

CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON WINE FROM AUSTRALIA
(DS602)

**THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA**

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<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001
<i>China – Broiler Products (Panel)</i>	Panel Report, <i>China - Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R, adopted 20 September 2011
<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012
<i>China – HP-SSST (AB)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – X-Ray Equipment (Panel)</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013
<i>EC – Bed Linen (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/ RW, adopted 8 April 2003
<i>EC – Fasteners (Panel)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R, adopted 28 July 2011
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003

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<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>Guatemala – Cement I (Panel)</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, p. 3797
<i>Korea – Stainless Steel Bars</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R, circulated to WTO Members 30 November 2020, appealed by Korea 22 January 2021
<i>Mexico – Anti-Dumping Measures on Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005
<i>US – Carbon Steel (India) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Softwood Lumber V (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Steel Plate from India</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement).

II. AUSTRALIA’S CLAIMS CONCERNING THE AD AGREEMENT

A. Article 6.8 and Annex II of the AD Agreement

2. To calculate the dumping margins in its investigation, China’s Ministry of Commerce (“MOFCOM”) relied in critical respects on facts available, rather than the information supplied by the Australian respondents.¹ Accordingly, the United States focuses its comments on the facts available requirements of the AD Agreement – i.e., the circumstances in which an investigating authority may resort to facts available and the information it may use as facts available.

3. Australia argues that, in relying upon facts available to calculate the dumping margins determined for the investigated Australian respondents, China breached its obligations under Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement.² Specifically, Australia argues that MOFCOM (i) lacked a basis to resort to facts available because “necessary” information was not missing from the record, and the Australian respondents did not fail to provide such information in response to MOFCOM’s requests;³ (ii) failed to specify in detail the information it required from the respondents;⁴ (iii) failed to take into account record information that was timely supplied and verifiable;⁵ (iv) failed to inform the Australian respondents why it did not accept their information or permit them to provide further explanations to the extent that information was deficient;⁶ and (v) selected facts that had no logical relationship with the record evidence.⁷

4. China argues that MOFCOM properly resorted to facts available because the sampled respondents withheld “important and necessary information to establish (and verify) the costs of production” and did not cooperate sufficiently in responding to MOFCOM’s questions.⁸ In defining certain missing cost data as “necessary” under Article 6.8, China cites the fact that such data could be used to verify the company’s costs of production and is included in questionnaires used by other investigating authorities.⁹ China also argues that even if the investigated

¹ See Australia FWS, paras. 26-28. MOFCOM’s use of facts available resulted in antidumping duties of between 116 and 218 percent which, according to Australia, “lacked any logical relationship to the facts on the record.” Australia FWS, para. 2.

² Australia FWS, paras. 25-28.

³ Australia FWS, paras. 8, 108-11, 139-156.

⁴ Australia FWS, paras. 8, 166-168.

⁵ Australia FWS, paras. 8, 184-185, 203, 297.

⁶ Australia FWS, paras. 198-213.

⁷ Australia FWS, paras. 8, 232-239, 382-406.

⁸ China FWS, paras. 180-181, 246-248.

⁹ See, e.g., China FWS, paras. 292-297.

respondents cooperated to the best of their abilities, MOFCOM was not required to use their information if it was not verifiable or would have generated “undue difficulties.”¹⁰

5. The United States wishes to provide several observations on the proper legal interpretation of Article 6.8 and Annex II of the AD Agreement.

6. Article 6.8 provides that:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph.

7. Accordingly, 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.

8. The “facts available” refer to “evidence” that is “able to be used or obtained” by the entity that is to conduct “the investigation” and make “preliminary and final determinations” – that is, the investigating authority. Evidence is “able to be used or obtained” if it has been submitted to the investigating authority in the investigation, or if the authority has placed that evidence on the record.¹¹ The United States also observes that the facts available that may be used to replace “necessary information” comprises information that is “necessary”, not information that is merely requested.¹² The distinction lies in the fact that “necessary information” is information that an investigating authority requires to make its determination.¹³

9. 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 necessary information it requested is not on the record.¹⁴

10. Australia also argues that MOFCOM failed to specify the information required from certain respondents and to ensure that those parties were aware of the consequences of not

¹⁰ See, e.g., China FWS, paras. 248-249.

