

Before the World Trade Organization

Panel Proceedings

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

(DS598)

AUSTRALIA'S EXECUTIVE SUMMARY

Business Confidential Information - REDACTED

19 September 2022

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<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , <u>WT/DS70/AB/R</u> , adopted 20 August 1999, DSR 1999:III, p. 1377
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<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R , adopted 17 November 2000, DSR 2000:XI, p. 5295
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<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , <u>WT/DS331/R</u> , adopted 24 July 2007, DSR 2007:IV, p. 1207
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<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , <u>WT/DS379/AB/R</u> , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , <u>WT/DS436/AB/R</u> , DSR 2014:VI, p. 2189
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <u>WT/DS184/AB/R</u> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <u>WT/DS184/R</u> ,

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<i>US – Large Civil Aircraft (2nd Complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <u>WT/DS353/AB/R</u> , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , <u>WT/DS277/R</u> , adopted 26 April 2004, DSR 2004:VI, p. 2485
<i>US – Supercalendered Paper</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , <u>WT/DS505/R</u> and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
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<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <u>WT/DS248/AB/R</u> , <u>WT/DS249/AB/R</u> , <u>WT/DS251/AB/R</u> , <u>WT/DS252/AB/R</u> , <u>WT/DS253/AB/R</u> , <u>WT/DS254/AB/R</u> , <u>WT/DS258/AB/R</u> , <u>WT/DS259/AB/R</u> , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , <u>WT/DS464/AB/R</u> and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <u>WT/DS166/AB/R</u> , adopted 19 January 2001, DSR 2001:II, p. 717

LIST OF ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Imported Barley from Australia", 18 May 2020
Anti-Dumping Final Disclosure	MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020
BCI	business confidential information
CICC	China International Chamber of Commerce
Countervailing Duties Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Countervailing Duty Investigation into Imported Barley from Australia", 18 May 2020
Countervailing Duties Final Disclosure	MOFCOM, "Basic facts based on which final determination on the countervailing duty investigation is made", 8 May 2020
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Injury POI	Injury period of investigation (1 January 2014 to 30 September 2018)
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	period of investigation (1 October 2017 to 30 September 2018)
SARMS Program	South Australian River Murray Sustainability Program
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SRWUI Program	Sustainable Rural Water Use and Infrastructure Program
VAIJ Fund	Agriculture Infrastructure and Jobs Fund – Victoria
WTO	World Trade Organization

I. INTRODUCTION

1. Australia has established that China's measures imposing anti-dumping and countervailing duties on Australian barley are inconsistent with China's obligations under the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994. These measures are the result of WTO-inconsistent investigations and determinations by China's investigating authority, MOFCOM.

2. China has failed to provide any legal or factual basis to rebut Australia's *prima facie* case in respect of each claim that Australia advanced. Instead, China has referred back to incomprehensible passages in the Final Determinations, contested translations in Australia's versions of the Final Determinations that are neither relevant nor material to the issues before the Panel, introduced *ex post facto* rationalisations, and attempted, through its interpretations, to hollow out key obligations in the Anti-Dumping and SCM Agreements.

A. MEASURES AT ISSUE

3. In its anti-dumping investigation, MOFCOM determined that Australian barley was dumped into the Chinese market and that dumped imports of Australian barley were causing material injury to the Chinese domestic barley industry.¹ In its countervailing duty investigation, MOFCOM determined that three of the 32 investigated programs – the SRWUI Program,² the SARMS Program,³ and the VAIJ Fund⁴ – were countervailable subsidies and were causing material injury to domestic industry.⁵

4. In both investigations, MOFCOM acknowledged receipt of interested parties' questionnaire responses, but rejected all information provided in those responses. Instead, MOFCOM based its dumping and subsidy determinations largely on facts available. It recommended an anti-dumping duty rate of 73.6% and a countervailing duty rate of 6.9% on barley from Australia.

5. On 19 May 2020, China imposed the anti-dumping and countervailing duties at the rates that MOFCOM recommended. All traders and producers were assigned identical rates of anti-dumping and countervailing duties, in force for five years.⁶

B. STANDARD OF REVIEW

6. As a preliminary matter, Article 11 of the DSU and Articles 17.5 and 17.6 of the Anti-Dumping Agreement establish the standard of review in this dispute. In sum, the

¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 22.

² Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7-9.

³ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9-10.

⁴ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10-12.

⁵ Countervailing Duties Announcement (Exhibit AUS-4), p. 1; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁶ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 1; Countervailing Duties Announcement (Exhibit AUS-4), p. 1.

questions before the Panel are: (i) whether MOFCOM's establishment of the facts was proper; and (ii) whether an unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, could have reached MOFCOM's conclusions.⁷

II. MOFCOM'S DEFINITION OF DOMESTIC INDUSTRY LACKED ANY EVIDENTIARY BASIS

7. The definition of the "domestic industry" selected by an investigating authority is a "keystone"⁸ of its investigation. In the investigations at issue, MOFCOM failed to properly define the domestic industry in accordance with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. Although MOFCOM acknowledged the two ways that the domestic industry may be defined (i.e. the domestic producers as a whole of the like products or those domestic producers whose collective output of the products constitutes a major proportion of the total domestic production of those products) and stated that it "investigated and confirmed the domestic industry in this case",⁹ it failed to specify which definition it had selected for purposes of the investigations. The texts of the Final Determinations appear to be "purposefully ambiguous" about which definition MOFCOM applied.¹⁰

8. Australia considered that MOFCOM purported to define the "domestic industry" on the basis of the domestic producers whose collective output of like products constituted a major proportion of the total domestic production of those products. This was based on the text of the Final Determinations, in the section entitled "Determination of the domestic industry", in which MOFCOM considered that "the relevant organizations of the six major production areas" in six provinces that "jointly authorized the Applicant to submit investigation applications ... accounted for more than 50% of the total domestic barley output".¹¹ The adjective "relevant" suggested that the organisations had some connection to the production of barley in the six provinces.¹² However, during the Panel proceedings, China revealed that these organisations were in fact [[XXX]]¹³ without any connection to barley production.¹⁴

9. On the basis of this apparent definition, Australia argued that MOFCOM had failed to satisfy both the "quantitative" and "qualitative" elements of a "major proportion". Australia argued, *inter alia*, that MOFCOM failed to provide: (i) the aggregate production volume of the producers that the "relevant organizations" purportedly represented; (ii) any explanation as

⁷ Panel Report, *US – Softwood Lumber VI*, para. 7.15; Australia's first written submission, section I.E.

⁸ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.397.

⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

¹⁰ Australia's opening statement at the second meeting of the Panel, para. 39.

¹¹ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 13-14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14; Australia's first written submission, para. 546.

¹² Australia's second written submission, para. 28.

¹³ Relevant organizations (Exhibit CHN-15 (BCI)).

¹⁴ Australia's second written submission, para. 28.

to how those producers' proportion of total domestic production was determined; and (iii) on what basis MOFCOM considered this to represent a "major proportion" capable of "substantially reflecting" the total domestic production, including with respect to the exclusion of the domestic producers in at least 14 barley-producing provinces.¹⁵

10. China attempted to "remedy"¹⁶ the ambiguity in MOFCOM's Final Determinations and deflect Australia's arguments by asserting, *ex post facto*, that MOFCOM "defined 'domestic industry' as producers as a whole".¹⁷ This argument does not have any basis in the text of the Final Determinations and conflates MOFCOM's flawed assessment of the Applicant's standing with its definition of the domestic industry.¹⁸ These obligations are separate, and must not be conflated.¹⁹

11. China similarly supported its assertion by claiming that MOFCOM conducted its injury and causation analyses on the basis of evidence concerning the "overall" Chinese barley industry.²⁰ To this end, China contended that the data provided by the [[XXX]] at the Annexes to CICC's Questionnaire Responses are "clearly [...] the data of 'domestic producers as a whole' of barley, or representative of the state of the 'domestic producers as a whole' of barley".²¹ These *ex post facto* rationalisations fail to address the obligation to define the "domestic industry" under Articles 4.1 and 16.1.²² As to China's claim concerning the data, Exhibits CHN-22 and 23 demonstrate the lack of evidence on the record from any actual domestic barley producer, let alone the "domestic producers as a whole".²³

12. Australia emphasises that China's characterisation of MOFCOM's purported approach to defining the domestic industry, if accepted, would remove the need for the identification, participation, or evidence of the actual domestic industry in an investigation.²⁴ This would be an "unsustainable outcome, systemically".²⁵

¹⁵ Australia's first written submission, paras. 546-549.

¹⁶ See Australia's opening statement at the second meeting of the Panel, para. 40 and footnotes thereto.

¹⁷ China's response to Panel question No. 43 following the first meeting of the Panel, para. 142.

¹⁸ Australia's second written submission, paras. 29-30. See also Australia's opening statement at the second meeting of the Panel, para. 40.

¹⁹ Australia's second written submission, paras. 29-30. See also Australia's first written submission, section IV.A; Appellate Body Reports, *EC – Fasteners (China)*, para. 418; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.323.

²⁰ China's first written submission, para. 435. See also China's responses to Panel question Nos. 43, 44 and 55 following the first meeting of the Panel; China's second written submission, paras. 139-140.

²¹ China's second written submission, para. 140.

²² Australia's opening statement at the second meeting of the Panel, para. 42. See also Australia's second written submission, paras. 32-35.

²³ Australia's opening statement at the second meeting of the Panel, para. 43.

²⁴ Australia's second written submission, para. 35.

