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

(DS602)

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

September 30, 2022

TABLE OF REPORTS

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China – Broiler Products (Panel)	*Panel* Report, *China - Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, adopted 20 September 2011
China – GOES (AB)	*Appellate* Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012
China – X-Ray Equipment (Panel)	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
Egypt – Steel Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Korea – Certain Paper (Article 21.5 – Indonesia)	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia*, WT/DS312/RW, adopted 22 October 2007
Korea – Stainless Steel Bars (Panel)	Panel Report, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars*, WT/DS553/R, circulated 30 November 2020
Korea – Pneumatic Valves (Japan) (AB)	Appellate Body Report*, Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R and Add.1, adopted 30 September 2019
Korea – Pneumatic Valves (Japan) (Panel)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R

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Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007
Morocco – Definitive AD Measures on Exercise Books (Tunisia) (Panel)	Panel Report, *Morocco – Definitive Anti-Dumping Measures on Exercise Books from Tunisia*, WT/DS578/R, circulated 27 July 2021
Morocco – Hot-Rolled Steel (Turkey) (AB)	Appellate Body Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/AB/R, adopted 8 January 2020
Morocco – Hot-Rolled Steel (Turkey) (Panel)	Panel Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/R, adopted 8 January 2020, as modified by Appellate Body Report WT/DS513/AB/R
Russia – Commercial Vehicles (Panel)	Panel Report, *Russian Federation – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add. 1, adopted 9 April 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Ripe Olives from Spain (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WT/DS577/R, adopted 20 December 2021

1 TERMS OF REFERENCE

1. In your view, does paragraph 1 of Annex II to the Anti-Dumping Agreement contain multiple obligations, with the result that a complainant must always identify in a panel request, directly or indirectly, the distinct portion of paragraph 1 of Annex II that it claims to be infringed? If so, please also identify each distinct obligation that you consider is contained in paragraph 1 of Annex II.

U.S. Response to Question 1:

1. As an initial matter, the United States understands Australia's claim to concern MOFCOM's resort to facts available. That is, first, whether under the first sentence of Article 6.8 of the AD Agreement MOFCOM had a justification to make its determinations on the basis of facts available, and second, whether under the second sentence of Article 6.8 MOFCOM observed certain provisions in Annex II of the AD Agreement. The United States understands those to be the legal basis for the complaint set forth in Australia's panel request and argued in its first written submission.

2. As to the latter question, the United States notes that paragraph 1 of Annex II, like the other paragraphs of Annex II, sets forth different guidelines for investigating authorities to follow in resorting to facts available. In summarizing the legal basis for its complaint concerning Article 6.8, the United States understands that Australia included certain of these guidelines, including those under paragraph 1.

3. It is difficult to answer in the abstract which obligations an Article 6.8 claim must identify and how, specifically, it must do so, because the controlling provisions are found in Article 6.2 of the DSU and not in the AD Agreement. In evaluating whether the claim is within the Panel's terms of reference, the Panel should base its analysis on the text of Article 6.2 of the DSU. As elaborated in paragraphs 5 through 12 of the U.S. comments on China's preliminary ruling request, the Panel should evaluate whether Australia's panel request satisfied the two basic requirements in Article 6.2: (i) identify the specific measure at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. If Australia's panel request satisfies these basic requirements with respect to its Article 6.8 claim, then it would meet the standard.[1]

4. However, it may not be necessary for the Panel to reach this evaluation. As explained in our comments, China's request does not appear to be based on the text of Article 6.2 of the DSU.[2] In particular, it relies upon an erroneous "how" or "why" framework which is not part of the text of Article 6.2.[3] To the extent China's request is based on extra-textual requirements not found in Article 6.2 of the DSU, it is not a basis for the Panel to reject Australia's claims, including the claim concerning Article 6.8 of the AD Agreement.

5. As it stands, China's "how" or "why" argument is based on an erroneous interpretation reached by the panel in *Korea – Pneumatic Valves (Japan)*.[4] As noted, this approach is not

[1] U.S. comments on China PRR, paras. 12-13.
[2] U.S. comments on China PRR, para. 12.
[3] U.S. comments on China PRR, para. 12.
[4] *See*, *e.g.*, China PRR, paras. 20-21, 26, 92, 95, and 107 (citing *Korea – Pneumatic Valves (Panel)*).

reflected in the text of Article 6.2. It is Article 6.2 of the DSU that 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 measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

6. 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." Neither of the terms "how" nor "why" appears in Article 6.2. Instead, to provide the brief summary required by Article 6.2, it is sufficient for a complaining Member to specify in its panel request the legal claims under the WTO provisions with respect to the identified measures.

