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

REPORT OF THE PANEL

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Short Title	Full Case Title and Citation
Australia – Anti-Dumping Measures on Paper	Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R and Add.1, adopted 28 January 2020
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615
Indonesia – Chicken (Article 21.5 – Brazil)	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS484/RW and Add.1, circulated to WTO Members 10 November 2020, appealed 17 December 2020
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW2 and Add.1, circulated to WTO Members 12 July 2019, appealed 9 September 2019
Ukraine – Ammonium Nitrate	Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R and Add.1, adopted 30 September 2019, DSR 2019:X, p. 5227
Ukraine – Ammonium Nitrate	Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R, DSR 2019:X, p. 5339
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
US – Carbon Steel (India) (Article 21.5 – India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India*, WT/DS436/RW and Add.1, 15 November 2019, mutually agreed solution reported
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R, DSR 2015:I, p. 183

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US – Pipes and Tubes (Turkey)	Panel Report, *United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed 25 January 2019
US – Tariff Measures (China)	Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R and Add.1, circulated to WTO Members 15 September 2020, appealed 26 October 2020
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description/Long title
AUS-11	Continuation 517 initiation notice	Notice of initiation of the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China (Anti-Dumping Notice No. 2019/86) (3 July 2019)
AUS-13	Investigation 238 Komodo Hong Kong Limited's questionnaire response	Komodo Hong Kong Limited's response to questionnaire in the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (dated 5 May 2014, published 21 May 2014)
AUS-14	Investigation 238 Zhuhai Grand's questionnaire response	Zhuhai Grand's response to questionnaire in the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (16 May 2014)
AUS-15	Investigation 238 Primy's questionnaire response	Primy's response to questionnaire in the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (published 20 May 2014)
AUS-49	Investigation 238 statement of essential facts	Statement of essential facts of the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (23 December 2014)
AUS-70	Investigation 193 (aluminium zinc coated steel) final report	Final report of the investigation into the alleged subsidization of zinc coated steel and aluminium zinc coated steel exported from China (Anti-Dumping Commission Report No. 193) (dated 28 June 2013, published 5 August 2013)
AUS-75 (BCI)	Investigation 221 final report, appendix 2 "Steel Price Uplift"	Final report of the investigation into the alleged dumping of wind towers exported from China and Korea, appendix 2 "Steel Price Uplift" (Anti-Dumping Commission Report No. 221) (dated 21 March 2014, published 16 April 2014)
AUS-81 (BCI)	Continuation 517 Zhuhai Grand verification visit report, p. 25 and attachment	Report of verification visit to Zhuhai Grand in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China, p. 25 and attachment
CHN-2	Investigation 238 final report	Final report of the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (Anti-Dumping Commission Report No. 238) (dated 19 February 2015, published 26 March 2015)
CHN-3	Investigation 466 final report	Final report of the investigation into the alleged dumping of railway wheels exported from China and France (Anti-Dumping Commission Report No. 466) (dated 1 March 2019, published 16 July 2019)
CHN-4	Investigation 221 final report	Final report of the investigation into the alleged dumping of wind towers exported from China and Korea (Anti-Dumping Commission Report No. 221) (dated 21 March 2014, published 16 April 2014)
CHN-5	Investigation 221 initiation notice	Notice of initiation of the investigation into the alleged dumping of wind towers exported from China and Korea (Anti-Dumping Notice No. 2013/68) (28 August 2013)
CHN-6	Investigation 221 findings notice	Notice of findings in relation to the investigation into the alleged dumping of wind towers exported from China and Korea (Anti-Dumping Notice No. 2014/33) (16 April 2014)
CHN-7	Continuation 487 initiation notice	Notice of initiation of the expiry review of the anti-dumping measures on wind towers exported from China and Korea (Anti-Dumping Notice No. 2018/115) (16 July 2018)
CHN-8	Continuation 487 findings notice	Notice of findings of the expiry review of the anti-dumping measures on wind towers exported from China and Korea (Anti-Dumping Notice No. 2019/33) (27 March 2019)
CHN-9	ADRP Review 2019/100 review proposal notice	Notice of ADRP proposal to conduct administrative review of the minister's decision in the expiry review of the anti-dumping measures on wind towers exported from China and Korea, in relation to TSP (8 May 2019)
CHN-10	ADRP Review 2019/100 minister's decision notice	Notice of minister's decision following the ADPR's administrative review of the continuation of the anti-dumping measures on wind towers exported from China and Korea, in relation to TSP (dated 8 July 2020, published 9 July 2020)

Exhibit	Short Title (if any)	Description/Long title
CHN-12	Investigation 238 initiation notice	Notice of initiation of the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (Anti-Dumping Notice No. 2014/20) (18 March 2014)
CHN-13	Investigation 238 termination notice	Notice of termination of part of the investigation into the alleged subsidization of stainless steel sinks exported from China (Anti-Dumping Notice No. 2015/16) (19 February 2015)
CHN-14	Investigation 238 findings notice	Notice of findings in relation to the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (Anti Dumping Notice No. 2015/41) (26 March 2015)
CHN-15	Review 352 initiation notice	Notice of initiation of the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Notice No. 2016/53) (16 May 2016)
CHN-16	Review 352 findings notice	Notice of findings in relation to the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Notice No. 2016/107) (dated 17 November 2016, published 21 November 2016)
CHN-17	Review 352 final report	Final report of the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Commission Report No. 352) (dated October 2016, published 21 November 2016)
CHN-18	Review 459 initiation notice	Notice of initiation of the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Notice No. 2017/187) (21 December 2017)
CHN-19	Review 459 findings notice	Notice of findings in relation to the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Notice No. 2018/75) (dated 14 June 2018, published 15 June 2018)
CHN-20	Review 461 initiation notice	Notice of initiation of the interim review of the anti-dumping measures on stainless steel sinks exported from China by Yingao (Anti-Dumping Notice No. 2018/24) (12 February 2018)
CHN-21	Review 461 findings notice	Notice of findings in relation to the interim review of the anti-dumping measures on stainless steel sinks exported from China by Yingao (Anti-Dumping Notice No. 2018/143) (dated 9 October 2018, published 12 October 2018)
CHN-22	Review 459 final report	Final report of the interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA (Anti-Dumping Commission Report No. 459) (dated April 2018, published 15 June 2018)
CHN-23	ADRP Review 2020/124 review proposal notice	Notice of ADRP proposal to conduct administrative review of the minister's decision in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China, in relation to Primy and Zhuhai Grand (6 April 2020)
CHN-24	ADRP Review 2020/124 minister's decision notice	Notice of minister's decision following the ADPR's administrative review of the continuation of the anti-dumping measures on stainless steel sinks from China, in relation to Primy and Zhuhai Grand (dated 3 July 2020, published 8 July 2020)
CHN-26	Investigation 466 initiation notice	Notice of initiation of the investigation into the alleged dumping and subsidization of railway wheels exported from China and the alleged dumping of railway wheels exported from France (Anti-Dumping Notice No. 2018/59) (18 April 2018)
CHN-27	Investigation 466 termination notice	Notice of termination of the investigation into the alleged subsidization of railway wheels exported from China (Anti-Dumping Notice No. 2019/12) (24 January 2019)
CHN-28	Investigation 466 findings notice	Notice of findings in relation to the investigation into the alleged dumping of railway wheels exported from China and France (Anti-Dumping Notice No. 2019/30) (dated 12 July 2019, published 16 July 2019)
CHN-29	Customs Act 1901, Part XVB	Customs Act 1901 (Commonwealth), Part XVB

Exhibit	Short Title (if any)	Description/Long title
CHN-30	ADRP Review 2019/100 conference summary	Summary of ADRP conference with ADC members in relation to the administrative review of the minister's decision in the expiry review of the anti-dumping measures on wind towers exported from China and Korea, in relation to TSP (dated 19 June 2019, published 1 July 2019)
CHN-31	Continuation 487 final report	Final report of the expiry review of the anti-dumping measures on wind towers exported from China and Korea (Anti-Dumping Commission Report No. 487) (dated 12 March 2019, published 27 March 2019)
CHN-32	ADRP Review 2019/100 report	ADRP's report of the administrative review of the minister's decision in the expiry review of the anti-dumping measures on wind towers exported from China and Korea, in relation to TSP (ADRP Report No. 100) (dated April 2020, published 9 July 2020)
CHN-33	Investigation 198 (hot rolled plate steel) final report	Final report of the investigation into the alleged dumping of hot rolled plate steel exported from China, Indonesia, Japan, Korea, and Chinese Taipei and the alleged subsidization of hot rolled plate steel exported from China (Anti-Dumping Commission Report No. 198) (dated 16 September 2013, published 5 February 2014)
CHN-35	Investigation 238 Zhuhai Grand verification visit report	Report of verification visit to Zhuhai Grand in the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (dated September 2014, published 2 October 2014)
CHN-36	Continuation 517 final report	Final report of the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China (Anti-Dumping Commission Report No. 517) (dated February 2020, published 28 February 2020)
CHN-38	Customs Amendment Regulations 2005 (No. 8) and Explanatory Statement	Customs Amendment Regulations 2005 (No. 8) (Commonwealth), Select Legislative Instrument 2005 No. 265 (23 November 2005), and Explanatory Statement to the Customs Amendment Regulations 2005 (No. 8) (28 November 2005)
CHN-42	ADC, *Dumping and Subsidy Manual* (2013), p. 43	ADC, *Dumping and Subsidy Manual* (December 2013), p. 43
CHN-43	Investigation 238 Primy verification visit report	Report of verification visit to Primy in the investigation into the alleged dumping and subsidization of stainless steel sinks exported from China (dated September 2014, published 2 October 2014)
CHN-46 (BCI)	Continuation 517 Primy's response to statement of essential facts	Primy's response to the statement of essential facts in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China (19 December 2019)
CHN-47	ADRP Review 2020/124 report	ADRP's report of the administrative review the minister's decision in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China, in relation to Primy and Zhuhai Grand (ADRP Report No. 124) (dated June 2020, published 8 July 2020)
CHN-48 (BCI)	Investigation 466 Masteel verification visit report, appendix 3 "Domestic Sales", tab "(b) Profit"	Report of verification visit to Masteel in the investigation into the alleged dumping and subsidization of railway wheels exported from China and the alleged dumping of railway wheels exported from France, appendix 3 "Domestic Sales", tab "(b) Profit"
CHN-51	Review 461 final report	Final report of the interim review of the anti-dumping measures on stainless steel sinks exported from China by Yingao (Anti-Dumping Commission Report No. 461) (dated September 2018, published 12 October 2018)
CHN-52	Continuation 517 findings notice	Notice of findings in relation to the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China (Anti-Dumping Notice No. 2020/003) (dated 27 February 2020, published 28 February 2020)

Exhibit	Short Title (if any)	Description/Long title
CHN-53 (BCI)	Investigation 466 Masteel verification visit report, appendix 2 "CTMS", tab "(a) CTMS"	Report of verification visit to Masteel in the investigation into the alleged dumping and subsidization of railway wheels exported from China and the alleged dumping of railway wheels exported from France, appendix 2 "CTMS", tab "(a) CTMS"
CHN-54 (BCI)	Investigation 466 Masteel verification visit report, appendix 2 "CTMS (Final with uplift)", tab "(a) CTMS"	Report of verification visit to Masteel in the investigation into the alleged dumping and subsidization of railway wheels exported from China and the alleged dumping of railway wheels exported from France, appendix 2 "CTMS (Final with uplift)", tab "(a) CTMS"
CHN-59	Investigation 238 consideration report	Report of consideration of the application for the anti-dumping and countervailing duty measures on stainless steel sinks exported from China (Consideration Report No. 238) (dated 11 March 2014, published 18 March 2014)
CHN-60	CBSA statement of reasons, attached to Investigation 238 application	CBSA's statement of reasons concerning the making of final determinations with respect to the dumping and subsidization of certain stainless steel sinks originating in or exported from China (9 May 2012), submitted to ADC as "Attachment C-1-1.1.1" to the application for anti-dumping and countervailing duty measures on stainless steel sinks exported from China (18 March 2014)
CHN-90 (BCI)	Continuation 517 Primy's response to statement of essential facts, table 6 "accessories adjustment"	Primy's response to the statement of essential facts in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China, table 6 "accessories adjustment"

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
304 SS CRC	304 stainless steel cold-rolled coil
AD claims	China's claims under the Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADRP	Anti-Dumping Review Panel
ADRP Review 2019/100	administrative review of the minister's decision in the expiry review of the anti-dumping measures on wind towers exported from China and Korea, in relation to TSP
ADRP Review 2020/124	administrative review of the minister's decision in the expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China, in relation to Primy and Zhuhai Grand
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
CBSA	Canadian Border Services Agency
Continuation 487	expiry review of the anti-dumping measures on wind towers exported from China and Korea
Continuation 517	expiry review of the anti-dumping and countervailing duty measures on stainless steel sinks exported from China
CTMS	cost to make and sell goods
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
f.o.b.	free on board
GAAP	generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Investigation 198	original investigation into the alleged dumping of hot rolled plate steel exported from China, Indonesia, Japan, Korea, and Chinese Taipei and the alleged subsidization of hot rolled plate steel exported from China
Investigation 221	original investigation into the alleged dumping of wind towers exported from China and Korea
Investigation 238	original investigation into the alleged dumping and subsidization of stainless steel sinks exported from China
Investigation 466	original investigation into the alleged dumping and subsidization of railway wheels exported from China and the alleged dumping of railway wheels exported from France
Jiabaolu	Zhongshan Jiabaolu Kitchen & Bathroom Products Co. Ltd.
Jigang	Shandong Iron and Steel Company Limited, Jinan Company
Masteel	Maanshan Iron & Steel Co Ltd
MCC	model control code
MEPS	MEPS (International) Ltd.
Primy	Primy Corporation Limited; or Zhuhai Primy Kitchen & Bathroom Co., Ltd.
Program 1	Stainless steel received at less than adequate remuneration; or Raw Materials Provided by the Government at Less than Fair Market Value
Review 352	first interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA
Review 459	second interim review of the anti-dumping measures on stainless steel sinks exported from China by SCEA
Review 461	interim review of the anti-dumping measures on stainless steel sinks exported from China by Yingao
Rhine	Rhine Sinkwares Manufacturing Ltd. Hui Zhou
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCEA	Shengzhou Chunyi Electrical Appliances Co. Ltd.
SG&A	administrative, selling and general costs
SIE	state invested enterprise
stainless steel sinks	deep drawn stainless steel sinks
TSP	Shanghai Taisheng Wind Power Equipment Co. Ltd.
Valdunes	MG-Valdunes SAS
VAT	value-added tax
WTO	World Trade Organization
Yingao	Guangdong Yingao Kitchen Utensils Co. Ltd.
Zhuhai Grand	Zhuhai Grand Kitchenware Co. Ltd.

1 INTRODUCTION

1.1 Complaint by China

1.1. On 24 June 2021, China requested consultations with Australia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 11 August 2021.

1.2 Panel establishment and composition

1.3. On 13 January 2022, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 17.4 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement with standard terms of reference.[2] At its meeting on 28 February 2022, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China in document WT/DS603/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS603/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 5 September 2022, the parties agreed that the panel would be composed as follows:

Chairperson:	Ms Elaine FELDMAN
Members:	Mr Luis M. CATIBAYAN Ms Silvia Lorena HOOKER ORTEGA

1.6. Argentina, Brazil, Canada, the European Union, India, Japan, the Republic of Korea, Malaysia, Mexico, Norway, the Russian Federation, Singapore, Switzerland, Chinese Taipei, the United Kingdom, the United States and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 21 October 2022. The Panel periodically updated its timetable throughout the dispute.

1.8. The Panel held an organizational meeting with the parties on 12 October 2022. The Panel held a first substantive meeting with the parties on 7 and 8 March 2023. A session with the third parties took place on 8 March 2023. At the parties' request, the meeting was held in a hybrid format, allowing delegates of the parties and third parties to participate either in person or remotely.[6] The Panel held a second substantive meeting with the parties on 1 and 2 August 2023. At the parties' request, the second substantive meeting was also held in a hybrid format.[7]

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[1] Request for consultations by China, WT/DS603/1 (China's consultation request).
[2] Request for the establishment of a panel by China, WT/DS603/2 (China's panel request).
[3] DSB, Minutes of the meeting held on 28 February 2022, WT/DSB/M/461, para. 2.4.
[4] Constitution note of the Panel, WT/DS603/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] Panel communications to the parties and third parties (17 February 2023).
[7] Panel communication to the parties (3 July 2023).

1.9. On 23 October 2023, the Panel issued the descriptive part of its Report to the parties. The parties submitted comments on the descriptive part on 6 November 2023. The Panel issued its Interim Report to the parties on 8 December 2023. The parties submitted comments on the Interim Report on 21 December 2023 and commented on each other's responses on 19 January 2024. The Panel issued its Final Report to the parties on 16 February 2024.

1.3.2 Working procedures concerning Business Confidential Information

1.10. After consultation with the parties, the Panel adopted Additional Working Procedures concerning Business Confidential Information (BCI) on 21 October 2022.[8]

1.3.3 Preliminary ruling request

1.11. On 16 December 2022, after China had already submitted its first written submission, Australia requested a preliminary ruling, arguing that certain challenged measures were outside the Panel's terms of reference due to their expiry before the date of the Panel's establishment. China submitted its response on 4 January 2023. Australia submitted its comments on China's response on 12 January 2023. On 13 January 2023, Australia submitted its first written submission. In its first written submission, Australia made further comments on China's response and requested that the Panel find that certain of China's other claims are also outside the Panel's terms of reference due to their expiry before the date of the Panel's establishment. Australia also argued that certain of China's claims were outside the Panel's terms of reference due to the failure of China's panel request to satisfy the requirements of Article 6.2 of the DSU.

1.12. On 12 January 2023, the Panel invited the third parties to comment on Australia's preliminary ruling request in their written submissions. Subsequently, certain third parties commented on the issues raised in Australia's request for a preliminary ruling in their third party submissions of 27 January 2023. By letter dated 10 February 2023, China informed the Panel that it wished to respond to matters raised in Australia's further comments on China's response to the preliminary ruling request, other arguments made in Australia's first written submission, as well as the comments of the third parties on the terms of reference issues, including making a first response to those comments in China's oral statement at the first meeting of the parties. On 13 February 2023, the Panel informed the parties that it would not rule on any terms-of-reference issues raised by Australia until after the first meeting with the parties, to allow China to have an opportunity to address such issues in its oral statement at the first meeting.

1.13. The Panel posed questions regarding these issues to the parties at and after the first substantive meeting. Following the first meeting, the Panel initially declined to set a date for the parties' filing of their second written submissions because the Panel wished, if reasonably possible, to resolve Australia's terms-of-reference challenges before the parties made such submissions and thus limit the issues the parties needed to address. Despite efforts to do so, the Panel considered that it could not reasonably rule on such issues without further input from the parties. Thus, the Panel thereafter set a deadline for the filing of the parties' second written submissions. The Panel posed additional questions regarding these issues to the parties at and after the second substantive meeting. In light of the complexity of the issues raised by Australia's terms-of-reference arguments, the Panel ultimately deferred ruling on Australia's arguments pertaining to the expiry of measures and Article 6.2 of the DSU until the issuance of its Report.

1.3.4 Agreed Procedures for Arbitration under Article 25 of the DSU

1.14. On 28 April 2022, Australia and China notified to the DSB their mutual agreement, "pursuant to Article 25.2 of the [DSU,] to enter into arbitration under Article 25 of the DSU to decide any appeal from any final panel report as issued to the parties"[9] in this dispute. In its Working Procedures, the Panel took "note of the Agreed Procedures for Arbitration under Article 25 of the DSU in this dispute notified by the parties on 28 April 2022 (WT/DS603/4) and of the joint requests of the parties to the Panel formulated therein".[10]

[8] Additional Working Procedures of the Panel concerning Business Confidential Information (Annex A-2).
[9] Agreed Procedures for Arbitration under Article 25 of the DSU, WT/DS603/4. (fn omitted)
[10] Working Procedures of the Panel, para. 34.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. China's panel request identifies the challenged measures as:

> **1 With respect to wind towers**
>
> By way of notices dated 14 April 2014, the Parliamentary Secretary to the Minister for Industry of Australia imposed final anti-dumping duties in respect of wind towers imported into Australia from China. The imposition of the duties was based on the findings and recommendations reported to the Parliamentary Secretary in *Anti-dumping Commission Report No. 221 – Dumping of Wind Towers Exported from the People's Republic of China and the Republic of Korea (21 March 2014)*.
>
> The specific legal instruments that imposed those duties, and other legal instruments that were subsequently published with respect to those instruments, are set out in the Appendix. The measures at issue include those specific legal instruments and all annexes, amendments, modifications, replacements, implementing acts or related measures in connection with those legal instruments.
>
> **2 With respect to [deep drawn stainless steel sinks (stainless steel sinks)]**
>
> By way of notices dated 19 March 2015, the Parliamentary Secretary to the Minister for Industry and Science of Australia imposed final anti-dumping and countervailing duties in respect of stainless steel sinks imported into Australia from China. The imposition of the duties was based on the findings and recommendations reported to the Parliamentary Secretary in *Anti-dumping Commission Report No. 238 – Alleged Dumping of Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China and Alleged Subsidisation of Deep Drawn Stainless Steel Sinks (19 February 2015)*.
>
> The specific legal instruments that imposed those duties, and other legal instruments that were subsequently published with respect to those instruments, are set out in the Appendix. The measures at issue include those specific legal instruments and all annexes, amendments, modifications, replacements, implementing acts or related measures in connection with those legal instruments.
>
> **3 With respect to railway wheels**
>
> By way of notices dated 12 July 2019, the Minister for Industry, Science and Technology of Australia imposed final anti-dumping duties in respect of railway wheels imported into Australia from China. The imposition of the duties was based on the findings and recommendations reported to the Minister in *Anti-dumping Commission Report No. 466 – Alleged Dumping of Certain Railway Wheels Exported from the People's Republic of China and France (1 March 2019)*.
>
> The specific legal instruments that imposed those duties are set out in the Appendix. The measures at issue include those legal instruments and all annexes, amendments, modifications, replacements, implementing acts or related measures in connection with those legal instruments.[11]

2.2 The underlying proceedings

2.2. As indicated in the section immediately above, China challenges Australia's measures concerning a series of anti-dumping/countervailing duties proceedings with respect to three different products, i.e. wind towers, deep drawn stainless steel sinks (stainless steel sinks), and railway wheels. China challenges anti-dumping measures in each of the three. Stainless steel sinks is the

[11] China's panel request, pp. 1-2. (emphasis original)

only one of the three with respect to which China also challenges countervailing measures. We briefly set out the basic facts relating to such proceedings below.

2.2.1 Wind towers

2.2.1.1 Original investigation (Investigation 221)

2.3. On 28 August 2013, the Australian Anti-dumping Commission (ADC) initiated an investigation into the alleged dumping of wind towers from China and Korea (Investigation 221).[12] It examined alleged dumping in an investigation period from 1 January 2012 to 30 June 2013, with injury assessed for the period starting 1 January 2008.[13] Shanghai Tai sheng Wind Power Equipment Co. Ltd. (TSP), a Chinese firm, participated in the investigation. TSP was the only exporter of the product under investigation from China.[14] The ADC issued its findings in this investigation in a report dated 21 March 2014.[15] On 16 April 2014, the relevant parliamentary secretary accepted the findings and conclusions in the report and imposed anti-dumping measures on TSP at the rate of 15% and on all other exporters from China at the rate of 15.6%.[16]

2.2.1.2 Five-year expiry review (Continuation 487)

2.4. On 16 July 2018, the ADC initiated a five-year expiry review concerning the anti-dumping measures imposed on wind towers from China and Korea (Continuation 487).[17] The ADC issued its findings in a report dated 12 March 2019.[18] On 25 March 2019, the relevant minister accepted the findings in the report.[19] As a result, the anti-dumping measures were continued in relation to exports from TSP at the rate of 6.4%. The information and calculation methodology pertaining to TSP were used to calculate a new dumping duty rate of 10.9% for all other Chinese exporters.[20]

2.2.1.3 Administrative review in relation to TSP

2.5. On 8 May 2019, an administrative review proceeding concerning the decision to continue the measures against TSP was initiated.[21] The Anti-Dumping Review Panel (ARP) issued its findings in a document dated April 2020.[22] As a result of this review, in a notice dated 8 July 2020, the decision was taken to revoke the anti-dumping measures as against TSP, effective 17 April 2019.[23] The measures in relation to all other Chinese exporters remained in place at the margin assessed in the expiry review.

2.2.2 Stainless steel sinks

2.2.2.1 Original investigation (Investigation 238)

2.6. On 18 March 2014, the ADC initiated an investigation into the alleged dumping and subsidization of stainless steel sinks from China (Investigation 238). The investigation examined alleged dumping and subsidization in an investigation period from 1 January 2013 to 31 December 2013, with injury assessed for the period starting 1 January 2009.[24] Multiple Chinese companies participated in the investigation by submitting their financial data and other relevant

[12] Investigation 221 initiation notice (Exhibit CHN-5).
[13] Investigation 221 final report (Exhibit CHN-4), p. 6.
[14] Investigation 221 final report (Exhibit CHN-4), pp. 9 and 32.
[15] Investigation 221 final report (Exhibit CHN-4).
[16] Investigation 221 findings notice (Exhibit CHN-6).
[17] Continuation 487 initiation notice (Exhibit CHN-7).
[18] Continuation 487 final report (Exhibit CHN-31).
[19] Continuation 487 findings notice (Exhibit CHN-8).
[20] Continuation 487 findings notice (Exhibit CHN-8); Continuation 487 final report (Exhibit CHN-31), p. 39 ("[t]he Commission established an export price for uncooperative and all other exporters under subsection 269TAB(3), based on verified information from TSP Shanghai. The Commission established a normal value under subsection 269TAC(6), having regard to information verified with TSP Shanghai, but exclusive of any favourable adjustments. In addition, uplift to plate steel has been based on all plate steel purchased from Chinese suppliers by TSP Shanghai for both domestic and exported wind towers during the inquiry period").
[21] ADRP Review 2019/100 review proposal notice (Exhibit CHN-9).
[22] ADRP Review 2019/100 report (Exhibit CHN-32).
[23] ADRP Review 2019/100 minister's decision notice (Exhibit CHN-10).
[24] Investigation 238 initiation notice (Exhibit CHN-12).

information as interested parties in the investigation.[25] Due to the number of exporters who responded, the ADC chose to limit the number of exporters individually examined to three. The three exporters were Zhuhai Grand Kitchenware Co. Ltd. (Zhuhai Grand), Primy Corporation Limited. (Primy), and Zhongshan Jiabaolu Kitchen & Bathroom Products Co. Ltd. (Jiabaolu). On 19 February 2015, the ADC issued its final report in this investigation.[26] The countervailing duty investigation was terminated with respect to the exporters Primy and Jiabaolu on the basis that the amounts of subsidy with respect to each of them were *de minimis*.[27]

2.7. In a notice dated 26 March 2015, the relevant parliamentary secretary accepted the findings in the final report.[28] As a result, anti-dumping measures were imposed with respect to exporters from China. The ADC assigned individual dumping margins of 12.5% to Zhuhai Grand, 5% to Primy, and 15.4% to Jiabaolu. The dumping margin of eight residual exporters not included in the examination was determined to be 10.4%. Uncooperative and all other exporters from China were assigned a dumping margin of 49.5%.[29] In the same decision, margins of subsidization were calculated as 3.3% for Zhuhai Grand, 3.4% for the residual exporters, and 6.4% for uncooperative and all other exporters from China. Anti-dumping duties were imposed on Primy and Jiabaolu at a rate of the respective dumping margins, and combined anti-dumping and countervailing duties were imposed on Zhuhai Grand at an individual rate of 12.5%, on residual exporters at a rate of 10.7%, and on uncooperative and all other exporters from China at a rate of 52.6%.[30]

2.2.2.2 First interim review in relation to SCEA

2.8. On 16 May 2016, the ADC initiated an interim review[31] concerning the measures imposed on stainless steel sinks from China, as it related to the exporter Shengzhou Chunyi Electrical Appliances Co. Ltd. (SCEA) (Review 352) [32] As a result of a notice dated 17 November 2016, SCEA's anti-dumping and countervailing measures were revised. The revised dumping margin for SCEA was 34.13% and its revised subsidization margin was 20.03% (a combined anti-dumping duty and countervailing duty rate of 34.33%).[33]

2.2.2.3 Second interim review in relation to SCEA

2.9. On 21 December 2017, the ADC initiated a second interim review concerning the measures imposed on stainless steel sinks from China, as it related to the same exporter as before, SCEA (Review 459).[34] As a result of a notice dated 14 June 2018, the anti-dumping and countervailing measures were again revised for SCEA. The revised dumping margin for SCEA was 8% and its revised subsidization margin was 1% (a combined anti-dumping duty and countervailing duty rate of 8%).[35]

2.2.2.4 Interim review in relation to Yingao

2.10. On 12 February 2018, the ADC initiated an interim review concerning the measures imposed on stainless steel sinks from China, as it related to the exporter Guangdong Yingao Kitchen Utensils Co. Ltd. (Yingao) (Review 461).[36] In a notice dated 9 October 2018, the anti-dumping measures

[25] Investigation 238 final report (Exhibit CHN-2), pp. 30-33.
[26] Investigation 238 final report (Exhibit CHN-2).
[27] Investigation 238 termination notice (Exhibit CHN-13).
[28] Investigation 238 findings notice (Exhibit CHN-14).
[29] Investigation 238 findings notice (Exhibit CHN-14).
[30] Investigation 238 findings notice (Exhibit CHN-14).
[31] Australia explains that "in certain circumstances an affected party may seek a review by the ADC of a dumping duty notice, a countervailing duty notice, or an undertaking (interim review). An interim review may concern the 'variable factors' – the normal value, export price, non-injurious price, or the amount of the countervailing subsidy, and may be in relation to a particular exporter or exporters generally". (Australia's first written submission, para. 142).
[32] Review 352 initiation notice (Exhibit CHN-15).
[33] Review 352 findings notice (Exhibit CHN-16).
[34] Review 459 initiation notice (Exhibit CHN-18).
[35] Review 459 findings notice (Exhibit CHN-19).
[36] Review 461 initiation notice (Exhibit CHN-20). This document contains a date of 12 February 2017, but later documents appear to clarify that it was instead 12 February 2018. (See e.g. Review 461 findings notice (Exhibit CHN-21)).

were revised for Yingao. The ADC assigned a zero dumping margin and a countervailable subsidy margin of 0.4%.[37]

2.2.2.5 Five-year expiry review (Continuation 517)

2.11. On 3 July 2019, the ADC initiated a five-year expiry review concerning the anti-dumping and countervailing measures imposed on stainless steel sinks from China (Continuation 517).[38] In a notice dated 27 February 2020[39], as a result of Continuation 517, varying anti-dumping and countervailing duties were continued against exporters from China.[40]

2.2.2.6 Administrative review in relation to Primy and Zhuhai Grand

2.12. On 6 April 2020, an administrative review proceeding was initiated concerning the rates at which the relevant minister had decided to continue the anti-dumping measures as against Primy and Zhuhai Grand, at the request of those companies.[41] In a notice dated 3 July 2020, the relevant minister affirmed the ADRP's recommendations to continue the anti-dumping measures as against Primy and Zhuhai Grand at the rates imposed in Continuation 517.[42] The anti-dumping measures that were continued with respect to all other exporters from China were also unaffected by this review.

2.2.3 Railway wheels original investigation (Investigation 466)

2.13. On 18 April 2018, the ADC initiated an investigation into the alleged dumping of railway wheels from China and France, and the alleged subsidization of railway wheels from China (Investigation 466). The investigation examined the alleged dumping and subsidization in an investigation period from 1 January 2017 to 31 December 2017, with injury assessed for the period starting 1 January 2014.[43] Maanshan Iron & Steel Co Ltd. (Masteel), being the only exporter of the product under investigation during the investigation period from China, participated in the investigation by submitting its financial data as a cooperative exporter.[44] On 24 January 2019, the countervailing duty investigation was terminated on the basis that the amounts of subsidy with respect to Masteel and "all other" exporters from China were *de minimis*.[45] The ADC issued its findings and conclusions in a final report dated 1 March 2019.[46]

2.14. In a notice dated 12 July 2019, the relevant parliamentary secretary accepted the findings and conclusions in the final report. As a result, anti-dumping measures were imposed with respect to Masteel and all other exporters from China at the rate of 17.4%.[47]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests that the Panel find that the challenged measures are inconsistent with Australia's obligations under the GATT 1994, the Anti-Dumping Agreement, and/or the SCM Agreement, as applicable. China further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that Australia bring its measures into conformity with its WTO obligations.

3.2. Australia requests that the Panel rule that many of China's claims are outside the Panel's terms of reference. Further, to the extent that the Panel does not find that China's claims are outside its

[37] Review 461 findings notice (Exhibit CHN-21).
[38] Continuation 517 initiation notice (Exhibit AUS-11).
[39] Continuation 517 findings notice (Exhibit CHN-52).
[40] Continuation 517 findings notice (Exhibit CHN-52); Continuation 517 final report (Exhibit CHN-36).
[41] ADRP Review 2020/124 review proposal notice (Exhibit CHN-23).
[42] ADRP Review 2020/124 minister's decision notice (Exhibit CHN-24). See also ADRP Review 2020/124 report (Exhibit CHN-47).
[43] Investigation 466 initiation notice (Exhibit CHN-26).
[44] Investigation 466 final report (Exhibit CHN-3), p. 22.
[45] Investigation 466 termination notice (Exhibit CHN-27).
[46] Investigation 466 final report (Exhibit CHN-3).
[47] Investigation 466 findings notice (Exhibit CHN-28), p. 2; Investigation 466 final report (Exhibit CHN-3), pp. 25-26.

terms of reference, Australia requests that the Panel reject China's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 24 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, the European Union, Japan, Mexico, Norway, the Russian Federation, the United Kingdom, and the United States are reflected in their executive summaries, provided in accordance with paragraph 27 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, and C-9). Argentina, India, the Republic of Korea, Malaysia, Singapore, Switzerland, Chinese Taipei, and Viet Nam did not provide the Panel with a third-party written submission or a written version of any oral statement.

6 INTERIM REVIEW

6.1. The requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 Treaty interpretation and standard of review

7.1. This dispute concerns claims raised by China under the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994. We briefly recall below the applicable provisions on treaty interpretation and standard of review.

7.1.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that such customary rules include those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

7.3. Article 17.6(ii) of the Anti-Dumping Agreement directs us to the same customary rules of treaty interpretation, and further provides:

> [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

7.1.2 Standard of review

7.4. Article 11 of the DSU sets out a general standard of review for panels, providing, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]

7.5. In addition to Article 11 of the DSU, Article 17.6(i) of the Anti-Dumping Agreement provides that in disputes under the Anti-Dumping Agreement:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]

7.6. Thus, Article 17.6(i) is explicit that in carrying out its objective assessment, the Panel is barred from conducting a *de novo* review of the facts. Instead, we are directed to "determine whether the authorities' establishment of the facts was proper", and "whether their evaluation of those facts was unbiased and objective".

7.7. As to the universe of relevant facts whose "establishment" and "evaluation" by the authority we must assess, Article 17.5(ii) of the Anti-Dumping Agreement provides that we are to "examine the matter based upon … the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

7.8. Although the SCM Agreement does not contain a similar provision, Members have declared that disputes arising from anti-dumping and countervailing duty measures should be resolved in a consistent manner.[48]

7.2 Expiry of measures and Australia's challenges under Article 6.2 of the DSU

7.9. In this section, we examine Australia's claims that certain measures are expired and provide a general analytical framework that we will apply to assess expiry. We also address Australia's challenges under Article 6.2 of the DSU in this section. We further note two points surrounding terminology at the outset. First, for ease of reference, we refer to the stages of the imposition and administration of anti-dumping and countervailing duty orders (e.g. investigations, interim reviews, expiry reviews, and administrative reviews) as "segments". The segments comprise "proceedings" more generally. Second, the parties use the term "expiry review" as referring to segments referenced in Article 11.3 of the Anti-Dumping Agreement and Article 21.3 of the SCM Agreement, which are sometimes referred to as "sunset" reviews. We adopt the term "expiry review" in this Report. The parties use the term "interim review" as referring to reviews referenced in Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement. We adopt that term in this Report as well.

7.10. The parties' arguments on these subjects, and particularly those surrounding expiry, are extensive. Issues surrounding expiry first arose in Australia's preliminary ruling request. This request concerned the alleged expiry of countervailing measures in the stainless steel sinks proceedings related to one subsidy programme called "Stainless steel received at less than adequate remuneration" or "Raw Materials Provided by the Government at Less than Fair Market Value" (Program 1). In its first written submission, Australia offered additional arguments concerning the alleged expiry of certain other anti-dumping measures in the stainless steel sinks and wind towers proceedings, along with challenges made under Article 6.2 of the DSU. As China responded to such challenges in its own submissions, and further clarified to what segments its challenges pertained, Australia subsequently raised additional arguments surrounding the alleged expiry of measures and additional challenges under Article 6.2 of the DSU. The summary of party arguments below separates arguments concerning expiry and challenges under Article 6.2 of the DSU.

7.2.1 Main party arguments

7.2.1.1 Expiry of measures

7.11. Australia requests, in its preliminary ruling request, "that the Panel issue a preliminary ruling that all of China's claims contained in Section B.2 of its request for the establishment of a panel [(China's panel request)], concerning 'countervailing measures,' fall outside the Panel's terms of

[48] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

reference" because they relate to measures that have expired.[49] Australia notes that the claims "are focused *exclusively* on 'the countervailing measures … only with regard to alleged *Program 1 – Raw Materials Provided by the Government at Less than Fair Market Value'* in the *Stainless Steel Sinks investigation*". [50] Australia asserts that the "measures challenged by China associated with 'Program 1' were terminated on 27 March 2020 – two years prior to the establishment of this Panel on 28 February 2022".[51] Australia argues that this is so because: (a) China only challenges the countervailing measures with respect to Program 1; (b) at that time the five-year expiry review superseded the original investigation as the legal basis for the countervailing measures; and (c) in the expiry review all countervailing duties with respect to Program 1 were terminated. Australia further notes that China's claims *vis-à-vis* Program 1 are only brought on an as-applied basis.[52] Australia argues that the termination of such measures, and particularly the fact that such measures were terminated before the Panel's establishment, means that the measures are outside the Panel's terms of reference.[53] Australia also claims that no benefits to China are being impaired by the expired countervailing measures.[54]

7.12. China responds that, in its view, the preliminary ruling request does not raise an issue going to the Panel's jurisdiction or terms of reference. In this context, China notes that Australia does not challenge the panel request's delineation of the relevant measures or claims in any relevant way, and instead argues that the countervailing measure on stainless steel sinks with regard to Program 1 does not exist.[55]

7.13. China further argues that, contrary to Australia's assertions, the relevant countervailing measure challenged in this proceeding is still in effect. China asserts that the relevant measure here is the original "countervailing duty notice"[56] dating from 2015 imposing countervailing duties on stainless steel sinks from China – an order that included countervailing duties imposed specifically with respect to Program 1 – and continues to be the relevant measure even after the most recent expiry review that Australia mistakenly argues replaced the original measure.[57] This is so, in China's view, because the expiry review merely changed the *amount of the countervailing duties* imposed with respect to Program 1, and did not affect in any way the *character of the legal measure, i.e. the countervailing duty order*, *itself* in place against China with respect to Program 1.[58] China further contends that, in general, under Australian law an expiry review does not terminate the basis on which anti-dumping or countervailing duty measures are in place, but, rather, such reviews continue it and are thus linked to the original investigation. China argues that Australian domestic courts have expressly explained this linkage. China argues that the measure was not just the countervailing duty amount, but also the manner of calculating the duties and the methodology used to do so, which, according to China, were applied consistently throughout the relevant segments, including the expiry review, and continue to be applied. China also submits that in cases where a respondent could impose duties on the goods from the complaining Member in a manner that may give rise to materially similar WTO inconsistencies that are alleged in the dispute, this may provide a basis for making findings with respect to the challenged measure.[59]

[49] Australia's preliminary ruling request, para. 1. Australia clarifies that it "is requesting that the Panel exclude from its terms of reference, China's claims under sections B.2.1 – B.2.5 of the [China's panel request])". (ibid. fn 1).

[50] Australia's preliminary ruling request, para. 2. (emphasis original)

[51] Australia's preliminary ruling request, para. 2. (emphasis original)

[52] Australia's preliminary ruling request, paras. 21-22.