²⁵ Australia's opening statement at the second meeting of the Panel, para. 45. See also Australia's second written submission, paras. 34-35.

III. INITIATION

13. China has acted inconsistently with its WTO obligations under Articles 5.1, 5.2(i), 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement and Articles 11.1, 11.2(i), 11.3, 11.4 and 11.9 of the SCM Agreement in relation to the initiation of the investigations.

A. APPLICATIONS WERE NOT MADE BY OR ON BEHALF OF DOMESTIC INDUSTRY, AND THE APPLICANT DID NOT HAVE STANDING

14. CICC's applications for the initiation of investigations failed to identify the domestic industry on whose behalf the applications were allegedly made. Specifically, the applications did not contain any list of known domestic producers, or associations of domestic producers, of the like product, contrary to the requirements of Article 5.2(i) of the Anti-Dumping Agreement and Article 11.2(i) of the SCM Agreement.²⁶ The nature of the domestic industry, including where it consists of small-scale and scattered firms, does not exempt an applicant from meeting the obligation to provide a list of either known domestic producers or associations of domestic producers. This requirement is express and nondiscretionary, and it ensures an authority does not receive frivolous or baseless claims for investigation submitted without industry support.²⁷ The Applicant, CICC, purported to act as a "representative" on the domestic industry's request.²⁸ If this was the case, CICC should have been reasonably capable of providing MOFCOM with a list of all known domestic producers that had requested it to make the applications on their behalf. CICC failed to do so, and MOFCOM failed to ensure that this mandatory identification requirement was met before initiating the investigations.

15. Moreover, pursuant to Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement, an investigating authority is required to determine that the application has been "made by or on behalf of the domestic industry" before it may properly initiate an investigation. MOFCOM failed undertake any such assessment in relation to CICC's applications. If MOFCOM had undertaken such an assessment, it would have determined that the information on which CICC purported to rely – a confidential report from an "authoritative third-party organization" – only confirmed that no domestic producer had participated in any aspect of the applications. Indeed, those reports *prove* that CICC's applications were not made on behalf of the domestic industry.

16. Finally, MOFCOM failed to undertake any assessment regarding whether CICC had standing to make an application, as required under Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.²⁹ MOFCOM's sole passing mention of standing occurs in its Final Determinations, 15 months after it had made the decision to initiate

²⁶ Australia's first written submission, section VII.B.1; second written submission, section II.B.2.

²⁷ The unique exception is where the applicant itself constitutes the domestic industry. See generally Canada's third party submission, para. 12; Australia's first written submission, para. 766; response to Panel question No. 55 following the first meeting of the Panel, para. 161.

²⁸ See Australia's first written submission, paras. 751, 766.

²⁹ Australia's first written submission, paras. 772-775.

investigations.³⁰ There is no indication that MOFCOM conducted any such assessment *prior* to initiation, as the Agreements require. In this belated standing determination, MOFCOM purportedly relied on record evidence. On examination, however, this record evidence did not demonstrate that the applications had the degree of support required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.³¹

17. As a consequence of these failings, MOFCOM did not comply with its obligations to initiate investigations in accordance with the Agreements in breach of Articles 5.1, 5.2(i), 5.3 and 5.4 of the Anti-Dumping Agreement and Articles 11.1, 11.2(i), 11.3 and 11.4 of the SCM Agreement.³²

B. MOFCOM HAD INSUFFICIENT EVIDENCE TO JUSTIFY INITIATION

18. Articles 5.2 and 5.3 of the Anti-Dumping Agreement and Articles 11.2 and 11.3 of the SCM Agreement require that an application contain evidence of dumping, subsidisation, injury and causation and, further, that an investigating authority must assess the accuracy and adequacy of such evidence to determine whether it is "sufficient" to justify the initiation of an investigation.³³ An applicant must submit a degree of "actual evidence" in support of its application.³⁴ CICC's evidence in its applications was not of the "quantity" and "quality" to meet the threshold of "sufficient evidence".³⁵ Pursuant to Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement, MOFCOM was therefore required to reject CICC's applications, however, it failed to do so.³⁶

19. The applications did not contain actual evidence of the existence of domestic industry, dumping (including any of the constituent elements of normal value, export price, and fair comparison), subsidisation (including any of the constituent elements of financial contribution, benefit, and specificity for each of the alleged programs), injury, or causation.³⁷

20. With respect to dumping, the applications did include export price adjustments. However, MOFCOM applied these adjustments without any explanation as to how they pertained to exports of barley from Australia to China.³⁸ In relation to injury, Annex VII of each application contained only general information in the form of broad averages, derived from unknown data sets by an unidentified "authoritative third-party institution".³⁹ This information suffered from the same absence of any connection to actual domestic producers that Australia has outlined above. Moreover, in relation to the information provided by the

³⁰ China's first written submission, para. 552 and fn 386 citing Anti-Dumping Final Determination English Translation (Exhibit CHN-1), p. 14 and Countervailing Duties Final Determination English Translation (Exhibit CHN-4), p. 14.

³¹ Australia's second written submission, paras. 22-24.

³² See further Australia's first written submission, section VII.B; second written submission, section II.B.

³³ Australia's first written submission, paras. 771, 780-783.

³⁴ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

³⁵ Australia's first written submission, sections VII.A.3, VII.C; second written submission, section III.B-D.

³⁶ Australia's first written submission, sections VII.A.4, VII.C.

³⁷ Australia's first written submission, paras. 784-820; second written submission, paras. 19-21, 39-50.

³⁸ Australia's first written submission, VII.C.1.(b); second written submission, para. 42.

³⁹ Australia's first written submission, para. 813.

"authoritative third-party institution", CICC provided no explanation of the data sources, methods of data collection, or methods of analysis.

21. In fact, the applications contained "simple assertion[s]" that there was injury to the domestic industry, and that it was being caused by the alleged dumping and subsidisation of imported Australian barley. At no point did MOFCOM query or corroborate the sources, accuracy, or representativeness of the data on which CICC based its assertions.

22. For these reasons, China acted inconsistently with Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement and Articles 11.2, 11.3 and 11.9 of the SCM Agreement.

IV. DUMPING DETERMINATION

23. The anti-dumping measures are inconsistent with China's WTO obligations under Articles 2.4, 2.4.2, 6.8, 6.10, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.

A. IMPROPER RECOURSE TO, AND SELECTION OF, FACTS AVAILABLE

24. Pursuant to Article 6.8 of the Anti-Dumping Agreement, an investigating authority may only resort to the facts available mechanism where interested parties refuse access to, or otherwise do not provide, information necessary for an anti-dumping assessment. Where parties have acted to the best of their abilities to provide necessary information, the authority must take it into account, even if it is not ideal in all respects.⁴⁰

25. In the anti-dumping investigation, interested parties provided all of the "necessary information", within the meaning of Article 6.8, that MOFCOM required in order to determine dumping margins pursuant to Article 2 of the Anti-Dumping Agreement. Notwithstanding the provision of this information by the interested parties, MOFCOM resorted to facts available and dismissed all information. MOFCOM was not permitted to do so under Article 6.8.⁴¹

26. MOFCOM's flawed approach to the use of facts available began with its inexplicable decision to focus its dumping analysis on Australian barley producers to the exclusion of barley traders, despite clear evidence that barley from Australia is exclusively exported by traders and not producers.⁴² This approach paved the way for MOFCOM's incorrect determination that there was "necessary information" missing from the record.

27. "Necessary information" is limited to that which is "essential" to an investigation and is in the interested party's possession.⁴³ While an investigating authority maintains some

⁴⁰ Australia's first written submission, paras. 375-376; Appellate Body Report, *US – Hot-Rolled Steel*, para. 77; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.

⁴¹ China contends that MOFCOM did not use facts available with respect to Group 2 traders. It is evident from MOFCOM's Final Determination that it was because of the alleged lack of necessary information that it purported to resort to other available "facts" on the record. This is a clear application of "facts available", conduct to which Article 6.8 of the Anti-Dumping Agreement applies. See Australia's second written submission, section V.C.2.(a).

⁴² Australia's second written submission, para. 115.

⁴³ Panel Reports, *EC – Salmon (Norway)*, para. 7.343; *Korea – Stainless Steel Bars*, para. 7.185.

discretion to determine what information is "essential" in the investigation, merely requesting information does not render it "necessary".⁴⁴

28. In the circumstances of this investigation, Australia and China agree that it was "essential" to ascertain the normal value and export price under Article 2 of the Anti-Dumping Agreement. The parties diverge on the information MOFCOM required to make these determinations. In particular, and contrary to China's argument, information from Australian producers – which do not export – concerning "the entire trading process" from field to final use, including export data, was not "necessary information".⁴⁵ Likewise, MOFCOM did not require information demonstrating that sales were "destined for consumption" in Australia under Article 2.1, contrary to China's *ex post facto* arguments.⁴⁶ In this light, MOFCOM's decision to reject *all* interested parties' information without any further explanation was inconsistent with Article 6.8 of the Anti-Dumping Agreement.

29. Neither piece of information was "necessary" to determine normal value and export price pursuant to Article 2, considering the information that interested parties in fact provided.⁴⁷ MOFCOM failed to take into account that, in the Australian barley market, grain from numerous producers is co-mingled in common storage in shared silos and warehouses, where it is sorted and separated in accordance with industry-wide quality standards.⁴⁸ Traders purchase an allocation of co-mingled stocks at arm's-length, above-cost, and market-based prices to sell either domestically or internationally.⁴⁹ As a result of this process, the trader cannot trace specific grains back to any particular producer, and a producer cannot trace its grains to end market, whether that is in Australia, China, or elsewhere. The evidence on MOFCOM's record demonstrated these immutable facts concerning the Australian barley market.

