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

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION

July 26, 2022

Madam Chairperson, Members of the Panel,

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

2. We will briefly address three issues that pertain to MOFCOM's antidumping and countervailing duty investigations: (i) the initiation of an investigation, including the extent to which an application identifies all known domestic producers in the requisite manner; (ii) the obligations, in an antidumping investigation, regarding the determination of individual dumping margins for each known exporter or producer; and (iii) the obligations regarding public notice and explanation under the AD Agreement and SCM Agreement.

I. Identification of All Known Domestic Producers

3. The United States first will provide comments on the proper interpretation of the requirements of Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement, and the degree to which China's arguments disregard those requirements.

4. Article 5.2(i) of the AD Agreement and Article 11.2(i) of the SCM Agreement require, among other things, that an application on behalf of the domestic industry contain certain information reasonably available to the applicant. One of those requirements is that the application "shall identify the industry on behalf of which the application is made by a list of all known producers of the like product."[1]

5. Here, we note that China, in its first written submission, did not dispute Australia's statement that the applications in question failed to "identif[y] a single Chinese barley producer

[1] *See* U.S. third-party submission, paras. 68-72.

or association of producers".[2] Instead, China has argued that the obligation to provide a list of producers was not relevant because it was clear to MOFCOM on whose behalf the applications were made – that is, on behalf of "all" barley producers.[3] China's argument ignores that the manner in which the industry is to be identified is – expressly – "by a list" of all known producers or associations of producers. Drawing a conclusion about the industry on whose behalf the application was made is not the same as determining whether that information was presented in the requisite manner.

6. China points to the provisions of AD Agreement Article 5.4 (and footnote 13) and SCM Agreement Article 11.4 (and footnote 38) which speak to determining the degree of support for or opposition to the application. The methods provided for in these provisions – namely, using statistically valid sampling techniques in the case of fragmented industries – do not speak to the separate requirement for the application to identify the relevant industry "by a list" of all known producers or associations of producers. The possibility of determining support for the petition by sampling does not obviate the need for the application to contain the information described in Article 5.2(i) of the AD Agreement and Article 11.2(i) of the SCM Agreement.

7. China has not provided any basis in the text for its arguments that the requirements of Article 5.2(i) of the AD Agreement and Article 11.2(i) of the SCM Agreement were satisfied or otherwise did not apply.[4]

[2] *See* U.S. third-party submission, para. 71 (citing China FWS, paras. 558-560).
[3] China FWS, para. 560.
[4] *See* China FWS, paras. 558-560.

8. With these considerations in mind, the Panel's task is to evaluate whether an unbiased and objective authority could have concluded that the applications contained the required information, including a list of all Chinese barley producers known to the applicant.[5]

II. Determination of Individual Dumping Margins for Each Known Exporter or Producer

9. We now turn to Australia's claim that MOFCOM acted inconsistently with Article 6.10 of the AD Agreement by assigning the same dumping margin to every Australian respondent, rather than calculating an individual dumping margin for each known exporter or producer.[6]

10. The first sentence of Article 6.10 of the AD Agreement establishes that "as a rule" an authority "shall determine an individual margin of dumping for each known exporter or producer." The second sentence of Article 6.10 permits the authority to limit the examination where the number of exporters or producers is so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable". In other words, the authority may limit the examination to a smaller number of exporters or producers when it does not have the resources to individually examine all parties involved in an investigation.[7]

11. However, to the extent that Article 6.10 permits the investigating authority to depart from the rule that it must "determine an individual margin of dumping for each known exporter or producer concerned," it is only in the sense that the authorities may "limit their examination" to a reasonable number of interested parties, consistent with the provisions of Article 6.10.[8]

[5] *See* Australia FWS, para. 754.
[6] Australia FWS, para. 348.
[7] AD Agreement, Art. 6.10.
[8] AD Agreement, Art. 6.10 (emphasis added). *See* U.S. FWS, paras. 25-27.

12. China has misconstrued this text to argue that an investigating authority may calculate individual dumping margins either for each known exporter or for each known producer, and then decline to calculate individual dumping margins for the other.[9] As explained in the U.S. third-party submission, China's argument finds no support in the text of Article 6.10.[10] Moreover, in the panel report cited by China, *EC – Salmon*, the panel's reasoning included an observation undercutting China's position – namely, that: "By including both the exporter and the producer in the investigation, Article 6.10 would dictate that an individual margin of dumping would have to be calculated for each entity."[11] Thus, even the report that China relies on does not support its position.

