

Before the World Trade Organization

Panel Proceedings

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

(DS598)

AUSTRALIA'S FIRST WRITTEN SUBMISSION

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<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R , adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Guatemala – Cement I</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R , adopted 25 November 1998, as reversed by Appellate Body Report WT/DS60/AB/R, DSR 1998:IX, p. 3797
<i>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
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R , adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R , adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Korea – Certain Paper (Article 21.5 – Indonesia)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia</i> , WT/DS312/RW , adopted 22 October 2007, DSR 2007:VIII, p. 3369
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R and Add.1, adopted 30 September 2019
<i>Korea – Pneumatic Valves (Japan)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R

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<i>Korea – Stainless Steel Bars</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020, appealed by Korea 22 January 2021
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R , adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R , adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R , adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R , adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Morocco – Hot-Rolled Steel (Turkey)</i>	Panel Report, <i>Morocco – Anti-dumping Measures on Certain Hot-Rolled Steel from Turkey</i> , WT/DS513/R and Add.1, adopted 8 January 2020; appeal withdrawn by Morocco as reflected in Appellate Body Report WT/DS513/AB/R
<i>Pakistan – BOPP Film (UAE)</i>	Panel Report, <i>Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates</i> , WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed by Pakistan 22 February 2021
<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
<i>Russia – Commercial Vehicles</i>	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R, DSR 2018:III, p. 1329
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741

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<i>Ukraine – Ammonium Nitrate</i>	Appellate Body Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/AB/R and Add.1, adopted 30 September 2019
<i>Ukraine – Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/R , Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R
<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> , WT/DS379/AB/R , adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R , adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
<i>US – Anti-Dumping and Countervailing Duties (Korea)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available</i> , WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed by the United States 19 March 2021
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R , adopted 28 November 2005, DSR 2005:XX, p. 10127
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Panel Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R , adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
<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> , WT/DS436/AB/R , adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Carbon Steel (India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189

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<i>US – Coated Paper (Indonesia)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia</i> , WT/DS491/R and Add.1, adopted 22 January 2018, DSR 2018:I, p. 273
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R , adopted 5 November 2001, DSR 2001:XII, p. 6027
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, 8243
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R , adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/AB/RW and Add.1, adopted 15 August 2019
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R , adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R , adopted 19 March 1999, DSR 1999:II, p. 521
<i>US – Differential Pricing Methodology</i>	Panel Report, <i>United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada</i> , WT/DS534/R and Add.1, circulated to WTO Members 9 April 2019, appealed by Canada 4 June 2019
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, 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> , WT/DS184/R , adopted 23

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	August 2001, as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R , WT/DS178/AB/R , adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Lamb</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/R , WT/DS178/R , adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
<i>US – Large Civil Aircraft (2nd Complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R , adopted 7 June 2000, DSR 2000:V, p. 2595
<i>US – OCTG (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea</i> , WT/DS488/R and Add.1, adopted 12 January 2018, DSR 2018:I, p. 7
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Offset Act (Byrd Amendment)</i>	Panel Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/R , WT/DS234/R , adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW , adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
<i>US – Pipes and Tubes (Turkey)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Pipe and Tube Products from Turkey</i> , WT/DS523/R and Add.1, circulated to WTO Members 18 December 2018, appealed by the United States 25 January 2019

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<i>US – Softwood Lumber II</i>	GATT Panel Report, <i>Panel on United States – Measures Affecting Imports of Softwood Lumber from Canada</i> , SCM/162, adopted 27 October 1993, BISD 40S/358
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R , adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R , adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW , adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R , adopted 26 April 2004, DSR 2004:VI, p. 2485
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW , adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R , WT/DS249/AB/R , WT/DS251/AB/R , WT/DS252/AB/R , WT/DS253/AB/R , WT/DS254/AB/R , WT/DS258/AB/R , WT/DS259/AB/R , adopted 10 December 2003, DSR 2003:VII, p. 3117

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<i>US – Supercalendered Paper</i>	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/AB/R and Add.1, adopted 5 March 2020
<i>US – Supercalendered Paper</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add.1, adopted 5 March 2020, as upheld by Appellate Body Report WT/DS505/AB/R
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R , Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R 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> , WT/DS166/AB/R , adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R , adopted 23 January 2007, DSR 2007:I, p. 3

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
3IP	Irrigation Industry Improvement Program
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ADM Trading	ADM Trading Australia Pty Ltd
Agracom	Agracom Pty Ltd
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

Abbreviation	Full Form or Description
Anti-Dumping Final Disclosure	MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020
Anti-Dumping Duty Announcement	MOFCOM, "Announcement [2020] No. 14: The Announcement on the Final Ruling of the Anti-Dumping Investigation into Imported Barley Originating in Australia", 18 May 2020
Baoying Malting	Supertime (Baoying) Malting Company Ltd
BCI	business confidential information
Bunge	Bunge Agribusiness Australia Pty Ltd
Cargill	Cargill Australia Limited
CBH	CBH Grain Pty Ltd
ChAFTA	China-Australia Free Trade Agreement
Changle Malting	Supertime (Changle) Malting Company Ltd
China's Countervailing Regulation	<i>Countervailing Regulation of the People's Republic of China</i>
CHS Broadbent	CHS Broadbent Pty Ltd
CHS (Shanghai)	CHS (Shanghai) Trading Co., Ltd
CICC	China International Chamber of Commerce
CIF	Cost, insurance and freight
CL Commodities	CL Commodities Pty Ltd
COFCO	COFCO International Australia Pty Ltd
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
Countervailing Duties Announcement	MOFCOM, "Announcement [2020] No. 15: The Announcement on the Final Ruling of the Countervailing Duty Investigation into Imported Barley Originating in Australia", 18 May 2020
Dalian Xingze Malt	Dalian Xingze Malt Processing Co., Ltd.
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Emerald	Emerald Grain Australia Pty Ltd
FAQ	fair average quality

Abbreviation	Full Form or Description
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
GIMAF	Grains Industry Market Access Forum
Glencore	Glencore Agriculture Pty Ltd
Grain Growers	Grain Growers Limited
GrainCorp	GrainCorp Operations Limited
Grain Trade Australia	Grain Trade Australia Ltd
Guangzhou Malting	Guangzhou Malting Co., Ltd.
Haycroft	Haycroft Enterprises
Iluka Trust	The Iluka Trust
Injury POI	Injury period of investigation (1 January 2014 to 30 September 2018)
Kalgan	Kalgan Nominees Pty Ltd
Louis Dreyfus	Louis Dreyfus Company Australia
McDonald	JW & JI McDonald & Sons
MOFCOM	Ministry of Commerce of the People's Republic of China
Ningbo Malting	Ningbo Malting Co., Ltd
OFIEP	On-Farm Irrigation Efficiency Project
PIIOP-NSW	Private Irrigation Infrastructure Operators Program for New South Wales
PIIPSA	Private Irrigation Infrastructure Program for South Australia
POI	period of investigation (1 October 2017 to 30 September 2018)
Qinhuangdao Malting	Supertime (Qinhuangdao) Malting Company Ltd
Quadra	Quadra Commodities Pty Ltd
Riordan	Riordan Group Pty Ltd
Tsingtao Brewery	Tsingtao Brewery Co., Ltd
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

LIST OF EXHIBITS

Exhibit No.	Exhibit Name	Short Title
AUS-1	Australian Government, "China-Australia Free Trade Agreement: Outcomes at a glance", August 2018 (pages renumbered)	ChAFTA: Outcomes at a glance
AUS-2	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 (English translation)	Anti-Dumping Final Determination
AUS-3	MOFCOM, "Announcement [2020] No. 14: The Announcement on the Final Ruling of the Anti-Dumping Investigation into Imported Barley Originating in Australia", 18 May 2020 (English translation)	Anti-Dumping Duty Announcement
AUS-4	MOFCOM, "Announcement [2020] No. 15: The Announcement on the Final Ruling of the Countervailing Duty Investigation into Imported Barley Originating in Australia", 18 May 2020 (English translation)	Countervailing Duties Announcement
AUS-5	CICC, "Application of the Barley Industry of the People's Republic of China for Anti-Dumping Investigation on Imported Barley Products Originating from Australia", 9 October 2018 (English translation) (pages renumbered)	CICC Application for Anti-Dumping Investigation
AUS-6	MOFCOM, "Announcement No. 89 on Filing of Anti-dumping Investigation against Imports of Australian Barley", 19 November 2018 (English translation) (pages renumbered)	Anti-Dumping Initiation of Investigation Announcement
AUS-7	MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020 (English translation)	Anti-Dumping Final Disclosure
AUS-8	CICC, "Application of the Barley Industry of the People's Republic of China for a Countervailing Duty Investigation on Imported Barley Products Originating in Australia", 29 October 2018 (English translation)	CICC Application for Countervailing Duties Investigation
AUS-9	MOFCOM, "Announcement No. 99 on Filing of Countervailing Investigation against Imports of Barley Originating in Australia", 22 December 2018 (English translation) (pages renumbered)	Countervailing Duties Initiation of Investigation Announcement

Exhibit No.	Exhibit Name	Short Title
AUS-10	MOFCOM, "Basic facts based on which final determination on the countervailing duty investigation is made", 8 May 2020 (English translation)	Countervailing Duties Final Disclosure
AUS-11	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 (English translation)	Countervailing Duties Final Determination
AUS-12	MOFCOM, "Anti-Dumping Case of Barley Imported from Australia Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer Anti-Dumping Questionnaire", 21 December 2018 (English translation)	Anti-Dumping Foreign Trader or Producer Questionnaire
AUS-13	CBH, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation)	CBH Anti-Dumping Questionnaire Response
AUS-14	GrainCorp, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (pages renumbered)	GrainCorp Anti- Dumping Questionnaire Response
AUS-15	Glencore, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation)	Glencore Anti-Dumping Questionnaire Response
AUS-16	COFCO, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 8 February 2019 (public version) (English translation) (pages renumbered)	COFCO Anti-Dumping Questionnaire Response
AUS-17	Kalgan, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered)	Kalgan Anti-Dumping Questionnaire Response
AUS-18 (BCI)	Iluka Trust, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	Iluka Trust Anti-Dumping Questionnaire Response Data

Exhibit No.	Exhibit Name	Short Title
AUS-19 (BCI)	McDonald, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	McDonald Anti-Dumping Questionnaire Response Data
AUS-20 (BCI)	Kalgan, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	Kalgan Anti-Dumping Questionnaire Response Data
AUS-21	Haycroft, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (pages renumbered)	Haycroft Anti-Dumping Questionnaire Response
AUS-22	Grain Growers, Submission in Response to Notice on Disclosing the Facts Based on which the Final Determination on the Barley Anti-dumping Case is Made, 18 May 2020, Annexing Grain Growers Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 31 January 2019 (public version) (English translation) (pages renumbered)	Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response
AUS-23 (BCI)	CBH, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	CBH Anti-Dumping Questionnaire Response (confidential version)
AUS-24	Iluka Trust Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered)	Iluka Trust Anti-Dumping Questionnaire Response
AUS-25	McDonald Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered)	McDonald Anti-Dumping Questionnaire Response
AUS-26 (BCI)	Kalgan, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	Kalgan Anti-Dumping Questionnaire Response (confidential version)
AUS-27 (BCI)	Iluka Trust Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	Iluka Trust Anti-Dumping Questionnaire Response (confidential version)

Exhibit No.	Exhibit Name	Short Title
AUS-28 (BCI)	McDonald Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version)	McDonald Anti-Dumping Questionnaire Response (confidential version)
AUS-29 (BCI)	CBH, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019	CBH Anti-Dumping Questionnaire Response Data
AUS-30	Cargill, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation)	Cargill Anti-Dumping Questionnaire Response
AUS-31	Emerald, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation)	Emerald Anti-Dumping Questionnaire Response
AUS-32	ADM Trading, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 5 February 2019 (public version) (English translation) (pages renumbered)	ADM Trading Anti-Dumping Questionnaire Response
AUS-33	CHS Broadbent, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation)	CHS Broadbent Anti-Dumping Questionnaire Response
AUS-34	Grain Trade Australia, Comments on Initiation of the Anti-Dumping Investigation, 9 February 2019 (public version) (English translation) (pages renumbered)	Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation
AUS-35	Grain Producers Australia, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 25 January 2019 (public version) (English translation) (pages renumbered)	Grain Producers Australia Anti-Dumping Questionnaire Response
AUS-36	Australian Government, Submission in response to Disclosure of Facts on which the Final Determination on the Anti-Dumping Investigation into imports of Barley from Australia, 15 May 2020 (pages renumbered)	Australian Government Comments on Anti-Dumping Final Disclosure

Exhibit No.	Exhibit Name	Short Title
AUS-37	Australian Government, Response to certain questions from section 7 of the Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019	Australian Government Anti-Dumping Questionnaire Response, Section 7
AUS-38	Australian Bureau of Agricultural and Resource Economics and Sciences, Department of Agriculture, Water and the Environment, Agricultural commodity statistics 2018, Rural commodities – coarse grains; and Agricultural commodity statistics 2019, Rural commodities – coarse grains, available at: https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/data#2018	ABARES Grains Data
AUS-39	Extract from Reserve Bank of Australia Historical Data, Daily Exchange Rates, 2014 to 2017 and 2018 to Current, available at: https://www.rba.gov.au/statistics/historical-data.html#exchange-rates	Reserve Bank of Australia Exchange Rates
AUS-40	Global Trade Atlas Data, Australia's Exports to All Trade Partners for Barley during the Period of Investigation, 1 October 2017 to 30 September 2018	Global Trade Atlas Data – Australia's POI Barley Exports
AUS-41	Grain Trade Australia and GIMAF, Submission in response to Anti-Dumping and Countervailing Duty Investigation Against Imported Barley Originating in Australia – Letter on the Disclosure of Facts, to Provide Basis for Making the Final Decision, 18 May 2020 (English translation) (pages renumbered)	Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Final Disclosure
AUS-42	CBH Comments on MOFCOM's Anti-Dumping Disclosure of Facts to provide basis for making the final determination, 15 May 2020 (pages renumbered)	CBH Comments on Anti-Dumping Final Disclosure
AUS-43	GrainCorp Comments on the essential facts of the MOFCOM's barley anti-dumping final decision, 18 May 2020, (English translation) (pages renumbered)	GrainCorp Comments on Anti-Dumping Final Disclosure
AUS-44	Quadra, Extract of Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 23 January 2019 (public version) (English translation)	Quadra Anti-Dumping Questionnaire Response

Exhibit No.	Exhibit Name	Short Title
AUS-45	Australian Government, Submission in response to Initiation of an Anti-Dumping Investigation into imports of Barley from Australia, 10 December 2018	Australian Government Comments on Initiation of Anti-Dumping Investigation
AUS-46	ADM Trading, Extract of Response to the Notice on Disclosing the Facts on which the Final Determination on the Barley Anti-Dumping Case is Made, 18 May 2020 (pages renumbered)	ADM Trading Comments on Anti-Dumping Final Disclosure
AUS-47	Tsingtao Brewery, Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 28 January 2019 (public version) (English translation) (pages renumbered)	Tsingtao Brewery Anti-Dumping Questionnaire Response
AUS-48	Dalian Xingze Malt, Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 January 2019 (public version) (English translation) (pages renumbered)	Dalian Xingze Malt Anti-Dumping Questionnaire Response
AUS-49	CHS (Shanghai), Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users, 24 January 2019 (public version) (English translation) (pages renumbered)	CHS (Shanghai) Anti-Dumping Questionnaire Response
AUS-50	Australian Government, Response to Countervailing Duties Questionnaire for Government, Section 2: Specific Programs, 16 February 2019	Australian Government Countervailing Duties Questionnaire Response, Section 2
AUS-51	Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Guidelines Round 1	SARMS Program, 3IP Guidelines, Round 1
AUS-52 (BCI)	Attachment to Australian Government Countervailing Duties Questionnaire Response: SARMS Program – Actual Water Transferred (pages renumbered)	SARMS Program, Actual Water Transferred
AUS-53	Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Guidelines Round 4	SARMS Program, 3IP Guidelines, Round 4
AUS-54 (BCI)	Attachment to Australian Government Countervailing Duties Questionnaire Response: SARMS Program – Grant Payments (pages renumbered)	SARMS Program, Grant Payments

Exhibit No.	Exhibit Name	Short Title
AUS-55 (BCI)	Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Applicants by Industry (pages renumbered)	SARMS Program, 3IP Applicants by Industry
AUS-56 (BCI)	Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP List of Approved Applicants (pages renumbered)	SARMS Program, 3IP List of Approved Applicants
AUS-57	GrainCorp, Comments on the essential facts of the MOFCOM's barley countervailing duties final decision, 18 May 2020, (English translation)	GrainCorp Comments on Countervailing Duties Final Disclosure
AUS-58	CBH, Comments on Final Countervailing Duties Disclosure, 15 May 2020 (pages renumbered)	CBH Comments on Countervailing Duties Final Disclosure
AUS-59	Australian Government, Comments on Final Countervailing Duties Disclosure (including Attachments 1 and 2), 15 May 2020 (pages renumbered)	Australian Government Comments on Countervailing Duties Final Disclosure
AUS-60	Grain Producers Australia, Comments on Final Countervailing Duties Disclosure, 15 May 2020 (English translation)	Grain Producers Australia Comments on Countervailing Duties Final Disclosure
AUS-61	Australian Government, National Partnership Agreement on Implementing Water Reform in the Murray–Darling Basin: Commonwealth Payments to Basin states, 5 June 2013	Water Reform National Partnership Agreement, Payments to Murray-Darling Basin States
AUS-62	Attachment to Australian Government Countervailing Duties Questionnaire Response: VAIJ Fund – Major Capital Works Application Guidelines 16 May 2017 (pages renumbered)	VAIJ Fund Major Capital Works Application Guidelines
AUS-63	Australian Government, National Partnership Agreement on Implementing Water Reform in the Murray-Darling Basin, 5 June 2013 (pages renumbered)	Murray-Darling Basin Water Reform National Partnership Agreement
AUS-64	CCIC Application for Countervailing Duties Investigation, All Annexes (English translation) (pages renumbered)	CICC Application for Countervailing Duties Investigation, Annexes
AUS-65	CICC, Response to the Anti-Dumping Questionnaire for Domestic Producers or Growers, 1 February 2019 (English translation)	CICC Anti-Dumping Questionnaire Response

Exhibit No.	Exhibit Name	Short Title
AUS-66	CICC, Response to the Countervailing Duty Questionnaire for Domestic Producers or Growers, 1 February 2019 (English translation)	CICC Countervailing Duties Questionnaire Response
AUS-67	Australian Government, Submission in response to Initiation of a Countervailing Duties Investigation into imports of Barley from Australia, 10 January 2019	Australian Government Comments on Initiation of Countervailing Duties Investigation
AUS-68	Glencore, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 25 February 2019 (public version) (English translation)	Glencore Countervailing Duties Questionnaire Response
AUS-69	CBH, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 18 February 2019 (public version) (English translation)	CBH Countervailing Duties Questionnaire Response
AUS-70	GrainCorp, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 25 February 2019 (public version) (English translation) (pages renumbered)	GrainCorp Countervailing Duties Questionnaire Response
AUS-71	MOFCOM, Records on the Survey Results of Barley in Yancheng, Jiangsu conducted on 11-13 December 2018, 20 February 2019 (English translation)	MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu
AUS-72	Emerald, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, date unknown (public version) (English translation) (pages renumbered)	Emerald Countervailing Duties Questionnaire Response
AUS-73	Global Trade Atlas Data on Australia's Exports to All Partners during the Injury Period of Investigation, 1 January 2014 - 30 September 2018	Global Trade Atlas Data - Australia's Injury POI Exports to All Partners
AUS-74	Australian Government, Extract of Submission following meeting with MOFCOM on 13 February 2019 to discuss initiation, 7 March 2019	Australian Government Submission Following Initiation Consultations
AUS-75	Guangzhou Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 3 January 2019 (public version) (English translation)	Guangzhou Malting Anti-Dumping Questionnaire Response

Exhibit No.	Exhibit Name	Short Title
AUS-76	Ningbo Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, undated (public version) (English translation)	Ningbo Malting Anti-Dumping Questionnaire Response
AUS-77	Baoying Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, undated (public version) (English translation)	Baoying Malting Anti-Dumping Questionnaire Response
AUS-78	Qinhuangdao Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 December 2018 (public version) (English translation)	Qinhuangdao Malting Anti-Dumping Questionnaire Response
AUS-79	Changle Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 December 2018 (public version) (English translation)	Changle Malting Anti-Dumping Questionnaire Response
AUS-80	CICC, Attachment of the application for the anti-dumping investigation of barley, All Annexes (pages renumbered)	CICC Application for Anti-Dumping Investigation, Annexes
AUS-81	Australian Government, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation)	Australian Government Request for Extension to file Countervailing Duties Questionnaire Response
AUS-82	Emerald, Request for extension to file questionnaire response in the countervailing duty investigation, 31 January 2019 (English translation) (pages renumbered)	Emerald Request for Extension to file Countervailing Duties Questionnaire Response
AUS-83	Grain Trade Australia, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation)	Grain Trade Australia Request for Extension to file Countervailing Duties Questionnaire Response
AUS-84	Grain Growers, Request for extension to file questionnaire response in the countervailing duty investigation, 11 February 2019 (English translation) (pages renumbered)	Grain Growers Request for Extension to file Countervailing Duties Questionnaire Response

Exhibit No.	Exhibit Name	Short Title
AUS-85	ADM Trading, Extract of Request for extension to file questionnaire response in the countervailing duty investigation, 8 February 2019 (English translation) (pages renumbered)	ADM Trading Request for Extension to file Countervailing Duties Questionnaire Response
AUS-86	Agracom, Request for extension to file questionnaire response in the countervailing duty investigation, 5 February 2019 (English translation) (pages renumbered)	Agracom Request for Extension to file Countervailing Duties Questionnaire Response
AUS-87	Bunge, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered)	Bunge Request for Extension to file Countervailing Duties Questionnaire Response
AUS-88	CHS Broadbent, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation)	CHS Broadbent Request for Extension to file Countervailing Duties Questionnaire Response
AUS-89	CBH, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered)	CBH Request for Extension to file Countervailing Duties Questionnaire Response
AUS-90	Cargill, Request for extension to file questionnaire response in the countervailing duty investigation, 3 February 2019 (English translation)	Cargill Request for Extension to file Countervailing Duties Questionnaire Response
AUS-91	CL Commodities, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation)	CL Commodities Request for Extension to file Countervailing Duties Questionnaire Response
AUS-92	GIMAF, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation)	GIMAF Request for Extension to file Countervailing Duties Questionnaire Response
AUS-93	GrainCorp, Request for extension to file questionnaire response in the countervailing duty investigation, 13 February 2019 (English translation)	GrainCorp Request for Extension to file Countervailing Duties Questionnaire Response
AUS-94	Glencore, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered)	Glencore Request for Extension to file Countervailing Duties Questionnaire Response

Exhibit No.	Exhibit Name	Short Title
AUS-95	Quadra, Request for extension to file questionnaire response in the countervailing duty investigation, 8 February 2019 (English translation)	Quadra Request for Extension to file Countervailing Duties Questionnaire Response
AUS-96	MOFCOM, Reply letter on the request for extension to file countervailing duties questionnaire, 15 February 2019 (English translation) (pages renumbered)	MOFCOM Reply letter on the request for extension to file CVD questionnaire
AUS-97	CBH, Comments on initiation of anti-dumping investigation, 10 December 2018 (English translation)	CBH Comments on Initiation of Anti-Dumping Investigation
AUS-98	COFCO, Request for extension to file questionnaire response in the countervailing duty investigation, 13 February 2019 (English translation)	COFCO Request for Extension to file Countervailing Duties Questionnaire Response

I. INTRODUCTION

A. INTRODUCTION

1. China's anti-dumping and countervailing duties on barley from Australia are the result of a flawed process yielding flawed results. In this submission, Australia will demonstrate how MOFCOM, China's investigating authority, failed comprehensively to comply with China's obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

2. In section II, in relation to MOFCOM's determination of dumping, Australia will demonstrate that China acted inconsistently with its 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 in the following respects:

- *First*, MOFCOM had no proper basis to use facts available because it had the "necessary information" on the record to properly determine normal value and export price in accordance with Article 2 of the Anti-Dumping Agreement. Further, MOFCOM: failed to specify in detail the information required; failed to take into account information which was verifiable, appropriately submitted, and timely; failed to provide reasons as to why submitted information was rejected; failed to inform the Australian traders and producers that their information was not accepted; failed to provide these interested parties an opportunity for further explanation; failed to exercise special circumspection in its selection of the facts available; and ultimately determined a dumping margin that had not logical relationship with the facts on the record.
- *Second*, as a result of MOFCOM's improper use and selection of facts available, China failed to determine normal value, export price and the consequent margin of dumping in accordance with Article 2 of the Anti-Dumping Agreement.
- *Third*, MOFCOM failed to make a fair comparison between the normal value and the export price, including because it failed to make due allowance for

factors affecting price comparability, and failed to indicate to interested parties the information necessary to ensure a fair comparison.

- *Fourth*, having chosen to establish the margin of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, MOFCOM failed to ensure that its determination was in fact based on "comparable" export transactions, by including "non-comparable" export transactions in the dumping margin calculation.
- *Fifth*, by assigning the same dumping margin to all Australian companies, MOFCOM failed to determine individual dumping margins for each known exporter and producer.

3. In section III, in relation to MOFCOM's determination regarding the existence of a countervailable subsidy, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 1.1(a), 1.1(b), 1.2, 2.1, 2.4 and 12.7 of the SCM Agreement in the following respects:

- *First*, MOFCOM improperly determined payments between government entities to amount to financial contributions, and mis-characterised other payments made to non-governmental entities as "direct transfers of funds".
- *Second*, MOFCOM's failure to properly characterise the alleged financial contribution vitiated its subsequent "benefit" analysis. Further MOFCOM failed to identify any relevant "recipients" or "advantage" to Australian barley producers or traders, and improperly found programs aimed at improving irrigation benefited producers of a product that is not grown with the aid of artificial irrigation.
- *Third*, MOFCOM failed to undertake a structured analysis of the evidence on the record as required by Article 2.1 with respect to its determination of "specificity" and failed to make its determination on the basis of positive evidence.

- *Fourth*, in respect of both its determination of "benefit" and "specificity", MOFCOM had no proper basis to use facts available because it had the "necessary information" on the record to make the determinations in accordance with the SCM Agreement. Further MOFCOM failed to select a reasonable replacement for the allegedly missing information, including because it failed to take into account all the facts on the record and failed to undertake a process of reasoning and evaluation.

4. In section IV, in relation to MOFCOM's determination of the domestic industry, Australia will demonstrate that China acted inconsistently with its WTO obligations under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement in the following respects:

- MOFCOM failed to establish that the "domestic industry" it defined covered "a major proportion of the total domestic production" of the like product. This failure vitiated MOFCOM's subsequent injury and causation analyses.

5. In section V, in relation to MOFCOM's determination that the alleged dumped and subsidised products caused injury to the Chinese domestic industry, Australia will demonstrate that China acted inconsistently with its WTO obligations under 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 in the following respects:

- *First*, in relation to MOFCOM's findings that there were significant absolute and relative increases in alleged dumped and subsidised imports of Australian barley, MOFCOM: failed to examine import volumes in an objective manner; failed to address relevant data; failed to explain how it took into account evidence that conflicted with its conclusions (including conflicting trends in the data); and applied an internally inconsistent methodology that made a final determination of injury more likely.
- *Second*, in relation to MOFCOM's findings that alleged dumped and subsidised imports of Australian barley caused significant price depression in China's domestic market for like products, MOFCOM: failed to ensure

price comparability including in relation to level of trade; failed to make necessary adjustments to the prices for imported Australian barley; failed to consider difference in product categories; failed to address relevant data and explain how it took into account evidence that conflicted with its conclusions (including conflicting trends in the data); and applied a methodology that made a final determination of injury more likely.

- *Third*, MOFCOM failed to evaluate all the economic factors bearing on the state of the Chinese barley industry. MOFCOM adopted a "check-list approach" which failed to assess "the role, relevance and relative weight" of factors and failed to explain its conclusions as to the relevance or significance of the identified factors. MOFCOM's evaluations were improperly skewed towards establishing the basis for a determination that the Chinese domestic barley industry had been injured.
- *Fourth*, MOFCOM's causation analysis was vitiated by the errors outlined above. Further, MOFCOM failed to conduct a proper analysis to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between subject imports of Australian barley and injury to the Chinese barley industry and failed to conduct non-attribution analyses in relation to other "known" factors.

6. In section VI, in relation to MOFCOM's imposition of duties, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, Articles 10, 19.4 and 32.1 of the SCM Agreement, and Articles VI:2 and VI:3 of the GATT 1994 in the following respects:

- *First*, China improperly imposed anti-dumping duties where all requirements for their imposition had not been fulfilled; did not impose anti-dumping duties in appropriate amounts; did not name the suppliers of the product concerned; and imposed anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement.

- *Second*, China improperly imposed countervailing duties pursuant to investigation that was not initiated and conducted in compliance with Article VI of the GATT 1994 and the SCM Agreement.

7. In section VII, in relation to MOFCOM's initiation of the investigations, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement and Articles 11.1, 11.2, 11.3, 11.4 and 11.9 of the SCM Agreement in the following respects:

- *First*, MOFCOM improperly initiated investigations following receipt of applications by CICC which failed to provide a list of known producers and did not properly "identify the industry on behalf of which the applications were made". MOFCOM also failed to examine the degree of support, or opposition to the application.
- *Second*, MOFCOM improperly initiated investigations on the basis of information provided by CICC which was not of the "quantity" and "quality" to meet the threshold of "sufficient evidence to justify the initiation of an investigation."

8. In section VIII, in relation to MOFCOM's conduct of the investigation, Australia will demonstrate that China acted inconsistently with its WTO obligations under 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 in the following respects:

- MOFCOM failed to observe the framework of procedural and due process obligations set out in the Anti-Dumping Agreement and SCM Agreement. In particular, MOFCOM: failed to give interested parties ample opportunities to present relevant evidence; failed to verify extensive evidence submitted by interested parties; failed to disclose information it collected; failed to respond to submissions by interested parties; and failed to provide adequate reasons for its determinations such that interested parties were able to discern why MOFCOM acted in the way it did.

9. Finally, in section IX, Australia provides a brief conclusion and requests the Panel to make findings and recommendations in accordance with Article 19.1 of the DSU.

B. CONTEXT OF THE DISPUTE

10. In assessing Australia's claims, it is important to understand the relevant factual context of the anti-dumping and countervailing duties applied by China.

11. The underlying investigations and duties concern barley, an unirrigated commodity grain product grown in Australia. Australia ranks in the top four of the world's barley producers and exporters. China, which produces only a small quantity of barley compared to its domestic consumption, is the world's top importer.

1. Domestic and international barley markets

12. Barley is openly traded within Australia and between Australia and other countries, including China, in the same manner as other WTO Members who participate in the global barley market.¹ As is the case with other WTO Members, exports of Australian barley are made by traders who purchase barley from producers at arm's-length prices, commingle it, sort it, store it, and ship it. Many of the traders active in Australia are the same large multinationals that are active in Canada, the United States, and the European Union.

13. Barley is traded at the prevailing world price. Domestic barley prices in Australia and China are bounded by export parity and import parity. Basic economic principles dictate that prices cannot be sustained below export parity. If they were, traders would export barley to the point at which domestic supply would become limited and prices would eventually return to export parity. Similarly, prices cannot be sustained above import parity. If domestic prices were above import prices, buyers would choose to import barley from the world market rather than purchase domestic barley. This would reduce demand for locally produced barley, bringing local prices back down to import parity.

¹ The China-Australia Free Trade Agreement (ChAFTA), entered into force on 20 December 2015, resulting in China's elimination of remaining tariffs on Australian barley on the same date. See Australian Government, "China-Australia Free Trade Agreement: Outcomes at a glance", August 2018 (pages renumbered) (ChAFTA: Outcomes at a glance) (Exhibit AUS-1), p. 1.

2. Implications for MOFCOM's anti-dumping investigation

14. The 73.6% anti-dumping duty rate applied by China is absurd and ignores the realities outlined above.

15. Once transportation and logistics costs and applicable duties and taxes are accounted for, prices of barley in Australia, in China, and traded between the two will be similar. In such circumstances, any "dumping" that occurs between Australia and China will be minimal, if it exists at all. Although, in theory, dumping could occur where the domestic barley prices in the exporting country are below the cost of production, the margins of dumping would still be small. In any event, in the circumstances of the current case, the evidence on the investigation record established that Australian selling prices during the period of the dumping investigation were above cost.

16. Moreover, there is no basis to ignore, as MOFCOM did, the established arm's-length commercial relationships between producers and traders when determining whether traders are selling at dumped prices. In such circumstances, prices paid to the producers accurately reflect the full acquisition costs of the traders. There is no need to continue to look behind these costs once it has been established that producers are selling at profitable prices.

3. Implications for MOFCOM's countervailing duties investigation

17. Two of the three subsidy programs found by MOFCOM to be countervailable concerned irrigation. As barley is produced in Australia without the aid of artificial irrigation, these programs were irrelevant to barley.

4. Implications for MOFCOM's injury and causation determination

18. MOFCOM's injury and causation findings must also be considered in the light of the realities outlined above. Although Australia helped fulfil Chinese barley consumption and was a reliable supplier of high-quality barley during the Injury POI, it was not the only international

supplier. Between 27-59% of barley imports were from countries other than Australia.² Like Australian barley, those imports would have been traded at the world price. Although geographic proximity confers a transportation cost advantage on Australian barley compared to non-subject imports, those non-subject imports alone would have ensured that domestic prices in China were bounded by import parity and could go no higher. In other words, Chinese barley prices would have been subject to the same competitive pressures without imports of Australian barley.

C. PROCEDURAL BACKGROUND

19. On 16 December 2020, Australia requested consultations with China pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994, Articles 17.2 and 17.3 of the Anti-Dumping Agreement, and Article 30 of the SCM Agreement, with respect to China's measures imposing anti-dumping duties and countervailing duties on barley imported from Australia.³ Pursuant to this request, Australia and China held consultations on 28 January 2021. Unfortunately, those consultations failed to resolve the dispute.

20. On 15 March 2021, Australia requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, Article 30 of the SCM Agreement, and Article XXIII of the GATT 1994.⁴ The DSB considered this request at its meeting on 28 April 2021, at which time China objected to the establishment of a panel.⁵

² 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 (English translation) (Anti-Dumping Final Determination) (Exhibit AUS-2), Attachment: Data Table of Barley Anti-Dumping Case, p. 23:

(10,000 tons)	2014	2015	2016	2017	2018
Total National Imports	541.3	1073.2	500.49	886.35	681.54
Imported Investigated Product (AUS)	387.71	436.2	325.18	648.04	417.84
	72%	41%	65%	73%	61%
Non-subject Imports (est.)	153.59	637	175.31	238.31	263.7
	28%	59%	35%	27%	39%

³ Request for consultations by Australia, WT/DS598/1, p. 1.

⁴ Request for the establishment of a panel by Australia, WT/DS598/4, p. 1.

⁵ DSB, Minutes of the meeting held on 28 April 2021, WT/DSB/M/451, p. 12.

21. Australia renewed its request for the establishment of a panel at the 28 May 2021 meeting of the DSB. At that meeting, a panel was established with the following terms of reference:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Australia in document WT/DS598/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁶

D. FACTUAL BACKGROUND

1. Measures at issue

22. China's anti-dumping and countervailing duties measures against Australian barley imports were announced by MOFCOM on 19 May 2020 in Notice No. 14 of 2020⁷ and Notice No. 15 of 2020.⁸

23. Under these measures, China levied a uniform anti-dumping duty rate of 73.6% and a countervailing duty rate of 6.9% against imports of barley from Australian producers and exporters. These rates are to continue for a period of five years from 19 May 2020.

2. Product subject to the investigations

24. MOFCOM described the product subject to investigation as "barley", stating that "[t]his product is listed under tariff numbers 10031000 and 10039000 in the Customs Import and Export Tariff of the People's Republic of China".⁹ The product's main uses are described in Notices No. 14 and No. 15 as "a cereal crop of *Hordeum linn* in Gramineae family mainly used for brewing and feed production, and can also be used as seed, as well as being eaten by consumers directly or through processing".¹⁰

⁶ Constitution note related to Australia's request to establish a panel, WT/DS598/6, p. 1.

⁷ MOFCOM, "Announcement [2020] No. 14: The Announcement on the Final Ruling of the Anti-Dumping Investigation into Imported Barley Originating in Australia", 18 May 2020 (English translation) (Anti-Dumping Duty Announcement) (Exhibit AUS-3).

⁸ MOFCOM, "Announcement [2020] No. 15: The Announcement on the Final Ruling of the Countervailing Duty Investigation into Imported Barley Originating in Australia", 18 May 2020 (English translation) (Countervailing Duties Announcement) (Exhibit AUS-4).

⁹ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 2; Countervailing Duties Announcement (Exhibit AUS-4), p. 2.

¹⁰ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 1; Countervailing Duties Announcement (Exhibit AUS-4), pp. 1-2.