7. According to the text, two basic requirements in Article 6.2 are that the panel request (i) identify the specific measure 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, the panel request need only specify the legal claims under the WTO provisions that it considers are breached by the identified measure. Article 6.2 does not require that a panel request include arguments. Instead, the DSU indicates that a complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel.

8. Past references in Appellate Body reports to a requirement to explain "how" or "why" a measure is inconsistent were unsupported by the text of Article 6.2. Under the Appellate Body's approach, a complaining party would be required to include in a panel request the arguments that the complaining party will present to the panel regarding each claim of inconsistency with a provision of a covered agreement. But Article 6.2 plainly does not require the inclusion of arguments in a panel request.

9. Before the Appellate Body read these requirements into Article 6.2, this provision had never been understood this way. It is notable that the text for Article 6.2 was drawn from, and does not differ materially from, the 1989 GATT Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These Montreal Rules provided: "The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis for the complaint sufficient to present the problem clearly."

10. The fact that the Article 6.2 language comes from the Montreal Rules suggests that its incorporation in the DSU was not meant to change the standard that would be applied to panel requests. Panel requests after the Montreal Rules did not include an explanation of "how" or "why" the measure at issue was inconsistent with the GATT 1947 provision at issue. Rather, GATT panel requests identified the relevant GATT legal provision, or one of its obligations. The practice of Contracting Parties under the GATT 1947 with respect to panel requests therefore also demonstrates that the "how" or "why" approach is in error.

11. The panel in *Korea – Pneumatic Valves* attempted to faithfully apply the "how" or "why" approach of the Appellate Body to a panel request, and in so doing, rejected several claims as outside its terms of reference. The complaining party appealed, arguing that the panel had effectively required that it present the arguments supporting its claims that certain legal provisions were breached, and the appellate report reversed the panel's application of the Appellate Body's own approach. The appellate report stated that "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis . . . sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU." The United States would agree that Article 6.2 – and not a requirement without textual basis – presents the legal requirements for a panel request, and Article 6.2 does not require a complaining party to explain "how" or "why" a measure breaches an identified WTO commitment.

12. The "legal framework" proposed by China is devoid of any discussion of the actual text of Article 6.2 of the DSU.[5] Although China quotes Article 6.2 at the outset,[6] it immediately abandons the text in favor of requirements that are not found in Article 6.2 – namely, the "how" or "why" approach.[7] China in turn relies upon those extra-textual requirements to argue that fourteen of Australia's claims do not satisfy Article 6.2.[8]

13. Because China's requests concerning Article 6.2 depend on legal requirements that are not in the text, they do not provide a basis for the Panel to reject Australia's claims.

2. In your view, does Article 6.5 of the Anti-Dumping Agreement contain multiple obligations, with the result that a complainant must *always* identify in a panel request, directly or indirectly, the distinct portion of Article 6.5 that it claims to be infringed? If so, please also identify each distinct obligation that you consider is contained in Article 6.5.

U.S. Response to Question 2:

14. The United States considers that Article 6.5 of the AD Agreement contains a number of different obligations. In other words, an investigating authority could breach one obligation under Article 6.5 (for example, disclosing information without specific permission of the submitting party) but not another (for example, treating information as confidential in a way that contravenes the conditions of the first sentence).

15. Similar to Question 1, it is difficult to answer in the abstract which obligations an Article 6.5 claim must identify and how it should do so, because the controlling provisions are found in Article 6.2 of the DSU and not in the AD Agreement. As a legal matter, the Panel should base its analysis on the two basic requirements in the text of Article 6.2 of the DSU, as we described

[5] *See* China PRR, paras. 8-17.
[6] China PRR, para. 9.
[7] *See* China PRR, paras. 18-28.
[8] *See*, *e.g.*, China PRR, paras. 30-31 (asserting that "merely paraphras[ing] the language of Articles 5.1, 5.2(i), and 5.4 of the ADA" is not enough to "satisfactorily explain[] *how* or *why* each of these provisions" have been breached) (emphasis original).

in response to Question 2, above, and in paragraphs 5 through 12 of our comments on China's preliminary ruling request.[9]

16. Furthermore, it may not be necessary for the Panel to reach this evaluation given China's reliance on textual interpretations that are not supported by the text of Article 6.2 – in particular, the "how" or "why" framework.[10]

2 INJURY

3. With respect to MOFCOM's methodology for applying the "imported customs clearance costs/liquidation expenses" as adjustment to the c.i.f. prices, China explains, at paragraphs 1058 1060 of its first written submission, that although MOFCOM did not disclose how it applied them as adjustments, it was only logical that it added them to the c.i.f. prices, as is the normal practice in anti-dumping investigations.[11] Please comment on China's statement.