30. With regard to MOFCOM's determination of normal value, producers and traders provided data that demonstrated values for sales made in the ordinary course of trade in the Australian market – above-cost, market-based and arm's-length – including input costs, profits, and sales prices.⁵⁰ This data provided MOFCOM with sufficient information to determine the prevailing domestic price in Australia. With regard to MOFCOM's determination of export price, Australian traders provided export price data and producers explained that they did not export barley and could not provide such data. This information was sufficient for MOFCOM to determine the export price for each known exporter. The

⁴⁴ Panel Reports, *Egypt – Steel Rebar*, para. 7.151; *US – Supercalendered Paper*, para. 7.174.

⁴⁵ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 7, 9, 11.

⁴⁶ Refer Australia's response to Panel question No. 4 following the first meeting of the Panel, para. 15. Australia reiterates that information regarding destination was never actually requested of interested parties, and was an *ex post facto* addition, the information supposedly "necessary" was not requested in detail as paragraph 1 of Annex II requires: refer Australia's first written submission, section II.A.4; second written submission, section V.C.3.

⁴⁷ See Australia's first written submission, section II.A.3(b); second written submission, sections V.C.2.(a)-(b).

⁴⁸ Australia's first written submission paras. 144-147, 185 and footnotes thereto.

⁴⁹ Australia's first written submission paras. 118-129 and footnotes thereto.

⁵⁰ Australia's first written submission paras. 115-134 and footnotes thereto; see particularly paras. 118-122.

foregoing necessary information was submitted in accordance with paragraphs 3 and 5 of Annex II.⁵¹ MOFCOM never determined otherwise and would have experienced no undue difficulty in using it.⁵² Nevertheless, MOFCOM disregarded this information in its entirety, completely failing to take it into account.

31. Furthermore, China's assertion that the Australian interested parties were required to demonstrate that their domestic sales were "set apart for consumption"⁵³ in Australia is illogical in the context of Article 2 as a whole, the object and purpose of the Anti-Dumping Agreement, and the commercial reality modern business, particularly in commodities trade.⁵⁴

32. The evidence on the record before MOFCOM established that it is impossible for an Australian barley producer to know where the product that it sells to a trader will ultimately end up. China's declaration that it was necessary for producers to provide proof of sales "intended for or set apart or devoted to" domestic consumption creates an impossible evidentiary hurdle that interested parties could never meet.⁵⁵ If China's position was accepted, then it would permit an investigating authority to declare any non-existent information "necessary", rendering its resort to facts available a foregone conclusion. China's interpretation would undermine one of the key purposes of Article 2 as a whole, namely, to accurately determine the normal value, or prevailing domestic price, of the product under consideration.

33. Even assuming *arguendo* that this non-existent information was necessary to make a determination under Article 2, Article 6.8 and Annex II provide that an investigating authority must use information provided by interested parties unless it determines that the interested parties have not acted to the best of their abilities, or that the provided information is unverifiable.⁵⁶ MOFCOM made no such findings and was therefore required to make active efforts to use the information provided. MOFCOM did not do so. In fact, despite considering certain information from producers "necessary", MOFCOM never made any contact with those producers, as required by paragraph 1 of Annex II. It did not make interested parties aware that certain information – such as evidence of destination – was "necessary", and did not inform them of the consequences of failing to meet its impossible requests for

⁵¹ Australia's first written submission, section II.A.5; second written submission, section V.C.4; note also that MOFCOM never considered timeliness of submitted information at all as required under Annex II: see for example Australia's second written submission, para. 162.

⁵² Although China states MOFCOM did consider paragraph 3 information requirements, there is no evidence of this on the record: China's first written submission, paras. 130-131; Australia's first written submission, para. 170; second written submission, section V.C.4.

⁵³ Noting exceptions where producer has actual knowledge of export under a contract: Australia's response to Panel question No. 4 following the first meeting of the Panel, para. 20.

⁵⁴ Australia's response to Panel question No. 4 following the first meeting of the Panel, paras. 13-23.

⁵⁵ China's response to Panel question No. 4 following the first meeting of the Panel, para. 52.

⁵⁶ See Panel Report, *US – Steel Plate*, para. 7.65.

information.⁵⁷ As outlined below, this conduct undermined the due process frameworks of the Anti-Dumping Agreement.

34. Pursuant to paragraph 6 of Annex II, an investigating authority must inform interested parties "forthwith" if their information is rejected, provide an opportunity for explanation, and consider those explanations, providing reasons if appropriate.⁵⁸ In its Final Disclosure, MOFCOM made a general statement concerning its decision to reject all information submitted by the Australian interested parties. It allowed only five working days for a response, and published its Anti-Dumping Final Determination on the date that comments on the Anti-Dumping Final Disclosure were due. This timeline did not permit any examination of the further explanations that interested parties provided, including the reasons why allegedly missing necessary information could not be provided. In order to satisfy the requirements of paragraph 6 of Annex II, MOFCOM was required to notify interested parties that their information was rejected at a point in time when any potential "explanations" received could meaningfully impact the course of the investigation.⁵⁹ It failed to do so.

35. Further, assuming *arguendo* that non-existent information was necessary and that MOFCOM permissibly disregarded *all* information provided by interested parties, paragraph 7 of Annex II required MOFCOM to select replacement facts with special circumspection.⁶⁰ Special circumspection ensures that anti-dumping investigations are conducted on the basis of information that is reliable,⁶¹ and with respect for due process.⁶² MOFCOM undercut this purpose, and breached this obligation, by selecting information that had no logical connection to the facts on the record and by providing no due process for interested parties.

36. MOFCOM determined that the best available information to determine normal value in Australia was the export price for two shipments of feed barley from Australia to Egypt, recorded in Global Trade Atlas. It did so without checking and analysing the sources of this data, contrary to paragraph 7 of Annex II.⁶³ MOFCOM's lack of analysis is clear. Had it acted in a manner compliant with paragraph 7, it would have remarked that its chosen replacement data was inconsistent with its own record.⁶⁴ In particular, the export price to Egypt was inconsistent with CICC's estimations of normal value, trader and producer records of domestic sales prices, the Australian Government Questionnaire Response data, publicly available

⁵⁷ Australia's first written submission, section II.A.6; second written submission, section V.C.5; MOFCOM only provided a "general statement" in the questionnaire – expressly ruled insufficient by previous panels – stating the possibility that it would make a determination on facts available: Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.

⁵⁸ Panel Report, *Korea – Certain Paper*, para. 7.85.

⁵⁹ Australia's response to Panel question No. 4 following the second meeting of the Panel, paras. 22-28.

⁶⁰ Australia's first written submission, section II.A.7; second written submission, section V.C.6.

⁶¹ See Panel Report, *Egypt – Steel Rebar*, para. 7.154.

⁶² Australia's first written submission, paras. 214-258; second written submission, section V.F.

⁶³ Panel Report, *Canada – Welded Pipe*, para. 7.140. See Appellate Body, *US – Carbon Steel (India)*, para. 4.425. In that dispute, the Appellate Body was considering the equivalent provision in the SCM Agreement, Article 12.7.

⁶⁴ Australia's first written submission, section II.A.7.

Australian sales data that MOFCOM used elsewhere in its calculations, and the other information available on Global Trade Atlas.

37. MOFCOM determined that the best available information to determine export price was the monthly averages of Australia's total barley exports to China from Global Trade Atlas. Again, had it checked this source against record evidence, MOFCOM could have seen clear inconsistencies. In addition, MOFCOM's decision to use broad averages made it impossible to determine individual export prices for Australian traders and producers as the Anti-Dumping Agreement requires.⁶⁵

38. MOFCOM selected replacement facts that resulted in a margin so illogical that it was punitive without reason,⁶⁶ and incomprehensibly applied this same margin to all traders and producers identically.

B. IMPROPER COMPARISON OF NORMAL VALUE AND EXPORT PRICE

39. Article 2 of the Anti-Dumping Agreement governs the determination of normal value and export price and the comparison of these values to arrive at an accurate determination of dumping. MOFCOM failed to comply with its obligations under this article.⁶⁷

40. Pursuant to Article 2.4, an investigating authority must make a fair comparison between normal value and export price. It must consider requests for price adjustments and make due allowance for factors affecting price comparability. It must also inform interested parties what information is necessary to ensure a fair comparison.⁶⁸

41. Several interested parties made clear and uncomplicated price adjustment requests in the brief time they were afforded to respond to MOFCOM's decision to use data of export sales to Egypt to determine the normal value of Australian barley. The requests were similar to concerns that interested parties raised at the beginning of, and during, the investigation. Parties noted that factors including departure port, barley quality, volume, timing, and logistics costs would require price adjustments. In breach of Article 2.4, MOFCOM failed to make any price adjustments, despite ample evidence that such adjustments were merited.⁶⁹ Furthermore, MOFCOM did not inform interested parties what information was necessary to ensure fair comparison between export sales to Egypt and export sales to China.⁷⁰

42. MOFCOM also did not observe the clear requirements of the second sentence of Article 2.4. First, MOFCOM did not provide any evidence that the comparison occurred at the same level of trade, citing no evidence that the sales on which normal value and export price

⁶⁵ See Australia's first written submission, paras. 250-251.

⁶⁶ See Australia's first written submission, paras. 252-253.