3. Initiation and conduct of the investigations

(a) Anti-dumping investigation

25. On 9 October 2018, MOFCOM received from CICC an application to commence an anti-dumping investigation in relation to imports of Australian barley.¹¹

26. The application for the investigation was based on barley output from 2014 to 2017 in China. CICC alleged that Australian barley was exported to China "at a price lower than the normal value, implying a larger extent of dumping" and resulting in "damages" to the domestic industry.¹²

27. MOFCOM launched the anti-dumping investigation on 19 November 2018.¹³ The investigation periods were set out as follows:

- 1 October 2017 to 30 September 2018 for MOFCOM's investigation period against "imported barley originating in Australia"; and
- 1 January 2014 to 30 September 2018 for MOFCOM's investigation period "of injury to the domestic industry".¹⁴

28. Interested parties were called to register their participation with MOFCOM within 20 days from 19 November 2018 (i.e. 9 December 2018).¹⁵

29. The Australian Government along with 45 Australian producers and traders registered as interested parties. Along with CICC, 17 Chinese domestic importers also registered.¹⁶

30. The Australian Government (on 10 December 2018), the Australian traders (GrainCorp on 7 December 2018, CBH on 10 December 2018, and Grain Trade Australia on

¹¹ CICC, "Application of the Barley Industry of the People's Republic of China for Anti-Dumping Investigation on Imported Barley Products Originating from Australia", 9 October 2018 (English translation) (pages renumbered) (CICC Application for Anti-Dumping Investigation) (Exhibit AUS-5).

¹² MOFCOM, "Announcement No. 89 on Filing of Anti-dumping Investigation against Imports of Australian Barley", 19 November 2018 (English translation) (pages renumbered) (Anti-Dumping Initiation of Investigation Announcement) (Exhibit AUS-6), p. 1.

¹³ Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-6).

¹⁴ MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020 (English translation) (Anti-Dumping Final Disclosure) (Exhibit AUS-7), p. 1.

¹⁵ Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-6), p. 2.

¹⁶ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 2.

11 February 2019) and two Chinese importers (Yuehai Yongshuntai (Guangzhou) Malt Co. Ltd and China Alcoholic Drinks Association on 5 December 2018) submitted comments on the initiation of the investigation.¹⁷ On 13 February 2019, at the request of the Australian Government, MOFCOM met with Australian officials, following which the Australian Government submitted further comments on the initiation, dated 7 March 2019.¹⁸

31. From 11 to 13 December 2018, MOFCOM conducted visits to Chinese domestic barley production sites and downstream users in Jiangsu province.¹⁹

32. On 21 December 2018, MOFCOM distributed the anti-dumping questionnaires to registered interested parties. The questionnaires were passed on to domestic importers.²⁰ MOFCOM also requested that the Australian Government "notify the relevant Australian stakeholders".²¹

33. The anti-dumping questionnaires stipulated a deadline of 37 days from the issuance for responses (i.e. 27 January 2019).²² The Australian Government, CICC and 17 companies applied for an extension and were each granted an additional 14 days to submit the anti-dumping questionnaire (i.e. 11 February 2019).²³ Two applications for extension – those of Grain Producers Australia and Itochu Australia Limited – were rejected on the basis they were made "after the specified time limit without stating the reasons."²⁴

34. On 14 November 2019, MOFCOM extended the anti-dumping investigation to 19 May 2020.²⁵

¹⁷ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 3.

¹⁸ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 3.

¹⁹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 4.

²⁰ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 2.

²¹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 2.

²² MOFCOM, "Anti-Dumping Case of Barley Imported from Australia Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer Anti-Dumping Questionnaire", 21 December 2018 (English translation) (Anti-Dumping Foreign Trader or Producer Questionnaire) (Exhibit AUS-12), p. 1.

²³ Anti-Dumping Final Disclosure (Exhibit AUS-7), pp. 2-3.

²⁴ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 3.

²⁵ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 4.

(b) Countervailing duties investigation

35. On 29 October 2018, MOFCOM received an application from CICC to commence a countervailing duties investigation. The application identified 32 Australian subsidy programs and alleged that "financial contribution", "specificity" and "benefit" were established in relation to each program.²⁶

36. MOFCOM launched the investigation via its website on 21 December 2018.²⁷ The investigation periods were set out as follows:

- 1 October 2017 to 30 September 2018 for MOFCOM's investigation period "against imports of barley originating in Australia"; and
- 1 January 2014 to 30 September 2018 for MOFCOM's investigation period "of industry injury".²⁸

37. MOFCOM set the "investigation and allocation period for the one-time subsidy benefits of this case" as "10 years", meaning the investigation would cover "the period of the case and the previous 9 years".²⁹

38. Interested parties were called to register their participation with MOFCOM within 20 days from 21 December 2018 (i.e. 10 January 2019).³⁰

39. The Australian Government, 27 Australian producers or traders, CICC and at least 12 Chinese domestic producers registered as interested parties.³¹

40. From 11 to 13 December 2018, MOFCOM conducted visits to Chinese domestic barley production sites and downstream users in Jiangsu province.³²

²⁶ CICC, "Application of the Barley Industry of the People's Republic of China for a Countervailing Duty Investigation on Imported Barley Products Originating in Australia", 29 October 2018 (English translation) (CICC Application for Countervailing Duties Investigation) (Exhibit AUS-8).

²⁷ MOFCOM, "Announcement No. 99 on Filing of Countervailing Investigation against Imports of Barley Originating in Australia", 22 December 2018 (English translation) (pages renumbered) (Countervailing Duties Initiation of Investigation Announcement) (Exhibit AUS-9).

²⁸ Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 2.

²⁹ MOFCOM, "Basic facts based on which final determination on the countervailing duty investigation is made", 8 May 2020 (English translation) (Countervailing Duties Final Disclosure) (Exhibit AUS-10), p. 5.

³⁰ Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 3.

³¹ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 3.

³² Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 4. Note that the visit referred to by MOFCOM in the Countervailing Duties Final Disclosure appears to be the same visit referred to by MOFCOM in the Anti-Dumping Final Disclosure (see above, para. 31). The visits occurred prior to the initiation of the countervailing duties investigation.

41. On 10 January 2019, the Australian Government, two major Australian traders (GrainCorp and CBH) and one Chinese importer submitted comments on the initiation of the countervailing duties investigation. On 13 February 2019, at the request of the Australian Government, MOFCOM met with Australian officials, following which the Australian Government submitted further comments on the initiation.³³

42. On 15 January 2019, questionnaires were issued by MOFCOM which could also be downloaded by "other interested parties and governments of related countries (regions)" that did not register.³⁴ The questionnaires stipulated a deadline of 37 days from the issuance for responses (i.e. 21 February 2019).³⁵ The Australian Government and 15 companies applied for an extension and were each granted an additional four days to submit the questionnaire (i.e. 25 February 2019).³⁶ MOFCOM stated that four Australian companies failed to respond on-time as did four Chinese domestic importers.³⁷

43. MOFCOM claimed in the Countervailing Duties Final Determination that it conducted a face-to-face meeting with certain Australian traders (GIMAF, Grain Trade Australia, and other industry associations) on 8 March 2019.³⁸ No written summary of that discussion was made available on the public file of the investigation.

44. On 17 December 2019, MOFCOM extended the countervailing duties investigation to 21 June 2020.

4. Final Disclosures

45. On 8 May 2020, MOFCOM released its Final Disclosures of the facts which it relied upon in both the anti-dumping and countervailing duties investigations.³⁹

46. MOFCOM allowed interested parties 10 days (including only five full business days) to provide comments on the Final Disclosures. The deadline for comments, 18 May 2020, was

³³ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 4.

³⁴ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 3; Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 5.

³⁵ Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 5.

³⁶ 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 (English translation) (Countervailing Duties Final Determination) (Exhibit AUS-11), p. 3.

³⁷ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 4.

³⁸ Countervailing Duties Final Determination (Exhibit AUS-11), p. 3.

³⁹ Anti-Dumping Final Disclosure (Exhibit AUS-7); Countervailing Duties Final Disclosure (Exhibit AUS-10).

the same day the Anti-Dumping Final Determination and the Countervailing Duties Final Determination were released.

5. Final Determinations

(a) Anti-Dumping Final Determination

47. MOFCOM issued the Anti-Dumping Final Determination on 18 May 2020 in which it ruled "that the imported barley originating in Australia had been dumped, the domestic barley industry suffered a material injury as a result, and there was a causal link between dumping and the material injury".⁴⁰

48. On the basis of this finding, China imposed the following anti-dumping duty rates for a period of 5 years commencing 19 May 2020:⁴¹

1. The Iluka Trust	73.6%
2. Kalgan Nominees Pty. Ltd.	73.6%
3. JW & JI McDonald & Sons	73.6%
4. Haycroft Enterprises	73.6%
5. All Others	73.6%

(b) Countervailing Duties Final Determination

49. MOFCOM issued the Countervailing Duties Final Determination on 18 May 2020 in which it found "that the imported barley originating in Australia had been subsidized, the domestic barley industry suffered a material injury as a result, and there was a causal link between the subsidy and the material injury."⁴²

50. MOFCOM made this determination in respect of three (out of 32) of the alleged subsidy programs. These three impugned subsidy programs were the Sustainable Rural Water Use and Infrastructure Program ("SRWUI Program"),⁴³ the South Australian River Murray

⁴⁰ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 1. See also, Anti-Dumping Final Determination (Exhibit AUS-2), p. 22.

⁴¹ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 2.

⁴² Countervailing Duties Announcement (Exhibit AUS-4), p. 1. See also, Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁴³ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7-9.

Sustainability Program – Irrigation Efficiency Element ("SARMS Program"),⁴⁴ and the Agriculture Infrastructure and Jobs Fund – Victoria ("VAIJ Fund").⁴⁵

51. Based on MOFCOM's findings, China imposed countervailing duties from 19 May 2020, at a rate of 6.9%, for a period of five years.⁴⁶

E. STANDARD OF REVIEW

52. In respect of claims under the SCM Agreement, Article 30 of that Agreement expressly provides that:

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

As a result, the standard of review imposed on panels by Article 11 of the DSU, with respect to both the ascertainment of facts and the legal characterisation of facts, applies to disputes brought under Part V of the SCM Agreement.⁴⁷

53. In respect of the Anti-Dumping Agreement, Appendix 2 of the DSU lists Articles 17.5 and 17.6 of the Anti-Dumping Agreement as special or additional rules and procedures. The Appellate Body has described "the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*."⁴⁸

54. Turning first then to the generally applicable standard established under Article 11 of the DSU. Article 11 imposes a comprehensive obligation for panels to make an "objective

⁴⁴ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9-10.

⁴⁵ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10-12.

⁴⁶ Countervailing Duties Announcement (Exhibit AUS-4), pp. 1-2.

⁴⁷ *US – Lead and Bismuth II*, para. 51. See also Appellate Body Reports, *EC – Hormones*, para. 116; *Argentina – Footwear (EC)*, para. 118.

⁴⁸ Appellate Body Report, *Guatemala – Cement I*, para. 66. (emphasis original)

assessment of the matter", thus embracing the panel's factual and legal assessment under a single, holistic examination. Specifically, Article 11 of the DSU provides, in part:

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

55. The "objective assessment" to be made by a panel pursuant to Article 11 of the DSU when reviewing an investigating authority's determination is generally understood to be informed by an examination of whether the authority "provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall [...] determination."⁴⁹

56. While it is well established that under Article 11 of the DSU, a panel's role is not to conduct a *de novo* review or substitute its conclusions for that of the investigating authority,⁵⁰ as the Appellate Body in *US – Lamb* emphasised:

[T]his does *not* mean that panels must simply *accept* the conclusions of the competent authorities. [...] Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.⁵¹ (emphasis original)

57. Thus, the Panel is required to examine whether MOFCOM's conclusions are "reasoned and adequate" with regard to the evidence in its "totality".⁵² The Appellate Body has described the requirements of this examination as "critical and searching",⁵³ noting that while it will inevitably require a case-by-case assessment:

The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in

⁴⁹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

⁵⁰ See Appellate Body Reports, *US – Lamb*, para. 106; *US – Cotton Yarn*, para. 69 (citing Appellate Body Report, *EC – Hormones*, para. 177); *US – Countervailing Duty Investigations on DRAMS*, para. 187; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

⁵¹ Appellate Body Report, *US – Lamb*, para. 106. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 52, 93 and 99.

⁵² Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 52 and 93-94; and *US – Countervailing Duty Investigation on DRAMS*, para. 188.

⁵³ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence.⁵⁴

58. Accordingly, the standard of review recognises that investigating authorities in anti-dumping and countervailing duties investigations "will inevitably be called upon to reconcile [...] divergent information and data".⁵⁵ However, as the Appellate Body has explained:

[T]he evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. [...] In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."⁵⁶

59. Finally, Australia recalls the Appellate Body's observation "that an 'objective assessment' under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review".⁵⁷

60. Turning to the special procedures under Articles 17.5 and 17.6 of the Anti-Dumping Agreement, Article 17.5(ii) provides that the panel is to examine the matter based upon the facts that were before the investigating authority of the importing Member when it made its determination. Article 17.6 of the Anti-Dumping Agreement provides the standard of review that panels must apply in respect of those facts. Specifically, Article 17.6 states that:

In examining the matter referred to in paragraph 5:

⁵⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

⁵⁵ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, Para. 97.

⁵⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 (citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

⁵⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184 (referring to Appellate Body Reports, *US – Lamb*, para. 105; and *US – Cotton Yarn*, paras. 75-78). See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184).

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with the customary rules on interpretation of public international law. Where the panel finds the relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

61. Article 17.5(ii) directs the Panel's focus to the facts that were made available to the investigating authority. The two sub-paragraphs of Article 17.6 then address two distinct issues: the approach a panel must take when assessing the investigating authority's establishment and evaluation of the facts, and the interpretation to be given to the relevant provisions of the Anti-Dumping Agreement.⁵⁸

62. Article 17.6(i) requires the panel to review whether the investigating authority's establishment of the facts was proper, and the evaluation of those facts was unbiased and objective. In relation to the first aspect, the panel in *US – Hot Rolled Steel* stated that "[w]hether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided – it essentially goes to the investigative process".⁵⁹

63. The next step requires an assessment of "whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached."⁶⁰ The panel in *US – Hot Rolled Steel* suggested that this required consideration of "whether all the evidence was considered, including facts that might detract from the decision actually reached".⁶¹ The panel in *Egypt – Steel Rebar* referred to this as "the process of analysis and interpretation of the facts".⁶²

⁵⁸ Appellate Body Report, *US – Hot Rolled Steel*, para. 54.

⁵⁹ Panel Report, *US – Hot Rolled Steel*, para. 7.26. See also, Panel Report, *Egypt – Steel Rebar*, para. 7.45.

⁶⁰ Panel Report, *US – Softwood Lumber VI*, para. 7.15.

⁶¹ Panel Report, *US – Hot Rolled Steel*, para. 7.26.

⁶² Panel Report, *Egypt – Steel Rebar*, para. 7.45.

64. In respect of this standard, the Appellate Body has recognised the parallels between the panel's role under Article 17.6(i) of the Anti-Dumping Agreement and under Article 11 of the DSU, observing that:

[T]he text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the Anti-Dumping Agreement does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter". In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.⁶³ (emphasis original)

65. In sum, the fundamental question before the panel is whether an unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, could have reached the conclusions that MOFCOM did in this matter. As Australia will demonstrate in the course of this submission, the answer to this question must be "no".

II. AUSTRALIA'S CLAIMS CONCERNING THE DUMPING DETERMINATION

66. Australia submits that China acted inconsistently with 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. MOFCOM was required to determine dumping in accordance with Article 2 of the Anti-Dumping Agreement, and it failed to do so.

67. Despite the cooperation of Australian traders and producers of barley in the anti-dumping investigation, MOFCOM's determination of dumping was made entirely on the basis of facts available. This led to dumping margins that were unsubstantiated and had no logical connection with the facts on the record.

68. Had MOFCOM properly applied the legal disciplines of facts available in the anti-dumping investigation in accordance with Article 6.8 and Annex II of the Anti-Dumping Agreement, it would not have resorted to facts available. MOFCOM's erroneous use of facts available led to a grossly flawed dumping margin of 73.6%, based on two shipments of barley

⁶³ Appellate Body Report, *US – Hot Rolled Steel*, para. 55. See also Panel Report, *US – Softwood Lumber VI*, paras. 7.15-7.17.

from Australia to Egypt of merely 54 tonnes (compared to 4.71 million tonnes for exports to China).⁶⁴ In contrast, the evidence on the record shows that *no dumping was occurring*.

69. MOFCOM's incorrect recourse to and selection of facts available was a fundamental error that undermined its entire dumping determination. Australia submits that MOFCOM then compounded that error and committed further breaches of the Anti-Dumping Agreement in its determination of dumping and imposition of anti-dumping duties. Specifically, MOFCOM: failed to determine normal value and export price in accordance with Article 2; failed to make a fair comparison between normal value and export price under Article 2.4; failed to determine dumping margins based on comparable export transactions under Article 2.4.2; and failed to determine individual dumping margins under Article 6.10 of the Anti-Dumping Agreement.

**A. CHINA ACTED INCONSISTENTLY WITH ARTICLE 6.8 AND ANNEX II OF THE
ANTI-DUMPING AGREEMENT**

70. Australia submits that China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement in its use of facts available in the anti-dumping investigation.

71. Australia submits that, in the first instance, there was no "necessary information" missing. Australian traders and producers submitted the necessary information for MOFCOM to determine normal values and export prices, in accordance with Article 2 of the Anti-Dumping Agreement, for each of these respondents to the investigation. As a result, the conditions of Article 6.8 were not met and, as a threshold matter, MOFCOM had no basis on which to make its determinations on the basis of facts available.

72. Further, by rejecting the information submitted by Australian traders and producers and selecting facts that had no logical relationship with evidence on the record, MOFCOM

⁶⁴ See Table 6, below; and Global Trade Atlas Data, Australia's Exports to All Trade Partners for Barley during the Period of Investigation, 1 October 2017 to 30 September 2018 (Global Trade Atlas Data – Australia's POI Barley Exports) (Exhibit AUS-40).

failed to observe the provisions of Annex II of the Anti-Dumping Agreement. Specifically, Australia submits that MOFCOM:

- failed to specify in detail the information required from the primary producers of the goods;
- failed to take into account information which was verifiable, appropriately submitted, and timely;
- not only failed to provide reasons as to why submitted information was rejected, but also failed to inform the Australian traders and producers that their information was not accepted and further failed to provide these interested parties an opportunity for further explanation; and
- failed both to exercise special circumspection in its selection of the facts available on which to base its findings and to set out any justification *at all* for the resulting dumping margin.

73. As a result, MOFCOM ascertained a grossly flawed dumping margin of 73.6%. Nowhere in the Final Disclosure or Final Determination did MOFCOM engage in a process of reasoning and evaluation in its decision to resort to facts available and in its selection of facts available. As Australia's submission demonstrated, the purported "facts" on which MOFCOM based its determination had no logical relationship with the evidence on the record.

1. Legal framework

74. Article 6.8 and Annex II reflect a careful balance between an investigating authority's ability to control its investigative process, and the legitimate interests of parties to submit information and have it taken into account.⁶⁵ This "careful balance" must be respected by both investigating authorities and interested parties.

⁶⁵ See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 77, 79, 86 and 102.

75. The first sentence of Article 6.8 identifies three circumstances where an investigating authority may overcome a lack of information in the responses of interested parties by using facts which are otherwise available.⁶⁶ In particular, Article 6.8 provides that:

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

76. Thus, in the present matter, in light of MOFCOM's Final Determination, the question before the Panel is whether the Australian traders and producers refused access to, or otherwise did not provide, necessary information in the course of the investigation as justification for MOFCOM's recourse to facts available.⁶⁷ The Appellate Body has explained that "if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party."⁶⁸ As such, if an interested party has supplied information, the starting premise is that an investigating authority should use it.⁶⁹ Australia will demonstrate that the Australian traders and producers *did*, in fact, supply the necessary information within a reasonable period. MOFCOM was, therefore, not permitted to have recourse to facts available under Article 6.8.

77. However, even in circumstances where the criteria set out in Article 6.8 to resort to facts available are met, an investigating authority does not have an unlimited discretion when selecting facts to replace missing information.⁷⁰ Facts used to replace missing necessary information must have a logical relationship with the facts on the record.⁷¹ The Appellate Body

⁶⁶ See Appellate Body Report, *US – Hot-Rolled Steel*, para. 77.

⁶⁷ Australia does not understand the criterion of whether an interested party has significantly impeded an investigation to be relevant based on the Anti-Dumping Final Determination.

⁶⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 77. (emphasis original)

⁶⁹ The Appellate Body explained that "assuming a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 288.)

⁷⁰ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

⁷¹ Panel Report, *China – Broiler Products*, para. 7.312.

has explained that the selection of facts is a *process* that an investigating authority must undertake:

Ascertaining which "facts available" reasonably replace the missing "necessary information" calls for a process of reasoning and evaluation of all substantiated facts on the record. In such a process, no substantiated facts on the record can be a priori excluded from consideration. [...] Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination [...].⁷² (footnotes omitted)

78. The second sentence of Article 6.8 provides that the provisions of Annex II are mandatory in the application of the Article.⁷³ Annex II sets out parameters which address both *when* facts available can be used, and *what* information can be used as facts available.⁷⁴ The provisions of Annex II clearly show information provided by interested parties, even if not ideal in all respects, should to the extent possible be used by investigating authorities.⁷⁵ This is because the Anti-Dumping Agreement expresses a "clear preference" for investigating authorities to use "first-hand information".⁷⁶ Provisions regulating the selection of facts available, in circumstances when "first-hand information" is not available, ensure the "reliability" of information used by the investigating authority, and that information from "unreliable sources" is avoided.⁷⁷

2. Anti-Dumping Final Determination

79. Before turning to the application of the legal standard of Article 6.8 and Annex II to the Final Determination, it is useful to first set out MOFCOM's asserted basis for its recourse to, and selection of, facts available in the anti-dumping investigation.

80. MOFCOM issued questionnaires to registered parties on 21 December 2018. This questionnaire was the only contact MOFCOM has with Australian traders and producers

⁷² Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172. See also *US – Carbon Steel (India)*, in which, in relation to the comparable provision in the SCM Agreement, Article 12.7, the Appellate Body explained that "ascertaining the reasonable replacements for the missing 'necessary information' involves a process of reasoning and evaluation. As with Article 6.8 of the Anti-Dumping Agreement, this in turn calls for a consideration of all substantiated facts on the record." (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.424.)

⁷³ See Panel Report, *US – Steel Plate*, para. 7.56. This means that Annex II is "incorporated by reference" into Article 6.8, or "forms part of Article 6.8". See Appellate Body Report, *US – Hot-Rolled Steel*, para. 75; Panel Report, *Egypt – Steel Rebar*, para. 7.153.

⁷⁴ Panel Report, *Egypt – Steel Rebar*, para. 7.152.

⁷⁵ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.

⁷⁶ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.

⁷⁷ See Panel Report, *Egypt – Steel Rebar*, para. 7.154.

during the course of the investigation. MOFCOM had no further communication with these interested parties until the Final Disclosure was issued in May 2020.

81. Despite acknowledging it received 18 questionnaire responses from Australian traders and producers,⁷⁸ MOFCOM rejected the entirety of this information.

(a) Group 1 producers

82. MOFCOM examined the information submitted by Group 1 producers independently from that provided by the Group 2 traders.⁷⁹ Within its examination of Group 1 producers, MOFCOM determined to ascertain the normal value and export price on the basis of facts available.

83. However, MOFCOM did not issue questionnaires to Group 1 producers. Instead, MOFCOM issued questionnaires to registered parties, all of which were traders, with instructions to provide the questionnaire to the producer of the goods,⁸⁰ if the registered party itself did not produce the goods.⁸¹ MOFCOM instructed companies to "work together on the Questionnaire", but that "each of the companies involved should submit their own Questionnaire separately."⁸²

84. Producers Iluka Trust, McDonald and Kalgan submitted questionnaires under cover of their trader, CBH (a trader examined in Group 2), within the specified time. The producer Haycroft submitted a questionnaire under cover of its trader, GrainCorp (a trader examined in Group 2), within the specified time.

i. Normal value

85. In the Final Determination, MOFCOM found that Haycroft did not provide the "sales conditions in Australia".⁸³ MOFCOM gave no further explanation as to what, specifically,

⁷⁸ See Anti-Dumping Final Determination (Exhibit AUS-2), p. 3.

⁷⁹ In the anti-dumping investigation, MOFCOM divided Australian interested parties into groups and examined these groups separately. MOFCOM gave no explanation for this course of action. For ease of reference, Australia refers to these groups as Group 1 (consisting of four Australian barley producers: Iluka Trust, McDonald, Kalgan and Haycroft), Group 2 (consisting of 12 traders: CBH, GrainCorp, Glencore, Emerald, COFCO, Cargill, ADM Trading, Bunge, CHS Broadbent, Australian Grain Export, Agracom, and CL Commodities), and Group 3 (consisting of Louis Dreyfus, Riordan, Quadra and all other companies).

⁸⁰ As will be demonstrated below, in the Australian barley industry, producers do not export barley, but exclusively sell it to traders and domestic end-users. Traders purchase barley at arm's-length prices from producers, which may number in the thousands, and re-sell it to domestic and export customers.

⁸¹ See Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12) p. 4, para. 6.

⁸² Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12) p. 4, para. 6.

⁸³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

Haycroft failed to provide. As for Iluka Trust, Kalgan, and McDonald, MOFCOM found that these producers *did* provide the respective sales conditions in Australia, however the traders who submitted questionnaires jointly with these producers "did not provide further information on the sales of similar products purchased from [these] producers".⁸⁴ Again, MOFCOM provided no further explanation as to the alleged deficiencies. MOFCOM concluded:

After review, it was found that the above producers and traders did not report the entire trading process of the Investigated Product and similar products from production to sales, i.e. the Investigated Product and similar products produced by different producers did not correspond to the sales of traders in different countries and regions. Therefore, the Investigating Authority determined that the existing evidence did not prove that the above producers and traders had accurately and completely reported their sales in Australia in the questionnaire.⁸⁵

86. MOFCOM then considered production costs and expenses.⁸⁶ MOFCOM found that Haycroft Enterprises "only filled in part of the tables and provided part of the cost data [...] and did not submit a completely answered questionnaire".⁸⁷ MOFCOM provided no explanation as to what "parts" specifically were missing. MOFCOM found that Haycroft and McDonald did not submit a financial report. For Iluka Trust and Kalgan, MOFCOM found that they apportioned costs and expenses based on a profit and loss statement for July 2017-June 2018, and not the POI (October 2017 – September 2018). MOFCOM also found that Iluka Trust and Kalgan failed to provide "all relevant data in the detailed statement of the production cost".⁸⁸ MOFCOM gave no further explanation of what "relevant data" was missing. MOFCOM concluded that "the existing evidence did not prove that the above four producers had accurately and completely reported the information on production costs and expenses in the questionnaire."⁸⁹

87. According to MOFCOM, it made "its best efforts to inform the above producers and traders of the consequences of failing to cooperate with the investigation, including giving explicit requirements and hints in the questionnaire."⁹⁰ However, MOFCOM did not

⁸⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

⁸⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

⁸⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

⁸⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

⁸⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

⁸⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

⁹⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

communicate with the Group 1 producers, or any Australian producer or trader who responded to the questionnaire, in the 15 months between the deadline for questionnaire responses and the release of the Final Disclosure, to discuss any alleged deficiencies in questionnaire responses.

88. MOFCOM rejected all information submitted by the Group 1 producers and ascertained that the export price of barley from Australia to Egypt, as recorded in the Global Trade Atlas, was the "best available information" for the normal value.⁹¹ MOFCOM reached this conclusion after claiming it:

[C]onsulted the websites of the Australian Department of Agriculture, Water and the Environment and relevant authorities, statistical data of customs, publicly available industry information, publications and study reports, and information in the application, and upon comparative analysis [...].⁹²

89. MOFCOM explained that it believed it had verified the information obtained during the investigation, and the Egypt export price was the "appropriate best information after taking sales volume, export market, transport mode and other factors into comprehensive consideration."⁹³

ii. Export price

90. In the questionnaire, MOFCOM requested "detailed information on the export sales" of barley to China.⁹⁴ MOFCOM found that the Group 1 producers:

[D]id not report the entire trading process of the Investigated Product and similar products from production to sales, i.e. the Investigated Product and similar products produced by different producers did not correspond to the sales of traders in different countries and regions. Therefore, the Investigating Authority determined that the existing evidence did not prove that the above producers and traders had accurately and completely reported their export sales to China in the questionnaires.⁹⁵

⁹¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

⁹² Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

⁹³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

⁹⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8. See also, Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), section 3, pp. 14-21.

⁹⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 9.

91. MOFCOM ascertained that the export price of barley from Australia to China, as recorded in the Global Trade Atlas, was the "best available information" for the export price.⁹⁶

92. MOFCOM calculated a dumping margin of 73.6% for each Group 1 producer.⁹⁷

(b) Group 2 traders

93. MOFCOM rejected all information submitted by all Group 2 traders. Ostensibly, MOFCOM provided four reasons for the rejection of such information, however the common theme of MOFCOM's reasoning was that Group 2 traders did not track the sales of barley from production to end market, and that individual producers of barley (numbering in the thousands) who sold to Group 2 traders did not separately answer the questionnaire. Specifically, MOFCOM found that:

- the traders did not provide complete questionnaires as producers of the goods did not independently submit questionnaires. MOFCOM found that a large number of producers sold barley to CBH and GrainCorp, however these two companies submitted joint questionnaires with only three producers and one producer respectively. As for the other ten traders, MOFCOM found they did not submit the questionnaire with any producer;⁹⁸
- barley sold by the traders "was not directly related to the cost data submitted by the producers."⁹⁹ MOFCOM found that CBH and GrainCorp "claimed" to use the production costs of producers who jointly submitted the questionnaire, but only four producers submitted data despite the traders purchasing barley from a large number of producers. Two other traders submitted cost data but did not provide sources for the data or evidence related to sales.¹⁰⁰ MOFCOM was "unable to conduct a lower-than-cost test",¹⁰¹

⁹⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 9.

⁹⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

⁹⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

⁹⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹⁰⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹⁰¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

- the traders did not report the "entire trading process";¹⁰² and
- the traders did not submit completed questionnaires jointly with producers that supplied them, and "existing evidence could not prove the existence of corresponding sales".¹⁰³

94. MOFCOM concluded that the Group 2 traders:

[P]rovided incomplete questionnaires and information, causing the Investigating Authority to be unable to obtain the information necessary to calculate the margins of dumping, the Investigating Authority was unable to calculate separate margins of dumping for the above 12 traders. The Investigating Authority decided that the 12 traders including CBH Grain Pty. Ltd. would be subject to the margins of dumping of other Australian companies.¹⁰⁴

95. MOFCOM assigned all Group 2 traders the same dumping margin as Group 1 producers, 73.6%.¹⁰⁵

(c) Group 3 companies

96. MOFCOM found that Louis Dreyfus did not submit the questionnaire response until "after the submission deadline",¹⁰⁶ and that Riordan did not submit the electronic version of the questionnaire response.¹⁰⁷ MOFCOM did not review these questionnaire responses because they "did not meet the requirements".¹⁰⁸ In addition, MOFCOM found that Quadra did not export barley to China during the POI.¹⁰⁹

97. MOFCOM assigned Louis Dreyfus, Riordan, Quadra, and all other companies that did not submit responses, the same dumping margin as Group 1 producers, 73.6%.¹¹⁰

3. The conditions to resort to facts available were not met

98. Australia submits that there was no necessary information missing from the record. Australian traders and producers submitted all necessary information in response to

¹⁰² Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹⁰³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹⁰⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹⁰⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12. See "All Others" rate.

¹⁰⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12. MOFCOM did not specify when the questionnaire was submitted, or the time that had lapsed since the deadline.

¹⁰⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹⁰⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹⁰⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹¹⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12. See "All Others" rate.

MOFCOM's sole request. The information, which MOFCOM asserted was not provided by Australian traders and producers, was not "necessary" for determinations of normal value, export price, and the existence and margin of dumping in accordance with the provisions of Article 2 of the Anti-Dumping Agreement. On that basis, the criteria in Article 6.8 to resort to facts available were not met as no interested party in the investigation refused access to, or otherwise did not provide, the necessary information. As a result, MOFCOM erred in having recourse to facts available. Therefore, China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement.

(a) Legal framework

99. Article 6.8 of the Anti-Dumping Agreement provides certain circumstances whereby an investigating authority may resort to facts available. In relation to the matter at hand, MOFCOM's asserted that its recourse to facts available was on the basis that the Australian traders and producers did not provide the "information necessary to calculate the margins of dumping", i.e. the *necessary information*.¹¹¹

100. There is no explicit guidance in the text of the Anti-Dumping Agreement as to what constitutes "necessary information". The ordinary meaning of "information" is "[k]nowledge communicated concerning some particular fact, subject, or event."¹¹² "Necessary" is defined as "[i]ndispensable, vital, essential; requisite."¹¹³ On this basis, Article 6.8 pertains only to facts which are indispensable, vital or essential. This is consistent with the interpretation of the panel in *US – Steel Plate*, where it explained that it is only in the absence of "essential knowledge or facts, which cannot be done without" that an investigating authority may make determinations on the basis of facts available.¹¹⁴ Similarly, panels have considered that "necessary information" is that which is "required to complete a determination".¹¹⁵

¹¹¹ See Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

¹¹² Oxford English Dictionary online, definition of "information", <https://www.oed.com/view/Entry/95568> (accessed 29 October 2021).

¹¹³ Oxford English Dictionary online, definition of "necessary", <https://www.oed.com/view/Entry/125629> (accessed 29 October 2021).

¹¹⁴ Panel Report, *US – Steel Plate*, para. 7.53.

¹¹⁵ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28 (citing Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416).

101. Necessary information has been distinguished from information that is merely "required" or "requested".¹¹⁶ Information which is "indispensable" or "essential" to complete a determination is clearly a high standard and does not encompass *all* information that may be requested by an investigating authority. While investigating authorities enjoy a discretion as to what constitutes "necessary information", the fact that information has been requested from an interested party does not, without more, render it necessary within the meaning of Article 6.8.¹¹⁷ Whether a given piece of information constitutes "necessary information" is an assessment that must be made on a case-by-case basis "in light of the specific circumstances of each investigation, not in the abstract."¹¹⁸

102. The Appellate Body has explained that an investigating authority is not "unconstrained" in its identification of "necessary information".¹¹⁹ An investigating authority is required to make a "reasonable assessment based on evidence and cannot simply infer, without further clarification, that the missing information is 'necessary'".¹²⁰ As such, the assessment of what constitutes "necessary information" must be conducted with reference to the information that is necessary to determine dumping pursuant to Article 2 of the Anti-Dumping Agreement. Specifically, in the current context, this includes information that is necessary to ascertain the normal value under Articles 2.1 and 2.2, and export price under Articles 2.1 or 2.3.

*i. Determining normal value in accordance with
Article 2*

103. Article 2.1 of the Anti-Dumping Agreement provides that the normal value of a product is the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". That is, it is defined in terms of the domestic sales transactions of the like product in the exporting country.¹²¹

¹¹⁶ Panel Report, *Egypt – Steel Rebar*, para. 7.151.

¹¹⁷ The panel in *Egypt – Steel Rebar* drew a distinction between "necessary information" and information that is "required" or "requested". (Panel Report, *Egypt – Steel Rebar*, para. 7.155.) It is only a refusal to provide "necessary information", and not "required" or "requested" information which permits an investigating authority to make determinations on the basis of facts available. See Panel Report, *US – Supercalendered Paper*, para. 7.174.

¹¹⁸ Panel Report, *Korea – Certain Paper*, para. 7.43.

¹¹⁹ Appellate Body Report, *US – Supercalendered Paper*, para. 5.81. The Appellate Body made this observation in light of the comparable provision of the SCM Agreement, Article 12.7.

¹²⁰ Appellate Body Report, *US – Supercalendered Paper*, para. 5.81. (footnotes omitted)

¹²¹ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272.

104. Article 2.2 provides:

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

Thus, Article 2.2 sets out three specific circumstances in which it is permissible for an investigating authority to determine normal value on a basis other than domestic sales of the like product in the exporting country.