U.S. Response to Question 3:

17. Article 3.2 of the AD Agreement does not specify any particular methodology an investigating authority must employ when considering the price effects of dumped imports.[12] However, whatever methodology or approach the investigating authority uses, it must respect the overarching provisions of Article 3.1 that the determination of injury involve an "objective examination" based on "positive evidence."[13] In turn, to show that it performed an objective examination, MOFCOM must have supported its findings with reasoning that is coherent and internally consistent.[14]

4. At paragraphs 1298-1301 of its first written submission, China relies on the finding of the panel in *China – Broiler Products* with respect to the comparability of c.i.f. and ex-works prices. That panel found that c.i.f. prices need not have been adjusted to reflect transportation costs to the importer's warehouse and a mark-up for an importer's selling expenses and profit.[15]

a. Do you agree with that finding of the panel in *China – Broiler Products*? Please explain.

U.S. Response to Question 4(a):

18. The United States disagrees with the finding. In *China – Broiler Products*, the United States argued that China acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement by basing its underselling analysis on a comparison of c.i.f. import prices (paid by importers at the border) to ex factory domestic prices (paid by first arms-length purchasers at the factory gate).

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[9] *See* U.S. comments on China PRR, paras. 5-13.
[10] *See* U.S. comments on China PRR, paras. 12-13.
[11] China FWS, paras. 1058-1060.
[12] *See*, *e.g.*, *US – Ripe Olives from Spain (Panel)*, para. 7.268.
[13] *See US – Ripe Olives from Spain (Panel)*, para. 7.268 and n. 587 (citing *Mexico – Rice (AB)*, para. 204; *China-GOES (Panel)*, para. 130).
[14] *See US – Ripe Olives from Spain (Panel)*, paras. 7.268 and 7.209.
[15] China FWS, paras. 1298-1301 (referring to *China – Broiler Products (Panel)*), paras. 7.455 and 7.487).

Based on its understanding of the U.S. claim and the facts and arguments set forth in that dispute, the panel found that the United States had not demonstrated that MOFCOM needed to add a mark-up corresponding to the importers' costs and profits to the subject import average unit value to render that average unit value comparable to the domestic prices average unit value.[16]

19. Contrary to that panel's understanding, a domestic producer's ex factory prices – the prices producers charge their first arm's-length customers – normally would include transportation costs to the factory gate, the producer's sales, general and administrative expenses, and profit. Such prices would therefore be at a higher level of trade than c.i.f. import prices. The United States considers that, in a price effects analysis, an authority's failure to control for issues such as levels of trade is inconsistent with the requirements of Articles 3.1 and 3.2 of the AD Agreement.

20. The relevant question for the Panel, however, is whether the investigating authority reached a conclusion that an "unbiased and objective" investigating authority could have reached "even though the panel might have reached a different conclusion."[17] In making its objective assessment under DSU Article 11 and AD Agreement Article 17.6, a panel is not undertaking a *de novo* evidentiary review nor serving as "*initial trier of fact*," but is instead acting as "*reviewer* of agency action."[18] Therefore, the Panel's task in this dispute is to assess whether MOFCOM properly established the facts and evaluated them in an unbiased and objective manner. It would be inconsistent with the Panel's function under DSU Article 11 to exceed its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

b. In your view, should stevedoring and logistics costs for unloading subject imports from the ship, transport costs to move subject imports from the dock to a warehouse, and warehousing and storage costs be added to a c.i.f. price to make it comparable with an ex-works price? Please explain by reference to the Incoterms definitions of c.i.f. and ex-works.

U.S. Response to Question 4(b):

21. Keeping in mind the relevant question of whether the investigating authority reached a conclusion that an "unbiased and objective" investigating authority could have reached, the United States observes that MOFCOM appears in the underlying proceedings to have made a finding of price undercutting almost inevitable. The United States considers that the Incoterms definitions of c.i.f. and ex-works are not helpful in interpreting Articles 3.1 and 3.2 of the AD Agreement. The definitions contemplate that an ex works transaction is one that implicates any form or forms of transport (i.e., air, ocean, ground, or multimodal), in which a buyer assumes all costs and responsibilities involved with transporting goods from the named place of delivery (typically the seller's factory, warehouse, or other distribution center), including loading the goods on the buyer's collecting vehicle; a c.i.f. transaction is one that requires the seller to deliver goods, cleared for export, onboard the vessel at the port of shipment, pay for the transport

[16] *China – Broiler Products (Panel)*, para. 7.486.
[17] Article 11 of the DSU and Article 17.6 of the AD Agreement, with respect to disputes involving anti-dumping measures, set forth the standard of review to be applied by WTO dispute settlement panels. Thus, Article 11 of the DSU and Article 17.6 of the AD Agreement together establish the standard of review that applies to this dispute.
[18] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

of the goods to the port of destination, and obtain and pay for minimum insurance coverage on the goods through their journey to the named port of destination.

