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

(DS598)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

September 5, 2022

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. Claims Concerning the AD Agreement

1. Article 6.8 of the AD Agreement enables investigating authorities to make determinations in defined circumstances. Article 6.8 permits recourse to facts available when an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Absent one of these bases, MOFCOM would not be justified in resorting to facts available.

2. The United States observes that "necessary information" comprises information that is "necessary", not information that is merely requested. The distinction lies in the fact that "necessary information" is information that an investigating authority requires to make its determination. As applied here, the United States considers that information that is needed to calculate the dumping margin pursuant to Article 2 is likely to be "necessary" because normal value and export price are central to an investigating authority's determination. At the same time, information that is "necessary" must be requested by the administering authority. This aspect of necessary information flows from the relationship between "necessary information" and an investigating authority's use of facts available, where the authority is required to arrive at an affirmative or negative finding based on facts available because information it requested is not on the record.

3. An investigating authority may not assign a margin based on facts available when the authority has not requested the information, indicating that it is "necessary", in the first place. The panel report in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information. Accordingly, the Panel should evaluate whether MOFCOM specified in sufficient detail the information that it required from them.

4. Annex II of the AD Agreement (albeit through non-mandatory guidance) clarifies circumstances and procedures for an investigating authority which may justify resort to facts available. By following the procedures in Annex II, authorities can select information that is considered the "best information available" consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations. Article 6.8 and Annex II, paragraph 1, together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available. Aa party will not have failed to provide necessary information, or have significantly impeded the investigation, if information submitted meets the conditions in paragraph 3 of being "verifiable," "appropriately submitted so that it can be used without undue difficulties," and "supplied in a timely fashion." Authorities are also not entitled to reject information submitted if it is "in a medium or computer language requested by the authorities."

5. Paragraph 5 of Annex II additionally provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." The language in the provision stipulates that authorities should not disregard information submitted by interested

parties, unless there is evidence that the party failed to act to the best of its ability. Paragraph 6 further states that if the evidence or information is not accepted, the supplying party should be informed and "should have the opportunity to provide further explanations within a reasonable period . . . . If the authorities consider the explanations as not satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination."

6. Article 6.8 applies exclusively to interested parties from whom information is required by competent authorities, and both Article 6.8 and Annex II establish the expectation that competent authorities will use information submitted to the extent that it can be used. In this way, Annex II reflects that an investigating authority's ability to rely on facts potentially less favorable to the interests of a non-cooperating interested party is inherent in the authority's role in conducting an investigation in accordance with the AD Agreement, provided certain conditions are met. Thus, an interested party will not have failed to provide necessary information, or have significantly impeded the investigation, where information is provided that is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and, where applicable, supplied in the requested medium; instead, this information should be taken into account. Unless MOFCOM's investigation satisfied each of the foregoing circumstances and requirements – including specifying in detail the information required of an interested party and determining that "necessary" information was missing from the record – China will have acted inconsistently with Article 6.8 of the AD Agreement.

7. 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." This language ("as a rule") sets out an obligation that applies "normally" or "generally". The provision then sets out circumstances in which the rule would not apply. The authority may limit its 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." Article 6.10 therefore allows Members to determine individual margins of dumping for a "reasonable number" of exporters and producers, and does not require the determination of an individual margin of dumping for all exporters and producers where a large number of exporters and producers is involved. Article 6.10 permits the limiting of an examination when an authority lacks the resources to individually examine all parties involved in an investigation.

8. In this regard, the United States notes that certain positions expressed by China are not consistent with the text of Article 6.10 of the AD Agreement. Specifically, the ability of an investigating authority to exclude producers or exporters is at the point of determining to limit examination, as described in the second sentence of Article 6.10. To the extent sentence two of Article 6.10 permits the investigating authority to depart from the rule expressed in sentence one (i.e., to "determine an individual margin of dumping for each known exporter or producer concerned"), it is at the point of "limit[ing] their examination".

9. China's reliance on a passage from the *EC – Salmon* panel report is misplaced because the passage concerned "the starting point for selection of interested parties investigated" – namely, whether the authority may limit its examination to "known exporter[s]" or to "known producer[s]". Indeed, paragraph 7.51 of the same panel refuted precisely the argument raised by China here: "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."

10. Accordingly, to the extent MOFCOM did not calculate an individual dumping margin for each known Australian respondent, the Panel should evaluate whether MOFCOM complied with Article 6.10 by limiting the examination "to a reasonable number of interested parties or products" "[i]n cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable".

II. CLAIMS REGARDING THE SCM AGREEMENT

11. Article 12.7 is drafted almost identically to Article 6.8 of the AD Agreement. For that reason, the United States refers the Panel to its exposition of Article 6.8 above. The SCM Agreement does not contain an Annex with clarifications on circumstances in which resort to facts available is appropriate. However, these AD Agreement provisions may be considered as context in interpreting Article 12.7 of the SCM Agreement in light of the virtually identical text of the obligation (Articles 6.8 and 12.7).