¹¹ *US – Carbon Steel (India) (AB)*, para. 4.417 (observing that the “facts available” refers “to those facts that are in the possession of the investigating authority and on its written record.”).

¹² *Egypt – Steel Rebar (Panel)*, paras. 7.150-7.151.

¹³ *Korea – Stainless Steel Bars (Panel)*, para. 7.185.

¹⁴ *Korea – Stainless Steel Bars (Panel)*, para. 7.185.

providing the requested information.¹⁵ 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.¹⁶ 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.¹⁷ Accordingly, the Panel should evaluate whether MOFCOM specified the information that it required from the sampled Australian exporters.

11. 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 elaborated in Annex II, investigating authorities are able to select suitable, available information consistent with the aim of Article 6.8 and Annex II to allow administering authorities to make determinations and complete their investigations.

12. Australia raises challenges under paragraphs 1, 3, 5, 6, and 7 of Annex II. Paragraph 1 provides that an investigating authority “should specify in detail the information required from any interested party”. Paragraph 1 also clarifies that an investigating authority should ensure that respondents receive notice of the authority’s right to use facts available:

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

13. 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.¹⁸

14. Paragraph 3 of Annex II to the AD Agreement states that:

¹⁵ Australia FWS, paras. 166, 219, 368, and 450.

¹⁶ Article 6.1 of the AD Agreement provides context for Article 6.8 by establishing that the investigating authorities must indicate to the interested parties the information that they require: “All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.” Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer “in the antidumping investigation” cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and “appear.” Rather, the investigating authority must affirmatively reach out and “give notice” of the information that it requires.

¹⁷ *Mexico – Anti-Dumping Measures on Rice (Panel)*, n.211.

¹⁸ *Argentina – Ceramic Tiles (Panel)*, para. 6.55 (providing that the inclusion in Annex II, paragraph 1, of a requirement to specify in detail the information required “strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.”). *See also China – GOES (Panel)*, para. 7.393 (observing that China’s failure to notify the “all other” exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement).

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

15. Thus, a party will not have failed to provide necessary information, or have significantly impeded the investigation, if the information submitted satisfies 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.”¹⁹ Investigating authorities are also not entitled to reject information submitted if it is “in a medium or computer language requested by the authorities.” Past reports have considered information to be verifiable when “the accuracy and reliability of the information can be assessed by an objective process of examination”²⁰ and “undue difficulties” are difficulties “beyond what is otherwise the norm in an antidumping investigation.”²¹

16. 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 investigating 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.

17. 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 explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.”

18. Finally, according to paragraph 7 of Annex II, an investigating authority that relies on information from a secondary source may reach a result “less favourable” to an interested party if that party “does not cooperate and thus relevant information is being withheld” from the authority.²² An authority that “ha[s] to base its findings . . . on information from a secondary source . . . should do so with special circumspection,” or “caution, care”.²³

19. 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.²⁴ In this way, Annex II reflects that an investigating authority’s ability to rely on facts potentially less favorable to the

¹⁹ *US – Hot-Rolled Steel (AB)*, para. 81.

²⁰ *US – Steel Plate (Panel)*, para. 7.71 and n.67.

²¹ *US – Steel Plate (Panel)*, para. 7.72.

²² See also *US – Hot-Rolled Steel (AB)*, para. 99 (discussing paragraph 7 of Annex II of the AD Agreement and noting that non-cooperation on the part of an interested party may lead to an outcome that is less favorable to the interested party).

²³ Oxford English Dictionary, “circumspection” (second definition: “circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness”) (available at oed.com).

²⁴ *US – Zeroing (EC) (AB)*, para. 459.

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.

20. In sum, the AD Agreement provides that when an interested party refuses access to, or otherwise does not supply necessary information, or significantly impedes the investigation, the investigating authority may resort to the facts available to make its determination. However, an interested party will not have failed to provide necessary information, or to 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.

21. 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.