22. More broadly, in a c.i.f. transaction, the buyer, typically an importer, assumes responsibility for various costs associated with clearing goods, such as those specified by Australia, that require clearing import formalities and assuming certain transportation costs from the border to the warehouse.[19] Because the average unit value of subject imports on a c.i.f. basis does not normally include these various costs and mark- ups, such unit values would naturally be lower than the average unit value of subject imports sold by importers to first arms-length customers. Thus, by comparing the average unit value of subject imports on a c.i.f. basis with the average unit value of the domestic like product sold by domestic producers to the first arm's-length customers from the domestic producer's warehouse, absent adjustment, MOFCOM appears in the underlying investigations to have made a finding of price undercutting almost inevitable.

5. Article 3.4 requires an evaluation of "factors affecting domestic prices". In this regard, the Panel refers to the parties' arguments at paragraphs 639-645 of Australia's first written submission and 1539-1545 of China's first written submission.

a. Since Article 3.4 does not refer to "all" factors affecting domestic prices, is there discretion on the part of the investigating authority as to which factors affecting domestic prices it will choose to examine?

U.S. Response to Question 5(a):

23. The answer lies in the reference in Article 3.4 of the AD Agreement to the word "relevant". Specifically, authorities must consider "all relevant" economic factors and indices "having a bearing on the state of the industry."[20] Whether or not a factor is among those enumerated under Article 3.4, if it is *relevant* to the condition of the domestic industry, the authority must consider it.

24. Further, as the United States elaborates in its response to Question 5.b below, with respect to factors affecting domestic prices, the authority may have already considered such factors in its price effects analysis under Article 3.2. However, if there are "relevant" factors other than the imports that play a role in the domestic market, the authorities should also consider those factors.

b. If an investigating authority has conducted a price effects analysis under Article 3.2 and relies on that analysis also in the context of its analysis under

[19] *See*, *e.g.*, https://www.ups.com/us/en/supplychain/insights/knowledge/glossary-term/ex-works.page?; *see also* https://www.aitworldwide.com/incoterms-cif.
[20] Article 3.4 of the AD Agreement further provides: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Article 3.4, does this mean that the authority has satisfied the requirement in Article 3.4 to examine "factors affecting domestic prices"? Please explain.

U.S. Response to Question 5(b):

25. The response to this question turns on the facts of the particular investigation. Whereas the second sentence of Article 3.2 of the AD Agreement, directly focuses on the relationship between the price of dumped imports and domestic prices, Article 3.4 focuses on factors indicative of the state of the domestic industry.[21] In some investigations, there may be relevant factors other than subject imports that "are affecting domestic prices." In other investigations, that may not be the case. In this regard, we find instructive that the panel report in *Morocco – Hot-Rolled Steel (Turkey)* drew the same conclusion from these provisions, namely, that "the manner in which an investigating authority decides to evaluate factors affecting domestic prices falls within the bounds of the authority's discretion."[22]

6. China argues at paragraphs 1607-1613 of its first written submission that MOFCOM was not required to evaluate the impact of changes in consumption volumes on the injury factors cited by Australia since this is a matter to be assessed in the non-attribution analysis under Article 3.5, and MOFCOM did address it in that context.[23] Is the examination of the impact of factors other than dumped imports on the domestic industry a matter to be examined under Article 3.4 or Article 3.5? Please explain.

U.S. Response to Question 6:

26. Whether under Article 3.4 or 3.5 of the AD Agreement, an investigating authority must evaluate and address the reasons for declines in the domestic industry's performance. For purposes of this analysis, consideration of "market share", and therefore the relevance and significance of changes in consumption volumes, are among the enumerated factors to be considered under Article 3.4. The reasons underlying observed domestic industry performance trends, however, are generally more relevant to an analysis of causation under Article 3.5 of the AD Agreement. For example, information purporting to show that the industry's performance indicators declined during the period of investigation for reasons unrelated to subject imports, such as a decline in apparent consumption, could be identified among "any known factors other than the dumped imports" to be examined for the purposes of Article 3.5.[24] Merely mentioning the factor, without further discussion or explanation, however, would not be sufficient to demonstrate that an authority conducted the required analysis of "any known factors other than the dumped imports".