[53] Australia's preliminary ruling request, paras. 8-9. See also Australia's opening statement at the first meeting of the Panel, paras. 25-26.

[54] Australia's preliminary ruling request, para. 3.

[55] China's response to Australia's request for a preliminary ruling, paras. 6-14.

[56] The word "notice" used by China in its response to the preliminary ruling request is a term under Australian law that refers to an instrument imposing anti-dumping or countervailing duties. (China's response to Australia's request for a preliminary ruling, paras. 18-24 (referring to Customs Act 1901, Part XVB (Exhibit CHN-29)).

[57] China's response to Australia's request for a preliminary ruling, paras. 23-24.

[58] China's response to Australia's request for a preliminary ruling, para. 21.

[59] China's response to Australia's request for a preliminary ruling, paras. 22-23, 33 and 56; opening statement at the first meeting of the Panel, paras. 15-18; second written submission, paras. 37-39, 40-41, and 44; response to Panel question No. 7, para. 22, and No. 70, paras. 69 and 70. China also argues that the ADC's practices in other proceedings that are not the subject of this dispute support the conclusion that even if a certain subsidy programme were assigned a zero countervailing duty rate in a particular segment, that

7.14. China notes that the expiry review found that subsidization was likely to recur with respect to Program 1, and specifically continued the effect of the original countervailing duty order with respect to that programme.[60] China contends that Program 1 would be within the scope of future expiry reviews and would simply consist of a re-determination of the amount of subsidization.[61] China also notes that, without the amount of subsidization attributable to Program 1 in the original investigation, the amount of subsidization for the sampled companies would have been *de minimis*, and thus the countervailing duty order would never have existed without the original findings with respect to Program 1.[62]

7.15. Australia counters that the mere possibility that Program 1 might become countervailable in the future is an insufficient reason to make findings with respect to the now-expired countervailing measures, and would render any such findings an inappropriate advisory opinion.[63] Australia further argues that: (a) China's contention is incorrect that no countervailing duties would have been imposed had it not been for countervailing duties attributable to Program 1 in the original investigation because uncooperative exporters would still have been assigned countervailing duty rates even in the absence of Program 1[64]; (b) China attempts to broaden its claims with respect to the countervailing measure in order to save them from Australia's challenge, thus improperly converting its claims from as applied claims to as such claims (because China is essentially basing the violation on the possibility that Australia might assign subsidy margins to Program 1 in the future)[65]; (c) China mischaracterizes Article 21.1 of the SCM Agreement; and (d) China assigns too much significance to the legal effect of the "notice" under Australian law.[66]

7.16. Australia also argues that all of China's claims under the Anti-Dumping Agreement (AD claims) relating to the wind towers and stainless steel sinks original investigation are outside the Panel's terms of reference. Australia asserts that original investigations and expiry reviews are distinct processes with different objectives both under WTO law and Australian law. Australia thus argues that the imposition of duties following the original investigation, and the continuation of duties following the expiry reviews – in which the ADC performed new calculations of normal values and export prices – were distinct and separate measures, with the latter superseding the former.[67] Australia also contends that even if the Panel finds that the original measures are not expired and makes findings with respect to them, the Panel should decline to make recommendations under Article 19.1 of the DSU with respect to them.[68]

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subsidy programme still remains within the scope of, and will be examined in, subsequent segments (China's closing statement at the first meeting of the Panel, para. 8(a). See also China's response to Australia's request for a preliminary ruling, paras. 57-72).

[60] China asserts that the expiry review found that Program 1 was a countervailable subsidy. (China's response to Australia's request for a preliminary ruling, para. 36 (quoting Continuation 517 final report (Exhibit CHN-36), p. 107)). Australia asserts that any mention in the final report of the expiry review stating that Program 1 was a countervailable subsidy was a typographical error. (Australia's comments on China's response to a preliminary ruling request, para. 25). China further asserts in this context that the expiry review "continue[d]" the original order, and that "Australia's use of the word *'continuation'* is coterminous with the *'continued imposition of the duty'*". (China's response to Australia's request for a preliminary ruling, para. 17 (quoting Article 21.1 of the SCM Agreement) (emphasis added by China)).

[61] China's response to Panel question No. 9. China also claims that examples taken from other ADC proceedings reveal administrative practices that support China's position in this context. (China's response to Australia's request for a preliminary ruling, paras. 57-72).

[62] China's response to Australia's request for a preliminary ruling, paras. 49-56. China later indicated that if Program 1 had not erroneously been found to be a subsidy, then there would have been no countervailing duties placed on the 15 companies that participated in the original investigation, and no expiry review would have been possible with respect to Program 1. (China's second written submission, para. 59).

[63] Australia's comments on China's response to a preliminary ruling request, para. 5.

[64] Australia's comments on China's response to a preliminary ruling request, paras. 29-30; response to Panel question No. 49.

[65] Australia's comments on China's response to a preliminary ruling request, paras. 34-35.

[66] Australia's comments on China's response to a preliminary ruling request, paras. 37-38.

[67] Australia's first written submission, paras. 58-63. We note that the European Union, as a third party, generally agrees with Australia that an expiry review replaces the original order. (European Union's response to third-party question No. 3.a). Japan and the United States consider the question as nuanced and must be evaluated on a case-by-case basis. (Japan's response to third-party question No. 3.a; United States' response to third-party question No. 3.a). Australia refers to the panel report in *US – Pipes and Tubes (Turkey)* as being an example of a panel refusing to rule on an expired measure in a factually similar case. (Australia's first written submission, paras. 67-69).

[68] Australia's first written submission, paras. 74-77, 131-134 and 138.

7.17. According to China, the expiry of a measure alone is not dispositive of whether a panel can address the claims with respect to that measure. China asserts that there is contextual support for this proposition in the DSU, and that the Appellate Body has recognized that repeal of a measure does not necessarily constitute a satisfactory settlement of the relevant matter. China further contends that even if the measures are "expired", they still have "effects", and thus in that scenario the Panel should recommend that the effects be removed. These effects, according to China, are the continued application of WTO-inconsistent methodologies and practices, including, with respect to stainless steel sinks specifically, the inclusion of Program 1 in the scope of the countervailing duty order.[69] China argues that because expiry reviews do not address all the issues that an original investigation addresses, operate according to different strictures, and can rely on previous findings of dumping and subsidization to continue an anti-dumping or countervailing duty order, "[i]t follows that any such determination of past dumping and subsidisation must have been WTO consistent in order for the continuation of a duty to be WTO consistent".[70]

7.18. China also rejects Australia's assertion that China's panel request "unambiguously states that it is only challenging the countervailing measures associated with Program 1".[71] China contends that the measures are set out in section A of its panel request, which "include[s] a connected set of measures, evidenced in instruments including those identified at Nos. 8 to 23 of the Appendix of the panel request".[72] Nor, according to China, does section B limit the measures at issue, as this section rather "presents the grounds on which the measures are in violation of WTO provisions and are nullifying or impairing the benefits that would otherwise accrue to China under the covered agreements".[73] Those legal grounds are, according to China, that the ADC's methodology of assessing Program 1, which led to imposition of countervailing duties, was inconsistent with the SCM Agreement, and that the methodology "has continued legal, and practical or operational effect".[74] At the first meeting China also emphasized that it was challenging "one indivisible, continuous measure", although China subsequently contended that this statement was in error and that China was challenging "one indivisible, continuous set of measures in each respect".[75]

7.19. Although China does not accept that the measures expired, China also argues that the measures, even if they had expired in a legal sense, have continued *operational and practical* effect. With respect to the countervailing duties on stainless steel sinks, China contends that if it had not been for the subsidy margin attributed to Program 1 in the original investigation, then no countervailing duties would have been imposed with respect to the 15 exporters that participated in the original investigation, and no continuation of the duties would have been possible under an expiry review. Thus, according to China, there exists "a clear factual chain established between the original erroneous findings relating to Program 1, and the current duties".[76]

7.20. In its responses to questions following the first meeting, China clarifies that, with respect to the wind towers and stainless steel sinks proceedings, it seeks findings and recommendations for all claims made for the original investigations and expiry reviews, and with respect to the stainless steel sinks proceedings the interim reviews as well. China sought no findings with respect to the wind towers administrative review that resulted in TSP being excluded from the wind towers AD order. For the railway wheels proceedings, China seeks findings and recommendations only with respect to the original investigation.[77] China specifies that the ADC's WTO-inconsistent conduct in the original investigations remains unchanged and unaltered in subsequent segments, and thus the latter segments have not changed the essence of the original WTO-inconsistent determinations by the ADC.[78] China further argues that its legal claims extend to the entirety of the anti-dumping and

[69] China's response to Panel question No. 40.

[70] China's opening statement at the first meeting of the Panel, para. 29. See also, generally, ibid. paras. 23-28.

[71] Australia's preliminary ruling request, para. 20.

[72] China's opening statement at the first meeting of the Panel, para. 12.

[73] China's opening statement at the first meeting of the Panel, para. 12.

[74] China's opening statement at the first meeting of the Panel, para. 12 (fns omitted). See also China's comments on Australia's preliminary ruling request, especially, paras. 18–48.

[75] China's opening statement at the first meeting of the Panel, para. 14; second written submission, para. 45 and fn 54.

[76] China's opening statement at the first meeting of the Panel, para. 22. China also expresses concern that if Australia's position on these issues is accepted, it becomes unclear how a WTO Member could challenge a reviewed or extended measure. (China's opening statement at the first meeting of the Panel, paras. 19-22).

[77] China's response to Panel question No. 37.

[78] China's responses to Panel question No. 37, para. 114; question No. 38, para. 118(a); and question No. 57, para. 147.

countervailing proceedings included in China's panel request, and that the violations alleged in the original investigations are inherent in the measures.[79]

7.21. In its second written submission, Australia argues that China has advanced new claims under Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement related to interim reviews.[80] Australia also argues that, following the first substantive meeting, China has attempted to redefine the measures at issue as a connected series of measures constituting one overarching measure, although China has not advanced sufficient evidence to establish such a measure.[81] With respect to China's CVD claims, Australia also stresses that the ADC would investigate Program 1 in a future countervailing duty proceeding if it were presented with evidence that it was a subsidy.[82] Also, according to Australia, China failed to mention the wind towers expiry review in its first written submission with respect to any claim except AD claim 6.a, and also failed to make reference to the stainless steel sinks interim reviews or expiry review in advancing multiple claims.[83] Australia submits that raising additional claims at a late stage is contrary to the paragraph 3(1) of the Panel's Working Procedures and is fundamentally unfair to Australia.[84]

7.22. In its response to Panel questions and in its second written submission, China clarifies that its submission is that the measure is an "indivisible, continuous set of measures in each respect".[85] China also argues that the measures it challenges are methodologies applied by the ADC in the original investigations and then carried through the subsequent segments such as interim reviews and expiry reviews.[86] In this regard, China argues in its second written submission[87] and responses to Panel questions[88] that the measures all continue to have the same essence. China also stresses that this dispute remains amenable to findings and recommendations even if the measures are found to have expired.[89]

7.23. China also asserts that the Panel must make findings with respect to the investigations in each case they are challenged because the investigations and other segments such as expiry reviews form parts of a continuous measure, i.e. an anti-dumping or countervailing duty order, and reaffirms that the original investigations' errors are "foundational" in nature.[90] In particular, China argues that if the alleged errors in the original investigation had not occurred then the injury assessment in the stainless steel sinks countervailing duty investigation, for example, would have involved a smaller group of exporters since, in China's view, individually investigated firms would have been excluded from the countervailing duty order altogether owing to the *de minimis* subsidization margins they should have received.[91] China further rejects Australia's argument that China's claims as against any segments of the proceedings are in violation of the Panel's Working Procedures.[92]

7.24. Australia counters that China's references to the "essence" of the challenged measures is legally irrelevant. Australia also argues that there were relevant factual differences in the ADC's findings and methodologies between the investigations and expiry reviews.[93] Australia also asserts that, in a hypothetical dispute, if all the measures are within the panel's terms of reference and not expired, and there were no changes in methodology between the investigations and expiry reviews, then the panel could make findings with respect to the expiry reviews.[94]

[79] China's response to Panel question No. 3, para. 8.
[80] Australia's second written submission, para. 7.
[81] Australia's second written submission, paras. 34-35 and 77-86.
[82] Australia's second written submission, para. 46.
[83] Australia's second written submission, paras. 131-132.
[84] Australia's second written submission, paras. 133-134; see also comments on China's response to Panel question No. 95.
[85] China's response to Panel question No. 98, para. 165; second written submission, para. 45.
[86] China's second written submission, paras. 24-25, 27-41, and 44-48.
[87] China's second written submission, para. 55.
[88] China's response to Panel question No. 69.
[89] China's second written submission, paras. 64-97.
[90] See e.g. China's response to Panel question No. 70, para. 65.
[91] China's response to Panel question No. 73.
[92] China's response to Panel question No. 95.
[93] Australia's response to Panel question No. 69.
[94] Australia's response to Panel question No. 70.

7.2.1.2 Article 6.2 of the DSU

7.25. Australia argues that China's AD claims relating to the wind towers and stainless steel sinks expiry reviews are outside the Panel's terms of reference by virtue of Article 6.2 of the DSU. Specifically with respect to wind towers, Australia notes that although the introductory parts of China's first written submission set out two claims explicitly related to segments subsequent to the stainless steel sinks investigation, China appears to direct additional claims against the wind towers expiry review in a later section of its first written submission.[95]

7.26. Australia further recalls the Appellate Body's guidance that "[i]dentification of the treaty provisions claimed to have been violated is 'always necessary' and 'a minimum prerequisite' if the legal basis of the complaint is to be presented at all".[96] Australia thus contends that, with respect to both wind towers and stainless steel sinks, critically, the panel request fails to cite Article 11.3 of the Anti-Dumping Agreement.[97] Australia contends that the panel in *EU – Footwear (China)* correctly determined that no claims under Article 2 of the Anti-Dumping Agreement can be made unless a panel's jurisdiction over an expiry review is first established via a claim under Article 11.3, which serves as a "gateway" provision to challenging expiry reviews.[98] Australia recalls that original investigations and expiry reviews are distinct proceedings governed by different legal standards.[99] Australia further contrasts this situation with at least one previous panel proceeding in which China challenged determinations made in the course of an expiry review but premised such claims on a violation of Article 11.3.[100] Australia cites other panel proceedings in which challenges under Article 2 were accompanied by citations in the panel requests to Article 11.3 where an investigating authority's conduct in five-year expiry reviews was at issue.[101]

7.27. Australia also raises similar challenges with respect to: (a) China's claims *vis-à-vis* the stainless steel sinks interim reviews, citing the absence of a reference to Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement in the panel request; and (b) China's CVD claims with respect to the stainless steel sinks expiry review, citing the absence of a reference to Article 21.3 of the SCM Agreement in the panel request.[102]

7.28. Australia also contends that, even if China had cited Article 11.3, the anti-dumping duties on TSP and the ADRP's report on the administrative review in relation to TSP in the wind towers proceedings are outside the Panel's terms of reference because the duties on TSP have been revoked pursuant to the administrative review.[103] Thus, even if TSP's anti-dumping duties and the ADRP's report are within its terms of reference and the Panel makes findings with respect to them, in Australia's view, the Panel should at minimum decline to issue recommendations with respect to them.[104]

7.29. Australia further asserts that China's claim under Article 2.4 of the SCM Agreement falls outside the Panel's terms of reference because China failed to cite Article 2.4 of the SCM Agreement in its panel request.[105]

7.30. China argues that "continued imposition of duties is based on the original investigations, reports and notices, all of which are particularised in our panel request".[106] Further, China asserts that claims based on Article 2 of the Anti-Dumping Agreement are not confined to original investigations, but relate to "the entirety of the measure at issue", including the expiry reviews in

[95] Australia's first written submission, para. 528 (referring to China's first written submission, paras. 35 and 272-279).
[96] Australia's first written submission, para. 80 (quoting Appellate Body Report, *Korea – Dairy*, para. 124).
[97] Australia's first written submission, paras. 80-87 and 95.
[98] Australia's first written submission, paras. 96-98.
[99] Australia's first written submission, paras. 88-90.
[100] Australia's first written submission, paras. 91-94.
[101] Australia's first written submission, para. 99 and 135-136. We note that the European Union and Japan, as third parties, generally agree with Australia's position in this context. (European Union's response to third-party question No. 1; Japan's response to third-party question No. 1).
[102] Australia's second written submission, paras. 4.c, 7, and 124-129.
[103] Australia's first written submission, paras. 102-106.
[104] Australia's first written submission, paras. 106 and 528-529.
[105] Australia's first written submission, paras. 657-658 and 662-663.
[106] China's opening statement at the first meeting of the Panel, para. 30.

which a dumping margin is calculated, and the requirements of Article 2 are applicable to those reviews. Thus, in China's view, it is unnecessary to cite Article 11.3 in order to bring an Article 2 claim.[107] China observes that Article 11.3 allows for expiry reviews, but it is still not the basis for China's claims; that basis is, rather, Article 2. China also argues that the panel report in *EC – Footwear (China)* made an Article 2 finding and then made consequential findings under Article 11.3, which indicates that the panel considered Article 2 to apply directly to the expiry review in question.[108] China also contends that by Australia's logic, in order to challenge conduct in an original investigation it would be necessary to cite Articles 5 and 6 of the Anti-Dumping Agreement.[109] China also applies these same general arguments to reject Australia's claims that it was necessary for China's panel request to cite Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement in order to challenge interim reviews, and also Article 21.3 of the SCM Agreement in order to challenge expiry reviews.[110] China also confirms that it makes no claims under Articles 11.2 and 11.3 of the Anti-Dumping Agreement, or under Articles 21.2 and 21.3 of the SCM Agreement.[111]

7.31. China agrees with Australia that the anti-dumping measures with respect to TSP are expired following the administrative review.[112]

7.32. China further asserts that its panel request adequately cites Article 2.4 of the SCM Agreement by including language that is similar thereto.[113]

7.2.2 Approach to expiry

7.33. As the above section illustrates, the parties' arguments surrounding expiry of measures and Article 6.2 of the DSU are extensive and have evolved over time.

7.34. The Panel is of the view that issues surrounding the expiry of challenged measures arise primarily due to two circumstances. First, multiple procedural segments have already occurred in the wind towers and stainless steel sinks proceedings.[114] With respect to wind towers, there has been an original investigation, an expiry review, and an administrative review. In stainless steel sinks, there has been an original investigation, three interim reviews, and an expiry review. In its submissions, China challenges certain aspects of Australian anti-dumping and countervailing duty orders (e.g. dumping margin calculations, determination of subsidy benefit, etc) with respect to all the segments enumerated in the preceding two sentences, with the exception of the wind towers administrative review.[115] Second, with respect to the majority of claims, China alleges that the challenged conduct by the ADC first appeared in the original investigations and was then repeated in later segments.

7.35. Against this background, Australia argues that the only non-expired measures are the wind towers and stainless steel sinks expiry reviews, and the railway wheels investigation; the other measures arising from pre-expiry-review segments are expired. This expiry occurred, in Australia's view, in one of two general ways. The first pertains to both AD claims and CVD claims. That is, Australia considers that the expiry reviews superseded and supplanted all preceding segments, including the original investigations. In this context, Australia notes that the ADC re-calculated all Chinese exporters' dumping and subsidy margins in the expiry reviews. Australia thus argues that China's claims (whether regarding anti-dumping or countervailing measures) as they pertain to the superseded segments (i.e. original investigations and interim reviews) are outside the Panel's terms of reference. The second pertains to China's CVD claims which operate as against Program 1. Australia argues that the measures have expired because the ADC found that Program 1

[107] See e.g. China's response to Panel question No. 65.
[108] China's opening statement at the first meeting of the Panel, paras. 30-34.
[109] China's response to Panel question No. 5.
[110] See e.g. China's response to Panel question No. 65.
[111] China's response to Panel question No. 65, para. 13. China refers to these articles as "procedural" provisions. (China's response to Panel question No. 65, para. 12).
[112] China's response to Panel question No. 41, para. 129. China notes that multiple previous WTO panels have considered both original investigations and related expiry reviews, including when the expiry review occurred before panel establishment. (China's response to Panel question No. 55, paras. 142-144).
[113] China's opening statement at the first meeting of the Panel, paras. 35-40.
[114] With respect to the railway wheels proceedings, there has only been an original investigation that is relevant in this dispute, and thus no expiry issues arise.
[115] China's response to Panel question No. 37, para. 116.

conferred no benefit to Chinese exporters in the expiry review. In Australia's view, this led to a finding by the ADC that Program 1 was no longer a countervailable subsidy, and thus to a termination of countervailing measures with respect to Program 1. Australia considers that China's CVD claims therefore relate to expired measures and are thus outside the Panel's terms of reference. Such arguments, if the Panel were to accept them, would mean that China would be able to challenge only aspects of the expiry reviews in the wind towers and stainless steel sinks proceedings. Australia further argues, in addition, that China cannot challenge the interim or expiry reviews because the panel request did not cite Articles 11.2 or 11.3 of the Anti-Dumping Agreement or Articles 21.2 or 21.3 of the SCM Agreement, and thus the panel request did not satisfy the requirements of Article 6.2 of the DSU. Such cumulative arguments, if accepted, would remove most of China's claims from our consideration, leaving only claims *vis-à-vis* the railway wheels proceedings. Given the major impact Australia's arguments could have on the scope of this dispute, and the systemic nature of certain arguments, in this section we articulate our overall approach to the issue of expiry, and to Australia's challenges under Article 6.2 of the DSU.

7.36. We first recall China's argument that the alleged errors in the original investigations are "foundational" in nature. Thus, from China's perspective, such errors in the original investigation "infect" the anti-dumping or countervailing duty order as it was originally imposed.[116] This infection, according to China, cannot be remedied by later-in-time segments because such segments merely continue the originally flawed order.[117] As a result, in China's view, we should always make findings in respect of the original investigations, and refrain from finding that they may have expired. In support of this conceptual approach, China argues, in particular, that in the absence of the alleged flaws in the original investigations, certain exporters' subsidization margins in the stainless steel sinks proceedings would have been *de minimis* (and thus the exporters would have been excluded from the scope of the countervailing duty order altogether), the injury and causation analyses in the CVD investigation would have been different, and there may not even be a countervailing duty order in place today. China also asserts that previous panels and the Appellate Body have observed that different segments of anti-dumping or countervailing proceedings are interrelated.[118]

7.37. We therefore note that China appears to advocate using a broad counterfactual approach to assessing expiry. That is, with respect to any given aspect of the orders, China asks us to envision a world in which the alleged WTO inconsistencies never occurred, assume that this would have required the ADC to change its approach to a given issue (e.g. assessment of subsidy benefit), compare that changed counterfactual situation to the situation in the actual world, and then, if anything about the anti-dumping or countervailing duty orders would have been different between the two, we could not find that the aspect is expired. We decline to adopt this approach. Because we generally must assess expiry before we determine whether to issue findings, China appears to ask us to assume that violations of WTO law occurred *ex ante*, assume how Australia would comply with any hypothetical findings, and then fashion a counterfactual world based upon those assumptions. We, however, consider it inappropriate to either assume violations of WTO law before they are found to exist or assume how Australia would comply with any findings that we might issue. Moreover, even if China more simply argues that the ongoing legal effect of an aspect of an anti-dumping or countervailing duty order should be judged by the fact that *other, related aspects* have continued legal effect, we still consider this approach flawed. This is so because we consider it illogical to assume that simply because certain aspects of anti-dumping or countervailing duty orders are related[119], in that one may change when another changes, that means that all such aspects become part and parcel of each other for expiry purposes when only one such aspect is challenged.[120]

[116] China's response to Panel question No. 102, para. 209.

[117] We note, however, that the parties agree that TSP was excluded from the wind towers anti-dumping order following an administrative review. China does not challenge this administrative review or its result, even though the wind towers anti-dumping order at large remains in place. We consider this inconsistent with the notion that the original order as a whole is irreparably "infected" and cannot be remedied by post-investigation segments.

[118] Overall, we note that although China argues at times that the segments are interconnected, China also raises distinct challenges to certain segments (see AD claims 6.b.ii and 6.b.iii with respect to stainless steel sinks, further below, which only pertain to expiry reviews). Thus, we see some tension between the conception of a single overall anti-dumping or countervailing duty order being the challenged measure and China's ability to discern problems with only specific segments.

[119] We note that China is correct that dumping determinations might affect subsequent injury and causation analyses in an original investigation.

[120] We agree with China that previous panels have correctly noted that segments of anti-dumping or countervailing proceedings are related, as they form related stages of administering a particular anti-dumping

We therefore recall that, in this dispute, China challenges certain aspects of Australian anti-dumping and countervailing duty orders (e.g. dumping margin calculations, determination of subsidy benefit, etc), and such claims are only lodged on an as-applied basis. This observation, in our minds, also critically undermines China's view that alleged errors committed by an investigating authority in an original investigation can never become expired through the application of a new approach taken by that investigating authority in a post-investigation segment.[121]

7.38. In light of these considerations, it seems to us that the question of whether a challenged aspect of the order is expired is narrower than China envisions. That is, the question of expiry is to be assessed with respect to the situation we observe at present, asking whether Australia legally applies a particular challenged aspect of the order at present or not. This appears consistent with the fact that China only challenges certain, specific aspects of the orders on an as-applied basis. We therefore consider it appropriate to assess expiry on a claim-by-claim basis, focusing on whether the specific, relevant aspects of the orders have expired (i.e. ceased to have legal effect) in the context of the relevant proceedings. We therefore disagree with China's arguments that we cannot find any challenged aspect of the orders to be expired and must make findings with respect to the original investigations whenever they are challenged.

7.39. In order to facilitate the expiry examination in a manner consistent with the above reasoning, the Panel will assess the extent to which the challenged aspect changed as between; (a) the original investigations, (i.e. the segment on which China focusses its challenges); and (b) the expiry reviews, i.e. the latest-in-time segments which determined the anti-dumping and countervailing duty rates to which Chinese exporters are currently subject.[122] We note that we do not consider the stainless steel sinks interim reviews in this context, because they all preceded the stainless steel sinks expiry review.[123] For convenience going forward, the Panel will refer to this inquiry as to whether the *essence* of the relevant aspect changed.

7.40. If the essence of a challenged aspect *remained unchanged* as between the investigations and the expiry reviews, two relevant consequences follow. The first is that, if China challenges the investigations and expiry reviews for a given claim, then an argument against one such segment functions as an argument against both. We thus note that, for all claims with respect to wind towers and stainless steel sinks except AD claims 6.b.ii and 6.b.iii, and CVD claim 5, China challenges not only the original investigations, but also the expiry reviews and the stainless steel sinks interim reviews.[124] If there is no essence change as between the investigations and expiry reviews,

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or countervailing duty order. See, e.g. Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 7.79 (characterizing different segments in the administration of a particular anti-dumping order as being part of a single "chain of assessment"). We see no reason to conclude, however, that this relationship means that a particular aspect of an original investigation can never become expired through subsequent conduct by an investigating authority, and we read no previous report cited by China as standing for that categorical proposition. (See e.g. China's response to Panel question No. 98, para. 171 and fn 94).

[121] We recognize China's argument that an expiry review cannot lead to the expiry of alleged errors made by an investigating authority in an original investigation because the expiry review is performed with an eye to discerning, on a prospective basis, whether the expiry of the relevant anti-dumping or countervailing duty order would be likely to lead to the continuation or recurrence of dumping, subsidization, and/or injury. This, analysis, according to China, is essentially based on the analyses of such issues performed by the investigating authority in an original investigation. We note, however, that China makes no claims under Article 21.3 of the SCM Agreement or Article 11.3 of the Anti-Dumping Agreement that the ADC improperly continued the overall anti-dumping or countervailing duty orders. We further note that: (a) the ADC's injury findings are not challenged in this dispute; (b) as far as Program 1, specifically, is concerned, the ADC assigned no countervailing duties to Program 1 as a result of the expiry review; and (c) the ADC recalculated and replaced all dumping margins in the expiry reviews. Thus, we ultimately fail to see how the continuation of the orders as a result of the expiry reviews supports the Chinese argument that the legal effect of more specific relevant aspects of the orders continues.

[122] We recall that in the expiry reviews the ADC re-calculated anti-dumping and countervailing duty rates for all Chinese exporters.

[123] We further note that each interim review addressed only one exporter, and thus the interim reviews are more limited in scope than the investigation and expiry reviews, which addressed all relevant exporters. Thus, the interim reviews could not have meaningfully superseded the preceding investigation with respect to exporters not subject to the interim reviews.

[124] See, especially, China's responses to Panel question Nos. 37 and 69.

therefore, then arguments against the investigations would function as against the expiry reviews and would be deemed lodged in a timely manner.[125]

7.41. The second consequence of observing no essence change is that we consider it within our discretion regarding the segment with respect to which we make findings.[126] In these circumstances, and when faced with this choice, we consider it sufficient and most appropriate to make findings with respect to the expiry reviews, these being the latest-in-time segment and the iteration of the anti-dumping or countervailing duty order to which Chinese goods are currently subject. This choice also means that we need not specifically address Australia's arguments that the expiry reviews led to the expiry of the original investigations and interim reviews, because we do not make findings with respect to these segments.

7.42. If the essence of a relevant aspect of the order *did change* as between the investigation and the expiry review, this, in our minds, indicates that the challenged aspect of the order present in the original investigation expired (having been effectively replaced by the expiry review).[127] Moreover, this will also mean that China, in order to effectively challenge the expiry reviews, must have raised arguments specific to that changed aspect in a timely manner. We note, however, that the essence-change assessment significantly facilitates, but may not in all cases resolve, the expiry inquiry. This is so because, for example, certain challenged aspects of orders may not technically change over time, but may still become expired through other means. Moreover, any such expiry analysis will ultimately be fact specific.

7.2.3 Australia's claims under Article 6.2 of the DSU

7.43. In the section immediately above, we articulated our approach to expiry issues in this dispute. In light of that approach, we, at this point, address Australia's challenges raised under Article 6.2 of the DSU. Australia bases these challenges on the Appellate Body's guidance that "[i]dentification of the treaty provisions claimed to have been violated is 'always necessary' and 'a minimum prerequisite' if the legal basis of the complaint is to be presented at all".[128]

7.44. First, we note Australia's argument that China cannot challenge the stainless steel sinks interim reviews because the panel request did not cite Article 11.2 of the Anti-Dumping Agreement or Article 21.2 of the SCM Agreement. We recall, however, that in the section above, we indicate that we will not be examining the interim reviews. Rather, insofar as we examine aspects of the orders that are not expired, we will focus our attention and make findings with respect to the expiry reviews only.[129] As we do not examine the interim reviews, we consider it unnecessary to address these Australian challenges under Article 6.2 of the DSU.

7.45. Second, we note Australia's argument that China cannot bring challenges under the SCM Agreement with respect to the stainless steel sinks expiry review because China's panel request failed to cite Article 21.3 of the SCM Agreement. Given our findings in sections 7.4.9, 7.4.10, and 7.4.11 below, that China's CVD claims address expired aspects of the stainless steel sinks CVD order, we consider it unnecessary to address these Australian challenges under Article 6.2 of the DSU. We further consider it unnecessary to address Australia's argument that China cannot bring a claim

[125] Previous panels have included segments of trade remedy proceedings in their terms of reference, even when the segments in question, unlike here, were not mentioned expressly in the panel request. (See, e.g. Panel Report, *US – Anti-dumping Methodologies (China)*, sections 7.3.2 and 7.3.4). If, however, we consider that Australia did not have an appropriate opportunity to respond to more specific Chinese arguments or evidence with respect to any claim, we address that issue in the appropriate section of this Report.

[126] One panel explained that it would make this decision with reference to the parties' requests, the objectives of dispute settlement and especially securing a positive solution to the dispute, recognizing that the panel's mandate covered both versions of the measure. (Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, appealed 17 December 2020, para. 7.5). See also Panel Report, *US – Tariff Measures (China)*, appealed 26 October 2020, para. 7.48 (discussing factors that panels consider in determining whether there was a change in essence in certain context).

[127] This is particularly so with respect to China's AD claims because, as noted by Australia, in the expiry reviews the ADC re-calculated all Chinese exporters' anti-dumping duty rates. We further recall that all of China's AD claims are brought under, or depend on, Article 2, i.e. dealing with the manner in which the ADC calculated dumping margins.

[128] Australia's first written submission, para. 80 (quoting Appellate Body Report, *Korea – Dairy*, para. 124).

[129] See para. 7.41 above.

under Article 2.4 of the SCM Agreement because China's panel request fails to cite Article 2.4 of the SCM Agreement for the same reason.

7.46. Finally, we note Australia's argument that China cannot bring challenges under the Anti-Dumping Agreement with respect to the stainless steel sinks and wind towers expiry reviews because China's panel request failed to cite Article 11.3 of the Anti-Dumping Agreement. Australia argues in this context that the need to cite Article 11.3 of the Anti-Dumping Agreement arises due to its function as a "gateway" provision that allows Article 2 claims to be brought in the context of an expiry review. We therefore recall that China also brings a challenge under Article 9.3 of the Anti-Dumping Agreement, "because the amount of the anti-dumping duties imposed by Australia exceeds any margins of dumping that may have been properly established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994".[130] Article 9.3 of the Anti-Dumping Agreement provides, in relevant part:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.47. Similarly, Article VI:2 of the GATT 1994 provides, in relevant part:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

7.48. Thus, Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 set the maximum level at which anti-dumping duties may be levied. We agree with previous WTO dispute settlement reports that the term "margin of dumping" in Article 9.3 "relates to a margin [of dumping] that is established in a manner *subject to the disciplines of Article 2 and which is therefore consistent with those disciplines*".[131] We also agree that an error or inconsistency under Article 2 of the Anti-Dumping Agreement "does not necessarily or automatically mean that the anti-dumping duty actually applied will exceed the correct margin of dumping".[132]

7.49. In light of this discussion of Article 9.3, we therefore recall that all of China's other claims raised under the Anti-Dumping Agreement are brought under Article 2 of the Anti-Dumping Agreement, i.e. they address the manner in which ADC established dumping margins. Logically, therefore, we would need to assess China's Article 2 claims (addressing how dumping margins were determined) in order to assess China's Article 9.3 claim (addressing whether the dumping margins were determined in a manner inconsistent with Article 2 and consequently were too high). We therefore consider that, even assuming that Australia is correct that a formal "gateway" provision is required in order for China to raise challenges *vis-a-vis* the expiry reviews, China's claim under Article 9.3 functions as such a "gateway" for China's claims under Article 2. That being the case, it is unnecessary to require China to have also cited Article 11.3 as an additional "gateway", and thus unnecessary for us to address Australia's claim that Article 11.3 had to be included in the panel request. We further note that because section B.1 of the panel request directs all anti-dumping claims (including Article 2 claims) against all segments listed in the appendix to the panel request "unless otherwise stated", and the expiry reviews appear in the appendix, we do not consider that a reference to Article 11.3 was otherwise necessary to satisfy the requirements of Article 6.2 of the DSU.

7.50. We further note that, in its first written submission, Australia presents its substantive arguments as against the wind towers and stainless steel sinks proceedings in the alternative, to be addressed only if the Panel disagrees with Australia's expiry arguments and challenges under Article 6.2 of the DSU. Consistent with the approach the Panel has adopted in this section and the immediately preceding section, and with the Panel's reasoning in section 7.6 below, insofar as we find a challenged aspect of a relevant order to have expired, we will not examine the

[130] China's panel request, section B(1), para. 8. The request directs this claim against all measures in the appendix to the panel request, which includes the expiry reviews.

[131] E.g. Panel Report, *EU – Biodiesel (Argentina)*, para. 7.359. (emphasis added)

[132] E.g. Panel Report, *EU – Biodiesel (Argentina)*, para. 7.363.

parties' substantive arguments pertaining thereto. If we determine that a challenged aspect is not expired, we will go on to examine the parties' substantive arguments.[133]

7.3 Wind towers

7.51. In this section, we address China's AD claims as against the wind towers proceedings. We recall that multiple segments have occurred in the wind towers proceeding, i.e. an original investigation, expiry review, and an administrative review. Thus, we will assess expiry for each claim in accordance with the discussion and approach articulated in section 7.2.2 above.

7.52. We recall at this point, however, that the parties agree that the wind towers administrative review involving TSP resulted in TSP's exclusion from the wind towers AD order. We discern no reason to disagree.[134] We further note that China pursues no challenges with respect to the TSP administrative review before this Panel. We therefore consider the wind towers AD order as expired with respect to TSP. Our evaluation of China's claims below, therefore, will ultimately focus on the ADC's alleged errors as they impacted the group of uncooperative and all-others exporters (TSP was the only identified exporter of wind towers to Australia in the investigation and expiry review).

7.53. We further note that China numbers its claims (i.e. AD claim 1, AD claim 2, etc.) in its first written submission, to track the claims as they are enumerated in its panel request. Certain claims operate with respect to multiple proceedings (e.g. AD claim 1 under Article 2.2 of the Anti-Dumping Agreement is made as against all three proceedings). Both parties have referred to China's claims according to this numbering scheme throughout this dispute. We adopt that same numbering throughout this Report for convenience. However, our examination of China's claims does not follow the numerical order under China's numbering scheme in one respect. Specifically, we address AD claim 3 (pertaining mainly to Article 2.2.1.1 of the Anti-Dumping Agreement) before AD claim 1 (pertaining mainly to Article 2.2 of the Anti-Dumping Agreement). This is so because, in our view, a discussion of the ADC's rejection of exporters' costs naturally precedes a discussion of the surrogate costs selected by the ADC following that rejection.

7.3.1 AD claim 3 under Article 2.2.1.1 of the Anti-Dumping Agreement: rejection of exporters' costs

7.3.1.1 Legal framework

7.54. We note that this claim pertains to Article 2.2.1.1 of the Anti-Dumping Agreement, which provides, in relevant part:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.55. Article 2.2.1.1 indicates that it operates "for the purpose of paragraph 2". Thus, this provision provides rules for determining costs when an investigating authority constructs normal value under Article 2.2 or performs the ordinary-course-of-trade test under Article 2.2.1. For clarity and convenience, this Report will refer to the two conditions in the first sentence of Article 2.2.1.1, i.e. the records kept by the exporter or producer (a) "are in accordance with the generally accepted accounting principles of the exporting country" and (b) "reasonably reflect the costs associated with the production and sale of the product under consideration" as the "first condition" and the "second condition".

[133] Australia's first written submission, sections V and VI. We also note, however, that Article 11.3 of the Anti-Dumping Agreement and Article 21.3 of the SCM Agreement provide the substantive bases for complainants to challenge the continuation of anti-dumping and countervailing duty orders occurring as a result of an expiry review. Thus, having failed to cite these provisions in its panel request, China may not and does not argue that the anti-dumping and countervailing duty orders at large should not have been continued as a result of the expiry reviews. Indeed, such claims would be outside our terms of reference.

[134] See section 7.2.1.2 above; ADRP Review 2019/100 minister's decision notice (Exhibit CHN-10).

7.56. As to the word "normally", the Appellate Body has explained that "[g]iven the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply".[135] These appear reasonable observations, and we thus agree that the word "normally" may provide a basis for rejecting exporters' record costs when constructing normal value or performing the ordinary-course-of-trade test.

7.57. We note the panel's report in *Australia – Anti-dumping Measures on Paper*. In that dispute, the panel assessed an almost identical claim by Indonesia that the ADC had violated Article 2.2.1.1 by rejecting the use of exporters' costs because the costs did not "reasonably reflect competitive market costs". In the underlying investigation in that dispute, the ADC considered the same statutory language as in the underlying proceedings here. The panel found that the ADC had made no finding as to whether the second condition had been fulfilled when rejecting exporters' costs. This raised the question as to whether the word "normally" in the first sentence of Article 2.2.1.1 provided a basis for the ADC to reject the exporters' costs in the absence of a second condition finding. The panel found that it did not because any flexibility that may be provided by the word "normally" would only be activated after the investigating authority determines that both of the conditions in the first sentence of Article 2.2.1.1 are fulfilled.[136] We agree with the panel's conclusion in this respect. In particular, and without setting out the panel's reasoning in full, we agree with the panel's point that if the word "normally" could be used to depart from exporters' costs without the investigating authority examining whether the two conditions in the first sentence of Article 2.2.1.1 were satisfied, this would effectively read out those two conditions from the text of Article 2.2.1.1.

