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

(DS602)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 21, 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. Otherwise, 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. 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.

3. 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. A 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."

4. 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. 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.

5. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales made at the same level of trade and as nearly as possible the same time) and to make appropriate adjustments to those sales (due allowances for differences which affect price comparability). The United States observes that nothing in the text of Article 2.4 limits an investigating authority's obligation to indicate "what information is necessary to ensure a fair comparison" to situations where normal value is based on data from a producer in a third country. Nor did the panel report in *EC – Fasteners (China)* actually identify such an extra-textual exception to the sixth sentence of Article 2.4. If the exporters have not provided evidence demonstrating to the authorities that there is a difference affecting price comparability, or argument demonstrating that existing information on the record reflects a difference affecting price comparability, however, there would be no basis for the investigating authority to make an adjustment and no requirement to do so. An investigating authority thus is not obligated to accept a request for an adjustment that is unsubstantiated. However, if the facts on the record support it, the investigating authority must make the appropriate price adjustments for differences in product mix and levels of trade.

6. 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 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 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. The second sentence of Article 6.10 permits an authority to limit its examination by "either" of two methods: (i) "using samples which are statistically valid on the basis of information available to the authorities at the time of the selection" or (ii) "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." Thus, if the authority samples, the sample must be "statistically valid on the basis of information available to the authorities at the time of the selection." If the authority limits its examination by export volume, Article 6.10 requires that it cover "the largest percentage of the volume of exports . . . which can reasonably be investigated." China conflates the distinct requirements of the two distinct methods to limit examination – i.e., "using samples" or "the largest percentage volume of the exports". China represents that MOFCOM employed the latter method, sampling, but argues that MOFCOM satisfied the conditions of *the other method* – i.e., that it selected "the

three companies with the most exports to China." Whether or not China's assertion about export volume is accurate, the Panel should evaluate whether the sample it constructed is "statistically valid on the basis of information available to the authorities at the time of the selection." Had MOFCOM limited its examination using the "largest percentage of volume of the exports" method (which China represents that it did not), Australia argues that MOFCOM nonetheless excluded an exporter, Pernod Ricard, that was needed to constitute the largest percentage of the volume of exports. The Panel would need to evaluate whether, in light of the arguments and evidence placed on the record by the interested parties, an unbiased and objective authority could have concluded that "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated" could exclude Pernod Ricard.

7. Article 5.2(i) of the AD Agreement requires that written application requesting the initiation of an antidumping investigation 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) . . . ." Article 5.2(i) also requires 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 requires 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." Thus, the Panel should evaluate whether an unbiased and objective authority could have concluded that the written application contained sufficient information on all domestic wine producers known to the applicant. Accordingly, the Panel should assess whether, in a situation where the petitioner and MOFCOM acknowledged that the written application excluded "hundreds" of domestic producers, that application nonetheless contained "such information as is reasonably available to the applicant" regarding all known domestic producer of the like product.

8. Article 5.2(iii) covers the various components of the dumping margin calculation – i.e., the elements for determining a normal value, export price, and any adjustments necessary for a fair comparison. The United States observes that China's argument that Article 5.2(iii) permits third-country proxy information in the place of prices in the country of origin or export is not based on the text of Article 5.2. China cites for support that Article 5.2(iii) uses the term "product in question" rather than "like product" and that the prices need not be specific to individual producers or exporters. *First*, neither Article 5.2 nor Article 2, which defines "dumping", indicate that the price of a product produced in a third country is an appropriate proxy for normal value for purposes of initiation of an investigation. *Second*, China overlooks that "product in question" is used elsewhere in the text of Article 5.2 where it plainly *does not* encompass products produced in third countries. *Third*, whether or not Article 5.2(iii) requires "separate information on the normal [value] for each producer or exporter in the exporting country" (China posits that it does not), the "information on prices" must still be provided in one of the three forms specified under Article 5.2(iii). *Fourth*, the prices of "the product in question" cannot be for a product imported from a third country into the country of origin or export because the alternative to domestic market prices includes "the prices at which the product is sold from the country or countries of origin or export to a third country . . . ." The imported product cannot be a product sold from the country or origin or export, so it therefore cannot be "the product in question". Rather, it refers to the "allegedly dumped product". *Fifth*, the export price information required under Article 5.2(iii) includes "prices at which the product is first resold . . . in the territory of the importing Member" – i.e., "the product" introduced earlier in the

same sentence as the "product in question" for domestic market prices. Given the "resold . . . in the territory of the importing Member" language, "the product" similarly would not include third-country products imported into the country of origin or export.

9. China also argues that the applicant provided sufficient evidence for MOFCOM to find that a "particular market situation" impacted costs and prices in Australia. Article 2 refers to the phrase "particular market situation" in describing the circumstances under which normal value may be based on something other than domestic market sales. While Article 5 does not require that at the time of initiation an investigating authority provide the same evidence of dumping needed to support a determination under Article 2, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping, as defined under Article 2, to justify initiating an investigation. Under Article 5.3, an investigating authority "shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation", and, under Article 5.8, an application "shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

10. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation. Article 6.9 further requires that an 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, 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."

11. Absent a full disclosure of the "essential facts" forming the basis for consideration of a dumping determination, it might not be possible for an interested party to identify whether the determinations contain clerical or mathematical errors or even whether the authority properly considered the factual information before it. In this regard, the United States agrees with the panel in *China – Broiler Products* that an authority, with respect to a determination of the existence and margin of dumping, should disclose: (i) the data used in the determination of normal value (including constructed value) and determination of export price; (ii) sales that were used in comparison between normal value and export prices; (iii) any adjustments for differences that affect price comparability; and (iv) the formulas applied to the data.

12. 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. 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 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. 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 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."

13. 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. To this end, Article 12.2.2 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." Therefore, 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.

14. The United States observes that the analyses in MOFCOM's final antidumping determination are very brief. They are often lacking in evidentiary support concerning key elements of the dumping, 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 MOFCOM could have satisfied its obligations under Articles 12.2 and 12.2.2 based on the content of such abbreviated, unsubstantiated, and indecipherable analyses. With respect to China's arguments that Australia did not establish a *prima facie* case with respect to many of its claims, 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. In making its findings, 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. Such an outcome would not appear appropriate under these important provisions that require an authority to disclose, in sufficient detail, the facts, law, and reasons that led to the imposition of antidumping duties.

II. Preliminary Ruling Request

15. China's preliminary ruling request does not appear to be based on the text of Article 6.2 of the DSU. In particular, it relies upon an erroneous "how" or "why" framework which is not part of the text of Article 6.2. The "legal framework" proposed by China is devoid of any discussion of the actual text of Article 6.2 of the DSU. Although China quotes Article 6.2 at the outset, it immediately abandons the text in favor of requirements that are not found in Article 6.2 – namely, the "how" or "why" approach. China in turn relies upon those extra-textual requirements to argue that fourteen of Australia's claims do not satisfy Article 6.2.

16. China's "how" or "why" argument is based on an erroneous interpretation reached by the panel in *Korea – Pneumatic Valves (Japan)*. This approach is not reflected in the text of Article 6.2 of the DSU. It is Article 6.2 hat 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. 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. 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, 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.

17. 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. 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." 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.

18. 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.