105. Read together, Articles 2.1 and 2.2 have been understood to mean that normal value must be determined on the basis of domestic sales, except where one of the circumstances provided for in Article 2.2 exist. Specifically, (i) where there are no sales in the exporting country of the like product in the ordinary course of trade; (ii) where sales in the exporting country do not "permit a proper comparison" because of a "particular market situation"; or (iii) where sales in the exporting country do not "permit a proper comparison" because of their low volume. As the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* explained:

As Article 2.1 makes clear, the starting point for normal value is "the comparable price, in the ordinary course of trade" for the like product when destined for consumption in the exporting country. Thus, the concept of dumping is, in the first instance, a comparison of home market and export prices. Only in the circumstances set forth in Article 2.2 may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value.¹²²

106. Article 2.1 requires investigating authorities to exclude domestic sales of the like product not made "in the ordinary course of trade" from the calculation of normal value to ensure that normal value is, indeed, the "normal" price of the like product in the home market of the trader. While the Appellate Body has noted that the Anti-Dumping Agreement does not

¹²² Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.76. See also Appellate Body Reports, *Ukraine – Ammonium Nitrate*, para. 6.83 (referring to Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 569; *EU – Biodiesel (Argentina)*, para 6.13); and *EC – Tube or Pipe Fittings*, paras. 93-95; and Panel Reports, *EC – Salmon (Norway)*, para 7.528; and *Australia – Anti-Dumping Measures on Paper*, para 7.68.

define the term "in the ordinary course of trade",¹²³ it has also indicated it could "envisage many reasons for which transactions might not be 'in the ordinary course of trade'", such as sales between affiliated parties.¹²⁴

107. Implicit in the Appellate Body's reasoning is that sales of the like product between economically independent parties, transacted at market prices, would usually be considered as sales made in the ordinary course of trade. However, the Appellate Body also recognised that there could be situations where a sales transaction between independent parties might not be "in the ordinary course of trade", such as "a liquidation sale by an enterprise to an independent buyer, which may not reflect 'normal' commercial principles".¹²⁵

*ii. Determining export price in accordance with
Article 2*

108. An investigating authority is required to use actual export prices in the determination of dumping under Article 2 of the Anti-Dumping Agreement. This has been confirmed by the Appellate Body, observing that "the 'export prices' and 'normal value' to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met."^{126, 127}

109. Reading the term "export price" in Article 2.1 in its broader context within the Anti-Dumping Agreement, including the requirement in Article 6.10 to determine individual dumping margins,¹²⁸ and the singular form of the terms "the export price" and "the exporter" in Article 2.3, "export price" means the export price *for a particular exporter*.

110. Australia's interpretation of "export price", i.e. the actual export price for a particular exporter, is supported by an examination of the object and purpose of the Anti-Dumping Agreement. In this respect, the Appellate Body has identified of a number of "fundamental

¹²³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 139.

¹²⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.

¹²⁵ Appellate Body Report, *US – Hot-Rolled Steel*, fn 106.

¹²⁶ (footnote original) Article 2.2 allows investigating authorities, under certain conditions, to use constructed normal value. Article 2.3 permits the use of constructed export prices under certain conditions.

¹²⁷ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 143.

¹²⁸ Article 6.10 of the Anti-Dumping Agreement provides, in relevant part, "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

disciplines that apply under the Anti-Dumping Agreement and the GATT 1994 to all anti-dumping proceedings".¹²⁹ These fundamental disciplines include that:

[T]he Anti-Dumping Agreement prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.

Other provisions of the Anti-Dumping Agreement also make it clear that "dumping" and "margins of dumping" relate to the exporter or foreign producer. Article 6.10 requires, "as a rule", that investigating authorities determine "an individual margin of dumping for each known exporter or producer".¹³⁰

111. The export prices in transactions by subject traders — referred to interchangeably as "export transaction prices", "transaction export prices" and "actual export prices"¹³¹ — can only be disregarded in the circumstances specified in Article 2.3.

112. Article 2.3 of the Anti-Dumping Agreement provides:

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

113. Article 2.3 thus sets out two conditions under which an investigating authority may disregard the actual export price and construct it using an alternative method. The first is "where there is no export price".¹³² The second is where it appears to the investigating authority that the export price is "unreliable because of association or a compensatory

¹²⁹ Appellate Body Report, *US — Zeroing (Japan)*, para. 107.

¹³⁰ Appellate Body Report, *US — Zeroing (Japan)*, paras. 111-112. (footnote omitted)

¹³¹ Panel Reports, *US — OCTG (Korea)*, para. 7.146 ("the transaction export price"); *US — Differential Pricing Methodology*, fn 163 ("the price of an export transaction"); and *EU — Biodiesel (Indonesia)*, para. 7.112 ("the actual export price").

¹³² Situations where there is no "price" paid for exported products may include, for instance, where an export transaction is an internal transfer, or where the product is exchanged in a barter transaction.

arrangement between the exporter and the importer or a third party". An investigating authority must have "grounds" for this view but is not required to make a "determination" as to the reliability of the export price.¹³³

114. If one of the two conditions in Article 2.3 is met, the investigating authority may construct export price "on the basis of the price at which the imported products are first resold to an independent buyer". However, if the products are not resold to an independent buyer or are not resold in the same condition, export price may be constructed "on such reasonable basis as the authorities may determine".

(b) No necessary information was missing from the record

115. Australia submits that no "necessary" information was missing from the record to determine the normal value pursuant to Articles 2.1 and 2.2 of the Anti-Dumping Agreement, and export price pursuant to Articles 2.1 and 2.3 of the Anti-Dumping Agreement. To the extent that MOFCOM found purported deficiencies in the questionnaire responses,¹³⁴ the information allegedly not provided was not indispensable or essential for the determinations to be made, including because some information did not in fact exist in the normal course of business in the barley industry and therefore could not be produced.

116. As Australia will set out in detail in this submission, there was the necessary information on the record for MOFCOM to determine the normal value and export price on the basis of the information provided by Australian traders and producers. Therefore, there was no proper basis for MOFCOM to conclude that the Australian traders and producers refused access to, or had otherwise not provided, necessary information. In the absence of this proper basis, China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in respect of MOFCOM's rejection of all the information provided by the Australian traders and producers and instead making determinations of the normal value and export price exclusively on the basis of facts available.

¹³³ Panel Report, *US – OCTG (Korea)*, paras. 7.146-7.147.

¹³⁴ See above, section II.A.2.

i. Australian traders and producers provided the necessary information to determine normal value under Articles 2.1 and 2.2 of the Anti-Dumping Agreement

117. Australia submits that Australian traders and producers provided evidence of domestic sales of barley that met the standard of "necessary information" for MOFCOM to determine normal value in accordance with Articles 2.1 and 2.2 of the Anti-Dumping Agreement, based on domestic sales in the ordinary course of trade.

- a. Australian traders and producers provided the necessary information to determine that domestic sales were in the ordinary course of trade

118. The record indicates that investigated Australian traders and producers provided domestic sales data in their questionnaire responses. This is clear from the responses to section 4 "Domestic Sale", question 8, wherein the companies were asked to "fill out and use the format of Form 4-2 Domestic Sale and provide details of each transaction of the domestic sale of the like product [...]".¹³⁵ Responses from Australian traders and producers reference a completed Form 4-2, providing domestic sales data as requested by MOFCOM.¹³⁶

119. MOFCOM also had the necessary information on the record to determine that the domestic sales of the like product reported by Australian traders and producers were in the ordinary course of trade. Specifically, there was evidence on the record demonstrating that domestic sales of barley by both producers and traders were at above-cost prices.¹³⁷

¹³⁵ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 23.

¹³⁶ See, for example, CBH, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (CBH Anti-Dumping Questionnaire Response) (Exhibit AUS-13), pp. 37-38; GrainCorp, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (pages renumbered) (GrainCorp Anti-Dumping Questionnaire Response) (Exhibit AUS-14), p. 127; Glencore, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation) (Glencore Anti-Dumping Questionnaire Response) (Exhibit AUS-15), p. 122; COFCO, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 8 February 2019 (public version) (English translation) (pages renumbered) (COFCO Anti-Dumping Questionnaire Response) (Exhibit AUS-16), p. 45; and Kalgan, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered) (Kalgan Anti-Dumping Questionnaire Response) (Exhibit AUS-17), p. 24.

¹³⁷ There was no evidence to suggest that domestic sales of barley by any Australian company were not in the ordinary course of trade for any other reason, nor did MOFCOM determine this to be the case.

Furthermore, there was no evidence on the record demonstrating that domestic sales of the like product were not in the ordinary course of trade for other reasons, such as sales between related companies or sales conducted on terms and conditions that were incompatible with normal commercial practices.¹³⁸

120. To begin with the producers, Group 1 producers provided cost of production and profitability data in the following data attached to questionnaire responses: Form 6-3 "Product Cost & Related Expenses", Form 6-4 "Production Cost Details of the Product Under Investigation and its Like Product", and Form-6-5 "Earning Performance".

121. The evidence provided in these forms by three producers Iluka Trust, Kalgan and McDonald is summarised below:^{139, 140}

Table 1 POI Unit Profit of Australian Barley Producers

	Iluka Trust	Kalgan	McDonald
Total Production/ Sales (tonnes)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Total Sales Revenue (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Total Cost of Production (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Total Expenses (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Profit (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Unit Profit (AUD per tonne)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]

¹³⁸ Appellate Body Report, *US — Hot-Rolled Steel*, paras. 140-143 and 147-148.

¹³⁹ Table data extracted from Iluka Trust, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (Iluka Trust Anti-Dumping Questionnaire Response Data) (Exhibit AUS-18 (BCI)), Sheets 6-3, 6-4 and 6-5; McDonald, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (McDonald Anti-Dumping Questionnaire Response Data) (Exhibit AUS-19 (BCI)), Sheets 6-3, 6-4 and 6-5; and Kalgan, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (contains BCI) (Kalgan Anti-Dumping Questionnaire Response Data) (Exhibit AUS-20 (BCI)), Sheets 6-3, 6-4 and 6-5.

¹⁴⁰ The public version of the questionnaire response from the fourth producer, Haycroft, indicates that it provided, relevantly, Form 5-7 "The Company's Operation Condition of the Product under Investigation and Like Products", Form 6-1-1 "Procurement Cost Sheet for Production Inputs" and Form 6-3 "Product Costs and Related Expenses". See Haycroft, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (pages renumbered) (Haycroft Anti-Dumping Questionnaire Response) (Exhibit AUS-21), pp. 7, 12, 13-14 and 17.

122. These producers also provided:

- further details and data on their costs and expenses in "Cost Input Sheet";
- itemised purchase costs of inputs in Form 6-1-1 "Purchase Costs of Inputs";¹⁴¹
- their calculation process and allocation method for sales, administrative and financial expenses and the expense allocation method used in Form 6-5 in Form 6-6 "Overhead Expense Allocation Details", Form 6-7 "Sales Expense Allocation Details" and Form 6-8 "Financial and Other Expense Allocation Details"; and
- domestic sales prices in Form 4-2 "Domestic Sale".¹⁴²

On the basis of the above information provided by Group 1 producers, MOFCOM had the necessary information to determine that these producers were selling above costs and therefore in the ordinary course of trade.

¹⁴¹ With the exception of [REDACTED].

¹⁴² See Iluka Trust Anti-Dumping Questionnaire Response Data (Exhibit AUS-18 (BCI)); McDonald Anti-Dumping Questionnaire Response Data (Exhibit AUS-19 (BCI)); and Kalgan Anti-Dumping Questionnaire Response Data (Exhibit AUS-20 (BCI)).

123. Australian grain industry bodies also provided estimates of the costs of production and profitability of Australian barley producers. In its questionnaire response, Grain Growers provided tables showing "[i]ndicative barley production cost and margin" for three barley-growing regions — Western Australia, South Australia and Southern New South Wales (NSW) — for the years 2013-2017.¹⁴³ A summary of the data for 2017 is extracted below:

Table 2 Australian Barley Industry Indicative Cost of Production and Profitability

	Western Australia	South Australia	Southern NSW
Total Variable Cost of Production (AUD per tonne)	131	184	172
Profitability Margin Feed (AUD per tonne)	155	83	129
Profitability Malting (AUD per tonne)	174	92	139

The profitability margins for all three regions for all years 2013 to 2017 were positive, ranging between AUD 50 to 174 per tonne.

124. While the above cost of production and profitability estimates only reflect variable costs, this was nevertheless information that was available to MOFCOM that supported the evidence provided directly by Australian producers, including with respect to the conclusion that domestic sales of barley by Australian producers were above costs and therefore in the ordinary course of trade.

125. As for the Group 2 traders, Australian traders and producers provided the necessary information to establish two facts:

- the acquisition costs of barley reported by Australian traders were a reliable reflection of the costs associated with the production and sale of barley in

¹⁴³ Grain Growers, Submission in Response to Notice on Disclosing the Facts Based on which the Final Determination on the Barley Anti-dumping Case is Made, 18 May 2020, Annexing Grain Growers Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 31 January 2019 (public version) (English translation) (pages renumbered) (Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response) (Exhibit AUS-22), pp. 103-106.

Australia at the time when traders assumed ownership of that barley in warehouses;¹⁴⁴ and

- traders' domestic sales of barley were above their acquisition and other costs.

126. *First*, there was sufficient evidence on the record to determine that traders were purchasing barley at arm's-length prices, and those prices were above producers' costs. For example, Australian traders and producers provided information that:

- producers are not affiliated with traders or grain receiving warehouses;¹⁴⁵
- [[REDACTED]
[REDACTED]],¹⁴⁶
- [[REDACTED]
[REDACTED]
[REDACTED]];¹⁴⁷

¹⁴⁴ This included evidence from one trader that [REDACTED]

See CBH, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (CBH Anti-Dumping Questionnaire Response (confidential version)) (Exhibit AUS-23 (BCI)), p. 27.

¹⁴⁵ Iluka Trust Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered) (Iluka Trust Anti-Dumping Questionnaire Response) (Exhibit AUS-24), p. 27; McDonald Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (pages renumbered) (McDonald Anti-Dumping Questionnaire Response) (Exhibit AUS-25), p. 20; and Kalgan Anti-Dumping Questionnaire Response (Exhibit AUS-17), p. 25. See also CBH, Extract from Data Attached to Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (CBH Anti-Dumping Questionnaire Response Data) (Exhibit AUS-29 (BCI)), Sheet1-6, showing cost of acquisition of barley, in which [REDACTED].

¹⁴⁶ Kalgan, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (Kalgan Anti-Dumping Questionnaire Response (confidential version)) (Exhibit AUS-26 (BCI)), p. 44; Iluka Trust Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (Iluka Trust Anti-Dumping Questionnaire Response (confidential version)) (Exhibit AUS-27 (BCI)), p. 44; and McDonald Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (confidential version) (McDonald Anti-Dumping Questionnaire Response (confidential version)) (Exhibit AUS-28 (BCI)), p. 44.

¹⁴⁷ Kalgan Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-26 (BCI)), p. 44; Iluka Trust Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-27 (BCI)), p. 44; and McDonald Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-28 (BCI)), p. 44.

- [[REDACTED]
[REDACTED]
[REDACTED]];¹⁴⁸ and
- traders will publish the price they will pay for barley at the "batch processing centre", and if producers are willing to accept that price the sale will go ahead.¹⁴⁹

127. *Second*, the record indicates that each of the Group 2 traders also provided information to MOFCOM on their sales revenue, cost, expenses and profits in their questionnaire responses. This is clear from the responses to section 6.1 "Production Process, Production Costs and Related Expenses", question 9(1), wherein the companies were asked to "provide info on the revenue, costs and expenses, and profits associated with the production and sale of the product under investigation and its like product following the format of 'Form 6-5: Earning Performance'". Responses from Australian traders reference a completed Form 6-5, providing revenue, cost, expenses and profit data as requested by MOFCOM.¹⁵⁰

128. *Finally*, Group 2 traders also provided specific data on their:

- acquisition costs in Form 1-6 "Purchase of the Product under Investigation";¹⁵¹
- calculation process and allocation method for sales, administrative and financial expenses and the expense allocation method used in Form 6-5 in Form 6-6 "Overhead Expense Allocation Details", Form 6-7 "Sales Expense

¹⁴⁸ Kalgan Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-26 (BCI)), p. 44; Iluka Trust Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-27 (BCI)), p. 44; and McDonald Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-28 (BCI)), p. 44.

¹⁴⁹ Cargill, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (public version) (English translation) (Cargill Anti-Dumping Questionnaire Response) (Exhibit AUS-30), p. 71.

¹⁵⁰ See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 53, 71; Emerald, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation) (Emerald Anti-Dumping Questionnaire Response) (Exhibit AUS-31), p. 52; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), p. 71; Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 5 and 96.

¹⁵¹ See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 11, 70; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 21-22; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), p. 10; and Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 18-19.

Allocation Details" and Form 6-8 "Financial and Other Expense Allocation Details";¹⁵² and

- domestic sales prices in Form 4-2 "Domestic Sale".¹⁵³

129. In summary, Australian traders and producers provided the necessary information with regard to their domestic sales prices for MOFCOM to determine normal value in accordance with Articles 2.1 and 2.2. Moreover, the necessary information was present on the record for MOFCOM to determine that domestic sales of the like product were in the ordinary course of trade. This was because both Australian traders and producers were selling barley domestically above their costs and there was no evidence of other indicia that sales were not in the ordinary course of trade (e.g. related party transactions or sales conducted on terms and conditions that were incompatible with normal commercial practices).

- b. Australian traders and producers provided the necessary information to determine the normal value by one of the alternative methods in Article 2.2

130. Australia further submits that, even if MOFCOM had determined that one of the specific circumstances outlined in Article 2.2 existed for recourse to an alternative basis for determining normal value, there was the necessary information on the record provided by Australian traders and producers to determine normal value for each Australian producer and trader on a constructed basis, or using a comparable, representative price of the like product when exported to an appropriate third country.

131. To begin with constructed normal value, there was the necessary information on the record for MOFCOM to construct normal value based on the cost of production of barley in Australia plus a reasonable amount for administrative, selling and general costs and for profits.

¹⁵² See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 71; Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), pp. 52-54; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), pp. 71-72; and Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 5, and 96-97.

¹⁵³ See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 37-38 and 70; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 127 and 255; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), p. 122; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), p. 45.

132. Specifically, Australian producers provided information regarding the cost of production of barley in Australia in Form 6-3 "Product Costs and Related Expenses" and Form 6-4 "Production Cost Details of the Product under investigation and Its like product", as summarised below.¹⁵⁴

Table 3 Cost of Production of Barley, as reported by Producers

	Iluka Trust	Kalgan	McDonald
Total Production/ Sales (tonnes)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Total Cost of Production (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
Unit Cost of Production (AUD)	[[REDACTED]]	[[REDACTED]]	[[REDACTED]]

In addition to the specific cost of production data provided by Australian producers, as outlined above, the industry body Grain Growers also provided "indicative barley cost of production data" for Australian barley growing regions.¹⁵⁵ Australian producers and traders also provided information on their administrative, selling and general costs and profit margins in Form 6-5 "Earning Performance", Form 6-6 "Overhead Expense Allocation Details", Form 6-7 "Sales Expense Allocation Details" and Form 6-8 "Financial and Other Expense Allocation Details".¹⁵⁶

133. Turning to normal value based on third country export sales, the record indicates that Australian traders who participated in the investigation provided information on their export sales to third countries in their questionnaire responses. This is clear from the responses to section 5 "Operational and Financial Information", question 4, wherein the companies were asked to "specify your export volume of the like product to countries (regions) other than China during the injury investigation period following the format of 'Form 5-4-1: Company's Export Volume of the Like Product to Third Countries (Regions)'" and "provide the price, volume and other data of the like product sold to clients in countries (regions) other than

¹⁵⁴ See Iluka Trust Anti-Dumping Questionnaire Response Data (Exhibit AUS-18 (BCI)); McDonald Anti-Dumping Questionnaire Response Data (Exhibit AUS-19 (BCI)); and Kalgan Anti-Dumping Questionnaire Response Data (Exhibit AUS-20 (BCI)).

¹⁵⁵ Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), pp. 97-100, see also pp. 103-106.

¹⁵⁶ See above, paras. 122, 127 and 128.

China during the injury investigation period following the format of 'Form 5-4-2: Export Sales to Countries (Regions) Other than China'.¹⁵⁷ Responses from Australian traders reference completed Forms 5-4-1 and 5-4-2, providing third country export sales data as requested by MOFCOM.¹⁵⁸

134. There was therefore the necessary information provided by Australian traders for MOFCOM to determine normal values based on a comparable, representative price of barley exported to an appropriate third country by each of those traders. For the Group 1 producers, it was open to MOFCOM to use the evidence of third country export sales by Group 2 traders, with appropriate adjustments for the determination of normal value.

c. Conclusion

135. In summary, the information that the Australian traders and producers provided to MOFCOM included all of the "necessary information" that would permit an objective and unbiased investigating authority to make determinations of normal value on the basis of sales in the ordinary course of trade in the Australian market, in accordance with the provisions of Article 2 of the Anti-Dumping Agreement.

136. The information on the record before MOFCOM did not support any determination that sales in the ordinary course of trade in the Australian market were absent. However, as further evidence of MOFCOM's error in resorting to "facts available" in the circumstances of this case, the information provided by Australian companies on the record before MOFCOM included the "necessary information" for MOFCOM to determine normal value. The information on the record allowed MOFCOM to do this either on a constructed basis, or by comparison with a comparable price of the like product when exported to an appropriate third country, in the event that MOFCOM had (erroneously) determined that one of the circumstances existed for recourse to an alternative basis for determining normal value under Article 2.2.

¹⁵⁷ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 28.

¹⁵⁸ See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 70-71; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 161 and 255; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 148-150 and 214; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), pp. 6 and 56; and Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 4 and 75-76.

137. In summary, it was not the case that Australian traders and producers refused access to, or otherwise did not provide, "necessary information" within the meaning of Article 6.8. As the conditions in Article 6.8 of the Anti-Dumping Agreement were not met, there was no proper basis for MOFCOM to make its determinations of normal value on the basis of facts available.

ii. Australian traders and producers provided necessary information to determine export price in accordance with Article 2 of the Anti-Dumping Agreement

138. The record indicates that investigated Group 2 traders provided export price data in their questionnaire responses. This is clear from the responses to section 3 "Exports and Sale to the Chinese Market", question 15, wherein the companies were asked to "fill out and use the format of Form 3-4 Exports and Sales to China and provide details about each transaction in the process of exporting and selling the product under investigation to China during the investigation period [...]".¹⁵⁹ Responses from Group 2 traders reference a completed Form 3-4, which provided export price data as requested by MOFCOM.¹⁶⁰

139. There is no indication that Group 2 traders failed to provide any information necessary for the determination of export price. MOFCOM could have determined an export price for each Group 2 trader based on the information these traders provided. It was evident from the record that none of the criteria in Article 2.3 for recourse to a constructed export price existed, namely there being no export price or the export price being unreliable because of association or a compensatory relationship. Hence, there was no basis for MOFCOM to depart from the actual export prices reported by traders.

140. With regard to the Group 1 producers, the information on the record before MOFCOM clearly established that Australian barley producers did not export barley, but sold it in Australia to traders and to domestic end-users, and that only the Group 2 traders exported

¹⁵⁹ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 15.

¹⁶⁰ See, for example, CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 26 and 70; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 85-86 and 255; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 81-82 and 213; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), pp. 5 and 29-30; and Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 4 and 31-32.

barley. As a consequence, an export price could not have been established for Group 1 producers. This should have indicated to MOFCOM that it was not appropriate to calculate a dumping margin for entities that had not exported any barley during the period of investigation and were not in the business of exporting any barley products. However, even if it was reasonable for it to determine an export price for the Group 1 producers, MOFCOM could have determined the export price for Group 1 producers based on the information provided by Group 2 traders.

141. In summary, there was the necessary information on the record for MOFCOM to determine export price in accordance with Article 2.1, based on the export price data reported by Group 2 traders.

iii. An interested party cannot refuse access to, or otherwise not provide, information which does not exist

142. As outlined above, Australia submits that the investigation record contained all of the necessary information for an objective and unbiased authority to determine normal value and export price on the basis of the actual sales and pricing data submitted by Australian traders and producers. Australia further submits that MOFCOM improperly resorted to Article 6.8 on the basis that Australian traders and producers did not provide alleged "necessary information", when it was clear from the record that such information did not exist in the normal course of trade in the circumstances of the Australian market and was therefore impossible to produce. An interested party cannot refuse access to, or otherwise not provide, information which does not exist in the normal course of business in the industry in question under these circumstances.¹⁶¹ In Australia's view, such information, which does not exist, cannot be considered "necessary" within the meaning of Article 6.8.¹⁶²

143. MOFCOM faulted the Group 1 producers for not reporting "the entire trading process". However, Group 1 producers submitted that they did not have knowledge as to

¹⁶¹ This is to be distinguished from a situation where information exists and is possessed by an interested party but in a different form.

¹⁶² In addition, information which does not exist cannot be replaced by the use of facts available. In this respect, Australia submits that information which does not exist, and therefore cannot be produced, is distinguishable from information which has not been provided for other reasons, such as a lack of cooperation from the interested party in possession of the information.

where their product was sold domestically, or for export, after it was sold to traders.¹⁶³ In relation to Group 2 traders, the premise for MOFCOM's rejection of *all* information submitted by *all* Group 2 traders was that, in their questionnaire responses, Group 2 traders were required to track barley from its source to end markets.

144. Barley is an agricultural commodity that is fungible and, in the normal course of trade in the circumstances of the Australian market, comingled when stored in a stockpile. This is common practice in all major barley-producing countries. As noted above, traders purchase barley from many different producers, and barley owned by different traders is stored in commercial warehouses, segregated in stockpiles according to grade, from which volumes are drawn for traders' shipments to domestic and export customers as required.¹⁶⁴ It would be uneconomical and impracticable, and in many cases impossible, for a trader to physically segregate the barley purchased from each producer and to manage these amounts into traceable quantities sold to end-users. As such, barley grown by a certain producer that is then purchased by a trader cannot be tracked in downstream transactions.¹⁶⁵ These facts are irrefutable.

¹⁶³ In response to the opening question of section 3 "Exports and Sale to the Chinese Market", Kalgan indicated "[o]ur company only grows barley and sells it to the domestic grain marketing companies. We do not export the product in consideration to China. Therefore, this part is not answered." (Kalgan Anti-Dumping Questionnaire Response (Exhibit AUS-17), p. 13. Iluka Trust and McDonald gave responses to the same effect. (Iluka Trust Anti-Dumping Questionnaire Response (Exhibit AUS-24), p. 12; and McDonald Anti-Dumping Questionnaire Response (Exhibit AUS-25), p. 11.) See also Kalgan Anti-Dumping Questionnaire Response (Exhibit AUS-17), p. 62; McDonald Anti-Dumping Questionnaire Response (Exhibit AUS-25), p. 49; and Iluka Trust Anti-Dumping Questionnaire Response (Exhibit AUS-24), p. 68, where these three producers respond to section 8 of the questionnaire "Estimation of Dumping Margin" to the effect that "Our company does not export barley to China, therefore this part is not applicable". Haycroft indicated that questions in section 3 of the questionnaire, "Export Sales to China", did not apply to the company. (Haycroft Anti-Dumping Questionnaire Response (Exhibit AUS-21), p. 4.)

¹⁶⁴ See below, para. 185.

¹⁶⁵ Haycroft indicated at p. 15 that, "[t]he Company does not know that the barley it sells will actually be used for export or domestic consumption, let alone the specific export market" (Haycroft Anti-Dumping Questionnaire Response (Exhibit AUS-21), p. 15); Grain Growers indicated at p. 37 that, "[a] grower may choose to sell to a domestic end-user customer, or may sell to a trader (who may then sell to domestic or export as the trader chooses). When a grower sells to a trader, the grower does not know what the trader will then do with that parcel of grain" (Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 37); ADM Trading indicated at pp. 22 and 37 that "barley is purchased from many suppliers and then mixed together. As a result, ADM cannot trace barley sources and identify barley producers in specific transactions", and at p. 55, that "ADM understands that individual farmers have no idea whether their products are for domestic sales or export" (ADM Trading, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 5 February 2019 (public version) (English translation) (pages renumbered) (ADM Trading Anti-Dumping Questionnaire Response) (Exhibit AUS-32), pp. 22, 37 and 55); Emerald indicated at p. 28 that "As the number of sales contracts is usually much larger than the average purchase contracts, our company accumulates the products under investigation through many suppliers. For example, a standard 50,000 tonne [...] contract can be accumulated and executed over the course of a month, with products coming from many production suppliers and other trading companies. It is therefore not practical or feasible to identify and list each supplier", and see p. 41 (Emerald AD Questionnaire Response, pp. 28, 41); COFCO indicated at pp. 38 and 53 that "[b]arley is a bulk commodity, so it is impossible to identify the suppliers/growers in each transaction" (COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), pp. 38 and 53);

145. As set out above, Article 6.8 pertains only to necessary information which an interested party "refuses access to, or otherwise does not provide". It is clear from the text of Article 6.8 that "necessary information" must be information "possessed"¹⁶⁶ or "held" by an interested party.¹⁶⁷ It is not merely all information requested from an interested party.¹⁶⁸ For information to satisfy this requirement, it must first *exist*.

146. Article 6.8 represents a careful balance between investigating authorities and interested parties.¹⁶⁹ It would be contrary to this careful balance if investigating authorities were able to request that an interested party produce information that does not exist in the normal course of trade in the circumstances of the Australian market, and then use the failure to comply with such an impossible request as a basis to make determinations on the basis of facts available.

147. It was not possible for the Group 1 producers and Group 2 traders to submit information pertaining to the "entire trading process"¹⁷⁰ because such information did not, and does not, exist in the normal course of trade in the circumstances of the Australian market. It is irrefutable that barley is fungible and comingled when stored in a shared stockpile. It cannot be traced from production to end market. Moreover, as discussed above, this information is not necessary in the circumstances of this investigation. Accordingly, the information MOFCOM determined was not provided was not "necessary information" within the meaning of Article 6.8 of the Anti-Dumping Agreement.

GrainCorp indicated at p. 110 that "The barley is gathered and mixed in the storage system, and port operators regard the inventory at ports as 'shared inventory', so this means that the delivery and usage of each batch of barley cannot be accurately determined and traced", and at p. 152 that "[a]s barley is gathered in GrainCorp's storage system, so it is generally impossible to trace the specific grower in the domestic sale" (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 110 and 152); and Cargill indicated at pp. 71 and 80 that "[w]hen barley sent to the batch processing centre by a farmer is mixed with the barley of the same grade, the supplier of barley cannot be identified" (Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 71 and 80).

¹⁶⁶ See Panel Report, *Korea – Stainless Steel Bars*, para. 7.185.

¹⁶⁷ The panel in *EC – Salmon (Norway)* explained that "'necessary information' refers to the specific information held by an interested party that is requested by an investigating authority for the purpose of making determinations." (Panel Report, *EC – Salmon (Norway)*, para. 7.343.)

¹⁶⁸ See above, para. 101.

¹⁶⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 102.

¹⁷⁰ MOFCOM reached this conclusion with respect to both normal value, and export price for Group 1 producers. See above, section II.A.2. With respect to Group 2 traders, see section II.A.2(b).

(c) Conclusion

148. Australia submits that no necessary information was missing from the record. Interested parties provided all necessary information for MOFCOM to make a determination of dumping in accordance with Article 2 of the Anti-Dumping Agreement. The information MOFCOM determined was not provided by Group 1 producers and Group 2 traders does not, in fact, exist in the normal course of business in the barley industry. As such, no party refused access to or otherwise did not provide the information. The information was not necessary in the circumstances of this investigation, and therefore cannot be classified as "necessary information" within the meaning of Article 6.8. Accordingly, the conditions to resort to facts available were not met, and China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement.

4. China acted inconsistently with paragraph 1 of Annex II by failing to specify in detail the information required from the producers of barley

149. Australia submits that it was unfounded for MOFCOM to determine dumping margins for Group 1 producers. However, as MOFCOM elected to do so, it was required to specify in detail the information required from those parties, and to ensure they were aware of the consequences should the requested information not be provided. MOFCOM failed to fulfil either of these requirements. Therefore, China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement.

(a) Legal framework

150. Paragraph 1 of Annex II provides that:

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

151. Paragraph 1 sets out two obligations on investigating authorities before determinations may be made on the basis of facts available. *First*, an investigating authority must inform any interested party of the information that must be supplied and must be "prompt and precise" in setting out the information it requires.¹⁷¹ The Anti-Dumping Agreement is silent as to how an investigating authority is to fulfil the notice requirements in paragraph 1 of Annex II. However, this does not alter the obligations contained in that provision, which have been clarified by panels and the Appellate Body. Furthermore, it is evident from the text of paragraph 1 of Annex II that the obligations contained in paragraph 1 are borne by the investigating authority. *Second*, an investigating authority must ensure a party is aware of the consequences of not submitting the requested information.¹⁷² There is a connection between the awareness of an interested party, and the ability of an investigating authority to resort to facts available.¹⁷³

(b) MOFCOM's chosen approach to examine Group 1 producers meant it was required to specify in detail the information required from those producers, and make them aware of the consequences of failing to provide information

152. In circumstances where a producer or trader is unknown to an investigating authority, and an investigating authority calculates a residual rate, past panels have taken different views concerning what notice is sufficient to meet the requirements of paragraph 1 of Annex II.¹⁷⁴ Australia submits that this investigation can be distinguished from prior disputes. Australia does not take issue under paragraph 1 of Annex II with MOFCOM's failure to notify unknown producers or traders in its calculation of the rate assigned to "other Australian companies".¹⁷⁵ Rather, Australia submits that, because MOFCOM chose an

¹⁷¹ Panel Report, *Egypt – Steel Rebar*, para. 7.155.

¹⁷² Panel Report, *EC – Salmon (Norway)*, para. 7.453 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259).

¹⁷³ See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

¹⁷⁴ See Panel Reports, *China – Autos (US)*, para. 7.130; *China – GOES*, para. 7.386; *China – Broiler Products*, para. 7.303; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.219. Specifically, past panels have disagreed as to whether publication of the questionnaire on MOFCOM's website was sufficient to notify interested parties of the information required.

¹⁷⁵ See Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

approach¹⁷⁶ whereby the Group 1 producers were the "focus" of the investigation and the information on which *all other* dumping margins were based, it was incumbent on MOFCOM to specify in detail the information required from those producers, and importantly, to make them aware of the consequences of failing to respond to the request.

153. Throughout the course of the investigation, MOFCOM had *no* direct contact with the Group 1 producers. MOFCOM never issued these producers with a questionnaire or any notice as to the information required. MOFCOM failed to notify these interested parties of the consequences of failing to comply with the request. In fact, MOFCOM never notified the Group 1 producers that they would be assigned an individual margin of dumping. MOFCOM's decision to do so, was not a reasonably foreseeable outcome of its investigation, given that Australian producers are not in the business of exporting barley and, therefore, had not exported barley to China during the POI.

154. Australia does not dispute that MOFCOM made the blank questionnaire for foreign traders and producers publicly available on its website.¹⁷⁷ In the questionnaire, MOFCOM stated that:

If you are just a trader who participated in the exports and sales to China instead of a producer of the product subject to investigation, you should forward the copies of the Questionnaire immediately to related producers so that producers and traders can work together on the Questionnaire. Besides, each of the companies involved should submit their own Questionnaire separately.¹⁷⁸

155. These instructions are ambiguous. MOFCOM fails to make clear whether it is requesting joint or separate responses from traders (who had registered as interested parties and received the questionnaire directly) and producers of barley. MOFCOM's statement that "producers and traders can work together" indicates that information submitted by separate parties would be considered holistically, rather than in isolation. MOFCOM fails to explain that a producer who receives the questionnaire from its associated trader, and who subsequently

¹⁷⁶ As set out above, what is considered "necessary information" within the meaning of Article 6.8 depends on the circumstances of an investigation, and may change depending on the approach adopted by an investigating authority. See above, para. 101.

¹⁷⁷ Panels have previously held that MOFCOM's action of making the questionnaire publicly available on its website was sufficient to meet the requirement in paragraph 1 of Annex II in relation to traders unknown to MOFCOM. See Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.218.

¹⁷⁸ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 4, para. 6.

responds to the questionnaire, would have an individual margin of dumping assigned to them. This is significant, as the margins of dumping assigned to Group 1 producers were the sole source of information from which all other margins assigned to all interested parties in the investigation were based. In *Korea – Stainless Steel Bars*, the panel held that since the investigating authority in that dispute failed to adequately inform the traders of the updated parameters for the "necessary information", the traders could not be said to have failed to provide, or otherwise refused, access to necessary information.¹⁷⁹ This is analogous to the current situation before the Panel. Because MOFCOM failed to adequately inform the Group 1 producers of the parameters for what it considered "necessary information" (including from *which* party information was to be provided), the Group 1 producers cannot be said to have failed to provide "necessary information".

156. Given MOFCOM's chosen approach to focus on the Group 1 producers and first assess whether they refused access to, or otherwise did not provide necessary information, it was essential for MOFCOM to ensure they were aware of the consequences if they did not provide the information requested. In these circumstances, making a questionnaire publicly available on a website is inadequate.

157. There were many ways in which MOFCOM could have notified the Group 1 producers had it chosen to do so. MOFCOM could have used the contact details provided by the Group 2 traders in their questionnaire responses and separately contacted the interested parties. Alternatively, MOFCOM could have separately requested Group 2 traders provide a sensible number of producer details.¹⁸⁰ Instead, MOFCOM made no attempts to contact producers of barley.¹⁸¹ Rather, MOFCOM erroneously attempted to delegate (and in the process eschew) its responsibility under Article 6.8 and paragraph 1 of Annex II to Group 2 traders with a request that traders and producers "work together on the Questionnaire".¹⁸²

¹⁷⁹ See Panel Report, *Korea – Stainless Steel Bars*, para. 7.196.

¹⁸⁰ Australia recalls there was ample information on the record demonstrating that the barley growers in Australia numbered in their thousands. See, for example, Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 82, "There are approximately 23,000 grain farm enterprises in Australia."