[21] *See*, *e.g.*, *EC – Tube or Pipe Fittings (Panel)*, para. 7.335.
[22] *Morocco – Hot-Rolled Steel (Turkey) (Panel)*, para. 7.261.
[23] China's first written submission, paras. 1607-1613 (quoting Panel Reports, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.301; and *Egypt – Steel Rebar*, para. 7.64).
[24] *See* AD Agreement Article 3.5 ("The authorities shall also examine any *known factors other than the dumped imports* which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports") (emphasis added).

7. China relies on *EU – Footwear (China)* to argue that fluctuations in exchange rates do not qualify as an other known factor under Article 3.5.[25] Please comment.

U.S. Response to Question 7:

27. Nothing in the text of Article 3.5 of the AD Agreement precludes consideration of exchange rate fluctuations as a known factor other than dumped imports. The second sentence of Article 3.5 requires an authority to examine "all relevant evidence" before it, both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury. The third sentence of Article 3.5 requires an authority to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry" to ensure that "the injuries caused by these other factors not be attributed to the dumped imports." Such an analysis is therefore necessary if (i) there are one or more known factors other than the dumped imports that (ii) are injuring the domestic industry (iii) at the same time.

28. The extent to which a factor other than imports is causing injury and becomes "known" to an authority may vary according to the nature of the alleged factor, and the manner in which the authority evaluates it in a given investigation. While an authority is under no express requirement to "seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation," an authority's findings and analysis under Article 3.5 must comply with the "positive evidence" and "objective examination" requirements of Article 3.1.

3 OPPORTUNITIES TO SEE INFORMATION AND MAKE PRESENTATIONS

8. Article 6.4 requires authorities to provide opportunities to see "information … that is not confidential as defined in" Article 6.5. In the context of an Article 6.4 claim, we understand China to take the view that if a respondent asserts that information is confidential within the meaning of Article 6.5, but the complainant has not made a claim under Article 6.5 with regard to that information, the complainant's Article 6.4 claim with regard to that information fails. Do you consider that to succeed in an Article 6.4 claim, where the respondent asserts the information is confidential, a complainant must have made a separate claim of inconsistency with Article 6.5? Or can the complainant demonstrate that the information is "not confidential as defined in paragraph 5" as part of its case under Article 6.4?

U.S. Response to Question 8:

29. As an initial matter, the United States notes that Australia has made a claim under Article 6.5 of the AD Agreement. Specifically, Australia included in its panel request, and argued in its first written submission, that MOFCOM did not satisfy the conditions of the first sentence of Article 6.5 in determining to treat certain information as confidential.[26] The hypothesis underpinning China's argument with respect to Article 6.4 is therefore misplaced.

[25] China FWS, para. 1979; *EU – Footwear (China) (Panel)*, paras. 7.516 and 7.537.
[26] *See*, *e.g.*, Australia FWS, paras. 831-832; Australia panel request, para. vi.

30. Furthermore, the United States understands China's argument to collapse the separate and distinct obligations under Articles 6.4 and 6.5. Article 6.4 requires, among other things, that interested parties have the opportunity to see information that is not confidential. Of course, if the information in question is in fact confidential, then a claim regarding this Article 6.4 obligation likely would not succeed. However, the text of Article 6.4 does not contain a requirement that to bring such a claim the complainant must also include a claim under Article 6.5 (as Australia did, in any event). As noted, these articles contain different obligations. Indeed, in paragraph 62 of its preliminary ruling request, China appears to share this understanding that Article 6.4 and Article 6.5 are distinct.

4 CONFIDENTIAL TREATMENT OF INFORMATION

9. In *EU – Footwear (China)*, the application requested confidential treatment of certain price information on the basis that disclosure of the information "would be of significant advantage to a competitor and/or would have a significantly adverse effect upon a person supplying the information and/or upon the person from whom he has acquired the information".[27] This is the wording of the "examples" provided in Article 6.5 for information that is by nature confidential. The panel found that the complainant had not established that the respondent's authority had acted inconsistently with Article 6.5 by accepting that statement as showing good cause for confidential treatment.[28] In your view, can the requirement for "good cause shown" in Article 6.5 be satisfied by an explanation that the information in question is by nature confidential?