⁶⁷ Australia's first written submission, section II.B-C; second written submission, section V.D.

⁶⁸ Australia's first written submission, section II.C.1.

⁶⁹ Australia's first written submission, section II.C.2.(c).

⁷⁰ Australia's first written submission, section II.C.3.

were based were made to purchasers at the same level of trade.⁷¹ Second, MOFCOM did not compare transactions made "at as nearly as possible the same time". Although China argues that transactions within the 12-month POI are comparable, accepting this position would disregard the substantial evidence on MOFCOM's record that timing of sales impacts the market price of barley. In its argument, China conflates the requirement to determine a POI with the requirement to ensure transactions are compared at as nearly as possible the same time; these two requirements serve different purposes.⁷²

43. Both as a result of the failures detailed above, and due to its overall failure to compare normal value and export price fairly, MOFCOM failed the overarching obligation in Article 2.4 to conduct a fair comparison between normal value and export price.⁷³

44. In addition to Article 2.4, Article 2.4.2 requires that an investigating authority establish existence of a margin of dumping based on a comparison of weighted average normal value with weighted average of prices of "comparable" export transactions. MOFCOM did not do this and instead compared normal value to non-comparable export transactions, breaching Article 2.4.2 in addition to Article 2.4.⁷⁴ Its dumping determination was therefore inaccurate, undermining the purpose of the Anti-Dumping Agreement to ensure accuracy in anti-dumping investigations.

C. FAILURE TO DETERMINE INDIVIDUAL DUMPING MARGINS

45. MOFCOM assigned identical margins to all Australian companies, contravening the obligation under Article 6.10 to determine individual dumping margins for each known exporter or producer. MOFCOM possessed sufficient information on the record to determine individual dumping margins for each known exporter or producer,⁷⁵ however, it instead undertook a single dumping margin calculation for all entities.

46. The ordinary meaning of Article 6.10, in its context and in light of its object and purpose, requires an investigating authority to determine an individual margin for *each known producer and each known exporter*. When preceded by "each", the ordinary meaning of "or" can be inclusive of multiple entities – a "set" – rather than indicating a choice between those entities.⁷⁶ This is the case in Article 6.10, where the relevant set is "each known exporter or producer concerned". This construction is common throughout the Agreement.⁷⁷ Contrary to China's flawed interpretation, the ordinary meaning of the term "or", particularly in light of the context in Article 6.10 and use elsewhere in the Agreement, is clearly inclusive.

⁷¹ Australia's second written submission, section V.D.2.

⁷² See Australia's first written submission, para. 294; second written submission, V.D.3.

⁷³ Australia's first written submission, section II.C.2.(d).

⁷⁴ Australia's first written submission, section II.D; second written submission, section V.E.

⁷⁵ See Australia's second written submission, section V.B.2.(b).

⁷⁶ Oxford English Dictionary online, definition of "each", <https://www.oed.com/view/Entry/58924> (accessed 6 May 2022). (emphasis original)

⁷⁷ See Australia's second written submission, paras. 86-88.

47. If, as China argues, the clear, mandatory,⁷⁸ requirement to determine individual dumping margins only requires investigating authorities to determine individual margins for one category of entities, the obligation under Article 6.10 is significantly weakened and leaves a practical, legal and factual void for the other category. The Panel should not accept an interpretation of Article 6.10 that allows an authority to arbitrarily assign a margin of dumping to an entire category of entities with no factual foundation, contrary to the object and purpose of the Agreement to ensure "objective decision-making based on facts". China's position would also render the second sentence of Article 6.10 *inutile*.⁷⁹

48. Although the panel in *EC – Salmon (Norway)* found that the word "or" suggested that the drafters "intended that Members be left with discretion to choose the focus of their investigations", this related to an investigating authority choosing which companies to select in a sampling exercise under the second sentence, not the ordinary meaning of the first sentence.⁸⁰

49. China's failure to determine individual dumping margins for Australian exporters and producers is inconsistent with its obligations under Article 6.10. of the Anti-Dumping Agreement.

V. SUBSIDY DETERMINATION

50. China's countervailing duty measures are inconsistent with China's obligations under Article 12.7 of the SCM Agreement in respect of MOFCOM's use of facts available, and Articles 1.1(a), 1.1(b), 1.2, 2.1, and 2.4 in respect of MOFCOM's determinations of financial contribution, benefit and specificity.

51. The three programs at issue were the SRWUI Program, SARMS Program, and VAIJ Fund. The evidence on the record before MOFCOM established that: (i) pursuant to the SRWUI Program, the federal government transferred funds to state governments where those governments reached certain water conservation targets; (ii) pursuant to the SARMS Program, the South Australian government supported improvements to irrigation infrastructure; and (iii) the VAIJ Fund allowed the Victorian government to invest in economic infrastructure and agricultural supply chains. This information was plain on the face of MOFCOM's record.

52. In each instance, MOFCOM failed to properly determine the existence of financial contribution, benefit to the barley industry, and specificity. In addition, MOFCOM improperly

⁷⁸ Appellate Body Report, *EC – Fasteners (China)*, paras. 316-317.

⁷⁹ Similarly, China's interpretation cannot be read coherently with Article 6.10.2 of the Anti-Dumping Agreement, which provides that, where an investigating authority conducts sampling, it must nevertheless "determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information". China's interpretation of the first sentence of Article 6.10 does not countenance such a requirement, and indeed MOFCOM did not determine individual margins for traders despite each submitting all necessary information. This reading of Article 6.10, wherein there are more requirements, and the interests of exporters and producers are more thoroughly protected, where sampling is used, is illogical.

⁸⁰ United States' third party submission, para. 27.

resorted to facts available contrary to Article 12.7, as all necessary information was on the record to determine that no benefit had been conferred upon Australian barley producers and that the programs were not specific. Even if MOFCOM's recourse to facts available could be considered consistent with Article 12.7 of the SCM Agreement, MOFCOM failed to select reasonable replacement facts.

A. FINANCIAL CONTRIBUTIONS DID NOT EXIST

53. MOFCOM determined that each program provided a financial contribution in the form of a direct transfer of funds.⁸¹

54. However, a financial contribution of this kind captures conduct in which resources are "made available to a recipient".⁸² The SRWUI Program and VAIJ Fund transferred funding between government entities and this fact was clear on the face of MOFCOM's record.⁸³ The SCM Agreement seeks to address government conduct that distorts the market – however, with one immaterial exception,⁸⁴ no funds moved from "government" into the market under either of these programs. It was therefore impossible for these programs to have had a trade-distortive impact. The transfers in question had no "recipient" and could not amount to financial contributions within the meaning of the SCM Agreement.

55. MOFCOM similarly determined that payments made under the SARMS Program constituted a direct transfer of funds. However, evidence on the record demonstrated that the SARMS Program funded irrigation operators and involved reciprocal obligations to transfer goods to the government in the form of water access entitlements.⁸⁵ This evidence contradicted MOFCOM finding of a direct transfer of funds. In any event, the evidence on the record clearly and repeatedly established that Australian barley production does not use irrigation.

56. China stated that MOFCOM did not use facts available to determine financial contribution, relying instead upon information provided in CICC's application and the Australian Government questionnaire.⁸⁶ These two statements are impossible to reconcile and demonstrate that MOFCOM had no evidentiary basis to determine financial contribution pursuant to Article 1.1(a) of the SCM Agreement.

⁸¹ Countervailing Duties Final Determination (Exhibit AUS-11) pp. 7-10.

⁸² Australia's first written submission, section III.A.1; Appellate Body Reports, *US – Large Civil Aircraft (2nd Complaint)*, para. 614; *Canada – Aircraft*, para. 154.

⁸³ Australia's first written submission, sections III.B.1-2. Under the VAIJ Fund, a single payment was made to an economic entity, a regional development organisation, in order to conduct a feasibility study for a Networked Grains Centre of Excellence.

⁸⁴ This payment was to the Wimmera Development Association, which is not a barley producer. See Australia's second written submission, para. 286.

⁸⁵ Australia's first written submission, para. 405.

⁸⁶ Australia's second written submission, para. 264.

57. MOFCOM thus failed to properly establish that a financial contribution existed under Article 1.1(a).

B. NO IDENTIFIED PROGRAM CONFERRED A BENEFIT ON THE BARLEY INDUSTRY

58. MOFCOM failed to properly determine whether each program conferred a benefit upon Australian barley producers.⁸⁷ MOFCOM did not identify evidence of a single instance of a barley producer receiving a benefit under any program. First, in relation to the SARMS and SRWUI Programs, MOFCOM's record demonstrated that barley production is unirrigated in Australia.⁸⁸ As such, MOFCOM's determinations that those Programs – water conservation programs focused on irrigators – had conferred a benefit on the producers of an unirrigated crop were directly contradicted by the evidence on the record. Second, in relation to the VAIJ Fund, MOFCOM's record confirmed that no payments were received by barley producers under the program and nor did they otherwise benefit from the Fund.

59. MOFCOM therefore failed to identify evidence of any possible benefit to the barley industry in violation of Article 1.1(b).

60. China argues on an *ex post facto* basis that Australia was obliged to provide information about how funds received under these programs were further dispersed under separate and independent "sub-programs", or other programs operated by sub-central government entities.⁸⁹ This is nonsensical. The respective scopes of the SRWUI Program and VAIJ Fund were limited to intra-government transfers,⁹⁰ with the goal of reallocating funding to allow the recipient governments to pursue ecological sustainability or local infrastructure projects. In China's words, this was the "*end in itself*".⁹¹ How different government entities applied those funds had no administrative or organisational connection to the programs that MOFCOM interrogated in its questionnaire. It was reasonable and logical, particularly under MOFCOM's short time limits, for the Australian Government to interpret a request for information about these programs to be just that – information about the programs themselves, not any separate disbursements.