B. Article 2.4 of the AD Agreement

22. Australia argues that MOFCOM breached Article 2.4 of the AD Agreement by failing to make allowances for differences affecting price comparability, including differences in product mix and level of trade.²⁵ Australia argues that those failures included: (i) not comparing normal value and export price at the same level of trade; (ii) not making due allowance for differences that affected price comparability; (iii) improperly rejecting requests for adjustments; and (iv) not timely indicating the information needed to ensure a fair comparison.²⁶

23. China argues that for due allowances to be made, there must be a difference that affects price comparability, which is substantiated by the requesting party.²⁷ In addition, China argues that MOFCOM was not required to make allowances for differences affecting price comparability because the Australian exporters either did not request such allowances²⁸ or did not adequately support the requests.²⁹

24. The United States wishes to provide several comments on the proper interpretation of Article 2.4.

25. Article 2.4 of the Anti-Dumping Agreement provides in relevant part:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other

²⁵ See Australia FWS, paras. 280-285, 407-409, 422-423, 478-481, 493-522.

²⁶ Australia FWS, para. 500.

²⁷ See China FWS, paras. 845-846.

²⁸ China FWS, paras. 849-852, 855-857.

²⁹ China FWS, paras. 847-848.

differences which are also demonstrated to affect price comparability The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

26. 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).³⁰

27. 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.³¹ An investigating authority thus is not obligated to accept a request for an adjustment that is unsubstantiated.³² 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.

28. A determination of whether the obligation in Article 2.4 has been met will depend on the specific facts and circumstances at issue. Therefore, consistent with Article 11 of the DSU and Article 17.6(i) of the AD Agreement, the question of whether MOFCOM failed to make reasonable adjustments will depend on whether MOFCOM’s findings could not have been made by an unbiased and objective investigating authority.

29. As to the sixth sentence of Article 2.4, Australia also argues that MOFCOM failed to indicate in a timely manner the information, such as the methodology used to determine normal value, that was necessary to ensure a fair comparison.³³ China argues that the sixth sentence exempts an investigating authority from the obligation to provide this information when (i) “the normal value is based on an exporter’s own data”, citing the panel report in *EC – Fasteners*

³⁰ For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, or in varying quantities, all of which may affect price. See AD Agreement, Art. 2.4; *EC – Tube or Pipe Fittings (Panel)*, para. 7.157. As the panel in *Egypt – Steel Rebar* explained, “[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value.” *Egypt – Steel Rebar (Panel)*, para. 7.335.

³¹ *EC – Tube or Pipe Fittings (Panel)*, para. 7.158; *Korea – Certain Paper (Panel)*, para. 7.147.

³² See *EC – Fasteners (China) (AB)*, para. 488 (finding that if an interested party does not demonstrate the existence of a difference affecting price comparability, an investigating authority is not obligated to make an adjustment).

³³ See Australia FWS, paras. 493-522.

(China),³⁴ or (ii) “a party does not cooperate to the best of its abilities” and normal value is based on facts available.³⁵

30. 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 2.4.³⁶

31. Accordingly, in evaluating whether MOFCOM satisfied its obligations under Article 2.4 to conduct a fair comparison, the Panel should evaluate whether MOFCOM failed to disclose its methodologies for determining normal value or export price.

C. Article 6.10 of the AD Agreement

32. Australia argues that MOFCOM breached Article 6.10 of the AD Agreement in the manner in which it limited its examination to a “sample” of three Australian exporters.³⁷ In particular, although MOFCOM purported to base its sample on the largest volume of exporters that could “reasonably be investigated”, it ignored record evidence that its sample was not so constituted.³⁸ According to Australia, MOFCOM did not take the steps needed to ensure that the three sampled companies were in fact the three largest exporters.³⁹

33. China argues that Australia did not provide the “evidence and legal argument in relation to its claim” to establish a *prima facie* case and that, in any event, an “unbiased and objective” investigating authority could have constructed the sample as MOFCOM did.⁴⁰ China further argues that MOFCOM had discretion under Article 6.10 to not select another Australian exporter, Pernod Ricard, and that Australia has not pointed to record evidence that MOFCOM needed to select Pernod Ricard to base its sample on the largest volume of exporters that could be reasonably investigated.⁴¹

34. The United States provides several comments on the proper interpretation of Article 6.10 of the AD Agreement. Article 6.10 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”) therefore sets out an obligation that applies “normally” or “generally”.⁴² 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

³⁴ China FWS, paras. 883-884. According to China, the panel’s findings were in the context of “a very particular factual situation,” where normal value was established by reference to data from a producer in a third country, which “implies that when . . . normal value is based on an exporter’s own data, there is no obligation on an investigating authority to indicate what information is necessary to ensure a fair comparison.”