U.S. Response to Question 9:

31. Under Article 6.5 of the AD Agreement, investigating authorities must treat information as confidential that is "by nature" confidential or that is provided "on a confidential basis," and for which "good cause" is shown for such treatment. In this dispute, under the chapeau of Article 6.5, the Panel should first determine whether an unbiased and objective investigating authority could have determined that the information was "by nature" confidential or was "provided on a confidential basis" by an interested party. The Panel should then determine whether the investigating authority ensured that the pertinent information was effectively communicated to all interested parties, for example by ensuring that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority does not provide a way to effectively communicate pertinent information to interested parties to an investigation, such parties are unable to adequately defend their interests.

32. The language of Article 6.5 does not obligate an investigating authority to "request" that a party providing information show good cause that the information should be accorded confidential treatment. As the panel in *EU – Footwear (China)* recognized, "there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided" and "the nature of the

[27] *EU – Footwear (China) (Panel)*, para. 7.727.
[28] *EU – Footwear (China) (Panel)*, paras. 7.728-7.729. *See also Mexico – Steel Pipes and Tubes (Panel)*, para. 7.378; and China FWS, para. 2309.

showing that will be sufficient to satisfy the 'good cause' requirement will vary, depending on the nature of the information for which confidential treatment is sought."[29] The panel in *Korea – Stainless Steel Bars* further observed that "Article 6.5 does not specify the manner in which 'good cause' is to be established. This lack of specificity necessarily means that the exact manner in which 'good cause' should be established is not prescribed."[30] Instead, "the nature and the degree of the requirement to show good cause depends on the information concerned."[31]

33. The merits underlying the grant of confidential treatment in an anti-dumping proceeding may be plain on the face of the record of the proceeding.[32] An authority may also set up a procedure in which a party requesting confidential treatment may certify that specific information is confidential because it is not publicly available and the release will cause harm to the submitter. In such situations, an investigating authority may infer that "good cause" exists to treat such information as confidential.[33]

34. If MOFCOM did not conduct the foregoing steps, or in doing did not objectively assess whether "good cause" existed for confidential treatment, then it will not have acted in a manner consistent with its obligations under Article 6.5.

5 CLAIMS UNDER ARTICLES 6.1, 6.1.1, 6.1.2 AND 6.2

10. In relation to its claim under Article 6.2, at paragraph 931 of Australia's first written submission, Australia argues that: "MOFCOM failed to consider the complete data provided in commonly-used Excel and PDF formats, neither issuing a request to Casella Wines to provide the complete data in an alternate format, nor identifying any deficiency in that data, nor offering any explanation for its refusal to take the complete data into account". At paragraphs 2400-2401 of China's first written submission, China states that Australia's argument seems to concern whether information was disclosed, and that "Article 6.2 of the Anti-Dumping Agreement does not embody an obligation regarding disclosure of information to interested parties". China quotes from paragraph 7.261 of the Panel Report in *EU – Footwear (China)*, which states that:

> **[A]rticle 6.2 does not establish any specific obligations with respect to disclosure of or access to information. Thus, to the extent China is asserting a**

[29] *EU – Footwear (China) (Panel)*, para. 7.728 (footnotes omitted).
[30] *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (footnote omitted).
[31] *Korea – Stainless Steel Bars (Panel)*, para. 7.206 (citing as support the panel reports in *Mexico – Steel Pipes and Tubes*, para. 7.378; *Korea – Certain Paper*, para. 7.335; and *EU – Footwear (China)*, para. 7.728).
[32] For example, where a party submits sensitive information (costs or prices for specific customers), the good cause for confidential treatment is plainly evident.
[33] *See Korea – Stainless Steel Bars (Panel)*, para. 7.206 (recognizing that an "implicit assertion" of good cause by a submitting party "could well suffice" in certain circumstances); *ibid.*, para. 7.206, n. 626 ("For some types of information, it will be self-evident that the information falls within one of the enumerated categories and would cause commercial harm if disclosed. Thus, whether such "implicit assertions" suffice depends on the information at issue in a given case").

> **delay in "disclosure" of information, we see no basis for its claim in Article 6.2 and reject it.**

Australia does not refer to this paragraph from *EU – Footwear (China)*, but rather at paragraph 904 of its first written submission cites the panel report *Korea – Certain Paper (Article 21.5)*, which relevantly states at paragraph 6.80:

> **[T]he right provided for under Article 6.2 to have full opportunity to defend one's interests is not limited to make comments on the factual basis of the authorities' determinations. It also entails the right to comment on how the data collected by the authorities have to be assessed.**

Please explain whether there is any tension between the relevant statements in *EU – Footwear (China)* and *Korea – Certain Paper* concerning the scope of the obligation(s) set forth in Article 6.2. Please include in your response your views as to what reasoning supports the panels' findings in those cases.