7.58. As to this point, we note Australia's argument that:

> [I]f a finding is made that circumstances are not "normal", then going on to make findings under the other two circumstances would be redundant. In either case, the subsequent findings would be redundant because there was already a finding to the effect that the obligation to use the exporter's records in the first sentence of Article 2.2.1.1 did not apply. Subsequent findings on the other circumstances, whether affirmative or negative, could not change that outcome.[137]

7.59. While this argument does have some weight, we disagree that the *Australia – Anti-dumping Measures on Paper* interpretation of the first sentence of Article 2.2.1.1 lacks any practical value, as Australia appears to argue. This is so because the two conditions in the first sentence of Article 2.2.1.1 were important enough in the drafters' minds to specifically include as conditions to examine, in light of which an investigating authority would "normally" use the exporters' record costs. Thus, it could reasonably be expected that rejecting exporters' costs, even when both conditions are satisfied, would be accompanied by an explanation as to why such rejection is justified *despite those conditions being satisfied*.

7.60. Thus, we consider that, in order for an investigating authority to rely on any flexibility to depart from using exporters' costs that may be provided by the word "normally" in the first sentence of Article 2.2.1.1, the investigating authority must first make affirmative findings as to both the first condition and the second condition in the first sentence.

7.3.1.2 Main party arguments

7.61. China makes this claim with respect to the wind towers investigation and expiry review. China asserts that the ADC rejected using the exporters' costs of production when constructing normal values and instead used non-Chinese surrogate costs for steel plate and flanges. China claims that,

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[135] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945; Appellate Body Report, *US – Clove Cigarettes*, para. 273).

[136] Panel Report, *Australia – Anti-dumping Measures on Paper*, paras. 7.109-7.125.

[137] Australia's second written submission, para. 164(a). Australia also made other arguments in support of its interpretation of Article 2.2.1.1, an interpretation that is different than the panel's interpretation of that provision in *Australia – Anti-dumping Measures on Paper*. See, e.g. Australia's first written submission, paras. 182-191; second written submission, paras. 149-186. As already stated in this section, however, we agree with the panel's interpretation of Article 2.2.1.1 in *Australia – Anti-dumping Measures on Paper*.

in doing so, Australia violated Article 2.2.1.1 – and, as a result, Articles 2.1 and 2.2 – of the Anti-Dumping Agreement because the ADC failed to calculate relevant costs "on the basis of records kept by the exporter or producer under investigation" within the meaning of Article 2.2.1.1. More specifically, China argues that the ADC either did not determine, or wrongly determined, that the records kept by the exporters or producers under investigation did not "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of the "second condition" of the first sentence of Article 2.2.1.1. This is so because, according to China, the ADC instead rejected the exporters' costs because they "did not reasonably reflect competitive market costs", within the meaning of applicable Australian law.[138] China further asserts that the ADC failed to make a finding under the "first condition" of the first sentence of Article 2.2.1.1 (i.e. that "records are in accordance with the generally accepted accounting principles of the exporting country") in the expiry review.[139] China also indicates that even if TSP had been excluded from the scope of the order owing to the most recent administrative review – and thus the relevant anti-dumping measures are expired with respect to TSP – this is immaterial because the methods used to calculate TSP's normal values were transferred over onto the uncooperative producers in the expiry review, and such exporters are still subject to the order.[140]

7.62. Australia argues that the ADC made a negative finding as to the second condition in both the investigation and expiry review, albeit not in the express language of Article 2.2.1.1.[141] Australia also argues that "China has mischaracterised and misunderstood the application of Regulation 180(2) of the Customs Regulation 1926 and then section 43(2) of the Customs (International Obligations) Regulation 2015"[142] because the requirement that exporters' costs, in order to be used in relevant calculations, must reflect competitive market costs is different from the issue to be determined in the second condition in the first sentence of Article 2.2.1.1. Australia further asserts that, as discussed in the context of Australia's arguments *vis-à-vis* AD claim 1, China misunderstood the relevant methodology regarding how the ADC constructed normal values in the investigation, and specifically how the ADC determined the uplift ratio used to alter certain of TSP's costs.[143] Australia underlines in this context that the "competitive market costs" test in the Australian law only indicates that the records of the exporters *must* be used if they satisfy that and other requirements, but says nothing about what should happen if the exporters' costs do *not* satisfy such criteria. Thus, Australia argues that a finding that costs do not reflect competitive market costs will not represent an automatic finding to not use such records.[144] Australia also asserts that because TSP was excluded from the scope of the order as a result of the administrative review following the expiry review, the relevant measures are expired with respect to TSP.[145]

7.63. Australia also argues that there was a change of essence as between the investigation and expiry review because the ADC uplifted costs of both steel plate and flanges in the investigation, but only uplifted the cost of steel plate in the expiry review.[146]

7.64. China maintains that in the original investigation and expiry review the ADC made no finding as to the second condition.[147] China also argues that the fact that the ADC uplifted the costs of steel plate and flanges in the investigation but only flanges in the expiry review does not mean that there was a change of essence between the two segments.[148] China also argues that evidence provided by Australia in support of its characterizations of how the ADC calculated the uplift ratio is flawed.[149]

7.3.1.3 Expiry

7.65. China's claim concerns the wind towers original investigation and expiry review. As discussed in section 7.2.2 above, the nature of China's claim raises the issue of whether or not the aspect

[138] China's first written submission, section F.1.
[139] China's response to Panel question No. 80, para. 104.
[140] China's response to Panel question No. 41.
[141] Australia's second written submission, para. 317; response to Panel question No. 78, paras. 110-119.
[142] Australia's first written submission, para. 493.
[143] Australia's first written submission, para. 494.
[144] Australia's responses to Panel question No. 77, and No. 78, paras. 75 and 79.
[145] Australia's first written submission, paras. 102-106.
[146] Australia's response to Panel question No. 69, para. 34.
[147] China's second written submission, paras. 174-183.
[148] China's responses to Panel question No. 69, para. 43, and No. 105.
[149] China's comments on Australia's response to Panel question No. 74.

challenged by China has expired. To address this issue, we will consider whether there was a change of essence in the approach taken by the ADC to reject exporters' costs in the investigation and expiry review.

7.66. In the investigation, the ADC constructed TSP's (the only Chinese exporter) normal value.[150] In so doing, the ADC indicated that:

> In determining the cost of production and the administrative, selling and general costs associated with the sale of those goods, the Parliamentary Secretary must have regard to factors provided for in Regulation 180.[151] The regulation requires that if an exporter keeps records relating to like goods that are in accordance with generally accepted accounting principles (GAAP) in the country of export, and reasonably reflect competitive market costs associated with the production or manufacture of like goods, the Parliamentary Secretary must work out the cost of production using information set out in the exporter's records.[152]

7.67. The ADC noted that TSP's records were maintained in a manner that complied with the generally accepted accounting principles (GAAP) of China.[153] The ADC then found that "the cost of plate steel and flanges reflected in the records of TSP do not reasonably reflect a competitive market cost. … Therefore, for the purposes of constructing a normal value, the Commission considers it appropriate to determine the cost of production for wind towers sold domestically by replacing the cost of plate steel and flanges with a competitive market cost".[154] In the expiry review, the ADC again constructed TSP's normal values[155] and replaced TSP's costs of steel plate (but not flanges) with surrogate costs, again finding that TSP's costs for steel plate did not reflect a competitive market cost.[156]

7.68. We consider that there was no change of essence in the ADC's cost-replacement/uplift methodology as between the investigation and expiry review. We note that: (a) in the investigation the uplift was applied to the costs of both steel plate and flanges whereas in the expiry review the uplift was applied only to steel plate; and (b) in the expiry review the uplifted costs were further altered with reference to the Steel Bulletin Board (Platts) benchmark.[157] These differences, however, in our view, are immaterial as they do not alter the key aspect of the order challenged by China, i.e. the rejection of TSP's record costs for at least steel plate based on the notion that they did not reflect competitive market costs.[158]

7.69. We further recall that TSP was excluded from the wind towers AD order following an administrative review, and thus we will focus on the ADC's alleged errors as they impacted the group of uncooperative and all-others exporters.[159] We therefore note that, in determining a normal value for uncooperative and all other exporters in the expiry review, the ADC made the following statement:

> The Commission established a normal value under subsection 269TAC(6), having regard to *information verified with TSP Shanghai*, but exclusive of any favourable adjustments. In addition, *uplift to plate steel* has been based on all plate steel purchased from Chinese

[150] Investigation 221 final report (Exhibit CHN-4), pp. 33-34.
[151] The specific relevant provision is Regulation 180(2) of the Customs Regulation 1926. Regulation 180(2) was subsequently replaced by section 43(2) of the Customs (International Obligations) Regulation 2015. (China's first written submission, paras. 162-164). The parties agree that the relevant wording of each is materially the same, although each was in effect during different stages of the relevant segments.
[152] Investigation 221 final report (Exhibit CHN-4), pp. 29-30. (fn added)
[153] Investigation 221 final report (Exhibit CHN-4), p. 30.
[154] Investigation 221 final report (Exhibit CHN-4), p. 30.
[155] Continuation 487 final report (Exhibit CHN-31), p. 32.
[156] Continuation 487 final report (Exhibit CHN-31), p. 33.
[157] See section 7.3.2.3 below (describing this further adjustment in the expiry review).
[158] We also note that neither China nor Australia consider that the ADC's method of rejecting TSP's relevant costs was materially different as between the investigation and expiry review. Australia indicates that in both the investigation and expiry review the ADC issued no second condition finding in the express language of Article 2.2.1.1, but, in both cases, the negative finding was nonetheless evident from the reports. (Australia's response to Panel question No. 78, paras. 110-119).
[159] See para. 7.52 above.

> suppliers by TSP Shanghai for both domestic and exported wind towers during the inquiry period.[160]

7.70. We consider that this statement sufficiently indicates that the cost-replacement methodology (both with respect to the rejection of TSP's record costs for steel plate and the selection of an "uplifting" strategy to establish a surrogate cost) for TSP was transferred over onto the uncooperative and all other exporters. This is so because the ADC indicated that, in determining the uncooperative exporters' normal values, it had reference to TSP's data, and then summarily indicated that it used uplifted steel plate costs, as it had done for TSP. Thus, even if the cost-replacement method could be deemed expired *vis-à-vis* TSP, specifically, owing to its later exclusion from the scope of the anti-dumping order, that methodology still remains the basis for the uncooperative exporters' still-active anti-dumping duty rate.[161]

7.71. We therefore consider that the challenged aspect of the anti-dumping order has not expired. We therefore will make findings with respect to this challenged aspect of the order and, as explained above, focus our attention on the expiry review.

7.3.1.4 Evaluation

7.72. In the expiry review, after deciding to construct normal values for TSP, the ADC noted:

> To determine the cost of production or manufacture, subsection 43(2) of the Regulation requires that if:
>
> - an exporter or producer keeps records relating to like goods that are in accordance with generally accepted accounting principles in the country of export; and
>
> - those records reasonably reflect competitive market costs associated with the production or manufacture of like goods;
>
> the Minister must work out the cost of production or manufacture using information set out in the exporter or producer's records.
>
> In [the final report of Investigation 221], the Commission found that the cost of plate steel and the cost of the flanges reflected in the records of TSP Shanghai did not reasonably reflect competitive market costs. The Commission has again examined these matters for the purposes of this inquiry.[162]

7.73. The ADC then performed an "Assessment of competitive market costs" and concluded:

> Having determined that the records of TSP Shanghai do not reasonably reflect competitive market costs in accordance with subsection 43(2)(b)(ii) of the Regulation, the Commissioner is not required to work out an amount for the cost of production using the information as set out in TSP Shanghai's records.
>
> Significant distortions in the plate steel market in China resulted in an uplift being applied to plate steel costs in [the final report of Investigation 221] to establish a competitive market cost. Given the available evidence indicates that these distortions

[160] Continuation 487 final report (Exhibit CHN-31), p. 39. (emphasis added)

[161] Australia asserts that the facts available mechanism under Article 6.8 of the Anti-Dumping Agreement was used to determine uncooperative exporters' normal values. While perhaps true, we still see nothing in the ADC's report indicating that it applied the uplifting methodology used for TSP in anything other than a mechanical fashion following from the use of this method *vis-à-vis* TSP itself. We therefore consider the use of facts available immaterial in this context. Australia confirmed that no facts available were used to determine the dumping margins of TSP in the expiry review. (Australia's response to Panel question No. 75).

[162] Continuation 487 final report (Exhibit CHN-31), p. 32.

> continue to exist, for this inquiry, the Commission uplifted the prices of raw material steel plate used in the constructed normal value for TSP Shanghai.[163]

7.74. We consider that this clearly indicates that the ADC rejected the costs of steel plate because the costs for steel plate were not "competitive market costs". Indeed, immediately after noting that the relevant underlying statutory language means that "the Commissioner is not required to work out an amount for the cost of production using the information as set out in TSP Shanghai's records", the ADC indicates that the record costs were rejected for the sole reason that "[s]ignificant distortions" in the Chinese steel markets meant that the costs for steel plate were not "competitive market costs".

7.75. We consider that the ADC's conclusion was a non-application of the second condition, i.e. the ADC did not reach a finding at all under the second condition. This is so because the consideration of whether costs "reasonably reflect competitive market costs" is different from the issue of whether the costs reflected in the exporters' records "reasonably reflect the costs associated with the production and sale of the product under consideration". The latter pertains to the question of whether the costs in the exporters' records reflect those incurred by the exporter. The former pertains to the question of whether the costs in the exporters' records reflect something else, i.e. competitive market costs.[164]

7.76. We also recall that the panel in *Australia – Anti-dumping Measures on Paper* addressed the same issue with respect to findings made by the ADC – where the ADC rejected exporters' costs because they did not reasonably reflect competitive market costs – and found that, in doing so, the ADC did not rely on the second condition. The panel so found because it considered that, after examining the ADC's findings and certain other considerations, "the ultimate measure of whether the pulp component of the exporters' records was acceptable to the ADC was the comparison of the exporters' pulp costs with the *competitive market* benchmark. Therefore, the standard the ADC was applying to the records was something other than whether the records reasonably reflected the costs incurred".[165]

7.77. We note that China refers to a practice manual of the ADC that was "operative at the time [that] each of th[e relevant] decisions were made", and which provides that:

> Concerning the term "reasonably reflect competitive market costs" for the cost to make used in Regulation 180(2), the Commission gives the term "reasonably reflect" the following meanings:
>
> - that the cost to make items are supported by the books of account; and
> - that the costs themselves are "reasonable" i.e. the cost allocations methods used by the exporter in working out those costs are reasonable.
>
> More generally, the Commission may examine whether the cost to make are those costs that would be incurred in a "competitive" market. The term "competitive" in Regulation 180(2) is given its usual meaning and this can only be known according to the case circumstances.
>
> For example, it may be relevant when examining whether the cost to make reasonably reflects competitive market costs to examine the production of other like goods in the country of export. A significant variation between the costs shown in the records of the exporter or producer concerned when compared with other producers of like goods may be an indication that the records do not reasonably reflect costs incurred. Or, contracts

[163] Continuation 487 final report (Exhibit CHN-31), p. 33. The ADC later concluded that it "has not applied any uplift to the flanges cost component in its normal value calculation". (ibid. p. 35).

[164] Australia appears to draw a distinction at times between: (a) the ADC's conclusion that exporters' costs did not reflect competitive market costs, which Australia argues is no finding under the second condition; and (b) the ADC's noting of distortions in the Chinese steel markets, which may underlie the conclusion described in (a), but on their own can form the basis for a negative findings as to the second condition. This does not appear to be a meaningful distinction, as neither focusses on the costs actually incurred by the exporter.

[165] Panel Report, *Australia – Anti-dumping Measures on Paper*, para. 7.106. (emphasis original)

> entered into for long term supply can be relevant when deciding that the price under those contracts is a normal competitive market price.[166]

7.78. China argues that this excerpt demonstrates that when the ADC rejects exporters' costs because they do not reflect competitive market costs, it amounts to a misapplication of the second condition of Article 2.2.1.1. We note that the practice manual does indicate that the term "reasonably reflect competitive market costs" can include an examination of "whether the cost to make items are supported by the books of account". This examination appears similar to the second condition of Article 2.2.1.1. However, the excerpt above further indicates that the ADC may also examine "whether the cost to make are those costs that would be incurred in a 'competitive' market". This is the determination made by the ADC, and, as explained further above in this section, this determination is materially different from the language of the second condition.[167]

7.79. We therefore conclude that the ADC did not make a negative finding under the second condition of Article 2.2.1.1 in the expiry review.[168] We also find that the ADC did not make an affirmative finding under the second condition in the expiry review. This is despite the presence of certain language in the ADC's report suggesting that such a finding may have been possible. Specifically, the ADC stated that "[t]he Commission is satisfied that the information provided by TSP Shanghai is accurate and reliable for the purpose of ascertaining the variable factors applicable to its exports of the goods".[169] Both parties indicated that this was not a second condition finding. Australia, in particular, indicated that this statement was for purposes of Article 6.6 of the Anti-Dumping Agreement, i.e. it was the ADC satisfying itself "as to the accuracy of the information" obtained from the exporter, but not specifically finding that the costs "reasonably reflect the costs associated with the production and sale of the product under consideration" for purposes of Article 2.2.1.1. Although we agree with Australia that there is likely "overlap" between these two inquiries, we ultimately do not see a compelling reason to disturb the parties' shared understanding that this statement pertains to the accuracy of TSP's information, generally, rather than the accuracy of the costs for purposes of normal value construction, specifically.[170]

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[166] China's first written submission, para. 203 (quoting ADC, *Dumping and Subsidy Manual* (2013), p. 43 (Exhibit CHN-42)) (emphasis omitted). We recall that the relevant wording of Regulation 180(2) of the Customs Regulation 1926 (mentioned in this exhibit) and section 43(2) of the Customs (International Obligations) Regulation 2015 (mentioned in the expiry review report) is materially the same. See fn 151 above.

[167] China also cites an explanatory statement accompanying the amendment to Regulation 180(2) that introduced the relevant "competitive market costs" language. This notes the introduction of the language and concludes:

> The amending Regulations substitute paragraph 180(2)(b)(ii) to prescribe that the Minister only has to use the records relating to the like goods if they reasonably reflect competitive market costs associated with the production or manufacture of like goods. *This ensures that the relevant records are only taken into account if they reasonably reflect competitive market costs and not just actual costs*.

(China's first written submission, para. 163 (quoting Customs Amendment Regulations 2005 (No. 8) and Explanatory Statement (Exhibit CHN-38), pp. 8-9)) (emphasis added by China). See also Australia's response to Panel question No. 77, paras. 70-73 (discussing the explanatory statement).

We do not consider this demonstrates that the "competitive market costs" test is the same as the inquiry under the second condition of Article 2.2.1.1. Indeed, the italicized language in the excerpt above itself seems to suggest they are different, cumulative inquiries.

[168] We also note that the ADC's findings in the expiry review for stainless steel sinks and in the investigation for railway wheels (discussed in the sections addressing AD claim 3 for these two proceedings, further below) are consistent with our conclusions in this section regarding the relationship between the "competitive market costs" standard and the second condition of Article 2.2.1.1.

[169] Continuation 487 final report (Exhibit CHN-31), p. 29.

[170] China's response to Panel question No. 80, para. 112; Australia's response to Panel question No. 80, para. 143. The parties' positions, and our conclusion, is the same with respect to the ADC's statement in the investigation that "[v]erification of TSP's information submitted in its questionnaire response showed that domestic sales and domestic CTMS calculations were reasonably complete, relevant and accurate". (Investigation 221 final report (Exhibit CHN-4), p. 33).

7.80. In light of the foregoing, we find that there was no basis for departure from using TSP's record costs for steel plate in constructing normal value in the wind towers expiry review.[171] We therefore find that the ADC acted inconsistently with Article 2.2.1.1 in that segment.[172]

7.3.2 AD claim 1 under Article 2.2 of the Anti-Dumping Agreement: costs of production in the country of origin

7.3.2.1 Legal framework

7.81. This claim pertains to Article 2.2 of the Anti-Dumping Agreement, which provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the *cost of production in the country of origin* plus a reasonable amount for administrative, selling and general costs and for profits.[173]

7.82. The expression "cost of production in the country of origin" in Article 2.2 has been understood as "a reference to the price paid or to be paid to produce something within the country of origin".[174] The Appellate Body has further explained that Article 2.2

> do[es] not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".[175]

7.83. We agree with this Appellate Body analysis. We note at this time that Australia argues that it would be unnecessary for the Panel to rule on China's claim under Article 2.2 if the Panel finds a violation of Article 2.2.1.1.[176] China argues that the Panel can and should address this claim even if the Panel finds a violation under Article 2.2.1.1.[177] We recall that China makes similar Article 2.2.1.1 claims and Article 2.2 claims *vis-à-vis* the wind towers, stainless steel sinks, and railway wheels proceedings. We consider it most appropriate, under the circumstances of this dispute, to make findings as to this claim regardless of whether or not a violation of Article 2.2.1.1 is found in the context of any of the three proceedings. This is so mainly because we consider the disciplines of

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[171] The parties also agree that there was no first condition finding in the expiry review. (Australia's response to Panel question No. 78, para. 116; China's responses to Panel question Nos. 69 and 80). We agree. Thus, even if there had been an affirmative second condition finding, the ADC would still not have been entitled to depart from using TSP's costs.

[172] China also claims violations of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in this context. (China's first written submission, section F.1). We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

[173] Fn omitted; emphasis added.

[174] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

[175] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70 (fns omitted). We recall that Australia generally argues that the limited information on the record of the relevant proceedings prevented the ADC from making further adjustments to the surrogate costs, and that, at times, it was the non-responsiveness of the exporters or the Chinese Government to requests for information that produced a record with limited information. We agree with the Appellate Body, however, that "it is for the investigating authority to determine normal value consistently with Article 2.2 when domestic sales cannot be used". (Appellate Body Report, *Ukraine – Ammonium Nitrate*, fn 419.) We also note that Australia has explained that in none of the relevant investigations or expiry reviews did the ADC use the facts available mechanism under Article 6.8 of the Anti-Dumping Agreement to determine normal value of examined exporters. (Australia's responses to Panel question Nos. 12 and 75). We therefore find this argument by Australia immaterial as to all three proceedings.

[176] Australia's response to Panel question No. 12.

[177] China's response to Panel question No. 12.

Articles 2.2.1.1 and 2.2 to be distinct, and we consider that issuing findings with respect to both this claim and China's other claims under Article 2.2.1.1 would be helpful in terms of resolution of this dispute.[178]

7.3.2.2 Main party arguments

7.84. China makes this claim with respect to the wind towers investigation and expiry review.[179] China argues that in these two segments the ADC rejected TSP's costs of production when determining normal values, and instead used surrogate costs.[180] These surrogate costs were "uplifted" costs for steel plate and flanges. China claims that, in doing so, Australia violated Article 2.2 – and, as a result, Articles 2.1 and 2.2.1.1 – of the Anti-Dumping Agreement because the ADC used costs that were not "the cost of production in the country of origin" within the meaning of Article 2.2. More specifically, China claims that the costs used were specifically chosen by the ADC because they were meant to *not* represent the costs of production in China, and that the ADC made no material effort to adapt such costs so that they could reasonably be considered "the cost of production in [China]".[181] China cites the Appellate Body reports in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* in support of its arguments in this context.[182]

7.85. Australia contends that China misunderstands how the ADC calculated the ratio used to uplift TSP's relevant costs of production. Australia asserts that "China alleges that the ADC compared Chinese plate steel prices with Korean and Chinese Taipei plate steel prices to work out a percentage difference. This is simply factually incorrect. The ADC compared plate steel *prices in China* with an unadjusted normal value for plate steel *in China* from a previous investigation to work out the relevant percentage difference" which was then used to uplift TSP's relevant costs.[183] In this context, Australia underlines that the Panel may not rely on publications of the Australian Government that postdate the original investigation to interpret the ADC's findings in the original investigation, as China does.[184] Australia also contends that it was the Chinese Government's failure to respond to questionnaire inquiries that led the ADC to rely on price information on steel plate from another investigation.[185]

7.86. Australia contends there was a change of essence in respect of this aspect as between the original investigation and the expiry review because in the expiry review the ADC used a benchmark to further adjust the investigation's uplifted prices.[186] Australia further asserts that China appeared to make only certain claims with respect to the wind towers expiry review in one part of its first written submission, but contradicts itself by directing this claim against the expiry review elsewhere in its first written submission.[187]

7.87. Australia also argues that if the Panel were to find a violation of Article 2.2.1.1 under AD claim 3, then it would not be necessary or desirable to also issue findings with respect to this Chinese claim. This is not, in Australia's view, because this claim is consequential to China's AD claim 3 under Article 2.2.1.1. Rather, in Australia's view, it is because the Panel would already have made a finding of error with respect to an aspect of the ADC's decision that forms a predicate for its assessments of the facts and issues presented with respect to this claim.[188]

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[178] We recognize that panels may differ in their approach to this issue under the unique circumstances they face. Compare Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.255-7.260 (making findings on a similar Article 2.2 claim after it had found a violation of Article 2.2.1.1) with Panel Report, *Australia – Anti-dumping Measures on Paper*, para. 7.133 (finding a consequential violation of Article 2.2 based on an underlying Article 2.2.1.1 violation).

[179] China's response to Panel question No. 37, table 1.

[180] China's first written submission, paras. 76-95.

[181] China's response to Panel question No. 69, paras. 49-53.

[182] China's first written submission, paras. 96-119.

[183] Australia's first written submission, para. 503. (emphasis original) See also Australia's first written submission, paras. 504-506 and 510-512 (containing relevant statements of the ADC); response to Panel question No. 74.

[184] Australia's first written submission, paras. 505 and 513-515 (referring to ADRP Review 2019/100 conference summary (Exhibit CHN-30)).

[185] Australia's first written submission, paras. 507-509.

[186] Australia's response to Panel question No. 69, para. 35.

[187] Australia's first written submission, paras. 517-518.

[188] Australia's response to Panel question No. 12.

7.88. China responds that, contrary to Australia's position, the ADC did use steel plate price data from Korea and Chinese Taipei, and compared that data to Chinese steel plate prices, to calculate the uplift ratio. China stresses that explanations provided in subsequent Australian administrative procedures support China's position, and that Australia's explanations are inconsistent with certain statements made by the ADC. Also, China asserts that the main piece of evidence Australia relies on to support its position (a confidential appendix to the investigation report[189]) does not actually support Australia's position. Moreover, according to China, even if Australia were correct in its factual assertions surrounding this issue, it would not matter because the normal values of the Chinese company in the prior investigation Australia alleges were used to calculate the uplift ratio had been constructed using non-Chinese costs. Moreover, in China's view, even if one were to accept that the ADC only used data from China to calculate the uplift ratio as Australia claims, the uplift ratio would still have resulted in a fictional cost of production for TSP and thus could still not be considered to be a cost of production in the country of origin for purposes of Article 2.2.[190] China also asserts that in the wind towers expiry review the ADC used an additional non-Chinese benchmark to further adjust relevant costs, thus further demonstrating the ADC's non-compliance with Article 2.2 in that segment.[191]

7.89. China also asserts that a violation of Article 2.2.1.1 would also result in a violation of Article 2.2, but considers that the Panel should still make findings with respect to this claim even if a violation of Article 2.2.1.1 is found. China indicates that such an approach has been followed in other disputes.[192]

7.3.2.3 Expiry

7.90. China's claim concerns the wind towers original investigation and expiry review. As discussed in section 7.2.2 above, we will address first the issue of whether or not the aspect challenged by China has expired. In this regard, we shall consider whether there was a change of essence in the approach taken by the ADC to select surrogate costs as between the original investigation and expiry review.

7.91. In the investigation the ADC constructed TSP's normal value.[193] In doing so, the ADC "consider[ed] it appropriate to determine the cost of production for wind towers sold domestically by replacing the cost of plate steel and flanges with a competitive market cost".[194] A competitive market cost for steel plate and flanges was obtained using information from a different Australian investigation, i.e. an investigation into hot rolled plate steel from China, Indonesia, Japan, Korea, and Chinese Taipei (Investigation 198). As explained by the ADC, "[t]he competitive *market* cost was established using verified domestic selling prices in China for plate steel from [Investigation 198]. These prices were then compared to the unadjusted normal values established in [Investigation 198]. The differences in these prices were then applied to the cost of steel plate and flanges for TSP".[195]

7.92. In the expiry review, the ADC again constructed TSP's normal value[196] and replaced TSP's costs of steel plate (but not flanges) with surrogate costs.[197]

> [To replace the costs the ADC] indexed the uplifted costs from [the final report of Investigation 221] by reference to movements in the Steel Bulletin Board (Platts) benchmark from the original investigation period in [the final report of Investigation 221] to the current inquiry period. The Commission selected *Flat Products / Plate CFR East Asia / East Asia import CFR $ / ton* (which is reported on Cost and Freight (CFR) terms in USD per tonne) as its benchmark because it is comprised of non-China import

[189] Investigation 221 final report, appendix 2 "Steel Price Uplift" (Exhibit AUS-75).
[190] China's response to Panel question No. 11; second written submission, paras. 145-149.
[191] China's second written submission, paras. 151-152.
[192] China's response to Panel question No. 12 (referring to Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.23; *Ukraine – Ammonium Nitrate*, para. 6.89).
[193] Investigation 221 final report (Exhibit CHN-4), pp. 33-34.
[194] Investigation 221 final report (Exhibit CHN-4), p. 30.
[195] Investigation 221 final report (Exhibit CHN-4), pp. 33-34.
[196] Continuation 487 final report (Exhibit CHN-31), p. 32.
[197] Continuation 487 final report (Exhibit CHN-31), pp. 33-35.

> prices, and is therefore likely to be the most representative of competitive plate steel prices in the region.[198]

7.93. We further recall that TSP was excluded from the wind towers AD order following an administrative review, and thus we will focus on the ADC's alleged errors as they impacted the group of uncooperative and all-others exporters.[199] We therefore further recall that, as explained in paragraph 7.70 above, we found that the cost-replacement methodology (both with respect to the rejection of TSP's record costs for steel plate and the selection of an "uplifting" methodology to establish a surrogate cost) for TSP was transferred over onto the uncooperative and all other exporters. Thus, even if the uplifting methodology could be deemed expired *vis-à-vis* TSP, specifically, owing to its later exclusion from the scope of the anti-dumping order, that methodology remains the basis for the uncooperative exporters' still-active anti-dumping duty rate.[200]

7.94. We consider that there was no change of essence in the ADC's uplifting methodology in the investigation and expiry review. We acknowledge that: (a) in the investigation the uplift was applied to both steel plate and flanges whereas in the expiry review the uplift was applied only to flanges; and (b) in the expiry review the uplifted costs were further altered with reference to the Steel Bulletin Board (Platts) benchmark. These minor differences in the approaches between the original investigation and the expiry review are not, in our view, material enough to alter the key aspects of the order challenged by China, i.e. the uplifting of TSP's costs with reference to data that (a) was not TSP's and (b) was not further adjusted.

7.95. We therefore consider that the challenged aspect of the anti-dumping order has not expired. We thus will make findings with respect to this challenged aspect of the order and, as explained above, focus our attention on the expiry review.

7.3.2.4 Evaluation

7.96. As noted in the section immediately above, in the expiry review, the ADC rejected TSP's record costs for steel plate, instead using surrogate costs for these production inputs by uplifting TSP's costs. We first note, therefore, that the parties disagree as to how the ADC calculated the ratio used to uplift TSP's costs. The parties agree that data for this purpose were taken from Investigation 198, a temporally overlapping Australian investigation of hot rolled plate steel from China, Indonesia, Japan, Korea, and Chinese Taipei.[201] The ADC stated in the wind towers investigation that "[a] competitive market cost for plate steel was established using verified domestic selling prices in China for plate steel from [Investigation 198]. These prices were then compared to *the unadjusted normal values* [for plate steel] established in [Investigation 198]. The difference in these prices was then applied to the purchase cost of plate steel as reflected in TSP's records".[202] China argues that the normal values were those taken from Korea and Chinese Taipei. Australia argues that the normal values were taken from the Chinese producer Shandong Iron and Steel Company Limited, Jinan Company (Jigang). In short, the parties disagree on the source of some of the data used to uplift TSP's costs (i.e. a Chinese entity Jigang or non-Chinese entities from Korea and Chinese Taipei).

7.97. This disagreement is potentially relevant because, if the ADC used Jigang's normal value (rather than Korean and Chinese Taipei entities' normal values) to calculate the uplift ratio, along with "verified domestic selling prices for plate steel", this might suggest that the result of the uplift could be deemed to be a "cost of production in the country of origin" (because only data taken from Chinese sources were used to uplift TSP's costs). Upon closer examination, though, we consider this disagreement moot. This is because we agree with China that even if Australia's factual characterizations surrounding this issue were correct, the ADC did not reasonably demonstrate that the surrogate costs would represent a cost of production in China for TSP. We reach this conclusion because the ADC fails to provide any explanation as to how the price at which a company that is not

[198] Continuation 487 final report (Exhibit CHN-31), pp. 33-34. (italics original; underlining added)
[199] See para. 7.52 above.
[200] China's first written submission, paras. 83 and 112.
[201] Investigation 198 (hot rolled plate steel) final report (Exhibit CHN-33).
[202] Investigation 221 final report (Exhibit CHN-4), p. 30. (emphasis added)

TSP (whatever WTO Member in which it may be located) sells steel plate, when compared to other selling prices for steel plate, yields a referent for TSP's steel plate costs.[203]

7.98. This error, in our view, was exacerbated in the expiry review, in which the ADC further adjusted the previously established uplifted costs with reference to the Steel Bulletin Board (Platts) benchmark. We recall that the benchmark was specifically chosen "because it is *comprised of non-China import prices*, and is therefore likely to be the most representative of competitive plate steel prices in the region".[204] We consider it plain that the use of "non-Chinese import prices" would move the already "uplifted" costs further away from what TSP's costs of production *in China* were. Australia has not pointed to any adjustments the ADC performed to such prices to adapt them to TSP's circumstances in China in either the investigation or expiry review, and we discern none.[205] While we note that the ADC explored other potential methodologies to replace TSP's costs in the expiry review, the ADC's explanations as to why it rejected alternative methods provide no insight into why no further adjustments to the uplifted costs would have been needed for purposes of Article 2.2.[206]

7.99. On this basis, we find that the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by using uplifted TSP's steel plate costs for the purpose of constructing normal value, and then transferring that methodology over onto the ADC's calculation of normal values for the uncooperative and all other exporters[207], without a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to TSP's circumstances, represented a cost of production in China for TSP.[208]

7.3.3 AD claim 5.c under Article 2.2.1.1 of the Anti-Dumping Agreement: "manner" and "circumstances" of rejection of exporters' costs

7.3.3.1 Main party arguments

7.100. China claims that Australia violated Articles 2.1, 2.2, 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 due to the "manner" and "circumstances" in which the ADC rejected the use of TSP's costs when constructing normal value in the wind towers investigation and expiry review.[209] China asserts that this claim is different from its other claims under Articles 2.2 and 2.2.1.1 because this claim "focusses on what the investigating authority did *after* it rejected the exporter's record costs of plate steel and flanges" and specifically "challenges the rationality of the 'cost difference' used by the investigating authority to 'uplift' the exporter's record costs for plate steel and flanges for the purposes of the calculation of the exporter's costs of production".[210] In China's view, the process by which the ADC "uplifted" the exporter's costs of production was neither

[203] The ADC chose to use information from Investigation 198 because the investigation concerned steel plate, its period of investigation overlapped with that of the wind towers investigation, and information on its record had been verified. (Investigation 221 final report (Exhibit CHN-4), pp. 29-30 and 33-34).

[204] Continuation 487 final report (Exhibit CHN-31), p. 34. (emphasis added)

[205] We note Australia's argument that "it would be nonsensical – through the choice of reference data under Article 2.2 – to reintroduce the very same distortions that the ADC legitimately excluded under Article 2.2.1.1". (Australia's second written submission, para. 197). We reject this argument because, even if Australia's argument is true in principle, in neither the investigation nor expiry review does the ADC offer a reasoned and adequate explanation, as to why making *no adjustments* to the uplifted costs was necessary to avoid reverting to the distortions it sought to avoid. We consider it unnecessary to address China's additional argument that Jigang's normal values could not be used to create costs of production in China at all because its normal values were constructed using Chinese *export prices* for coking coal. (China's second written submission, para. 145(d)).

[206] Continuation 487 final report (Exhibit CHN-31), pp. 34-35. The ADC also made certain adjustments to the normal value at large. See Investigation 221 final report (Exhibit CHN-4), p. 34 (noting changes to SG&A, financing costs, and other costs deemed necessary for a "fair comparison"); Continuation 487 final report (Exhibit CHN-31), p. 37 (noting changes deemed necessary for a "fair comparison"). We discern no way in which these adjustments, however, were made for the purpose of adapting the uplifted costs, specifically, to TSP's circumstances in China.

[207] See para. para. 7.52 above.

[208] China also claims violations of Articles 2.1 and 2.2.1.1 of the Anti-Dumping Agreement, and Article VI of the GATT 1994 in this context. (China's first written submission, section E.1). We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

[209] China's first written submission, para. 14.

[210] China's first written submission, para. 261. (emphasis original)

unbiased nor objective. Further, according to China, the determination was not based on positive evidence and the ADC provided no reasoned or adequate explanation to justify this cost adjustment. China notes that the period of investigation in Investigation 198 – i.e. the other investigation from which the ADC took the surrogate costs used to replace TSP's costs – had a different, albeit overlapping, period of investigation than the wind towers investigation. Moreover, with respect to the expiry review, China asserts that the Steel Bulletin Board (Platts) benchmark used to adjust the already-uplifted surrogate costs from the original investigation was similar to TSP's steel costs during the expiry review's period of investigation, and thus there should have logically been no need to adopt modified and uplifted surrogate costs at all for purposes of the expiry review.[211]

7.101. Australia asserts that this claim, insofar as it relates to the obligation for using costs of production in the country of origin, is subsumed under China's AD claim 1 under Article 2.2, and, insofar as it relates to the second condition of Article 2.2.1.1, it lacks a legal basis.[212] Australia also argues that China misunderstands the ADC's findings in this context .[213] Australia asserts that since this claim is duplicative of China's other claims, the expiry issues arising with respect to those claims apply equally to this claim.[214]

7.3.3.2 Expiry

7.102. In the section immediately below, we find this claim effectively subsumed under China's AD claims 1 and 3 under Articles 2.2 and 2.2.1.1, and we therefore make no additional findings here. The expiry issue is thus moot.

7.3.3.3 Evaluation

7.103. In this claim, China asks the Panel to find that in the wind towers investigation the ADC improperly used surrogate costs of production taken from a different investigation and time period, and in the expiry review further adjusted those costs with a benchmark that further modified the already-inaccurate costs. We recall, however, that we have already found that Australia violated Articles 2.2.1.1 and 2.2 by improperly rejecting TSP's relevant costs and then failing to adapt the chosen surrogate costs such that they could be considered costs of production in China.[215] We consider that those conclusions already address the key underlying concerns in China's claim here, i.e. the propriety of using "uplifted" costs as surrogate costs of production for TSP in constructing normal value. Here, China asks us to state the same conclusion in a different manner. We therefore consider that we need not separately consider this claim and decline to make any additional findings with respect to it.

7.3.4 AD claim 6.a under Article 2.4 of the Anti-Dumping Agreement: fair comparison

7.3.4.1 Legal framework

7.104. Article 2.4 of the Anti-Dumping Agreement provides:

[211] China's first written submission, paras. 261-279 and 297-306.
[212] Australia's first written submission, paras. 522-525; response to Panel question No. 16; second written submission, paras. 204-214.
[213] Australia's first written submission, para. 520.
[214] Australia's response to Panel question No. 69, para. 36.
[215] See discussions surrounding AD claims 1 and 3 above.