³⁵ China FWS, para. 885.

³⁶ See *EC – Fasteners (Panel)*, para. 7.149.

³⁷ Australia FWS, para. 881.

³⁸ Australia FWS, paras. 891-898.

³⁹ Australia FWS, paras. 894-898.

⁴⁰ China FWS, para. 2339.

⁴¹ China FWS, paras. 2341-2348.

⁴² Oxford English Dictionary, “rule” (Phrases: (h) “As a rule”: “normally, generally”) (available at oed.com).

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. In other words, Article 6.10 permits the limiting of an examination when an authority does not have the resources to individually examine all parties involved in an investigation.⁴³

35. 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.”

36. The United States will not comment on the record facts, but addresses certain positions by China that conflict with the text of Article 6.10. In particular, 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.⁴⁴ However, in responding to Australia’s claim that MOFCOM breached the examination limitation provisions of Article 6.10, China argues that MOFCOM satisfied the conditions of *the other method* – i.e., that it selected “the three companies with the most exports to China.”⁴⁵ Whether or not China’s assertion about export volume is accurate, the Panel should evaluate whether the sample MOFCOM constructed is “statistically valid on the basis of information available to the authorities at the time of the selection.” If China did not satisfy these conditions for “using samples”, then it breached the second sentence of Article 6.10. In this regard, the United States notes that China does not indicate where in MOFCOM’s determinations it demonstrated that the sample was statistically valid.⁴⁶

37. 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.⁴⁷ 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

⁴³ AD Agreement, Art. 6.10 (second sentence: “In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.”). *See, e.g., EC – Salmon (Norway) (Panel)*, para. 7.188.

⁴⁴ *See, e.g., China FWS* para. 2336 (tinting the relevant section of its FWS “CONSTRUCTION OF THE SAMPLE”).

⁴⁵ *See China FWS*, para. 2336.

⁴⁶ To the contrary, China perfunctorily dismisses arguments about the representativeness of the sample as “irrelevant”. *China FWS*, para. 2336.

⁴⁷ *See Australia FWS*, paras. 895-897. Australia argues that the exporter needed to be among the three selected exporters or selected as a fourth exporter.

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.

38. As to China’s argument that Australia failed to establish a *prima facie* case, an argument repeated throughout China’s submission, the United States comments further in Section H. In particular, many of the supposed failures pertain to MOFCOM findings that, as catalogued by Australia, were not set forth with sufficient clarity (if at all). China similarly suggests that because Australia focuses in its first written submission on whether the selected exporters constituted the “largest percentage of the volume of the exports . . .” (i.e., the stated basis for MOFCOM limiting its examination), Australia ceded any other issues concerning the second sentence of Article 6.10.⁴⁸ The United States does not understand Australia’s claim to be so limited.⁴⁹ Furthermore, the Panel should not permit China to benefit from MOFCOM’s own lack of clarity as to which method it used to limit its examination to the three exporters, and the basis for that method.

D. Article 5.2(i) of the AD Agreement

39. Australia argues that the application did not contain sufficient evidence of dumping and that, by initiating the investigation, MOFCOM breached Articles 5.2, 5.3, and 5.8 of the AD Agreement.⁵⁰ Australia argues that China breached Article 5.2(i) of the AD Agreement because at the initiation stage of the investigation, both MOFCOM and the applicant, the China Alcoholic Drinks Entity (CADA), acknowledged “hundreds” of domestic producers but did not provide a list of those “known” domestic producers.⁵¹ Instead, CADA’s application only listed its 122 members, omitting the other domestic producers.⁵² For this defect, among others, Australia also argues that MOFCOM breached Article 5.8 by failing to reject the application.⁵³