U.S. Response to Question 10:

35. The United States does not understand the passages cited above to be in tension. The panel report in *EU-Footwear* observed that Article 6.2 of the AD Agreement "does not establish any specific obligations with respect to disclosure of or access to information."[34] Whereas in *Korea – Certain Paper (Article 21.5),* the panel report observed "the right provided for under Article 6.2 to have full opportunity to defend one's interests is not limited to make comments on the factual basis of the authorities' determinations. It also entails the right to comment on how the data collected by the authorities have to be assessed."[35] Although the panel report in *EU - Footwear* correctly observed that Article 6.2 does not establish specific obligations with respect to disclosure, as the report in *Korea-Certain Paper* observed, Article 6.2 does not exist in a vacuum.

6 ACCURACY OF INFORMATION

11. At paragraph 2423 of China's first written submission, China submits that Article 6.6 should be interpreted such that "to assess MOFCOM's compliance with Article 6.6 of the Anti-Dumping Agreement, the Panel in the present case has to simply check whether MOFCOM's examination of the accuracy of information submitted to it, represented an 'unbiased and objective evaluation of facts'" (referring at footnote 2363 in support of this proposition to Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.193). At paragraph 955 of Australia's first written submission, Australia states that: "Necessarily inherent in the obligation on an investigating authority to 'satisfy itself as to the accuracy' of information is that the process it uses to make that assessment must be rationally capable of determining the reliability and probity of the information being assessed". Please indicate your

[34] *EU-Footwear (Panel),* para. 7.261.
[35] *Korea – Certain Paper (Article 21.5)*, para. 6.80.

views on what is required of authorities to "satisfy themselves as to the accuracy of the information" under Article 6.6.

U.S. Response to Question 11:

36. The United States agrees that the Panel should evaluate whether MOFCOM conducted an unbiased and objective evaluation of facts, as Article 17.6 of the AD Agreement requires. However, China appears to overlook the distinct language of Article 6.6 concerning "information supplied by interested parties upon which [the investigating authority's] finding are based." For this category of information, investigating authorities are directed to "satisfy themselves as to [its] accuracy". Thus, for a particular subset of information, Article 6.6 sets forth a distinct obligation that does not simply repeat the same language as Article 17.6. China's position that this inquiry simply refers to the "unbiased and objective evaluation of facts" would render the Article 6.6 obligation redundant.

37. The text of Article 6.6 does not specify a particular method for the investigating authority to "satisfy themselves as to the accuracy of the information", and the investigating authority will need to take due account of the particular factual record and arguments that are before it. If the factual record rebuts or calls into question the accuracy of information provided by interested parties, that context would need to be considered in evaluating whether the investigating authority satisfied itself as to the accuracy of the information. In other words, if record evidence demonstrates that the information in question is not accurate, it is difficult to envision how the investigating authority could nonetheless have satisfied itself as the accuracy of that information.

38. The United States agrees with Australia that Article 6.6 employs distinct language to encompass a distinct obligation that the investigating authority must satisfy. The United States also notes the factual circumstances outlined by Australia which, it argues, demonstrate that MOFCOM did not satisfy itself as the accuracy of certain information that it ultimately relied upon.[36] The Panel should evaluate whether, given these factual circumstances, MOFCOM nonetheless satisfied its obligation under Article 6.6 as to the accuracy of this information.

7 ESSENTIAL FACTS

12. Please explain in what context, if any, you understand dumping margin calculation methodologies to be within the scope of Article 6.9. Please include discussion of both paragraph 7.256(a) of the Panel Report *Russia – Commercial Vehicles* and paragraph 7.377 of *China – Broiler Products (Article 21.5 – US)* in your answer.

U.S. Response to Question 12:

39. Article 6.9 requires that an investigating authority, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The disclosure obligation of Article 6.9,

[36] *See*, *e.g.*, Australia FWS, para. 936.

while it does not cover all facts, does cover facts which are "essential" and "form the basis" for a decision to apply definitive measures.[37]

40. The United States understands the scope of Article 6.9 to include the dumping margin calculation methodologies. As explained in its third party submission, the United States finds instructive the panel report in *China – Broiler Products*, which observed that for a determination of the existence and margin of dumping, the investigating authority must disclose: (i) the data used in the determination of normal value (including constructed value) and determination of export price, (ii) the sales used in comparison between normal value and export prices, (iii) the adjustments for differences that affect price comparability, and (iv) the formulas applied to the data.[38]

41. In paragraph 7.256(a) of the panel report in *Russia – Commercial Vehicles*, the panel observed that "Article 6.9 requires the disclosure of facts: the information underlying a decision rather the reasoning, calculation or methodology that led to a determination."[39] The disclosure obligation of Article 6.9, while it does not extend to all facts, does extend to those facts which are "essential" and "form the basis" for a decision to apply definitive measures. However, the obligation to disclose "facts" under Article 6.9 does not also mean that authorities must, before issuing their determinations, explain how they will use or weigh the relevant facts.

