras. 641-642, 654-656.

enterprises or industries," referred to as "certain enterprises."[81] Article 2.1(c) addresses the principles for finding that a subsidy is *de facto* specific, that is, when a subsidy is limited in fact to certain enterprises.[82] Article 2.1(a) in contrast addresses the principles for finding that a subsidy is *de jure* specific, that is, when access to the subsidy is "explicitly limited to certain enterprises."[83] Thus, where an investigating authority clearly substantiates, on the basis of positive evidence,[84] that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement.

50. China's argument that the ADC was required to identify a formal "subsidy program" implemented through a plan or scheme[85] 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.[86] 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.[87] 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.[88] To the extent China is arguing that the SCM Agreement requires a subsidy or "subsidy program" to be implemented pursuant to a formally instituted government plan or scheme, such an argument finds no textual support in Article 2.1(c). Indeed, it negates the distinction between Article 2.1(c), which relates to *de facto* specific subsidies, and the text of Article 2.1(a), which relates to *de jure* specific subsidies.

51. As to the last two sentences of Article 2.1(c), a specificity determination involves a fact-based analysis, made on a case-by-case basis.[89] Thus, the relevance of either (i) the length of

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[81] SCM Agreement, Article 2.1.

[82] Article 2.1(c) provides:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such 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. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation.

[83] Article 2.1(a) provides: "When the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific."

[84] SCM Agreement, Article 2.4.

[85] *See* China FWS, paras. 554-558/

[86] China FWS, para. 553.

[87] China FWS, para. 553.

[88] *See* China FWS, paras. 554-558.

[89] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373 (noting that the "determination of whether a number of enterprises or industries constitute 'certain enterprises' can only be made on a case-by-case basis").

time a subsidy has been in place or (ii) the economic diversification in the Member country would also be determined on a case-by-case basis. In particular, those factors would be relevant only if the period of time examined could directly impact the specificity determination, or if the subject economy lacks diversification. China does not in its first written submission identify the relevance of either factor; instead, it only asserts that they were not sufficiently considered.[90]

52. Accordingly, 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.

IV. CONCLUSION

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

[90] *See* China FWS, paras. 561-565 (asserting that the ADC's determination in the original investigation lacked an "explicit or implicit" consideration of either duration or diversification, but not identifying what was missing or why it was relevant to the evaluation under Article 2.1(c) of the SCM Agreement).