12. For a facts available determination to be consistent with Article 12.7, the investigating authority would need to conduct an evaluation that satisfies the foregoing – both in justifying the use of facts available and in selecting the facts used to replace any missing, necessary information. The evaluation is fact-specific and must take appropriate account of whether the information was verifiable, timely submitted, and can be used without undue difficulty (i.e., the "nature, quality, and amount of the evidence on the record"), which includes the information supplied by the Australian respondents and any other relevant record information.

13. As to Article 1.1(a) of the SCM Agreement, the first question in any subsidy analysis is whether there is a financial contribution by a government or a public body. The United States considers that a financial contribution necessarily involves a recipient, as distinct from the "government or public body" that is making the financial contribution, as is suggested by the title and text ("benefit to the recipient") of Article 14. According to China, MOFCOM countervailed the programs in question because they involved "a direct transfer of funds" from the government or public body" to the recipients in question – i.e., barley producers. China asserts that the Government of Australia's questionnaire responses "made it clear" that the recipients of the direct transfers of funds were the "agricultural industries" rather than the government itself; however, China does not point to any record evidence supporting that finding. It is difficult to see how an objective and unbiased investigating authority could have concluded, based on the record evidence as summarized by MOFCOM, that a financial contribution was made.

14. If MOFCOM did not base its determination on the record information supplied by the interested parties, it is not apparent how it could have reached an affirmative determination without resorting to fact available – even though China argues that MOFCOM did not rely on facts available. As a general matter, to the extent the investigating authority is resorting to facts available as opposed to the information supplied by the respondents, the investigating authority would need to satisfy the obligations described above. Because China represents that barley producers or certain "agriculture industries" were the recipients and that MOFCOM based financial contribution on "a direct transfer of funds", the Panel should evaluate whether MOFCOM adequately demonstrated that those identified recipients received a direct transfer of funds as defined under Article 1.1(a)(1)(i). Evidence concerning a different subparagraph of

Article 1.1(a)(1), such as the provision of goods or services, would not support MOFCOM's determination under Article 1.1(a)(1)(i).

15. Article 1.1(b) of the SCM Agreement sets out the second step of the subsidy analysis, an inquiry into whether the financial contribution identified under Article 1.1(a) confers "a benefit." The term "benefit" is not defined by the SCM Agreement. Based on the ordinary meaning of this term and the context provided by Article 14, a "benefit" arises when the recipient has received from a financial contribution something that makes it better off (an "advantage, profit, gain") than it would otherwise have been absent that financial contribution. The focus of the inquiry is on the "benefit to the recipient" rather than the cost to the government.

16. Accordingly, the Panel should evaluate whether MOFCOM adequately demonstrated the "benefit to the recipient" – i.e., that Australian barley producers benefited from direct transfers of funds, as defined under Article 1.1(a)(1)(i). As represented by China, this determination relied upon the use of facts available, as opposed to the information supplied by the Australian respondents. Thus, in addition to the foregoing, the Panel should evaluate whether MOFCOM's determinations of benefit satisfied all of the requirements of Article 12.7 outlined above.

17. Article 1.2 of the SCM Agreement provides that a subsidy can only be subject to countervailing measures if it is "specific in accordance with the provisions of Article 2." The "central inquiry" under Article 2.1 is to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to "certain enterprises" within the jurisdiction of the granting authority.

18. Article 2.1(c) establishes that, "notwithstanding any appearance of non-specificity" resulting from application of subparagraphs (a) and (b), a subsidy may nevertheless be "in fact" specific. Application of Article 2.1(c) is a fact-driven, context-dependent exercise. In conducting its analysis under Article 2.1(c), an investigating authority "may" consider "other factors" – i.e., the four factors set out in the second sentence of Article 2.1(c): use of a subsidy program 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. An authority need not examine all four factors when conducting its analysis. The analysis in Article 2.1 is informed by the obligation in Article 2.4 that any specificity determination "shall be clearly substantiated on the basis of positive evidence." The Panel should evaluate whether MOFCOM evaluated the programs in question, satisfied each condition set forth under Article 2.1(c), and did so in a manner that was "clearly substantiated on the basis of positive evidence."

19. In identifying the basis for MOFCOM's specificity determinations, China indicates that it was based on MOFCOM's "reason to suspect that the barley industry is a major user of the funds." Although the first sentence of Article 2.1(c) refers to "reasons to believe that the subsidy may in fact be specific", it is as the precondition for the investigating authority to "[consider] other factors". The "reasons to believe" are not a basis to find *de facto* specificity, a determination which must satisfy the requirements of Articles 2.1(c) and 2.4, outlined above.

20. In purporting to identify the "other factors" relied upon by MOFCOM, China relies upon text that is not found in Article 2.1(c). Specifically, China refers to two "other factors": that barley is a major crop "in terms of the cultivated areas, yield and output value" and that "the

Australian Government gives priority to agriculture." These are not among the four "other factors [that] may be considered" in evaluating *de facto* specificity under Article 2.1(c).