61. In addition, MOFCOM knew of the existence of additional separate programs because CICC provided these program names in its application.⁹² However, MOFCOM never requested any information about those programs nor took any steps to investigate beyond issuing its

⁸⁷ Countervailing Duties Final Determination (Exhibit AUS-11) pp. 8-11. See also Australia's second written submission, paras. 293-296.

⁸⁸ Australia's first written submission, paras. 390, 451-455, 466, 499 and footnotes thereto; second written submission, section III.A.2, in particular paras. 250-263 and footnotes thereto.

⁸⁹ Australia's second written submission, para. 267.

⁹⁰ The one immaterial exception to this was the payment to the Wimmera Development Association. See Australia's first written submission, paras. 393, 400.

⁹¹ China's first written submission, paras. 329-332. (emphasis original)

⁹² CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 53-61.

single questionnaire. MOFCOM wrongly "remained passive" in the face of this information on the record.⁹³

62. MOFCOM therefore failed to establish that a benefit was conferred on Australian barley producers pursuant to Article 1.1(b).

C. NO IDENTIFIED PROGRAM WAS SPECIFIC

63. MOFCOM determined that the three subsidy programs were specific without any analysis and in the absence of any positive evidence, in contravention of Articles 1.2, 2.1, 2.4 of the SCM Agreement.⁹⁴ China argues on an *ex post facto* basis that MOFCOM determined each program to be *de facto* specific.⁹⁵ There are no indications of any examination or determination of *de facto* specificity in MOFCOM's Final Determination, and there is no evidence on the record that would have supported such examination or determination.

64. Specificity requires some restriction on access to a program. MOFCOM's "analysis" included no consideration of whether such access limitations existed.⁹⁶ In fact, in relation to all three programs, MOFCOM merely stated it had "reason to suspect that the barley industry is a major user of the funds".⁹⁷ This "suspicion" is insufficient to support a determination of specificity. Further, this "suspicion" was not based on affirmative, probative evidence. Rather, it was derived from MOFCOM's simple assumptions that the programs provided funds to the benefit of the Australian agricultural sector and that barley is an agricultural crop that is widely produced in certain areas of Australia.⁹⁸ This approach disregarded MOFCOM's obligation to objectively determine whether the programs were specific on the basis of positive evidence. Moreover, it ignored the record evidence demonstrating that these programs were broad environmental or infrastructure programs that provided no financial contributions or benefits to the Australian barley industry, and could therefore not be considered "specific" to the barley industry in any way.⁹⁹

D. IMPROPER RECOURSE TO, AND SELECTION OF, FACTS AVAILABLE

65. No necessary information was missing from the record of the countervailing duty investigation. MOFCOM had all of the information it needed to properly and accurately determine that none of the investigated programs conferred any benefit on Australian producers or exporters of barley, nor were they "specific" to the Australian barley industry.¹⁰⁰

⁹³ Appellate Body Report, *US – Washing Machines*, para. 5.268; Australia's first written submission paras. 519-522.

⁹⁴ See Australia's first written submission, section III.E.1.

⁹⁵ China's first written submission, paras. 388-392.

⁹⁶ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

⁹⁷ See Australia's second written submission, paras. 312-313, 318.

⁹⁸ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9, 11.

⁹⁹ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1, 162, 205.

¹⁰⁰ See Australia's first written submission, sections III.D.2 and III.E.2; second written submission, section VI.D.

Contrary to its obligation under Article 12.7 of the SCM Agreement to consider all the evidence on the record, MOFCOM rejected all information submitted by the Australian Government.

66. China has attempted to justify MOFCOM's disregard for relevant evidence by arguing that the questionnaire responses did not meet certain requirements. These alleged requirements were arbitrary and without any clear explanation. For example, in relation to the evidence that barley is a dryland crop that is not artificially irrigated in Australia, China argued that this information should not constitute "evidence" at all.¹⁰¹ This position has no legal or factual basis. Participants and stakeholders in the barley industry provided questionnaire responses based on their expertise and experience in the production and marketing of barley in Australia, together with signed certifications that the information they provided was accurate. China's argument impermissibly attempts to narrow the concept of "evidence" in countervailing duty investigations to exclude information that is provided directly by interested parties in their certified questionnaire responses. There is no basis for this interpretation.

67. China's position that MOFCOM was permitted to disregard all information because some information was inadequate is misleading. In fact, the information that MOFCOM alleged was "missing" was not only impossible to provide, it was also not necessary to determine benefit or specificity. For example, regarding the SRWUI Program, MOFCOM required application documents in circumstances where there was no application process because the program was an intra-governmental arrangement. MOFCOM similarly required barley producers' applications for irrigation programs, however, these *did not exist* because no such applications were made. This is not surprising in light of the evidence on the record confirming that Australian barley is unirrigated. In effect, MOFCOM required interested parties to do the impossible – prove a negative. MOFCOM improperly reversed the burden of proof, arguing there was no evidence that the barley industry did *not* benefit.¹⁰² MOFCOM's position is unsupportable on this point. Furthermore, even if the Panel were to accept that MOFCOM considered such necessary information was missing, MOFCOM was obliged to not remain "passive in the face of possible shortcomings".¹⁰³ MOFCOM failed to make any further enquiries with interested parties regarding purported shortcomings, and it failed to inform parties that it would disregard all information relevant to its benefit and specificity determinations – including information appropriately submitted within a reasonable time.

68. Finally, if, *arguendo*, the Panel were to find that MOFCOM properly had recourse to facts available, MOFCOM acted inconsistently with Article 12.7 of the SCM Agreement by failing to select a reasonable replacement for the necessary information it found to be missing. To determine benefit and specificity, MOFCOM cited budget figures that had no logical connection to the facts on the record. These budget figures included payments made outside

¹⁰¹ China's second written submission, paras. 298-299, 301.

¹⁰² Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

¹⁰³ Appellate Body Report, *US – Washing Machines*, para. 5.268. (footnotes omitted)

the POI. MOFCOM connected these budget figures to the alleged benefit conferred on the barley industry by stating it "had reason to believe" that, as the program applied to the agricultural sector, and barley is an agricultural product that is widely produced in the relevant area, it follows that barley production must have received a benefit. However, this reasoning consisted of mere assumptions and there was no logical link, let alone evidence, to establish that the programs conferred any benefit on the barley industry or could be considered "specific" to that industry. Further, in choosing to "believe" as it did, MOFCOM ignored the evidence on the record, supplied by the Australian government, of the actual recipients and the actual amounts of funding that they received. MOFCOM therefore failed to undertake the required evaluation of all relevant evidence on the record in order to select a reasonable replacement for the alleged missing necessary information to reach an accurate determination of subsidisation.

69. MOFCOM's failure to properly apply Articles 1, 2 and 12.7 of the SCM Agreement led to an improper subsidy margin of 6.9% for all Australian traders and producers.

VI. INJURY AND CAUSATION

70. In each of the investigations, China acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

71. Articles 3.1 and 15.1 impose overarching obligations requiring an investigating authority to make "objective" findings based on "positive evidence", meaning evidence that is credible, affirmative, and verifiable in character.¹⁰⁴ Exhibits CHN-22 and 23 bring MOFCOM's failure to rely on positive evidence into sharp focus, revealing the lack of evidence on the record [[XXX]]¹⁰⁵ [[XXX]]¹⁰⁶ In short, MOFCOM's investigations and analyses were not based on positive evidence and, as such, are inconsistent with the overarching obligations in Articles 3.1 and 15.1.

A. MOFCOM'S FLAWED ANALYSES OF CHANGES IN VOLUME OF SUBJECT IMPORTS

72. Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the first sentence of Article 15.2 of the SCM Agreement require an investigating authority to make an objective assessment based on positive evidence of whether there has been a significant increase in subject imports.¹⁰⁷ MOFCOM was required to

¹⁰⁴ Australia's first written submission, paras. 553-556; Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192, 196; Panel Reports, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.272; *US – Carbon Steel (India)*, para. 4.582. These obligations are absolute. See Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109.

¹⁰⁵ Australia's opening statement at the second meeting of the Panel, para. 43.

¹⁰⁶ See particularly Australia's opening statement at the second meeting of the Panel, para. 47 and footnotes thereto.

¹⁰⁷ Australia's first written submission, para. 559.

consider whether there had been a significant increase in allegedly dumped and subsidised imports of Australian barley, either in absolute terms or relative to production or consumption in China.¹⁰⁸ MOFCOM considered all three of these metrics, but did not do so objectively or on the basis of positive evidence.¹⁰⁹

73. Due to the WTO-inconsistent manner in which MOFCOM determined the volumes of allegedly dumped and subsidised barley imported from Australia, its consideration of whether there had been significant increases in these imports was vitiated because it could not meet the overarching obligations to be "based on positive evidence" and to "involve an objective examination".¹¹⁰

74. Should the Panel determine that MOFCOM's examination of the volume of subject imports was "based on positive evidence", MOFCOM nonetheless did not conduct this examination in an "objective" manner.¹¹¹ MOFCOM: (i) failed to address relevant data; (ii) failed to explain how it took into account evidence that conflicted with its conclusions; and (iii) examined the metrics that it used in an inconsistent manner that made a final determination of injury more likely.¹¹² In short, MOFCOM's failure to deal objectively with the data before it was fatal to its analysis.