40. China argues that CADA’s application included a list of all “known” producers because it “included . . . all producers that were members of CADA.”⁵⁴ According to China, CADA was “aware of the fact” that there were other domestic producers who were not included but “did not know who [they] were [or] what their production volumes were”.⁵⁵ China also argues in the alternative that because Article 4.1 of the AD Agreement does not require that an investigating authority define the domestic industry at the outset, the list of “known” domestic producers is unnecessary information for initiation purposes.⁵⁶ In addition, China argues that a list of “the associations” of domestic producers (i.e., according to China, CADA) satisfied Article 5.2(i).⁵⁷

41. The United States provides several comments on the proper interpretation of the requirements of Article 5.2 of the AD Agreement. The chapeau to Article 5.2 and paragraph (i)

⁴⁸ China FWS, para. 2331.

⁴⁹ See, e.g., Australia FWS, para. 889.

⁵⁰ Australia FWS, para. 769.

⁵¹ Australia FWS, paras. 750-755.

⁵² See Australia FWS, paras. 765-767.

⁵³ See Australia FWS, paras. 802-823 (arguing that CADA’s application failed in other respects to provide sufficient evidence of injury).

⁵⁴ China FWS, para. 2064.

⁵⁵ China FWS, para. 2064.

⁵⁶ China FWS, para. 2066.

⁵⁷ China FWS, para. 2064-2065.

of that Article provide that the application “shall contain such information as is reasonably available to the applicant on the following:

* * *

Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known producers of the like product (or associations of the like product) and to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers.”⁵⁸

42. Accordingly, 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.”⁵⁹

43. As the panel report observed in *US – Softwood Lumber V*, and both Australia and China note, these provisions “oblige the applicant to provide reasonably available information of the relevant matters.”⁶⁰

44. 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.” The panel report in *Guatemala – Cement I* observed that while “the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination,” the term “sufficient evidence” nevertheless required “a factual basis to the decision of the national investigative authorities.”⁶¹

45. Given these requirements, 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.⁶² Accordingly, the Panel should assess whether, in a situation where CADA and MOFCOM acknowledged that the written application excluded “hundreds” of domestic producers, that application nonetheless contained “such

⁵⁸ Emphasis added.

⁵⁹ The United States observes that China provides no support for its argument that the requirements of Articles 4.1 and 16.1 of the AD Agreement and an investigating authority’s definition of the domestic industry *following an investigation* override the requirements of Article 5.2(i) at the *initiation of an investigation* – namely, the requirement that an application on behalf of a domestic industry contains information “reasonably available” to it.

⁶⁰ *US – Softwood Lumber V (Panel)*, para. 7.54. See also Australia FWS, para.746; China FWS, para. 568.

⁶¹ *Guatemala – Cement I (Panel)*, para. 5.36. See also *EC – Bed Linen (Panel)*, para. 6.199 (considering that the only basis upon which a panel can review an authority’s examination of the accuracy and adequacy of information filed in a petition is by reference “to the determination that examination is in aid of – the determination whether there is sufficient evidence to justify initiation”, which is itself primarily based on an examination of the information contained in the relevant petition).

⁶² See Australia FWS, para. 813.

information as is reasonably available to the applicant” regarding all known domestic producer of the like product.

E. Article 5.2(iii) of the AD Agreement

46. With respect to Article 5.2(iii), Australia argues that MOFCOM improperly relied upon an unsubstantiated claim of a “particular market situation” to justify omitting prices in Australia.⁶³ Australia also argues that the information included instead – *i.e.*, the prices of Chinese wine imports into Australia – were not an appropriate basis for normal value, and that MOFCOM failed to make appropriate adjustments to normal value to permit a fair comparison.⁶⁴

47. China argues that MOFCOM’s conclusion that the written application contained the information required was consistent with Articles 5.2, 5.3, and 5.8 of the AD Agreement.⁶⁵ In particular, China argues that the “information on prices” in the home market required under Article 5.2(iii) is different than the “like product” defined in the application, and can instead be a proxy produced in a third country and imported into the country of export.⁶⁶