¹⁸¹ Similar to the obligation contained in Article 6.1 of the Anti-Dumping Agreement, Australia submits that the obligation in paragraph 1 of Annex II means that if MOFCOM did not have sufficient details for the producers, it was required to "make all reasonable efforts to obtain the requisite contact details." See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.132.

¹⁸² Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 4, para. 6.

158. Australia recalls that what constitutes "necessary" information within the meaning of Article 6.8 is not a determination that can be made in the abstract.¹⁸³ It is "specific information" requested from an interested party,¹⁸⁴ and must be essential or indispensable for the determination to be made. What is "necessary information" from one party, will not necessarily constitute "necessary information" from another. It is contrary to Article 6.8 for an investigating authority to issue a blanket request for information, ostensibly pursuant to paragraph 1 of Annex II, and maintain that all information requested therein is "necessary" for no other reason than it was requested. Therefore, as MOFCOM was not aware of the Group 1 producers at the time the questionnaire was issued, and did not issue those producers with a request for information, the information MOFCOM found to be deficient from Group 1 producers' questionnaire responses could not have been "necessary information" within the meaning of Article 6.8, as it was information that MOFCOM never requested pursuant to paragraph 1 of Annex II.

(c) Conclusion

159. MOFCOM was only permitted to have recourse to facts available in circumstances where the interested parties were aware of the information required of them. As MOFCOM adopted an approach to focus on the Group 1 producers, it was incumbent on MOFCOM to specify in detail the information it required of them. MOFCOM failed to do so. Accordingly, China acted inconsistently with Article 6.8 and paragraph 1 of Annex II with respect to the Group 1 producers.

5. China acted inconsistently with paragraphs 3 and 5 of Annex II by failing take into account information which was verifiable, appropriately submitted, and supplied in a timely fashion

160. Australia submits that before rejecting *all* information submitted to it and basing its findings on facts available, MOFCOM was obliged to take into account information submitted by interested parties in Groups 1 and 2 which was verifiable, appropriately submitted, supplied in a timely fashion, and in an appropriate medium, when making its determinations of dumping. MOFCOM failed to do so and therefore China acted inconsistently with Article 6.8

¹⁸³ See above, para. 101.

¹⁸⁴ See Panel Report, *EC – Salmon (Norway)*, para. 7.343.

and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement. If MOFCOM correctly observed paragraphs 3 and 5 of Annex II and took the submitted information into account, it would not have determined that necessary information was missing from the record in order to ascertain the normal value and export price and would not have made its determinations on the basis of facts available.

(a) Legal framework

161. Neither Article 6.8 nor paragraph 1 of Annex II to the Anti-Dumping Agreement addresses when an investigating authority is permitted to reject information submitted to it.¹⁸⁵ Paragraphs 3 and 5 of Annex II together concern whether the information submitted by interested parties must be used by an investigating authority.¹⁸⁶

162. Paragraph 3 of Annex II provides that:

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

163. Paragraph 3 sets out certain criteria concerning information. When these criteria are satisfied, an investigating authority is obliged to take that information into account when determinations are made. Conversely, paragraph 3 also governs when an investigating authority may reject information submitted to it.¹⁸⁷ Paragraph 5 of Annex II is a "complement" to paragraph 3.¹⁸⁸ Paragraph 5 provides that:

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

¹⁸⁵ See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 79-80.

¹⁸⁶ Panel Reports, *Egypt – Steel Rebar*, para. 7.161; *US – Steel Plate*, para. 7.55. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 81.

¹⁸⁷ Appellate Body Report, *US – Hot Rolled Steel*, para. 81.

¹⁸⁸ Panel Report, *Egypt – Steel Rebar*, para. 7.161.

164. Information that satisfies the criteria of paragraph 3, but which "may not be ideal in all respects" nevertheless should be taken into account by an investigating authority provided the interested party has "acted to the best of its ability."

165. According to paragraph 3, information which is "verifiable", "appropriately submitted so that it can be used [...] without undue difficulties", "supplied in a timely fashion" and, where applicable, "supplied in a medium or computer language requested by the authorities", should be taken into account. Australia will briefly consider the ordinary meaning of each of these criteria.

166. The ordinary meaning of "verifiable", in the context of paragraph 3 of Annex II, is information that "can be verified or proved to be true, authentic, accurate, or real; [is] capable, admitting, or susceptible of verification."¹⁸⁹ Notably, paragraph 3 does not mandate that an investigating authority undertake on-the-spot verification, but only that the information is *susceptible* of verification.¹⁹⁰

167. As for information which is "appropriately submitted", the ordinary meaning of "appropriately", in the context of paragraph 3, is "[i]n a manner properly suited; fittingly."¹⁹¹ Therefore, in order for information to meet this criterion in paragraph 3, it must be properly suited or fitting for use in the investigation, such that it can be used without "undue difficulties". Whether using appropriately submitted information would give rise to "undue difficulties" has been held to be a highly fact-specific issue.¹⁹² The ordinary meaning of "undue" is "[g]oing beyond what is appropriate, warranted, or natural; excessive."¹⁹³ It is clear that paragraph 3 is not concerned with just any difficulties, but rather only those that are excessive.

¹⁸⁹ Oxford English Dictionary online, definition of "verifiable", <https://www.oed.com/view/Entry/222501> (accessed 29 October 2021).

¹⁹⁰ Panel Report, *Guatemala – Cement II*, para. 8.252. The panel found that the fact that information submitted by the exporter, Cruz Azul, was not actually verified by the investigating authority did not change the panel's assessment that it was verifiable.

¹⁹¹ Oxford English Dictionary online, definition of "appropriately", <https://www.oed.com/view/Entry/9873> (accessed 29 October 2021).

¹⁹² Panel Report, *US – Steel Plate*, paras. 7.72 and 7.74. See also Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.342.

¹⁹³ Oxford English Dictionary online, definition of "undue", <https://www.oed.com/view/Entry/212679> (accessed 29 October 2021).

168. Next, paragraph 3 is concerned with information submitted in a "timely fashion". The ordinary meaning of "timely" is "[o]ccurring, done, or made at a fitting, suitable, or favourable time".¹⁹⁴ The Appellate Body in *US – Hot-Rolled Steel* interpreted timeliness "as a reference to a 'reasonable period' or a 'reasonable time'".¹⁹⁵ When determining whether information was submitted within a "reasonable period", an investigating authority must take into account the particular circumstances of each case, including factors such as the number of days by which the submission missed the applicable time-limit, and the verifiability of the information and the ease by which it can be used by the investigating authority.¹⁹⁶ An investigating authority is not entitled to reject information for the sole reason that it was submitted after a deadline, without considering whether the information was submitted in a "timely fashion".¹⁹⁷

169. Finally, paragraph 3 provides that information which is supplied in a medium or computer language requested by the authorities should be taken into account. The operation of this requirement is straightforward and provides that information submitted in the requested format should be taken into account.

170. To the extent that an investigating authority is dissatisfied with information submitted to it, it must examine the information provided in light of (i) the criteria set out in paragraph 3,¹⁹⁸ and (ii) the determination to be made.¹⁹⁹ However, examination in the absence of explanation is not sufficient. An investigating authority must also explain how the information which is being rejected does not meet the criteria in paragraph 3.²⁰⁰ The panel in *China – Broiler Products* explained that:

Because every element of information that satisfies the criteria of paragraph 3 must be taken into account, an investigating authority is not entitled to reject all information submitted and apply facts available, when only individual elements of that information fail to satisfy the criteria of paragraph 3. An investigating authority must, at a minimum, explain in what way

¹⁹⁴ Oxford English Dictionary online, definition of "timely", <https://www.oed.com/view/Entry/202120> (accessed 24 May 2021).

¹⁹⁵ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 81-83. See also Panel Report, *US – Steel Plate*, para. 7.76.

¹⁹⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.

¹⁹⁷ See Appellate Body Report, *US – Hot-Rolled Steel*, para. 89.

¹⁹⁸ Panel Report, *US – Steel Plate*, para. 7.58. The panel explained that this does not mean that an investigating authority must scrutinize each piece of information submitted to establish whether it satisfied the criteria of paragraph 3. See Panel Report, *US – Steel Plate*, para. 7.58.

¹⁹⁹ Australia recalls that what constitutes "necessary information" must be considered with reference to the substantive provisions of the Anti-Dumping Agreement to which the determination at issue relates. See above, para. 102.

²⁰⁰ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

the information that it is rejecting does not meet the requirements of paragraph 3.²⁰¹
(emphasis original; footnotes omitted)

171. There is no "unlimited right" to reject *all* information on the basis that *some* information was not provided.²⁰²

172. Paragraph 5 of Annex II highlights that information that satisfies the requirements of paragraph 3, but which is not perfect, must not be rejected.²⁰³ However, this is contingent on an interested party acting to the "best of its abilities". The ordinary meaning of "best", in the context of paragraph 5, is "[d]esignating an effort, action, etc., which surpasses all others in commitment or dedication; that involves the most work, or one's highest level of application."²⁰⁴ Whether an action "involves the most work" or the "highest level of application" is necessarily dependent upon the particular action. An action that is burdensome will require greater work than one that is not. Therefore, whether an interested party has acted to the "best of its abilities" is dependent on the circumstances in which the interested party is acting.

173. This interpretation is consistent with the findings of the Appellate Body, when it explained that investigating authorities are entitled to expect a "very significant degree of effort [...] from investigated exporters", but they are "not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters."²⁰⁵ The threshold in paragraph 5, whether an interested party has acted "to the best of its ability", is a measure of the "nature and quality" of the interested party's participation.²⁰⁶ Whether an interested party has acted to the best of its ability cannot be judged against an absolute standard.

174. Ultimately, investigating authorities must cooperate with interested parties, and "actively make efforts to use information submitted if the interested party has acted to the best of its ability."²⁰⁷ In this respect, it is clear that there is a preference under the Anti-Dumping Agreement for "first-hand" information. It is only in limited circumstances

²⁰¹ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7. 343.

²⁰² Panel Report, *US – Steel Plate*, para. 7.57.

²⁰³ Panel Report, *US – Steel Plate*, para. 7.65.

²⁰⁴ Oxford English Dictionary online, definition of "best", <https://www.oed.com/view/Entry/18180> (accessed 29 October 2021).

²⁰⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 102. (emphasis original)

²⁰⁶ Panel Report, *Egypt – Steel Rebar*, para. 7.159.

²⁰⁷ Panel Report, *US – Steel Plate*, para. 7.65.

where an investigating authority may "base its determination on facts, albeit perhaps 'second-best' facts."²⁰⁸ This interpretation is consistent with the object and purpose of Article 6.8 (which incorporates Annex II) and the Anti-Dumping Agreement as a whole, which seeks to "ensure objective decision-making based on facts".²⁰⁹

(b) MOFCOM was required to assess whether the submitted information met the criteria in paragraph 3

i. *Groups 1 and 2*

175. In reaching its conclusions that interested parties refused access to or otherwise did not provide necessary information in order to ascertain the normal value and export price, MOFCOM failed to address the quality and quantity of the information that *was* provided, in the manner required by paragraph 3 of Annex II.²¹⁰ MOFCOM's conclusion for Group 1 producers, that "the existing evidence did not prove that the above producers and traders had accurately and completely reported their sales in Australia in the questionnaire",²¹¹ does not demonstrate any "meaningful consideration by MOFCOM of the criteria in paragraph 3."²¹² In fact, it does not address the quality of the "existing evidence" at all. Similarly, for Group 2 traders, MOFCOM's conclusion that the interested parties provided "incomplete questionnaires and information"²¹³ simultaneously acknowledges that information *was* provided and disregards the information without any proper basis to do so. There is no evidence in the Final Determination, or elsewhere on the record, that MOFCOM considered the information submitted in light of the criteria in paragraph 3 of Annex II.

a. The information submitted was verifiable

176. The information submitted by Groups 1 and 2 interested parties was verifiable, within the meaning of paragraph 3 of Annex II. The information was submitted in response to MOFCOM's questionnaire and was therefore the type of information routinely collected in the

²⁰⁸ Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391. See also, Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.

²⁰⁹ Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391.

²¹⁰ See section II.A.3(b) where Australia sets out the information on the record relevant to the determination of normal value and export price.

²¹¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

²¹² Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.348. In that dispute, the panel considered an analogous situation.

²¹³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

course of an anti-dumping investigation. There is no evidence that MOFCOM made any discernible effort to verify the information submitted. The Final Determination indicates that MOFCOM "reviewed" the information provided, and "after review", found various deficiencies.²¹⁴ MOFCOM does not explain what its "review" of the information constituted, and whether as a result, MOFCOM found the information to be verifiable or otherwise.²¹⁵ MOFCOM's failure to conduct a verification audit of the information submitted is not dispositive of whether that information was verifiable in character.²¹⁶ Interested parties cannot be penalised by having their information rejected where verification has not occurred because of MOFCOM's inaction.

177. For this reason, Australia submits that, in the absence of any explanation from MOFCOM to the contrary, there was no proper basis to determine that any of the information submitted by Group 1 producers and Group 2 traders was not "verifiable" — that is, not capable of being "verified or proved to be true" through an "objective process of examination".²¹⁷ Moreover, MOFCOM made no such determination.

b. The information was appropriately submitted
and in the form requested

178. The information was appropriately submitted so that it could be used without undue difficulties. There is no evidence on the record to indicate the contrary. The information was also in the form requested by MOFCOM. If MOFCOM was *not* able to use the information submitted without experiencing "undue difficulties", it was incumbent on MOFCOM to provide an explanation of the problem.²¹⁸ MOFCOM did not do so.

²¹⁴ See Anti-Dumping Final Determination (Exhibit AUS-2), pp. 6-11.

²¹⁵ See Panel Report, *EC – Salmon (Norway)*, para. 7.363.

²¹⁶ See Panel Report, *Guatemala – Cement II*, para. 8.252. The fact that information submitted by the exporter, Cruz Azul, was not verified did not change the panel's assessment that it was verifiable.

²¹⁷ Panel Report, *US – Steel Plate*, para. 7.71.

²¹⁸ See Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74; *China – Broiler Products (Article 21.5 – US)*, para. 7.348.

- c. The information was supplied in a timely fashion

179. Finally, the information from Group 1 producers and Group 2 traders was submitted in a timely fashion²¹⁹ and in an appropriate medium. MOFCOM does not appear to allege otherwise. Accordingly, the information submitted by the Group 1 producers and Group 2 traders met all of the criteria in paragraph 3 of Annex II.

180. To the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II,²²⁰ and at a minimum, explain how the information it rejected did not meet those criteria.²²¹ Moreover, MOFCOM was required to "actively make efforts" to use the information submitted.²²² Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. An objective and unbiased investigating authority could not have found otherwise. There is no "unlimited right" for MOFCOM to reject all information and ascertain the normal value and export price entirely on the basis of facts available if *some* information was not provided, or if *some* information did not meet the criteria in paragraph 3 of Annex II.²²³

- d. The interested parties acted to the best of their ability

181. Assuming, *arguendo*, MOFCOM considered that the information submitted by the Group 1 producers and Group 2 traders was "not ideal in all respects" (despite no such finding in the Final Determination), MOFCOM was still precluded from rejecting that information pursuant to paragraph 5, provided the interested parties acted to the best of their abilities.

182. MOFCOM was entitled to expect a "very significant degree of effort from investigated [producers and traders]", and equally, the producers and traders were entitled to expect that

²¹⁹ See Anti-Dumping Final Determination (Exhibit AUS-2), p. 3, where MOFCOM states that "[a]s at the deadline for returning the questionnaires", the Group 1 producers and Group 2 traders submitted a questionnaire response.

²²⁰ Panel Report, *US – Steel Plate*, para. 7.58.

²²¹ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

²²² See Panel Report, *US – Steel Plate*, para. 7.65.

²²³ Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 – US)*, para. 7. 343.

MOFCOM would not impose "unreasonable burdens".²²⁴ The nature and quality of the effort from Group 1 producers and Group 2 traders must be assessed in light of the burdensome requests made by MOFCOM.

183. MOFCOM made impossible requests from the interested parties. *First*, it is evident from MOFCOM's treatment of the information provided that it expected the interested parties to track barley from production to end market in their questionnaire responses. *Second*, MOFCOM required Group 2 traders to compel their unrelated producers to submit responses to the questionnaire. Each of these are examined below.

184. As explained above,²²⁵ the nature of the barley industry in Australia is such that producers themselves do not export barley; this is done by the traders who purchase the barley from the producers.²²⁶ Moreover, producers have no influence over or knowledge of where the barley they sell to traders will ultimately be re-sold, either in the domestic market or in export markets.²²⁷ Therefore, to the extent that Group 1 producers and Group 2 traders did not provide information about the entire trading process of barley grown in Australia, it was because such information did not exist.²²⁸ Any purported deficiencies in the questionnaire responses were not a result of reluctance or refusal on the part of interested parties.²²⁹ To the

²²⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 102. In addition, traders were entitled to expect that MOFCOM would "conduct a sufficiently diligent investigation into, and solicitation of, relevant facts" (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152 (citing Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602)), including by "actively seek[ing] out pertinent information" (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130 (citing Appellate Body Report, *US – Washing Machines*, para. 5.268, in turn citing Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55; and referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; Panel Report, *China – Broiler Products*, para. 7.261)).

²²⁵ See para. 140.

²²⁶ See Kalgan Anti-Dumping Questionnaire Response (Exhibit AUS-17), p. 13; Iluka Trust Anti-Dumping Questionnaire Response (Exhibit AUS-24), p. 12; and McDonald Anti-Dumping Questionnaire Response (Exhibit AUS-25), p. 11, where these three producers responded to section 3 of the questionnaire "Exports and Sales to the Chinese Market" to the effect that "[o]ur company only grows barley and sells it to the domestic grain marketing companies. We do not export the product in consideration to China. Therefore, this part is not answered." See also Kalgan Anti-Dumping Questionnaire Response (Exhibit AUS-17), p. 62; McDonald Anti-Dumping Questionnaire Response (Exhibit AUS-25), p. 49; and Iluka Trust Anti-Dumping Questionnaire Response (Exhibit AUS-24), p. 68, where these three producers respond to section 8 of the questionnaire "Estimation of Dumping Margin" to the effect that "[o]ur company does not export barley to China, therefore this part is not applicable". Traders also gave evidence that growers do not sell directly to China but to traders instead. For example, ADM Trading indicated that "[i]ndividual farmers do not sell the product directly to China, but exporters instead". (ADM Trading Anti-Dumping Questionnaire Response (Exhibit AUS-32), p. 55.)

²²⁷ Haycroft indicated that "[t]he Company does not know that the barley it sells will actually be used for export or domestic consumption, let alone the specific export market", (Haycroft Anti-Dumping Questionnaire Response (Exhibit AUS-21), pp. 11 and 15. ADM Trading gave similar evidence, explaining that "ADM understands that individual farmers have no idea whether their products are for domestic sales or export", (ADM Trading Anti-Dumping Questionnaire Response (Exhibit AUS-32), p. 55.)

²²⁸ See above, section II.A.3(b)iii.

²²⁹ All interested parties submitted that this information was not possible to produce. This is clear evidence that the reason the information was not provided was not mere reluctance or refusal.

contrary, the evidence on the record shows that the Group 1 producers and Group 2 traders were forthcoming in the information they provided, including about the structure of the industry in Australia.²³⁰

185. For example, the producers and traders explained that barley from different producers is co-mingled in warehouses,²³¹ and stored according to quality specifications.²³² As a result, it is impossible for traders to trace a specific quantity of barley back to the supplying producers,²³³ which could number in the thousands for each trader.²³⁴ Evidence before MOFCOM indicated that there were "approximately 23,000 'grain farm' enterprises in Australia", and few, if any of these exclusively produce barley; rather, barley is produced in rotation with other crops such as wheat, canola and oats.²³⁵ Australia maintains a "common

²³⁰ See above, para. 173.

²³¹ Emerald indicated at p. 62 that, "[g]rain stored in commercial warehouses can be owned by multiple traders and will be stored in common stacks". (Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 62.) GrainCorp indicated at p. 227 that "grains are classified and stored at each warehousing site of the system, and the grains delivered by farmers are evenly mixed into grain stacks based on applicable acceptance criteria". (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 227.) Cargill indicated at pp. 18 and 48 that, "[g]rains stored in a commercial warehouse are stacked together, and the owner transfers ownership of a portion of the grains to the purchaser when a transaction takes place. When purchased barley is mixed with other barley of the same grade, the supplier of barley in the stockpile cannot be identified". Cargill further observed at p. 110 that, "Grain stored in commercial warehouses can be owned by several traders and is stacked together". (Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 18, 48 and 110.)

²³² See above, fn 231. See also GrainCorp's evidence at p. 32 that, "[f]ollowing relevant international treaties, the Australian grains industry classifies and stores the grains based on the standards developed by Grain Trade Australia (GTA) and Grain Industry Association of Western Australia (GIWA)". (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 32.) COFCO indicated at p. 20 that, "[i]n Australia, barley is stored and separated according to GTA's and GIWA's grade specifications". (COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), p. 20.)

²³³ Emerald indicated at p. 28 that, "[a]s the number of sales contracts is usually much larger than the average purchase contracts, our company accumulates the products under investigation through many suppliers. For example, a standard 50,000 tonne [...] contract can be accumulated and executed over the course of a month, with products coming from many production suppliers and other trading companies. It is therefore not practical or feasible to identify and list each supplier". (Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 28, see also p. 41.) ADM indicated at pp. 22 and 37 that "barley is purchased from many suppliers and then mixed together. As a result, ADM Trading cannot trace barley sources and identify barley producers in specific transactions". (ADM Trading Anti-Dumping Questionnaire Response (Exhibit AUS-32), pp. 22 and 37.) COFCO indicated at pp. 38 and 53 that, "[b]arley is a bulk commodity, so it is impossible to identify the suppliers/growers in each transaction". (COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-16), pp. 38 and 53.) GrainCorp indicated at p. 110, "[t]he barley is gathered and mixed in the storage system, and port operators regard the inventory at ports as 'shared inventory', so this means that the delivery and usage of each batch of barley cannot be accurately determined and traced", and at p. 152, that "[a]s barley is gathered in GrainCorp's storage system, so it is generally impossible to trace the specific grower in the domestic sale". (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 110 and 152.) Cargill indicated at pp. 71 and 80 that "[w]hen barley sent to the batch processing centre by a farmer is mixed with the barley of the same grade, the supplier of barley cannot be identified". (Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), pp. 71 and 80.)

²³⁴ Emerald indicated at pp. 17 and 32 that, "[o]ur company is not the producer of the products under investigation and has acquired the products under investigation directly from thousands of different producers or their grower brokers". (Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), pp. 17 and 32.) GrainCorp indicated at p. 13 that "GrainCorp purchases the barley from over 5,000 individual farmers across Australia", and at pp. 72, 120 and 124 that, "GrainCorp trades with about 5,000 barley producers", and further at pp. 141, 142, 144 and 145, that, "[d]uring the investigation period, GrainCorp purchased barley from over 5,000 barley producers in Australia based on multiple delivery conditions". (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 13, 73, 120, 124, 141, 142, 144 and 145).

²³⁵ Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 15.

user/grain system" whereby "a number of exporters store barley in the same commercial location".²³⁶ Barley is stored according to quality specifications, and is owned by multiple traders, who each have a right to access a specific percentage of grain held in the common stack.²³⁷ All of this information was on the record before MOFCOM.

186. Australia recalls that MOFCOM did not issue questionnaires to Group 1 producers.²³⁸ Rather, MOFCOM instructed Group 2 traders to "forward" the questionnaire to "related producers" so that producers and traders can "work together" to submit a response.²³⁹ Group 2 traders were not in a position to compel Group 1 producers to submit information or participate in the investigation. None of the Group 2 traders were within the same corporate group as the Group 1 producers. The threshold for an interested party acting to the best of its ability does not include compelling an unrelated company to participate in an investigation.

187. Whether interested parties acted to the best of their abilities must be assessed in the context of MOFCOM's impossible request. Given the volume of evidence provided to MOFCOM concerning the operation and structure of the barley industry in Australia, the Group 1 producers and Group 2 traders clearly acted to the best of their abilities in responding to MOFCOM's requests in the questionnaire. No objective and unbiased investigating authority could have concluded otherwise. Furthermore, the information was verifiable, appropriately submitted and timely. Therefore, in accordance with paragraphs 3 and 5 of Annex II, MOFCOM was not entitled to reject the information. While MOFCOM requested information that did not exist in the normal course of trade in the circumstances of the Australian barley market, this did not mean that the information provided by the interested

²³⁶ Grain Growers commented at p. 37 that "Australia has a unique grain storage and handling system and can be described as a common user/grain system. In the common user system, a number of traders store barley in the same commercial location. Grain is received to the location on a common set of standards that have been developed and adopted by the industry (GTA and GIWA standards)". (Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 37.) See also CHS Broadbent, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, undated (public version) (English translation) (CHS Broadbent Anti-Dumping Questionnaire Response) (Exhibit AUS-33), p. 37; Grain Trade Australia, Comments on Initiation of the Anti-Dumping Investigation, 9 February 2019 (public version) (English translation) (pages renumbered) (Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation) (Exhibit AUS-34), p. 5; Grain Producers Australia, Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 25 January 2019 (public version) (English translation) (pages renumbered) (Grain Producers Australia Anti-Dumping Questionnaire Response) (Exhibit AUS-35), p. 23; and GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 59.

²³⁷ See GrainCorp evidence at p. 227 that "[t]he grain stored in the same grain stack of a commercial warehouse may be owned by multiple traders, and each trader has the right to pick up the grain based on their respective proportion of ownership". (GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 227.)

²³⁸ See above, para. 83.

²³⁹ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 4, para. 6.

parties in their explanations was somehow deficient, or otherwise unusable, and to be disregarded.

188. In summary, MOFCOM had an obligation to take the information submitted by the Group 1 producers and Group 2 traders into account. The information submitted met the criteria of paragraph 3 of Annex II and therefore MOFCOM should have taken it into account in the determinations of normal value and export price. Furthermore, the interested parties acted to the best of their abilities within the meaning of paragraph 5 of Annex II, and therefore MOFCOM was not justified in disregarding the information in the event that it may not have been ideal in all respects.

ii. Group 3

189. MOFCOM rejected the entirety of the questionnaire response from Louis Dreyfus on the basis that it was submitted after the applicable time-limit.²⁴⁰ MOFCOM provided no other justification for rejecting the information.

190. The Appellate Body has clearly explained that an investigating authority is not required to reject information as being untimely if the information is submitted within a reasonable period of time.²⁴¹ There is no evidence in the Final Determination, or elsewhere on the record, that MOFCOM considered whether the submission from Louis Dreyfus was submitted within a reasonable period of time, despite being submitted after the time-limit. MOFCOM did not indicate how many days lapsed between the time-limit and submission, nor did MOFCOM indicate if taking the late submission into account would compromise its ability to conduct the investigation expeditiously. Given MOFCOM issued its Final Disclosure some 15 months after the deadline for questionnaires was set, it is implausible that it could not have taken into account the questionnaire response from Louis Dreyfus, despite the fact that it was provided after the deadline.

191. Accordingly, MOFCOM acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II by rejecting the questionnaire response from Louis Dreyfus for the sole reason that it was submitted after the applicable time-limit.

²⁴⁰ See above, para. 96.

²⁴¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 83.

192. MOFCOM rejected the entirety of the questionnaire response from Riordan on the basis that no electronic version was submitted.²⁴² There is no evidence in the Final Determination, or elsewhere on the record, that Riordan did not act to the best of its abilities in submitting the information to MOFCOM. MOFCOM made no finding in this regard. As such, MOFCOM was obliged to take into account the information submitted by Riordan even though it may not have been ideal in all respects. Accordingly, MOFCOM acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II by rejecting the questionnaire response from Riordan.

(c) Conclusion

193. Before disregarding the information submitted by the Groups 1 and 2 interested parties and Group 3 companies Louis Dreyfus and Riordan and making determinations on the basis of facts available, MOFCOM was obliged to examine whether the submitted information was verifiable, appropriately submitted, supplied in a timely manner, and in the medium requested, as required by paragraph 3 of Annex II. MOFCOM failed to do so. If it had properly done so, Australia submits that, based on the evidence on the record, it would have concluded that the information submitted did meet these criteria.

194. While MOFCOM did not make any finding that the information submitted was not ideal in all respects, *arguendo*, to the extent that the submitted information may have been deficient, as outlined above, the interested parties acted to the best of their abilities to provide the information requested in MOFCOM's questionnaire or to otherwise provide responses relevant to those requests. Indeed, MOFCOM did not make any findings to the contrary.

195. Had MOFCOM correctly observed paragraphs 3 and 5 of Annex II, it would have taken the information submitted by interested parties in Groups 1 and 2 into account and found that no necessary information was missing. Accordingly, Australia submits that China acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement as a result of MOFCOM rejecting the information submitted by Groups 1 and 2 and making determinations on the basis of facts available.

²⁴² See above, para. 96.

196. In relation to the information submitted by Louis Dreyfus, Australia submits that China acted inconsistently with Article 6.8 and paragraph 3 of Annex II as a result of MOFCOM rejecting the information for the sole reason that it was submitted after the applicable time-limit.

197. In relation to the information submitted by Riordan, Australia submits that China acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II as a result of MOFCOM rejecting the information on the basis that no electronic version was submitted and in the absence of any finding that Riordan did not act to the best of its ability.

6. China acted inconsistently with paragraph 6 of Annex II by failing to inform supplying parties of the reasons for not accepting information and failing to give an opportunity to provide further explanations within a reasonable period

198. Australia submits that China acted inconsistently with Article 6.8 and paragraph 6 of Annex II of the Anti-Dumping Agreement. At no stage during the investigation, prior to the publication of the Final Disclosure, did MOFCOM inform *any* interested party that the entirety of the information they had submitted was not accepted. In addition, MOFCOM failed to give reasons for its decision to reject information and failed to afford parties any due process, including by providing an opportunity to provide further explanations.

(a) Legal framework

199. Paragraph 6 of Annex II provides that:

If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.

200. The scope of the obligations in paragraph 6 are well settled.²⁴³ Paragraph 6 of Annex II is one of many important protections of due process obligations owed to interested

²⁴³ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.186.

parties participating in an investigation.²⁴⁴ Investigating authorities have an obligation to inform an interested party "forthwith" if information submitted by them is not accepted. The ordinary meaning of "forthwith", in the context of paragraph 6, is "[i]mmediately, at once, without delay or interval".²⁴⁵ The ordinary meaning of "reason" is "an account or explanation of, or answer to, something."²⁴⁶ Therefore paragraph 6 requires an investigating authority to give an account or explanation of why information was not accepted immediately after the decision to reject it was made.

201. An interested party must then be afforded an opportunity to provide further explanations as to why the information should be taken into account.²⁴⁷ An investigating authority must provide reasons if it rejects the information notwithstanding the explanations.

202. It is not sufficient to provide a "general statement" of the possibility that a determination may be made on the basis of facts available.²⁴⁸ In order to satisfy paragraph 6, an investigating authority must provide an "affirmative and direct notification" to the interested party concerned that submitted information has been rejected, and the reasons for the rejection.²⁴⁹

(b) MOFCOM failed to inform interested parties of the reasons why it was not accepting their submitted information or provide an opportunity for further explanations

203. Interested parties submitted questionnaire responses in February 2019,²⁵⁰ within the time frame set by MOFCOM.²⁵¹ Approximately 15 months later,²⁵² on 8 May 2020, MOFCOM

²⁴⁴ For example, Article 6 of the Anti-Dumping Agreement safeguards other important due process obligations. In particular, Article 6 mandates particular disclosure obligations. Article 6.5.1 sets out that parties must have access to a summary of confidential information. See Panel Report, *China – GOES*, para. 7.205.

²⁴⁵ Oxford English Dictionary online, definition of "forthwith", <https://www.oed.com/view/Entry/73702> (accessed 29 October 2021). See also, Panel Report, *Korea – Certain Paper*, para. 7.75.

²⁴⁶ Oxford English Dictionary online, definition of "reason", <https://www.oed.com/view/Entry/159068> (accessed 29 October 2021).

See also, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225. In differentiating "facts" and "reasons", the panel found that a "reason" is a motive, cause or justification.

²⁴⁷ Panel Report, *Korea – Certain Paper*, para. 7.85.

²⁴⁸ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.

²⁴⁹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.

²⁵⁰ The anti-dumping questionnaires stipulated a deadline of 37 days from the issuance for responses (i.e. 27 January 2019). The Australian Government and 17 companies applied for and were each granted a 14-day extension to submit the anti-dumping questionnaire (i.e. 11 February 2019).

²⁵¹ Louis Dreyfus is the sole exception.

²⁵² The time taken for MOFCOM to notify interested parties that their information was not accepted was, in fact, longer than the time MOFCOM ought to have taken to complete an entire investigation. Article 5.10 of the Anti-Dumping Agreement

issued the Final Disclosure notifying all traders and producers that the entirety of their information was not accepted.

204. In the 15 months between receipt of questionnaire responses and publication of the Final Disclosure, there is nothing on the record to suggest that MOFCOM made any effort to inform the interested parties that their information was not accepted or to provide reasons as to why it had not been accepted. Nor did MOFCOM identify specific deficiencies in the information contained in the questionnaire responses. Given the length of time between receipt of questionnaires, and publication of the Final Disclosure, it is clear that MOFCOM failed to notify the interested parties *immediately* and *without delay*.

205. Because MOFCOM failed to provide the requisite notice to interested parties, it follows that MOFCOM also failed to provide interested parties an opportunity to give explanations as to why the information ought to be considered.

206. The only notice provided to interested parties in the investigation was in the Final Disclosure. Groups 1 and 2 made submissions in response to the Final Disclosure concerning MOFCOM's rejection of their submitted information.²⁵³ Pursuant to paragraph 6 of Annex II, MOFCOM was obliged to consider these explanations and, if they were not considered satisfactory, MOFCOM was obliged to provide the reasons for the rejection of the evidence and information in its published determinations. MOFCOM rejected the evidence and information contained in the submissions and failed to provide reasons in its Final Determination. This is not surprising, given that MOFCOM issued its Final Determination on the same day that comments on the Final Disclosure were due.

207. In response to submissions from Group 1 producers, MOFCOM provided only a cursory response in the Final Determination, claiming that it "verified the information obtained during the investigation and other information from independent sources in choosing the best available information".²⁵⁴ This response from MOFCOM does not address, in any meaningful way, the issues raised in the submissions. It is not a "reason" for why

provides that "investigations shall [...] be concluded within one year, and in no case, more than 18 months after their initiation."

²⁵³ See Anti-Dumping Final Determination (Exhibit AUS-2), p. 4. MOFCOM listed the submissions made in response to the Anti-Dumping Final Disclosure.

²⁵⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8. In fact, MOFCOM gave no account of how it verified any information obtained during the investigation.

MOFCOM did not accept information. Providing reasons entails giving an account for why a decision has occurred. It is concerned with setting out the evaluation of facts, rather than the establishment of those facts.²⁵⁵ A recitation of what has occurred, or what MOFCOM took into account, is not an *evaluation* of facts. As such, MOFCOM failed to provide reasons as to why the information was rejected.

208. In response to submissions from Group 2 traders that it was "impossible to track the whereabouts of barley from the producer to the final market", MOFCOM found as follows:

The Investigating Authority thoroughly reviewed the questionnaires submitted by responding companies and considered the submitted comments in the final ruling. As for the above claim, the Investigating Authority believed that the above interested parties only focused on the sales process and particularities of logistics, but did not explain the different roles in sales transactions of traders and producers, and ignored the fact that transaction relationships exist between traders, so the above assertion cannot refute the fact that the submitted questionnaires failed to meet the completeness requirement. The Investigating Authority considered the above claim, but the interested parties were unable to explain the relationship between the rationality of determining the tax rate for traders and the above facts. The Investigating Authority did not accept the above claim.²⁵⁶

209. MOFCOM's ambiguous response fails to address the basic factual assertion: that it was impossible to track barley from production to end market. There was no evidence on the record that would have called into question the accuracy of the facts explained by the interested parties, including that barley is fungible, that in the normal course of business it is comingled in shared storage, and cannot be tracked from production to end market. In addition, MOFCOM failed to explain what additional information could possibly have been provided by the interested parties to satisfy the impossibly high standard that MOFCOM erroneously applied to the information that it considered "necessary" for determining normal value and export price. Again, MOFCOM failed to provide reasons as to why all of the information provided by the interested parties was rejected.

²⁵⁵ See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.227, where the panel explained, with reference to Articles 6.9 and 17.6(i), that "a reason is part of the evaluation of a fact, and not the fact itself. [...] we agree [...] that an investigating authority must inform interested parties why certain information is disregarded. However [...] that obligation is found in Article 6.8 (through Annex II, para. 6), and not in Article 6.9." (footnotes omitted)

²⁵⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

210. In the Final Determination, MOFCOM claimed that it "made its best efforts to inform the above producers and traders of the consequences of failing to cooperate with the investigation, including giving explicit requirements and hints in the questionnaire."²⁵⁷

211. The questionnaire issued to interested parties states:

9. If you are unable to submit the questionnaire within the required timeframe, or the questionnaire you submit is incomplete or inaccurate, or you fail to allow the Trade and Remedy Investigation Bureau to verify the information and materials you provide, the Trade and Remedy Bureau is free to make determinations on the basis of facts available and the best information available according to the *Anti-dumping Regulation of People's Republic of China*.²⁵⁸

212. This statement is not sufficient to meet the requirement in paragraph 6 to inform an interested party that their information is not accepted. The guidance provided by MOFCOM in the questionnaire is a general statement provided to anyone in receipt of the document that facts available *may* be used in certain circumstances. It is clearly not an "affirmative and direct notification"²⁵⁹ to the interested party concerned explaining that the information submitted by them has not been accepted.