75. With respect to MOFCOM's treatment of conflicting evidence, MOFCOM observed large upward and downward changes in annual import volumes,¹¹³ but concluded that a change of 7.78%, based on an endpoint-to-endpoint comparison of the data (i.e. between 2014 and 2018), indicated that the volume of subject imports had "increased significantly".¹¹⁴ MOFCOM did not explain how or why it considered this increase to be "significant" in the context of the much larger year-to-year fluctuations, which included decreases of over 25% between 2015 and 2016 and over 35% between 2017 and 2018.¹¹⁵

76. The panel in *Pakistan – BOPP Film (UAE)* stressed that, although an investigating authority may attach greater weight to certain data on its record, it "must not ignore other relevant data, and must explain how it took into account evidence that conflicted with its conclusions".¹¹⁶ As to the use of an "endpoint-to-endpoint" analysis, the Appellate Body stated in *US – Steel Safeguards* that this type of analysis "could easily be manipulated" to avoid conflicting evidence.¹¹⁷ These principles are applicable to MOFCOM's analysis.¹¹⁸

¹⁰⁸ Australia's first written submission, para. 564; second written submission, para. 405.

¹⁰⁹ Australia's first written submission, section V.A.2; second written submission, section VII.B.

¹¹⁰ Australia's first written submission, para. 566.

¹¹¹ Australia's first written submission, para. 567.

¹¹² Australia's first written submission, para. 567.

¹¹³ Australia's first written submission, para. 570.

¹¹⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

¹¹⁵ Australia's first written submission, para. 571.

¹¹⁶ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.271 (footnotes omitted); Australia's first written submission, paras. 572-573.

¹¹⁷ See Appellate Body Report, *US – Steel Safeguards*, para. 354.

¹¹⁸ Australia's first written submission, para. 574.

77. Although MOFCOM also applied the endpoint-to-endpoint methodology in examining whether subject imports had increased relative to production of like domestic products in China, it departed from this approach in its examination of subject import volumes relative to domestic consumption, omitting such a comparison entirely. Had it conducted the same endpoint-to-endpoint comparison, MOFCOM would have found that the "market share" of subject imports decreased by 4.65 percentage points during the Injury POI (from 53.66% in 2014 to 49.01% in 2018).¹¹⁹ Rather than making this objective and unbiased finding, MOFCOM instead made an alternative finding that the ratio of subject imports to consumption "remained at a relatively high level most of the time, and even exceeded 60% in 2017".¹²⁰

B. MOFCOM'S FLAWED PRICE EFFECTS ANALYSES

78. An investigating authority's price effects analysis must comply with the second sentence of Article 3.2 of the Anti-Dumping Agreement and the second sentence of Article 15.2 of the SCM Agreement. As in all injury analyses, an investigating authority cannot disregard conflicting evidence.¹²¹ Furthermore, an investigating authority must ensure price comparability between subject imports and like domestic products. Failing to do so defeats the explanatory force of subject imports for a significant reduction in domestic prices.¹²²

79. MOFCOM determined that the allegedly dumping and subsidised "imported product caused a significant reduction in the price of similar domestic product"¹²³ and that "the low price competition for [the allegedly dumped and subsidies] imported product ... caused a substantial reduction in the prices of similar products in the domestic industry".¹²⁴ However, MOFCOM failed to objectively consider record evidence that demonstrated it was comparing prices of subject imports with prices of like domestic products that were not directly comparable, vitiating the injury analysis in its entirety. MOFCOM failed to ensure that the prices compared were adjusted to account for different levels of trade (e.g. sales to wholesalers, distributors, or end-users) in order to ensure price comparability.¹²⁵ MOFCOM also failed to correctly adjust prices to account for costs relating to transportation, logistics, storage and import operations that arose prior to the importer's sales into the Chinese market.¹²⁶

¹¹⁹ Australia's first written submission, para. 577.

¹²⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15; Australia's first written submission, para. 578.

¹²¹ Australia's first written submission, para. 591. See also Australia's first written submission, para. 620.

¹²² Australia's first written submission, paras. 592-593.

¹²³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

¹²⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 20 ("the low price competition for dumped imported product has caused a substantial reduction in the prices of similar products in the domestic industry"); Countervailing Duties Final Determination (Exhibit AUS-11), p. 21 ("the Investigating Authority believed that the low price competition for subsidized imports had caused a significant reduction in the prices of similar domestic products").

¹²⁵ Australia's first written submission, paras. 600-602; second written submission, section V.D.2.

¹²⁶ Australia's first written submission, paras. 603-605.

80. In addition, MOFCOM possessed abundant evidence that the barley market in China is segmented, consisting primarily of two distinct categories: barley for malting purposes (malting barley) and barley used as animal feed in livestock production (feed barley).¹²⁷ These sectors have separate grade, variety, consistency and quality requirements, and considerable price differences distinguish the different categories of barley purchased for different end uses. Chinese importers made this clear in their questionnaire responses,¹²⁸ as did Australian traders.¹²⁹ Australian malt barley imports did not compete with Chinese feed or seed barley, but with other imports of malting barley from third countries.¹³⁰ MOFCOM failed to ensure that it addressed relevant data and did not explain how it accounted for this market segmentation.

81. Furthermore, MOFCOM did not address relevant data nor explain how it took into account evidence conflicting with its conclusions. For example, MOFCOM simply asserted that domestic prices and subject import prices were "linked". However, domestic prices and subject import prices moved in opposite directions in certain years, conflicting with MOFCOM's conclusion. Similarly, MOFCOM had evidence on the record that Chinese demand was rapidly growing, and that Australia's market share was decreasing while the market share of third countries increased.¹³¹ MOFCOM failed to engage with this conflicting evidence.

82. China asserted that Australia's translations of the final determinations were incorrect and that MOFCOM had found "price undercutting" rather than "price depression". However, the text of the Final Determinations clearly indicates an examination of price depression, focusing on how the average unit price of domestic like products "dropped" over the injury POI, and alleging that this was caused by its relationship with the average unit price of subject imports.¹³² For example, it is uncontested that MOFCOM considered that: "[u]nder the influence of the increase in the quantity and decrease in the price of [the allegedly dumped and subsidised] imports, the sales price of similar domestic products dropped..."; and "[a]ffected by this, the price of domestic like product in general dropped substantially".¹³³ This analysis was one of price depression, rather than price undercutting, suggesting that Australia's translation is correct when considered in the context of MOFCOM's price effects examination. In any event, the obligations to ensure price comparability and to conduct objective examinations based on positive evidence apply to MOFCOM's examination of price effects, regardless of whether it is characterised as a price undercutting analysis, a price

¹²⁷ Australia's first written submission, paras. 606-614; second written submission, paras. 424-436.

¹²⁸ Australia's first written submission, paras. 608-610.

¹²⁹ Australia's first written submission, paras. 611-613.

¹³⁰ Australia's second written submission, paras. 437-442.

¹³¹ Australia's first written submission, para. 624; second written submission, section VII.C.4.

¹³² See Anti-Dumping Final Determination (Exhibit AUS-2), p.16, and (Exhibit CHN-1), p. 16; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 16-17, and (Exhibit CHN-4), p. 16.

¹³³ Anti-Dumping Final Determination (Exhibit AUS-2), p.16, and (Exhibit CHN-1), p. 16; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 16-17, and (Exhibit CHN-4), p. 16.

depression analysis, or both. The question of translation therefore has no consequence in relation to MOFCOM's failure to meet those obligations.¹³⁴

83. In sum, MOFCOM provided no positive evidence of price depression,¹³⁵ and no positive evidence that the subject imports of Australian barley in fact caused a reduction in the average price of domestic barley.¹³⁶

C. MOFCOM'S FAILURE TO EVALUATE ALL RELEVANT ECONOMIC FACTORS

84. Pursuant to Articles 3.4 of the Anti-Dumping Agreement and 15.4 of the SCM Agreement, an investigating authority must consider certain economic factors bearing on the state of the domestic industry in its injury analyses.¹³⁷ As with the examination of price effects under the second sentences of Articles 3.2 and 15.2, Articles 3.4 and 15.4 require an examination of the relationship between the domestic industry and the subject imports.¹³⁸

85. MOFCOM failed to meet the requirements of Article 3.4 and 15.4 on a number of grounds. MOFCOM did not evaluate all of the listed economic factors mandated by Articles 3.4 and 15.4,¹³⁹ including cash flow, inventories, employment, wages, growth, financing, or investment.¹⁴⁰ China's assertion that statistics were not available¹⁴¹ does not absolve MOFCOM of its complete failure to obtain or evaluate any positive evidence regarding these mandatory factors. One of the reasons why this information was not available is because no domestic producers had participated in the investigation, and therefore none had submitted their evidence in questionnaire responses. If even a sample of domestic producers had participated, MOFCOM would have had the required information.¹⁴² Further, in relation to wages, CICC had in fact provided information on average labour costs for certain domestic producers.¹⁴³

86. Those factors that MOFCOM *did* mention were cited in a mere "checklist", an approach that previous panels have expressly ruled to be insufficient.¹⁴⁴ MOFCOM offered no explanation or assessment of the relative significance, weight, role, or relevance of the economic factors, stating only that a factor was "important" with no further information. MOFCOM therefore did not conduct a substantive assessment that considered conflicting

¹³⁴ Australia's second written submission, sections I.B; VII.C.2.