21. Elsewhere in its first written submission China does refer to "predominant use of certain enterprises" and "use of a subsidy programme by a limited number of certain enterprises", two factors identified under Article 2.1(c). However, China simply equates those factors with different factors which are absent from Article 2.1(c). These arguments would effectively substitute factors that, as noted above, were not included in Article 2.1(c) for factors that were. If an authority bases its *de facto* specificity determination on a factor that is not provided for under Article 2.1(c), that determination would be inconsistent with the SCM Agreement.

22. Assuming *arguendo* that MOFCOM based its specificity determinations on one of the factors China now cites – i.e., "predominant use by certain enterprises" or "use . . . by a limited number of certain enterprises" – the Panel would need to evaluate whether MOFCOM clearly substantiated on the basis of positive evidence that such use was limited to "certain enterprises". Although China suggests that the "certain enterprises" identified by MOFCOM were barley producers, the limitations it identifies are with respect to (i) the entire agriculture industry or (ii) a collection of different crops, one of which is barley, that "accounted for 80% of all crops in terms of the cultivated area, yield, and output value." For the two factors identified by China, to satisfy the requirements of Articles 2.1(c) and 2.4, an authority would need to identify how the subsidy is limited to or predominately used by the "certain enterprises" it identified.

23. Finally, the United States notes that many of China's arguments pertain to MOFCOM's reliance on facts available. As outlined above, MOFCOM would need to satisfy the requirements for recourse to facts available under Article 12.7 of the SCM Agreement.

III. CLAIMS REGARDING DETERMINATION OF INJURY

24. The second sentences of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement require an investigating authority to examine "all relevant evidence" before it both to ascertain whether there was a causal link between the dumped and subsidised imposts and the injury experienced by the domestic industry and to examine whether factors other than the dumped or subsidised imports were also causing injury. The third sentences of these articles require an authority to examine "any known factors other than the [dumped or subsidised] imports which at the same time are injuring the domestic industry" to ensure that "the injuries caused by these other factors must not be attributed to the [dumped or subsidised] imports." A non-attribution analysis is therefore necessary if (i) there are one or more other known factors other than the dumped or subsidised imports that (ii) are injuring the domestic industry (iii) at the same time. The question of whether an investigating authority's analysis is consistent with these articles should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination.

25. Based on the above discussion, the United States observes that the Panel must determine if the investigating authority demonstrated in its investigation that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, and based its causation analysis on an examination of all relevant evidence. The conclusions must be those an unbiased and objective investigating authority could have reached.

IV. CLAIMS REGARDING INITIATION

26. Article 5.2(i) of the AD Agreement and Article 11.8(i) of the SCM Agreement require that written applications requesting the initiation of anti-dumping or countervailing duty investigations contain, among other things, "the identity of the applicant" and, where "on behalf of the domestic industry," a "list of all known domestic producers of the like product (or associations of domestic producers of the like product) . . . ." They also require a "description of the volume and value of the domestic production of the domestic like product by the applicant." In turn, Article 5.3 of the AD Agreement and Article 11.3 of the SCM Agreement, require authorities to "examine the accuracy and adequacy of the evidence provided in the [applications] to determine whether there is sufficient evidence to justify the initiation of an investigation."

27. China argues that the list of known producers (or associations) required under Articles 5.2(i) and 11.2(i) "was not relevant" because their "specific purpose was to 'identify the industry on behalf of which the application is made'", and the "domestic industry on behalf of which the applications were made is the Chinese barley industry with all barley producers." Contrary to China's argument, that requirement is explicit and mandatory. China also cites a footnote under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement, separate provisions that direct authorities to undertake "an examination of the degree of support for, or opposition to" petitions, allows authorities to evaluate the standing of applicants using "statistically valid sampling techniques" in the case of "fragmented industries." However, a plain reading of Article 5.2(i) and Article 11.8(ii) reveals no such exemptions.

V. CLAIMS RELATED TO PUBLIC NOTICE AND EXPLANATIONS OF DETERMINATIONS

28. Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement require 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" leading to the imposition of definitive measures.

29. The United States observes that the analyses contained in the final anti-dumping and subsidy determinations (as appended to the parties' written submissions) are very brief. They are often lacking in evidentiary support concerning key elements of the dumping, subsidy, injury, and causation determinations. In some cases, it is difficult even to discern the basis for MOFCOM's conclusions. The Panel will need to determine whether China 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 such analyses.

30. With respect to the claim that Australia did not establish a *prima facie* case or improperly seeks for China to "self-substantiate" the findings, the United States notes Australia's catalogue of numerous areas in which it argues that it could not discern the relevant information, or MOFCOM simply did not provide it. The Panel should consider whether MOFCOM should benefit from its own failure to provide notice or explanation of relevant information by using those failures to argue that the complainant did not meet its burden of proof.