(c) Conclusion

213. MOFCOM had an obligation to inform all interested parties that the information which they had submitted was not accepted. MOFCOM was obliged to notify the interested parties immediately and provide an account for why the information was not accepted. All interested parties were also entitled to have an opportunity to provide explanations. MOFCOM failed to inform the interested parties, it failed to provide reasons, and it failed to provide an opportunity for the interested parties to provide explanations. Accordingly, China acted inconsistently with Article 6.8 and paragraph 6 of Annex II of the Anti-Dumping Agreement.

²⁵⁷ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 8 and 9.

²⁵⁸ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 5.

²⁵⁹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.

7. China acted inconsistently with paragraph 7 of Annex II by failing to exercise special circumspection in its selection of facts available

214. Australia submits that China acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. Assuming, *arguendo*, that MOFCOM was entitled to resort to facts available, MOFCOM failed to select a reasonable replacement for the allegedly missing information.²⁶⁰ MOFCOM based its findings on information from the Global Trade Atlas database without exercising special circumspection or undertaking a process of reasoning and evaluation of the record evidence. The resulting dumping margin of 73.6%, calculated on the basis of the Global Trade Atlas data, was grossly flawed and had no logical relationship with the facts of the record.

(a) Legal framework

215. Paragraph 7 of Annex II provides that:

If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

Thus, paragraph 7 of Annex II requires that when an investigating authority bases its findings on "information from a secondary source", it must exercise "special circumspection" and "check the information from other independent sources".

216. "Secondary source" is not a defined term in the Anti-Dumping Agreement. The ordinary meaning of "source", in the context of paragraph 7 of Annex II, is defined as "[a] work, etc., supplying information or evidence (esp. of an original or primary character) as to some fact, event, or series of these. Also, a person supplying information, an informant, a

²⁶⁰ In the first instance, Australia submits that no necessary information was missing from the record. MOFCOM acted inconsistently with Article 6.8, and paragraphs 1, 3, 5 and 6 of Annex II in making its determinations on the basis of facts available.

spokesman."²⁶¹ As such, "source" includes a work or individual supplying information or evidence. "Secondary", in the context of paragraph 7, is defined as "[s]econd best; of the second grade of quality."²⁶² Something that is of a "second grade of quality" can only be understood with reference to what comes before it, or is of a "first grade of quality". The context of Article 6.8 and Annex II makes clear that information from a source of "first grade quality"²⁶³ is the interested party from whom the necessary information was requested; it is only when this information is missing that an investigating authority may base its determinations on facts available and the disciplines in paragraph 7 are relevant.²⁶⁴ A "secondary source" is therefore "second best" to this. Therefore, the ordinary meaning of information from a "secondary source", in its context and in light of its object and purpose, is information from a work, or person, other than the interested party from which the necessary information was requested.

217. An investigating authority must use information from a secondary source with "special circumspection". The ordinary meaning of "circumspection" is "vigilant and cautious observation of circumstances or events. [...] Circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness."²⁶⁵ "Special", in the context of paragraph 7, is defined as "[e]xceptional in quality or degree; unusual; out of the ordinary. [...] Additional to the usual or ordinary."²⁶⁶ As such, "special circumspection" can be defined as caution that is exceptional in quality; additional to the ordinary. It is clear from the ordinary meaning of "special circumspection"

²⁶¹ Oxford English Dictionary online, definition of "source", <https://www.oed.com/view/Entry/185182> (accessed 29 October 2021).

²⁶² Oxford English Dictionary online, definition of "secondary", <https://www.oed.com/view/Entry/174507> (accessed 29 October 2021).

²⁶³ The panel in *Mexico – Anti-Dumping Measures on Rice* explained that the Anti-Dumping Agreement "expresses a clear preference for *first-hand information* but does not allow any party to hold the authority hostage by not providing the necessary information, and thus provides that second-best information from secondary sources may be used in certain well-defined circumstances." (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.) (emphasis added)

²⁶⁴ See e.g. Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172, where the Appellate Body explained that an investigating authority must "use those facts available that reasonably replace the necessary information that an interested party failed to provide with a view to arriving at an accurate determination."

²⁶⁵ Oxford English Dictionary online, definition of "circumspection", <https://www.oed.com/view/Entry/33369> (accessed 29 October 2021).

²⁶⁶ Oxford English Dictionary online, definition of "special", <https://www.oed.com/view/Entry/185972> (accessed 29 October 2021).

that when using information from a secondary source, an investigating authority must act with exceptional caution.²⁶⁷

218. Paragraph 7 provides that an investigating authority must also "check the information from other independent sources". The obligation to "check" is triggered only when information from a secondary source is used. The ordinary meaning of "check", in the context of paragraph 7, is "[t]o agree upon comparison".²⁶⁸ To find "agreement" in the comparison of two data sources is to reconcile them, corroborate, or verify the contents of one source against the other. Paragraph 7 sets out an illustrative list of sources that can be used in this process. The Appellate Body has explained that this process is comprised as follows:

[A]scertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".²⁶⁹

219. Ultimately, paragraph 7 of Annex II requires investigating authorities to "undertake a process of reasoning and evaluation when selecting the facts available that reasonably replace the missing 'necessary information' to arrive at an accurate determination."²⁷⁰ In this process, "no substantiated facts on the record can be *a priori* excluded from consideration."²⁷¹ There must be a "logical relationship" between the replacement facts and the facts on the record.²⁷²

220. The final sentence of paragraph 7 provides that if an interested party does not cooperate, it could lead to a result which is less favourable than if the party were to cooperate. However, investigating authorities are not entitled to arrive at a less favourable result simply because an interested party failed to furnish information if the interested party otherwise cooperated.²⁷³

²⁶⁷ This is consistent with the interpretation by panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* where it explained that, "[w]e note that paragraph 7 generally requires the investigating authorities to exercise caution in their selection of facts available." (Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.26.)

²⁶⁸ Oxford English Dictionary online, definition of "check", <https://www.oed.com/view/Entry/31082> (accessed 24 May 2021).

²⁶⁹ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

²⁷⁰ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.173 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.425; *Mexico – Anti-Dumping Measures on Rice*, para. 289).

²⁷¹ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

²⁷² See Panel Report, *China – Broiler Products*, para. 7.312.

²⁷³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.

(b) Group 1 producers

221. MOFCOM made both normal value and export price determinations using data from Global Trade Atlas.²⁷⁴ This data was not provided by any of the Group 1 producers in response to a request from MOFCOM. As such, the Global Trade Atlas data is information from a work, or person, other than the interested party from which the necessary information was requested. It is therefore information from a "secondary source" within the meaning of paragraph 7 of Annex II.

222. Because MOFCOM based its findings on information from a secondary source, it was required to do so with special circumspection and, where practicable, to check the information from other independent sources. This means MOFCOM was required to exercise exceptional caution by confirming that the information agreed with other independent sources upon comparison. MOFCOM failed to do so, and selected replacement facts that had no logical relationship with facts on the record.

*i. MOFCOM did not check the information regarding
normal value from other independent sources*

223. MOFCOM claimed it undertook a "comparative analysis" of various sources, and that it took into "comprehensive consideration" the "sales volume, export market, transport mode and other factors" in order to ascertain that the "best available information" for the normal value was an export price of barley from Australia to Egypt as recorded in Global Trade Atlas.²⁷⁵

224. There is no evidence on the record to support the assertion that MOFCOM checked the Global Trade Atlas data it used for the normal value against other independent sources, in the manner required by paragraph 7. As for the "comparative analysis", MOFCOM merely lists various data sources it collected. The collection of data is not indicative of its analysis. As the panel explained in *Canada – Welded Pipe*:

Collecting data is not the same as undertaking a comparative and systematic evaluation and assessment of that data for the purpose of applying facts available. Nor does checking for

²⁷⁴ See above, paras. 88 and 91.

²⁷⁵ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 8 and 9.

anomalies, aberrations, or the need for adjustments equate to a comparative evaluation and assessment.²⁷⁶

225. MOFCOM does not explain what, exactly, it compared in the data collected, whether it evaluated prices, volumes, product specification, or differences in sales terms, shipping costs, and market structure in order to reconcile the information from Global Trade Atlas. It is not sufficient for MOFCOM to merely assert it took into "comprehensive consideration" specific factors in the absence of any further explanation or analysis. Explanations provided by an investigating authority must be sufficiently detailed to allow a panel to assess whether the facts available were a reasonable replacement for the missing necessary information.²⁷⁷

226. Australia submits that MOFCOM's explanation was lacking in requisite detail because it is clear from the following evidence on the record that MOFCOM did *not* check the Global Trade Atlas information against other independent sources as required by paragraph 7 of Annex II. Evidence placed on the record throughout the investigation regarding the domestic price of Australian barley indicated that the true normal value was significantly below the price of exports to Egypt.

- a. MOFCOM did not check the information against evidence in the application

227. At the very beginning of the investigation, in its application for an anti-dumping investigation, CICC estimated a "Normal Value before Allowance Made".²⁷⁸ This was based on the average prices of barley in Australia in each quarter of 2017, resulting in a figure of USD 209.68 per tonne.²⁷⁹ As highlighted by the Australian Government in its comments on the Final Disclosure, with MOFCOM's export price of USD 216.83 per tonne, "[i]f the applicant's normal value estimate was used, the dumping margin would be negative 3 per cent (i.e. no dumping)".²⁸⁰

²⁷⁶ Panel Report, *Canada – Welded Pipe*, para. 7.140.

²⁷⁷ See Appellate Body, *US – Carbon Steel (India)*, para. 4.421. In this dispute, the Appellate Body was considering the equivalent provision in the SCM Agreement, Article 12.7.

²⁷⁸ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 26-27.

²⁷⁹ CICC calculated an average price of AUD 272.75 per tonne, then applied a blanket AUD to USD exchange rate of 1.3008.

²⁸⁰ Australian Government, Submission in response to Disclosure of Facts on which the Final Determination on the Anti-Dumping Investigation into imports of Barley from Australia, 15 May 2020 (pages renumbered) (Australian Government Comments on Anti-Dumping Final Disclosure) (Exhibit AUS-36), pp. 4-5. See also CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 26-27.

- b. MOFCOM did not check the information against publicly available information from Australian Government Department of Agriculture

228. At the questionnaire response stage of the investigation, the Australian Government provided evidence regarding the domestic price of barley in Australia. In its questionnaire response, the Australian Government repeatedly cited and provided links to "Agricultural Commodities and trade data" on the website of the Australian Department of Agriculture, Water and the Environment.²⁸¹ MOFCOM also referred to the Department of Agriculture, Water and the Environment's website, as well as "publicly available industry information", as sources of information upon which it based its normal value determination.²⁸² The relevant dataset on the Department's website, "Rural Commodities – coarse grains" includes historical data on the domestic price of feed barley in Australia, from 1974-1975 until 2017-2018 and 2018-2019.²⁸³ Monthly domestic prices are available for each month of the POI.²⁸⁴ While this data only records the price for feed barley, it provides a useful benchmark against which to judge MOFCOM's determined normal value. Moreover, the Australian Government provided evidence that around two thirds of the domestic demand for barley is feed barley, so the Department of Agriculture, Water and the Environment's data accounts for the majority of domestic sales.²⁸⁵

229. The Department of Agriculture, Water and the Environment's data show that, over the past 45 years, the domestic price of feed barley in Australia has never been in the vicinity of the price of export sales to Egypt, i.e. USD 392.81 per tonne. The average of the monthly data on prices of feed barley over the 12-month POI equates to approximately USD 220.26 to

²⁸¹ Australian Government, Response to certain questions from section 7 of the Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 11 February 2019 (Australian Government Anti-Dumping Questionnaire Response, Section 7) (Exhibit AUS-37), pp. 19-23 and 68, referring to Department of Agriculture and Water and the Environment, Australian Bureau of Agricultural and Resource Economics and Sciences, 'Agricultural commodities and trade data', available: <https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/data#2018>. (See also Australian Bureau of Agricultural and Resource Economics and Sciences, Department of Agriculture, Water and the Environment, Agricultural commodity statistics 2018, Rural commodities – coarse grains; and Agricultural commodity statistics 2019, Rural commodities – coarse grains, available at: <https://www.agriculture.gov.au/abares/research-topics/agricultural-outlook/data#2018> (ABARES Grains Data) (Exhibit AUS-38)).

²⁸² Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

²⁸³ See ABARES Grains Data (Exhibit AUS-38).

²⁸⁴ See ABARES Grains Data (Exhibit AUS-38).

²⁸⁵ Australian Government Anti-Dumping Questionnaire Response, Section 7 (Exhibit AUS-37), p. 27.

251.05 per tonne.²⁸⁶ The highest domestic price for feed barley in Australia between 1974 and the end of the POI was recorded in September 2018, the final month of the POI, and equated to approximately USD 291.22 to 299.14 per tonne.²⁸⁷ Hence, the highest domestic price for feed barley in the 44 years leading to September 2018 was approximately USD 100 per tonne below the price of export sales to Egypt.²⁸⁸

230. Hence, data that was publicly available on the Australian Department of Agriculture, Water and the Environment's website (which MOFCOM stated that it had referred to) and was referred to by the Australian Government in its anti-dumping questionnaire response regarding the domestic price of feed barley in Australia, showed that not only has the domestic price never exceeded the equivalent of USD 300 per tonne, let alone reached USD 392.81 per tonne, but the average domestic price of barley during the POI was far closer to the export price MOFCOM used in its determination.

- c. MOFCOM did not check the information against information obtained from other interested parties during the investigation

231. MOFCOM could also have checked the Global Trade Atlas data against "information obtained from other interested parties during the investigation." The data submitted by Australian traders and producers on domestic sales, cost of production and expenses, and third country sales, which Australia submits MOFCOM unjustifiably disregarded,²⁸⁹ also suggests that the normal value of Australian barley was far below the price of export sales to Egypt. To illustrate this, Australia will outline the data provided by one Group 2 trader,

²⁸⁶ The average price of the Department of Agriculture data for the POI is AUD 310.09 per tonne (note, the 2018 and 2019 data sheets have different prices for May 2018, hence the higher price from the 2019 data has been used in Australia's calculations). The USD equivalent range was calculated using the lowest (0.7103) and highest (0.8096) AUD to USD exchange rates during the POI, as recorded by the Reserve Bank of Australia. See Extract from Reserve Bank of Australia Historical Data, Daily Exchange Rates, 2014 to 2017 and 2018 to Current, available at: <https://www.rba.gov.au/statistics/historical-data.html#exchange-rates> (Reserve Bank of Australia Exchange Rates) (Exhibit AUS-39).

²⁸⁷ The price recorded in the Department of Agriculture for September 2018 was AUD 410 per tonne. The USD equivalent range was calculated using the lowest (0.7103) and highest (0.7296) AUD to USD exchange rates during September 2018, as recorded by the Reserve Bank of Australia. See Reserve Bank of Australia Exchange Rates (Exhibit AUS-39).

²⁸⁸ It should also be noted that the high domestic price of barley during the second half of 2018 reflects the effect of the drought in eastern Australia in 2018, about which several Australian interested parties gave detailed evidence. See, for example, Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), pp. 4-5; ADM Trading Anti-Dumping Questionnaire Response (Exhibit AUS-32), p. 38; and GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 71-72, 81-83 and 245-250. The effects of the drought are evident in data on the domestic prices, which increases by almost AUD 100 per tonne between May and December 2018.

²⁸⁹ See section II.A.5.

CBH, [REDACTED]
[REDACTED]].

232. To begin with domestic sales, CBH's data shows a weighted average domestic sale price for the POI equating to approximately [REDACTED] per tonne.²⁹⁰ The lower range of this approximate price is [REDACTED] the normal value MOFCOM determined, USD 392.81 per tonne. Therefore, for a trader [REDACTED], the domestic price of barley sold during the POI was [REDACTED] of the price of Australia's total exports to Egypt during the POI.

233. Regarding production costs and expenses, the evidence provided by CBH regarding its total costs and expenses associated with its domestic sales during the POI is summarised below:²⁹¹

Table 4 CBH's Production Costs, Plus Expenses

	Malting	Feed	Weighted Average
Unit Costs	[REDACTED]	[REDACTED]	[REDACTED]
Unit Expenses	[REDACTED]	[REDACTED]	[REDACTED]
Total (AUD)	[REDACTED]	[REDACTED]	[REDACTED]
Total (USD equivalent)	[REDACTED]	[REDACTED]	[REDACTED]

234. The price of export sales to Egypt was [REDACTED] the amount reported by CBH for its total costs and expenses. While the above estimates do not include an amount for profits, starting from total costs and expenses of [REDACTED]
[REDACTED]
[REDACTED]] This implied profit margin of at least [REDACTED] is manifestly unreasonable for a commodity grain product.

²⁹⁰ CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 4-1. [REDACTED]

The USD equivalent range was calculated using the lowest (0.7103) and highest (0.8096) AUD to USD exchange rates during the POI, as recorded by the Reserve Bank of Australia. (See Reserve Bank of Australia Exchange Rates (Exhibit AUS-39).)

²⁹¹ See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 6-3 (Domestic Sales). The USD equivalent range was calculated using the lowest (0.7103) and highest (0.8096) AUD to USD exchange rates during the POI, as recorded by the Reserve Bank of Australia. (See Reserve Bank of Australia Exchange Rates (Exhibit AUS-39).)

235. Finally, the evidence from CBH regarding its export sales to markets other than China during the POI is summarised below:²⁹²

Table 5 CBH's Exports to Third Country Markets during the POI

Market	Volume	Ex-Factory Price (USD per tonne)
[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
[[REDACTED]]	[[REDACTED]]	[[REDACTED]]
[[REDACTED]]	[[REDACTED]]	[[REDACTED]]

236. It is noteworthy that CBH, [[REDACTED]]
[[REDACTED]].²⁹³ Further, as evidenced by the table above, the ex-factory prices of exports to the [[REDACTED]] third country markets to which CBH actually exported barley during the POI were [[REDACTED]]
[[REDACTED]]. The highest such price was [[REDACTED]] of the price of Australia's total exports to Egypt during the POI. In fact, the price of CBH's sales to its predominant non-China export market, [[REDACTED]], was [[REDACTED]] the export price MOFCOM determined.²⁹⁴

237. Hence, the information provided by one of Australia's major traders, which was among the traders in Group 2, indicated that the normal value of Australian barley was far below the export price of barley to Egypt.

- d. MOFCOM did not check the information against other information contained in the Global Trade Atlas

238. Even after MOFCOM had disregarded the information supplied by Australian interested parties and decided to use the Global Trade Atlas database as a secondary source, the information contained in that database indicated that the price of exports to Egypt was an outlier price far above the normal range of prices of Australian exported barley.

²⁹² CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 5-4-1. [[REDACTED]]

²⁹³ CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 5-4-1.

²⁹⁴ CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 5-4-1.

239. The Global Trade Atlas shows that of the 23 markets to which Australia exported barley during the POI, Egypt was the third lowest by volume, and the third highest by weighted average export price. The total export volumes and weighted average export price of Australian exports of barley to all markets during the POI recorded in the Global Trade Atlas are as follows:²⁹⁵

²⁹⁵ See Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40). Global Trade Atlas records monthly average prices, hence the calculations of weighted average price for the POI have been undertaken by Australia. The weighted average prices are for Tariff Line Descriptions "Barley For Malting (Excl. Seed)" and "Barley (Excl. Seed And Barley For Malting)", they do not include "Barley Seed".

**Table 6 Volume and Weighted Average Price of Australia's Exports During the POI, as
recorded in Global Trade Atlas**

Export Market	Volume (tonnes)	Weighted Average Export Price (USD per tonne)
China	4.71 million	216.83
Japan	911,544	231.47
Thailand	211,247.46	241.01
Vietnam	115,118.53	238.07
South Korea	41,412.6	218.96
Taiwan	32,763.89	231.54
United Arab Emirates	27,524.65	226.64
New Zealand	7873.27	230.96
Philippines	6397.55	250.08
Malaysia	1759.80	216.68
New Caledonia	1507.21	270.77
Pakistan	760.91	283.57
Germany	539.56	901.88
Papua New Guinea	262.66	275.70
Myanmar	259.26	178.04
Singapore	200	141.61
French Polynesia	130.48	300.33
Kuwait	125.4	232.42
Hong Kong	78.33	467.97
India	65	281.13
Egypt	54	392.82
Bahrain	46	337.8
Macau	1	355.93

240. The top 10 export markets comprise China, followed by the nine other markets with total export volumes above 1,700 tonnes. These nine markets accounted for 99.7% of non-China sales. The overall weighted average export price to these nine markets was USD 233.10 per tonne, meaning the export price to Egypt was 68.5% higher than this average. The range of export prices to these markets was between USD 216.68 and 250.08 per tonne, meaning the export price to Egypt was 57.1% to 81.3% higher than the prices to these markets.

241. In summary, it is clear that MOFCOM failed to check the export price of barley from Australia to Egypt as contained in the Global Trade Atlas against other independent sources in making its selection of facts available on which to calculate normal value.

ii. MOFCOM's selection of facts to determine normal value failed to have any logical connection with facts on the record

242. In selecting facts available to replace any allegedly missing necessary information, MOFCOM was obliged to use information that had a "logical relationship with the facts on the record".²⁹⁶ Australia has demonstrated in detail above how MOFCOM failed to check the information from Global Trade Atlas against other independent sources. Considering the evidence set out above, the resulting dumping margin for Group 1 producers based on Global Trade Atlas data (and, by implication, the dumping margin assigned to all other traders) had no logical relationship with the facts on the record.

243. Furthermore, MOFCOM's Final Determination does not address the illogicality of ascertaining a dumping margin for the Group 1 producers who do not export barley in their own right, and who sell to traders who cannot trace where a certain producer's barley is sold.²⁹⁷ There can be no price discrimination – and therefore no dumping – in circumstances where a producer does not export the goods, and exclusively sells its goods domestically.

244. Nowhere in the Final Determination does MOFCOM explain the assumptions and inferences it must have made in order to determine a dumping margin for a producer operating in these circumstances.

²⁹⁶ Panel Report, *China – Broiler Products*, para. 7.312. The panel explained that the "rate based on facts available must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts."

²⁹⁷ See above, para. 184.

iii. MOFCOM did not undertake a process of evaluation or reasoning of the facts on the record regarding normal value

245. MOFCOM had a range of other information on the record available to it to determine the normal value and export price for Group 1 producers.²⁹⁸ For example, MOFCOM could have based its determinations on the domestic and export sales made by other interested parties in the investigation – the traders. There was sufficient evidence on the record to determine the normal value based on traders' domestic sales made in the ordinary course of trade.²⁹⁹

246. Alternatively, MOFCOM could have selected export sales made by the Group 2 traders to an appropriate third country as the facts upon which to determine normal value. As outlined above,³⁰⁰ the Group 2 traders provided data on their sales to third countries during the POI. The information provided by one trader, CBH, [REDACTED] indicated that during the POI, it exported barley only to [REDACTED].

247. Failing this, MOFCOM could have used other secondary source data, including a *representative* export price contained in the Global Trade Atlas. The Global Trade Atlas data on Australia's total exports of barley during the POI is outlined in Table 6 at paragraph 239. The weighted average price of Australia's total exports to its major markets, [REDACTED], was between USD 231 and 241 per tonne.

248. By failing to consider the other information in its selection of facts to replace the allegedly missing information, MOFCOM failed to undertake "a process of reasoning and evaluation" to select facts which reasonably replaced facts on the record in order to arrive at an accurate determination.³⁰¹

²⁹⁸ Australia maintains that the conditions to resort to facts available were not met and therefore MOFCOM was not permitted to make determinations on the basis of facts available. However, assuming *arguendo* that MOFCOM was permitted to have recourse to facts available, Australia submits that MOFCOM's selection of facts was inconsistent with paragraph 7 of Annex II.

²⁹⁹ See section II.A.3(b)i.a.

³⁰⁰ See section II.A.3(b)i.b.

³⁰¹ See Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

*iv. MOFCOM did not exercise special circumspection
in its selection of facts to determine the export
price*

249. In relation to the export price, the explanation provided by MOFCOM for its selection of facts was almost identical to that for the normal value. MOFCOM claimed it "consulted" various data sources and "upon comparative analysis" ascertained that the export price of barley from Australia to China as recorded in Global Trade Atlas was the best available information.³⁰²

250. The Global Trade Atlas data was recorded as monthly averages. The aggregated nature of this data made it impossible for MOFCOM to determine individual export prices for Australian traders and producers, as it was required to do.³⁰³

251. The aggregated nature of the Global Trade Atlas data also meant it had no logical relationship with the facts on the record, those facts being the export prices reported by Group 2 traders. It is also apparent that MOFCOM did not check the information it used against information from other independent sources, such as the information provided by Group 2 traders. Finally, it is apparent that MOFCOM did not undertake a process of evaluation or reasoning of the facts on the record, given that it chose to use aggregated monthly data instead of the information Group 2 traders provided regarding actual exports to China.

v. The resulting dumping margin was punitive

252. The dumping margin for Group 1 producers of 73.6% calculated on the basis of the Global Trade Atlas data is of such a large magnitude, and bears no "logical relationship" with facts on the record, that it is punitive in nature.

253. The final sentence of paragraph 7 of Annex II provides that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." MOFCOM did not make any findings concerning a lack of cooperation on the part

³⁰² Anti-Dumping Final Determination (Exhibit AUS-2), p. 9.

³⁰³ See section II.A.3(a)ii.

of the interested parties which would support a "less favourable" result. Even if MOFCOM did make such a finding, investigating authorities are not entitled to arrive at a less favourable result simply because an interested party failed to furnish information if they otherwise cooperated.³⁰⁴ According to the Appellate Body:

Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination, and thus cannot be made on the basis of procedural circumstances alone.³⁰⁵ (footnotes omitted)

(c) Groups 2 and 3

254. MOFCOM assigned the same dumping margin of 73.6% to all other interested parties in the investigation.³⁰⁶

255. MOFCOM did not provide any explanation as to why the rate determined for the Group 1 producers was a reasonable replacement for the allegedly missing necessary information for the individual interested parties in Groups 2 and 3. In disregarding all information before it and assigning the same rate to all interested parties, MOFCOM failed to both engage in a process of reasoning and evaluation of all substantiated facts on the record and select facts with a view to arriving at an accurate determination. Furthermore, Australia has set out above why MOFCOM's selection of facts for the Group 1 producers was inconsistent with paragraph 7 of Annex II. Accordingly, it follows that MOFCOM's selection of the same facts with respect to the Groups 2 and 3 interested parties was inconsistent with paragraph 7 of Annex II of the Anti-Dumping Agreement.

(d) Conclusion

256. MOFCOM determined a dumping margin for Group 1 producers based on information from a secondary source. It was therefore required to exercise special circumspection and check the information from other independent sources on the record. MOFCOM failed to do so, and the resulting dumping margin had no logical relationship with

³⁰⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 99. See also, Panel Report, *US – Coated Paper (Indonesia)*, para. 7.115. See also section II.A.5(b)i.d. above where Australia demonstrates that there is no evidence on the record to suggest that the Group 1 producers did not act to the best of their abilities within the meaning of paragraph 5 of Annex II.

³⁰⁵ Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

³⁰⁶ See above, paras. 95 and 97.

the facts on the record. MOFCOM failed to select a reasonable replacement for the allegedly missing necessary information.

257. MOFCOM then applied the flawed dumping margin ascertained for Group 1 producers to all other interested parties in the investigation. In applying the Group 1 rate, and excluding all other information before it, MOFCOM failed to engage in a process of reasoning and evaluation of all substantiated facts on the record and select facts with a view to arriving at an accurate determination.

258. Accordingly, China acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement in relation to MOFCOM's selection of facts available for all interested parties.

8. Conclusion

259. For the reasons set out above, Australia has established that China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement in respect of MOFCOM's use of facts available in the anti-dumping investigation.

B. CHINA FAILED TO DETERMINE NORMAL VALUE AND EXPORT PRICE IN ACCORDANCE WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

260. Australia submits that, as a result of MOFCOM's improper recourse to and selection of facts available as detailed above, China failed to determine normal value, export price and the consequent margin of dumping in accordance with Article 2 of the Anti-Dumping Agreement.

261. Given there was no justification for MOFCOM's recourse to facts available, it was required to determine normal value and export price in accordance with Article 2. In particular, Australia submits that MOFCOM was required to determine normal value based on domestic sales in the ordinary course of trade, and export price based on the actual, individual export prices reported by Australian traders.

1. China failed to determine normal value and export price in accordance with Article 2 of the Anti-Dumping Agreement

262. MOFCOM's unjustified rejection of all information submitted by Australian producers and exporters and improper recourse to facts available, in breach of Article 6.8 and Annex II of the Anti-Dumping Agreement, meant it did not determine normal value in accordance with the requirements of Article 2 of the Anti-Dumping Agreement. Specifically, in the absence of any justification to resort to facts available, as was the case in the present matter, MOFCOM was required to determine normal value in accordance with the methodology required under the provisions of that Article. It failed to do so.

263. MOFOM was obligated to determine normal value based on domestic sales, unless it properly determined that one of the circumstances in Article 2.2 for recourse to an alternative basis for normal value was met.³⁰⁷ Australia submits that there was no evidence on the record to suggest this was, in fact, the case. Rather, as Australia has already outlined in detail, there was the necessary information on the record from Australian producers and exporters to determine normal value based on domestic sales in the ordinary course of trade.

264. Therefore, should the Panel agree with Australia that MOFCOM erred by determining normal value by improper recourse to facts available, it follows that MOFCOM should have properly determined normal value in accordance with the provisions of Article 2 of the Anti-Dumping Agreement.

265. With regard to export price, as detailed above, Australia has demonstrated that China breached Article 6.8 and Annex II as a result of MOFCOM's unjustified rejection of all export price information from Group 2 traders and its incorrect selection of Global Trade Atlas aggregate monthly data of Australia's exports to China as the replacement facts. In the absence of a proper basis to have recourse to facts available, MOFCOM was required to determine export price in accordance with Article 2 of the Anti-Dumping Agreement. Recalling the legal framework outlined above, Article 2 requires that an investigating authority is required to use actual export prices, except in circumstances where "there is no export price" or "it appears to the authorities concerned that the export price is unreliable", in which case

³⁰⁷ See section II.A.3(a)i.

an investigating authority is permitted to determine the export price on a constructed basis or, in specified situations, "on such reasonable basis as the authorities may determine".³⁰⁸ MOFCOM's unjustified rejection of the export price information submitted by Australian exporters meant that it did not determine export price using actual export prices.

266. Moreover, MOFCOM was required to determine individual export prices for individual exporters, recalling the fundamental discipline of the Anti-Dumping Agreement that dumping is the result of the pricing behaviour of individual exporters.³⁰⁹ As a result of MOFCOM's incorrect selection of Global Trade Atlas aggregate monthly data of Australia's exports to China as the replacement facts, MOFCOM did not determine individual export prices for Australian exporters.

267. Therefore, should the Panel agree with Australia that MOFCOM erred by determining export price by improper recourse to facts available, it follows that MOFCOM should have properly determined export price in accordance with the provisions of Article 2 of the Anti-Dumping Agreement.

2. Conclusion

268. Australia submits that MOFCOM's improper recourse to facts available cannot shield it from its obligation to determine normal value and export price in accordance with the provisions of Article 2. Its failure to do so undermines the entire foundation of its dumping determination. In light of its incorrect determination of these constituent elements, MOFCOM also failed to determine the margin of dumping in accordance with Article 2.

269. For the reasons set out above, Australia has established that China failed to determine normal value, export price, and the margin of dumping in accordance with Article 2 of the Anti-Dumping Agreement.

³⁰⁸ See section II.A.3(a)ii. Article 2.1 defines dumping in reference to "the export price of the product exported from one country to another", that is, in reference to the actual export price. An investigating authority may only depart from the actual export price under the conditions specified in Article 2.3. It was evident from the facts of the present case that the conditions in Article 2.3 for recourse to constructed export price were not met, nor did MOFCOM determine that these conditions were met.

³⁰⁹ Appellate Body Report, *US — Zeroing (Japan)*, paras. 111-112.

C. CHINA FAILED TO MAKE A FAIR COMPARISON BETWEEN THE EXPORT PRICE AND THE NORMAL VALUE IN ACCORDANCE WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

270. Australia submits above that MOFCOM determined normal value and export price in a manner inconsistent with Article 6.8 and Annex II and failed to make these determinations in accordance with Article 2 of the Anti-Dumping Agreement. However, even assuming *arguendo*, that the Panel were to disagree with Australia's submissions on this point, Australia further submits that MOFCOM also failed to make a fair comparison between the normal value and the export price, in breach of China's obligations under Article 2.4 of the Anti-Dumping Agreement.

271. Even if the Panel accepts that MOFCOM's selection of normal value and export price were consistent with China's WTO obligations, which Australia maintains it was not, MOFCOM's failure to make a fair comparison, including its failure to make due allowance for factors affecting price comparability, and failure to indicate to interested parties the information necessary to ensure a fair comparison, breached China's obligations under Article 2.4 of the Anti-Dumping Agreement.

1. Legal framework

(a) Substantive obligation

272. Article 2.4 of the Anti-Dumping Agreement relevantly provides:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.³¹⁰ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.

³¹⁰ (footnote original) It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

273. Read in the broader context of the provisions of Article 2, the object and purpose of Article 2.4 is to ensure that the comparison between the normal value and the export price in a dumping determination is "fair" so as to provide an accurate indication of whether, and if so to what extent, dumping is occurring. To this end, due allowance must be made for factors affecting price comparability.

274. The first sentence of Article 2.4 provides the overarching obligation on the investigating authority to make a "fair comparison" between normal value and export price. The term "fair" is relevantly defined as "free from bias, fraud, or injustice; equitable; legitimate, valid, sound".³¹¹ The term "comparison" is defined as "[t]he action, or an act, of comparing, likening, or representing as similar".³¹² Read in its context in Article 2.4, the term "fair comparison" requires that the investigating authority's act of comparing the normal value and export price is free from bias, and is valid and sound.

275. In *EU – Fatty Alcohols (Indonesia)*, the Appellate Body stated:

Article 2.4 requires authorities to ensure a fair comparison between the export price and, to this end, to make due allowance, or adjustments, for differences affecting price comparability [...] However, Article 2.4 does not prescribe a particular methodology by which investigating authorities must satisfy their obligation to ensure a fair comparison.³¹³

276. While Article 2.4 does not prescribe a particular methodology, the Appellate Body has confirmed that it does place an overall obligation on the investigating authorities to ensure its comparison is unbiased and objective:

The focus of Article 2.4 is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the fairness of that comparison. For a comparison to be fair, it must be unbiased, objective and even-handed.³¹⁴ (emphasis original)

³¹¹ Oxford English Dictionary online, definition of "fair", <https://www.oed.com/view/Entry/67704> (accessed 29 October 2021).

³¹² Oxford English Dictionary online, definition of "comparison", <https://www.oed.com/view/Entry/37450> (accessed 29 October 2021).

³¹³ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para 5.20.

³¹⁴ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.20-5.21. See also Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138 and Panel Report, *Egypt – Steel Rebar*, para. 7.333.

277. The Appellate Body also noted that "[t]he requirement to make a fair comparison, set out in the first sentence of Article 2.4, presupposes that the component elements of the comparison – i.e. the normal value and the export price – have already been established".³¹⁵ While the Appellate Body has also confirmed that the fair comparison requirement in Article 2.4 applies irrespective of the methodology used to determine normal value,³¹⁶ the panel in *EU – Biodiesel (Argentina)* considered that the methodology used may have a bearing on the kinds of allowances that need to be made to ensure a fair comparison.³¹⁷ Hence, where the normal value is based on third country export sales, this will have a bearing on the kinds of allowances that are necessary. Specifically, due allowance must be made for factors affecting price comparability between export sales to the third country and export sales to the Member undertaking the anti-dumping investigation.

278. The second sentence of Article 2.4 begins with the words "[t]his comparison", referring to the "fair comparison" in the first sentence. By its terms, the second sentence elaborates certain requirements to ensure the comparison is fair. This is consistent with the interpretation of the Appellate Body, which found that the second sentence "identifies basic parameters that further the goal of achieving a fair comparison, requiring investigating authorities to make the comparison at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".³¹⁸

279. The third sentence of Article 2.4 requires that due allowance be made, on the merits, for differences affecting price comparability. The phrase "to make allowance(s) for" is relevantly defined as "[t]o make addition or deduction corresponding to",³¹⁹ while "due" is relevantly defined as "that is as it ought to be; occurring, done, etc., as is fitting, expected, or natural; correct, right, proper".³²⁰ Read in its context, this obligation furthers the objective of ensuring a "fair comparison", by requiring investigating authorities to make correct and proper

³¹⁵ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.21.