48. As described in the previous section, Article 5.2, which requires evidence of dumping, injury, and causation, provides that the information may not be “[s]imple assertion” or “unsubstantiated by relevant evidence”. With respect to the required evidence of dumping, Article 5.3(iii) requires that the application contain reasonably available information including:

*information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member.*⁶⁷

49. Article 5.2(iii) thus 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.⁶⁸ With regard to dumping, the applicant must provide evidence that permits the actual normal value, export price, and value of any adjustments to be established for the period identified in the complaint.⁶⁹ A normal value not substantiated by relevant evidence would not satisfy the requirements of Article 5.2.⁷⁰

50. 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

⁶³ Australia FWS, paras. 775-777.

⁶⁴ Australia FWS, paras. 782, 798.

⁶⁵ China FWS, para. 2068.

⁶⁶ China FWS, para. 2094.

⁶⁷ Emphasis added.

⁶⁸ *Morocco – School Exercise Books (Panel)*, paras. 7.350-7.351.

⁶⁹ *Morocco – School Exercise Books (Panel)*, paras. 7.352.

⁷⁰ *Morocco – School Exercise Books (Panel)*, paras. 7.352.

question” rather than “like product” and that the prices need not be specific to individual producers or exporters.⁷¹ *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.⁷² *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).⁷³ *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.

51. China also argues that the applicant provided sufficient evidence for MOFCOM to find that a “particular market situation” impacted costs and prices in Australia.⁷⁴ 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.⁷⁵ 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.⁷⁶ Under Article 5.3 of the AD Agreement, 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

⁷¹ See China FWS, paras. 2094-2096.

⁷² See Article 5.2(ii) (requiring, with respect to the allegedly dumped product from “the country or countries of origin or export in question”, “a list of known persons importing *the product in question*”) (emphasis added).

⁷³ Those bases are: the price of the product in question when destined for consumption in the exporting country, a comparable representative price when exported to an appropriate third country, or the constructed value of the product.

⁷⁴ China FWS, para. 2085.

⁷⁵ The United States notes as a threshold matter that CADA’s application did not cite a “particular market situation”, or another basis under Article 2 of the AD Agreement to find that “sales do not permit a proper comparison”, in explaining why Australian prices were not provided, nor did MOFCOM in its notice of initiation. See Exhibit-AUS-64 (CADA Application); see also Exhibit AUS-89 (MOFCOM Notice of Initiation), p. 2 (stating only that MOFCOM had reviewed “the impact of the products subject to investigation on China’s domestic industry” and “the situation of the country subject to the investigation request.”).

⁷⁶ *Guatemala – Cement II*, paras. 8.35-8.36.

satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.”

52. Accordingly, the Panel should evaluate whether CADA’s written application contained “such evidence as is reasonably available” concerning the types of “information on prices” listed under Article 5.2(iii). Absent this information, and adherence to the above requirements under Articles 5.3 and 5.8, MOFCOM’s decision to initiate the investigation would be inconsistent with Article 5.2.

F. Articles 6.2 and 6.9 of the AD Agreement

53. Australia argues that MOFCOM acted inconsistently with Article 6.2 of the AD Agreement by failing to provide parties with a full opportunity for defence of their interests.⁷⁷ Australia also argues that MOFCOM breached its obligations under Article 6.9 of the AD Agreement to provide interested parties with a full opportunity to defend their interests because MOFCOM failed to disclose, prior to the imposition of antidumping measures, the essential facts upon which it based its final determination.⁷⁸

54. China argues that Australia conflates the requirements of Articles 6.2 and 6.9 with Article 12.⁷⁹ China also argues that the “reasoning” or “decisions” of an investigating authority are distinct from its Article 6.9 obligation to “inform all interested parties of the essential facts under consideration which form the basis for the decision to apply definitive measures.”⁸⁰

55. 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 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, 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.”⁸¹

56. Absent a full disclosure of the “essential facts” forming the basis for consideration of an underlying 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 investigating authority properly considered the factual information before it. In this regard, the United States agrees with the panel in *China – Broiler Products* that an investigating 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;

⁷⁷ Australia FWS, paras. 904 and 907.