> 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 differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. 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.
>
> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

7.3.4.2 Main party arguments

7.105. China recalls that, when constructing normal values in all three challenged proceedings, including the wind towers proceedings, the ADC used costs that were different from the costs actually incurred by the exporters in manufacturing the product under consideration. China argues that the ADC's cost substitution methodology to determine constructed normal values generated relevant disparities between the normal value and the export price because:

a. On the one hand, actual export prices were formulated by the Chinese exporters on the basis of their knowledge and understanding of the production of those goods in China, the actual costs of production in China, and the exporters' desired profit for producing and selling those products from China to customers in other countries; and

b. On the other hand, constructed normal values were calculated by the ADC on the basis of unrealistic and inflated costs of production, which did not reflect the recorded cost of the exporters nor the cost of production in China as the country of origin.[216]

7.106. China argues that such disparities represent differences affecting price comparability under Article 2.4, because by using costs higher than an exporter's record costs in constructing normal value, the ADC imputed a price-setting variable of which the exporter was not cognisant and thus necessarily did not take into account when making export sales.[217] China submits that absent any due allowances to account for these disparities[218], the comparison between the normal value as constructed and the export price in each of the three investigations was not a "fair comparison" under Article 2.4.[219]

7.107. China, however, asserts that if the Panel were to find violations of Article 2.2, 2.2.1, and 2.2.1.1, then there would be no need for the Panel to address this claim.[220]

7.108. Australia argues that China's claim under Article 2.4 is "entirely, and impermissibly, premised on China's disagreement with Australia's construction of normal value, and not on any failure to make due allowances under Article 2.4".[221] Australia argues that there is no textual basis to challenge the ADC's normal value calculation under Article 2.4. Australia thus rejects China's position that Australia's cost substitution resulted in a difference between normal value and export price that required an adjustment under Article 2.4. In Australia's view, Article 2.4 is only concerned with making appropriate adjustments which are unrelated to the construction of normal value pursuant to Article 2.2, because Article 2.4 presupposes that the normal value and export

[216] China's first written submission, paras. 326 and 336; opening statement at the first meeting of the Panel, paras. 89 and 90.
[217] China's first written submission, paras. 332-333 and 335.
[218] China's first written submission, paras. 327-331.
[219] China's first written submission, paras. 15(a), 322, 324 and 327.
[220] China's second written submission, paras. 279-280.
[221] Australia's first written submission, paras. 314, 318, and 413. See also ibid. paras. 532-535.

price have already been established.[222] Australia agrees that the Panel need not proceed to an analysis under Article 2.4 if China succeeds on AD claims 1 and 3.[223]

7.3.4.3 Expiry

7.109. In the section immediately below, we find it unnecessary to examine the substance of this claim. We therefore consider an expiry analysis moot.

7.3.4.4 Evaluation

7.110. The issue before us under AD claim 6.a is to determine whether the ADC's conduct is consistent with the practice of an unbiased and objective investigating authority by not making an adjustment under Article 2.4 to account for the difference between the export price and the normal value generated by the alleged use of non-Chinese surrogate costs to construct normal value. China claims that the ADC bears an obligation under Article 2.4 to make due allowance for differences affecting price comparability, including those stemming from the ADC's allegedly inappropriate use of non-Chinese surrogate costs for normal value calculation purpose.[224] The parties agree that the practical implication of China's AD claim 6.a, if successful, is to reverse the methodology used to construct normal value.[225] The parties disagree, however, as to whether such a reversing is prescribed or permitted under the Anti-Dumping Agreement.[226]

7.111. We begin by considering the relationship between China's AD claim 6.a under Article 2.4, and its claims under Articles 2.2 and 2.2.1.1. Although Article 2.4 contains obligations separate and distinct from those contained in Articles 2.2 and 2.2.1.1, the adjustments China requests in the present case are essentially the same as those requested under the Articles 2.2 and 2.2.1.1 claims, i.e. to construct normal value using the exporters' costs of production in China. Thus, China's AD claim 6.a under Article 2.4 is, in essence, an additional or secondary course of action to address the same underlying issue stemming from the ADC's use of alternative data for normal value calculation. In their responses to a question from the Panel, both parties agreed that there is no need for the Panel to review this claim separately if the Panel were to find a breach under Articles 2.2 and 2.2.1.1 (AD claims 1 and 3).[227] With respect to the expiry review, we have found with respect to AD claim 1, above, that the ADC acted inconsistently with Article 2.2 by using TSP's uplifted costs from the original investigation, which were adjusted according to a benchmark that excluded Chinese data, but not adjusted to TSP's circumstances in China. We have also found with respect to AD claim 3, above, that the ADC acted inconsistently with Article 2.2.1.1 because there was no basis for the ADC to reject the exporter's record costs for steel plate in constructing normal value under the circumstances of the expiry review.

7.112. In light of these findings, we consider it unnecessary to examine further whether the ADC also failed to conduct a fair comparison under Article 2.4 by making adjustment to account for the differences generated through the use of surrogate costs in the expiry review.

7.3.5 AD claim 7 under Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement

7.3.5.1 Legal framework

7.113. Article 2.2 of the Anti-Dumping Agreement provides that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country,

[222] Australia's first written submission, para. 328; second written submission, paras. 216, 218, and 221.
[223] Australia's response to Panel question No. 20, para. 40.
[224] China's response to Panel question No. 20, paras. 74–75.
[225] Australia's response to Panel question No. 21, para. 44; Australia's second written submission, paras. 216 and 220; and China's opening statement at the first meeting of the Panel, para. 93.
[226] China's opening statement at the first meeting of the Panel, para. 93; Australia's second written submission, paras. 220 and 221.
[227] Australia's response to Panel question No. 20, para. 40; China's response to Panel question No. 20, para. 77; opening statement at the first meeting of the Panel, para. 97; and second written submission, para. 279.

> such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[228]

7.114. Article 2.2.2 of the Anti-Dumping Agreement provides that:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.115. The *chapeau* of Article 2.2.2 imposes a general obligation on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade" when determining amounts for SG&A and profits for the purpose of calculating constructed normal value. Only "[w]hen such amounts cannot be determined on this basis" may an investigating authority proceed to employ one of the other three methods provided in subparagraphs (i)-(iii). Thus an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the "actual data pertaining to production and sales in the ordinary course of trade".

7.116. Similarly, subparagraphs (i) and (ii) also express a preference for actual data, whereas subparagraph (iii) permits an investigating authority to use "any other reasonable method", subject to the condition that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.3.5.2 AD claim 7.a: Profits not based on "actual data"

7.3.5.2.1 Main party arguments

7.117. China argues that the ADC arrived at incorrect amounts for profit in the wind towers original investigation and expiry review by determining a profit rate with reference to actual cost and sales data in the ordinary course of trade, but then applying that profit rate to the cost of production and administrative, selling and general costs (SG&A) incorporating non-record and non-Chinese surrogate costs which had been "uplifted".[229]

7.118. China argues that the *chapeau* of Article 2.2.2 imposes a general obligation on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade" when determining amounts for SG&A and profits.[230] China contends that the "uplifted cost base" used to calculate the amount of profit included costs of production that were not the

[228] Fn omitted.
[229] China's first written submission, paras. 16(a), 395 and 397.
[230] China's first written submission, paras. 402-404 (referring to, *inter alia*, Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 97; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.25).

exporter's actual data.[231] In China's view, the ADC's methodology is incapable of rendering an amount for profit "based on *actual data* pertaining to production and sales in the ordinary course of trade … by the exporter or producer under investigation" as required by Article 2.2.2.[232]

7.119. Australia notes that China does not challenge the profit rates used by the ADC.[233] Australia argues that the constructed cost base reflected the "correct" costs of the exporter, and thus using them for profit determination would be consistent with using "actual data pertaining to production and sales" within the meaning of Article 2.2.2.[234] Further, Australia argues that this claim is derivative of China's AD claims 1 and 3 and should be rejected for the reasons set forth in Australia's responses to those claims.[235]

7.120. China disagrees with Australia that its claims under the *chapeau* of Article 2.2.2 are derivative of its AD claims 1 and 3. In China's view, Article 2.2.2 is prescriptive of the method that must be followed in order to calculate the amounts for profit "[f]or the purpose of paragraph 2".[236]

7.3.5.2.2 Expiry

7.121. China's claim concerns the wind towers investigation and expiry review.[237] As discussed in section 7.2.2 above, the nature of China's claim raises the issue of whether or not the aspect challenged by China has expired. To address this issue, we will consider whether there was a change of essence in the approach taken by the ADC to calculate profit under Article 2.2.2 as between the investigation and expiry review.

7.122. In both segments, TSP was the only investigated Chinese exporter and the ADC uplifted TSP's costs. Against that background, China makes the same claim here *vis-à-vis* both segments, i.e. the ADC applied a profit rate to TSP's *uplifted* cost data, thus violating the *chapeau* of Article 2.2.2 because such costs were not "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation". Australia does not contest that the ADC applied a profit rate to the TSP's uplifted costs in both segments and we see no reason to doubt this shared understanding by the parties. We therefore consider that there was no change of essence as between the two segments, and thus no expiry of this aspect of the order. We will thus proceed to examine this claim and focus on the expiry review.

7.3.5.2.3 Evaluation

7.123. As indicated in the section above, China claims that the ADC applied a profit rate to uplifted cost data in the wind towers proceedings[238]; Australia does not contest these facts. All that the parties contest is whether the uplifted data could be considered "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" within the meaning of the *chapeau* of Article 2.2.2.

7.124. We recall that TSP was excluded from the wind towers AD order following an administrative review, and thus we will focus on the ADC's alleged errors as they impacted the group of uncooperative and all-others exporters.[239] Thus, so far as TSP is concerned, China's claim addresses an expired aspect of the anti-dumping order. Furthermore, we have found in section 7.3.1.3 above that the uplift methodology was effectively transferred over to the uncooperative exporters. In this regard, the ADC stated in section 6.6.1 of its expiry review report that:

> The Commission established a normal value [for uncooperative and all other exporters] under subsection 269TAC(6), having regard to information verified with TSP Shanghai,

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[231] China's first written submission, para. 416.
[232] China's first written submission, paras. 397, 401, 413-414, and 416-418. China also claims violations of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. (China's second written submission, para. 304).
[233] Australia's first written submission, paras. 542-543.
[234] Australia's first written submission, para. 544; second written submission, para. 329.
[235] Australia's first written submission, paras. 538, and 543-544.
[236] China's second written submission, para. 306.
[237] China's responses to Panel question Nos. 37 and 69.
[238] China's first written submission, paras. 16(a), 395, and 397.
[239] See para. 7.52 above.

> but exclusive of any favourable adjustments. In addition, uplift to plate steel has been based on all plate steel purchased from Chinese suppliers by TSP Shanghai for both domestic and exported wind towers during the inquiry period.[240]

7.125. However, it is not clear to us from the above extract whether the ADC applied the profit rate *to these uplifted data*, specifically, in order to help determine the uncooperative exporters' normal value. China argues that the profit determination made with respect to TSP was "automatically applied to the determination of the amount for profit for all other exporters", "both in the original investigation and in the subsequent expiry review".[241] We note, however, that China has not pointed to any specific statement in the paragraph above or elsewhere in the expiry review report to the effect that the uplifted cost data were used as part of any relevant profit determination for the uncooperative and all other exporters. Rather, all the above excerpt indicates is that the ADC had "regard to information verified with TSP" more generically. Accordingly, we find that China has failed to make a *prima facie* case that the ADC applied a profit rate to the uplifted cost data in the expiry review.[242]

7.3.5.3 AD claim 7.c: Inconsistency in "like products" determination

7.3.5.3.1 Main party arguments

7.126. China argues that the ADC's normal value calculation in the wind towers investigation and expiry review contained an internal inconsistency with respect to Articles 2.1 and 2.2, on the one hand, and Article 2.2.2, on the other hand.[243] China claims that the ADC applied the profit methodology under the *chapeau* of Article 2.2.2, which requires sales of the like product in the ordinary course of trade to calculate profit, after having previously concluded that it had to construct a normal value because of the lack of "relevant" sales in the domestic market.[244] China argues that the ADC failed to provide any adequate or reasoned explanation to justify the contradictory findings that there was both an "absence of relevant sales of like goods on the domestic market"[245] for the purpose of Article 2.2, and an *existence* of such domestic sales of like product for calculating the amount of profit under Article 2.2.2 *chapeau*.[246] China argues that Article 2.6 provides a uniform definition of "like product" for all provisions under the Anti-Dumping Agreement. Accordingly, in China's view, an investigating authority may not find a particular product to be a like product for the purposes of Article 2.2.2, but not a like product for the purpose of Article 2.2.[247] According to China, if an investigating authority determined that there were no sales of the like product on the domestic market in the ordinary course of trade for purposes of Article 2.2, then the investigating authority would be barred from determining the amounts for profit using the Chinese exporter's domestic sales of those same products under the *chapeau* of Article 2.2.2.[248] China contends that the ADC's decision to construct a normal value under Article 2.2 and its decision to use the *chapeau* of Article 2.2.2 to calculate profit as part of that construction exercise are therefore evidently incompatible. China also contends that, in the expiry review, after TSP raised this issue with the ADC, the ADC responded that it had found domestic sales in the ordinary course of trade of the like product such that it could apply the method provided in the *chapeau* of Article 2.2.2, although the ADC still used a constructed normal value, citing lack of "relevant" sales on the domestic market.[249]

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[240] Continuation 487 final report (Exhibit CHN-31), p. 39. See also ibid. p. 34, where it is stated that "TSP Shanghai's steel plate costs have been uplifted accordingly in its cost to make data".

[241] China's first written submission, para. 415 (referring to Investigation 221 final report (Exhibit CHN-4), p. 34; Continuation 487 final report (Exhibit CHN-31), p. 39).

[242] In so concluding, we note that it may appear somewhat odd to find that that ADC violated Article 2.2.1.1 in uplifting TSP's costs and then failing to adapt them properly under Article 2.2, but still find that they reflect "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" within the meaning of the *chapeau* of Article 2.2.2. Regarding China's claims under Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, we discern no independent basis on which to find violations of these provisions. We thus decline to make findings as to these claims as it would not be helpful in resolving the dispute.

[243] China's first written submission, para. 455; second written submission, para. 323.

[244] China's first written submission, paras. 441-442.

[245] Investigation 221 final report (Exhibit CHN-4), p. 33.

[246] China's first written submission, para. 454.

[247] China's first written submission, para. 447.

[248] China's first written submission, para. 453.

[249] China's first written submission, para. 453.

7.127. Australia argues that China has failed to make a *prima facie* case of inconsistency.[250] Australia argues that in the expiry review the ADC did not reframe its position in the original investigation. According to Australia, the ADC found in the original investigation that there was an absence of *relevant* sales of like goods on the domestic market in China for determining normal values. Australia asserts that the ADC similarly determined in the expiry review that the domestic sales were not "relevant sales" for the purposes of determining normal value.[251] In response to a question from the Panel, Australia clarified that although the ADC found in both segments that there were sales on the domestic market in the ordinary course of trade, those sales were not considered to be relevant sales for the purpose of Article 2.2.[252]

7.3.5.3.2 Expiry

7.128. China's claim concerns the wind towers investigation and expiry review.[253] As discussed in section 7.2.2 above, the nature of China's claim raises the issue of whether or not the aspect challenged by China has expired. To address this issue, we will consider whether there was a change of essence in the approach taken by the ADC to determine whether sales of the like product occurred for purposes of Articles 2.2 and 2.2.2 as between the investigation and expiry review.

7.129. We consider that there was no change of essence as between the investigation and expiry review. In both segments, the ADC constructed TSP's normal value because, in its view, there were no "relevant" domestic sales to use to establish a normal value.[254] The ADC also considered that there were sales of the like product for purposes of determining a level of profit in both segments.[255] We thus recall that TSP was excluded from the wind towers AD order following an administrative review, and thus we will focus on the ADC's alleged errors as they impacted the group of uncooperative and all-others exporters.[256] As noted in section 7.3.1.3 above, TSP's data were used as a basis for determining the normal value for the non-cooperating and all-other exporters in the expiry review.[257] We consider that the ADC's explanation for how this was accomplished, and specifically referencing the uplifting of TSP's steel prices, indicates that the construction approach used for TSP was effectively transferred over onto the uncooperative exporters (because the point of uplifting costs was to construct normal value). We therefore consider that the relevant aspect of the order has not expired. We thus make findings with respect to this claim and, in doing so, we focus on the expiry review.

7.3.5.3.3 Evaluation

7.130. China's AD claim 7.c is premised on an alleged internal inconsistency in the ADC's normal value determination in both the original investigation and the expiry review. As discussed in the section immediately above, we will focus our analysis on the expiry review. We will refer to the ADC's determination in the original investigation where necessary, and where the ADC refers to its own original findings during the course of the expiry review.

7.131. According to China, on the one hand, the ADC found that there was an absence of relevant sales of like products on the domestic market in China for determining normal values. On the other hand, the ADC determined the profit component of the constructed normal value on the premise that TSP's domestic sales of wind towers were domestic sales of the like product in the ordinary course of trade.[258]

7.132. In response to a Panel question, China indicated that its claim of "internal inconsistency" can be understood as containing two claims in the alternative, i.e. a breach of Article 2.2 for resorting to constructed normal value where the conditions for doing so were not met because there were

[250] Australia's first written submission, paras. 545 and 549; responses to Panel question No. 29, para. 85, and No. 30, para. 87.
[251] Australia's first written submission, para. 547.
[252] Australia's response to Panel question No. 29, para. 83.
[253] China's responses to Panel question Nos. 37 and 69.
[254] See Investigation 221 final report (Exhibit CHN-4), pp. 33-34; Continuation 487 final report (Exhibit CHN-31), p. 36.
[255] See Investigation 221 final report (Exhibit CHN-4), p. 34; Continuation 487 final report (Exhibit CHN-31), p. 36.
[256] See para. 7.52 above.
[257] See also Continuation 487 final report (Exhibit CHN-31), p. 39.
[258] China's second written submission, para. 319.

sales of the like product in the ordinary course of trade in the domestic market; and in the alternative, a breach of the *chapeau* of Article 2.2.2 for calculating profit using data pertaining to domestic sales where it was determined that there were no sales of the like product in the ordinary course of trade on the domestic market.[259] Thus, China's claim essentially turns on a factual question: did the ADC determine (a) that there were sales of the like product in the ordinary course of trade on the domestic market, or (b) that there were no sales of the like product in the ordinary course of trade on the domestic market?

7.133. In the expiry review, the ADC stated that:

> The Commission notes that wind tower sales are project driven and differ in their technical properties between projects. As such, the Commission considers that each wind tower is a unique product and that, because of the many variables and differences in technical specifications which would affect proper comparison, it is not possible to accurately adjust domestic prices to make them comparable with export prices.
>
> Therefore, the Commission is of the view that there is an absence of sales of like goods in the market of the country of export that would be relevant for the purposes of determining a price under subsection 269TAC(1).[260]

7.134. The ADC further stated that:

> [W]hilst wind towers may vary from project to project and have different technical properties, they nevertheless are like goods. However, these differences mean that there are no relevant sales of like goods on the domestic market to enable matching to the goods exported to Australia.[261]

7.135. The statements of the ADC that "there are no relevant sales of like goods" and "there is an absence of sales of like goods in the market of the country of export" suggest that the ADC found that there were no sales of the like product in the ordinary course of trade in the domestic market. In response to a Panel question, however, Australia clarified that while there were sales of the like product in the domestic market, these sales were not considered "relevant" sales.[262] Australia's position finds support in the ADC's statement in the investigation that "domestic sales of like goods in China and Korea are not relevant and suitable to compare to export sales".[263] In the expiry review, the ADC also stated that "[t]he Commission observes that, having established that like goods are sold in the domestic market, there is no basis for derogating from subsection 45(2) of the Regulation".[264] For this reason, we accept Australia's position that the ADC determined that there were sales of the like product in the domestic market. Accordingly, the factual premise of China's claim under the *chapeau* of Article 2.2.2 fails. We focus instead on China's claim under Article 2.2.

7.136. Australia's defence to China's claim under Article 2.2 boils down to a distinction that the ADC seems to have made between (a) the existence of sales of the like product and (b) the existence of *relevant* sales of the like product. Article 2.2, however, makes no such distinction; it only refers to "sales" of the "like product".[265]

7.137. Article 2.2 permits an investigating authority to resort to two alternative methods for determining normal value in two mutually exclusive situations: first, where there are no sales of the like product in the domestic market; second, where such sales do not permit a proper comparison, either because of the particular market situation, or because the volume of the sales was low. In the present case, we accept Australia's position that the ADC determined that there were sales of the like product on the domestic market. Accordingly, the ADC could not have properly relied on the first

[259] China's response to Panel question No. 28, para. 98; second written submission, para. 318.
[260] Continuation 487 final report (Exhibit CHN-31), p. 32.
[261] Investigation 221 final report (Exhibit CHN-4), p. 29.
[262] Australia's response to Panel question No. 29, para. 83.
[263] Investigation 221 final report (Exhibit CHN-4), p. 29.
[264] Continuation 487 final report (Exhibit CHN-31), p. 36.
[265] We posed additional questions to Australia with respect to this issue. In response, Australia referred the Panel to paragraphs 545-549 of its first written submission, which do not address these questions. (Australia's response to Panel question No. 29(b), para. 85).

criterion to justify resort to the alternative method of determining normal value. That leaves the second criterion, namely, where such sales do not permit a proper comparison, either because of the particular market situation, or because the volume of the sales was low. It is clear from the record that the ADC concluded that the domestic sales did not permit a proper comparison with export sales. However, the ADC did not determine that the domestic sales failed to permit a proper comparison because the volume of the sales was low, or because of a particular market situation. In particular, with respect to the latter, the ADC stated in the expiry review report that: "[n]either of those circumstances (being the composition of the Australian industry or the method of ascertaining normal value in circumstances of a particular market situation in the country of export) are relevant to the present inquiry".[266]

7.138. Thus, the ADC determined that the domestic sales did not permit a proper comparison with export sales on the basis of a "relevance" test that has no basis in Article 2.2. In doing so, the ADC resorted to a constructed normal value in a manner inconsistent with that provision.[267]

7.3.6 AD claim 8 under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994: collection of duties in excess of the margin of dumping

7.139. The applicable legal framework for this claim has already been set forth in section 7.2.3 above.

7.3.6.1 Main party arguments

7.140. China asserts that Australia has collected anti-dumping duties on the basis of margins of dumping that were inflated as a result of the alleged WTO-inconsistencies challenged in China's other AD claims. [268] China claims that, as a result, Australia has collected anti-dumping duties in excess of the margins of dumping that would have been "properly established" under Article 2, contrary to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[269]

7.141. Australia argues that China's claim under Article 9.3 is purely consequential, and that it must fail given that the ADC's calculation of relevant dumping margins was consistent with Article 2 of the Anti-Dumping Agreement.[270]

7.3.6.2 Evaluation

7.142. To the extent that we have found above that the ADC acted inconsistently with the provisions of Article 2, we consider that China has established, as a matter of fact, that the dumping margins were improperly inflated through the use of uplifted, surrogate costs in the expiry review. As the ADC made clear in its report, the surrogate costs it used were "significantly higher" than the costs in the exporter's records during the relevant period. The use of inflated costs thus lead to an increase in the dumping margin in this case.[271] We note that Australia does not argue otherwise. Rather,

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[266] Continuation 487 final report (Exhibit CHN-31), p. 50. The ADC made a similar finding in the original investigation, where it stated that "[g]iven the finding that normal values cannot be determined under s.269TAC(1), the Commission considers that the assessment of whether a market situation exists in the Chinese domestic market to be redundant. … As outlined in the previous chapter of this report, the Commission did not consider it necessary to undertake an assessment of the market situation claims". (Investigation 221 final report (Exhibit CHN-4), pp. 29 and 33.)

[267] China also claims violations of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in this context. (See China's first written submission, section H.1). We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

[268] See for example, China's first written submission, para. 338; opening statement at the first meeting of the Panel, para. 111; and responses to Panel question No. 17, para. 62, No. 19, para. 68, No. 23, para. 94, and No 110, paras. 240 and 246.

[269] China's first written submission, paras. 458 and 459-480. See also China's second written submission, para. 325.

[270] Australia's first written submission, paras. 165, 344-345, and 474; second written submission, para. 230.

[271] In this regard, we note that the ADC also concluded in the expiry review report that:

> The benchmark indicates that competitive market steel prices were significantly higher during the manufacturing period than the costs set out in the exporter's records. Therefore

Australia appears to treat the success of China's claim under Article 9.3 as dependent on the other underlying claims under the Anti-Dumping Agreement. In the absence of any rebuttal from Australia, this in our view establishes *prima facie* that the anti-dumping duties imposed by the ADC exceeded the margins of dumping that would have been established had the authorities acted consistently with Article 2.

7.143. Accordingly, we uphold China's claim that Australia acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. We also recall that, in so finding, the underlying violations of Article 2 that we have found apply to the uncooperative and all-others rate that was determined with reference to the TSP's normal values, given TSP's exclusion from the wind towers AD order following the administrative review.[272]

7.4 Stainless steel sinks

7.144. In this section, we address China's AD and CVD claims as against the stainless steel sinks proceedings. We recall that multiple segments have occurred in the stainless steel sinks proceedings, i.e. an original investigation, three interim reviews, and an expiry review. Thus, we will assess expiry for each claim in accordance with the discussion and approach articulated in section 7.2.2 above. The only exceptions to this are AD claims 6.b.ii and 6.b.iii, which are directed only as against the expiry review.

7.145. We also note that the numbering of China's claims, and the order in which we address them, has already been described in paragraph 7.53 above.

7.4.1 AD claim 3 under Article 2.2.1.1 of the Anti-Dumping Agreement: rejection of exporters' costs

7.146. Under AD claim 3, China argues that the ADC improperly rejected exporters' records as the basis on which to determine exporters' costs of production under Article 2.2.1.1 in order to determine normal value. We recall that China's AD claim 4 is predicated on the notion that in using surrogate costs for 304 stainless steel cold-rolled coil (304 SS CRC) improperly chosen under Article 2.2.1.1 to perform the ordinary-course-of-trade test (which is used to help determine normal value), Australia violated Article 2.2.1. We thus consider that China's AD claim 3 is most effectively and efficiently addressed in conjunction with AD claim 4. We turn to that claim immediately below.

7.4.2 AD claim 4 under Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement: use of correct "costs" in the ordinary-course-of-trade test

7.4.2.1 Legal framework

7.147. This claim pertains to Article 2.2.1 of the Anti-Dumping Agreement, which provides:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[273]

> TSP Shanghai's steel plate costs have been uplifted accordingly in its cost to make data. The Commission's index methodology and workings can be found at Confidential Attachment 4.

(Continuation 487 final report (Exhibit CHN-31), p. 34)

[272] See para. 7.52 above.
[273] Fns omitted.

7.148. The parties agree that the word "costs" in the context of Articles 2.2 and 2.2.1.1 should be interpreted consistently with the word "costs" in Article 2.2.1.[274] Thus, if the ADC selects costs in a manner that is inconsistent with Article 2.2 or 2.2.1.1, and if the ADC used the same costs in the ordinary-course-of-trade test in the context of Article 2.2.1, it necessarily leads to a violation of that article as well. We agree. The panel in *Ukraine – Ammonium Nitrate* interpreted this article in a similar way. In that dispute, the panel noted that "Ukraine used the surrogate price of gas, rather than the reported gas cost, first, to identify the below-cost sales, and second, to assess whether the below-cost sales exhibited the characteristics set out in the first sentence of Article 2.2.1".[275] The panel then reasoned:

> [W]e note that Article 2.2.1.1 applies to "[p]aragraph 2". The reference to "[p]aragraph 2" covers not just Article 2.2 but also Article 2.2.1. The panel in *EC – Salmon (Norway)* recognized that the rules for calculating the costs used in a determination under Article 2.2.1 are found in Article 2.2.1.1. It would follow, in our view, that costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1. Further, if we were to accept Ukraine's arguments, we would essentially be concluding that the investigating authority was free to disregard the specific rules under Article 2.2.1.1 when calculating the cost of production used for the purposes of the ordinary-course-of-trade test under Article 2.2.1. However, there is nothing in the text of Article 2.2.1 or Article 2.2.1.1 to support such a view. Such an interpretation is also likely to create systemic problems as in conducting their ordinary-course-of-trade test under Article 2.2.1 investigating authorities would be free to use a cost of production calculated inconsistently with Article 2.2.1.1, thereby frustrating the very purpose of this test.[276]

7.149. We agree with this reasoning. Moreover, we consider that the general thrust of this reasoning also applies with respect to an underlying violation of Article 2.2. Indeed, if the costs used in the ordinary-course-of-trade test under Article 2.2.1 were not costs in the country of origin, then it is not clear how such costs could be properly used to determine below-cost sales by the exporter which is, of course, in the country of origin.

7.150. The legal framework for Article 2.2.1.1 appears in section 7.3.1.1 above.

7.4.2.2 Main party arguments

7.151. China makes this claim with respect to the stainless steel sinks original investigation, interim reviews and expiry review. China considers that this claim is dependent on AD claim 3 raised under Article 2.2.1.1, discussed further above.[277] China notes that in these segments the ADC used non-Chinese surrogate costs, rather than the Chinese exporters' costs of production, in constructing normal values and/or determining whether sales made by the relevant exporters were made in the ordinary course of trade for purposes of assessing whether such sales were below-cost.[278] China argues that having wrongfully rejected the exporters' costs of production, contrary to Article 2.2.1.1, the ADC also violated Article 2.2.1 by subsequently using non-Chinese surrogate costs in the ordinary-course-of-trade test.[279] China contends that the violation of Article 2.2.1 also resulted in an inconsistency with Articles 2.1 and 2.2.[280]

7.152. China claims that Australia violated Article 2.2.1.1 of the Anti-Dumping Agreement because the ADC failed to calculate relevant costs "on the basis of records kept by the exporter or producer under investigation" within the meaning of Article 2.2.1.1. This is so because, according to China, the ADC instead rejected the exporters' costs because they "did not reasonably reflect competitive

[274] Australia's first written submission, para. 408; China's first written submission, paras. 145 and 247.
[275] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.114.
[276] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.116. (fn omitted)
[277] China's response to Panel question No. 2.
[278] China's response to Panel question No. 37, and No. 69, para. 61; annex A to China's responses to Panel questions after the second meeting of the Panel.
[279] China's first written submission, para. 247.
[280] China's first written submission, paras. 246-250. China also claims a violation of Article VI:1 of the GATT 1994.

market costs" within the meaning of applicable Australian law, which, in China's view, is a misapplication of the second condition in the first sentence of Article 2.2.1.1.[281]

7.153. Australia agrees with China that the ADC used surrogate costs for 304 SS CRC in performing the ordinary-course-of-trade test in the original investigation and expiry review, and in constructing normal value in the original investigation.[282] Australia further agrees that this claim is dependent on whether Australia violated Article 2.2.1.1.[283]

7.154. With respect to the investigation, Australia argues that the ADC acted consistently with Article 2.2.1.1 because the ADC made a negative finding as to the second condition in the investigation.[284] According to Australia, "[t]he ADC determined that the exporters' records did not adequately capture the cost of 304 SS CRC, and as a result, the ADC decided to adjust the exporters' recorded costs for 304 SS CRC in order to construct normal value".[285] Australia stresses that the ADC's findings for purposes of the second condition of Article 2.2.1.1 were not made on the basis that the exporters' records did not reflect "competitive market costs".[286] Rather, according to Australia, the ADC acknowledged that it needed to make findings specifically with respect to the strictures of the second condition of Article 2.2.1.1[287], and then did so by finding that the exporter's records reflected 304 SS CRC costs that were distorted by the Chinese Government's interventions in the steel market.[288] Australia explains that:

> [T]he ADC determined not to employ the 304 SS CRC costs in the exporters' records *not* because the *costs themselves* were unreasonable, but because the ADC had determined that the recorded costs *did not reasonably reflect the actual 304 SS CRC costs* associated with the production and sale of the product under consideration. In other words, the ADC determined under the second condition of Article 2.2.1.1 that the exporters' records did not reasonably reflect the exporters' costs because the records were not an accurate and reliable reflection of the costs actually incurred in the production and sale of stainless steel sinks.[289]

7.155. Australia also indicates that the Chinese Government refused to provide certain information to the ADC regarding the operation of the steel market in China, which led the ADC to rely on information reasonably available to it in its analyses in this context.[290]

7.156. With respect to the expiry review, Australia argues that China has not made a *prima facie* case with respect to this segment. This is so, in Australia's view, because in the investigation there was a negative finding for the second condition in Article 2.2.1.1 whereas in the expiry review there was a positive finding under both the first and the second conditions. Therefore, according to Australia, in the expiry review, the ADC relied on the flexibility provided by the word "normally" in the first sentence of Article 2.2.1.1 in rejecting the exporters' 304 SS CRC costs.[291] Australia considers that because China never recognized this change of essence it did not make a *prima facie* case with respect to the expiry review.[292] Australia also asserts that there were other relevant differences as between the investigation and expiry review. Specifically, Australia contends that, although the ADC used North American and European 304 SS CRC costs as surrogate costs in both segments, the ADC used surrogate costs for constructing normal value and performing the ordinary-course-of-trade test in the original investigation, but only used surrogate costs for the ordinary-course-of-trade test in the expiry review.[293] Australia also indicates that the ADC obtained

[281] China's first written submission, section F.1.
[282] Australia's response to Panel question No. 69, para. 22.
[283] Australia's first written submission, para. 409; response to Panel question No. 2.
[284] Australia's second written submission, para. 241.
[285] Australia's first written submission, para. 363; second written submission, para. 241; and response to Panel question No. 78, paras. 85-91.
[286] Australia's first written submission, para. 364.
[287] Australia's first written submission, para. 365.
[288] Australia's first written submission, para. 366.
[289] Australia's first written submission, para. 367 (emphasis original). See also ibid. paras. 374-380.
[290] Australia's first written submission, paras. 353-361 and 374.
[291] Australia's responses to Panel question No. 69, para. 24, and No. 78, paras. 106-108.
[292] Australia's responses to Panel question No. 69, para. 24, Nos. 100 and 107.
[293] Australia's response to Panel question No. 69, para. 22.

its surrogate 304 SS CRC prices from different data sources in the original investigation and expiry review.[294]

7.157. China responds that the ADC made no proper finding as to the second condition in either the investigation or the expiry review.[295] China also argues that this claim operates with respect to the wrongful determination of costs whether or not normal values were constructed in the expiry review, and that the ADC made no reference to the term "normally", as used in Article 2.2.1.1 of the Anti-Dumping Agreement, in its expiry review report.[296] China also argues that in the expiry review the ADC used surrogate costs for both constructing normal value and for performing the ordinary-course-of-trade test.[297] China agrees with Australia that the ADC used a 304 SS CRC price obtained from two different sources in the investigation and the expiry review but disagrees that this means that there was a change of essence between the two segments.[298]

7.158. We note that both parties indicate that China's other claim under Article 2.2.1.1, discussed in the section immediately above, underlies this claim. We agree. Thus, we incorporate the parties' arguments with respect to that claim by reference here.

7.4.2.3 Expiry

7.159. China's claim concerns the stainless steel sinks original investigation, interim reviews and expiry review. As discussed in section 7.2.2 above, we shall first consider whether or not the aspect challenged by China has expired. To do so, we shall consider whether there was a change of essence in the approach taken by the ADC to reject exporters' costs as between the investigation and expiry review, and do not examine the interim reviews.

7.160. In the original investigation, the ADC constructed certain normal values for investigated exporters, and thus had to determine such exporters' costs of production.[299] The ADC noted that "Regulation 180(2) requires that if an exporter keeps records in accordance with the appropriate GAAP, and those records reasonably reflect competitive market costs associated with the production of like goods, then the cost of production must be worked out using the exporter's records" and that "the records of Chinese exporters of the goods have been kept in accordance with the relevant GAAP".[300] This is an affirmative finding under the first condition of the first sentence of Article 2.2.1.1. The ADC then found "that 304 SS CRC (also supplied in sheet form) prices in China are affected by GOC influences in the iron and steel industry, and hence do not reasonably reflect competitive market costs, and should be replaced by a competitive market substitute".[301] We consider this a clear statement to the effect that the ADC rejected the use of exporters' 304 SS CRC record costs because they did not reasonably reflect a competitive market cost.[302] We further note

[294] Australia's responses to Panel question No. 78, para. 25 (table).

[295] China's second written submission, paras. 174-183; comments on Australia's responses to Panel question No. 69, para. 19, Nos. 80 and 100; and responses to Panel question Nos. 69, 80, 100 and 107.

[296] China's comments on Australia's response to Panel question No. 69, paras. 17-19.

[297] China's response to Panel question No. 69, para. 61.

[298] China's response to Panel question No. 69, para. 43.

[299] Investigation 238 final report (Exhibit CHN-2), pp. 39-43.

[300] Investigation 238 final report (Exhibit CHN-2), p. 42.

[301] Investigation 238 final report (Exhibit CHN-2), p. 42. 304 SS CRC is a key input in the production of stainless steel sinks. (ibid. p. 40).

[302] As discussed in section 7.3.1.4 above, this was not a finding under the second condition of the first sentence of Article 2.2.1.1. We discern nowhere else where the ADC issued any finding under the second condition, whether affirmative or negative. We note that Australia argues that, while not made expressly in the language of Article 2.2.1.1, a negative finding under the second condition is evident in the report. Australia submitted that the ADC understood that it had to make a finding under the second condition of Article 2.2.1.1, as evidenced by the ADC's statement that:

> However, the Commissioner does not consider this ability to amend costs is limited to situations where costs are not reasonably reflective of 'competitive market costs', but also where costs do not reasonably reflect the costs associated with the production and sale of the goods or like goods in general. In such cases, these costs do not 'reasonably reflect the costs associated with the production and sale of the product under consideration' as provided for by Article 2.2.1.1.

(Investigation 238 final report (Exhibit CHN-2), p. 146)

We ultimately find such statements immaterial because they do not amount to findings under the second condition. (Australia's second written submission, paras. 238-244; responses to Panel question No. 61, para. 194, and No. 78, paras. 85-91).

that the ADC used the surrogate costs not only to construct certain normal values, but also to perform the ordinary-course-of-trade test.[303]

7.161. In the expiry review, the ADC again rejected exporters' costs of 304 SS CRC for purposes of performing the ordinary-course-of-trade test, but not in constructing normal values because no normal values were constructed.[304] In doing so, the ADC found – under the first condition of the first sentence of Article 2.2.1.1 – that the relevant exporters' records were kept in accordance with the GAAP of China.[305] The ADC also stated that "[t]hrough the verification of each exporter's production data, the Commission found that the stainless steel production costs in each exporter's production records were a reasonable reflection of the price paid to their stainless steel suppliers. To this extent, the Commission is satisfied that the cost of production records reasonably reflects the costs associated with the production of like goods".[306] We consider this to be, on its face, a clear affirmative second condition finding under the first sentence of Article 2.2.1.1 with respect to stainless steel costs. China argues that it is not an affirmative second condition finding because "[t]he second condition does not ask whether any one or other of an exporter's actual invoiced and paid-for costs is a *'reasonable reflection of the price paid'*".[307] In our view, however, the accurate reflection in exporters' records of the costs actually paid for certain production inputs is precisely upon what the second condition of Article 2.2.1.1 focuses. In sum, in the expiry review the ADC made affirmative findings under both the first and second conditions of the first sentence of Article 2.2.1.1. The ADC then went on to again reject exporters' 304 SS CRC record costs because, in its view, they did not reasonably reflect competitive market costs.[308]

7.162. We consider that there was a change of essence in the approach taken by the ADC as between the investigation and expiry review. We first note that in the investigation, the ADC used surrogate costs for constructing normal values *and* performing the ordinary-course-of-trade test. In the expiry review, the ADC used surrogate costs only in performing the ordinary-course-of-trade test (the ADC did not construct normal values in the expiry review). In the context of this claim, however, this difference is immaterial because a violation of Article 2.2.1.1 may occur in rejecting the exporters record costs whether this is done for purposes of selecting costs to use in normal value construction or for performing the ordinary-course-of-trade test.[309]

7.163. We also note that in the investigation, there was an affirmative finding under the first condition, but no finding under the second condition. In the expiry review, there were affirmative findings under both the first and second conditions. This change is material because, as discussed in section 7.3.1.1, this means that in the investigation, the ADC was unable to rely on any flexibility afforded by the word "normally" in the first sentence of Article 2.2.1.1 to reject exporters' 304 SS CRC costs; but in the expiry review, the ADC could potentially rely on such flexibility. We therefore find that the ADC's approach to rejecting exporters' 304 SS CRC record costs in the original investigation has expired, having been replaced by the approach taken in the expiry review.[310] In the next section, we will therefore focus on the approach taken by the ADC in the expiry review and, in particular, examine whether China has raised specific arguments, in a timely manner, *vis-à-vis* that approach.

[303] Investigation 238 final report (Exhibit CHN-2), pp. 39-43 and 207-219.

[304] Continuation 517 final report (Exhibit CHN-36), pp. 61, 65, 67, 70-71, 73, and 107.