³¹⁶ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.205.

³¹⁷ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.297. While that case concerned normal values constructed based on cost of production, a similar logic applies when considering normal value based on the price of export sales to a third country.

³¹⁸ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.21 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 168 and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.235).

³¹⁹ Oxford English Dictionary online, definition of "allowance", <https://www.oed.com/view/Entry/5464> (accessed 29 October 2021).

³²⁰ Oxford English Dictionary online, definition of "due", <https://www.oed.com/view/Entry/58238> (accessed 29 October 2021).

adjustments (additions or deductions) corresponding to differences affecting price comparability. The third sentence also provides a list of differences affecting price comparability. The phrases "including" and "any other differences which are also demonstrated to affect price comparability" indicate that this list is illustrative and non-exhaustive.³²¹

280. The Appellate Body has found that:

The overarching obligation to ensure a fair comparison between the export price and the normal value informs the understanding of the adjective "due" in the third sentence of Article 2.4. This adjective qualifies the word "allowances", with these allowances being the means by which to achieve the fair comparison between the export price and the normal value. The Appellate Body has emphasized that, if proper "allowances" are not made, then the comparison made by the investigating authorities between the export price and the normal value will, by definition, not be "fair".³²²

In addition, the need to make due allowances "must be assessed in light of the specific circumstances of each case".³²³

281. The Appellate Body has confirmed that, while the obligation to ensure a fair comparison lies on the investigating authority:

[E]xporters bear the burden of substantiating "as constructively as possible" their requests for adjustments reflecting "due allowance" within the meaning of Article 2.4. As such, "[i]f it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment". However, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".³²⁴ (footnotes omitted)

282. The panel in *Egypt – Steel Rebar* indicated that the requirement for respondent parties in an investigation to substantiate requests for due allowance "on the merits" is

³²¹ Appellate Body report, *EU – Fatty Alcohols (Indonesia)*, para 5.23 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157).

³²² Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para 5.22 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 176).

³²³ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para 5.24 (referring to Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.87 and *US – Hot-Rolled Steel*, para. 179).

³²⁴ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.163 (citing Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (referring to Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.158 and *Korea – Certain Paper*, para. 7.147)).

subject to the procedural obligation that investigating authorities not impose a burden of proof on those respondents.³²⁵

283. In *EU – Footwear (China)*, the panel indicated that, in order to make a *prima facie* case of violation of Article 2.4:

[A] complaining party must demonstrate that due allowance should have been made with respect to (i) a difference (ii) that was demonstrated to affect price comparability between the normal value and the export price and (iii) that the investigating authority failed to make the adjustment.³²⁶

(b) Procedural obligation

284. The final sentence of Article 2.4 provides:

The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

285. Read in its context, this obligation can be seen as furthering the overall objective of Article 2.4, to ensure a fair comparison between normal value and export price for the purposes of determining the existence of dumping. The procedural obligation complements the substantive obligation, by ensuring that information regarding factors affecting price comparability is brought before the investigating authority in order for it to make "due allowance", on the merits, for these factors so as to undertake a fair comparison.

286. The Appellate Body has indicated that:

The last sentence of Article 2.4 thus adds a procedural requirement to the general obligation of investigating authorities to ensure a fair comparison. The sentence imposes an obligation on the investigating authority to tell the parties what information the authority will need in order to ensure a fair comparison. Thus, whereas the exporters may be required to "substantiate their assertions concerning adjustments", the last sentence of Article 2.4 requires the investigating authorities to "indicate to the parties" what information these requests should contain, so that the interested parties will be in a position to make a request

³²⁵ Panel Report, *Egypt – Steel Rebar*, para. 7.381.

³²⁶ Panel Report, *EU – Footwear (China)*, para. 7.278 (referring to Panel Reports, *Korea – Certain Paper*, para. 7.138 and *EC – Fasteners (China)*, para. 7.298).

for adjustments. This process has been described as a "dialogue" between the authority and the interested parties.³²⁷

287. The Appellate Body provided further guidance:

[T]he dialogue under Article 2.4 of the Anti-Dumping Agreement necessarily starts in the early stages of an investigation and thus precedes the disclosure of essential facts under Article 6.9. An investigating authority should indeed indicate to the parties in question what information is necessary early enough in the investigation such that these parties can make requests for adjustments ensuring a fair comparison between normal value and export price before the dumping margin is determined. Therefore, in most cases, a disclosure under Article 6.9 of the Anti-Dumping Agreement will not fulfil the requirements of Article 2.4. However, whether information shared at the end of an on-going dialogue under Article 2.4 is timely enough to ensure a fair comparison between normal value and export price must be assessed on a case-by-case basis, by assessing whether interested parties had a meaningful opportunity to request adjustments in the light of the information shared by the investigating authority towards the end of that dialogue.³²⁸

288. The question of whether or not a given piece of information should be shared with interested parties under the last sentence of Article 2.4 has to be made in the light of the specific circumstances of each investigation, and not in the abstract.³²⁹

2. MOFCOM failed to make a fair comparison between normal value and export price, and failed to make due allowance for factors affecting price comparability

289. MOFCOM made no price adjustments to ensure a fair comparison between export price and normal value. The Final Determination relevantly provides as follows:

In determining the normal value and export price, the Investigating Authority used Australian Customs' export data recorded in the Global Trade Atlas. The determination of these two items was conducted in the same stage, so they are comparable. Thus, the Investigating Authority made no price adjustment.³³⁰

In a later section, the Final Determination indicates that:

In accordance with Article 6 of the *Anti-Dumping Regulation*, on the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal

³²⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 489 (citing Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.158 and *Egypt – Steel Rebar*, para. 7.352).

³²⁸ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.191.

³²⁹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.178.

³³⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 9.

value and export price at the same level fairly and reasonably. In calculating the margin of dumping, the Investigating Authority compared the weighted average normal value with the weighted average export price to obtain the margin of dumping.³³¹

290. MOFCOM's assertion that it had considered "various comparable factors affecting price" and compared the normal value and export price "at the same level fairly and reasonably" sits at odds with its statement that it made no price adjustments. The fact that MOFCOM made no price adjustments is confirmed by a review of the Global Trade Atlas data. The normal value and export price indicated in the Final Disclosure, USD 392.81 per tonne and USD 216.83 per tonne, correspond to the weighted average of the data recorded in Global Trade Atlas of Australian exports to Egypt and China respectively during the POI.³³² Moreover, the margin of dumping of 73.6% corresponds to the difference between these unadjusted figures, expressed as a percentage of the CIF price MOFCOM determined.³³³

291. By failing to make any such adjustments, MOFCOM failed in its obligation to undertake a fair comparison between the normal value and export price, as required under Article 2.4 of the Anti-Dumping Agreement. However, MOFCOM dismissed comments to that effect by Australian interested parties following the release of the Final Disclosure, without explanation. Instead, in the Final Determination MOFCOM simply stated: "[t]he Investigating Authority held that it had made a fair comparison between the export price and normal value at the same level of trade."³³⁴ This statement provides no further explanation or clarity as to why MOFCOM decided not to make price adjustments to ensure a fair comparison in light of the evidence before it.

292. This assessment will begin with an analysis of MOFCOM's failure to comply with the second and third sentences of Article 2.4, before returning to the overarching obligation in the first sentence to ensure a "fair comparison".

(a) "at the same level of trade"

293. The Final Determination asserts that normal value and export price were determined "at the same level of trade", but provides no detail to substantiate this. The level of trade at

³³¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

³³² See Table 6 and Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40).

³³³ See Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 10.

³³⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

which the normal value and export price were determined is not clear from the Final Disclosure nor the Final Determination. The Australian Government raised concerns over this in comments on the Final Disclosure, noting that Article 2.4 requires that the comparison between normal value and export price should normally be undertaken at the ex-factory or "free on board" level.³³⁵ In the absence of any evidence demonstrating that MOFCOM compared normal value with export price at the same level of trade, MOFCOM has acted inconsistently with this requirement of Article 2.4.

(b) "at as nearly as possible the same time"

294. Article 2.4 also requires that a comparison be made in respect of "sales made at as nearly as possible the same time". The evidence clearly demonstrates that MOFCOM failed to meet this requirement. In comments on the Final Disclosure, Australian industry bodies provided official Australian Bureau of Statistics data showing Australia's exports of barley to Egypt.³³⁶ During the POI, Australia exported two containers of 27 tonnes of barley to Egypt, in December 2017 and May 2018. In contrast, exports of barley to China occurred *throughout* the POI, totalling 4.71 million tonnes over the 12-month period, although volumes fluctuated significantly in different months.³³⁷ The data provided by the Australian industry correlates precisely with the data in the Global Trade Atlas database upon which MOFCOM purported to rely.³³⁸ Hence, MOFCOM compared a normal value based on two sales during specific months with an export price based on aggregated pricing data for the entire 12-month POI. Australia submits that this approach cannot be considered consistent with the requirement under Article 2.4 to compare sales made at as nearly as possible the same time.

295. In light of the evidence before MOFCOM that the timing of sales has a material impact on the price of barley, MOFCOM's failure to compare sales made at the same time had

³³⁵ Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 5.

³³⁶ Grain Trade Australia and GIMAF, Submission in response to Anti-Dumping and Countervailing Duty Investigation Against Imported Barley Originating in Australia – Letter on the Disclosure of Facts, to Provide Basis for Making the Final Decision, 18 May 2020 (English translation) (pages renumbered) (Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures) (Exhibit AUS-41), p. 5; CBH Comments on MOFCOM's Anti-Dumping Disclosure of Facts to provide basis for making the final determination, 15 May 2020 (pages renumbered) (CBH Comments on Anti-Dumping Final Disclosure) (Exhibit AUS-42), p. 7.

³³⁷ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), pp. 5-6; CBH Comments on Anti-Dumping Final Disclosure (Exhibit AUS-42), p. 7.

³³⁸ GrainCorp Comments on the essential facts of the MOFCOM's barley anti-dumping final decision, 18 May 2020 (English translation) (pages renumbered) (GrainCorp Comments on Anti-Dumping Final Disclosure) (Exhibit AUS-43), p. 7; see also Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40).

particularly significant distorting effects in this case. The evidence clearly demonstrated two key factors related to timing that an investigating authority evaluating the facts in an unbiased and objective manner would have taken into account.

296. *First*, barley is a commodity sold in a competitive global marketplace, the price of which varies substantially over time according to basic market forces of supply and demand.³³⁹ *Second*, there is an interrelationship between the nature of sales and the timing of sales. The evidence indicated that large export sales, such as those to China, are often based on forward contracts, with the contract terms and pricing agreed months in advance of the delivery of the barley.³⁴⁰ By contrast, for instance, in the Australian domestic market, barley is traded at a "spot price in the spot market", usually in smaller volumes, with the contract terms agreed close to the time of delivery.³⁴¹ Given the small volumes of the two export sales to Egypt during the POI, it is possible that the terms of these sales were also agreed close to the time of delivery. Due to the first factor – the fluctuating price of barley as a globally traded commodity – a fair comparison could only be ensured by comparing sales for which the date the terms of the sale were agreed, the "contract date", were proximate.

297. In the present case, MOFCOM did not even attempt to compare sales made at the same time, let alone account for the two factors described above that are basic features of the global barley trade and were clearly presented in the evidence. In doing so, MOFCOM failed to comply with the obligations to compare sales made at as nearly as possible the same time.

(c) Due allowance

298. Turning to the third sentence of Article 2.4, MOFCOM was required to make due allowance, on the merits, for differences affecting price comparability. While prior reports have found that interested parties are required to substantiate their requests for adjustments as constructively as possible, an investigating authority must not impose an unreasonable burden of proof on interested parties in this regard.

³³⁹ Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), pp. 3 and 7; Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 19; CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 25; and CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-33), pp. 45 and 49-50.

³⁴⁰ GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 70-71 and 84.

³⁴¹ GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 70 and 83.

299. Australian interested parties made requests for adjustments, and substantiated these, at two stages of the investigation: *first*, in the early stages of the investigation, and *second*, after the Final Disclosure, when the choice of export sales to Egypt as the basis of normal value was disclosed.

300. In the first of these, the early stages of the investigation, several Australian interested parties requested that MOFCOM adjust for factors affecting price comparability, and substantiated these requests as constructively as was possible at that early stage of the investigation. Specifically, in comments on the initiation of the investigation and questionnaire responses such parties identified factors including the location or 'Port Zone' of the barley in Australia;³⁴² the quality of the barley;³⁴³ volume of sales;³⁴⁴ and transportation and logistics costs.³⁴⁵

301. Subsequently, at a late stage in the investigation, MOFCOM revealed in the Final Disclosure that normal value would be based on export sales to Egypt. A number of Australian interested parties were able to bring forward further evidence on factors affecting price comparability in the brief time period, 10 days, allowed for comments. This evidence demonstrated a number of specific factors affecting price comparability relevant to a

³⁴² Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), pp. 3 and 7; Quadra, Extract of Response to Anti-Dumping Questionnaire for Foreign Exporter or Producers Foreign Trader or Producer, 23 January 2019 (public version) (English translation) (Quadra Anti-Dumping Questionnaire Response) (Exhibit AUS-44), p. 33; and GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 244-251.

³⁴³ Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), p. 7; Quadra Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 33; Cargill Anti-Dumping Questionnaire Response (Exhibit AUS-30), p. 95; CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-28), pp. 37-38; and Australian Government, Submission in response to Initiation of an Anti-Dumping Investigation into imports of Barley from Australia, 10 December 2018 (Australian Government Comments on Initiation of Anti-Dumping Investigation) (Exhibit AUS-45), para. 29.

³⁴⁴ GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 155 and 248; Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), p. 7; and Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 30.

³⁴⁵ Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), p. 159 (Glencore specifically indicates that "[c]ompared to the barley exported to other countries, the barley exported from Australia to Asia enjoys lower sea transportation costs"); GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 156 and 249; Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 19; Quadra Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 33; CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-33), pp. 37-38; Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), p. 8; and Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 30.

comparison between a normal value based on export sales to Egypt, and an export price to China, which would have required adjustments such as:

- quantities, and conditions and terms of sale;³⁴⁶
- quality and type of barley, given the significant price difference between malting, FAQ and feed barley;³⁴⁷
- shipping and freight costs, as well as associated fees such as loading and unloading;³⁴⁸ and
- the timing of sales, and its impact on price.³⁴⁹

302. Of these, the quantities and conditions of sale are particularly significant in the current context. Australian interested parties provided evidence demonstrating that the sales to Egypt were two 27-tonne shipments in containers.³⁵⁰ By contrast, the vast majority of sales to China were in bulk, with Australian industry bodies providing official Australian Bureau of Statistics data showing that only 19,085 of the 4,710,756 tonnes (0.405%) of barley exported to China during the POI were shipped in containers, with the remainder in bulk.³⁵¹ This factor had a significant impact on price comparability, with the containerised exports to Egypt being comparatively more expensive due to the smaller quantities and higher transportation and logistics costs.³⁵²

³⁴⁶ ADM Trading, Extract of Response to the Notice on Disclosing the Facts on which the Final Determination on the Barley Anti-Dumping Case is Made, 18 May 2020 (pages renumbered) (ADM Trading Comments on Anti-Dumping Final Disclosure) (Exhibit AUS-46), paras. 3, 14-16 and 18-19; Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), pp. 5-6; CBH Comments on Anti-Dumping Final Disclosure (Exhibit AUS-42), pp. 7-8; GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), p. 8; and Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), pp. 4-5.

³⁴⁷ GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), p. 8; Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 5; and ADM Trading Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), paras. 18-19.

³⁴⁸ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), p. 6; GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), p. 8; Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 5; and ADM Trading Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), paras. 18-19.

³⁴⁹ ADM Trading Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), paras. 18-19; GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), p. 8; and Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 5.

³⁵⁰ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), p. 5; CBH Comments on Anti-Dumping Final Disclosure (Exhibit AUS-42), p. 7.

³⁵¹ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), pp. 5-6.

³⁵² ADM Trading Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), paras. 3, 16 and 18-19; Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), pp. 5-6; and GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), p. 8.

303. In terms of quality or type of barley, there was evidence on the record that the 54 tonnes of barley exported to Egypt was feed barley,³⁵³ whereas exports to China comprised sales of malting, FAQ and feed barley.³⁵⁴ This evidence was consistent with the Global Trade Atlas data, which showed that the 54 tonnes exported to Egypt were recorded under the Tariff Line Description "Barley (Excl. Seed And Barley For Malting)". Exports to China comprised 1.93 million tonnes of barley under the Tariff Line Description "Barley For Malting (Excl. Seed)", and 2.78 million tonnes under the Tariff Line Description "Barley (Excl. Seed And Barley For Malting)".³⁵⁵ Following MOFCOM's failure to account for the different categories of barley in its determination of normal value, Australian interested parties requested that MOFCOM make due allowance for the differences in quality between different categories of barley.

304. Thus, it is clear from such submissions that once Australian interested parties were made aware of the basis selected by MOFCOM to determine normal value, they made specific requests for adjustments for factors affecting price comparability in light of MOFCOM's methodology. It is equally clear that Australian interested parties substantiated these requests as constructively as possible, particularly in light of the fact that they were only afforded 10 days to do so, in the window provided for comments on the Final Disclosure.

305. Notwithstanding such efforts, MOFCOM took no steps to consider the evidence put to it by Australian interested parties, or to assess the adjustments claimed to determine whether, and to what extent, those adjustments had merit. This is not surprising given MOFCOM's decision to publish its Final Determination on the same day that the comments on the Final Disclosure were due.

306. MOFCOM's decision to ignore the identification of relevant factors affecting price comparability is egregious in light of the evidence on the record which clearly indicated, as a matter of fact, that the differences between exports of Australian barley to Egypt and China had a substantive effect on price comparability, such that due allowance was required on the

³⁵³ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), p. 5.

³⁵⁴ See, for example, Grain Growers Comment on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), pp. 27-28.

³⁵⁵ Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40) (see Column M for Tariff Line Description).

merits. Specifically, there were differences between the quantities, qualities, timing, and terms or conditions of sale of exports to Egypt and China respectively. The evidence provided by Australian interested parties demonstrated that each of these differences affected price comparability. An investigating authority evaluating the facts in an unbiased and objective manner would have determined that adjustments for these differences were merited. However, MOFCOM, by its own admission, failed to make an adjustment for these differences, resulting in a *prima facie* breach of Article 2.4.

(d) Fair comparison

307. Returning to the first sentence of Article 2.4, MOFCOM also failed to comply with the overarching obligation to make a "fair comparison" between the normal value and the export price. To begin with, following the reasoning of the Appellate Body in *US – Hot-Rolled Steel* and *EU – Fatty Alcohols (Indonesia)*, MOFCOM's failure to make proper allowances for factors affecting price comparability meant that its comparison between normal value and export price was "by definition", not fair.

308. In order for a comparison to be fair, in addition to accounting for factors that affect price comparability, it must be "unbiased, objective and even-handed". Comparing a normal value based on two 27-tonne containers of feed barley shipped to Egypt with an export price based on 4.71 million tonnes of barley shipped to China in thousands of sales of varying quantity, quality, timing, and other characteristics, without any price adjustments whatsoever, does not account for factors affecting price comparability and cannot be said to be an "unbiased, objective and even-handed" comparison.

309. MOFCOM's treatment of the "fair comparison" requirement in the Final Determination raises further concerns. MOFCOM found that "[t]he determination of these two items [normal value and export price] was conducted in the same stage, so they are comparable".³⁵⁶ The implication that determining normal value and export price using data from the same database means they are comparable fundamentally misconstrues the task of the investigating authority and the requirements of Article 2.4. MOFCOM also claimed that it "made a fair comparison between the export price and normal value at the same level of

³⁵⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

trade".³⁵⁷ Again, the suggestion that all that is required for a fair comparison is to ensure that normal value and export price are at the same level of trade reduces the entirety of Article 2.4 to a portion of its second sentence, ignoring, *inter alia*, the clear obligations contained in the first and third sentence.

310. Accordingly, Australia submits that MOFCOM failed to meet the obligations under Article 2.4 to make a fair comparison between normal value and export price, and to make due allowance for differences affecting price comparability.

3. MOFCOM failed to indicate to the interested parties what information was necessary to ensure a fair comparison

311. The final sentence of Article 2.4 requires investigating authorities to indicate to interested parties what information is necessary to ensure a fair comparison. MOFCOM failed to comply with this obligation.

312. The questionnaire to Australian exporters and producers included questions regarding differences affecting price comparability between domestic sales and sales to China as follows:

If you believe there are other factors that affect the comparability between the prices of your domestic sale and the exporting sale, please provide all materials available including the calculation methods and adjustments, and all the supporting documents.³⁵⁸

313. The questionnaire also included the following question:

Please complete "Form 5-4-2: Export Sales to Countries (Regions) Other than China" with regards to all instances that fall within the investigation period following the format requirements of Form 3-4. You are required to report all sales information in regard to countries or regions other than China. **The reporting of such information on your part may serve as the basis for determining normal value.**

Please specify any variances that may affect comparison with export sales to China, including but not limited to sales channels, trade processes, modes of trade, pricing strategies, and terms of payment.³⁵⁹ (emphasis original)

³⁵⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

³⁵⁸ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 26.

³⁵⁹ Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 28.

314. While MOFCOM advanced these general questions in the questionnaire, its compliance with the requirement to indicate information necessary to ensure a fair comparison must be viewed in light of the broader investigation process.

315. Australian interested parties were asked to report their sales to countries other than China, as well as factors affecting price comparability with export sales to China. However, there is no evidence that any of the Australian exporters investigated exported barley to Egypt during the POI, which is not surprising given only two exports of 27 tonnes occurred. Therefore, no Australian exporter was asked to specify differences affecting price comparability between export sales to Egypt and export sales to China.

316. MOFCOM was required to indicate to the interested parties that the normal value would be based on export sales to Egypt. Only then would the interested parties be able to provide the information necessary to ensure a fair comparison between MOFCOM's chosen basis for normal value and the export price. As the Appellate Body has explained, the dialogue between the investigating authority and interested parties regarding the information necessary to ensure a fair comparison "necessarily starts in the early stages of an investigation and thus precedes the disclosure of essential facts under Article 6.9".³⁶⁰ This did not occur in the present case.

317. The factual record indicates that MOFCOM engaged in no communication with Australian interested parties between the submission of questionnaire responses in January-February 2019, and the release of the Final Disclosure on 8 May 2020. There was no "dialogue" because MOFCOM did not initiate any.

318. The Appellate Body has indicated that in most cases, a factual disclosure under Article 6.9 will not fulfil an investigating authority's procedural obligation under Article 2.4, although it may do so if interested parties had a "meaningful opportunity" to request adjustments.³⁶¹ In the present case, following a period of 15 months without any communication between MOFCOM and the interested parties, the Final Disclosure was released on 8 May 2020. MOFCOM allowed interested parties 10 days (including only five full business days) to provide comments. The deadline for comments, 18 May 2020, was the same

³⁶⁰ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.191.

³⁶¹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.191.

day that the Final Determination was released. Australia submits that there can be no suggestion that interested parties had a meaningful opportunity to request price adjustments in these circumstances.

319. Accordingly, Australia submits that MOFCOM failed to meet the procedural obligation in Article 2.4 to indicate to the parties in question what information is necessary to ensure a fair comparison.

4. Conclusion

320. For the reasons set out above, Australia submits that China breached both its procedural and substantive obligations under Article 2.4 of the Anti-Dumping Agreement. China failed to make a fair comparison between the export price and the normal value; failed to make such a comparison at the same level of trade and in respect of sales made at as nearly as possible the same time; failed to make due allowance for differences affecting price comparability and failed to indicate to interested parties the information necessary to ensure a fair comparison.

D. CHINA FAILED TO ESTABLISH THE MARGIN OF DUMPING ON THE BASIS OF A COMPARISON OF "COMPARABLE" EXPORT TRANSACTIONS IN ACCORDANCE WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

321. Australia submits that, in addition to the failures detailed above, China failed to determine the margin of dumping in a manner consistent with Article 2.4.2 of the Anti-Dumping Agreement. Having chosen to establish the margin of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, MOFCOM failed to ensure that its determination was in fact based on "comparable" export transactions.

322. MOFCOM determined margins of dumping by comparing a normal value based on 54 tonnes of feed barley exported to Egypt with an export price based on 4.71 million tonnes of malting, feed and FAQ barley exported to China. In doing so, it failed to account for the differences between the product categories of malting, feed and FAQ barley. MOFCOM

thereby breached Article 2.4.2 of the Anti-Dumping Agreement by including "non-comparable" export transactions in the dumping margin calculation.

1. Legal framework

323. Article 2.4.2 relevantly provides, "subject to the provisions governing fair comparison in paragraph 4", dumping margins "shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". This is commonly referred to as the W-W methodology.³⁶²

324. The ordinary meaning of "comparable" is "[a]ble to be compared, capable of comparison (*with*)".³⁶³ This is consistent with the finding of the Appellate Body that "comparable export transactions" are export transactions that are able to be compared.³⁶⁴ Reading this term in its context in Article 2.4.2, "comparable export transactions" are export transactions that are able to be compared to the normal value for the purposes of determining the margins of dumping.

325. The panel in *US – Softwood Lumber V* emphasised that the term "comparable" in Article 2.4.2 must have been included for a purpose:

If the drafters had intended to require that the existence of a dumping margin for a product always be calculated by comparing a single weighted average normal value and a single weighted average of prices of all export transactions, we do not believe that they would have included the word "comparable" in Article 2.4.2, as that word would serve no purpose in the text. The fact that the word "comparable" was added to the text of Article 2.4.2 towards the end of the negotiating process, confirms our view that it was included for a purpose and should not simply be disregarded as surplus verbiage.³⁶⁵ (footnote omitted)

326. Agreeing with the panel, the Appellate Body in *US – Softwood Lumber V* further elaborated upon the comparability requirement, clarifying that comparing non-comparable export transactions did not comply with this requirement in Article 2.4.2:

[A] weighted average normal value is to be compared with a weighted average of the prices of "comparable" export transactions, and not with prices of "non-comparable" export

³⁶² Article 2.4.2 describes two other methodologies to undertake comparisons in order to determine dumping margins, neither of which are relevant in this case.

³⁶³ Oxford English Dictionary online, definition of "comparable", <https://www.oed.com/view/Entry/37424> (accessed 29 October 2021).

³⁶⁴ Appellate Body Report, *EC – Bed Linen*, para. 57.

³⁶⁵ Panel Report, *US – Softwood Lumber V*, para. 7.203.

transactions [...] we agree with the Panel that the term "all comparable export transactions" means that a Member "may only compare those export transactions which are comparable, but [...] it must compare *all* such transactions".³⁶⁶ (emphasis original)

327. In the present matter, Australia will demonstrate that MOFCOM's failure to acknowledge and account for different product categories of barley resulted in the improper inclusion of non-comparable transactions. MFOCOM therefore failed to undertake a fair comparison in accordance with Article 2.4.2.

328. Relevantly, the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* addressed the situation where, in a case involving multiple models or product categories of the "like product",³⁶⁷ "there are certain exported models which do not match any of the models on the normal value side of the comparison".³⁶⁸ In this situation, the Appellate Body found that the investigating authority cannot exclude exports of such models from its dumping calculations. Rather, "the investigating authority has to take non-matching models into account by making the necessary adjustments to eliminate the effect of factors that affect price comparability".³⁶⁹

329. The text of Article 2.4.2 expressly provides that the provision is "[s]ubject to the provisions governing fair comparison in paragraph 4". The relationship between the two provisions has been confirmed on multiple occasions by the Appellate Body's recognition that Article 2.4 informs and provides context for the interpretation of Article 2.4.2.³⁷⁰ In this way, the obligation under Article 2.4 to adjust for factors affecting price comparability can, in certain circumstances, form part of the obligation to determine margins of dumping in accordance with Article 2.4.2. That is, if an investigating authority fails to adjust for factors affecting price comparability between different product categories of the product under

³⁶⁶ Appellate Body Report, *US – Softwood Lumber V*, para. 86.

³⁶⁷ The Appellate Body in *US – Softwood Lumber V* confirmed that the practice of "multiple averaging" is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. This practice allows an investigating authority to "divide the product under investigation into product types or models for purposes of calculating a weighted average normal value and a weighted average export price for the transactions involving each product type or model or sub-group of 'comparable' transactions". See Appellate Body Report, *US – Softwood Lumber V*, paras. 80-81. (footnotes omitted)

³⁶⁸ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.271 (citing Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.272).

³⁶⁹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.271 (citing Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.272).

³⁷⁰ See, for instance, Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.264-5.265; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 101.

consideration, then it failed to ensure that the margin of dumping is established based on a comparison of the normal value and "all *comparable* export transactions". A failure to make requisite adjustments will mean some export transactions are not "comparable" within the meaning of Article 2.4.2.

**2. MOFCOM determined the dumping margin on the basis of
"non-comparable" export transactions**

330. The Final Determination contains scant information as to how the margins of dumping were calculated, simply indicating that "[i]n calculating the margin of dumping, the Investigating Authority compared the weighted average normal value with the weighted average export price to obtain the margin of dumping."³⁷¹

331. The Final Determination does not include figures for the weighted average normal value and weighted average export price. These figures were included in the Final Disclosure, where MOFCOM indicated "[t]he normal value was USD 392.81/ton, the export price was USD 216.83/ton, and the CIF price was USD 239.02/ton. After calculation, the final dumping margin was 73.6%."³⁷²

332. Although MOFCOM provided no explanation or details of its calculation process, it is possible to deduce this process from the Global Trade Atlas data. The Global Trade Atlas can show monthly export data, including total quantities and values of exports of a given product. A monthly average unit price can be included in the data, comprised of the total monthly value divided by the total monthly quantity. It appears MOFCOM calculated the weighted average normal value and weighted average export price by taking the weighted average of the monthly average unit price figures for Australian exports of barley to Egypt and China respectively.

333. MOFCOM's approach in the present case is precisely the approach that the panel in *US – Softwood Lumber V* found the drafters of the Anti-Dumping Agreement did *not* intend. As Australia will demonstrate, MOFCOM compared a single normal value (comprised of the average price of two statistically insignificant sales of feed barley) with a single weighted

³⁷¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

³⁷² Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 10.

average of prices of all export transactions across the 12-month POI (comprising 4.71 million tonnes of malting, FAQ and feed barley aggregated together). In doing so, MOFCOM determined a margin of dumping based on non-comparable transactions.

334. It was apparent from the evidence on the record that Australian exports of barley to China comprised multiple different product-categories, including malting, FAQ,³⁷³ and feed barley. For instance, in the anti-dumping questionnaire, MOFCOM asked respondents to record their data on exports of barley to China during the POI in Form 3-4, which included Field 6 "Product Name & Model". Australian traders recorded different types, "models" (i.e. grades), or quantities of barley, such as [REDACTED] [REDACTED]].³⁷⁴ Australian interested parties gave evidence that FAQ barley exported to China is drawn from Australian feed-grade barley with unique characteristics.³⁷⁵ Australian traders also gave narrative responses to the same effect, including for instance:

We categorize the barley in each transaction exported to China based on the following barley grades:

- Feed barley;
- FAQ (Homogeneous) barley; and
- Malting barley.³⁷⁶

335. In addition, the Global Trade Atlas database MOFCOM used disaggregated between the tariff line descriptions "Barley For Malting (Excl. Seed)", in other words, malting barley, and "Barley (Excl. Seed And Barley For Malting)", that is, feed barley. For the POI, the Global

³⁷³ See the Australian Government's comment that, "FAQ – 'Fair Average Quality' barley, not of a specific variety but sold with common malting barley specifications and used in the malting industry to produce malt for use in the beer brewing process, and as a food and drink ingredient; this grade of barley has evolved specifically for China's brewing market; there is no equivalent in Australia's domestic malting and brewing market but would be considered close to feed barley in Australia's domestic market. This is a medium quality product." (Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 16.)

³⁷⁴ See, for example, CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 3-4, Column G. Hindmarsh barley is described by one trader as follows: "This is a food grade barley that is exported to the regular Chinese malt market and to the Japanese brewing industry. Since Hindmarsh is a best-selling variety in the regular grade Chinese brewing market, we classify it as a beer [malting] barley. See CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16. For the purposes of the present analysis, Hindmarsh barley will be treated as malting barley. However, the quality differences between Hindmarsh and regular malting barley are a relevant factor for an Article 2.4 price comparison.

³⁷⁵ Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 20-21; CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16.

³⁷⁶ Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 85-86.

Trade Atlas recorded 1.93 million tonnes of malting barley and 2.78 million tonnes of feed barley exported from Australian to China.³⁷⁷

336. In contrast, the evidence on the record demonstrated that the exports of barley from Australia to Egypt during the POI, which MOFCOM decided to use as the basis for normal value, were composed solely of feed barley. This fact was highlighted in comments on the Final Disclosure by Australian interested parties,³⁷⁸ and was apparent from the Global Trade Atlas data, which recorded 54 tonnes total of "Barley (Excl. Seed And Barley For Malting)".³⁷⁹

337. In the Final Determination, MOFCOM acknowledged comments from the Australian Government that "[t]he imported Investigated Product consists of malt-making barley (i.e. brewing-grade barley), middle-quality barley and feed barley. These three products are different in terms of quality, market, and price".³⁸⁰ MOFCOM dismissed these comments as follows:

[T]he Australian Government failed to provide evidence to prove the difference of the Investigated Product in terms of quality, market and price; finally, through an investigation, brewing-grade barley and feed barley were found to be substantially the same in terms of physical and chemical properties, and growing method. Barley grown in the same field can be used for food, brewing or feed, or as seed. There is no evidence to prove that downstream users had a line of demarcation in using barley.³⁸¹

338. MOFCOM therefore failed to acknowledge the existence of different categories within the product under consideration. It concluded that malting, FAQ and feed barley could be treated as a single homogenous product. MOFCOM's conclusion is in stark contrast to the

³⁷⁷ Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40) (see Column M for Tariff Line Description).

³⁷⁸ Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), Table 2 on p. 5.

³⁷⁹ Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40).

³⁸⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 5.

³⁸¹ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 5-6. MOFCOM's finding that there is no evidence to prove that downstream users had a line of demarcation in using barley is in stark contrast to evidence provided by Chinese importers and downstream users. See Tsingtao Brewery's response that "[t]he domestic demand for barley is divided into three parts: First, the demand for malting barley. Malt made from malting barley is irreplaceable as the primary raw material for beer brewing [...] Second, the demand for feed barley [...] Third, the demand for edible barley". (Tsingtao Brewery, Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 28 January 2019 (public version) (English translation) (pages renumbered) (Tsingtao Brewery Anti-Dumping Questionnaire Response) (Exhibit AUS-47), pp. 25-26.) See also, for example, Dalian Xingze Malt, Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 January 2019 (public version) (English translation) (pages renumbered) (Dalian Xingze Malt Anti-Dumping Questionnaire Response) (Exhibit AUS-48), pp. 32-33.

evidence on the record demonstrating the differences between the subcategories, including that:

- feed and malting barley have different physical properties, including different protein content, moisture content, size, and weight.³⁸² FAQ barley has a higher protein content than malting barley, but is still capable of germinating;³⁸³
- feed and malting barley have different qualities, including different levels of purity, "defective grains" and "foreign matter".³⁸⁴ FAQ is a "fair average quality" or "intermediate malting grade" barley;³⁸⁵
- feed and malting barley have different end uses, specifically, feed barley is used in the animal feed market, and malting barley is used as a fermentable material (malt) that can be used in beer and other alcoholic beverages;³⁸⁶
- FAQ barley is only sold in the Chinese market where it is used in lower quality malts for the more economic and mid-range beer market;³⁸⁷
- feed and malting barley are perceived and sought after differently by end-users, with maltsters and brewers preferring malting barley for its "varietal purity" for "optimum performance".³⁸⁸ FAQ barley was introduced at the request of the Chinese maltsters over 20 years ago to assist them with

³⁸² Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 8; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), pp. 14 and 17; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 32 and 37; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), p. 19; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), pp. 14-16.

³⁸³ Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 19-20; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16.

³⁸⁴ Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 8; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), pp. 14 and 17.

³⁸⁵ Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 9; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 19-20; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16.

³⁸⁶ Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), pp. 8-9; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 13.

³⁸⁷ Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 9; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), p. 20; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16.

³⁸⁸ Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 13.

a more cost-competitive product to support the growing beer market in China at the time;³⁸⁹

- [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]];³⁹⁰
- feed and malting barley have different tariff classifications. The very database MOFCOM used, Global Trade Atlas, recorded Barley For Malting (Excl. Seed) under Tariff Line Code 10039010, and Barley (Excl. Seed And Barley For Malting) under Tariff Line Code 10039020.³⁹¹ Australian traders gave evidence consistent with this distinction: "[d]uring the investigation period, Australian barley was imported into China under two HS codes: 10039010 and 10039020";³⁹² and
- Chinese importation documentation recognised the difference between malting and feed barley. The evidence on the record included import permits completed by Chinese importers, with the field "purpose" marked as "feed barley".³⁹³ The evidence also included goods declarations for importation, with the field "Name and Specification of Commodity" including specifications such as "Intended for brewing" or "Intended for feed".³⁹⁴

339. The evidence was clear that there are differences between malting, FAQ and feed barley in terms of properties, end uses and qualities. This evidence clearly established that malting, FAQ and feed barley were distinct product categories of the "like product".