13. Furthermore, in the text of Article 6.10, the use of the conjunction "or" in the phrase "each known exporter or producer" does not support China's position that MOFCOM was relieved of the obligation to calculate individual dumping margins for either all known exporters or all known producers. Rather, the conjunction "or" reflects that each known entity referred to in the second sentence of Article 6.10 may be either an exporter or producer of the product under investigation, and need not be both an exporter and producer. The plain meaning of the text here is evident. Indeed, the list of "interested parties" under Article 6.11 employs the same construction using the word "or" when it provides, for example, that "interested parties" shall include "an exporter or foreign producer or the importer of a product subject to investigation . . ."[12] Using the word "or" merely signifies that each type of entity may be an

[9] *See* China FWS, paras. 278-282.
[10] *See* U.S. Third-Party Submission, paras. 25-27.
[11] *EC – Salmon (Norway) (Panel)*, para. 7.167 (emphasis added); *see also* U.S. third-party submission, paras. 25-27.
[12] AD Agreement, Art. 6.11(i) (emphasis added).

interested party, not that the investigating authority may pick one type – exporters, producers, or importers – and decline to treat the other two as interested parties.

14. Thus, China's textual argument about the significance of "or" in Article 6.10 has no support in the plain language of Article 6.10 or the rest of Article 6. The investigating authority must determine an individual margin of dumping "for each known exporter or producer". An investigating authority may not except itself from this requirement on the basis that the known entity is an exporter, or that it is a producer.

15. In this light, to the extent MOFCOM did not calculate an individual dumping margin for each known Australian respondent – whether a producer or an exporter – the Panel may evaluate whether MOFCOM acted consistently with the first and second sentences of Article 6.10.

III. Public Notice and Explanation of Determinations

16. We now turn to the public notice requirements of Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement. Australia's claims under these provisions highlight certain inadequacies that appear to pervade MOFCOM's determinations and the manner in which it conducted the dumping and subsidy investigations. In particular, Australia argues that MOFCOM acted inconsistently with the obligations contained in these articles by omitting from its public notices or reports certain relevant information on matters of fact, law, and reasons concerning MOFCOM's dumping, subsidy, injury, and causation determinations.[13]

[13] *See* Australia FWS, paras. 940-958.

17. Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement set forth the overarching obligations for authorities to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" by the investigating authority, and "all relevant information on matters of fact and law and reasons" leading to the imposition of definitive measures.

18. To this end, Article 12.2.2 of the AD Agreement and Article 22.5 of the SCM Agreement provide that the investigating authority's public notice or separate report on a final affirmative determination "shall" contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers."[14]

19. In the current dispute, the United States observes that the analyses contained in the final anti-dumping and subsidy determinations appear to be very brief and often appear to be lacking in evidentiary support concerning key elements of the dumping, subsidy, injury, and causation determinations.[15]

20. In its first written submission, Australia catalogued many ways in which MOFCOM's dumping, countervailing duty, and injury determinations lacked evidentiary support or, in some cases, lacked a comprehensible explanation of MOFCOM's conclusions or how it considered the record evidence, if at all.[16] Australia's catalogue of these deficiencies is lengthy and concerns fundamental aspects of MOFCOM's determinations to impose antidumping and countervailing

[14] AD Agreement, art. 12.2.2.
[15] U.S. third-party submission, para. 79 (citing Australia FWS, paras. 940-958).
[16] *See* Australia FWS, paras. 940-958.

duty measures. As noted in the U.S. third-party submission, in some instances it is difficult even to discern the basis for MOFCOM's conclusions.[17]

21. We note several exemplars of such deficiencies today.

22. Some of these deficiencies concern MOFCOM's subsidy investigation. For example, as described in paragraphs 55 through 59 of the U.S. third-party submission, the basis for MOFCOM's specificity determination is unclear, as are the "certain enterprises" to whom the subsidy was supposedly limited.

23. As described in paragraphs 40 through 42 of the U.S. third-party submission, it also is not clear (i) what the basis for MOFCOM's financial contribution determination was, (ii) who the benefiting recipients were, or (iii) whether MOFCOM's determination was based on the record evidence or on facts available.

24. Similarly, with respect to MOFCOM's dumping determination, Australia has described the absence of an explanation by MOFCOM as to how it established normal value and export price, and the reasons for its chosen methodologies.[18]

25. The Panel here will need to determine whether MOFCOM could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement based on the content of any abbreviated, unsubstantiated, or indecipherable analyses.[19]

[17] U.S. third-party submission, para. 79 (citing Australia FWS, paras. 940-958).
[18] Australia FWS, paras. 948-951.
[19] *See* U.S. FWS, paras. 79-80.

IV. Conclusion

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