[305] See Continuation 517 final report (Exhibit CHN-36), p. 50 (noting "[f]or the purpose of this inquiry, the Commission is satisfied that the production records of all of the selected exporter complied with section 43(2)(b)(i) of the Regulation in so far that they were kept in accordance with generally accepted accounting principles in the country of export").

[306] Continuation 517 final report (Exhibit CHN-36), pp. 50-51.

[307] China's comments on Australia's response to Panel question No. 80, para. 69. (emphasis original)

[308] Continuation 517 final report (Exhibit CHN-36), pp. 51-53. The ADC stated "[i]n light of the above finding that the production costs of stainless steel incurred by Chinese exporters of the goods do not reasonably reflect competitive market costs for that input, the Commission has considered how best to determine what a competitive market substitute price for this input in China should be, having regard to all available information".

[309] See China's panel request, para. B.1.3 (referring to the "determination of normal value" with respect to AD claim 3).

[310] We decline to make findings with respect to the approach taken in the original investigation. See section 7.6 below.

7.4.2.4 Evaluation

7.164. We recall Australia's argument that China did not make a *prima facie* case with respect to the expiry review because China bases its arguments on an incorrect factual predicate, i.e. that the ADC failed to make any finding under the second condition of the first sentence of Article 2.2.1.1 in the expiry review.

7.165. In light of Australia's argument, we recall the manner in which China has challenged the expiry review in this proceeding. At no point before the second substantive meeting did China discuss the second condition affirmative finding in the expiry review. China had predicated this claim, rather, on the notion that there was no proper second condition finding. Indeed, even after the second meeting, China adhered to its position that there was no affirmative second condition finding.[311] As discussed in the above section, this is incorrect. We therefore consider that China has not established a factual basis for its claim.

7.166. We also find that, even if China had acknowledged the affirmative second condition finding when China first specifically addressed this finding at the second meeting[312], this, in our minds, would have been too late for China to make a viable argument against the expiry review. Panels, of course, consider arguments submitted throughout the proceedings.[313] However, introducing a new line of argumentation so late in this proceeding would raise due process concerns in our minds.[314] The Working Procedures of the Panel reflect the basic structure of the proceeding as envisioned by the DSU, i.e. a first phase in which the parties present the facts of their cases and their arguments (first written submissions and first meeting), and a second phase in which parties present rebuttals (second written submissions and second meeting).[315] If China could introduce an entirely new argument in the second phase as to why the ADC violated Article 2.2.1.1, Australia would not be provided a meaningful opportunity to respond to, and reasonably develop, its position against such an argument. As explained in section 7.3.1.1 above, any argumentation based on the ADC making both affirmative first and second condition findings would present a new argument because in that case the issue arises as to whether the word "normally" presented a basis to reject exporters' relevant costs for purposes of conducting the ordinary-course-of-trade test. Under China's argument of non-compliance, any flexibility offered by the word "normally" is never triggered.

7.167. In light of the foregoing, we find that China has failed to make a *prima facie* case that the ADC acted inconsistently with Articles 2.2.1.1 or 2.2.1 in the context of AD claims 3 or 4.[316] We therefore also note that we need not address or resolve the parties' arguments concerning whether the word "normally" could have provided a basis for departing from using exporters' record costs.

7.4.3 AD claim 1 under Article 2.2 of the Anti-Dumping Agreement: costs of production in the country of origin

7.168. Under AD claim 1, China argues that the ADC selected surrogate costs that did not represent the costs of production in the country of origin under Article 2.2 of the Anti-Dumping Agreement in order to determine the margin of dumping. We recall that China's AD claim 2 is predicated on the notion that Australia violated Article 2.2.1 in using surrogate costs for 304 SS CRC to perform the ordinary-course-of-trade test (which is used to help determine normal value and thus the margin of dumping), costs that were improperly chosen under Article 2.2. We thus consider that

[311] See China's first written submission, section F.1; second written submission, section F.1.a; responses to Panel question Nos. 62, 79, 80, 100, 106, 107; and comments on Australia's responses to Panel question No. 69, para. 19, No. 78, para. 56(c), and No. 100, paras. 116-117. See also footnote 5 to question No. 80(a) in the Panel's questions sent to the parties before the second substantive meeting.

[312] See footnote 5 to question No. 80(a) in the Panel's questions sent to the parties before the second substantive meeting.

[313] Appellate Body Report, *Korea – Dairy*, para. 139; Panel Report, *China – Broiler Products*, para. 6.74.

[314] Australia also argues that it would be too late to advance such arguments. (Australia's second written submission, para. 130).

[315] Working Procedures of the Panel, para. 3.

[316] We also make no findings with respect to the other provisions that China alleged had been violated in the context of AD claims 3 and 4, i.e. Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. (See China's first written submission, sections F.1 and F.2). We discern no independent basis on which to find violation of these provisions.

China's AD claim 1 is most effectively and efficiently addressed in conjunction with AD claim 2. We turn to that claim immediately below.

7.4.4 AD claim 2 under Articles 2.2 and 2.2.1 of the Anti-Dumping Agreement: use of correct "costs" in the ordinary-course-of-trade test

7.169. The applicable legal framework for this claim has already been set forth in sections 7.3.2.1and 7.4.2.1 above.

7.4.4.1 Main party arguments

7.170. China makes this claim with respect to the stainless steel sinks original investigation, interim reviews, and expiry review.[317] China notes that Article 2.2.1 of the Anti-Dumping Agreement provides that "sales of the like product in the domestic market of the exporting country" may be treated as outside the ordinary course of trade if such sales are below-cost. China asserts that the word "costs" as used in Article 2.2.1 refers to the "costs of production in the country of origin" as that term is used in Article 2.2. China therefore further recalls that the ADC, in the stainless steel sinks investigation, used surrogate costs for 304 SS CRC, rather than the exporters' costs, in determining whether sales made by the relevant exporter were made in the ordinary course of trade for purposes of assessing whether such sales were below-cost. China argues, therefore, that because the ADC used surrogate costs which were not costs of production in China, and used those same surrogate costs in the ordinary-course-of-trade test performed under Article 2.2.1, Australia violated Article 2.2.1.[318] China stresses, however, that in its view this claim is not dependent on any other claims China makes.[319]

7.171. China argues that the ADC acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because in the relevant segments the ADC rejected using the exporters' costs for 304 SS CRC when determining normal values, and instead used non-Chinese surrogate costs from Europe and North America.[320] China claims that, in doing so, Australia violated Article 2.2 of the Anti-Dumping Agreement because the ADC used costs that were not "the cost of production in the country of origin" within the meaning of Article 2.2. More specifically, China claims that the costs used were specifically chosen by the ADC because they were meant to *not* represent the costs of production in China, and that the ADC made no material effort to adapt such costs so that they could reasonably be considered "the cost of production in [China]". China cites the Appellate Body reports in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* in support of its arguments in this context.[321]

7.172. Australia agrees with China that "the cost of production to be used for the OCOT assessment under Article 2.2.1 must meet the same disciplines as those applicable to the cost of production in the country of origin under Article 2.2 and the rules regarding the use of exporters' records in Article 2.2.1.1".[322] In light of such observations, Australia concludes that this claim is dependent on China's other Article 2.2 claim, discussed in the section immediately above, insofar as this claim concerns the stainless steel sinks investigation. With respect to the interim and expiry reviews, Australia submits that for AD claim 2 China cannot have made a *prima facie* case because it has not addressed the differences in the ADC's ordinary-course-of-trade assessment between the investigation and the interim and expiry reviews, or advanced any separate arguments.[323]

7.173. Australia, however, asserts that the ADC acted consistently with Article 2.2. Australia argues that the ADC had to use non-Chinese surrogate data due to the distortions in the Chinese steel

[317] See e.g. China's responses to Panel question Nos. 37 and 69; annex A to China's responses to Panel questions after the second meeting of the Panel.
[318] China's first written submission, paras. 132-146. China argues, as a consequence, Australia violated Articles 2.1, 2.2, and 2.2.1.1. (ibid. para. 8).
[319] China comments on Australia's response to Panel question No. 69, para. 20.
[320] China's first written submission, paras. 76-95; response to Panel question No. 69; and annex A to China's responses to Panel questions after the second meeting of the Panel.
[321] China's first written submission, paras. 96-119. China also claims violations of Articles 2.1 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.
[322] Australia's first written submission, para. 408.
[323] Australia's first written submission, para. 410; responses to Panel question No. 5, paras. 1-2, and No. 69, paras. 27-28.

market caused by government involvement.[324] Australia further contends that the ADC selected the costs after considering multiple different potential surrogate costs and decided on the selected sources, after unsuccessful attempts to secure relevant information from the Chinese Government.[325] Australia specifically indicates that the ADC rejected using other benchmarks because, *inter alia*, some of them included Chinese steel data and others – particularly those from other Asian countries – were likely distorted by the prevalence of Chinese steel in the region.[326] Australia argues that the ADC actively sought to adjust these data but could not do so in certain ways because the Chinese Government and the exporters failed to provide information to the ADC.[327] Australia underlines that the ADC used the chosen information in an attempt to avoid reintroducing the same market distortions it had identified in the Chinese steel markets.[328] Australia claims that the ADC adjusted the costs by adding, as appropriate, delivery costs and slitting costs for 304 SS CRC depending on the exporters' circumstances.[329]

7.174. In response to a question from the Panel, Australia also argued that there were differences between the investigation and expiry review, with which China did not engage, because in the investigation the ADC used the price of North American and European prices for 304 SS CRC published by MEPS (International) Ltd. (MEPS), a steel market data company, whereas in the expiry review the ADC used prices for North American and European 304 SS CRC published by Steel Business Briefing Ltd.[330] Australia further notes that in the original investigation the ADC used surrogate costs for constructing normal values and for performing the ordinary-course-of-trade test, but in the expiry review the ADC only used surrogate costs for conducting the ordinary-course-of-trade test because no normal values were constructed in the expiry review.[331]

7.175. China responds that the ADC's adjustments for delivery and slitting costs were insufficient to render a cost of production in China.[332] China also indicates that in the expiry review the ADC used surrogate costs both for constructing normal value and for performing the ordinary-course-of-trade test.[333] Moreover, China indicates that even if the ADC used different data sources to obtain the surrogate costs in the investigation and expiry review, this is immaterial because the essence of the challenged methodology is the use of out-of-country data and the lack of appropriate adjustments to reflect the cost in the country of origin.[334]

7.4.4.2 Expiry

7.176. China's claim concerns the stainless steel sinks original investigation, interim reviews, and expiry review.[335] As discussed in section 7.2.2 above, we will address first the issue of whether or not the aspect challenged by China has expired. In this regard, we shall consider whether there was a change of essence in the approach taken by the ADC to select surrogate costs as between the original investigation and expiry review, and do not examine the interim reviews.

7.177. We first recall that, per our discussion surrounding expiry with respect to AD claim 4, above, the ADC used surrogate costs in constructing normal value and performing the ordinary-course-of-trade test in the investigation, but only in performing the ordinary-course-of-trade test in the expiry review. We do not ultimately consider this change to be material in this specific context, however. This is so because both parties agree, as do we, that costs that represent the costs of production in the country of origin, within the meaning of Article 2.2, must be used in performing the ordinary-course-of-trade test under Article 2.2.1. Thus, use of

[324] Australia's first written submission, paras. 387-391.
[325] Australia's first written submission, paras. 392-397.
[326] Investigation 238 final report (Exhibit CHN-2), pp. 212-215.
[327] Australia's first written submission, paras. 399-402.
[328] Australia's second written submission, para. 254.
[329] Australia's first written submission, paras. 404-405; response to Panel question No. 69, para. 25. Australia also argues that if the Panel were to find a violation under AD claim 3, then it would not be necessary or desirable to also issue findings with respect to AD claim 1. (Australia's response to Panel question No. 12). This argument is moot, however, as we have found no violation under AD claim 3 for the stainless steel sinks proceedings.
[330] Australia's response to Panel question No. 69, para. 25 (referring to Investigation 238 final report (Exhibit CHN-2), pp. 42 and 217; Continuation 517 final report (Exhibit CHN-36), p. 54).
[331] Australia's response to Panel question No. 69, para. 22.
[332] China's response to Panel question No. 69, para. 54.
[333] China's response to Panel question No. 69, para. 61.
[334] China's response to Panel question No. 69, para. 43(b).
[335] China's responses to Panel question Nos. 37 and 69.

surrogate costs in performing the ordinary-course-of-trade test is sufficient, in our view, to examine whether such costs comported with the standards in Article 2.2 for purposes of examining whether there is a violation of Article 2.2.1.[336]

7.178. We also recall that, in the investigation, to select a surrogate cost for 304 SS CRC, the ADC "determined that the most reasonable option available is a MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices alone (excluding the Asian price). This was calculated using the monthly reported data for the investigation period available from MEPS".[337] The ADC then explained that it "compared: the benchmark MEPS European and North American average 304 SS CRC prices; to verified purchase prices actually incurred by Chinese exporters of deep drawn stainless steel sinks when purchasing this input to arrive at an individual percentage difference between the benchmark and purchases prices, which was then be applied to the stainless steel costs recorded in the exporters' records".[338]

7.179. The ADC made two adjustments to the surrogate costs depending on the circumstances of the exporters: (a) the ADC added to the MEPS benchmark price "the verified annual weighted average delivery cost of 304 SS CRC from one selected exporter … to arrive at a per tonne 304 SS CRC delivery cost in China"[339]; and (b) the ADC added a cost for slitting 304 SS CRC "based on the annual average verified price difference between slit and unslit product purchased at the same time by the same exporter from the same supplier of slit and unslit stainless steel".[340] This latter adjustment was considered necessary because the MEPS benchmark price was for *unslit* 304 SS CRC.[341]

7.180. In the expiry review, the ADC again selected North American and European 304 SS CRC prices as surrogate costs for 304 SS CRC. However, the ADC obtained the prices from a different source, i.e. from Steel Business Briefing Ltd.[342] The ADC again adjusted for delivery and slitting costs.[343]

7.181. We consider that there was no change of essence in the ADC's approach to surrogate cost selection as between the investigation and expiry review. Indeed, the same surrogate costs were chosen in each, i.e. European and North American 304 SS CRC prices. The only noteworthy difference we discern is that the surrogate costs were obtained from different sources in the two segments, i.e. MEPS in the investigation and Steel Business Briefing Ltd. in the expiry review. This minor difference in the approaches between the two segments is not, in our view, material enough to alter the key aspect of the order challenged by China, i.e. the selection of European and North American 304 SS CRC costs to replace exporters' 304 SS CRC costs with adjustments only made for delivery costs and slitting costs.

7.182. We therefore consider that the challenged aspect of the anti-dumping order has not expired. We therefore will make findings with respect to this challenged aspect of the order and, as explained above, focus our attention on the expiry review.

7.4.4.3 Evaluation

7.183. As indicated in section 7.4.2.3 above, in the expiry review, the ADC rejected exporters' record costs of 304 SS CRC for purposes of conducting the ordinary-course-of-trade test, and instead selected surrogate costs for doing so. Those costs were "the average price of grade 304 [SS] CRC for North America and Europe published by [Steel Business Briefing Ltd.]".[344] The ADC

[336] See China's panel request, para. B.1.1 (referring generically to the "determination of the margin of dumping" with respect to AD claim 1).

[337] Investigation 238 final report (Exhibit CHN-2), pp. 42-43. This surrogate cost was "the same 'benchmark' price considered to be representative of 'adequate remuneration' for the purposes of determining a benefit under Subsidy Program 1 – Raw Materials Provided by the Government at Less than Fair Market Value" for purposes of the countervailing investigation in the stainless steel sinks proceedings. (Ibid. p. 137).

[338] Investigation 238 final report (Exhibit CHN-2), p. 43.

[339] Investigation 238 final report (Exhibit CHN-2), p. 219.

[340] Investigation 238 final report (Exhibit CHN-2), p. 219.

[341] Investigation 238 final report (Exhibit CHN-2), p. 219.

[342] Continuation 517 final report (Exhibit CHN-36), pp. 53-54.

[343] Continuation 517 final report (Exhibit CHN-36), p. 54. The slitting cost adjustment was considered necessary because the benchmark price was for *unslit* 304 SS CRC.

[344] Continuation 517 final report (Exhibit CHN-36), p. 53.

chose this benchmark because it was the same surrogate cost selected in the original investigation. In particular, the ADC considered that the key factors in selecting the surrogate cost remained applicable, i.e. it "includes only data related to prices of 304 CRC stainless steel" and "does not include any Asian pricing data that may be unreasonable due to the influence of exported Chinese 304 CRC stainless steel in the region".[345] The ADC further made adjustments for slitting and delivery costs, as it had done in the original investigation.[346]

7.184. In the expiry review, we note that one party before the ADC argued that: (a) any advantage in 304 SS CRC costs that Chinese companies enjoyed were not due to any identified government distortions but instead due to other advantages like cheaper electricity and nickel; and (b) European and North American market conditions were different than those in China. The ADC dismissed these arguments simply by noting that significant government influence was present in the Chinese steel industry, and that in the original investigation the surrogate price was deemed the only reasonable one primarily due to the absence of any influence from the Chinese steel markets.[347]

7.185. In our view, the ADC did not, in the expiry review, reasonably demonstrate that the selected surrogate costs, even with adjustments to delivery and slitting costs, reflected a "cost of production in the country of export" within the meaning of Article 2.2 of the Anti-Dumping Agreement. Simply stated, the ADC never explained why 304 SS CRC costs on two different continents (i.e. North America and Europe) represent a cost of production *in China* rather than a cost of 304 SS CRC in Europe and North America. Again, the ADC selected the surrogate costs largely because they were free from influence of Chinese steel market conditions. Thus, the surrogate costs were selected because they are *not "distorted" Chinese* costs. But we discern no logical basis on which to conclude that this *ipso facto* makes them (presumably undistorted) *Chinese* costs, and the ADC never offered a reasoned explanation as to why this would be the case.

7.186. On this basis, we find that the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the surrogate costs, with only adjustments for delivery and slitting costs, represented a cost of production in China for the relevant exporters. As a result, and because it used surrogate costs that were not demonstrated to be costs of production in the country of origin in conducting the ordinary-course-of-trade test, the ADC violated Article 2.2.1.[348]

7.4.5 AD claim 6.a under Article 2.4 of the Anti-Dumping Agreement: due allowance to ensure a fair comparison

7.187. The applicable legal framework for this claim has already been set forth in section 7.3.4.1 above.

[345] Continuation 517 final report (Exhibit CHN-36), p. 53.

[346] Continuation 517 final report (Exhibit CHN-36), p. 54. One party before the ADC also argued that adjustments should be made to "reflect the same export terms as those received by the manufacturers in China". In response, the ADC indicated that "this has been addressed in its replacement methodology". (Continuation 517 final report (Exhibit CHN-36), p. 55). In the original investigation, the ADC also noted that a slightly different thickness of steel was used in North America, although the ADC considered that this did not inflate the surrogate price because thicker steel was usually cheaper in this context. (Investigation 238 final report (Exhibit CHN-2), p. 216). The ADC also dismissed one argument from Jiabaolu that "the percentage difference between the 304 SS CRC benchmark and the price of that input incurred by exporters should be applied to the revenue generated by exporters in selling scrap stainless steel". (Investigation 238 final report (Exhibit CHN-2), p. 137).

[347] Continuation 517 final report (Exhibit CHN-36), p. 54.

[348] China also claims violations of Articles 2.1 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994. (China's first written submission, sections E.1 and E.2). We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

7.4.5.1 Main party arguments

7.188. China argues that the ADC's cost replacement methodology to determine normal values[349] generated relevant disparities between the normal value and the export price.[350] China argues that such disparities represent differences affecting price comparability under Article 2.4.[351] China submits that absent any due allowances by the ADC to account for these disparities[352], the comparison between the normal value and the export price in each of the investigation was not a "fair comparison" under Article 2.4.[353] China, however, asserts that if the Panel were to find violations of Articles 2.2, 2.2.1, and 2.2.1.1 under AD claims 1-4, then there would be no need for the Panel to address this claim.[354]

7.189. China argues that the ADC's failure to adjust for the actual differences in the costs of production for domestic sales and export sales resulting from the use of non-Chinese surrogate costs stands in stark contrast to its decision to make adjustments to account for the difference in recoverability of value-added tax (VAT) in the same proceedings. For China, the approach taken by the ADC with respect to these two types of adjustments were neither unbiased nor even-handed.[355]

7.190. Australia argues that China's claim under Article 2.4 is "entirely, and impermissibly, premised on China's disagreement with Australia's construction of normal value, and not on any failure to make due allowances under Article 2.4".[356] Australia argues that there is no textual basis to challenge the ADC's normal value calculation under Article 2.4. Australia thus rejects China's position that Australia's cost substitution resulted in a difference between normal value and export price that required an adjustment under Article 2.4. In Australia's view, Article 2.4 is only concerned with making appropriate adjustments which are unrelated to the construction of normal value pursuant to Article 2.2, because Article 2.4 presupposes that the normal value and export price have already been established.[357] Australia agrees with China that the Panel need not proceed to an analysis under Article 2.4 if China succeeds on AD claims 1 and 3.[358] Australia also argues that China has lodged no "separate arguments … on the relationship between the application of the OCOT assessment and any failure to make due allowance to ensure a fair comparison".[359]

7.4.5.2 Expiry

7.191. China's claim concerns the stainless steel sinks original investigation, interim reviews and expiry review.[360] As discussed in section 7.2.2 above, we shall first consider whether or not the aspect challenged by China has expired. To do so, we shall consider whether there was a change of essence in the approach taken by the ADC with respect to the need for adjustments to account for any difference resulting from the ADC's use of the cost replacement methodology as between the investigation and expiry review, and do not examine the interim reviews.

7.192. In the investigation, the ADC constructed normal values by using costs of production incorporating surrogate costs.[361] However, in the expiry review, the ADC decided not to construct the normal values for selected exporters and used instead the data pertaining to the

[349] China notes that the ADC calculated normal values on the basis of a domestic price or constructed normal value under Article 2.2 using "a substituted and inflated cost or cost used for the production of subject products". (China's first written submission, para. 324).
[350] China's first written submission, paras. 326 and 336; opening statement at the first meeting of the Panel, paras. 89 and 90.
[351] China's first written submission, paras. 332-333 and 335.
[352] China's first written submission, paras. 327-331.
[353] China's first written submission, paras. 15(a), 322, 324, and 327.
[354] China's second written submission, paras. 279-280.
[355] China's first written submission, paras. 338-342. See section 7.4.6.1.1 below for China's arguments regarding VAT adjustments. China clarifies that this lack of evenhandedness is a factor for the Panel's consideration "as part of its standard of review of the investigating authority's decision in the context of Article 2.4". (China's response to Panel question No. 18, para. 63).
[356] Australia's first written submission, paras. 314, 318, and 413. See also ibid. paras. 532-535.
[357] Australia's first written submission, para. 328; second written submission, paras. 216, 218, and 221.
[358] Australia's response of Panel question No. 20, para. 40.
[359] Australia's response of Panel question No. 69, para. 29.
[360] China's responses to Panel question Nos. 37 and 69.
[361] China's first written submission, paras. 401 and 417-418; Investigation 238 final report (Exhibit CHN-2), pp. 43-44.

exporters' recorded sales.[362] Thus, the alleged need for an adjustment to account for differences generated by the use of surrogate costs in constructing normal value did not arise in the expiry review. We therefore consider that there was a change of essence as between the original investigation and the expiry review in this respect. Thus, the specific aspect of the order challenged by China, i.e. comparing export price and normal value constructed using surrogate costs without proper adjustment, has expired. We decline to issue findings with respect to this aspect of the order therefore, per the Panel's reasoning in section 7.6 below.

7.193. However, insofar as China's Article 2.4 claim is predicated on the normal value being flawed due to the use of surrogate costs in applying the ordinary-course-of-trade test, we consider that there is no change of essence in the ADC's methodology in this respect because the ADC used surrogate costs in performing the ordinary-course-of-trade test in both the original investigation and expiry review. We therefore will address China's claim insofar as it is based on the ADC's alleged failure to make adjustments under Article 2.4 stemming from the use of surrogate costs in performing the ordinary-course-of-trade test, and, as explained above, focus our attention on the expiry review.

7.4.5.3 Evaluation

7.194. Insofar as normal values calculated in the expiry review being allegedly flawed due to the use of surrogate costs in applying the ordinary-course-of-trade test, we have found in section 7.4.4 above that the ADC acted inconsistently with Articles 2.2 and 2.2.1 by using surrogate costs that did not represent the cost of production in China in determining whether sales made by the relevant exporter were made in the ordinary course of trade for purposes of assessing whether such sales were below-cost. We also recall that the parties agreed that there is no need for the Panel to review this claim separately if the Panel were to find a breach under Articles 2.2 and 2.2.1.1.[363] For these reasons, we consider it unnecessary to make findings on whether the ADC also acted inconsistently with Article 2.4 by failing to make adjustments to account for the differences generated through the alleged use of those improperly selected surrogate costs in applying the ordinary-course-of-trade test.

7.4.6 AD claim 6.b under Article 2.4 of the Anti-Dumping Agreement

7.195. China claims that, in the stainless steel sinks proceedings, the ADC breached Article 2.4 in three additional respects.[364] We will address these in turn.

7.196. The applicable legal framework for this claim has already been set forth in section 7.3.4.1 above.

7.4.6.1 AD claim 6.b.i: VAT adjustment

7.4.6.1.1 Main party arguments

7.197. China's claim regarding the VAT adjustment is two-fold. First, China argues that the ADC failed to provide a reasoned and adequate explanation that differences in VAT recoverability affected price comparability.[365] Second, China argues that the upward VAT adjustment both misrepresented and overstated the actual "extra costs" associated with the difference in VAT recoverability.[366]

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[362] Continuation 517 final report (Exhibit CHN-36), pp. 61, 65, 68, 71 and 73. See also Australia's response to Panel question No. 69, para. 31; China's response to Panel question No. 69, p. 107.

[363] Australia's response of Panel question No. 20, para. 40; China's response to Panel question No. 20, para. 77; opening statement at the first meeting of the Panel, para. 97; and second written submission, para. 279.

[364] China raises five points to support its AD claim 6.b in its panel request and in paragraph 15(b) of its first written submission. However, in light of the fact that the first and second points concern the same subject matter, i.e. upward adjustment to account for VAT recoverability; and the third and fourth points concern the accessories adjustments, we address this claim in three sections. We note that in its first written submission Australia also organized its rebuttal in three categories.

[365] China's first written submission, paras. 350(a) and 353. See also China's opening statement at the first meeting of the Panel, para. 100; response to Panel question No. 27, para. 97(b); and second written submission, para. 281.

[366] China's first written submission, para. 356.

7.198. Regarding the ADC's conclusion that differences in VAT recoverability affected price comparability, China argues that there was no reference in the investigation report to any record evidence showing that the VAT difference had an effect on price comparability.[367] China argues that the ADC's statement that the difference "*should have* an associated effect on export price" shows that its finding was based on "guesswork"[368], and "an unsupported and incorrect presumption".[369] In China's view, in order to make an adjustment under Article 2.4, the ADC should, as a first step, identify and quantify the "actual VAT costs that the exporter would have incurred due to the lower VAT refund"[370]; then, the ADC should have sought information from the exporter as to how or whether the actual unrecovered VAT amount impacted the exporter's export pricing decision, and how that differed from the exporter's domestic pricing decision.[371]

7.199. Regarding the method used by the ADC to calculate the amount of the adjustment, China argues that the ADC both misrepresented and overstated the actual "extra costs" associated with the actual VAT recoverability difference.[372] First, China argues that the ADC's methodology of applying the difference to normal values was incapable of representing the "*non-refundable value-added tax (VAT) expense*" associated with the export sales or its impact on price comparability.[373] In China's view, to make due allowance "*on its merits*" under Article 2.4, the due allowance should have been made in a way to appropriately capture the differences in the "*actual liability incurred by the company*"[374], i.e. based on "the extent of the additional tax liability expense".[375] Second, China contends that, by applying an 8% VAT adjustment to an inflated normal value constructed using surrogate costs which were higher than the exporters' actual costs, or to a sales-based normal value which went through an ordinary-course-of-trade test containing surrogate costs, the ADC's method inflated the actual difference in VAT costs/liability associated with the Chinese exporter's export and domestic sales business.[376]

7.200. Australia argues that the ADC adopted an upward adjustment to normal values because the evidence provided by the exporters such as Zhuhai Grand showed that there was an eight percentage point difference between the VAT recoverability for export and domestic sales, which would have affected pricing.[377] Australia contends that the ADC set out its reasoning on this issue in the investigation report, which makes specific relevant reference to Zhuhai Grand's submissions and the ADC's verification findings.[378] Furthermore, Australia argues that the ADC correctly applied the 8% upward adjustment to the constructed normal value even though the constructed normal value used surrogate costs, because to do otherwise would have reintroduced the distortions that the ADC had previously excluded in constructing normal value.[379]

7.4.6.1.2 Expiry

7.201. China's claim concerns the stainless steel sinks original investigation, interim reviews and expiry review.[380] As discussed in section 7.2.2 above, we shall first consider whether or not the aspect challenged by China has expired. To do so, we shall consider whether there was a change of

[367] China's first written submission, paras. 350(a) and 353. See also China's opening statement at the first meeting of the Panel, para. 100; response to Panel question No. 27, para. 97(b); and second written submission, para. 281.
[368] China's first written submission, para. 353.
[369] China's second written submission, para. 281. See also China's response to Panel question No. 81, paras. 121-122.
[370] China's response to Panel question No. 81, para. 118.
[371] China's response to Panel question No. 81, para. 119.
[372] China's first written submission, para. 356.
[373] China's first written submission, para. 355. (emphasis original) See also China's response to Panel question No. 83, para. 128.
[374] China's first written submission, para. 354 (referring to Investigation 238 final report (Exhibit CHN-2), p. 149). See also China's first written submission, para. 340; second written submission, para. 281; responses to Panel question No. 27, para. 97, and No. 81, para. 118. In response to the Panel's question, China argues that the logically correct calculation would be to calculate such amount on the export price, being the activity that generated the difference in the recoverable vs non-recoverable VAT and the subject of the difference being adjusted. (China's response to Panel question No. 27, para. 97).
[375] China's first written submission, para. 354.
[376] China's first written submission, paras. 338, 340, 341, 350, and 355-356.
[377] Australia's first written submission, para. 428.
[378] Australia's first written submission, para. 430.
[379] Australia's first written submission, para. 434; second written submission, paras. 276-278.
[380] China's responses to Panel question Nos. 37 and 69.

essence in the approach taken by the ADC with respect to the need for adjustments to account for any VAT recoverability difference and the ADC's calculation methodology to account for such difference as between the investigation and expiry review, and do not examine the interim reviews.

7.202. In the stainless steel sinks investigation, the comparison between normal value and export price was carried out on "VAT-free basis". That is to say, the normal value and the export price are both net of any VAT when they are compared. Nevertheless, the ADC considered there to be an "expense" or "extra cost" of unrecovered VAT expenses associated with export sales, but not with domestic sales.[381] The ADC accounted for this perceived difference in taxation as between domestic and export sales[382] by applying an upward adjustment of 8% to the unadjusted normal values.[383] In the investigation report, the ADC states that:

> Zhuhai Grand submitted that there should be no adjustment to normal values to account for differences in VAT between export prices and normal values in any case, as both the export price and the cost-based normal value (i.e. those calculated under s. 269TAC(2)(c)) are VAT-free.
>
> The Commissioner does not agree with Zhuhai Grand's submission that an adjustment for differences in VAT liability between the export and domestic market is not warranted in general, simply because the constructed normal value and export prices being used for dumping margin comparison are VAT free.
>
> The purpose of the adjustment is that, when making the export sale, the company is aware of the fact that it is unable to recover the full amount of VAT paid on its inputs, and that this should have an associated effect on export price whereby the export price would be raised to accommodate this extra cost. Consequently, it is logical to upwards adjust the normal value for this 8% difference in taxation, as provided for by s. 269TAC(9) of the Act.[384]

7.203. In the expiry review, the ADC also made adjustments for "non-refundable VAT expenses" by "[a]dd[ing] an amount for non-refundable VAT expenses incurred on exports of the goods to Australia".[385] Although this reference is somewhat summary in nature, we consider that it indicates that the ADC implicitly carried forward its reasoning in the original investigation into the expiry review in order to make what appears to be (and neither party disputes) the same adjustment to normal value for VAT in the expiry review.[386]

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[381] Australia's first written submission, paras. 427-428; China's first written submission, para. 347; and Investigation 238 Primy verification visit report (Exhibit CHN-43), section 8.4. See also Investigation 238 Zhuhai Grand verification visit report (Exhibit CHN-35), p. 19; Investigation 238 Zhuhai Grand's questionnaire response (Exhibit AUS-14), p. 35 (where Zhuhai Grand states "[t]he export of the subject goods during the [period of investigation] was subject to refund of VAT of 9%. The export VAT refund is calculated based on the [f.o.b.] export price"); Investigation 238 Primy's questionnaire response (Exhibit AUS-15), p. 38 (where Primy said "on the exportation of the subject goods during the [period of investigation] Primy was entitled to [a] refund of VAT of 9%"); Investigation 238 Komodo Hong Kong Limited's questionnaire response (Exhibit AUS-13), p. 15 (where Komodo Hong Kong Limited said "[d]uring the investigation period, the VAT refund rate for sink, drainer, tray and clips is 9%; for waste kit is 15%; for cutting board is 13%. Therefore, Komodo GZ incurs non-refundable VAT cost (2%-8%) for those Australia sales, as compared with the domestic sales VAT exclusive price").

[382] Investigation 238 Primy verification visit report (Exhibit CHN-43), section 8.4; Investigation 238 final report (Exhibit CHN-2), pp. 149-150.

[383] During the original investigation, the ADC used constructed normal values for some models and normal values based on domestic sales that passed the ordinary-course-of-trade test, for other models. During the expiry review, the ADC did not construct normal values and used sales-based normal values instead. China uses the term "unadjusted" in its first written submission, as we understand it, to refer to the normal values calculated before the relevant adjustment under consideration have been made, i.e. in this case the VAT adjustment.

[384] Investigation 238 final report (Exhibit CHN-2), p. 150.

[385] Continuation 517 final report (Exhibit CHN-36), pp. 62, 66, 69, 71, and 74.

[386] According to Australia, the ADC identified and applied different *rates* of VAT liability for the expiry review period from 1 July 2018 to 30 June 2019. (Australia's response to Panel question No. 69, para. 30). See also China's comments on Australia's response to Panel question No. 69, para. 23 (arguing that this difference does not affect the expiry analysis). We discern no other differences in the approach by the ADC to this issue in the expiry review, and the parties direct us to none. The fact that the VAT refund rate may have varied as between the original investigation and the expiry review does not change our conclusion.

7.204. Accordingly, we consider that there was no essence change as between the two segments that is relevant to this claim, and that this aspect of the order is not expired. We will thus proceed to make findings with respect to it and, we focus our attention on the expiry review.

7.4.6.1.3 Evaluation

7.205. We will address China's claim regarding the VAT adjustment by examining its two principal aspects in turn. As discussed in the section immediately above, we will focus our analysis on the expiry review.

7.4.6.1.3.1 Whether the ADC failed to provide a reasoned and adequate explanation that the differences in VAT recoverability affected price comparability

7.206. The first aspect of China's claim focuses on its assertion that there was no reference in the investigation report to any record evidence indicating that the VAT difference had any effect on price comparability. China argues that Australia was not able to identify any such evidence when asked by the Panel.[387] China further argues that the ADC's statement that the difference "*should have* an associated effect on export price" shows that its finding was based on "guesswork"[388] and "an unsupported and incorrect presumption".[389]

7.207. We start with the question of whether the ADC identified and substantiated a *difference* in VAT recoverability as between the export price and the normal value. We note that, while we focus our analysis on the expiry review, as noted in paragraph 7.203 above, we will refer to the ADC's reasoning in the investigation report, because we consider that the ADC implicitly carried forward its reasoning with respect to the VAT adjustments in the original investigation into the expiry review. We note at first that during the expiry review the ADC identified a difference related to "non-refundable VAT expenses".[390] In the original investigation, the ADC identified a difference in the unrecovered "amount of VAT paid on its inputs", which "should have an associated effect on export price whereby the export price would be raised to accommodate this extra cost".[391] Australia referred to the difference as "costs applicable to exports (non-refundable VAT liability), that [*sic*] were not applicable to domestic sales".[392]

7.208. It is clear and undisputed that that unrecovered input VAT occurs only when an export sale is made. There is, therefore, a clear connection between unrecovered VAT and export sales. Accordingly, we consider that the ADC properly identified a difference in VAT recoverability as between the domestic sales and the export sales, i.e. the input VAT for the domestic sales which is fully recovered and the input VAT for the export sales which is only partially recovered.[393] In quantitative terms, the difference is between the VAT on the input for the production of an export sale and the VAT refund, i.e. 9% of the free on board (f.o.b.) export price. We note that evidence on the record indicates that, with respect to some exporters at least, the VAT refund resulted in unrecovered input VAT.[394] China has also presented no evidence showing that the input VAT incurred in the production of an export sale equals or is less than the VAT refund realized. We thus consider that the ADC did not act inconsistently with the practice of an unbiased and objective investigating authority in concluding that the VAT refund of 9% for export sales is *likely* to result in a difference in VAT recoverability for domestic and export sales.

7.209. We next consider the question of whether the ADC acted reasonably in determining that the identified difference affected price comparability. Differences in taxation feature among the examples of factors that may affect the price comparability in Article 2.4. In the investigation, the ADC explained that, when making an export sale, exporting producers were aware of the fact that

[387] China's second written submission, para. 282 (referring to Australia's response to Panel question No. 27, para. 78).
[388] China's first written submission, para. 353.
[389] China's second written submission, para. 281.
[390] Continuation 517 final report (Exhibit CHN-36), pp. 62, 66, 69, 71, and 74.
[391] Investigation 238 final report (Exhibit CHN-2), p. 150.
[392] Australia's response to Panel question No. 83, para. 149.
[393] We note that the ADC did not construct normal values during the expiry review. Thus, the difference identified by the ADC pertains to the actual difference in the domestic and export markets.
[394] Komodo Hong Kong Limited and Primy provided responses to the questionnaire that referred to partial VAT refunds for exported goods. (Investigation 238 Primy's questionnaire response (Exhibit AUS-15), p. 38; Investigation 238 Komodo Hong Kong Limited's questionnaire response (Exhibit AUS-13), p. 15).

they are unable to recover the full amount of VAT paid on inputs, and would raise the export price accordingly to accommodate this extra cost. Thus, the ADC provided an explanation concerning the way in which the identified differences are likely to affect the comparability of normal value and export price.

7.210. We acknowledge China's argument that the ADC did not demonstrate that the difference in VAT recoverability *actually affected* price comparability. In our view, though, it was sufficient for the ADC to establish that exporting producers knew about the differences in VAT recoverability for their export sales and domestic sales, bearing in mind record evidence to this effect.[395] We do not consider that the mere use of the words by the ADC that "should have an associated effect on export price" shows that this conclusion was based on guesswork or unsupported presumption. Rather, it shows that the ADC considered that the evidence available on the record, although not an irrefutable proof, supported a finding that there is a likely possibility that the VAT difference has an associated effect on export price (i.e. resulting in the exporters raising export price) which is not present on domestic sales price. [396] We further note that China has pointed to nothing on the record indicating that the exporters would have addressed the cost of unrecovered VAT on export sales in some other manner.

7.211. For this reason, we do not consider the ADC's consideration of the matter to be inconsistent with Article 2.4.

7.4.6.1.3.2 The methodology applied by the ADC to calculate the VAT adjustment

7.212. The second aspect of China's claim under Article 2.4 on VAT recoverability concerns the methodology applied by the ADC to calculate the adjustment. We begin by setting out our understanding of the factual background concerning the VAT adjustment in the proceedings at issue. We recall that, while we focus our analysis on the expiry review, as noted in paragraph 7.203 above, we will refer to the ADC's reasoning in the investigation report, because we consider that the ADC implicitly carried forward its reasoning with respect to the VAT adjustments in the original investigation into the expiry review.