³⁸⁹ Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 17; Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), p. 20; and CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 16.

³⁹⁰ CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-23 (BCI)), p. 31.

³⁹¹ Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40) (see Columns L and M).

³⁹² GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 34; Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 15. See also Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 4.

³⁹³ CHS (Shanghai), Response to Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users, 24 January 2019 (public version) (English translation) (pages renumbered) (CHS (Shanghai) Anti-Dumping Questionnaire Response) (Exhibit AUS-49), pp. 49, 51, 53, 55, 57, 59, 61 and 63.

³⁹⁴ CHS (Shanghai) Anti-Dumping Questionnaire Response (Exhibit AUS-49), pp. 65-66.

340. This case therefore falls into the circumstances discussed by the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)*, where there are certain exported categories of the product which do not match any of the categories on the normal value side of the comparison. Specifically, the malting and FAQ barley exported to China was not matched on the normal value side, which was based exclusively on feed barley. In order to determine dumping margins in a manner consistent with Article 2.4.2, MOFCOM was required to take the export transactions involving non-matching product categories into account by making the necessary adjustments to eliminate the effect of factors that affect price comparability, and thereby rendering the export transactions comparable. MOFCOM failed to do this. Therefore, export transactions to China involving malting and FAQ barley were not comparable with the normal value based on two export transactions to Egypt of feed barley.

341. In addition, export transactions to China involving feed barley were also non-comparable, due to MOFCOM's failure to adjust for factors affecting price comparability between exports of feed barley to Egypt and exports of feed barley to China, as Australia established above.³⁹⁵

3. Conclusion

342. For the reasons set out above, Australia submits that China failed to determine the margin of dumping in a manner consistent with Article 2.4.2 of the Anti-Dumping Agreement, by failing to compare a weighted average normal value with a weighted average of prices of "comparable" export transactions.

E. CHINA FAILED TO DETERMINE INDIVIDUAL DUMPING MARGINS IN ACCORDANCE WITH ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT

343. Australia submits that, by assigning the same dumping margin to all Australian companies, China acted inconsistently with its obligation under Article 6.10 of the Anti-Dumping Agreement to determine individual dumping margins for each known exporter and producer.

³⁹⁵ See Section II.C.

1. Legal framework

344. Article 6.10 of the Anti-Dumping Agreement provides that investigating authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". The Appellate Body has confirmed that the term "shall" expresses a "mandatory rule"³⁹⁶ of "binding nature"³⁹⁷, rather than "a preference".³⁹⁸ This "general rule" applies "unless derogation from it is provided for in the covered agreements".³⁹⁹

345. The second sentence of Article 6.10 permits derogation from the requirement to calculate individual dumping margins for each known exporter or producer concerned where an investigating authority undertakes sampling in accordance with certain requirements. This is not relevant in the present case.⁴⁰⁰

346. While, as outlined above, Australia does not accept that MOFCOM's recourse to facts available in this matter was justified, even if such a decision were consistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, it would not exempt an investigating authority from its obligation to comply with Article 6.10. This was confirmed by the Appellate Body in *EC – Fasteners (China)* wherein it rejected an argument that the calculation of dumping margins for "a non-cooperating exporter or producer" based on facts available was a derogation from the rule in Article 6.10:

We observe, however, that Article 6.8 of the Anti-Dumping Agreement allows an investigating authority to rely on "facts available" if an exporter or producer does not cooperate, and that the margin applied to the non-cooperating exporter or producer would still be an individual one even if it is calculated based on facts available rather than on information provided by the exporter or producer.⁴⁰¹

347. Indeed, prior panels have reasoned that it is "precisely because of"⁴⁰² facts available that it will remain possible to determine individual margins, because Article 6.8 "expressly

³⁹⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 316.

³⁹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 327.

³⁹⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 329.

³⁹⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 320.

⁴⁰⁰ See Australian Government comments that "MofCom has previously confirmed orally that it is not resorting to sampling [...] MofCom has indicated to Australia that it is not sampling". (Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), p. 3.) (emphasis original)

⁴⁰¹ Appellate Body Report, *EC – Fasteners (China)*, para. 322.

⁴⁰² Panel Report, *Argentina – Ceramic Tiles*, fn 96.

allow[s] investigating authorities to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided".⁴⁰³

2. MOFCOM failed to determine individual dumping margins

348. In the Final Determination, Group 1 producers were listed individually, but all assigned the same dumping margin. Group 2 and Group 3 traders were allocated an "All Others" dumping margin. The "All Others" dumping margin was the same as the margin allocated to the Group 1 producers.⁴⁰⁴

349. MOFCOM acknowledged comments by the Australian Government following the release of the Final Disclosure claiming that MOFCOM failed to determine individual dumping margins for each exporter and producer and failed to explain the margin of dumping for the Group 1 producers.⁴⁰⁵ In the Final Determination, MOFCOM responded as follows:

The Investigating Authority believed that it had analyzed each of the above companies [the Group 1 producers] who had submitted the questionnaire in the ruling, gave a collective explanation with respect to the common problems in the ruling, and calculated the respective margins of dumping for the above four companies.⁴⁰⁶

350. Regarding Group 2 traders, the Final Determination relevantly provides:

To sum up, as 12 traders including CBH Grain Pty. Ltd. provided incomplete questionnaires and information, causing the Investigating Authority to be unable to obtain the information necessary to calculate the margins of dumping, the Investigating Authority was unable to calculate separate margins of dumping for the above 12 traders. The Investigating Authority decided that the 12 traders including CBH Grain Pty. Ltd. would be subject to the margins of dumping of other Australian companies.⁴⁰⁷

⁴⁰³ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.216.

⁴⁰⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12. The Final Determination relevantly provides as follows:

After calculation, the margin of dumping of each company was finally determined as follows:

1. The Iluka Trust	73.6%
2. Kalgan Nominees Pty. Ltd.	73.6%
3. JW & JI McDonald & Sons	73.6%
4. Haycroft Enterprises	73.6%
5. All Others	73.6%

⁴⁰⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

⁴⁰⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

⁴⁰⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

351. Regarding Group 3 companies, the Final Determination relevantly provides:

Louis Dreyfus Company Australia did not submit the questionnaire until after the submission deadline. Riordan Group Pty. Ltd. did not submit the electronic version of the questionnaire. As the questionnaires of these two companies did not meet the requirements, the Investigating Authority decided not to review them. In addition, after review, Quadra Commodities Pty. Ltd. did not export the Investigated Product to China during the Period of the Anti-Dumping Investigation. Accordingly, the Investigating Authority decided that the above-mentioned three companies were subject to the margins of dumping of other Australian companies.⁴⁰⁸

352. To begin the analysis with Group 1 producers, it is not possible to reconcile MOFCOM's claim to have calculated "respective" margins of dumping for these four producers with the fact that they were allocated a single, uniform dumping margin. Moreover, it is clear from MOFCOM's determination of a single normal value and a single export price, both based on Australia-wide aggregate export data, that only a single dumping margin calculation was undertaken. The Final Disclosure relevantly provide:

Calculation process of dumping margin:

The normal value was USD 392.81/ton, the export price was USD 216.83/ton, and the CIF price was USD 239.02/ton. After calculation, the final dumping margin was 73.6%.⁴⁰⁹

The terms "normal value", "export price", "CIF price", "calculation" and "dumping margin" are all in the singular, reinforcing the only possible conclusion, that a single dumping calculation was undertaken. By imposing a single, uniform margin of dumping on all Group 1 producers, and in the absence of any permissible derogation, MOFCOM is in clear breach of the mandatory obligation in Article 6.10 to determine individual dumping margins for each known producer.

353. With respect to Group 2 and Group 3 traders, MOFCOM attempted to justify its failure to calculate individual dumping margins on its use of facts available. However, as outlined above, even if MOFCOM's recourse to facts available were found to be proper (which Australia maintains it was not), there is no basis in the text of the Anti-Dumping Agreement for such a justification. Rather, following its decision to disregard information submitted by Australian companies, MOFCOM was required to use facts available to complete the data with

⁴⁰⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

⁴⁰⁹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 10.

regard to a particular exporter in order to determine an individual margin for that exporter. Instead, MOFCOM assigned the same uniform dumping margin to Group 2 and 3 traders as it had to Group 1 producers. In doing so, MOFCOM was in breach of the obligation to calculate individual dumping margins, and its approach does not fall within a permissible derogation to that obligation.

3. Conclusion

354. For the reasons set out above, Australia submits that MOFCOM failed to comply with China's obligation in Article 6.10 of the Anti-Dumping Agreement to determine individual dumping margins for each known exporter and producer.

F. CONCLUSION

355. For the reasons set out above, Australia has established that China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement in respect of MOFCOM's use of facts available in the anti-dumping investigation and Articles 2.4, 2.4.2 and 6.10 of the Anti-Dumping Agreement in relation to the determination of dumping.

III. AUSTRALIA'S CLAIMS CONCERNING THE SUBSIDY DETERMINATION

356. Australia submits that China acted inconsistently with Articles 1.1(a), 1.1(b), 1.2, 2.1, 2.4, and 12.7 of the SCM Agreement. MOFCOM was required to properly establish, *inter alia*, the existence of a countervailable subsidy on the basis of positive evidence pursuant to Articles 1 and 2 of the SCM Agreement. It failed to do so.

357. Despite the full cooperation of the Australian Government and Australian traders and producers during the investigation, MOFCOM disregarded all information submitted by these interested parties and made a determination of subsidisation on the basis of facts available.⁴¹⁰ The resulting subsidy margin had no logical connection with the facts on the record.

⁴¹⁰ Based on the Countervailing Duties Final Determination (Exhibit AUS-11), Australia understands that MOFCOM determined that the alleged subsidy programs conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement and were specific within the meaning of Article 2 on the basis of facts available. Australia does not understand MOFCOM to have determined the existence of a financial contribution within the meaning of Article 1.1(a)(1) on the basis of facts available.

358. MOFCOM's failure to properly apply Articles 1 and 2 of the SCM Agreement and its erroneous use of facts available led to a grossly flawed subsidy margin of 6.9% for all Australian traders and producers, even though no trader or producer of barley received subsidies from the Australian Government.

A. LEGAL FRAMEWORK

359. Article 1 of the SCM Agreement provides a definition of "subsidy" for the purposes of the Agreement. This definition requires an investigating authority to establish the existence of a financial contribution by a government that confers a benefit on the recipient. Article 1.2 further provides that such a subsidy may be subject to countervailing duties only if it is specific in accordance with the provisions of Article 2. Article 12.7 sets out the circumstances and conditions under which an investigating authority is permitted to make determinations on the basis of "facts available".

1. Article 1.1(a) of the SCM Agreement

360. Turning to the first element, the determination of a financial contribution, the Appellate Body has explained that "[a]n evaluation of the existence of a financial contribution involves *consideration of the nature of the transaction* through which something of economic value is transferred by a government."⁴¹¹ This approach reflects the terms of the chapeau of Article 1.1, which specifies that "a subsidy shall be deemed to exist if" there is a financial contribution of the types set out in the subparagraphs of Article 1.1(a)(1).⁴¹² The Appellate Body explained that an assessment of "whether the measure may fall within any of the types of financial contributions set out in [Article 1.1(a)(1)]" requires a panel to "scrutinize the measure both as to its design and operation and to identify its principal characteristics".⁴¹³

361. Four categories of financial contribution are set out in Article 1.1(a)(1)(i)-(iv). Relevantly, Article 1.1(a)(1)(i) refers to a "government practice involv[ing] a direct transfer of funds [...], potential direct transfers of funds or liabilities". The Appellate Body has explained that this provision "captures conduct on the part of the government by which money, financial

⁴¹¹ Appellate Body Report, *US – Softwood Lumber IV*, para. 52. (emphasis added)

⁴¹² There is no suggestion that the measures in question involve any form of income or price support, hence this standard is not considered here.

⁴¹³ Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120 (citing Appellate Body Reports, *China – Auto Parts*, para. 171). See also, Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 586.

resources, and/or financial claims are made available *to a recipient*".⁴¹⁴ A "recipient" is the economic entity, which can be a natural or legal person, receiving the benefit (e.g. a producer or exporter of the product under investigation).⁴¹⁵ As such, a transaction involving a transfer of funds from one part of government to another cannot be properly understood to involve a "recipient" of a financial contribution within the meaning of Article 1.1(a)(1).

362. The remaining sub-paragraphs of Article 1.1(a)(1) set out other forms of a "financial contribution", including forgone government revenue (Article 1.1(a)(1)(ii)), provision of goods or services other than general infrastructure, or purchases of goods (Article 1.1(a)(iii)), or payments to a funding mechanism or directions/entrustments to a private body (Article 1.1(a)(iv)).

2. Article 1.1(b) of the SCM Agreement

363. Turning to the second element, Article 1.1(b) of the SCM Agreement requires an investigating authority to show that the financial contribution has conferred a benefit on the recipient. This requires showing the financial contribution has conferred "some form of advantage",⁴¹⁶ and thereby made "the recipient 'better off' than it would otherwise have been, absent that contribution."⁴¹⁷ This advantage is to be assessed "by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market".⁴¹⁸ Such a determination, therefore, requires the investigating authority to identify the relevant market against which to compare the financial contribution under consideration.⁴¹⁹

364. Importantly, an investigating authority's analysis must be aimed at determining whether there has been a benefit *to the recipient*. A benefit does not exist in the abstract, there must be a recipient.⁴²⁰ In this light, the enquiry is not aimed at the existence and amount

⁴¹⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 614. (emphasis added)

⁴¹⁵ Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 112; *US – Lead and Bismuth II*, paras. 57-58.

⁴¹⁶ Appellate Body Report, *Canada – Aircraft*, para. 153. See also Oxford English Dictionary online, definition of "benefit" <https://www.oed.com/view/Entry/17694> (accessed 29 October 2021).

⁴¹⁷ Appellate Body Report, *Canada – Aircraft*, para. 157.

⁴¹⁸ Appellate Body Report, *Canada – Aircraft*, para. 157.

⁴¹⁹ The Appellate Body has observed that the "definition of the relevant market is central to, and a prerequisite for, a benefit analysis under Article 1.1(b) of the SCM Agreement". (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.169.)

⁴²⁰ Appellate Body Report, *Canada – Aircraft*, para. 154.

of any cost to the government or public body providing the alleged financial contribution, but rather the benefit actually received by the recipient.⁴²¹

3. Article 2 of the SCM Agreement

365. A subsidy can only be subject to the provisions concerning the imposition of countervailing duties in Part V of the SCM Agreement if it is specific, in accordance with Article 2 of that Agreement. As such, a determination of specificity is made, either "explicitly or implicitly - every time a Member finds that a subsidy falls within the scope of the SCM Agreement".⁴²² Thus, even when an investigating authority determines a subsidy is specific on the basis of facts available, it is necessarily making a determination that the subsidy is specific within the meaning of Article 2 of the SCM Agreement.

366. Article 2 of the SCM Agreement sets out the framework governing the determination of specificity. The chapeau of Article 2.1 establishes that the analysis of specificity is to be directed at "a subsidy, as defined in [Article 1.1]". This indicates that the analysis must be preceded by an assessment of whether the measure involves a financial contribution of a kind listed in Article 1.1(a)(1), or income or price support as referred to in Article 1.1(a)(2), which also confers a benefit.⁴²³ It is only after an investigating authority has determined there to be a financial contribution from a government that confers a benefit that it can be determined whether that subsidy, as found, is specific within the meaning of Article 2. If the analysis of financial contribution or benefit is flawed, for example due to a failure to correctly identify or characterise the financial contribution, it will undermine the assessment of specificity.

367. A subsidy can be specific either in law, or in fact.⁴²⁴ In either instance, the assessment of specificity is concerned with limitations on access to a subsidy.⁴²⁵ The panel in *US – Anti-Dumping and Countervailing Duties (China)* explained that, "the specificity provisions establish that the subsidies deemed under the Agreement to be potentially trade

⁴²¹ Appellate Body Report, *Canada – Aircraft*, para. 154.

⁴²² Panel Report, *US – Carbon Steel (India)*, para. 7.118.

⁴²³ Appellate Body Reports, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.225; *US – Countervailing Measures (China)*, para. 4.144.

⁴²⁴ Panel Report, *US – Softwood Lumber IV*, para. 7.116.

⁴²⁵ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21; Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.228.

distortive are those that are targeted in some way to particular beneficiaries, rather than being broadly available throughout the economy of a Member."⁴²⁶

368. However, a finding of specificity within the meaning of Article 2 cannot be demonstrated by reliance on *any* limitation on access *per se*. Rather, it requires a case-by-case assessment to determine whether a subsidy is provided to a sufficiently limited group of enterprises.⁴²⁷

369. Article 2.1 imposes a set of principles.⁴²⁸ *First*, Articles 2.1(a) and (b) are concerned with *de jure* specificity and non-specificity, including setting out explicit limitations on eligibility that favour certain enterprises (Article 2.1(a)) and objective criteria that work to guard against selection eligibility (Article 2.1(b)).⁴²⁹ *Second*, Article 2.1(c) is concerned with *de facto* limitations of access to the subsidy (i.e. in situations where there is no explicit limitation of access), but there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.⁴³⁰ The Appellate Body has explained that the analysis under Article 2.1 will ordinarily proceed in a sequential manner, beginning with an assessment under subparagraphs (a) and (b).⁴³¹

370. Further, Article 2.4 of the SCM Agreement requires that "any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence." The Appellate Body has described this as an "affirmative obligation" that arises even without any party raising arguments during an investigation.⁴³² It has found that the term "positive evidence" relates "to the quality of the evidence that authorities may rely upon in making a determination", which "must be of an affirmative, objective and verifiable

⁴²⁶ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21.

⁴²⁷ Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.1235.

⁴²⁸ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366; Panel Report, *US – Carbon Steel (India)*, para. 7.118.

⁴²⁹ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.226.

⁴³⁰ Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.227.

⁴³¹ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.120 provides:

[A]n investigating authority will normally begin by examining this evidence in the light of subparagraphs (a) and (b) in order to determine whether the subsidy is *de jure* specific. This analysis under subparagraphs (a) and (b) may lead an investigating authority to conclude that a subsidy is *de jure* specific within the meaning of Article 2.1(a), or that a subsidy is *not de jure* specific because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document. (emphasis original)

⁴³² Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.50.

character, and that it must be credible."⁴³³ The requirement that any determination of specificity "shall be based" on positive evidence imposes a mandatory obligation on an investigating authority to make a determination of specificity only where it has before it positive evidence, of an affirmative, objective and verifiable character, that is credible, to substantiate its determination. Accordingly, an investigating authority that makes a determination of specificity that is not supported by "positive evidence", will act inconsistently with both Articles 2.1 and 2.4.

4. Article 12.7 of the SCM Agreement

371. Article 12.7 of the SCM Agreement provides as follows:

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

372. Article 12.7 of the SCM Agreement permits an investigating authority to make determinations on the basis of "facts available" only in certain specified circumstances — namely, where an interested party "refuses access to [...] necessary information", or "otherwise does not provide necessary information within a reasonable period", or "significantly impedes the investigation".⁴³⁴ Article 12.7 permits the use of facts that are otherwise available on the record *solely* for the purpose of replacing necessary information that may be missing — "to fill in gaps in the information necessary" to allow the investigating authority to make an accurate subsidization determination.⁴³⁵

373. Like Article 6.8 of the Anti-Dumping Agreement, Article 12.7 is concerned with overcoming the lack of "necessary information", and not just "any" or "unnecessary" information.⁴³⁶ In order for the use of facts available to not be "markedly different" across the SCM Agreement and Anti-Dumping Agreement, the interpretation of "necessary information" — an integral element of one of the preconditions to resort to facts available —

⁴³³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

⁴³⁴ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 235.

⁴³⁵ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291; Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.190.

⁴³⁶ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416. See also, section II.A.1.

must be common between the two agreements.⁴³⁷ In this regard, necessary information is information *required* to complete a determination.⁴³⁸ Information which is "required" for a determination must be information which is "indispensable, vital, essential; requisite."⁴³⁹ Ultimately, the question of whether certain information is "necessary" is to be assessed in light of the specific facts and circumstances of a given case, including the specific determination to be made and for which information is sought,⁴⁴⁰ i.e. a determination of the constituent elements of subsidisation.⁴⁴¹

374. Although Article 12.7 is not accompanied by an equivalent of Annex II to the Anti-Dumping Agreement, the Appellate Body has explained that this does not mean that no such conditions exist in the SCM Agreement.⁴⁴² The Appellate Body has explained that Article 12 of the SCM Agreement, as context for Article 12.7, sets out due process rights that apply throughout an investigation.⁴⁴³ In particular, Article 12.1 provides that interested parties must be given notice of the information required, and "ample opportunity" to present all evidence they consider relevant.⁴⁴⁴ The requirement to afford interested parties the opportunity to present all evidence they consider relevant "concomitantly requires the investigating authority [...] to take into account the information submitted".⁴⁴⁵

375. Recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. It is not a licence to rely on only part of the evidence provided.⁴⁴⁶ An investigating authority must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete

⁴³⁷ There is no explicit guidance in the SCM Agreement as to what constitutes "necessary information". Article 6.8 of the Anti-Dumping Agreement provides relevant context for the interpretation of Article 12.7 of the SCM Agreement. (See above, section II.A.1). The Appellate Body has explained that it would be "anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.)

⁴³⁸ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

⁴³⁹ See above, section II.A.3(a). See also, Panel Report, *US – Supercalendered Paper*, para. 7.174.

⁴⁴⁰ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.269.

⁴⁴¹ See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

⁴⁴² See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291 and 295.

⁴⁴³ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292 (referring to Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 138; *EC – Bed Linen (Article 21.5 - India)*, para. 136). The Appellate Body in also examined Article 12 as context for the interpretation of Article 12.7 in Appellate Body Report, *US – Carbon Steel (India)*, para. 4.418.

⁴⁴⁴ Article 12.1 of the SCM Agreement provides that "[i]nterested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

⁴⁴⁵ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

⁴⁴⁶ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

information requested of that party.⁴⁴⁷ When selecting facts, an investigating authority is limited to selecting those that reasonably replace the missing necessary information that an interested party failed to provide.⁴⁴⁸ The Appellate Body has explained that there must be a connection between the missing "necessary information" and the "facts available" on which a determination is based.⁴⁴⁹

376. Article 12.7 of the SCM Agreement requires investigating authorities to select those facts available that constitute *reasonable replacements* for the missing "necessary" information in the specific facts and circumstances of a given case. In selecting reasonable replacements, investigating authorities must take into account all facts that are properly available to them.⁴⁵⁰

377. Determinations made on the basis of facts available must have a "factual foundation",⁴⁵¹ and cannot be made on the basis of non-factual assumptions or speculation.⁴⁵² Nor does the use of facts available necessarily entail a negative inference by an investigating authority.⁴⁵³ Applying an adverse inference is not the same as applying facts available.⁴⁵⁴

378. Ascertaining what facts reasonably replace the missing necessary information calls for a process of reasoning and evaluation by the investigating authority.⁴⁵⁵ Where there are several facts available, this process of reasoning and evaluation may involve a degree of comparison.⁴⁵⁶ The Appellate Body has explained that:

[W]here there are several "facts available" from which to choose, an investigating authority must nevertheless evaluate and reason which of the "facts available" reasonably replace the missing "necessary information", with a view to arriving at an accurate determination.⁴⁵⁷

⁴⁴⁷ Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Carbon Steel (India)*, para. 4.419; and Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.190.

⁴⁴⁸ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

⁴⁴⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

⁴⁵⁰ Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.41.

⁴⁵¹ See Panel Report, *China – GOES*, para. 7.296.

⁴⁵² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.

⁴⁵³ Appellate Body Report, *Japan – DRAMs (Korea)*, fn 449.

⁴⁵⁴ Panel Report, *Japan – DRAMs (Korea)*, para. 7.396.

⁴⁵⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.418.

⁴⁵⁶ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.431.

⁴⁵⁷ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.

379. Importantly, the evaluation and reasoning to which the Appellate Body refers must be evidenced in an investigating authority's published determinations. While the explanation and analysis in a determination will vary depending on the circumstances, it "must be sufficient to allow a panel to assess whether the 'facts available' employed by the investigating authority are reasonable replacements for the missing 'necessary information'".⁴⁵⁸

B. THE PROGRAMS AT ISSUE AND THE FINAL DETERMINATION

380. MOFCOM determined that three out of 32 of the programs contained in the application were countervailable subsidies,⁴⁵⁹ and calculated an *ad valorem* subsidy rate of 6.9% on the basis of facts available.⁴⁶⁰

381. MOFCOM justified its decision to resort to facts available in respect of the determination on the basis of its conclusion that no known producer or exporter of barley provided complete answers to the questionnaire.⁴⁶¹ In particular, MOFCOM found that it:

[W]as not able to obtain the necessary information on whether any Australian exporter or producer of the Investigated Product received the subsidy, the amount of subsidy, and other information on marketing and sales of such product. The Investigating Authority shall, in accordance with Article 21 of the *Countervailing Regulation*, decided [*sic*] to rule on the basis of available facts.⁴⁶²

382. Before turning to the application of the legal standards set out above to the Final Determination, Australia will first set out the purpose, nature and operation of the three programs MOFCOM found to be countervailable, and MOFCOM's asserted basis for its recourse to, and selection of, facts available in each case.

⁴⁵⁸ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

⁴⁵⁹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7, 9 and 10. See also, CICC Countervailing Duties Application (Exhibit AUS-8), pp. 17-49.

⁴⁶⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁴⁶¹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 6. MOFCOM found that although the first group of eight companies examined (Emerald, COFCO, ADM Trading, CHS Broadbent, CBH, Cargill, GrainCorp, and Quadra) replied to the questionnaire, the producers who supplied those companies did not respond to the questionnaire (Countervailing Duties Final Determination (Exhibit AUS-11), pp. 5-6). It made a similar finding with respect to Glencore (Glencore submitted a response together with its affiliated producer Glencore Land (Australia) Pty Ltd and holding company Glencore Grain Holdings Australia Pty Ltd) (Countervailing Duties Final Determination (Exhibit AUS-11), p. 6). With respect to the final group of Australian interested parties, MOFCOM found that Louis Dreyfus, Bunge, Agracom and Riordan submitted the questionnaire response after the submission deadline. MOFCOM granted a four-day extension to Bunge and Agracom, however these companies did not submit the questionnaire within the extended time-limit (Countervailing Duties Final Determination (Exhibit AUS-11), p. 6).

⁴⁶² Countervailing Duties Final Determination (Exhibit AUS-11), p. 6.

1. SRWUI Program

383. The SRWUI Program is a national program aimed at ensuring the sustainable ecological functioning of the Murray-Darling River System.⁴⁶³ It is facilitated by three federal agreements between the Australian Government and the governments of the Australian states and territories to provide systemic funding to support programs of national significance, which include the National Partnership Agreement on Implementing Water Reform in the Murray-Darling Basin, the Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin, and the Intergovernmental Agreement of Federal Financial Relations.⁴⁶⁴

384. Pursuant to these arrangements, during the POI, funds were provided by the Australian Government to the governments of the various states and territories.⁴⁶⁵ The evidence on the record shows that during the 2017-18 financial year,⁴⁶⁶ the Australian Government transferred a total of AUD 10.59 million to state and territory governments.⁴⁶⁷ There are no records of payments to "recipients" outside government.

385. MOFCOM found that the SRWUI Program conferred a benefit and was specific on the basis of facts available.⁴⁶⁸ MOFCOM found that the Australian Government did not provide, *inter alia*, evidence that proved the barley industry did *not* receive a benefit under the program,⁴⁶⁹ or to support its statement that the program was an environmental program and was not specific to the barley industry.⁴⁷⁰

386. MOFCOM determined that the amount alleged in the application, AUD 10 billion, was the subsidy amount under the program, amortized over a 10-year period.⁴⁷¹ MOFCOM ascertained a subsidy rate of 5.82% for this program.

⁴⁶³ The SRWUI Program has funding allocated until 2024.

⁴⁶⁴ Australian Government, Response to Countervailing Duties Questionnaire for Government, Section 2: Specific Programs, 16 February 2019 (Australian Government Countervailing Duties Questionnaire Response, Section 2) (Exhibit AUS-50), p.1.

⁴⁶⁵ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-4.

⁴⁶⁶ The records for the 2017 – 18 financial year provide the most accurate record of the payments made during the POI.

⁴⁶⁷ This amount included payments of AUD 6.79 million to the Government of Victoria, AUD 1.98 million to the Government of Queensland, AUD 1.48 million to the Government of South Australia, and AUD 0.32 million to the Government of the Australian Capital Territory.

⁴⁶⁸ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8 and 8-9 respectively.

⁴⁶⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

⁴⁷⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

⁴⁷¹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9.

2. SARMS Program

387. MOFCOM made a determination in relation to one of two sub-programs under the SARMS Program, the Irrigation Industry Improvement Program ("3IP"). The 3IP was established to recover rights to draw water from the South Australian River Murray watercourse, known as Water Access Entitlements, and to assist the long-term sustainability of South Australia's River Murray-dependent irrigation industries and their associated communities. The purpose of the program was to generate water savings and water returns through eligible projects that focussed on irrigation efficiency and optimisation, along with improvements to business and industry viability, in order to help secure a sustainable future for South Australia's irrigation communities.⁴⁷²

388. MOFCOM made findings in relation to the "Irrigation Efficiency Element under the [3IP] Program", which Australia understands to refer to "Investment Stream One – Irrigation Efficiency" ("Irrigation Efficiency Investment Stream").^{473, 474}

389. Under the Irrigation Efficiency Investment Stream, the Government of South Australia purchased rights to draw water from the River Murray, in order to return the volume of water covered by those drawing rights to the river system to help ensure its continued ecological sustainability.⁴⁷⁵ In consideration for the transfer of these water drawing rights, the Government of South Australia funded agreed improvements to the efficiency of the irrigation

⁴⁷² Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Guidelines Round 1 (SARMS Program, 3IP Guidelines, Round 1) (Exhibit AUS-51), p. 4. The SARMS Program ceased in 2019.

⁴⁷³ The 3IP comprised the following three "investment streams": (1) Irrigation Efficiency Investment Stream; (2) Water Returns Investment Stream; and (3) Irrigation Industry Assistance Investment Stream.

⁴⁷⁴ This understanding is based on MOFCOM's determination that "[t]he Irrigation Efficiency Element aims to increase the efficiency of water supply and use by irrigators in South Australia and ensure a long-term average annual yield of water of approximately 16.8 gigalitres for the federal environment". (See Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.) This volume of water to be returned to the Federal Government for environmental use, i.e. 16.8GL, is characteristic of a central element of the "Irrigation Efficiency" investment stream as described in the 3IP Guidelines (this description is included in the guidelines for all four funding rounds). (See SARMS Program, 3IP Guidelines, Round 1 (Exhibit AUS-51), p. 8.) Further, the CICC Countervailing Duties Application refers to the "Irrigation Efficiency Improvement Program" as having a budget of AUD 80 million (CICC Countervailing Duties Application (Exhibit AUS-8), p. 38). MOFCOM indicates in its Countervailing Duties Final Determination that it has relied on the CICC Countervailing Duties Application as though it were evidence in its assessment of this program (Countervailing Duties Final Determination (Exhibit AUS-11), p. 9). The SARMS Program, 3IP Guidelines, for Round 1 state, "The Irrigation Efficiency Stream has \$80 million allocated to support improvements in water efficiency of irrigation operations in South Australia for holders of Eligible WAE". (SARMS Program, 3IP Guidelines, Round 1 (Exhibit AUS-51), p. 8). The identification of the funding amount of AUD 80 million in same context as the 16.8GL volume of water entitlements to be returned confirm Australia's understanding that MOFCOM uses the term "Irrigation Efficiency Element" to refer to the Irrigation Efficiency Investment Stream within the 3IP.

⁴⁷⁵ Attachment to Australian Government Countervailing Duties Questionnaire Response: SARMS Program – Actual Water Transferred (pages renumbered) (SARMS, Actual Water Transferred) (Exhibit AUS-52 (BCI)), p. 1.

infrastructure owned or operated by the applicants. The water saving efficiencies achieved allowed applicants to continue their irrigation operations while taking less water from the river system than they otherwise would have, thereby freeing up Water Access Entitlements for environmental sustainability purposes.⁴⁷⁶

390. Funding was provided over four grant rounds, across five years.⁴⁷⁷ During the POI, approximately [REDACTED] was provided to grant recipients across all three of the 3IP investment streams.⁴⁷⁸ Because funding applications were commonly made under multiple investment streams, records are not available showing payments provided under the individual investment streams. However, the evidence on the record shows that funding was provided to [REDACTED] [REDACTED].⁴⁷⁹ Notably, no recipient of funding is involved in the dryland agriculture industry.⁴⁸⁰ Crucially, in Australia barley is known to be produced exclusively by means of dryland agriculture, that is without the aid of artificial irrigation.⁴⁸¹ Accordingly, programs which support irrigation infrastructure are irrelevant to

⁴⁷⁶ Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Guidelines Round 4 (SARMS Program, 3IP Guidelines, Round 4) (Exhibit AUS-53), pp. 6 and 8.

⁴⁷⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 165 (see row 6 of the table, labelled "Funding"); SARMS Program, 3IP Guidelines, Round 4 (Exhibit AUS-53), p. 7.

⁴⁷⁸ Attachment to Australian Government Countervailing Duties Questionnaire Response: SARMS Program – Grant Payments (pages renumbered) (SARMS Program, Grant Payments) (Exhibit AUS-54 (BCI)), pp. 6-8. This figure is the sum of grant entitlements approved and paid during the POI.

⁴⁷⁹ Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP Applicants by Industry (pages renumbered) (SARMS Program, 3IP Applicants by Industry) (Exhibit AUS-55 (BCI)), pp. 6-9. Note that as shown by SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)), only Round 4 fell within the POI.

⁴⁸⁰ SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)), pp. 6-9; Attachment to Australian Government Countervailing Duties Questionnaire Response: 3IP List of Approved Applicants (pages renumbered) (SARMS Program, 3IP List of Approved Applicants) (Exhibit AUS-56 (BCI)), pp. 6-10; and SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)), pp. 6-8. The figures set out in this paragraph can be gleaned by cross referencing these three records. Applicants are consistently identified by application number across all records. The first identifies the industry participation of each applicant. The second shows those applicants that were successful. The third sets out the actual amounts paid to each applicant.

⁴⁸¹ Grain Trade Australia and GIMAF, stated that, "barley grown in Australia is mainly a dryland crop (i.e., non-irrigated planting)". (Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), p. 9.) Grain Corp explained that, "as far as GrainCorp knows, almost no field barley is planted or irrigated in Murray-Darling Basin. Due to cost reasons, irrigation water is usually used for high-value horticultural and grape crops rather than grain crops. (GrainCorp, Comments on the essential facts of the MOFCOM's barley countervailing duties final decision, 18 May 2020 (English translation) (GrainCorp Comments on Countervailing Duties Final Disclosure) (Exhibit AUS-57), p. 6.) CBH Grain observed, "[m]ore importantly, SRWUIP and SARMSP are aimed at benefiting farmers for irrigation. However, the barley sold by CBH Grain is grown on (non-irrigated) dryland. Therefore, CBH Grain and its affiliated company would in no way be able to benefit from these three subsidy programs". (CBH, Comments on Final Countervailing Duties Disclosure, 15 May 2020 (pages renumbered) (CBH Comments on Countervailing Duties Disclosure) (Exhibit AUS-58), p. 4. (emphasis added)) The Australian Government explained that, "[i]rrigation water (due to cost) is used on high value horticulture and grape crops, not normally cereal crops". (Australian Government, Comments on Final Countervailing Duties Disclosure (including Attachments 1 and 2), 15 May 2020 (pages renumbered) (Australian Government Comments on Countervailing Duties Final Disclosure) (Exhibit AUS-59), para. 19.) Grain Producers Australia, commented that, "Australian grain production is generally produced under dryland agriculture, not using irrigation" and that "It is apparent that MOFCOM may have misunderstood the

Australian barley production or trade and cannot be understood to confer any benefit upon it.

391. In spite of this evidence, MOFCOM determined that the SARMS Program conferred a benefit and was specific on the basis of facts available.⁴⁸² MOFCOM determined the amount of AUD 65 million, as "provided in the answers", was the subsidy amount, and the rate for the program was 0.52%.⁴⁸³

3. VAIJ Fund

392. The VAIJ Fund was an infrastructure and development program funded and administered by the Government of Victoria. The purpose of the Fund was to invest in enabling economic infrastructure and agriculture supply chains to boost productivity and increase the resilience of the [Victorian] agricultural sector.⁴⁸⁴

393. The Fund included two funding streams, being the Program Stream and the Infrastructure Stream. Under the Program Stream, AUD 0.61 million was distributed during the POI.⁴⁸⁵ This comprised payments only to the Department of Economic Development, Transport, Jobs & Resources, an agency of the Victorian Government.⁴⁸⁶ The Infrastructure Stream comprised the Local Roads to Market Program and the Major Capital Works Program. Under the Local Roads to Market Program, payments of AUD 4.58 million were made during the POI to various local governments to upgrade local roads and conduct feasibility studies for other road and bridge works. Under the Major Capital Works Program, two payments were made during the POI totalling AUD 12.25 million. AUD 12 million was provided to the Victorian Government Department of Economic Development, Transport, Jobs & Resources, Agriculture Industry Development, while AUD 0.25 million was provided to the Wimmera Development

differences between Australian and Chinese grain production farming systems. [...] Barley in Australia is generally produced through a non-irrigated production system, known as broadacre dryland agriculture." (Grain Producers Australia, Comments on Final Countervailing Duties Disclosure, 15 May 2020 (English translation) (Grain Producers Australia Comments on Countervailing Duties Final Disclosure) (Exhibit AUS-60), pp. 3-4. (emphasis added).)