⁷⁸ Australia FWS, paras. 1010-1069. In particular, Australia argues that MOFCOM failed to disclose essential facts concerning the margin of dumping, the calculation methodology for duties on the sampled companies, the information selected as facts available, and the bases for those selections, and the injury and causation determinations.

⁷⁹ China FWS, paras. 2514-2518.

⁸⁰ China FWS, paras. 2522-2526.

⁸¹ See *China – GOES (AB)*, para. 240; *China – Broiler Products*, para. 7.86; *China – X-Ray Equipment*, paras. 7.399-7.400.

(iii) any adjustments for differences that affect price comparability; and (iv) the formulas applied to the data.⁸²

57. Accordingly, the Panel should assess whether MOFCOM properly disclosed the essential facts under consideration which form the basis for the decision whether to apply definitive measures, so as to: (i) permit interested parties to understand clearly the data being used by the investigating authority and how that data was used to determine the existence and margin of dumping; and (ii) provide interested parties with a full opportunity for the defense of their interests.⁸³

G. Articles 6.5 and 6.5.1 of the AD Agreement

58. Australia argues that MOFCOM acted inconsistently with Article 6.5 of the AD Agreement because it neither ensured that the applicant and domestic producers demonstrated “good cause” for confidential treatment nor objectively examined their justifications for confidential treatment.⁸⁴ Australia also argues that MOFCOM acted inconsistently with Article 6.5.1 of the AD Agreement by failing to require those parties to provide adequate non-confidential summaries.⁸⁵

59. China argues that under Article 6.5 the Panel must evaluate whether MOFCOM assessed “good cause” before granting confidential treatment, not whether the information was actually confidential.⁸⁶ Further, China argues that a “holistic examination”, not limited to “MOFCOM’s determinations and supporting documents”, demonstrates that MOFCOM conducted an objective assessment of the existence of “good cause”.⁸⁷ China also argues that MOFCOM satisfied Article 6.5.1 by publishing non-confidential summaries explaining why certain information could not be summarized.⁸⁸

60. The United States wishes to provide several observations on the proper legal interpretation of Article 6.5 of the AD Agreement.

61. The chapeau of Article 6.5 provides:

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities.

⁸² *China – Broiler Products*, para. 7.93.

⁸³ *China – HP-SSST (AB)*, para. 5.131.

⁸⁴ Australia FWS, para. 831.

⁸⁵ Australia FWS, para. 832.

⁸⁶ China FWS, para. 2274.

⁸⁷ China FWS, para. 2276.

⁸⁸ China FWS, paras. 2310-2312. Similar to its arguments concerning many other issues in its first written submission, China labels its disagreement with Australia’s claims as a failure by Australia “to establish a *prima facie* case”. In Section H below, the United States comments on these arguments.

Such information shall not be disclosed without specific permission of the party submitting it.

62. Additionally, Article 6.5.1 of the AD Agreement states:

The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

63. These provisions balance the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests.⁸⁹ The United States considers Article 6.5 to require investigating authorities ensure the confidential treatment of certain information. Article 6.5.1 balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Under Article 6.5.1 such a summary must convey a “reasonable understanding of the substance of the information submitted in confidence.”

64. 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. The Appellate Body in *EC – Fasteners (China)* supported this view when it explained that a party must show good cause for confidential treatment at the time the information is submitted, after which the investigating authority “must objectively assess the ‘good cause’ alleged for confidential treatment, and scrutinize the party’s showing in order to determine whether the submitting party has sufficiently substantiated its request.”⁹⁰

65. Based on the above, therefore, the Panel should first determine if an interested party designated information as confidential. The Panel should then determine whether an investigating authority that accepted confidential information ensured 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 and allow such parties the ability to adequately defend their interests. If MOFCOM did not conduct either of these steps, or in doing did not objectively assess whether “good cause” existed for confidential treatment, then it breached its obligations under Article 6.5 and 6.5.1.

⁸⁹ See, e.g., AD Agreement, Article 6.2, first sentence (“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.”); AD Agreement, Article 6.9, second sentence (“Such disclosure should take place in sufficient time for the parties to defend their interests.”).