7.213. The Chinese VAT rate for the product concerned during the period of investigation was 17%. When the goods were produced and sold in China, any VAT on input costs was fully recovered, being offset against the output VAT charged on sales on the domestic market. When the goods were exported, however, the exporters were not able to recover the VAT charged on relevant inputs by offsetting against the output VAT (because the export sales were subject to zero per cent VAT).[397] Instead, and for stainless steel sinks, specifically, exporters were entitled to a VAT refund from the Chinese tax authorities at a rate of 9% of the f.o.b. export price during the original investigation.[398] Australia has indicated that the VAT refund rate during the expiry review was different.[399]

7.214. The ADC treated the unrecovered amount of VAT in case of exportation as a "8% difference in taxation", and considered that "it is logical to upwards adjust the normal value for this 8% difference in taxation, as provided for by s. 269TAC(9) of the Act".[400] Australia has referred to the difference during these proceedings as "the non-refundable VAT liability for export sales" which was "a percentage of the export selling price".[401] In the investigation, the ADC used the following formula

[395] See fns 381-382 above.

[396] We recall that the Appellate Body has stated that differences affecting price comparability include any "differences in characteristics of the compared transactions that have an impact*, or are likely to have an impact,* on the prices of the transactions". (Appellate Body Report*, EU – Fatty Alcohols (Indonesia)*, para. 5.22 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157)) (emphasis added). Both parties referred to this statement of the Appellate Body. (China's first written submission, para. 332; Australia's second written submission, para. 273). We recall that our task is to determine whether the ADC's approach was unbiased and objective.

[397] China's response to Panel question No. 81, para. 118, where China states that "the liability arises from inability to offset input VAT, not from the exporting activity itself, which is VAT free".

[398] Australia's response to Panel question No. 69, para. 30.

[399] Australia's response to Panel question No. 69, para. 30. China has not contested Australia's assertion.

[400] Investigation 238 final report (Exhibit CHN-2), p. 150.

[401] Australia's second written submission, para. 277. China disagrees with Australia's description of what the ADC did. (China's response to Panel question No. 83, para. 126).

to work out the adjustment: "[f.o.b.] normal value X 8% (the amount of VAT that is non-refundable)".[402]

7.215. The ADC also made the following observations:

> In its submission in response to the Verification Visit Report, Zhuhai Grand submitted that the Commission's methodology applied in the company's Verification Visit Report to calculate the upwards adjustment to normal values to account for differences in VAT between the domestic and export markets was mathematically erroneous. Specifically, Zhuhai Grand submitted that:
>
> - the VAT adjustment should be calculated on the 'actual [f.o.b.] value', meaning the actual [f.o.b.] export prices achieved by Zhuhai Grand in the investigation period, rather than the constructed [f.o.b.] normal value with profit included (as this would have been the actual liability incurred by the company); and
>
> - the formula applied by the Commission is incorrect.
>
> In [the statement of essential facts], the Commission made no changes to the approach taken in the company's Verification Visit Report in relation to the above.
>
> In its response to [the statement of essential facts], Zhuhai Grand again submitted the above points.
>
> …
>
> [T]he Commissioner does not agree with Zhuhai Grand's submission that the VAT adjustment should be calculated on actual (achieved) [f.o.b.] export prices. In constructing Zhuhai Grand's normal value, it is the Commission's intention to derive a normal value for the goods if they had been sold domestically, and to undertake appropriate adjustments to that normal value to account for differences between export and domestic sales of those goods if sold at that normal value. It is therefore logical that any adjustment applied to normal value for differences in VAT across markets be applied to the full constructed normal value, determining the rate of the adjustment had the goods been exported at that normal value.[403]

7.216. China's arguments regarding the ADC's VAT adjustment formula have evolved during the Panel proceedings. We understand China's principal argument to be that "the due allowance should have been made based on the extent of the additional tax liability expense".[404] More specifically, China argues that the VAT adjustment was calculated using the uplifted normal value base, which is: (a) different to, and higher than, the actual cost incurred; and (b) different to, and higher than, a normal value reflecting actual costs in the financial record kept by the Chinese exporter.[405] Thus, in China's view, the ADC's calculation method inflated the alleged price effect of the cost difference between export and domestic sales. China additionally argues that, instead of applying the 8% to the normal value, the ADC should have applied the 8% to the export price, exportation "being the activity that generated the difference in the recoverable vs non-recoverable VAT and the subject of the difference being adjusted"[406]. Towards the latter part of the proceedings, China argued that, to compute the adjustment, the ADC needed to "identify the actual VAT costs that the exporter would have incurred due to the lower VAT refund".[407] Regarding China's claim that the VAT adjustment inflated the difference in VAT recoverability, we note that this claim is premised on the ADC's use of surrogate costs in the calculation of the constructed normal value and the use of the surrogate costs in applying the ordinary-course-of-trade test.[408] China is concerned that a percentage was applied

[402] Investigation 238 final report (Exhibit CHN-2), p. 150.
[403] Investigation 238 final report (Exhibit CHN-2), pp. 149-150. (fns omitted)
[404] China's first written submission, para. 354. See also China's first written submission, para. 350(b).
[405] China's response to Panel question No. 17, para. 62.
[406] China's response to Panel question No. 27, para. 97.
[407] China's response to Panel question No. 81, para. 118.
[408] See China's response to Panel question No. 83, para. 127. See also Continuation 517 final report (Exhibit CHN-36), pp. 61, 65, 67, 70 and 73, where the ADC stated that, for each selected exporting

to an inflated normal value base. As discussed in section 7.4.2.3 above, the ADC did not construct normal value in the expiry review. Insofar as China's claim is predicated on the normal value being flawed due to the use of surrogate costs in applying the ordinary-course-of-trade test, we have found that the ADC acted inconsistently with Article 2.2.1 by using surrogate costs that did not represent the cost of production in China. In particular, we consider that the use of these higher surrogate costs in applying the ordinary-course-of-trade test would logically lead to the exclusion of lower-priced sales from the normal value calculation and consequently a higher normal value. We note that Australia does not argue otherwise.

7.217. Consequently, we uphold China's claim that the ADC acted inconsistently with Article 2.4 by applying a percentage to the flawed normal value base through the use of surrogate costs in applying the ordinary-course-of-trade test.

7.218. Given this finding, we consider it unnecessary to further consider China's other arguments, i.e. whether the ADC should have applied a percentage to the export price, instead of the normal value, or whether the ADC should have calculated the actual VAT costs that the exporter would have incurred due to the lower VAT refund.

7.4.6.2 AD claim 6.b.ii: differences relating to accessories

7.219. We note that this claim pertains to the ADC's findings in the expiry review only, and thus no expiry issues arise with respect to this claim.[409]

7.220. The applicable legal framework for this claim has already been set forth in section 7.3.4.1 above.

7.4.6.2.1 Main party arguments

7.221. China claims that the ADC improperly calculated the amount of due allowance for accessories differently depending on whether the accessory concerned had been produced by the exporter or was purchased from a third-party supplier[410], even though the exporting producer Primy "did not differentiate product costing" on that basis.[411] China asserts that, in cases where accessories were produced by the exporters themselves, a profit margin was added in the adjustment, the profit margin being the profit realized by the exporter "on domestic sales of the like goods in OCOT".[412] However, in cases where the exporters purchased accessories from a third party, no such ordinary-course-of-trade profit margin was added in the adjustment.[413] China argues that the ADC did not provide any explanation as to why it has treated accessory costs differently depending on whether the accessory concerned had been produced by Primy, or was purchased by Primy from a third-party supplier.[414] China notes Australia's argument that the accessories sourced from third-party suppliers already incorporate a profit, and thus no profit should be added. China rejects this argument because it essentially means that the ADC assumed Primy (a) sold sinks incorporating purchased accessories with no profit on those accessories; and (b) sold sinks incorporating self-produced accessories with the same level of profit on those accessories as on the overall sink. China considers this a nonsensical opinion as to Primy's business practice not supported by evidence or explained by the ADC.[415] China also argues that the ADC's methodology increased the dumping margin.[416]

7.222. Furthermore, China argues that although the ADC had on record the actual costs of accessories for each product code[417], it failed to calculate a due allowance based on the actual

producers, the ADC has re-examined the volume of sales in ordinary course of trade using a revised CTMS after replacing each exporter's reported stainless steel production costs with a suitable competitive market substitute.

[409] China's responses to Panel question Nos. 37 and 69.
[410] China's first written submission, para. 365; second written submission, para. 289.
[411] China's first written submission, para. 372; second written submission, para. 290.
[412] Continuation 517 final report (Exhibit CHN-36), p. 59.
[413] China's first written submission, paras. 15(b) and 362.
[414] China's first written submission, para. 372.
[415] China's response to Panel question No. 23, para. 94; second written submission, para. 290.
[416] China's opening statement at the first meeting of the Panel, para. 109.
[417] China's first written submission, para. 373; second written submission, para. 298.

accessory cost differences.[418] China asserts that the ADC instead averaged certain accessory costs across a number of different product codes under a model control code (MCC) to calculate the due allowance.[419] According to China, this led to a distorted outcome, because the actual "unit accessories costs for each product code within one MCC are vastly different".[420] China contends that the averaging approach misrepresented the accessory cost difference in all cases, by decreasing the accessory cost difference in the case of the model with the most expensive accessory costs, and by increasing the accessory cost differences the case of all other models with less expensive accessory costs.[421] China argues that the ADC failed to provide any defence of the distortive effects of this averaging in its expiry review report.[422] China thus contends that the ADC's averaging methodology lacks objectivity and is inconsistent with Article 2.4.[423]

7.223. Regarding the inclusion of a profit margin in the costs of accessories, Australia agrees with China's explanations regarding how the ADC added a profit margin to certain costs of accessories produced by exporters, whereas such a profit margin was not added to the costs of the exporter's purchased accessories. Australia contends, however, that a reasoned and adequate explanation for such differential treatment was provided in the ADC's expiry review report and the ADRP's administrative review report.[424] Australia asserts that the differential treatment was due to the fact that the purchase price for accessories purchased from third-party suppliers was considered to reflect its full market value inclusive of a profit, to which no profit was added; whereas a profit was added to the internally produced accessories.[425]

7.224. Regarding the averaging of the costs of accessories across different models, Australia explains that the ADC made deductions at the MCC level because the range of design variations relating to the stainless steel sinks was very broad. Australia explains that the MCC structure was based on three product specifications, and that the ADC determined that the range of accessories sold domestically was considerably larger than the range of accessories sold with sinks exported to Australia.[426] Australia asserts that, when making adjustments to account for differences in accessories included in different models, the ADC used accessory costs for models within each MCC, i.e. the ADC calculated an average cost for accessories across the range of models within each MCC.[427] Thus, to ensure a fair comparison, Australia explains that the ADC first deducted average accessory costs from normal value at the MCC level, and then adjusted normal value upwards by the costs of accessories relating to the exported product to Australia, at the accessories level, as opposed to the MCC level.[428] Australia argues that, even though the methodologies applied for the downwards and upwards adjustments for accessories were not identical, the ADC adopted an

[418] China's first written submission, para. 363.
[419] China's second written submission, paras. 294 and 298.
[420] China's first written submission, para. 363; second written submission, para. 294.
[421] China's first written submission, para. 366. See also China's opening statement at the first meeting of the Panel, paras. 110-111; second written submission, para. 294.
[422] China's second written submission, para. 295.
[423] China's first written submission, para. 374.
[424] Australia's first written submission, paras. 441-442.
[425] Australia's first written submission, para. 440 (referring to Continuation 517 final report (Exhibit CHN-36), p. 59); second written submission, para. 284.
[426] Australia's first written submission, para. 445. The MCC structure contains three broad categories by reference to (a) the number of bowls; (b) the number of drainer boards; and (c) the total capacity of the sink. Under each of the broad categories, there are three or four specific subcategories, namely, 1 bowl, 1 bowl (round), 2 bowls, and 2 bowls (round) for the first category, no drainer boards, 1 drainer board, and 2 drainer boards for the second category, and capacity of 7 to 30 L, 30 to 50 L, and 50 to 70 L for the third category. During the expiry review, interested parties claimed, and the ADC acknowledged that:

> [O]utside of the three MCC categories, the range of design variations relating to the sinks the subject of this inquiry is very broad and the MCC structure relied on in [the statement of essential facts] may not capture the production cost and price variations brought about by market specific product differences between the goods exported to Australia and like goods sold in China.

(Continuation 517 final report (Exhibit CHN-36), p. 19)

However, the ADC decided not to expand the MCC categories but would capture the differences by making adjustment to the normal value. (See Australia's first written submission, paras. 445-449 (referring to Continuation 517 final report (Exhibit CHN-36), p. 19)).
[427] Australia's first written submission, para. 450.
[428] Australia's first written submission, paras. 450-452. In response to a question from the Panel, Australia clarified that when making the upward adjustments, the ADC used the costs of export accessories at accessories level as opposed to the MCC level. (Australia's response to Panel question No. 25, paras. 61-68).

"evidence based approach".[429] Australia argues that Article 2.4 does not prescribe how adjustments are to be calculated, and that the ADC made adjustments that were appropriate in light of the evidence before it.[430] Australia further asserts that its adjustments reduced the normal value ascertained and therefore Primy's dumping margin.[431]

7.4.6.2.2 Evaluation

7.225. Before proceeding to discuss this claim in substance, we recall the basic factual background. In the expiry review, the ADC considered that it had to make a fair comparison between stainless steel sinks sold domestically and those exported to Australia. The ADC noted that accessories sold with sinks were not only diverse, generally, but also varied widely as between domestically sold sinks and exports to Australia.[432] To control for these differences, the ADC removed accessories costs from domestically sold sinks and then added back costs of accessories sold for export to Australia. In that fashion, the ADC essentially ended up with domestic sales and exports with the same accessory costs (i.e. export accessory costs).[433] In order to do that exercise, however, the ADC needed to determine the costs of domestic and export accessories. The two aspects of this claim relate to the ADC's determinations regarding how to calculate such costs.

7.226. That general background being established, we note that this claim contains two aspects: (a) the ADC's differential treatment of levels of profit *vis-a-vis* accessories purchased from third-party suppliers versus those made internally when making adjustments under Article 2.4; and (b) the ADC's use of average accessories' cost in making adjustments under Article 2.4. We address each in turn.

7.4.6.2.2.1 Treating accessories purchased from third-party suppliers differently from accessories produced internally by the exporting producer

7.227. We begin with China's claim that the ADC calculated the amount of the due allowance differently depending on whether the accessory concerned had been produced by the exporter or was purchased from a third-party supplier without a reasoned and adequate explanation.[434] Australia argues that a reasoned and adequate explanation for such differential treatment was provided in the ADC's expiry review report and the ADRP's administrative review report.[435]

7.228. In the expiry review report, the ADC stated:

> To account for differences in prices that are driven by the market specific product differences between equivalent domestic and Australian MCCs and to achieve a proper comparison between the price of like goods and exported goods, the Commission considers that an adjustment under section 269TAC(8) is warranted. The value of the adjustment has been worked out by calculating the difference in the weighted average unit cost of production (excluding accessory costs) between the two markets for each relevant MCC and then adding to this result each exporter's profit margin (as a percentage of cost) realised on domestic sales of like goods in OCOT.
>
> The Commission notes that the treatment outlined above relates to differences arising from each exporters own production activities. Where a specification adjustment occurs due to features that relate to items which are sold with sinks, but are however sourced from third party suppliers, such as accessories, the adjustments do not recognise OCOT profit margin.[436]

7.229. We note first that to calculate the adjustment the ADC added a profit margin to the costs of accessories produced by the exporter itself, but not to the costs of accessories when they were

[429] Australia's response to Panel question No. 25, para. 69.
[430] Australia's first written submission, para. 454.
[431] Australia's second written submission, para. 289. See also Australia's response to Panel question No. 25, para. 71.
[432] Continuation 517 final report (Exhibit CHN-36), p. 20.
[433] Australia's response to Panel question No. 25, para. 52.
[434] China's first written submission, para. 372.
[435] Australia's first written submission, paras. 440-443.
[436] Continuation 517 final report (Exhibit CHN-36), p. 59.

purchased from third-party suppliers. Given that Primy sold the sinks and accessories to the customers in a single package[437], we consider that the ADC's differential treatment of self-producer accessories and purchased accessories is untenable (in the sense that it is inconsistent with the practice of an unbiased and objective investigating authority) absent some justification. While the above statement sets out the ADC's *decision* not to add a profit margin to accessories costs when they were sourced from third-party suppliers, it does not explain why the ADC has treated accessories sourced from third-party suppliers differently. Australia points us to no other contents of the expiry review findings by the ADC that contain any additional explanations as to the reasoning behind the ADC's differential treatment, and we discern none. Australia's argument that the ADC applied differential treatment because the price for accessories purchased from third-party suppliers was considered to reflect its full market value inclusive of a profit, to which no profit needed to be added, therefore amounts to an *ex post facto* explanation. We therefore do not consider it here.

7.230. Moreover, we do not consider that a relevant explanation was provided for the ADC's differential treatment in the ADRP's administrative review report. This is a report published on 8 July 2020[438], produced in the context of the subsequent *administrative review*. This report thus postdates the expiry review. Accordingly, any explanations by the ADC referred to in this report also amount to an *ex post facto* explanation, and we similarly decline to consider them in this context.

7.231. Consequently, we conclude that the ADC failed to provide a reasoned and adequate explanation concerning the differential treatment of accessories produced by the exporter itself and accessories sourced from third-party suppliers in its calculation of due allowance.[439]

7.232. In light of the above, we find that the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.4 of the Anti-Dumping Agreement by treating accessories purchased by Primy from third-party suppliers differently from accessories produced by Primy without an adequate and reasonable explanation.

7.4.6.2.2.2 Failure to use actual accessory costs to calculate adjustment

7.233. We now turn to China's claim that the ADC failed to make a due allowance based on *actual* accessory cost differences by averaging domestic accessory costs.[440] We recall that, when making adjustments to account for differences in domestic and export accessories included in different models of sinks, the ADC adopted a two-step methodology. As the first step, the ADC calculated an average domestic accessories cost from each domestic sales transaction across all the different product codes under a particular MCC on a quarterly basis. For convenience, we will call this "MCC-level average domestic accessories costs". The ADC deducted this MCC-level average domestic accessories costs from the normal value to arrive at a normal value net of domestic accessories costs. Australia calls this step the "downwards adjustment", and we adopt that term here as well.[441]

7.234. As the second step, the ADC calculated an average export accessories cost, not at an MCC level, but at an "accessories level". By accessories level, we understand Australia to mean that the ADC used the average costs of *the same type of accessories* (such as basket waste, sealing tape, clips or bypass kit) provided by the exporter Primy as the costs for *a particular type* of accessories, rather than to calculate this average at product code level or at MCC level. The ADC then used the average accessories costs to arrive at the costs for the different accessories packs (i.e. a combination

[437] Continuation 517 Primy's response to statement of essential facts (Exhibit CHN-46 (BCI)), p. 16.
[438] ADRP Review 2020/124 report (Exhibit CHN-47).
[439] In any event, we are not persuaded by Australia's argument during these proceedings that the price paid by Primy for accessories purchased from third-party suppliers reflects its full market value inclusive of a profit, to which no profit needs to be added. The "profit" referred to by Australia in this context is the profit generated by the third-party supplier, rather than the profit generated by Primy when the accessories were resold to Primy's customers as part of the sinks. (Australia's response to Panel question No. 85, para. 154). Australia's proposition seems to be that a sinks producer like Primy did, and will always, pass on sinks accessories purchased from third-party suppliers to their customers at cost, i.e. with no markup. This proposition appears to be inconsistent with evidence on the record, which shows that Primy treated sinks and accessories "as one single product in the cost accounting, and the cost of production is calculated together as one single product". (Continuation 517 Primy's response to statement of essential facts (Exhibit CHN-46 (BCI)), p. 16).
[440] China's first written submission, para. 363.
[441] Australia's response to Panel question No. 25, para. 52.

of accessories) that were ultimately sold together with the sinks.[442] The ADC then added the accessories-pack-level export accessories costs to the downwards-adjusted value for each domestic sales transaction of various product codes within an MCC.[443] Australia calls this step the "upwards adjustment"[444], and we adopt that term here as well. Through these two steps, the ADC effectively replaced the domestic accessories costs in the normal value with the export accessories costs, and then compared this adjusted normal value with the export price.

7.235. China's claim pertains to both the first and second steps described above.[445] We note that in both of these two steps, the ADC used an averaging methodology to calculate the adjustments for differences in accessories. The way in which the ADC averaged the accessory costs in these two steps was different. Nevertheless, the thrust of China's claim with respect to both steps concerns the ADC's use of *averaged* accessory costs, rather than the *actual* accessory costs allegedly available to the ADC. We will therefore address the use of averaging in both steps together rather than making separate findings with respect to each step separately.

7.236. According to China, the accessory costs for different product codes under a given MCC were very different, and thus by averaging out these individual actual differences for each model under an MCC, the ADC not only failed to make a due allowance to account for the *actual* accessory cost differences that it has identified under Article 2.4, but also introduced a distortion in the resulting prices. Thus, China argues that "the ADC did not make a fair comparison, nor did it apply an appropriate due allowance to ensure a fair comparison".[446] Australia argues that Article 2.4 does not prescribe how adjustments are to be calculated. In Australia's view, the ADC did not act in an arbitrary manner in making adjustments that were appropriate in light of the evidence before it.[447] The issue before us therefore is whether it is consistent with the practice of an unbiased and objective investigating authority to use an average accessories cost across different models or for different accessories types for the purpose of calculating due allowance in the circumstances of the present case.

7.237. Article 2.4 prescribes no particular methodology by which investigating authorities must satisfy their obligation to ensure a fair comparison. The focus of Article 2.4 is on the means by which to ensure the *fairness* of the comparison between normal value and export price.[448] Whatever methodology an investigating authority employs to calculate a due allowance, that due allowance must be calculated on the merits of each individual case and must serve the purpose of accounting for the differences determined to affect price comparability. If the methodology does not serve to account for the differences determined to affect price comparability, it does not comport with the requirements of Article 2.4.

7.238. We thus first note China's argument that the ADC's averaging methodology failed to account for the actual differences determined to affect price comparability. In the present case, the ADC found that:

> [T]he kinds of accessories offered with sinks was also found to be a price determinant, particularly since the range of accessories sold with sinks on the domestic market in China were considerably larger than the range of accessories sold with sinks exported to Australia. As a result, the Commission has applied adjustments to normal value to account for differences in accessories.[449]

7.239. The differences thus identified by the ADC are actual differences between the ranges, and hence the costs of accessories for the domestic sales, on the one hand, and the costs of accessories for its comparable export sales in general, on the other hand. The ADC sought to address these differences by, first, deducting accessories costs from the normal value sales transactions in order to reach normal values without accessories costs (after which the ADC added back in *export*

[442] Australia's response to Panel question No. 25, paras. 61-63.
[443] Australia's first written submission, paras. 450-452. See also Australia's response to Panel question No. 25, paras. 62-63.
[444] Australia's response to Panel question No. 25, para. 52.
[445] China's response to Panel question No. 24, para. 95.
[446] China's response to Panel question No. 109, para. 238.
[447] Australia's first written submission, para. 450. See also Australia's response to Panel question No. 25, paras. 69-71.
[448] Panel Report, *Egypt – Steel Rebar*, para. 7.333.
[449] Continuation 517 final report (Exhibit CHN-36), p. 20.

accessories costs to the normal values). Thus, in a general sense, the ADC accounted for the differences between the domestic and export sales, i.e. different accessories costs. Of course, by *averaging* costs, the ADC's methodology did not account for the *individual and specific* differences as determined to affect price comparability with respect to each product code or each individual sales transaction. This result, however, is inherent to the process of averaging. The question thus becomes whether the averaging process prevented the resulting comparison between normal value and export price from being fair. The only aspect of China's arguments that addresses this issue is China's argument that the averaging methodology resulted in distortions in calculating due allowances.[450]

7.240. China notes that Primy identified this issue, specifically with respect to the downwards adjustment, in its submission to the ADC during the expiry review:

> The Commission deducted MCC average unit accessory cost from each sales transaction for various product codes within each MCC. Because the unit accessories costs for each product code within one MCC are vastly different, such deduction of MCC average unit accessories costs would distort the resulting calculated sinks price without accessories. Primy, again for the MCC with the largest IP sales to Australia, 1BWL0DBB, prepared Table 5 showing the production quantities within narrower ranges of accessories costs for product codes within MCC 1BWL0DBB. It can be seen that [a large percentage] of the production quantity of various product codes of Primy are with unit accessories costs at least [an appreciable percentage] away from the MCC average developed by the Commission, either lower than the MCC average or higher.
>
> For The [sic.] resulting effect is simply and clear. For the product codes with actual accessories costs at the lower end of the range in Table 5, the Commission has significantly over-deducted accessories costs from the selling prices, and on the other hand, for those product codes with actual accessories costs at the higher end of the range in Table 5, the Commission has significantly under-deducted accessories costs from the selling prices. As result, for any given sales transactions for any product code, the selling prices after the deduction would be a significantly distortive one, almost without exception. Since after the ordinary course of trade test… will only leave part of the domestic sales transactions within this MCC in the calculation of normal value, the normal value would be based on a bunch of domestic sales prices distorted after this deduction.[451]

7.241. We recognize, as did Primy, that, since the costs of domestic accessories varied across different product codes in an MCC, the ADC's methodology of deducting MCC-weighted-average accessory costs from the normal value logically has the distortive effect of over-deducting accessory costs from some product codes and under-deducting them from other product codes within the MCC. China's principal argument as to why such distortions led to an unfair comparison is that the averaging methodology did not correctly reflect the actual difference in accessory costs and thus increased the dumping margin.[452] In response to a question from the Panel as to how the averaging methodology increased the dumping margin in the present case, China refers to and elaborates on the example of table 5 in Primy's submission as mentioned above.[453] In particular, China argues that the use of averaging has the impact of (a) "excluding domestic products with lower accessory costs"; (b) "retaining domestic products with higher accessory costs"; and (c) "comparing domestic products with higher accessory costs with the export price, where adjustment to the domestic product normal value for accessories was only based on the average accessory costs for the entire domestic product sales within the MCC, instead of using the actual, and higher, accessory costs associated with those domestic products sold that formed the basis of the normal value comparison, resulting in an insufficient 'deduction' or 'downward adjustment' to the normal value".[454] We note that table 5 contained not only instances for which the costs are higher than the average, but also instances where accessories costs are lower than the average. In our view, this result is merely a characteristic of averaging. We do not consider that an objective and impartial investigating authority would necessarily refrain from averaging transactions in this manner simply because different results were

[450] China's first written submission, para. 366; second written submission, para. 294.
[451] Continuation 517 Primy's response to statement of essential facts (Exhibit CHN-46 (BCI)), pp. 12-13.
[452] China's opening statement at the first meeting of the Panel, para. 111.
[453] China's response to Panel question No. 110, paras. 239-243.
[454] China's response to Panel question No. 110, para. 242.

reached for individual transactions (or even the overall adjustment) than those that would have been reached without averaging. We further note that there is no claim that the averaging methodology itself was used in a biased manner against certain data sets but not others.

7.242. With respect to the upwards adjustment, China presented Exhibit CHN-90 (BCI) which contained a "table 6" showing that the "accessory costs used by the Commission" to make the upwards adjustment to the normal value were consistently higher than the actual accessory costs for the product exported by Primy to Australia.[455] However, China does not explain that it is the use of averaging that leads to this outcome. Furthermore, as mentioned above, we understand China's claim to specifically relate to the use of averaging in both the downward and upward adjustments.[456] Commenting on table 6, China also states clearly that "Primy's submission to the investigating authority also demonstrated the specific effect of using *average* accessory costs as an upward adjustment with respect to the export models".[457] We therefore consider that China has not reasonably explained how this table supports its claim in this context.[458] We further discern no additional arguments raised by China against the upward adjustment beyond the general claim that the use of averaging leads to distortions across averaged data. We would reject this argument here for the same reasons as we rejected it with respect to the downward adjustment in the paragraph immediately above.

7.243. Accordingly, we find that China has failed to demonstrate that the ADC acted inconsistently with Article 2.4 by using an averaging methodology in calculating the adjustments in this context.

7.4.6.3 AD claim 6.b.iii: comparison of export models to other export models

7.244. We note that this claim pertains to the ADC's findings in the expiry review only, and thus no expiry issues arise with respect to this claim.[459]

7.245. The applicable legal framework for this claim has already been set forth in section 7.3.4.1 above.

7.4.6.3.1 Main party arguments

7.246. China does not dispute that there are differences in physical characteristics between the export models and the domestic models for which a due allowance should be made to ensure price comparability.[460] China argues that for four MCCs exported to Australia (export models) where there were insufficient domestic sales of like goods sold in ordinary course of trade (domestic models), the ADC calculated the normal value using data pertaining to domestic surrogate models with the closest physical characteristics under the MCC hierarchy structure, with an appropriate specification adjustment. In making the specification adjustment, China argues, the ADC compared these export models with export models of the MCC containing the domestic surrogate models. China contends that the ADC should have compared the export models with the domestic surrogate models that formed the basis of the normal value.[461] China argues that the ADC therefore improperly calculated the due allowance by comparing two *export* model costs[462], rather than comparing the cost of an export model and its comparable domestic model.[463] Using an example to illustrate the

[455] China's response to Panel question No. 110, paras. 244-246 (quoting Continuation 517 Primy's response to statement of essential facts (Exhibit CHN-46 (BCI)), p. 15; referring to Continuation 517 Primy's response to statement of essential facts, table 6 "accessories adjustment" (Exhibit CHN-90 (BCI))).

[456] China's first written submission, paras. 362, 366, and 373; opening statement at the first meeting of the Panel, para. 110; second written submission, paras. 294 and 298; and opening statement at the second meeting of the Panel, paras. 82-84.

[457] China's response to Panel question No. 110, para. 244.

[458] We note that China offers this table for the first time in China's response to the Panel's questions following the second meeting. (China's response to Panel question No. 110). We therefore note that insofar as China offers this table in an attempt to broaden its arguments against the downward and upward adjustments beyond its arguments that the use of averaging itself led to the unfair comparison, we would consider such broadened arguments untimely and reject them accordingly. See para. 7.166 above.

[459] China's responses to Panel question Nos. 37 and 69.

[460] China's first written submission, para. 386.

[461] China's first written submission, paras. 379-382.

[462] China's first written submission, para. 387.

[463] China's first written submission, paras. 381-382.

ADC's methodology[464], China argues that this methodology had no relevance to the differences between the export price of the model concerned and a normal value that is necessarily based on domestic sales.[465] Accordingly, China submits that the ADC's adjustment was incapable of ensuring a fair comparison.[466]

7.247. Regarding the ADC's adjustment method of comparing export models with export models, Australia accepts China's description and characterization of the events.[467] Australia argues that the ADC acted consistently with Article 2.4 by carefully considering and properly assessing the alternative adjustment methodology requested by Zhuhai Grand.[468]

7.248. We again note that the parties' arguments with respect to this claim pertain to the ADC's findings in the expiry review only, and thus no expiry issues arise, and no such arguments are raised, with respect to this claim.[469]

7.4.6.3.2 Evaluation

7.249. We recall that during the stainless steel sinks expiry review, the ADC calculated a dumping margin for Zhuhai Grand by comparing export price and the normal value based on the exporter's domestic sales of like products within the same MCC. For four MCCs exported to Australia (export models) where there were either no or insufficient domestic sales of like goods sold in the ordinary course of trade (domestic models), the ADC calculated the normal value using data pertaining to surrogate domestic models with the closest physical characteristics under the MCC hierarchy structure, with an appropriate adjustment for the purposes of Article 2.4. The ADC stated that:

> For four other MCCs exported to Australia the Commission is not satisfied that there were sufficient domestic sales of like goods sold in OCOT on the basis there was an absence, or low volume, of sales in the country of export of the identical MCC. For these MCCs the Commission is satisfied that there were sufficient domestic sales volumes of surrogate models based on the MCCs with the closest physical characteristics under the MCC hierarchy structure. Accordingly, the normal value for these MCCs could be determined under section 269TAC(1) with an appropriate specification adjustment applied in the manner described at section 7.5.[470]

7.250. In section 7.10.5 of the expiry review report, the ADC further stated that:

> In addition to the adjustments outlined in [the statement of essential facts] in relation to Zhuhai Grand, the Commission also considers that further adjustments under section 269TAC(8) [of the Customs Act 1901] are warranted to account for the effect on prices brought about by the difference in the amount of stainless steel and other market specific product differences between domestic and export MCCs.[471]

7.251. Thus, for four MCCs the ADC determined normal values by using surrogate domestic sales taken from other MCCs. In light of the differences between the domestic and export MCCs, the ADC identified a need to make certain adjustments. For this purpose, the ADC compared the export models of these four MCCs with export models of the MCCs containing the surrogate domestic models.[472] It is undisputed that the ADC actually had the cost data for the domestically sold

[464] China's first written submission, paras. 388-389.
[465] China's first written submission, para. 390.
[466] China's first written submission, para. 391.
[467] Australia's first written submission, paras. 460-461.
[468] Australia's first written submission, para. 463.
[469] See, e.g. China's responses to Panel question Nos. 37 and 69.
[470] Continuation 517 final report (Exhibit CHN-36), p. 73.
[471] Continuation 517 final report (Exhibit CHN-36), p. 73.
[472] By way of example, call one of these exported MCCs "MCC Exp 1". Note that there are only sufficient export sales in MCC Exp 1. In order to determine the normal value for MCC Exp 1 to be compared with the export price in MCC Exp 1, the ADC selected another MCC that most resembled the physical characteristics of the exported MCC, e.g. MCC 2, which did have sufficient domestic sales to determine normal value, in addition to being exported to Australia. That is to say, there are both domestic sales and export sales in MCC 2. The ADC calculated the adjustment to the normal value based on MCC 2 domestic models by comparing the export

surrogate MCC on the record, but chose to use the cost data for the exported version instead.[473] The issue before us is whether it is consistent with the practice of an unbiased and objective investigating authority to use cost data pertaining to export sales of a MCC to compare with the export sales of a surrogate MCC in order to compute an adjustment to account for the differences in physical characteristics between an export sale and a domestic sale.

7.252. We answer this question in the negative. We recall that in order for due allowance adjustments to be made under Article 2.4, differences affecting price comparability must exist between two markets. That is, a difference between the price at which the like product is sold in the exporting country and that at which the allegedly dumped product is sold in the importing country. If there is no difference affecting the prices of products sold in the markets concerned, no adjustment can be made. When making an adjustment in this regard, the due allowance has to be calculated on the merits of each individual case and must serve the purpose of accounting for the differences determined to affect price comparability. In other words, the due allowance adjustment must serve the purpose of accounting for the differences affecting price comparability in the two markets. In the present case, by comparing export models with export models, the ADC's methodology necessarily does not serve the purpose of accounting for differences affecting price comparability in the two markets. We do not consider that this is consistent with the practice of an objective and impartial investigating authority.

7.253. Accordingly, we find that the ADC acted inconsistently with Article 2.4 by comparing export models to export models for purposes of performing a fair comparison as between the normal value and export price for Zhuhai Grand in the stainless steel sinks expiry review.

7.4.7 AD claim 7.a under Article 2.2.2 of the Anti-Dumping Agreement: profits not based on "actual data"

7.254. The applicable legal framework for this claim has already been set forth in section 7.3.5.1 above.

7.4.7.1 Main party arguments

7.255. China claims that the ADC calculated both the profit rate as well as the amounts of the profit in the stainless steel sinks proceedings by using the cost of production incorporating surrogate costs.[474] China argues that the *chapeau* of Article 2.2.2 imposes a general obligation on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade" when determining amounts for SG&A and profits.[475] China contends that the "uplifted cost base" used to calculate the profit rate and/or the amount of profit included costs of production that were not the exporter's actual data.[476] Accordingly, in China's view, the ADC's methodology is incapable of rendering an amount for profit "based on *actual data* pertaining to production and sales in the ordinary course of trade … by the exporter or producer under investigation" as required by Article 2.2.2.[477] Consequently, China argues, the ADC also acted inconsistently with the requirements of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[478]

7.256. Australia argues that the ADC applied a profit rate which was calculated consistently with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement.[479] Australia notes that during the

models of MCC Exp 1 with the export models of MCC 2 "to account for the effect on prices brought about by the difference in the amount of stainless steel and other market specific product differences between domestic and export MCCs". Thus, and critically, to account for differences between MCC Dom 1 (now replaced with MCC Dom 2) with MCC Exp 1, the ADC calculated the adjustment by comparing the price of MCC Exp 1 with the price of the *exported models of MCC 2* (MCC Exp 2) rather than using the price of the *domestically sold models of MCC 2* (MCC Dom 2). (See Continuation 517 final report (Exhibit CHN-36), p. 73).

[473] Australia's first written submission, para. 461. See also China's first written submission, para. 387 (referring to ADRP Review 2020/124 report (Exhibit CHN-47), p. 26).

[474] China's first written submission, paras. 401 and 417-418; responses to Panel question Nos. 37 and 69.

[475] China's first written submission, paras. 402-404 (referring to, *inter alia*, Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 97; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.25).

[476] China's first written submission, para. 416.

[477] China's first written submission, paras. 397, 401, 413-414, and 416-418.

[478] China's second written submission, para. 304.

[479] Australia's first written submission, paras. 465-471.

investigation, the ADC accepted a submission from Zhuhai Grand to use the full cost to make and sell the goods (CTMS) at issue, for each selected Chinese exporter to calculate the target profit rate.[480] Australia argues that the relevant exporters raised no relevant objections to the ADC's methodology during the investigation.[481] Further, Australia argues that this claim is derivative of China's AD claims under Articles 2.2.1.1 and 2.2 and should be rejected for the reasons set forth in Australia's responses to those claims.[482]

7.257. China disagrees with Australia that its claims under the *chapeau* of Article 2.2.2 are derivative of its AD claims 1 and 3.[483] In China's view, Article 2.2.2 is prescriptive of the method that must be followed in order to calculate the amounts for profit "[f]or the purpose of paragraph 2".[484]

7.258. In response to a question from the Panel, both parties agreed that the ADC did not calculate normal value during the interim review for Yingao and the expiry review.[485]

7.4.7.2 Expiry

7.259. China's claim concerns the stainless steel sinks original investigation, interim reviews and expiry review.[486] As discussed in section 7.2.2 above, we shall first consider whether or not the aspect challenged by China has expired. To do so, we shall consider whether there was a change of essence in the approach taken by the ADC in calculating profit as between the investigation and expiry review, and do not examine the interim reviews.

7.260. In the investigation, the ADC calculated both the profit rate and the amounts of profit by using the cost of production incorporating surrogate costs.[487] However, in the expiry review, the ADC decided not to construct the normal values for selected exporters and used instead the data pertaining to the exporters' recorded sales.[488] As such, the ADC had no reason to calculate profit under Article 2.2.2 for any exporters, China points to no instance in which the ADC did so, and we discern none. We therefore consider that there was a change of essence as between the original investigation and the expiry review. Thus, the specific aspect of the order challenged by China, i.e. construction of normal value using surrogate costs in the profit determination, has expired. We decline to issue findings with respect to this aspect of the order therefore, per the Panel's reasoning in section 7.6 below.

7.4.8 AD claim 8 under Article 9.3 of the Anti-Dumping Agreement: collection of duties in excess of the margin of dumping

7.261. The applicable legal framework for this claim has already been set forth in section 7.2.3 above.

7.4.8.1 Main party arguments

7.262. China asserts that Australia has collected anti-dumping duties on the basis of margins of dumping that were inflated as a result of the alleged WTO-inconsistencies challenged in China's other AD claims.[489] China claims that, as a result, Australia has collected anti-dumping duties in excess of

[480] Australia's first written submission, paras. 467-469. See also Investigation 238 final report (Exhibit CHN-2), p. 43; Investigation 238 statement of essential facts (Exhibit AUS-49), p. 37.
[481] Australia's first written submission, paras. 470-471.
[482] Australia's first written submission, para. 473; second written submission, paras. 298-302.
[483] China's second written submission, para. 306.
[484] China's second written submission, para. 306.
[485] Australia's response to Panel question No. 69, para. 31; China's response to Panel question No. 69, p. 107.
[486] China's responses to Panel question Nos. 37 and 69.
[487] China's first written submission, paras. 401 and 417-418; Investigation 238 final report (Exhibit CHN-2), pp. 43-44.
[488] Continuation 517 final report (Exhibit CHN-36), pp. 61, 65, 68, 71 and 73. See also Australia's response to Panel question No. 69, para. 31; China's response to Panel question No. 69, p. 107.
[489] See for example, China's first written submission, para. 338; opening statement at the first meeting of the Panel, para. 111; responses to Panel question No. 17, para. 62, No. 19, para. 68, No. 23, para. 94, and No 110, paras. 240 and 246.

the margins of dumping that would have been "properly established" under Article 2, contrary to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[490]

7.263. Australia argues that China's claim under Article 9.3 is purely consequential, and that it must fail given that the ADC's calculation of relevant dumping margins was consistent with Article 2 of the Anti-Dumping Agreement.[491]

7.4.8.2 Evaluation

7.264. To the extent that we have found above that the ADC acted inconsistently with the provisions of Article 2, we consider that China has established, as a matter of fact, that the dumping margins were improperly inflated through the use of surrogate costs in the stainless steel sinks proceedings. In this regard, we note that the ADC concluded in the stainless steel sinks expiry review that "[i]n each case, application of the [Steel Business Briefing] benchmark price resulted in an increase to each exporters' production costs, i.e. the actual stainless steel costs incurred by exporters were lower than the benchmark amount".[492] As discussed in section 7.4.2.3 above, the ADC did not use the surrogate costs to construct normal values but it did use these higher surrogate costs in applying the ordinary-course-of-trade test, which would logically lead to the exclusion of more lower-priced sales from the normal value calculation and consequently a higher dumping margin. We note that Australia does not argue otherwise. Rather, Australia appears to treat the success of China's claim under Article 9.3 as dependent on the other underlying claims under the Anti-Dumping Agreement. In the absence of any rebuttal from Australia, this in our view establishes *prima facie* that the anti-dumping duties imposed by the ADC exceeded the margins of dumping that would have been established had the authorities acted consistently with Article 2.