13. Please indicate whether the "quantum of adjustments" (as referred to at paragraphs 1043 and 1048 of Australia's first written submission) requires disclosure under Article 6.9. Please explain the legal basis for your interpretation, and identify any prior dispute settlement reports which are consistent with your position.

U.S. Response to Question 13:

42. As noted in response to Question 12, the United States agrees with the observation of the panel in *China – Broiler Products* that an investigating authority, with respect to a determination of the existence and margin of dumping, must disclose: (i) the data used in the determination of normal value (including constructed value) and determination of export price, (ii) sales used in comparison between normal value and export prices, (iii) adjustments for differences that affect price comparability, and (iv) the formulas applied to the data.[40]

43. The United States understands Australia's use of the term "quantum of adjustments" to refer to the identification of and explanation of the quantity or amount of the adjustments which were requested by Australia, and the MOFCOM either accepted or rejected in calculating the dumping margin.

44. The United States considers that "adjustments for differences that affect price comparability" and "the formulas applied to the data"[41] are "essential facts under consideration"

[37] *See China – GOES (AB)*, para. 240; *China – Broiler Products*, para. 7.86; *China – X-Ray Equipment*, paras. 7.399-7.400.
[38] *See* U.S. FWS, para. 56 (citing *China –Broiler Products (Panel)*), para. 7.93.
[39] *Russia – Commercial Vehicles (Panel),* para. 7.256 (emphasis original).
[40] *China – Broiler Products (Panel)*, para. 7.91.
[41] *China – Broiler Products (Panel)*, para. 7.91.

which the investigating authority must disclose in a manner that fulfils its obligations under Article 6.9 of the AD Agreement, such that the interested parties may "defend their interests".

8 PUBLIC NOTICE

14. Article 12.2.2 requires that notice of a Final determination "shall contain the information described in subparagraph 2.1" (i.e. Article 12.2.1). Article 12.2.1(iii) in turn refers to "the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2". Please explain your views as to the extent of the notice required by Articles 12.2 and 12.2.2 as informed by Article 12.2.1(iii), including whether and to what extent authorities must set out the methodology and reasons concerning the calculation of the dumping margin.

U.S. Response to Question 14:

45. The question correctly observes that Article 12 of the AD Agreement explicitly links the methodology and reasons concerning the calculation of the dumping margin to the public notice and explanations of determinations.

46. Article 12.2 and Article 12.2.2 require authorities to provide (i) "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" and (ii) the information on matters of fact and law which are considered material or led to the imposition of definitive measures. These provisions require an authority to disclose the facts, law, and reasons that led to the imposition of anti-dumping duties, so as to enable interested parties to, among other things, "pursue judicial review of a final determination."[42]

47. Article 12.2.2 in particular provides 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." That obligation includes "the information described in subparagraph 2.1", which in turn includes all of the "margins of dumping information" described under subparagraph 2.1(iii).

48. As elaborated in the U.S. third-party submission, disclosure by the investigating authority, including a mere reference to data in possession of an interested party, may not necessarily constitute disclosure of "relevant information on matters of fact and law and reasons which have led to the imposition of final measures," because an interested party may not be able to discern from the reference whether the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

49. At a minimum, the calculations employed by an investigating authority to determine dumping margins, and the data underlying those calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the

[42] *China – GOES (AB)*, paras. 240-241, 258.

dumping margins imposed by an investigating authority. They thus are "relevant" to the decision to apply final measures, and because they consist of sales and cost data and mathematical uses of these data, they are "issues" or "matters" of "fact" under Articles 12.2 and 12.2.2.

50. In this regard, the United States disagrees with the various interpretations of Articles 12.2 and 12.2.2 developed by China in its first written submission.[43] For one, contrary to China's interpretation, the obligations under Articles 12.2 and 12.2.2 do not simply duplicate the essential facts obligation under Article 6.9 such that satisfying the obligations set forth under one article permits the investigating authority to disregard the other. Furthermore, that certain information is disclosed as an essential fact does not in itself mean that the investigating authority satisfied the requirements of Articles 12.2 and 12.2.2 with respect to that information.

51. The United States considers that the legal framework proposed by China is not based on the actual text of Article 12 and therefore should not be form the basis for the Panel's analysis.

[43] *See* China FWS, paras. 2598-2606.