¹³⁵ See generally Australia's first written submission, section V.A.3.(b).

¹³⁶ See Australia's first written submission, para. 620.

¹³⁷ Australia's first written submission, section V.A.4; second written submission, section VII.D.3.

¹³⁸ Australia's first written submission, para. 629.

¹³⁹ Noting this requirement is mandatory and cannot be met with a checklist approach: Panel Reports, *Guatemala – Cement II*, para. 8.283; *Thailand – H-Beams*, para. 7.229; *Korea – Certain Paper*, para. 7.272.

¹⁴⁰ Australia's first written submission, section V.A.4.(c).

¹⁴¹ China's first written submission, para. 504.

¹⁴² Australia's comments on China's response to question No. 14 from the Panel following the second substantive meeting, para. 44.

¹⁴³ Australia's first written submission, paras. 650-651.

¹⁴⁴ Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.314; *US – Hot-Rolled Steel*, para. 7.234.

evidence, including intervening trends and increases to planting costs.¹⁴⁵ As stated in relation to Articles 3.2 and 15.2, an unbiased and objective investigating authority must also consider conflicting evidence in order to comply with the obligations under Articles 3.4 and 15.4.

87. In addition, and as explained above, MOFCOM did not correctly identify the domestic industry. It follows that MOFCOM, by necessity, could not have evaluated all factors "bearing on the domestic industry" without having first properly defined the industry in question.¹⁴⁶

D. MOFCOM'S FLAWED CAUSATION ANALYSES

88. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement establish the framework for an investigating authority to determine whether a "causal relationship" exists between dumped or subsidised imports and injury to the relevant domestic industry.¹⁴⁷ MOFCOM's causation analysis fell short of meeting China's obligations under Articles 3.5 and 15.5.¹⁴⁸ This is the case for three key reasons.

89. First, MOFCOM carried forward the outcomes of its flawed examinations of price effects under Articles 3.2 and 15.2 and of relevant economic factors under Articles 3.4 and 15.4 into its causation analyses under Articles 3.5 and 15.5, vitiating the latter.¹⁴⁹

90. Second, MOFCOM failed to provide any reasoned explanation of a "genuine and substantial relationship" of cause and effect between subject imports and injury to the domestic industry.¹⁵⁰ The Final Determinations merely state that "low price competition from [dumped/subsidised] imported product has caused a substantial reduction in the prices of similar products in the domestic industry", with no further analysis.¹⁵¹ This statement is insufficient to constitute a proper explanation establishing causation.

91. Third, MOFCOM failed to conduct a non-attribution analysis in relation to "known factors" to identify and distinguish their contributions to injury suffered by the domestic industry.¹⁵² As the Appellate Body explained in *US – Hot-Rolled Steel*, the third sentences of Articles 3.5 and 15.5 require an investigating authority to "ensure that the injurious effects of the other known factors are not 'attributed' to dumped [subsidised] imports".¹⁵³ In this case, the "known factors" that MOFCOM failed to properly consider included: the impact of Chinese wheat and corn support policies on the domestic market;¹⁵⁴ uncompetitive domestic

¹⁴⁵ See particularly Australia's first written submission, paras. 640-641.

¹⁴⁶ Australia's first written submission, section V.A.4.(b); second written submission, section VII.D.4.

¹⁴⁷ Australia's first written submission, para. 655.

¹⁴⁸ See particularly Australia's second written submission, section VII.E.4

¹⁴⁹ Australia's first written submission, section V.A.4.(b); second written submission, section VII.B.

¹⁵⁰ Australia's first written submission, section V.A.4.(c); Appellate Body Report, *US – Wheat Gluten*, para. 69.

¹⁵¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 20; Countervailing Duties Final Determination (Exhibit AUS-11), p. 21; see particularly Australia's second written submission, section VII.E.3.

¹⁵² Australia's first written submission, para. 673.

¹⁵³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 223; Australia's first written submission, para. 657; second written submission, section VII.E.4.

¹⁵⁴ Australia's first written submission, section V.A.4.(d); second written submission, section VII.E.A.(a); Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21.; see also Countervailing Duties Final Determination (Exhibit AUS-11), p. 22; Australia's

production costs;¹⁵⁵ the impact of third-country imports on the market;¹⁵⁶ and, in relation to the anti-dumping determination, Chinese buyers purchasing Australian barley due to "factors other than price".¹⁵⁷

92. MOFCOM's treatment of non-subject imports from third countries is a striking example of its failure to account for the impact of other important factors on the Chinese market.¹⁵⁸ Demand for barley in China increased between 2014 and 2018 by 1.3 million tonnes, or 18%.¹⁵⁹ However, subject imports increased over the same period by only 301,300 tonnes, satisfying only a small portion – 23% – of this growth, and showing an 8.7% relative decline in market share. In contrast, imports from third countries increased over the same period by 1.1 million tonnes, capturing 85% of the growth, showing a 45.5% relative increase in market share, and ultimately taking market share from Chinese domestic barley and imports of Australian barley.¹⁶⁰

VII. CONDUCT OF THE INVESTIGATIONS

93. MOFCOM's conduct undermined the due process framework of both the SCM Agreement and the Anti-Dumping Agreement.¹⁶¹ As a result, China acted inconsistently with Articles 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 12.1, 12.3, 12.4.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement.¹⁶² Failures with respect to MOFCOM's conduct of the investigations are intertwined with, and exacerbate, MOFCOM's failures in its substantive determinations.¹⁶³ Contrary to China's assertions, there is no basis in the text of the Agreements to afford "procedural" obligations less weight than substantive obligations.

A. MOFCOM FAILED TO PROVIDE INTERESTED PARTIES WITH AMPLE OPPORTUNITIES TO PRESENT EVIDENCE THAT THEY CONSIDERED RELEVANT

94. Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement expressly require that interested parties have a full and "ample" opportunity to defend their interests.¹⁶⁴ The requirements to give "ample opportunity" to present all evidence and give notice within the meaning of Articles 6.1 and 12.1 are "distinct yet closely

first written submission, para. 679 and footnotes thereto. MOFCOM was also more likely to be in possession of information regarding government policy impact on industry.

¹⁵⁵ Australia's first written submission, section V.A.4; Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 36.

¹⁵⁶ Australia's first written submission, section V.A.4.

¹⁵⁷ Australia's first written submission, section, V.A.4.(d)iii; second written submission, section VII.C.3; refer above regarding market segmentation.

¹⁵⁸ Australia's first written submission, paras. 584-585.

¹⁵⁹ Australia's first written submission, Table 11, p. 268.

¹⁶⁰ Australia's first written submission, para. 693.

¹⁶¹ Australia's second written submission, sections VII.F, VI.E, V.F.

¹⁶² Australia's first written submission, section VIII; second written submission, section IV.

¹⁶³ Australia's second written submission, section IV.

¹⁶⁴ Australia's first written submission, section VIII.A; second written submission, sections VI.E.2; IV.C; V.F.2. See also Panel Report, *China – X-Ray Equipment*, para. 7.459.

related" obligations. Contrary to China's assertions, this does not mean that the scope of the obligation to give "ample opportunity" is limited by the obligation to give notice.¹⁶⁵ China's interpretation – that the obligation to give "ample opportunity" only arises when "notice" has been given – would largely render Articles 6.1 and 12.1 devoid of meaning. To that end, the conduct of an investigating authority can be subject to more than one obligation at a time under the Agreements.

95. MOFCOM's failure to provide interested parties with a full opportunity for the defence of their interests manifested not only in certain specific instances, outlined below, but also when considering the totality of MOFCOM's conduct and management of the investigations.¹⁶⁶

96. Interested parties requested between two to four week extensions to respond to the questionnaires, detailing significant barriers including the unavailability of translators over the Chinese holiday period, the demands of the peak harvest period, and, in the case of the countervailing duties investigation, resources dedicated to the concurrent anti-dumping investigation.¹⁶⁷ MOFCOM provided an extension of only two business days, without the due consideration mandated by Article 12.1.1. This inadequate time to prepare evidence undermined interested parties' right to present evidence under Article 12.1 of the SCM Agreement.¹⁶⁸

97. Further, MOFCOM failed to give notice to interested parties of the information required and collected at "the prominent barley producing areas in Jiangsu" in December 2018.¹⁶⁹ An investigating authority must give notice to *all* interested parties of the information it requires, as the notice requirements in Articles 6.1 and 12.1 cover all interested parties, not merely the recipient of requests for information.¹⁷⁰ The scope of these requirements also entails the right for parties to comment on how data that may be collected is assessed. Interested parties must, therefore, first be aware of what information is requested. As such, MOFCOM was under an obligation to give notice to Australian interested parties of the information requested from the participants in the December visit, and it failed to do so.

98. Australian interested parties were not provided with any opportunity to comment on how the data they provided was to be assessed until after the Final Disclosures. In order to have "ample opportunity" to present evidence, an investigating authority must give notice in a timely manner. Waiting until the Final Disclosures clearly does not meet this requirement.¹⁷¹

¹⁶⁵ China's first written submission, para. 620; Australia's second written submission, section IV.C.

¹⁶⁶ Australia's first written submission, para. 859.

¹⁶⁷ Australia's first written submission, paras. 860-861 and footnotes thereto.

¹⁶⁸ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.218; Australia's first written submission, para. 862.

¹⁶⁹ Australia's first written submission, paras. 864-867.

¹⁷⁰ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.221.

¹⁷¹ Australia's first written submission, paras. 868-870.