7.265. Accordingly, we uphold China's claim that Australia acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.4.9 CVD claims 2 and 3 under Articles 1.1(b) and 14(d) of the SCM Agreement: use of out of country benchmark[493]

7.266. China brings claims under the SCM Agreement regarding the ADC's findings in the stainless steel sinks proceedings with respect to one subsidy programme named "Program 1 – Raw Materials Provided by the Government at Less than Fair Market Value" (Program 1). This programme concerns the provision of a particular raw material, i.e. 304 SS CRC, used in the production of stainless steel sinks, for less than adequate remuneration by a government or public body.[494]

7.4.9.1 Main party arguments

7.267. China claims that, in determining the existence and amount of benefit conferred by Program 1, the ADC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, by using a benchmark that did not relate to the prevailing market conditions in the country of provision (i.e. China) and rejecting in-country benchmarks without a reasoned and adequate explanation. China contends that to justify the rejection of in-country prices, the ADC should have explained how identified government interventions, used as the basis for rejecting in-country prices, distorted the price of 304 SS CRC.[495] China argues, in particular:

[490] China's first written submission, paras. 458, 459-480. See also China's second written submission, para. 325.
[491] Australia's first written submission, paras. 165, 344-345, and 474; second written submission, para. 310.
[492] Continuation 517 final report (Exhibit CHN-36), p. 54.
[493] We note that China did not pursue a claim with respect to "CVD claim 1" in its submissions. Thus, we begin by addressing China's CVD claims 2 and 3.
[494] See e.g. Investigation 238 final report (Exhibit CHN-2), pp. 11, 53, and 137.
[495] China's first written submission, para. 513.

a. The ADC's examination was not based on the evidence on the record of the particular investigation but on conclusions it reached in "previous investigations" concerning different products.[496] There was no analysis of the market for 304 SS CRC.[497]

b. The ADC determined, without justification, that government policy has distorted the Chinese domestic market for 304 SS CRC. The ADC referred to concerns expressed in other investigations about macroeconomic policies and plans relating to the Chinese iron and steel industry more generally, rather than specifically about the market for 304 SS CRC.[498]

c. The ADC only made limited adjustments to the benchmark, with no consideration of prevailing market conditions in the country of provision, such as price, quantity, availability, marketability and other conditions of purchase or sale within China.[499]

7.268. Australia argues that this claim pertains to an expired measure. Australia contends that although the ADC used an out-of-country benchmark in the original investigation, the ADC used an in-country benchmark in the expiry review. Moreover, Australia asserts that, unlike in the original investigation, in the expiry review the ADC found that Program 1 conferred no benefit on exporters and was thus found not to be a subsidy.[500]

7.269. Australia also argues that during the original investigation, the Chinese Government did not provide a complete response to the government questionnaire.[501] According to Australia, the ADC therefore had to resort to the evidence available to it, which included substantial evidence that there was significant government intervention in the Chinese iron and steel industry that distorted prices for various steel outputs.[502] Noting the significant similarities in the raw materials and manufacturing processes for these steel outputs and that for 304 SS CRC, the ADC determined there was sufficient evidence to show that prices of 304 SS CRC were also distorted. Australia contends that these ADC findings were sufficient to allow the ADC to resort to out-of-country benchmarks in its benefit analysis.[503] Australia asserts that the ADC adopted an out-of-country benchmark that was the best available representation of the market-determined price of 304 SS CRC in China. Australia further argues that the ADC adjusted this benchmark for prevailing market conditions in China.[504] Australia further contends that Article 14 does not require investigating authorities to adopt a particular style of analysis or methodology in every investigation.[505]

7.270. China responds that, in its view, the ADC's approach of using out-of-country benchmarks to evaluate whether exporters obtained goods at less than adequate remuneration under Program 1 has not expired. China contends that this is so, in particular, because in the expiry review the ADC indicated in its statement of essential facts and in its anti-dumping findings that using an out-of-country benchmark was an ongoing practice in this context.[506] China also asserts that Australia provides no evidence that the benchmark used in the expiry review did not continue to be an out-of-country benchmark[507], but also indicates that the use of a different methodology for one exporter in the expiry review did suggest that an out-of-country benchmark methodology had not

[496] China's first written submission, paras. 514-516.
[497] China's first written submission, paras. 515-516 and 518.
[498] China's first written submission, para. 520.
[499] China's first written submission, para. 530.
[500] Australia's responses to Panel question No. 69, paras. 19-21, and No. 90; comments on China's response to Panel question No. 97. Australia also argues that the challenged countervailing duty measure as against Program 1 is no longer in effect, and accordingly no benefits accruing to China under the WTO Agreements are being impaired. (Australia's first written submission, paras. 603 and 606). Additional Australian arguments pertaining to expiry in this context have also been explained in more detail in section 7.2.1.1 above.
[501] Australia's first written submission, paras. 594-596 and 610.
[502] In response to the Panel's question, Australia clarified that the ADC did not resort to the facts available mechanism set forth in Article 12.7 of the SCM Agreement, except for uncooperative and all other exporters. (Australia's response to Panel question No. 34, para. 96, fn 59).
[503] Australia's first written submission, para. 608.
[504] Australia's second written submission, para. 337.
[505] Australia's second written submission, para. 341.
[506] China's response to Panel question No. 97.
[507] China's comments on Australia's response to Panel question No. 69, para. 15.

been used. China stresses that there is no basis on which to conclude, however, that the use of out-of-country benchmarks in this context had been abandoned by the ADC as a general matter.[508]

7.4.9.2 Expiry

7.271. China's claim concerns the stainless steel sinks original investigation, interim reviews, and expiry review.[509] As discussed in section 7.2.2 above, we will address first the issue of whether or not the aspect challenged by China has expired. In this regard, we shall consider whether there was a change of essence in the approach taken by the ADC to evaluate the benefit received by exporters under Program 1 as between the original investigation and expiry review, and do not examine the interim reviews.

7.272. In the original investigation, in determining whether a benefit had been conferred on the exporters under Program 1, the ADC considered the difference between costs incurred by Chinese exporters when purchasing 304 SS CRC from state invested enterprises (SIE or SIEs) and an external benchmark. That benchmark was the same benchmark used in determining costs for constructed normal values and conducting the ordinary-course-of-trade test in the dumping determination, i.e. a MEPS-based average price for 304 SS CRC using the monthly reported MEPS North American and European prices (excluding the Asian price) (see section 7.4.4.2 above).[510]

7.273. In the expiry review findings, out of the selected investigated exporters, the ADC examined Program 1 with respect to two exporters only, i.e. Rhine Sinkwares Manufacturing Ltd. Hui Zhou (Rhine) and Zhuhai Grand.[511] The ADC noted that Rhine had provided an updated stainless steel purchase ledger which listed the names of stainless steel suppliers, and the business licences for these companies. After examination, the ADC found that Rhine had not benefited from Program 1 because none of its suppliers of stainless steel were public bodies.[512] Since the ADC excluded the existence of any subsidy benefit on the basis of the absence of public body involvement, the issue of benchmarking for the less-than-adequate-remuneration assessment never arose. With respect to exporter Zhuhai Grand, the ADC stated that:

> To determine whether Zhuhai Grand had received a benefit from its SIE traders through less than fair market value, the Commission *compared the selling prices from its SIE traders to non-SIE traders* and noted that the prices paid by Zhuhai Grand to its SIE traders were consistently higher than purchases from non-SIE traders.
>
> The Commission is of the view that purchases of stainless steel via SIE traders did not result in a benefit in the form of lower prices being received by Zhuhai Grand. As such, the Commission does not consider that a benefit under this program has been conferred.[513]

[508] China's comments on Australia's response to Panel question No. 90.
[509] China's comments on Australia's response to Panel question No. 90.
[510] Investigation 238 final report (Exhibit CHN-2), p. 219. As discussed in section 7.4.4.3 above, the ADC made limited adjustments to this benchmark. In resorting to this external benchmark, the ADC considered and rejected two internal benchmark options, i.e. private prices from non-SIE 304 SS CRC suppliers, and import prices of 304 SS CRC to China. (Ibid. pp. 207 and 208).
[511] Continuation 517 final report (Exhibit CHN-36), pp. 82-83. The countervailing duty investigation had previously been terminated so far as two of these five selected exporters were concerned (Primy and Jiabaolu). (See Investigation 238 final report (Exhibit CHN-2), p. 12). With respect to the other exporter, Guangdong Cresheen Smart Home Co Ltd, the expiry review report does not contain any discussion regarding Program 1.
[512] Continuation 517 final report (Exhibit CHN-36), pp. 82-83.
[513] Continuation 517 final report (Exhibit CHN-36), p. 83. (emphasis added) In the expiry review the ADC also stated that: "[f]or the purpose of this inquiry *the benchmark price used for Program 1* and the stainless steel cost substitute in relation to section 43(2) of the Regulation relies on the average price of grade 304 [SS] CRC for North America and Europe published by [Steel Business Briefing Ltd.]" (ibid. p. 53 (emphasis added)). China refers to this statement in support of its assertion that in the expiry review report the ADC again relied on an external benchmark in conducting its benefit analysis *vis-à-vis* Program 1. (China's first written submission, para. 508). We note, however, that the ADC made this statement in the context of selecting a surrogate steel price for purposes of the *dumping investigation*. This statement was not made in the context of the subsidization findings in the expiry review and indeed, appears contradicted by the ADC's express findings on benefit, discussed above in this section. We therefore consider this statement immaterial.

7.274. Thus, while the ADC did assess potential Program 1 benefit for Zhuhai Grand by reference to a benchmark for the less-than-adequate-remuneration assessment, that benchmark was comprised of selling prices from its non-SIE traders. China does not contend that such non-SIE prices comprised an out-of-country benchmark.[514] Indeed, Australia has submitted a BCI exhibit (with content taken from Zhuhai Grand's verification) which is consistent with the conclusion that the ADC used an in-country, rather than external, benchmark.[515]

7.275. We consider that there was a change of essence in the approach taken by the ADC in determining whether Program 1 conferred a benefit as between the original investigation and the expiry review. Specifically, while the ADC did employ an external benchmark for this purpose in the original investigation, there is no evidence that the ADC did so in the expiry review. We therefore consider that the approach taken by the ADC in the original investigation regarding the determination of benefit for Program 1 has expired. Because China's claim only pertains to the use of an out-of-country benchmark, this claim only pertains to an expired aspect of the order.[516] We therefore decline to make findings with respect to this claim per our reasoning in section 7.6 below.

7.4.10 CVD claim 4 under Articles 1.2 and 2.1(c) of the SCM Agreement: specificity determination of Program 1

7.4.10.1 Main party arguments

7.276. China asserts that the ADC determined that Program 1 was *de facto* specific under Article 2.1(c) of the SCM Agreement. China claims that the ADC acted inconsistently with Articles 1.2 and 2.1(c) in the original investigation and the expiry review by failing to:

a. identify a subsidy programme with respect to Program 1;

b. consider whether the purported programme was used by a limited number of certain enterprises; and

c. consider, either explicitly or implicitly, the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation.[517]

7.277. China argues that the ADC's mere reference to Program 1 as a "subsidy program" in its findings is insufficient to establish the existence of a subsidy programme for the purposes of Article 2.1(c)[518], and that any identification of a subsidy programme must be done explicitly rather than implicitly.[519] China contends that there was no evidence that subsidies had been provided to recipients pursuant to a plan or scheme, or that a systematic series of actions pursuant to which financial contributions that confer a benefit had been provided to certain enterprises.[520] China also argues that the ADC's recognition that 304 SS CRC was a "key input in the manufacture of

[514] We recall that China argues that the ADC used an external benchmark to assess benefit for an exporter in the statement of essential facts. Because that document does not constitute the findings of the ADC, we do not consider it relevant.

[515] Continuation 517 Zhuhai Grand verification visit report, p. 25 and attachment (Exhibit AUS-81 (BCI)). China has not contested that this exhibit demonstrates the in-country nature of the benchmark used in the expiry review for Zhuhai Grand.

[516] As we consider the operable question to be whether the ADC currently applies an out-of-country benchmark in the stainless steel sinks countervailing duty order, we reject China's arguments that we should consider what group of Chinese exporters would be subject to the order had the ADC not used an out-of-country benchmark in the original investigation. This reasoning applies in equal force to CVD claims 4 and 5, in that we consider the expiry issues there focus on whether the ADC currently applies an affirmative specificity determination for Program 1 in a meaningful legal sense, or currently must apply the original initiation decision to investigate Program 1 under the countervailing duty order. (See CVD claims 4 and 5 with respect to stainless steel sinks, further below).

[517] China's first written submission, para. 552.

[518] China's first written submission, paras. 553 (referring to Panel Report, *US – Pipes and Tubes (Turkey)*, appealed 25 January 2019, para. 7.153) and 558.

[519] China's comments on Australia's response to Panel question No. 113.

[520] China's first written submission, paras. 554-557; second written submission, paras. 357-358; comments on Australia's responses to Panel question Nos. 91 and 92.

downstream products (including deep drawn stainless steel sinks)" is not evidence of the actual "use" of any programme by a limited number of enterprises.[521]

7.278. China further argues that the ADC's investigation report does not contain any express or implicit reference to an examination of the mandatory factors under Article 2.1(c), i.e. the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[522]

7.279. Finally, China contends that the ADC's determination that Program 1 was specific was not substantiated by positive evidence as is required by Article 2.4, because the investigation report contains no evidence supporting the conclusion that Program 1 was a subsidy programme, or that the use of Program 1 was limited to certain enterprises.[523]

7.280. Australia argues that this claim pertains to an expired measure. Australia contends that all references to Program 1 being a countervailable subsidy in the expiry review report, including any references to the specificity of Program 1, are typographical errors.[524] This is so because, in Australia's view, the ADC found in the expiry review that there was no benefit conferred by Program 1 to any exporters, and thus it was unnecessary to assess specificity of the subsidy programme.[525] Australia relatedly asserts that because there was no subsidy found to exist with respect to Program 1 in the expiry review, there could not logically have been a specificity finding with respect to it.[526]

7.281. Australia also argues that the ADC identified a subsidy programme through a systematic series of actions that involved the granting of a financial contribution conferring a benefit, i.e. the provision of 304 SS CRC for less than adequate remuneration by Guangdong Metals and Minerals Import & Export Co., Ltd. to a limited group of particular enterprises engaged in the manufacture of downstream products including stainless steel sinks.[527] Australia contends that the series of transactions were not just the mere provision of financial contributions to certain enterprises, but a systematic series of actions that "occurred in the wider context of systemic subsidisation and associated policies of the Government of China within the Chinese steel market".[528] Australia underlines that, in its view, the systematic series of actions as evidenced by the ADC's analysis of the conferral of a benefit under Program 1 to selected exporters in the investigation was sufficient to identify a subsidy programme, and that no further analysis was needed with respect to any other entities that may have received financial contributions or associated benefits under Program 1.[529] Australia also asserts that the identification of a subsidy programme by an investigating authority can be done implicitly.[530]

7.282. Regarding the consideration of mandatory factors in Article 2.1(c), Australia argues that investigating authorities have significant flexibility as to how they take account of these two factors.[531] Relying on the panel report in *US – Carbon Steel (India) (Article 21.5 – India)*, Australia argues that "it can be sufficient for other aspects of a determination to demonstrate that 'account was taken' of the matter".[532] Australia also argues that the taking account of the two factors need

[521] China's first written submission, paras. 559-560.
[522] China's first written submission, paras. 562-564; second written submission, paras. 362-364.
[523] China's first written submission, para. 566.
[524] Australia's request for a preliminary ruling, fn 39; comments on China's response to the preliminary ruling request, para. 25.
[525] Australia's first written submission, para. 634.
[526] Australia's responses to Panel question No. 69, paras. 19-21, and No. 90. Additional Australian arguments pertaining to expiry in this context have also been explained in more detail in section 7.2.1.1 above.
[527] Australia's first written submission, paras. 638 and 653; second written submission, paras. 367-368.
[528] Australia's second written submission, paras. 369-370.
[529] Australia's responses to Panel question Nos. 91-92; comments on China's response to Panel question No. 92.
[530] Australia's response to Panel question No. 113; comments on China's response to Panel question No. 113.
[531] Australia's second written submission, para. 374.
[532] Australia's second written submission, para. 374 (referring to Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.210).

not be done explicitly.[533] Australia considers that the findings of the ADC indicate that the ADC adequately took account of both mandatory factors.[534]

7.283. China responds that the ADC, in the expiry review, did in fact make a finding that the Program 1 was specific, and any such finding is not, as Australia argues, a typographical error. China notes that the ADC stated in the expiry review that Program 1 was a countervailable subsidy, and that under Australian domestic law, a subsidy must be specific in order to be countervailable. Moreover, in China's view, in the expiry review the ADC signalled that it had not changed its approach to determining the specificity of Program 1 from the original investigation.[535]

7.4.10.2 Expiry

7.284. China's claim concerns the stainless steel sinks original investigation, interim reviews, and expiry review.[536] As discussed in section 7.2.2 above, we will address first the issue of whether or not the aspect challenged by China has expired. As also explained in that section, we would normally start by assessing whether there was a change of essence as between the original investigation and expiry review, and do not examine the interim reviews. Here, however, we take a slightly different approach in recognition of the fact that, in the expiry review, the ADC found that Program 1 did not qualify as a subsidy.

7.285. As described in section 7.4.9.2 above, the ADC found that Program 1 conferred no benefit on exporters in the expiry review. In order for a subsidy to exist both in the SCM Agreement and under Australian law, there must be both a financial contribution and it must confer a benefit. Without a conferral of a benefit, Program 1 does not meet the definition of a subsidy for purposes of the expiry review. The existence of a "subsidy" is a prerequisite to finding that the subsidy is specific under both the SCM Agreement and Australian law.[537] Thus, even if there *is* a finding of specificity in the expiry review, it is without legal effect because the finding has no "subsidy" to which to attach.[538] China points to no other way in which the specificity finding in the expiry review has any material relevance under Australian law.[539]

7.286. We therefore consider this aspect of the order expired. Because China's claim pertains to an expired aspect of the order, we decline to make findings with respect to this claim per our reasoning in section 7.6 below.

7.4.11 CVD claim 5 under Articles 11.2 and 11.3 of the SCM Agreement: initiation of investigation for Program 1

7.4.11.1 Main party arguments

7.287. China claims that the ADC acted inconsistently with Articles 11.1, 11.2, and 11.3 of the SCM Agreement by failing to properly evaluate the sufficiency of the application for the purpose of justifying the initiation of the investigation into Program 1.[540] China argues that the application included insufficient evidence of the existence and nature of Program 1. In China's view, an objective and unbiased investigating authority could not have concluded that there was sufficient basis to initiate the investigation, because

[533] Australia's second written submission, paras. 374 and 376 (referring to Panel Report, *US – Carbon Steel (India) (Article 21.5 – India)*, para. 7.211).
[534] Australia's first written submission, paras. 640-641; second written submission, paras. 378-379 (referring to Investigation 238 final report (Exhibit CHN-2), p. 207).
[535] China's response to Australia's request for a preliminary ruling, para. 36; response to Panel question No. 69, paras. 33-42.
[536] China's comments on Australia's responses to Panel question Nos. 37 and 69.
[537] See SCM Agreement, Article 1; Continuation 517 final report (Exhibit CHN-36), p. 77.
[538] China argues that the ADC made a specificity finding in the expiry review, evidenced by the following statement by the ADC: "[I]n accordance with sections 269TAAC(4) and (5) and having had regard to sections 269TAAC(2) and (3), that *Programs 1*, 3, 8, 20, and new Programs 31, 34, 35, 37 *are specific*". (Continuation 517 final report (Exhibit CHN-36), p. 107 (emphasis added)).
[539] China never argues that this specificity finding would compel the ADC to find that Program 1 is specific in a later segment.
[540] China's first written submission, para. 569; second written submission, para. 367.

a. the application contained insufficient evidence that stainless steel sinks were being subsidized at the time the application was lodged, given that the statement of findings by the Canadian Border Services Agency (CBSA)[541], a Canadian investigating authority, relied on by the applicant relates to a period that was "between 36 and 16 months prior to the period of investigation" and "over 30 months" before the initiation of the investigation by the ADC[542]; and

b. the application neither asserted that Program 1 is specific, nor contained evidence upon which specificity could be considered.[543]

7.288. More specifically, China argues that the applicant relied on the findings of another Member's investigating authority, i.e. the CBSA, with respect to a similar programme as "relevant information" for determining that there are reasonable grounds to investigate Program 1. However, as noted above, China asserts that the CBSA's statement relates to a period that was between 36 and 16 months prior to the period of investigation considered by the ADC, and over 30 months before the initiation of the investigation.[544] China argues that the ADC did not explain why or how such historic information was considered sufficient to justify the initiation of the investigation.[545] China also argues that the ADC merely acknowledged in the "consideration report"[546] of the investigation that a subsidy needed to be specific in order to be countervailable, without actually examining specificity.[547] China also asserts that the CBSA's statement also does not include a finding upon which it could be concluded that the similar programme investigated by the CBSA, i.e. "Program 83: Raw Materials Provided by the Government at Less than Fair Market Value", was specific.[548] In sum, China submits that an objective and unbiased investigating authority could not have concluded that there was sufficient basis to initiate the investigation regarding Program 1.[549]

7.289. China rejects Australia's argument that Article 11 does not prevent an investigating authority from considering evidence outside the four corners of the application when evaluating whether to initiate an investigation based upon an application. China argues that Australia's position is based on a misunderstanding of the panel report in *China – GOES*, is not justified on any interpretation of Articles 11.1, 11.2, and 11.3, and ignores Article 11.6.[550] China contends that Article 11.3 requires the investigating authority to review the evidence provided in the application and to decide whether that evidence "is sufficient to justify the initiation of an investigation".[551] In China's view, while it is permissible for an investigating authority to consider information outside the application to assess the adequacy and accuracy of the evidence provided in the application, Article 11.3 does not allow an investigating authority to seek its own information when an application fails to meet the requirements of Article 11.2.[552]

7.290. China further argues that it is unclear from the record that the ADC actually had regard to any information external to the application when considering whether initiating an investigation into Program 1 was justified. China notes that the ADC's consideration report does not reference specificity beyond noting that it is a requirement of establishing that a countervailing subsidy exists.[553]

7.291. Australia argues that this claim pertains to an expired measure. Australia notes that, in the expiry review, the ADC investigated both new subsidies and previously investigated subsidies under the same legal authority, i.e. Part XV, Division 6A of the Customs Act 1901. Australia also contends that there is no requirement that the ADC investigate Program 1 again in a subsequent expiry or

[541] CBSA statement of reasons, attached to Investigation 238 application (Exhibit CHN-60).
[542] China's first written submission, paras. 585 and 589.
[543] China's first written submission, para. 587.
[544] China's first written submission, para. 585.
[545] China's first written submission, para. 586.
[546] Investigation 238 consideration report (Exhibit CHN-59). This report was published before the initiation of the investigation, and the purpose of the report appears to be to consider whether the application was sufficient to justify the initiation of the investigation.
[547] China's first written submission, paras. 581-582.
[548] China's first written submission, paras. 580 and 587.
[549] China's first written submission, para. 579.
[550] China's second written submission, para. 386.
[551] China's second written submission, para. 106.
[552] China's second written submission, para. 386.
[553] China's second written submission, paras. 387 to 388.

interim review simply due to the fact that it had been previously investigated in prior segments. Australia further stresses that any subsidy, whether previously investigated or not, can be investigated in an expiry review whether or not it had been investigated in a previous segment, if there is evidence that it should be included in the scope of the examination.[554] Australia also underlines that it is not the case that, absent new evidence regarding Program 1, the ADC would investigate it in a subsequent expiry review or interim review, and also that any examination of Program 1 would operate as if it were a new subsidy that had never been previously examined.[555] Australia further rejects China's assertions that the ADC's investigation of new subsidies in the expiry review may be contrary to WTO law.[556]

7.292. Australia also argues that in deciding whether to initiate an investigation, an investigating authority is not limited to the evidence in the application itself. Australia contends that the ADC also relied on its previous investigations into similar subsidy programmes such as aluminium zinc coated steel and galvanized steel, and hot rolled plate steel in which the ADC determined that these subsidies (which the ADC considered to be variations of Program 1) were specific.[557] Australia argues that the domestic industry did not have access to such information and therefore could not have included it in its application.[558] Australia further contends that the application itself contained information on the nature of the subsidy which went to specificity.[559]

7.293. Australia further argues that the absence of explicit references to a specificity determination in the consideration report is not in itself inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.[560] Australia contends that "it is implicit in the *Stainless Steel Sinks Investigation 238 Consideration Report*, that the ADC did consider whether there was adequate evidence indicating specificity".[561] In this regard, Australia points to a statement of the ADC in the consideration report that Australia's domestic legislation "provides that, in order for a subsidy to be countervailable, it must also be specific".[562] Thus, Australia argues that the ADC acknowledged that specificity must be considered.[563]

7.294. China acknowledges that the question of whether new subsidies can be investigated in an expiry review is not a question raised by China's claim. However, China argues that any such practice may be contrary to WTO law. China indicates that the ADC did in fact examine new subsidies in the expiry review, and appeared to examine all subsidies (new or old) under the same legal authority. China also asserts that nothing about how the ADC examined Program 1 in the expiry review indicates that it has somehow been removed from the scope of future countervailing proceedings.[564] China also argues that any new subsidies would be investigated under the countervailing duty order that only exists due to the foundational errors committed in the original investigation.[565] China states that Division 6A of the Customs Act 1901 simply allows the ADC to investigate subsidies under an existing anti-dumping or countervailing duty order, and thus it links the investigations of new subsidies to the foundational errors made in the original investigation.[566]

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[554] Australia's responses to Panel question Nos. 71, 73, 103, and 104.

[555] Australia's response to Panel question No. 104.

[556] Australia's comments on China's response to Panel question No. 71. Additional Australian arguments pertaining to expiry in this context have also been explained in more detail in section 7.2.1.1 above.

[557] Australia's first written submission, paras. 691-692 (referring to Investigation 198 (hot rolled plate steel) final report (Exhibit CHN-33), p. 10; Investigation 193 (aluminium zinc coated steel) final report (Exhibit AUS-70), p. 48).

[558] Australia's response to Panel question No. 94.

[559] Australia's response to Panel question No. 94.

[560] Australia's first written submission, paras. 695-696 (referring to Panel Report, *US – Countervailing Measures (China)*, para. 7.25).

[561] Australia's first written submission, para. 696.

[562] Investigation 238 consideration report (Exhibit CHN-59), p. 34.

[563] Australia's first written submission, para. 696.

[564] China's response to Panel question No. 71.

[565] China's response to Panel question No. 103.

[566] China's comments on Australia's response to Panel question No. 71. China states that the ADC investigated the new subsidies in the expiry review under the same legal authority used to investigate Program 1 in the original investigation. (China's response to Panel question No. 71, para. 83). See also China's response to Panel question No. 104, para. 218(a) ("[i]t would be consistent with Australian investigating authority practice for it to do whatever it likes, in terms of examination of subsidies, in a subsidy 'variable factor' review".); and response to Panel question No. 73, para. 96(d) (indicating that the ADC

7.295. China further asserts that according to its understanding of the ADC's practice, the ADC could examine Program 1 in a future interim or expiry review, but the ADC would not need to examine Program 1 as a new subsidy because the ADC could rely on previous findings *vis-à-vis* Program 1 that it made in previous segments. China also contends that there does not appear to be any evidentiary requirements to be met for the ADC to examine Program 1 in a future review.[567] Moreover, in China's view, the subsidization provided for under Program 1 is embedded in the countervailing duty order because, in an expiry review, the ADC only will continue the order if revocation of the order would lead to the continuation or recurrence of "the … subsidization" and material injury that the order is intended to prevent. According to China, "the subsidization" includes the subsidization by Program 1 found to exist in the original investigation. China also adds that, in its view, including new subsidies in an expiry review is likely contrary to Australian law.[568] Finally, China asserts that the ADC initiation notice in the expiry review indicates that the ADC would review the subsidy programmes included in the original investigation.[569]

7.4.11.2 Expiry

7.296. Unlike the majority of China's claims, this claim is directed solely against the original investigation.[570] This is so because that is the only segment in which there was a decision by the ADC as to whether to initiate an investigation, and the decision to initiate an investigation with respect to Program 1 was part of that overall exercise. Thus, it is not possible, as a practical matter, to examine whether there has been a change of essence as between the initiation decision in the original investigation and a similar decision in a later segment. As noted in section 7.2.2 above, however, this is not the end to the expiry inquiry. We therefore continue to examine whether the ADC's initiation decision with respect to Program 1 in the original investigation has ceased to have legal effect, i.e. whether it has expired.

7.297. We consider that the legal result of the initiation decision with respect to Program 1 was to allow the ADC to examine Program 1 in the original investigation.[571] The question of whether the initiation decision has ceased to have legal effect, therefore, in our minds, centres on whether Australia currently must apply the original initiation decision for Program 1 to investigate Program 1 in a post-investigation segment under the countervailing duty order.[572] We consider that the record before us indicates that the answer to this question is in the negative. This is so because the record supports the conclusion that under Australian law and practice the ADC could investigate Program 1 under the countervailing duty order in a post-investigation segment even in the absence of an initiation decision in the original investigation.

7.298. We first note that the Panel has asked the parties specific questions regarding the circumstances under which the ADC can investigate "new" subsidies in post-investigation segments (i.e. subsidies that had not been investigated in an original investigation) and whether such new subsidies are treated differently than subsidies that had been investigated in an original investigation (which we will refer to as "original" subsides).[573] China has directed us to nothing in the ADC's reports in any segment or in Australian law that constrains the ability of the ADC to examine new subsidies in a post-investigation segment, or that compels new and original subsidies be treated

investigates not only original subsidies in an expiry review but also "any other subsidies to which it might turn its mind in the expiry review").

[567] China's response to Panel question No. 104.

[568] China's comments on Australia's response to Panel question No. 103.

[569] China's comments on Australia's response to Panel question No. 104.

[570] China's responses to Panel question Nos. 37 and 69.

[571] See Investigation 238 consideration report (Exhibit CHN-59), p. 38 ("[i]n light of the above [assessment of Program 1], the Commission considers that there are reasonable grounds to conclude that exporters of deep drawn stainless steel sinks may have received benefits under this subsidy and that its investigation is warranted.").

[572] We recall that we earlier found that we need not consider what group of Chinese exporters might have been subject to the stainless steel sinks countervailing duty order, and whether a change in that composition calls into question whether a countervailing duty order would exist today or not, had the alleged inconsistencies with the SCM Agreement not occurred. These considerations are counterfactual in nature and, in our minds, extend beyond the key question of whether Australia currently must apply the original initiation decision for Program 1 to investigate Program 1 under the countervailing duty order.

[573] See e.g. Panel's question Nos. 71, 103, and 104.

in a different manner in post-investigation segments.[574] China does, however, mention the following statement in the ADC's initiation notification for the stainless steel sinks expiry review:

> My examination of countervailable subsidies will be limited to programs currently covered by the countervailing duty notice, however should further evidence of additional countervailable subsidy programs be provided I may examine the additional programs if to do so will not prevent the timely completion of the inquiry.[575]

7.299. We consider that this statement does not reveal whether new and original subsidies are treated differently under Australian law in the context of post-investigation segments.[576]

7.300. The record does contain evidence, however, that the ADC can and does investigate new and original subsidies in similar manners in post-investigation segments. In a response to a Panel question, Australia referred to Australian law Part XV, Division 6A of the Customs Act 1901, which addresses expiry reviews. We agree with Australia that this section of Australian law appears to draw no distinctions between original and new subsidies.[577] We also note that in the three stainless steel sinks interim reviews and the expiry review, the ADC requested information on both original and new subsidies and examined exporters' records with an eye to determining whether new subsidies had been received. We take special note that in one interim review and the expiry review the ADC examined new subsidies. In no segment do we discern any indication that the ADC considered its ability to investigate new subsidies was different than how it examined old subsidies as a legal matter.[578] Thus, we consider that the ADC could assess Program 1 in post-investigation segments in essentially the same legal manner whether it was or was not included in the original investigation. We also do not consider China's argument that investigating new subsidies in post-investigation segments may be contrary to WTO law relevant, as this is not an issue before us in this dispute.

7.301. We therefore consider that the record reflects that the ADC does not need to rely on the fact that Program 1 was investigated in the original investigation in determining whether or how it may be examined in the post-investigation segments. This, in our minds, compels the conclusion that the original initiation decision with respect to Program 1 is an expired aspect of the order. We therefore decline to make findings with respect to this aspect of the order per our reasoning in section 7.6 below.

7.5 Railway wheels

7.302. In examining China's claims below with respect to railway wheels, we recall that there has only been one relevant segment that has occurred thus far, i.e. the original investigation. Thus, no expiry issues arise with respect to China's railway wheels claims. We also note that the numbering of China's claims, and the order in which we address them, has already been described in paragraph 7.53 above.

7.5.1 AD claim 3 under Article 2.2.1.1 of the Anti-Dumping Agreement: rejection of exporters' costs

7.303. The applicable legal framework for this claim has already been set forth in section 7.3.1.1 above.

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[574] China does argue that the ADC considers information about subsidies from prior segments in making findings. This may be correct, but it does not demonstrate a legal compulsion to treat new and original subsidies differently.

[575] Continuation 517 initiation notice (Exhibit AUS-11), p. 5.

[576] We acknowledge that this example may illustrate a more general practice of the ADC, in a given segment, to investigate previously investigated subsidies in a somewhat automatic fashion. Even if correct, however, this would not, in our minds, change the ultimate conclusion in this section because the ADC would still be able to investigate Program 1 in post-investigation segments in the absence of an original initiation decision.

[577] Australia's response to Panel question No. 103.

[578] See Review 352 final report (Exhibit CHN-17), p. 18; Review 459 final report (Exhibit CHN-22), p. 18; Review 461 final report (Exhibit CHN-51), p. 27; and Continuation 517 final report (Exhibit CHN-36), pp. 79-81 and 83-84.

7.5.1.1 Main party arguments

7.304. China argues that the ADC rejected Masteel's[579] costs of production when constructing normal values and instead used non-Chinese surrogate costs. China claims that, in doing so, Australia violated Article 2.2.1.1 of the Anti-Dumping Agreement because the ADC failed to calculate relevant costs "on the basis of records kept by the exporter or producer under investigation" within the meaning of Article 2.2.1.1. More specifically, China argues that the ADC either did not determine, or wrongly determined, that the records kept by Masteel did not "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of Article 2.2.1.1. This is so because, according to China, the ADC instead rejected the Masteel's costs because they "did not reasonably reflect competitive market costs", within the meaning of applicable Australian law.[580]

7.305. Australia argues that China misunderstands the ADC's findings and calculations of Masteel's steel billet costs.[581] Specifically, Australia argues that "[t]he ADC's constructed value methodology for Masteel did not rely on the second condition in the first sentence of Article 2.2.1.1, as China erroneously assumes. Australia contends that the ADC relied on the term 'normally,' as set forth in the first sentence of Article 2.2.1.1, when relying on information other than Masteel's records for the purpose of calculating the cost of production for steel billet".[582] Indeed, Australia asserts that the ADC only made a first condition finding, but no second condition finding, for purposes of Article 2.2.1.1.[583] According to Australia, the ADC concluded that the relevant circumstances were "not normal or ordinary" due to the Chinese Government's intervention in the underlying steel market, which caused significant and systemic imbalances in that market.[584] Australia argues that the word "normally" in the first sentence of Article 2.2.1.1 must be taken into account to give a proper interpretation of the provision.[585] Australia contends that a proper interpretation of Article 2.2.1.1 leads to the conclusion that "irrespective of whether the records are (a) GAAP compliant, and (b) 'reasonably reflect' costs, an investigating authority may rely on data other than the records of the exporter or producer if there are not normal or ordinary circumstances affecting the exporter or producer's costs".[586] In this regard, Australia argues that the structure of the first sentence of Article 2.2.1.1 does not impose an order of analysis as between the two conditions and consideration of the word "normally", and thus the word "normally" affords discretion to depart from using exporters' costs even if the investigating authority does not make findings as to one or both conditions.[587] Australia further asserts that such a sequencing would serve no meaningful purpose.[588] Australia argues that an investigating authority's reliance on the word "normally" is not unconstrained, and there must be a proper basis for doing so on the record.[589] Australia also contends that the ADC sought information from Masteel and the Chinese Government in this context but the responses to such requests were incomplete.[590]

7.306. China responds that any flexibility afforded by the word "normally" in the first sentence of Article 2.2.1.1 would only arise if the ADC made affirmative findings as to the two conditions in that sentence, consistent with the panel's analysis in *Australia – Anti-dumping Measures on Paper*.[591] China maintains that any discretion afforded by the word "normally" to depart from using exporters' records when the two conditions are satisfied must be limited. More specifically, China argues that the text and context of the Anti-Dumping Agreement indicates that such flexibility would arise in the situation where an exporter's records do not give the investigating authority confidence in the accuracy, completeness, faithfulness and reliability of the exporter's cost record.[592] China

[579] Masteel was the only investigated Chinese exporter in the investigation.
[580] China's first written submission, section F.1.
[581] Australia's first written submission, para. 177.
[582] Australia's first written submission, para. 178.
[583] Australia's responses to Panel question No. 61, para. 193, and No. 78, paras. 82-83.
[584] Australia's first written submission, paras. 179 and 192-243; second written submission, paras. 143 and 146.
[585] Australia's first written submission, paras. 182-191.
[586] Australia's first written submission, para. 244.
[587] Australia's second written submission, paras. 150-158.
[588] Australia's second written submission, para. 157.
[589] Australia's second written submission, para. 166.
[590] Australia's first written submission, paras. 234-243.
[591] China's second written submission, paras. 199 and 203-205.
[592] China's second written submission, para. 239.

further asserts that the ADC failed to make a finding under the first condition of Article 2.2.1.1 in the investigation.[593]

7.5.1.2 Evaluation

7.307. China claims that the ADC improperly rejected Masteel's costs of producing steel billet when constructing its normal value because the ADC did so without making a proper finding under the second condition of Article 2.2.1.1.