⁹⁰ *EC – Fasteners (China) (AB)*, para. 5.39.

H. Articles 12.2 and 12.2.2 of the AD Agreement

66. Australia argues that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the AD Agreement by failing to publish all relevant information on matters of fact, law, and reasons for its determinations concerning dumping⁹¹ and injury and causation⁹². In particular, Australia argues that the public notice of final determination failed to disclose all matters of fact and law and reasons relating to MOFCOM’s (i) calculation of the total production of the domestic industry;⁹³ (ii) recourse to “facts available” and selection of the facts available;⁹⁴ (iii) decisions concerning adjustments to ensure a fair comparison of normal value and export price;⁹⁵ (iv) the differences in price comparability;⁹⁶ (v) calculation of dumping margins for exporters and the reasons for the calculation methodology used;⁹⁷ and (vi) determination of injury and causation.⁹⁸

67. China argues that Articles 12.2 and 12.2.2 do not require public disclosure of an “exaggerated level of detail”, which according to China includes information such as “underlying data and calculations regarding dumping margins, “[d]omestic price data”, the “methodology adopted by an investigating authority”, or “decisions made by the authority”.⁹⁹ China also argues that Australia did not establish a *prima facie* case that MOFCOM breached Articles 12.2 and 12.2.2.¹⁰⁰ In support, China disputes whether the matters of fact, law, and reasons identified by Australia were in fact disclosed in MOFCOM’s final determination.¹⁰¹

68. Articles 12.2 and 12.2.2 of the AD 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. 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.”¹⁰²

69. 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.”¹⁰³ 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

⁹¹ Australia FWS, paras. 1077-1118.

⁹² Australia FWS, paras. 1119-1128.

⁹³ Australia FWS, paras. 1086-1091.

⁹⁴ Australia FWS, paras. 1105-1108.

⁹⁵ Australia FWS, paras. 1092-1104.

⁹⁶ Australia FWS, paras. 1109-1112.

⁹⁷ Australia FWS, paras. 1113-1118.

⁹⁸ Australia FWS, paras. 1119- 1128.

⁹⁹ China FWS, paras. 2604-2605.

¹⁰⁰ China FWS, paras. 2607-2665.

¹⁰¹ See China FWS, paras. 2607-2665.

¹⁰² *China – GOES (AB)*, paras. 240-241, 258.

¹⁰³ AD Agreement, Article 12.2.2.

final measures,”¹⁰⁴ 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.

70. 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 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.

71. The United States observes that the analyses in MOFCOM’s final antidumping determination (as appended to Australia’s written submission) are very brief. They are often lacking in evidentiary support concerning key elements of the dumping, injury, and causation determinations.¹⁰⁵ In some cases it is difficult even to discern the basis for MOFCOM’s conclusions.¹⁰⁶ The Panel will need to determine whether MOFCOM could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement based on the content of such abbreviated, unsubstantiated, and indecipherable analyses.

72. With respect to China’s arguments that Australia did not establish a *prima facie* case with respect to many of its claims,¹⁰⁷ 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.¹⁰⁸ 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.

¹⁰⁴ AD Agreement, art. 12.2.2. *See also* China – HP-SSST (AB), para. 5.131 (observing that the “mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts.”).

¹⁰⁵ *See* Exhibit AUS-2 (Final Antidumping Determination). Australia’s submission identifies examples concerning the reliance on “facts available” to determine normal value and the selection of the facts available, the calculation of normal value and export price, and the injury determination. *See, e.g.*, Australia FWS, paras. 1076-1129.

¹⁰⁶ *See* Exhibit AUS-2 (Final Antidumping Determination). For example, as described above, it is not clear which of the two methods of limiting its examination MOFCOM chose. Similarly, Australia elaborates on how the information and methodology used to calculate the dumping margins were in key respects unclear or unexplained. *See, e.g.*, Australia FWS, paras. 383-393, 472-474, 1049-1051.

¹⁰⁷ *See, e.g.*, China FWS, paras. 35-36, 2607-2665.

¹⁰⁸ *See, e.g.*, Australia FWS, para. 1096.

III. CONCLUSION

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