99. MOFCOM also failed to give notice of deficiencies in information submitted by Australian interested parties. In order to provide "ample opportunity" to present evidence, an investigating authority must give notice in a timely manner. These parties were not provided with any opportunity to comment on how the data they provided was to be assessed until after the Final Disclosures, and waiting until the this point clearly did not meet this requirement. Moreover, MOFCOM failed to take into account interested parties' comments on the Final Disclosures. Instead, it published the Final Determinations on the same day that submissions in response to the Final Disclosures were due providing no scope for MOFCOM to give meaningful consideration to the submissions received.

100. For these reasons, China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

B. MOFCOM FAILED TO PROVIDE OPPORTUNITIES TO SEE ALL INFORMATION

101. China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement.¹⁷² MOFCOM failed to provide opportunities for interested parties to see whether and, if so, how: (i) the domestic industry was defined, (ii) the standing of CICC to make applications on behalf of the domestic industry was established, and (iii) MOFCOM utilised the Global Trade Atlas data in the anti-dumping investigation. This information met the criteria of Articles 6.4 and 12.3, and China was therefore obliged to provide timely opportunities for interested parties to see the information.

C. MOFCOM FAILED TO REQUIRE THAT INTERESTED PARTIES FURNISH NON-CONFIDENTIAL SUMMARIES

102. Under Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement, MOFCOM was obliged to require CICC to provide a non-confidential summary of allegedly confidential information.¹⁷³ As previously detailed in relation to MOFCOM's failure to properly define the domestic industry, CICC's applications did not do this. Not only was the information not, in fact, confidential, but CICC did not indicate what the confidential information covered in a manner permitting interested parties to understand the substance of the information.¹⁷⁴ The summaries were insufficient because they implied that underlying data existed to support the summarised information when, in fact, the summaries were a full reproduction of the allegedly confidential information. Finally, in relation to the name of the third-party organisation providing the information, not only was there no

¹⁷² See Australia's first written submission, para. 878.

¹⁷³ Australia's first written submission, sections VIII.A.5; VIII.B.3; Australia's opening statement at the second substantive meeting of the Panel, paras. 61-63. See also Appellate Body Report, *China – GOES*, para. 240-241.

¹⁷⁴ Australia's opening statement at the second substantive meeting of the Panel, para. 60.

justification for confidential treatment, MOFCOM also failed to require CICC to provide an adequate non-confidential summary of the nature of the organisation.

D. MOFCOM FAILED TO SATISFY ITSELF AS TO THE ACCURACY OF THE INFORMATION

103. MOFCOM remained passive and failed to verify extensive data and submissions, in contravention of Articles 6.6 and 12.5.¹⁷⁵ The sole verification-style activity that MOFCOM conducted – a reference to a visit in connection with the domestic industry in December 2018 – occurred prior to MOFCOM's receipt of CICC's questionnaire responses in either investigation. In fact, the countervailing duties investigation had not even been initiated. MOFCOM cites no other consultation, inquiry, or verification or other activity undertaken to verify information provided. If MOFCOM believed that certain information was required in order to verify the accuracy of the information provided by interested parties, then it was obligated to inform the relevant parties what was required in this regard. It failed to do so.¹⁷⁶

E. MOFCOM FAILED TO DISCLOSE ESSENTIAL FACTS

104. MOFCOM was required to disclose essential facts under Articles 6.9 of the Anti-Dumping Agreement and 12.8 of the SCM Agreement.¹⁷⁷ However, MOFCOM's sole "disclosure" of both the facts essential to the investigation and the decision to reject all information from interested parties was the Final Disclosures.¹⁷⁸ Several essential facts were never disclosed at all, including the basis of CICC's standing as an Applicant, the definition of domestic injury MOFCOM utilised, the Global Trade Atlas Data that was vital to determining the dumping margin, and the factual bases for MOFCOM's findings that the investigated programs involved a "financial contribution" in the form of a direct transfer of funds or that the subject imports were causing material injury to the domestic industry.

105. Even with respect to the information that was actually disclosed, parties had only five business days to respond, and MOFCOM published its Final Determinations on the same day those responses were due. As a consequence, MOFCOM deprived interested parties of a meaningful opportunity to respond. MOFCOM provided no reasoning for rejecting interested parties' arguments – and, more importantly, it could not have properly considered them or set out reasons for disregarding them under its self-imposed timetable.

¹⁷⁵ Australia's first written submission, section VIII.B.4; Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *US – Steel Plate*, fn 67.

¹⁷⁶ Australia's second written submission, para. 514 and footnotes thereto.

¹⁷⁷ Australia's first written submission, section VIII.B.5.

¹⁷⁸ Australia's opening statement at the second substantive meeting with the Panel, para. 16; Australia's first written submission, section VIII.B.2.

F. MOFCOM'S PUBLIC NOTICES FAILED TO CONTAIN ALL RELEVANT INFORMATION

106. MOFCOM was obliged to provide sufficiently detailed reasons for its determinations pursuant to Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.¹⁷⁹ This obligation includes reasons for MOFCOM's decisions to disregard information and resort to facts available.¹⁸⁰ However, MOFCOM's determinations failed to contain all relevant information on the matters of fact, law and reasons which led to the imposition of final measures. MOFCOM's determinations did not explain the basis for finding a subsidy existed, why the same anti-dumping duty and countervailing duty rates were applied to traders and producers, the basis for injury and causation, the basis for the comparison of normal value and export price, or the reasons for rejecting information provided by interested parties.¹⁸¹

107. For example, when considering whether a program was specific to the barley industry, MOFCOM merely stated it "had reason to suspect that the barley industry is a major user of the funds". It provided no factual or legal basis for this statement. MOFCOM failed to explain how its "suspicion" met the requirements under Article 2 of the SCM Agreement to clearly substantiate any determination of specificity on the basis of positive evidence. These gaps prevented interested parties from understanding MOFCOM's reasoning and thus responding to MOFCOM's position adequately, undermining their systemically important rights to due process.¹⁸²

108. China's only defence of MOFCOM's public notices is that the deficiencies raised by Australia were, in fact, "sufficiently addressed" in the Final Determinations.¹⁸³ This was not in fact the case and, in any event, this argument is insufficient to rebut Australia's claims.¹⁸⁴

VIII. DUTY IMPOSITION

109. MOFCOM's improper and insubstantial investigation resulted in China incorrectly imposing anti-dumping and countervailing duties.¹⁸⁵

110. China's imposition of anti-dumping duties was the result of a flawed investigation, and was inconsistent with Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994. The margin is higher than would have been the case had

¹⁷⁹ See Panel Reports, *China – X-Ray Equipment*, para. 7.472; *EU – Footwear (China)*, para. 7.844; Australia's first written submission, section VIII.B.6.

¹⁸⁰ Panel Reports, *China – Broiler Products*, para. 7.317; *China – Broiler Products (Article 21.5 – US)*, paras. 7.368 and 7.401. See also, Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.115.

¹⁸¹ Australia's first written submission, section VIII.B.6.

¹⁸² United States' third party submission, para. 79; Canada's third party submission, para. 42.

¹⁸³ China's first written submission, paras. 690-694 and 697-709.

¹⁸⁴ See Australia's second written submission, section IV.D.

¹⁸⁵ Australia's first written submission, section VI; second written submission, section VIII.

MOFCOM complied with the Anti-Dumping Agreement. Had MOFCOM acted consistently with Article 2, it would have determined that dumping was not occurring or at least would have determined a dumping margin substantially lower than 73.6%.

111. In addition, MOFCOM only listed four producers individually and applied an "all others" rate to all 15 traders who had responded to the questionnaire. This is inconsistent with the mandatory obligation under Article 9.2 to name the suppliers of the product concerned.¹⁸⁶

112. China's imposition of countervailing duties was inconsistent with Articles 10, 19.4 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994. China implemented the duties that MOFCOM recommended based on an investigation that did not comply with Article VI:3 of GATT 1994 as interpreted by the SCM Agreement. Such a failure results in a consequential breach of Articles 10 and 32.1 of the SCM Agreement in respect of the imposition of countervailing duties.¹⁸⁷ Further, China's imposition of a rate of duty greater than zero also contravened Article 19.4 of the SCM Agreement because there was no factual or legal basis for MOFCOM's calculation of per unit rate of subsidisation. Had MOFCOM properly complied with the SCM Agreement, no countervailing duties would have been imposed.

IX. CONCLUSION

113. For the reasons set out in its submissions, Australia respectfully requests that the Panel find that China's measures are inconsistent with its obligations under the following agreements:

- Articles 1, 2.4 and 2.4.2, 3.1, 3.2, 3.4, 3.5, 4.1, 5.1, 5.2, 5.3, 5.4, 5.8, 6.1, 6.2, 6.4, 6.5.1, 6.6, 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II, 6.9, 6.10, 9.1, 9.2, 9.3, 12.2 and 12.2.2 of the Anti-Dumping Agreement;
- Articles 1.1(a), 1.1(b), 1.2, 2.1, 2.4, 10, 11.1, 11.2, 11.3, 11.4, 11.9, 12.1, 12.3, 12.4.1, 12.5, 12.7, 12.8, 15.1, 15.2, 15.4, 15.5, 16.1, 19.4, 22.3, 22.5 and 32.1 of the SCM Agreement; and
- Articles VI:2 and VI:3 of the GATT 1994.

114. Australia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend to the DSB that it request China to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

¹⁸⁶ Australia's first written submission, paras. 720-722.

¹⁸⁷ Australia's first written submission, section VI.B.; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.