7.308. In the original investigation, the ADC calculated a constructed normal value for Masteel (the only investigated Chinese exporter).[594] In assessing what costs of production to use in its construction of normal value, the ADC recalled that, per the relevant underlying statute, the ADC must use the Masteel's records concerning its costs of production if they are kept in accordance with GAAP and reasonably reflect competitive market costs. The ADC then recalled that the influence of the Chinese Government had, in its view, resulted in distortions in China's domestic steel and steel input markets.[595] The ADC stated that "[i]n these circumstances, the Commission is not required to work out an amount for the cost of production using the information set out in Masteel's records".[596] The ADC then summarily indicated that it had selected a suitable replacement steel billet benchmark cost.[597] This analytic progression by the ADC, in our view, establishes that the ADC rejected Masteel's costs of producing steel billet because, in its view, they did not reasonably reflect competitive market costs. In an appendix to its report, the ADC elaborated on why it considered that Masteel's costs of producing steel billet did not reasonably reflect competitive market costs.[598] The ADC also indicated in this appendix that "[t]hese circumstances are not normal and ordinary because the records of Masteel reflect the government influence by the GOC which distorts the costs in the steel and steel input markets in China".[599]

7.309. We recall that in section 7.3.1.4 above, addressing a similar claim with respect to the wind towers proceedings, we considered that when the ADC applies the competitive market costs test, it is failing to apply, rather than misapplying, the second condition in Article 2.2.1.1 of the Anti-Dumping Agreement. We see no reason to alter that conclusion here. We discern no other point at which the ADC makes either an affirmative or negative finding under the second condition. Again, the assessment of whether costs "reasonably reflect competitive market conditions", in our opinion, is different than whether costs "reasonably reflect the costs associated with the production and sale of the product under consideration". As indicated in the paragraph immediately above, the ADC rejected Masteel's relevant costs based on the former inquiry, rather than the latter. On this basis, we find that, in rejecting Masteel's costs because they did not reflect competitive market costs, the ADC did not make a finding under the second condition of Article 2.2.1.1. The ADC therefore could not rely on any flexibility provided by the word "normally" in the first sentence of Article 2.2.1.1, and thus had no basis upon which to depart from using Masteel's costs of production reflected in its records. We therefore find that the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement. We also note that we conclude that there was no first condition finding made in the ADC's report in the investigation. Thus, even if there had been an affirmative second condition finding, the ADC would still not have been entitled to depart from using Masteel's costs.[600]

[593] China's responses to Panel question Nos. 69 and 80.
[594] Investigation 466 final report (Exhibit CHN-3), pp. 23-24.
[595] Investigation 466 final report (Exhibit CHN-3), pp. 24 and 80-95.
[596] Investigation 466 final report (Exhibit CHN-3), p. 24.
[597] Investigation 466 final report (Exhibit CHN-3), pp. 24-25.
[598] Investigation 466 final report (Exhibit CHN-3), appendix 2.
[599] Investigation 466 final report (Exhibit CHN-3), p. 80.
[600] We note that Australia argues that the ADC made a first condition finding in the statement of essential facts in this investigation, and that this finding was not contested and therefore the finding was clear from the course of the investigation. (Australia's responses to Panel question No. 61, para. 193, and No. 78, para. 82.) The ADC's report, not the statement of essential facts, in our mind reflects the ADC's findings, however, and we discern no first condition finding in that report. We therefore consider that no first condition finding was made in the investigation. China also claims violations of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in this context. (China's first written submission, section F.1.) We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

7.5.2 AD claim 1 under Article 2.2 of the Anti-Dumping Agreement: costs of production in the country of origin

7.310. The applicable legal framework for this claim has already been set forth in section 7.3.2.1 above.

7.5.2.1 Main party arguments

7.311. China recalls that in the railway wheels investigation the ADC rejected using the exporters' costs of production when determining normal value, and instead used surrogate costs. Specifically, China indicates that the ADC replaced Masteel's steel-billet production costs with a French producer MG-Valdunes SAS (Valdunes)'s steel-billet purchasing costs.[601] China claims that, in doing so, Australia violated Article 2.2 of the Anti-Dumping Agreement because the ADC used costs that were not "the cost of production in the country of origin" within the meaning of Article 2.2. More specifically, China claims that the ADC used the selected surrogate costs because they were meant to *not* represent the costs of production in China, and that the ADC made no material effort to adapt such costs so that they could reasonably be considered "the cost of production in [China]". China notes that although the ADC made certain adjustments to the surrogate costs in the investigation, such adjustments were insufficient to make the surrogate costs "costs of production in the country of origin". China also asserts that the ADC noted the need for further such adjustments, but failed to perform them, citing the lack of information on the record, which, in China's view, is an irrelevant legal consideration in this context.[602] China cites the Appellate Body reports in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* in support of its arguments in this context.[603]

7.312. Australia asserts that "China's claim is limited to challenging the ADC's approach to determining the cost of a single (but important) input in Masteel's production process: steel billet".[604] In this context, Australia contends that the ADC recognized that Article 2.2 does not preclude the use of out-of-country data, that the circumstances of the investigation meant that it was proper for the ADC to resort to out-of-country data, and that the ADC made proper adjustments to Valdunes's data to reflect Masteel's circumstances in China.[605] Australia recalls that the ADC found that it could not use Masteel's recorded costs, and thus turned to other data to determine such costs. Australia asserts that the ADC selected the surrogate costs in this context because Valdunes's purchases were of a particular relevant grade of steel, such data were taken from the same relevant period of investigation and were verified by the ADC, and because Valdunes's costs did not reflect Chinese market distortions.[606] Australia asserts that the ADC adjusted Valdunes's SG&A because Masteel, unlike Valdunes, was a vertically integrated producer that made its own steel billet.[607] Australia indicates that the ADC considered, but rejected, the use of alternative data sources.[608] Australia further argues that the ADC could not further adjust Valdunes's data to ensure that such data represented the cost of production in China because the Chinese Government and Masteel failed to provide relevant information to the ADC that could have been used to make such adjustments.[609]

7.313. Australia also argues that if the Panel were to find a violation of Article 2.2.1.1 under AD claim 3, then it would not be necessary or desirable to also issue findings with respect to this claim under Article 2.2. This is not, in Australia's view, because this claim is consequential to China's claim under Article 2.2.1.1. Rather, in Australia's view, it is because if a violation of Article 2.2.1.1 is found, this claim is premised on a particular outcome of the Article 2.2.1.1 analysis,

[601] China's first written submission, paras. 76-95.
[602] China's second written submission, paras. 158-161.
[603] China's first written submission, paras. 96-119.
[604] Australia's first written submission, para. 277.
[605] Australia's first written submission, paras. 278 and 289-292. Specifically, Australia discusses in this context the adjustments made to Valdunes's costs to reflect the fact that Masteel was a vertically integrated producer which did not purchase, but made, steel billet. (Australia's first written submission, paras. 289-290).
[606] Australia's first written submission, para. 286.
[607] Australia's second written submission, paras. 199-202. Australia notes that the ADC used the costs of another steel company, ArcelorMittal, in making this adjustment, because Masteel provided such data for this express purpose, ArcelorMittal's core business was production and sale of steel products, and its relevant costs were readily identifiable in its records. (ibid. para. 201).
[608] Australia's first written submission, paras. 298-311.
[609] Australia's first written submission, paras. 293-297.

and if the ADC improperly rejected exporters' costs under Article 2.2.1.1, then the Panel's analysis of whether the ADC properly adjusted the costs to represent the cost of production in China used would be irrelevant as a practical matter.[610]

7.314. China responds that a violation of Article 2.2.1.1 would also result in a violation of Article 2.2, but argues that the Panel should still make findings with respect to this Article 2.2 claim even if a violation of Article 2.2.1.1 is found. China indicates that such an approach has been followed in other disputes.[611] China also asserts that the ADC's adjustment of the surrogate costs for SG&A to which Australia refers was incapable of rendering a cost of production in China.[612]

7.5.2.2 Evaluation

7.315. China claims that the surrogate costs for steel billet selected by the ADC for purposes of constructing Masteel's normal value in the railway wheels investigation did not represent the "cost of production in country of origin" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

7.316. In the investigation, and after rejecting Masteel's costs of producing steel billet in constructing normal value, the ADC considered multiple benchmarks to use for Masteel's steel billet costs, i.e. private prices, import prices, and external benchmarks.[613] The ADC ultimately used the steel billet costs of the company Valdunes. Valdunes was a French producer and the only other verified exporter of railway wheels subject to the investigation.[614] The ADC selected Valdunes's cost data because "they are the cost of the particular grade of micro alloyed steel used in the production of the goods under consideration" and the ADC had verified the costs for the same period of investigation.[615] The ADC thus concluded that "the suitable [replacement] benchmark is to uplift Masteel's steel billet input costs to reflect the difference between these costs and the costs incurred by Valdunes".[616]

7.317. Two adjustments were made to Valdunes's steel-billet costs. The first was deemed appropriate because Valdunes purchased its steel billet whereas Masteel made its own steel billet.[617] The ADC thus adjusted Valdunes's SG&A to reflect that Masteel would not have incurred certain costs as a vertically integrated company in this respect.[618] The ADC made the second adjustment to address Valdunes's lack of steel billet purchase cost data for one quarter of the period of investigation as follows:

> Due to this [lack of data], the Commission adjusted the French billet costs from the third quarter of the investigation period, relative to movements of an East Asia steel benchmark, to determine a French billet price in that quarter. The Commission then annualised the difference between the French billet costs and the Masteel costs to produce billet used in railway wheels, and uplifted the Masteel billet costs by this annualised percentage.[619]

7.318. The ADC discussed, but declined to make, other adjustments to Valdunes's costs. Certain parties before the ADC raised concerns that the steel billet surrogate costs did not reflect

[610] Australia's response to Panel question No. 12.
[611] China's response to Panel question No. 12.
[612] China's response to Panel question No. 69, paras. 57-59.
[613] Investigation 466 final report (Exhibit CHN-3), pp. 100-102.
[614] Investigation 466 final report (Exhibit CHN-3), p. 22.
[615] Investigation 466 final report (Exhibit CHN-3), pp. 101-102.
[616] Investigation 466 final report (Exhibit CHN-3), p. 25. See also Ibid. p. 96 (explaining that in the statement of essential facts "the Commission calculated the cost of production with reference to the actual costs incurred by Masteel in production of steel billet of the particular grades used to produce railway wheels and uplifted these costs with reference to the difference between these costs, and the billet purchase price for railway wheel grade steel incurred by the French producer examined in this investigation, Valdunes")
[617] Investigation 466 final report (Exhibit CHN-3), pp. 81, 93-94, and 96.
[618] Investigation 466 final report (Exhibit CHN-3), pp. 25, 81, and 98-102.
[619] Investigation 466 final report (Exhibit CHN-3), p. 96. Interested parties also argued that steel billet purchasing costs were irrelevant because Masteel was a vertically integrated producer of steel billet. The ADC disagreed, indicating that "[g]iven the GOC's significant influence on the Chinese steel market and steel input markets, the Commission considers that it is appropriate to uplift Masteel's costs at the steel billet level. This is the most appropriate point to uplift the costs to capture the total impact of the Government influences on the cost to produce steel billet in China". (ibid. pp. 96-97). The subject of whether the cost of purchasing steel billet was relevant at all pertains most directly to China's AD claim 5.d, discussed further below.

comparative advantages that Masteel enjoyed, such as lower labour costs and the fact that Masteel was a "large-scale" producer capable of achieving relatively cheap production of steel billet.[620] The ADC declined to make additional adjustments to Valdunes's costs, however, because:

> The Commission considers that in order to calculate any comparative advantages or disadvantages between Chinese and French billet costs, would [*sic*] require the Commission to isolate and subtract the effect of the GOC's significant involvement in the Chinese steel market. The Commission considers that it would not be possible to isolate and quantify the effect of GOC involvement, with any degree of accuracy, in the relevant markets and to quantify such comparative advantages or disadvantages.[621]

Moreover, the ADC indicated that it had not received information from interested parties that would have allowed it to make such adjustments.[622]

7.319. We consider that the ADC did not reasonably demonstrate that the surrogate costs represented costs of production in China. The costs were taken from a producer in a different country, and the only adjustment made was related to Masteel being a vertically integrated producer of steel billet. There is no explanation in the ADC's findings as to why a *French* company's cost of *purchasing* steel billet would meaningfully represent a *Chinese* company's cost of *producing* steel billet in China. [623]

7.320. On this basis, we find that the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to Masteel's circumstances in China (other than SG&A), represented a cost of production in China for Masteel.[624]

7.5.3 AD claim 5.d under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement: the "manner and circumstances" of rejection of exporters' costs

7.5.3.1 Main party arguments

7.321. China claims that Australia violated Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 due to the "manner" and "circumstances" in which the ADC rejected certain of Masteel's costs in the railway wheels investigation when constructing normal value.[625] China asserts that its claim addresses "what a 'cost' is".[626] China explains that:

> The investigating authority failed to provide any reasoned and adequate explanation as to why *prices* paid in the French market for steel billet used in the production of railway wheels in France were relevant evidence for calculating the *costs* of iron ore, coal and scrap steel and the processing of those materials into railway wheels in China. China

[620] Investigation 466 final report (Exhibit CHN-3), pp. 97-98 and 100.
[621] Investigation 466 final report (Exhibit CHN-3), p. 98. See also Ibid. p. 100 (making same conclusion with respect to similar issue).
[622] Investigation 466 final report (Exhibit CHN-3), p. 98.
[623] We note Australia's argument that "it would be nonsensical – through the choice of reference data under Article 2.2 – to reintroduce the very same distortions that the ADC legitimately excluded under Article 2.2.1.1". (Australia's second written submission, para. 197). We reject this argument because the ADC undertook no meaningful analysis as to why conditions in France, specifically, were meaningfully representative of costs of production of steel billet *in China*, whether distorted or undistorted. It seems to us, rather, that the surrogate prices were certain costs for purchasing steel billet, perhaps free from the alleged Chinese distortions, in France.
[624] China also claims violations of Articles 2.1 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in this context. We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.
[625] China's first written submission, para. 14. China also claims a violation of Article VI:1 of the GATT 1994.
[626] China's first written submission, para. 308.

> submits that it is not possible to provide such an explanation within the legal requirements of Articles 2.2 and 2.2.1.1.[627]

This is so, according to China, because Masteel did not purchase steel billet, and thus using a surrogate cost for steel billet in place of Masteel's raw input costs for the production of steel billet cannot be said to have "'a genuine relationship with the production and sale of the product under consideration'".[628] China clarifies and stresses "that a cost determination carried out and the ultimate calculation of cost must be in relation to a cost of a type incurred by the exporter concerned".[629]

7.322. Australia responds that "the ADC assessed Masteel's records and implemented its cost adjustment at the steel billet level rather than at the raw material level because an adjustment at that level of production was appropriate on the facts of this investigation".[630] Australia emphasizes that, in this context, the ADC took into account information in Masteel's questionnaire response, that the ADC did not have access to verifiable and isolated raw materials costs, and that the ADC adjusted the reference data (i.e. the purchase price of steel billet) to reflect the fact that Masteel was a vertically integrated producer.[631] Australia also contends that China's claim lacks a clear legal basis.[632] Overall, therefore, Australia asserts that this claim, insofar as it relates to the obligation to use costs of production in the country of origin, is subsumed under China's AD claim 1 under Article 2.2, and, insofar as it relates to the second condition of Article 2.2.1.1, it lacks a legal basis.[633]

7.5.3.2 Evaluation

7.323. In this claim, China asks the Panel to find that in the railway wheels investigation the ADC improperly used a cost of *purchasing* steel billet as a substitute for the Chinese exporter's cost of *producing* steel billet in constructing normal value. We recall, however, that we have already found that Australia violated Articles 2.2.1.1 and 2.2 by improperly rejecting Masteel's steel-billet production costs and then failing to adapt the chosen surrogate costs such that they could be considered costs of production in China.[634] We consider that those conclusions already address the key underlying concerns in China's claim here, i.e. that the chosen surrogate costs were an improper substitute for Masteel's relevant steel billet costs. Here, China asks us to state the same conclusion in a somewhat different manner. We therefore consider that we need not separately consider this claim and decline to make any additional findings with respect to it.

7.5.4 AD claim 6.a under Article 2.4 of the Anti-Dumping Agreement

7.324. The applicable legal framework for this claim has already been set forth in section 7.3.4.1 above.

7.5.4.1 Main party arguments

7.325. As already explained in examining AD claims 1 and 3 for this proceeding, above, China argues that the ADC's cost substitution methodology to determine constructed normal values generated disparities between the normal value and the export price.[635] China argues that such disparities represent differences affecting price comparability under Article 2.4 of the Anti-Dumping Agreement, because by using costs higher than an exporter's record costs in constructing normal value, the ADC imputed a price-setting variable of which the exporter was not

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[627] China's first written submission, para. 313. (emphasis original)

[628] China's first written submission, para. 312 (quoting Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.24). See also China's first written submission, paras. 280-289 and 307-314.

[629] China's response to Panel question No. 15, para. 52.

[630] Australia's first written submission, para. 253.

[631] Australia's first written submission, paras. 253 and 260-272.

[632] Australia's first written submission, paras. 255-259. This is so because, according to Australia, insofar as this claim concerns the use of costs in the country of origin, that claim is already addressed in AD claim 1, and insofar as this claim relies on the second condition of Article 2.2.1.1 (i.e. related to AD claim 3), that condition was not the basis for the ADC's decision to not use the relevant exporters' costs, but, rather, the ADC relied on the term "normally" in Article 2.2.1.1 in this context.

[633] Australia's response to Panel question No. 18; second written submission, paras. 204-214.

[634] See discussions of AD claims 1 and 3 for railway wheels, above.

[635] China's first written submission, paras. 326 and 336; opening statement at the first meeting of the Panel, paras. 89 and 90.

cognisant and thus necessarily did not take into account when making export sales.[636] China submits that absent any due allowances to account for these disparities[637], the comparison between the normal value as constructed and the export price in each of the three investigations was not a "fair comparison" under Article 2.4.[638] China, however, asserts that if the Panel were to find violations of Articles 2.2, and 2.2.1.1, then there would be no need for the Panel to address this claim. China notes that this approach was followed by the Appellate Body in *EU – Biodiesel (Argentina)*.[639]

7.326. Australia argues that this claim is "entirely, and impermissibly, premised on China's disagreement with Australia's construction of normal value, and not on any failure to make due allowances under Article 2.4".[640] Australia argues that there is no textual basis to challenge the ADC's normal value calculation under Article 2.4. Australia thus rejects China's position that Australia's cost substitution resulted in a difference as between normal value and export price that required an adjustment under Article 2.4. In Australia's view, Article 2.4 is only concerned with making appropriate adjustments that are unrelated to the construction of normal value pursuant to Article 2.2, because Article 2.4 presupposes that the normal value and export price have already been established.[641] Australia agrees with China that the Panel need not proceed to an analysis under Article 2.4 if China succeeds on AD claims under Articles 2.2 and 2.2.1.1.[642]

7.5.4.2 Evaluation

7.327. We have already set out our understanding of the relationship between China's claim under Article 2.4, and its claims under Articles 2.2 and 2.2.1.1, in discussing AD claim 6.a in the context of the wind towers proceedings, further above. We continue to consider that the adjustments China requests pursuant to Article 2.4 would essentially require the authority to construct normal value using the exporters' costs of production in China. This is the issue addressed in the context of China's claims under Articles 2.2 and 2.2.1.1. We have already found that the ADC acted inconsistently with Articles 2.2 and 2.2.1.1 in resorting to surrogate costs in the railway wheels investigation in examining AD claims 1 and 3 with respect to this proceeding. Accordingly, we consider it unnecessary to examine further whether the ADC also failed to conduct a fair comparison under Article 2.4 by failing to make any adjustments linked to such use of surrogate costs.

7.5.5 AD claim 7.b under Article 2.2.2 of the Anti-Dumping Agreement: profits not actually realized in the domestic market

7.328. The applicable legal framework for this claim has already been set forth in section 7.3.5.1 above.

7.5.5.1 Main party arguments

7.329. China recalls that, in the railway wheels investigation, the ADC found that the only investigated Chinese exporter, Masteel, did not sell like products domestically. Accordingly, when constructing normal values, the ADC could not calculate profit based on actual data pertaining to domestic sales of the like product, as envisaged in the *chapeau* of Article 2.2.2. China asserts that the ADC instead used the method provided for in Article 2.2.2(i), which refers to the actual amount of profit realized on domestic sales for the same general category of products.[643] China claims that, in doing so, the ADC acted inconsistently with Article 2.2.2(i):

a. by including exported products in its calculation of the profit rate of the exporter in respect of production and sales in the domestic market of the same general category of products under Article 2.2.2(i). More specifically, China contends that the profit rate was calculated with reference to Masteel's entire Wheels Division, which made both export and domestic

[636] China's first written submission, paras. 332-333 and 335.
[637] China's first written submission, paras. 327-331.
[638] China's first written submission, paras. 15(a), 322, and 327.
[639] China's second written submission, para. 279.
[640] Australia's first written submission, paras. 314, 318, and 413. See also ibid. paras. 532-535.
[641] Australia's first written submission, para. 328; second written submission, paras. 216, 218, and 221.
[642] Australia's response of Panel question No. 20, para. 40.
[643] China's first written submission, paras. 425-426.

sales.[644] The profit was therefore, according to China, not based on "sales in the domestic market" as required by Article 2.2.2(i); and

b. by applying that profit rate to a constructed cost of production using non-Chinese surrogate costs, instead of the Chinese exporter's recorded cost of production in the country of origin, the profit was therefore, according to China, not "the actual amounts incurred and realized" by the exporter, as required by Article 2.2.2(i).[645]

7.330. China further argues that the ADC knew that the data it used included both domestic sales and export sales.[646] China rejects Australia's argument that it was not possible for the ADC to distinguish and separate export sales from domestic sales.[647] In China's view, Australia cannot shift the investigating authority's obligation to determine profits on the basis of actual data in the domestic market to the exporting producers.[648] According to China, Masteel was misled to believe that the profit was calculated from the data pertaining to its domestic sales, instead of from the data pertaining to global sales that included both domestic and export sales.[649]

7.331. Australia agrees with China that the ADC relied on Article 2.2.2(i) in making the profit determination in this context, and that in doing so the ADC was required to use actual profit amounts realized by Masteel in the Chinese domestic market.[650] Australia argues, however, that China failed to make a *prima facie* case that the sales figures used by the ADC included Masteel's sales in both the domestic and export markets.[651] Australia acknowledges that the ADC used Masteel's sales data of all railway wheels from Masteel's "Wheels Division" as its basis, which included both domestic and export sales.[652] However, Australia contends that the sales data were *the best available verified information* the ADC could obtain from Masteel on the actual amounts it had incurred and realized from the sale of railway wheels *in the Chinese domestic market*.[653] Australia argues that Masteel had suggested that the ADC use this data for this purpose.[654] Australia further argues that neither Masteel nor the Chinese Government raised any concerns or objections to the method used by ADC to calculate the profits during the investigation.[655]

7.332. In response to China's argument that the ADC arrived at incorrect amounts for profit by applying its calculated profit rate to a constructed cost of production instead of the Chinese exporter's recorded cost of production in the country of origin, Australia offers two arguments. First, Australia argues that China failed to make a *prima facie* case of inconsistency because the ADC determined amounts for profits using the best available verified information it could obtain from Masteel on the actual profits it had realized from the sale of railway wheels in China's domestic market. Second, Australia argues that, given China's allegation that the ADC improperly applied the profit rate to the cost of production is entirely contingent on China's claim under Article 2.2 (AD claim 1), China failed to make a *prima facie* case of inconsistency under this claim because it failed to make a *prima facie* case under Article 2.2.[656]

7.5.5.2 Evaluation

7.333. We recall that Article 2.2.2(i) allows an investigating authority to determine the profit on the basis of "the actual amounts incurred and realized by the exporter or producer in question in respect

[644] Investigation 466 Masteel verification visit report, appendix 3 "Domestic Sales", tab "(b) Profit" (Exhibit CHN-48 (BCI)).
[645] China's first written submission, paras. 431-432.
[646] China's second written submission, para. 314.
[647] China's second written submission, para. 314.
[648] China's second written submission, para. 316.
[649] China's second written submission, paras. 315 and 316.
[650] Australia's first written submission, para. 334.
[651] Australia's first written submission, paras. 335-336.
[652] Australia's first written submission, para. 341; second written submission, para. 228.
[653] Australia's first written submission, paras. 335-336; second written submission, para. 228. In response to a question from the Panel, Australia clarified that it "has not suggested that the finding was made on basis of facts available in the sense of an Article 6.8 AD determination. The reference to 'best available' in this context merely meant that the ADC used the only verified information that was available". (Australia's response to Panel question No. 31, para. 91).
[654] Australia's second written submission, para. 228.
[655] Australia's first written submission, para. 339; second written submission, para. 228; and response to Panel question No. 31, para. 90.
[656] Australia's first written submission, para. 342.

of production and sales in the domestic market of the country of origin of the same general category of products".

7.334. This claim contains two aspects: first, that the ADC failed to calculate profit on the basis of "sales in the domestic market" within the meaning of Article 2.2.2(i); and second, that the ADC calculated Masteel's profit by applying a profit rate to an uplifted cost of production. We begin with the first. In this regard, the parties agree that: (a) the ADC determined profit on the basis of Article 2.2.2(i)[657]; and (b) the ADC used sales data pertaining to "all railway wheels" produced by the Wheels Division of Masteel, which included both domestic sales and export sales. Specifically, in response to a question posed by the Panel, Australia confirmed that the data it used for the purpose of calculating profit included data related to both export sales and domestic sales:

> The cost and sales data relied on was split into 2 categories labelled "Goods Sub Type A … Wheel Under Investigation Scope" and "Goods Sub Type B … Wheel Not Under Investigation Scope".
>
> Of these categories, "Goods Sub Type A … Wheel Under Investigation Scope" *were disaggregated by market* but was not usable for the profit calculation since Masteel had no sales of the like product in China during the investigation period. The second category, "Goods Sub Type B … Wheel Not Under Investigation Scope", was not disaggregated and *included both domestic and export sales*. The ADC was not able, on the basis of the verified cost data before it, distinguish between export sales and domestic sales in this latter category. [658]

7.335. Accordingly, we find that the ADC did not calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of sales only "in the domestic market of the country of origin", as required by Article 2.2.2(i).

7.336. Australia raises three principal arguments to justify the ADC's use of data which included export sales. First, Australia argues that the data was the best available verified information concerning "the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products". Second, Australia argues that Masteel had proposed that the ADC use the data set that contained both domestic and export sales.[659] Third, Australia argues that neither Masteel nor the Chinese Government raised any concerns or objections to the method used by ADC to calculate the profits during the investigation (which included data pertaining to both domestic and export sales). We reject all three of these arguments, because Article 2.2.2(i) contains no exception or qualification from the rule to use actual data which pertains to "sales in the domestic market".[660] Australia's arguments are premised on an exception that does not exist.

7.337. Accordingly, with respect to the first aspect of China's claim, we conclude that the ADC acted inconsistently with Article 2.2.2(i) by failing to calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of "sales in the domestic market of the country of origin".

7.338. Turning to the second aspect of China's claim involving the calculation of amounts of profit in the railway wheels investigation, we note that the ADC applied a profit rate to a constructed cost of production using surrogate costs, rather than using the Chinese exporter's recorded costs of production.[661] The profit was therefore, according to China, not "the actual amounts incurred and

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[657] Australia's first written submission, para. 334. See also Investigation 466 final report (Exhibit CHN-3), p. 25, where the ADC stated that "[a]s Masteel does not sell like goods in China, the Commission was unable to calculate profit under subsection 45(2) of the Regulation. The Commission has instead calculated an amount for profit under subsection 45(3)(a) of the Regulation by identifying the *actual amounts realised by Masteel from the sale of the same general category of goods (other types of railway wheels sold by Masteel) on the domestic market in China*". (emphasis added)

[658] Australia's response to Panel question No. 31, paras. 92-93. (emphasis added)

[659] Australia's second written submission, para. 228.

[660] In response to a question from the Panel, Australia clarified that the present case does not concern a situation where there was no data concerning "sales in the domestic market" or a lack of cooperation from the exporting producer which justified the use of facts available under Article 6.8 of the Anti-Dumping Agreement. (Australia's response to Panel question No. 31, para. 91).

[661] See also Investigation 466 final report (Exhibit CHN-3), p. 25.

realized" by the exporter, as required by Article 2.2.2(i).[662] We thus recall that we have found above with respect to AD claims 1 and 3 that the ADC acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement by improperly rejecting certain of Masteel's costs of production when constructing normal value, and replacing them with surrogate costs that did not represent Masteel's cost of production in the country of origin. Under these circumstances, we discern no way in which such amounts could be said to represent the "actual amounts incurred and realized" by Masteel in the domestic market, as required by Article 2.2.2(i). Accordingly, with respect to the second aspect of China's AD claim 7.b, we find that the ADC acted inconsistently with Article 2.2.2(i) by using non-Chinese surrogate costs of production in its profit determination in the railway wheels investigation.[663]

7.5.6 AD claim 8 under Article 9.3 of the Anti-Dumping Agreement: collection of duties in excess of the margin of dumping

7.339. The applicable legal framework for this claim has already been set forth in section 7.2.3 above.

7.5.6.1 Main party arguments

7.340. China asserts that Australia has collected anti-dumping duties on the basis of margins of dumping that were inflated as a result of the alleged WTO-inconsistencies challenged in China's other AD claims. [664] China claims that, as a result, Australia has collected anti-dumping duties in excess of the margins of dumping that would have been "properly established" under Article 2, contrary to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[665]

7.341. Australia argues that China's claim under Article 9.3 is purely consequential, and that it must fail given that the ADC's calculation of relevant dumping margins was consistent with Article 2 of the Anti-Dumping Agreement.[666]

7.5.6.2 Evaluation

7.342. To the extent that we have found above that the ADC acted inconsistently with the provisions of Article 2, we consider that China has established, as a matter of fact, that the dumping margins were improperly inflated through the use of "uplifted" surrogate costs in the railway wheels investigation. In this regard, we note that the ADC stated in the final report of Investigation 466 that "[t]he Commission considers that the suitable benchmark is to *uplift* Masteel's steel billet input costs to reflect the difference between these costs and the costs incurred by Valdunes, as adjusted for SG&A expenses that Masteel would not have incurred in the production of railway wheels in China" and that Masteel's cost of production of steel billet was "typically lower than the Valdunes purchase price".[667] We note that Australia does not argue otherwise. Rather, Australia appears to treat the success of China's claim under Article 9.3 as dependent on the other underlying claims under the Anti-Dumping Agreement. In the absence of any rebuttal from Australia, this in our view establishes *prima facie* that the anti-dumping duties imposed by the ADC exceeded the margins of dumping that would have been established had the authorities acted consistently with Article 2.

[662] China's first written submission, paras. 431-432.

[663] China also claims violations of Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in this context. (See China's first written submission, section G.6). However, China does not elaborate on these claims. We discern no independent basis on which to find violations of these provisions. The Panel declines to make findings as to these claims as it would not be helpful in resolving the dispute.

[664] See for example, China's first written submission, para. 338; opening statement at the first meeting of the Panel, para. 111; and responses to Panel question No. 17, para. 62, No. 19, para. 68, No. 23, para. 94, and No 110, paras. 240 and 246.

[665] China's first written submission, paras. 458, 459-480. See also China's second written submission, para. 325.

[666] Australia's first written submission, paras. 165, 344-345, and 474; second written submission, para. 230.

[667] Investigation 466 final report (Exhibit CHN-3), pp. 25 and 93 (emphasis added); Investigation 466 Maasteel verification visit report, appendix 2 "CTMS", tab "(a) CTMS" (Exhibit CHN-53 (BCI)) and Investigation 466 Maasteel verification visit report, appendix 2 "CTMS (Final with uplift)", tab "(a) CTMS" (Exhibit CHN-54) (showing an increase in "material costs" attributable to adjustments made by the ADC).

7.343. Accordingly, we uphold China's claim that Australia acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.6 Whether to issue findings and recommendations for expired aspects of the anti-dumping and countervailing duty orders

7.344. With respect to certain claims above, we have found that challenged aspects of the anti-dumping and countervailing duty orders are expired. As explained in those sections, we decline to make findings or recommendations with respect to the claims that pertain to those aspects. This section sets forth our reasoning for so declining.

7.345. At the outset, we agree with China and previous statements by the Appellate Body that we have jurisdiction to rule on expired measures.[668] We also agree with previous panel and Appellate Body reports indicating that panels have discretion as to whether to issue findings with respect to expired measures.[669] We note that the relatively recent panel report in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* engaged in a detailed discussion regarding the manner in which panels have exercised this discretion.[670] We agree with that panel that:

> Panels have attached importance to several different considerations, including most notably (1) whether the measure at issue was withdrawn prior to, or only after, the establishment of the panel by the DSB; (2) whether there was a risk of reintroduction of the same or materially similar measure; and (3) whether findings on the withdrawn measure would have any practical value for implementation in the light of other findings on materially similar measures. None of these three considerations is decisive in and of itself, and they do not necessarily exhaust the circumstances that panels may take into account when deciding how to exercise their discretion[.][671]

We also agree with that panel that "[i]n respect of measures withdrawn before panel establishment, panel practice appears to heavily lean against making any findings; in respect of measures withdrawn after panel establishment, panel practice appears to heavily lean towards panels making findings on such measures, but not making any recommendation pursuant to Article 19.1 of the DSU".[672]

7.346. China generally asserts that the same arguments which mitigate, in its view, in favour of finding that the measures are not expired also mitigate in favour of making findings and recommendations with respect to them even if they are expired.[673] We described such arguments extensively in section 7.2.1 above, and in the sections addressing expiry of specific aspects. We thus will not repeat them here. We are also cognizant that we may consider a range of factors in deciding whether to issue findings on expired measures. In our view, we discern no factor or combination of factors that may point in favour of making findings that outweigh the fact that certain aspects of the anti-dumping and countervailing duty orders expired before panel establishment. We therefore recall that certain aspects of the anti-dumping and countervailing duty orders have expired by virtue of: (a) the ADC's findings in the wind towers and stainless steel sinks expiry reviews, which were concluded in 2019 and 2020, respectively; and/or (b) the administrative review, pursuant to which TSP was excluded from the anti-dumping order, concluded in 2020.[674] All were concluded before

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[668] See e.g. China's second written submission, paras. 87-95; Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270 (explaining that the DSU "nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue").

[669] See e.g. Appellate Body Report, *EU – PET (Pakistan),* para. 5.19 (explaining that "a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU", and that "[w]ithin this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue").

[670] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, appealed 9 September 2019, section 7.4.3.1. This panel report was circulated on 12 July 2019, and appealed on 9 September 2019. It has not yet been adopted by the DSB. We nonetheless find its examination persuasive insofar as we cite it, as is the case with other reports cited with approval in this Report.

[671] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, appealed 9 September 2019, para. 7.468.

[672] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, appealed 9 September 2019, para. 7.469. (fns omitted)

[673] China's second written submission, para. 92.

[674] See section 2 above.

Panel establishment in 2022. We consider this factor decisive, and we decline to issue findings or recommendations as to the expired aspects of the orders on that basis.[675]

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. **Wind towers**:

i. with respect to AD claim 3, in the expiry review, the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because there was no basis for departing from using TSP's record costs for steel plate in constructing normal value;

ii. with respect to AD claim 1, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by uplifting TSP's steel plate costs for the purpose of constructing normal value, and then transferring that methodology over onto the ADC's calculation of normal values for the uncooperative and all other exporters, without a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to TSP's circumstances, represented a cost of production in China for TSP;

iii. it is unnecessary to examine AD claim 5.c under Articles 2.1, 2.2, 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, because the claim is already effectively addressed under AD claims 1 and 3;

iv. with respect to AD claim 6.a, having already found violations of Articles 2.2 and 2.2.1.1, it is unnecessary to examine whether the ADC failed to conduct a fair comparison under Article 2.4 of the Anti-Dumping Agreement by making adjustments to account for the differences generated by the use of surrogate costs in constructing normal value;

v. with respect to AD claim 7.a, China has not demonstrated that the ADC acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement because it failed to make a *prima facie* case that the ADC applied a profit rate to "uplifted" cost data in the expiry review;

vi. with respect to AD claim 7.c, in the expiry review, the ADC acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by determining that the domestic sales did not permit a proper comparison with export sales on the basis of a "relevance" test that has no basis in Article 2.2; and

vii. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the expiry review, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

b. **Stainless steel sinks**:

i. with respect to AD claims 3 and 4, China has not demonstrated that the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and thus acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement, by

[675] The situation with respect to the ADC's initiation decision with respect to Program 1 is somewhat unique, since our basis for that finding was that the ADC need not rely on the original initiation decision in order to investigate Program 1. See section 7.4.11.2 above. This is not technically due to the ADC's findings in the expiry review, *per se*, but due to a more general legal situation existing under Australian law. Nonetheless, we consider that the aspect expired before Panel establishment because that general legal situation existed even at the time of the expiry review.

rejecting exporters' record costs for purposes of performing the ordinary-course-of-trade test in the expiry review;

ii. with respect to AD claims 1 and 2, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the surrogate costs, with only adjustments for delivery and slitting costs, represented a cost of production in China. Thus, the ADC also acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because it used surrogate costs that were not demonstrated to be costs of production in the country of origin in performing the ordinary-course-of-trade test;

iii. with respect to AD claim 6.a, having already found a violation of Articles 2.2 and 2.2.1, it is unnecessary to issue findings on whether the ADC acted inconsistently with Article 2.4 the Anti-Dumping Agreement by failing to make adjustment to account for the differences generated through the use of surrogate costs in applying the ordinary-course-of-trade test. Also, insofar as the claim is based on the comparison of export price and a normal value that is constructed using surrogate costs, we decline to issue findings with respect to this aspect of the order because it is expired;

iv. with respect to AD claim 6.b.i, China has not demonstrated that the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the expiry review in determining that the VAT recoverability difference between domestic and export sales affected price comparability between the normal value and export price. However, in the expiry review, the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by applying a percentage to the normal value base that was flawed via the use of surrogate costs in applying the ordinary-course-of-trade test;

v. with respect to AD claim 6.b.ii, in the expiry review, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.4 of the Anti-Dumping Agreement by treating accessories purchased by Primy from third-party suppliers differently from accessories produced by Primy without an adequate and reasonable explanation. However, China has not demonstrated that the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in the expiry review by using an averaging methodology in calculating the adjustments to account for differences in accessories for the exporting producer Primy;

vi. with respect to AD claim 6.b.iii, in the expiry review, the ADC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by comparing export models to export models for purposes of performing a fair comparison as between the normal value and export price for Zhuhai Grand;

vii. with respect to AD claim 7.a, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by using the cost of production incorporating surrogate costs in its determination of profit, because this aspect of the order is expired;

viii. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the expiry review, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;

ix. with respect to CVD claims 2 and 3, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by improperly rejecting in-country benchmarks and instead using a benchmark that did not relate to the prevailing market conditions

in the country of provision (i.e. China) because this aspect of the order challenged by China is expired;

x. with respect to CVD claim 4, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Article 2.1(c) of the SCM Agreement by improperly determining that Program 1 was specific because this aspect of the order challenged by China is expired; and

xi. With respect to CVD claim 5, the Panel declines to issue findings with respect to China's claim that the ADC acted inconsistently with Articles 11.1, 11.2, and 11.3 of the SCM Agreement by failing to properly evaluate the sufficiency of the application for the purpose of justifying the initiation of the investigation into Program 1, because this aspect of the order challenged by China is expired.

c. **Railway wheels**:

i. with respect to AD claim 3, in the original investigation, the ADC acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it had no basis for departing from using Masteel's record costs of production when constructing normal value;

ii. with respect to AD claim 1, in the original investigation, the ADC acted inconsistently with the practice of an unbiased and objective investigating authority with respect to Article 2.2 of the Anti-Dumping Agreement by failing to provide a reasoned and adequate explanation as to why the uplifted costs, without any adjustments to adapt such uplifted costs to Masteel's circumstances in China (other than SG&A), represented a cost of production in China for Masteel;

iii. with respect to AD claim 5.d, it is unnecessary to consider this claim under Articles 2.1, 2.2, and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the claim is already effectively addressed under AD claims 1 and 3;

iv. with respect to AD claim 6.a, having already found violations of Articles 2.2 and 2.2.1.1, it is unnecessary to examine further whether the ADC also failed to conduct a fair comparison under Article 2.4 by failing to make any adjustments linked to such use of surrogate costs in constructing normal value;

v. with respect to AD claim 7.b, in the original investigation, the ADC acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by failing to calculate profit on the basis of the actual amounts incurred and realized by Masteel in respect of "sales in the domestic market of the country of origin". The ADC also acted inconsistently with Article 2.2.2(i) of the Anti-Dumping Agreement by using surrogate costs of production in its profit determination; and

vi. with respect to AD claim 8, to the extent that the ADC acted inconsistently with the provisions of Article 2 of the Anti-Dumping Agreement in the original investigation, the ADC also acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATT 1994 and Anti-Dumping Agreement, they have nullified or impaired benefits accruing to China under those agreements.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that Australia bring its measures into conformity with its obligations under the GATT 1994 and the Anti-Dumping Agreement.