⁴⁸² Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9 and 10, respectively.

⁴⁸³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

⁴⁸⁴ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 200; Attachment to Australian Government Countervailing Duties Questionnaire Response: VAIJ Fund – Major Capital Works Application Guidelines 16 May 2017 (pages renumbered) (VAIJ Fund Major Capital Works Application Guidelines) (Exhibit AUS-62), p. 2.

⁴⁸⁵ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-209. This figure was arrived at by adding together the amounts recorded in the "actual paid" column in the Program Stream made between 1 October 2017 to 30 September 2018, as set out in the table in Australian Government Countervailing Duties Questionnaire Response.

⁴⁸⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-209.

Association to conduct a study to explore the opportunities for a Networked Grains Centre of Excellence.⁴⁸⁷ All of this information was on the investigation record before MOFCOM.

394. MOFCOM determined that the VAIJ Fund conferred a benefit and was specific on the basis of facts available.⁴⁸⁸ MOFCOM determined that the program's budget of AUD 66.84 million in 2017-2018, "provided in the answers", was the subsidy amount, and that the subsidy rate for the program was 0.56%.⁴⁸⁹

C. CHINA FAILED TO PROPERLY ESTABLISH THE EXISTENCE OF A FINANCIAL CONTRIBUTION

395. Australia submits that China acted inconsistently with Article 1.1(a) of the SCM Agreement in relation to MOFCOM's determination that payments under the three alleged subsidy programs constituted financial contributions.

396. In making determinations in this regard, MOFCOM made two fundamental errors. *First*, payments from one governmental entity to another cannot amount to financial contributions for the purposes of Article 1.1(a)(1).⁴⁹⁰ As nearly all payments under the programs at issue were of this nature, MOFCOM erred in its conclusion that these were financial contributions under Article 1.1(a). *Second*, to the extent that any payments were made to non-governmental entities, MOFCOM erred by characterising such payments made as direct payment under Article 1.1(a)(i) of the SCM Agreement.

1. Payments between government entities cannot amount to a financial contribution

397. MOFCOM determined that each of the three programs at issue involved direct transfers of funds.⁴⁹¹ However, because the overwhelming majority of the payments made pursuant to the SRWUI Program and VAIJ Fund⁴⁹² were from one government entity to

⁴⁸⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210.

⁴⁸⁸ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10-12.

⁴⁸⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁴⁹⁰ Article 1.1(a)(1)(i) provides a definition of "financial contribution" that requires a transfer or potential transfer of funds to a "recipient" (Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 614), which must be an economic entity and hence not a part of government (Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 112; *US – Lead and Bismuth II*, paras. 57-58). See above, section III.A.1.

⁴⁹¹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7-10.

⁴⁹² Payments made under the second Program, the SARMS Program Irrigation Efficiency Investment Stream, do not fall into this category as the recipients were all commercial entities, though none in the barley industry.

another and therefore there was no "recipient" within the meaning of Article 1.1(a) of the SCM Agreement, they cannot properly be considered to amount to "financial contributions" within the meaning of that provision.

398. The SRWUI Program is administered by the Australian Government with the purpose of providing funding to state and territory governments, to enable them to implement certain policies to improve the ecological sustainability of the Murry Darling River System and support the surrounding communities that depend on it. The Australian Government provided to MOFCOM records of the actual payments made under this program to those governments during the POI.⁴⁹³ These showed that during the 2017-18 financial year, the Australian Government transferred a total of AUD 10.59 million to state and territory governments.⁴⁹⁴ During the POI, there were no payments to "recipients" outside government, that is, no payments were made to an enterprise or industry and therefore no records of such payments exist.

399. Similarly, all but one of the payments under the VAIJ Fund during the POI were made by one government entity to another.⁴⁹⁵ Australia recalls that all funds distributed pursuant to the Program Stream during the POI (AUD 0.61 million) were provided to agencies of the Victorian Government.⁴⁹⁶

400. Similarly, all but one of the payments made pursuant to the Infrastructure Stream during the POI (AUD 16.58 million) were provided to Victorian government agencies. The remaining payment of AUD 0.25 million was provided to the Wimmera Development Association to conduct a study to explore the opportunities for a Networked Grains Centre of

⁴⁹³ Australian Government, National Partnership Agreement on Implementing Water Reform in the Murray–Darling Basin: Commonwealth Payments to Basin states, 5 June 2013 (Water Reform National Partnership Agreement, Payments to Murray–Darling Basin States) (Exhibit AUS-61), p. 1; Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 1.

⁴⁹⁴ This amount included payments of AUD 6.79 million to the Government of Victoria, AUD 1.98 million to the Government of Queensland, AUD 1.48 million to the Government of South Australia, and AUD 0.32 million to the Government of the Australian Capital Territory.

⁴⁹⁵ See section III.B.3 above for the structure of the VAIJ Fund. Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁴⁹⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-209.

Excellence.⁴⁹⁷ This payment of AUD 0.25 million was the only payment from the VAIJ Fund during the POI to a non-government "recipient".

401. Further, the evidence on the record clearly identified the VAIJ Fund to be an infrastructure and development program funded and administered by the Government of Victoria. Under the VAIJ Fund, the Victorian Government provided funds to local governments and other government agencies to upgrade public roads, conduct studies related to infrastructure projects, and develop regional energy infrastructure.⁴⁹⁸ Accordingly, even setting aside the absence of a "recipient", the payments made, under the program to government entities, could not reasonably have been characterised as "direct transfers" for the purposes of Article 1.1(a)(1)(i), noting that payments related to the provision of goods, services, and infrastructure are more properly dealt with under other sub-paragraphs of that Article.

402. MOFCOM's determination that all payments under all of the programs at issue amounted to financial contributions within the meaning of Article 1.1(a) is therefore untenable. Had MOFCOM conducted a proper analysis of each program, it would have found that the evidence did not support a finding that the inter-governmental payments made under the SRWUI Program and VAIJ Fund constituted financial contributions, as defined under Article 1.1(a).

2. MOFCOM erred in characterising payments to non-government bodies as direct transfers of funds

403. To the extent that payments were made to non-government entities pursuant to the programs at issue, MOFCOM also erred by characterising those payments as "direct transfers" under Article 1.1(a)(1)(i) of the SCM Agreement because the evidence did not support such a finding.⁴⁹⁹

404. The scope of the category of financial contribution defined by Article 1.1(a)(1)(i) must be interpreted in light of its context as one of four different categories of transactions subject to the SCM Agreement. The category described by subparagraph (i) and in particular by the

⁴⁹⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210.

⁴⁹⁸ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁴⁹⁹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7-8, 9 and 10.

term "direct transfer of funds" is broad and must be interpreted in light of the context provided by the subsequent subparagraphs, which provide narrower definitions. For example, a purchase of goods under subparagraph (iii) in the usual case involves a payment in the nature of a direct transfer of funds. If such a transaction could properly be characterised under subparagraph (i), subparagraph (iii) would be deprived of meaning. Further, an overly broad interpretation of subparagraph (i) such as this, would also lead any subsequent benefit analysis into error.

405. In this case, MOFCOM erred in characterising all payments made to non-government entities as direct transfers of funds under subparagraph (i). All of the payments under the SARMS Program Irrigation Efficiency Investment Stream involved reciprocal obligations to transfer goods to the government in the form of water access entitlements.⁵⁰⁰ Similarly, under the VAIJ Fund, the sole payment within the POI to a non-government entity also involved reciprocal obligations, namely the obligation to undertake a feasibility study.⁵⁰¹ These characteristics, properly considered, could not reasonably support MOFCOM's erroneous characterisation of these transactions as direct transfers of funds.

3. Conclusion

406. MOFCOM erred in characterising payments made under the programs at issue both to government and non-government entities as direct transfers of funds under Article 1.1(a)(1)(i). For this reason, China acted inconsistently with Article 1.1(a) of the SCM Agreement.

D. CHINA FAILED TO PROPERLY DETERMINE WHETHER THE PROGRAMS CONFERRED A BENEFIT TO THE BARLEY INDUSTRY

407. Australia submits that China acted inconsistently with Articles 1.1(b) and 12.7 of the SCM Agreement in relation to MOFCOM's determination that the alleged financial contributions conferred a benefit.

⁵⁰⁰ SARMS Program, 3IP Guidelines, Round 1 (Exhibit AUS-51), p. 6. Applicants could only be eligible for funding if they could demonstrate the ability to transfer water access entitlements to government.

⁵⁰¹ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210. The study was required to "explore the opportunities for a Networked Grains Centre of Excellence".

408. *First*, Australia submits that MOFCOM acted inconsistently with Article 1.1(b) because it failed to properly characterise the alleged financial contribution associated with the payments at issue, and because it compounded this error by determining that a benefit had been conferred in circumstances where there was neither a "recipient" nor an "advantage", and therefore, no benefit within the meaning of Article 1.1(b) could have been conferred. *Second*, Australia submits that MOFCOM acted inconsistently with Article 12.7 by having recourse to facts available in order to determine whether a benefit was conferred because there was no necessary information missing from the record. *Third*, in addition to its incorrect recourse to Article 12.7, Australia submits that MOFCOM also acted inconsistently with Article 12.7 by failing to select a reasonable replacement for the allegedly missing necessary information.

1. China acted inconsistently with Article 1.1(b) in relation to the determination that the programs conferred a benefit

(a) MOFCOM failed to properly characterise the alleged financial contribution and therefore failed to determine if a benefit was conferred

409. Australia has set out above how the alleged government action could not have been a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i). Because MOFCOM failed to properly characterise the alleged financial contribution at issue, it therefore follows that it failed to properly determine if a benefit was conferred within the meaning of Article 1.1(b) of the SCM Agreement.

(b) There was no "recipient" and as such, no benefit was conferred

410. A benefit cannot exist in the abstract. The Appellate Body has explained that:

A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the *SCM Agreement* should be on the recipient and not on the granting authority. The ordinary meaning of the word "confer", as used in Article 1.1(b), bears this out. "Confer" means, *inter alia*, "give", "grant" or "bestow". The use of the past participle

"conferred" in the passive form, in conjunction with the word "thereby", naturally calls for an inquiry into *what was conferred on the recipient*.⁵⁰²

In order to determine whether a benefit was conferred in accordance with Article 1.1(b), MOFCOM was required to inquire into what was conferred on the recipient (i.e. whether the financial contribution conferred on the recipient some form of advantage), and thereby made "the recipient 'better off' than it would otherwise have been, absent that contribution."⁵⁰³ It is implicit in the Appellate Body's reasoning that the recipient in question must be a "person, natural or legal, or group of persons" that is not an emanation or arm of the government. The framework established by Article 1.1(b) necessarily requires two participants, being the government, and a recipient, which must necessarily have an identity separate to the government. It is a necessary corollary of the Appellate Body's reasoning as set out above, that this framework cannot apply to a situation in which one government agency provides funds to another.

411. As Australia will set out below, MOFCOM had the necessary information on the record to determine that the SRWUI Program and the overwhelming majority of payments under the VAIJ Fund, did not confer a benefit.⁵⁰⁴ The evidence on the record clearly demonstrated that the SRWUI Program was an intra-governmental arrangement between the Australian Government and the governments of the states and territories and did not confer a benefit on any *recipient*.⁵⁰⁵ Under the VAIJ Fund during the POI, an overwhelming majority of funds were distributed from the Victorian state government to local councils.⁵⁰⁶ In both of these programs, no "person, natural or legal, or [...] group of persons [other than government entities] [...] in fact received something."⁵⁰⁷

412. There was no "recipient" in each instance, and as such, no "benefit" could have been "conferred" within the meaning of Article 1.1(b). In making a determination to the contrary in

⁵⁰² Appellate Body Report, *Canada – Aircraft*, para. 154. (footnotes omitted, emphasis original)

⁵⁰³ See above, section III.A.2. See Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, paras. 635–636, 662, and 690.

⁵⁰⁴ See section III.D.2(a).

⁵⁰⁵ As explained at section. III.A.2, the term "recipient" for the purposes of Article 1.1(b) of the SCM Agreement cannot be understood to include government agencies.

⁵⁰⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215. During the POI, one payment of AUD 0.25 million was provided to the Wimmera Development Association to conduct a study to explore the opportunities for a Networked Grains Centre of Excellence. The Wimmera Development Association did not produce or export barley to China during the POI, or at any other time.

⁵⁰⁷ See above, section III.A.1.

respect of each program, MOFCOM acted inconsistently with Article 1.1(b) of the SCM Agreement.

(c) Barley producers did not receive any benefit

413. A benefit can only be conferred within the meaning of Article 1.1(b) if a financial contribution is made available on terms more favourable than the recipient could have obtained on the market. This necessarily means that the financial contribution must have first been obtained by a relevant recipient. This was not the case in relation to any of the three programs at issue.

414. *First*, the alleged financial contribution MOFCOM found with respect to the SRWUI Program was made to state and territory governments, not to enterprises or industries nor to barley producers or traders in Australia.⁵⁰⁸ *Second*, the alleged financial contributions as part of the SARMS Program were made to irrigators in specified industries that did *not* include dryland agriculture, of which barley production is a part.⁵⁰⁹ *Third*, the alleged financial contributions as part of the VAIJ Fund were made to state government agencies or local councils, with one payment made to Wimmera Development Association – an entity that during the POI did not, nor has it ever, engaged in the production or exportation of barley.⁵¹⁰

415. Australia observes that MOFCOM made a specific determination that GrainCorp, an interested party and barley exporter, received funding via the VAIJ Fund.⁵¹¹ GrainCorp is listed as an approved recipient from the VAIJ Fund in the Australian Government's questionnaire response. However, this funding was approved in April 2016, prior to the POI. Moreover, the Australian Government provided MOFCOM with updated evidence during the investigation explaining that GrainCorp had not accepted the funds allocated because the proposed project did not go ahead and as a result, the payment of the grant was not made to GrainCorp.⁵¹² MOFCOM acknowledged receiving this information,⁵¹³ but chose not to consider it, finding

⁵⁰⁸ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-6.

⁵⁰⁹ SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)), pp. 6-8.

⁵¹⁰ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁵¹¹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

⁵¹² Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 22 and Attachments 1 and 2.

⁵¹³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 12.

that, "[i]n comments disclosed before the final ruling, the Australian Government provided an update that GrainCorp did not accept the Fund, but no evidence was attached."⁵¹⁴

416. No further explanation was given by MOFCOM as to how the detailed submission provided by the Australian Government did not amount to evidence for the purposes of this investigation. Nor did MOFCOM request additional evidence or seek further clarification of the information provided. Despite clear advice provided to MOFCOM that not only was the funding to GrainCorp approved outside of the POI, but that GrainCorp did not receive those allocated funds and no payments were made by the Victorian Government, MOFCOM determined that a financial contribution had been provided which conferred a benefit. This was directly contradicted by the evidence on the record.

417. The record before MOFCOM demonstrated that no member of the barley industry in Australia obtained a financial contribution on *any* terms, let alone on terms more favourable than what would have been available on the market. On that basis, in making a determination that each program conferred a benefit, MOFCOM acted inconsistently with Article 1.1(b) of the SCM Agreement.

(d) Conclusion

418. MOFCOM's failure to properly characterise the alleged financial contributions necessarily meant that MOFCOM made an erroneous determination that a benefit was conferred. Furthermore, the record evidence demonstrated that there were no relevant "recipients", let alone recipients of a financial contribution which was made available on terms more favourable than what could have been obtained on the market. For the reasons set out above, China acted inconsistently with Article 1.1(b) of the SCM Agreement in respect of MOFCOM's determination that the financial contribution conferred a benefit for the three programs at issue.

⁵¹⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 12.

2. China acted inconsistently with Article 12.7 in relation to the use of facts available to determine benefit

(a) No necessary information was missing from the record

419. Australia submits that China acted inconsistently with Article 12.7 of the SCM Agreement as a result of MOFCOM's recourse to facts available to determine that a benefit was conferred in respect of the three programs. *First*, Australia submits that there was no "necessary" information missing from the record which was "required", in that it was indispensable or vital, for MOFCOM to determine whether a benefit was conferred on barley producers in Australia, within the meaning of Article 1.1(b) of the SCM Agreement. *Second*, the information MOFCOM alleged was not provided did not, in fact, exist and could not be provided. As such, the information was not "necessary" information within the meaning of Article 12.7. *Third*, MOFCOM failed to consider whether information which it alleged was submitted out of time was nonetheless submitted within a reasonable period. *Finally*, MOFCOM failed to notify interested parties it was making determinations on the basis of facts available.

420. Therefore, there was no proper basis for MOFCOM to conclude that the Australian Government, and Australian traders and producers, refused access to, or otherwise did not provide, necessary information within the meaning of Article 12.7 of the SCM Agreement.⁵¹⁵ In the absence of this proper basis, MOFCOM acted inconsistently with Article 12.7 in determining each program conferred a benefit on the basis of facts available.

i. Australian interested parties provided the necessary information to determine whether the programs conferred a benefit on producers or exporters of barley

421. As Australia will outline below, the Australian Government provided the necessary information to MOFCOM about the recipients of funds pursuant to each program to show that

⁵¹⁵ Based on the Countervailing Duties Final Determination, Australia does not understand the criterion of whether an interested party has significantly impeded an investigation to be relevant in the present case.

no benefit was conferred on Australian producers or traders of barley within the meaning of Article 1.1(b) of the SCM Agreement.

a. SRWUI Program

422. The Australian Government provided a complete questionnaire response fully detailing the recipients of funds, the amounts provided to each recipient, and the agreements governing the distribution of funds to recipients. This information was set out at section 2 of the Australian Government's questionnaire response.⁵¹⁶

423. Documents detailing the operation of the program and funding relationship between the Australian Government and state and territory governments were provided in response to question 3.⁵¹⁷ The recipients under the program were state and territory governments in Australia. The Australian Government's questionnaire response clearly stated that "the program is an arrangement between the Commonwealth and State Governments of Australia."⁵¹⁸ The supporting documentation states that the parties to the agreement are the "Commonwealth of Australia *and the participating Basin State Governments*."⁵¹⁹ The primary funding commitment under the program is as follows:

The Commonwealth will provide a total financial contribution to the participating Basin States of up to \$139.5 million from 2012-13 to 2019-20 in respect of this Agreement, through payments to the Basin States to support the reforms covered by this Agreement. [...] ⁵²⁰

424. In addition, financial records detailing the transfers of funds in each financial year from the Australian Government to the governments of the states and territories, being the recipients under the program, were set out in the "National Partnership Agreement on Implementing Water Reform in the Murray-Darling Basin – Commonwealth payments to Basin states".⁵²¹ The Australian Government made clear in responses to questions 4 to 6 and 9 to

⁵¹⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-8.

⁵¹⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 1.

⁵¹⁸ See Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-4 and 6.

⁵¹⁹ Australian Government, National Partnership Agreement on Implementing Water Reform in the Murray-Darling Basin, 5 June 2013 (pages renumbered) (Murray-Darling Basin Water Reform National Partnership Agreement) (Exhibit AUS-63), clause 6, p. 3. (emphasis added)

⁵²⁰ Murray-Darling Basin Water Reform National Partnership Agreement (Exhibit AUS-63), clause 27, p. 6.

⁵²¹ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 2.

11 regarding the SRWUI Program that this program "does not target or benefit the barley industry".⁵²²

b. SARMS Program

425. The Australian Government provided a complete questionnaire response explaining the structure of the program and attached financial records showing all recipients of funds, the amount received, the industry in which they operate, and the eligibility and selection criteria for the program.⁵²³

426. The questionnaire response explained the structure of the Program.⁵²⁴ With respect to the recipients of funds under the SARMS Program's 3IP – Irrigation Efficiency Investment Stream's four funding rounds, records showing the grant amounts paid to each individual recipient were attached to the Australian Government's questionnaire response. As requested by MOFCOM, these records also indicated the industries to which each recipient belongs. The data therein identified each recipient of grant funding by an "EOI number".⁵²⁵ The amounts provided to each recipient are clearly indicated in the row containing each applicant's name or application number.⁵²⁶ This evidence clearly demonstrated that none of the payments were received by the barley industry or barley producers.

c. VAIJ Fund

427. The Australian Government provided a comprehensive questionnaire response which incorporated detailed financial records showing all recipients of funds, the amounts received by each, and the eligibility and selection criteria for the program. It also clearly explained the structure and components of the program and the purposes to which funding under each component was to be applied.⁵²⁷

⁵²² Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-3.

⁵²³ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 162-171; SARMS Program, Grants Payments (Exhibit AUS-54 (BCI)); SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)); and SARMS Program, 3IP Guidelines, Round 1 (Exhibit AUS-51).

⁵²⁴ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 162-168.

⁵²⁵ SARMS Program, 3IP List of Approved Applicants (Exhibit AUS-56 (BCI)); 3IP Applicants by Industry (Exhibit AUS-55 (BCI)).

⁵²⁶ SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)); 3IP Applicants by Industry (Exhibit AUS-55 (BCI)).

⁵²⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 198.

428. Australia provided information in its questionnaire response, listing all recipients of funds provided from the VAIJ Fund for all years from 2015 to 2019-20.⁵²⁸ These records made clear that none of the payments made from the Fund were provided to barley producers or exporters. Indeed, as set out at section III.B.3 above, the evidence on the record makes clear that, of the AUD 17.44 million of payments made under this program during the POI, all but AUD 0.25 million were reallocations of funds within the Victorian Government or provision to local governments in Victoria.⁵²⁹ This evidence also clearly indicated that the balance of AUD 0.25 million was also not provided to producers or exporters of Australian barley.

ii. An interested party cannot refuse access to, or otherwise not provide, information which does not exist

429. MOFCOM determined that no known producer or trader of barley provided complete answers to the questionnaire.⁵³⁰ MOFCOM found that producers who supplied traders did not respond to the questionnaire. In addition, MOFCOM found that the Australian Government did not provide complete answers.⁵³¹

430. MOFCOM made these findings on the basis that the interested parties had not provided certain specific information. However, the information MOFCOM alleged was not provided did not, in fact, exist. An interested party cannot refuse access to, or otherwise not provide, information which does not exist. Information which does not exist, and is therefore impossible to produce, cannot be considered "necessary" within the meaning of Article 12.7 of the SCM Agreement.⁵³² As such, there was no proper basis for MOFCOM to assert that a failure to produce that information meant that interested parties "refuse[d] access to, or otherwise [did] not provide" the "necessary information" within the meaning of Article 12.7.

⁵²⁸ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁵²⁹ See section III.B.3 above, and Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 207-215. This figure was arrived at by adding together the amounts recorded in the "actual paid" column for all parts of the Fund, made between 1 October 2017 to 30 September 2018, to entities other than local and state government entities, as set out in the table in Australia's questionnaire response.

⁵³⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 6. See above, para. 381.

⁵³¹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7, 8, 9, 10 and 11.

⁵³² See above, Section II.A.3(b)iii.

431. In relation to benefit conferred, MOFCOM found that the Australian Government failed to provide application and approval documents under each program. For example, in relation to the VAIJ Fund, MOFCOM found that:

The Investigating Authority believed that, first, no Australian barley producer exporting the Investigated Product to China provided complete answers as required. The Investigating Authority was *not able to obtain the barley producers' application documents under this Program, approval documents by the Government, amount of subsidy obtained*, the cultivated area of barley, production quantity, sales quantity, sales destination and price. Second, the Australian Government reported the overall situation in the answers but did not, as required by the Investigating Authority, provide the *names, cultivated area, yield and amount of subsidy of producers applied for and obtained* during the investigation period under this Program.⁵³³ (emphasis added)

MOFCOM reached similar conclusions with respect to the SRWUI Program,⁵³⁴ and the SARMS Program.⁵³⁵

432. MOFCOM's dismissal of the Australian Government's evidence, with the rationale that documents relating to applications and approvals for funding to barley producers or traders under the alleged subsidies were not provided, was manifestly in error. MOFCOM has before it evidence that no barley producer or trader applied for funding under the VAIJ Fund, the SRWUI Program, or the SARMS Program.⁵³⁶ Hence, the documents were never brought into existence by any barley producer or trader and therefore cannot have been provided to MOFCOM by the Australian Government. As can be seen from the Australian Government's questionnaire response, detailed information about applicants and recipients of funds from the programs were provided to MOFCOM as requested and *where applicable*.⁵³⁷ If documents did not exist, the Australian Government could not, and therefore did not, provide them. This could have been confirmed had MOFCOM verified the information provided.

⁵³³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵³⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8, "The Investigating Authority was not able to obtain the barley producers' application documents under this Program".

⁵³⁵ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10, "The Investigating Authority was not able to obtain the barley producers' application documents under this Program".

⁵³⁶ The single exception to this is GrainCorp. GrainCorp did not receive any funding under the program as the funded project did not proceed. See Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 22.

⁵³⁷ See Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215, providing precise detail about the identity, purpose and amount of all funds applied for, approved and paid out, under this program.

433. In the circumstances of this case, the evidence submitted by the Australian Government clearly established that the programs at issue were not intended for, had not provided any financial contributions to, and had not conferred any benefits on Australian producers or traders of barley. The Australian Government provided evidence that no benefit had been conferred on Australian producers or traders of barley by providing complete lists of recipients of any of the programs.⁵³⁸ Thus, the *absence* of the information which MOFCOM claimed interested parties has not provided supported *negative* determinations under Article 1.1 of the SCM Agreement rather than recourse to facts available under Article 12.7.

*iii. MOFCOM failed to consider whether information
was provided within a reasonable period*

434. MOFCOM rejected certain questionnaire responses on the basis that they were submitted after the deadline.⁵³⁹ Article 12.7 of the SCM Agreement provides that an investigating authority may have recourse to facts available if an interested party refuses access to, or otherwise does not provide, necessary information *within a reasonable period*. Even if information is submitted after a deadline, but within a reasonable period, an investigating authority is not entitled to resort to facts available.⁵⁴⁰

435. MOFCOM did not consider whether, despite being submitted after the deadline, the questionnaire responses were submitted within a reasonable period. MOFCOM did not indicate in its Final Determination how many days lapsed between the deadline for submissions and the subsequent late submissions. Nor did MOFCOM indicate whether taking the late submissions into account would compromise its ability to conduct the investigation expeditiously. Given MOFCOM issued its Final Disclosure some 15 months after the deadline for questionnaires was set, it is implausible that it could not have taken into account the questionnaire responses from Louis Dreyfus, Bunge, Agracom and Riordan, despite the fact that they were provided after the deadline.

⁵³⁸ Water Reform National Partnership Agreement, Payments to Murray-Darling Basin States (Exhibit AUS-61), p. 1; SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)), pp. 1-9; SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)), pp. 1-9; and Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁵³⁹ The questionnaire responses at issue were from Louis Dreyfus, Bunge, Agracom and Riordan.

⁵⁴⁰ See Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 15.35. In relation to this issue in the context of Article 6.8 of the Anti-Dumping Agreement see also, Appellate Body Report, *US – Hot-Rolled Steel*, para. 89.

iv. *MOFCOM failed to notify interested parties it was making determinations on the basis of facts available*

436. MOFCOM failed to inform all interested parties that it considered "necessary information" was missing from the record, that it was not taking into account *any* information submitted by interested parties, and that it was making determinations on the basis of facts available.

437. After the questionnaires were issued to interested parties in January 2019, and certain parties made oral submissions in January and February 2019, MOFCOM had no further contact with any interested party until the Final Disclosure was issued 15 months later, in May 2020.

438. At no stage prior to May 2020 did MOFCOM inform interested parties that it considered their responses to be deficient, or that it was not taking their responses into account. Apart from the Final Disclosure, at which stage MOFCOM had already determined that countervailable subsidies existed, MOFCOM did not provide interested parties with any opportunity to provide further explanations with respect to the alleged deficiencies. MOFCOM failed to afford interested parties any due process with respect to its decision to disregard their submitted information.

v. *Conclusion*

439. A benefit cannot exist in the abstract. It must be conferred on a recipient. In order for an investigating authority to impose countervailing duties, it must, *inter alia*, show that the benefit was "conferred" on a relevant recipient. The information provided by the Australian Government clearly demonstrated that no barley producers or exporters received a benefit within the meaning of Article 1.1(b) pursuant to any of the three programs, let alone the particular traders and producers subject to MOFCOM's investigation. MOFCOM's contention that a failure to provide application and approval documents under each program amounts to necessary information missing from the record has no merit because information which does not exist and therefore cannot be produced – such as applications for a subsidy which were never made – cannot be "necessary" information within the meaning of

Article 12.7. In addition, MOFCOM rejected certain information as being submitted after the deadline without considering if it was, nonetheless, submitted in a reasonable time, and failed to notify the Australian Government and other interested parties that despite their submission of complete questionnaire responses, it was making determinations on the basis of facts available. On that basis, there was no necessary information missing from the record and there was no proper basis for MOFCOM to resort to facts available in order to determine whether a benefit was conferred.

440. Accordingly, the conditions for MOFCOM to resort to facts available in order to determine whether a benefit had been conferred were not met, and therefore China acted inconsistently with Article 12.7 of the SCM Agreement.

(b) MOFCOM failed to select a reasonable replacement for the allegedly missing necessary information

441. Assuming, *arguendo*, that MOFCOM was entitled to resort to facts available, Australia submits that China acted inconsistently with Article 12.7 of the SCM Agreement by failing to select a reasonable replacement for the allegedly missing information necessary to make a determination as to whether a benefit was conferred under each program. A financial contribution will confer a benefit when it is made on terms that are more favourable than the recipient could have obtained on the market. An investigating authority must apply this standard *regardless* of the evidence on which it relies.⁵⁴¹ As such, MOFCOM was required to comply with Article 1.1(b) even if it was making a determination on the basis of facts available.

442. In accordance with Article 12.7 of the SCM Agreement, an investigating authority is obliged to take into account all facts on the record, even if it considers that those facts may not be complete. MOFCOM failed to do so. Specifically, there is no evidence that MOFCOM undertook a process of reasoning or evaluation when determining the amount of the benefit conferred under each program. MOFCOM erroneously disregarded all evidence on the record provided by Australian interested parties in relation to benefit on the basis that certain information (which did not exist and therefore could not be produced) was not provided,⁵⁴²

⁵⁴¹ The panel in *Japan – DRAMs (Korea)* found that there are no provisions in the SCM Agreement regarding the precise nature of the evidence on which an investigation authority must rely. (Panel Report, *Japan – DRAMs (Korea)*, para. 7.275.)

⁵⁴² See Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8, 10, and 11.

and then arbitrarily excluded from consideration relevant evidence on the record in making a highly selective and entirely inaccurate replacement for the allegedly missing necessary information. As a result, the ascertained subsidy margin of 6.9% clearly had no logical connection with the facts on the record. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement.

i. SRWUI Program

443. MOFCOM determined that, pursuant to the SRWUI Program, the Australian Government provided a subsidy in the amount of AUD 10 billion. In its Final Determination, MOFCOM observed:

(I) Sustainable rural water use and infrastructure program

The Applicant claimed that the Program is a national plan worth AUD 10 billion consisting of three main components: the irrigation infrastructure program, the purchase of water and supply measures. Most funds for infrastructure were spent on projects in the Murray-Darling Basin for the implementation of the "Basin Plan". An essential purpose of the Program is to help agricultural irrigators improve water-use efficiency.

1. Financial contribution.

The Program was developed by the Federal Government of Australia and implemented jointly by the federal and state governments. It provides financial support for the irrigation infrastructure program and the purchase and supply of water for agricultural production and to improve agricultural competitiveness. [...] The Investigating Authority determined that the subsidy under this Program constituted the financial contribution.⁵⁴³

444. In determining the amount of the subsidy, MOFCOM observed simply:

According to the application, the amount of subsidy for the Program is AUD 10 billion. The Investigating Authority determined that the amount of subsidy under this Program was AUD 10 billion [...].⁵⁴⁴

445. MOFCOM did not indicate the evidentiary basis for its determination. The only document on the record referring to an amount of AUD 10 billion in connection with the SRWUI Program was Australia's notification to the WTO Committee on Subsidies and

⁵⁴³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 7.

⁵⁴⁴ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9.

Countervailing Measures of 16 May 2018 ("Committee Notification"),⁵⁴⁵ an extract of which was annexed to the CICC Application.⁵⁴⁶

446. The Committee Notification was created to meet Australia's transparency obligations in relation to a particular two-year period. It was not produced for the purpose of responding to MOFCOM's investigation. For this reason, it was provided to the Committee "without prejudice" to Australia's interests in any dispute settlement proceedings. Australia maintains the position that the payments during the POI were made exclusively to state and territory governments. Even if it had been appropriate to prefer the Committee Notification to the Australian Government's questionnaire response, it was not a reasonable replacement for the allegedly missing information.

447. If MOFCOM had properly considered the Committee Notification, it would have observed the following. The Committee Notification explained that the SRWUI Program "consists of three main components: irrigation infrastructure projects (including those projects listed below); water purchase and supply measures",⁵⁴⁷ the combined total budget of which was AUD 10 billion.⁵⁴⁸ The Committee Notification covered financial years 2015-16 and 2016-17 (i.e. a period ending 30 June 2017).

448. MOFCOM's selection of replacement facts from the Committee Notification was highly selective and had no logical connection with the facts on the record. *First*, the period covered by the Committee Notification did not overlap with the POI. MOFCOM did not explain why, notwithstanding the fact that the Committee Notification covered a separate period, the information contained therein was nonetheless a reasonable replacement.

⁵⁴⁵ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS. Australia recalls that Committee Notifications are provided to the WTO Committee on Subsidies and Countervailing Measures on a "without prejudice" basis, i.e. "without prejudice to the legal status, effects or nature of the measures under the WTO Agreement". Australia notes that MOFCOM has placed substantial weight on selective information in the notification, while ignoring other aspects of the evidence set out therein.

⁵⁴⁶ See CICC Application for Countervailing Duties Investigation, All Annexes (English translation) (pages renumbered) (CICC Application for Countervailing Duties Investigation, Annexes) (Exhibit AUS-64), Annex VIII. While MOFCOM's determination is unclear in this regard, Australia assumes this document to be the basis of CICC's allegations on which MOFCOM subsequently relied.

⁵⁴⁷ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS p. 11.

⁵⁴⁸ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 11.

449. *Second*, notwithstanding that the Committee Notification did not cover the POI and therefore could not have been a reasonable replacement, MOFCOM used the notification to assess the cost to government, rather than a benefit actually received by recipients. The Appellate Body has explained that the quantum of the benefit must be calculated by assessing the benefit that is actually received by a recipient, and not merely by assessing the cost to the government.⁵⁴⁹ In selecting a reasonable replacement for the missing necessary information, MOFCOM should have considered the actual amount reported to have been spent during the POI, whether the nature of the subsidy was such that it should be expensed rather than allocated, and if so, over what period; rather than a budgeted amount. Budgeted amounts indicate an allocation or estimate of the total funding required by or made available to a program, but do not have any probative value when seeking to establish the quantum of funds that were in fact dispersed to a recipient, pursuant to a particular program, during the relevant period of time.

450. While the Committee Notification states that AUD 10 billion was budgeted for the entire SRWUI Program, this figure represents the combined total budget for all three components of the Program over its eight-year duration. Only one of those projects, the irrigation infrastructure component, was relevant to MOFCOM's investigation.

451. The irrigation infrastructure component was composed of nine sub-programs.⁵⁵⁰ Further examination would have revealed that six of the nine sub-programs (programs (iii)-(iix) in the Committee Notification) involved transfers of funds between the Australian Government and state and territory governments only.⁵⁵¹ Only the remaining three sub-programs saw grant funding provided to irrigation infrastructure operators, local service providers or individual irrigators, i.e. to non-government recipients. In particular, these sub-programs related to the funding arrangements under the Private Irrigation Infrastructure

⁵⁴⁹ Appellate Body Report, *Canada – Aircraft*, para. 154.

⁵⁵⁰ Budget allocations and actual amounts spent during the 2015 – 16 and 2016 – 17 financial years are provided in the Committee Notification in sections describing each sub-project. Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, pp. 11-19.

⁵⁵¹ This fact was confirmed in the Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-3, and other correspondence with MOFCOM during the investigation (Australian Government Comments on Countervailing Duties Disclosure (Exhibit AUS-59), para. 18.)

Operators Program for New South Wales ("PIOP-NSW"), the Private Irrigation Infrastructure Program for South Australia ("PIPSA") and the On-Farm Irrigation Efficiency Project (OFIEP).⁵⁵²

452. If MOFCOM had properly considered the evidence on the record regarding the actual funds spent in relation to the three relevant sub-programs over the 2015-16 and 2016-17 financial years, it would have found that AUD 195 million was spent pursuant to PIOP-NSW,⁵⁵³ AUD 0.5 million was spent pursuant to PIPSA,⁵⁵⁴ and AUD 140.2 million was spent pursuant to the OFIEP.⁵⁵⁵ Hence, the total actual expenditure for these sub-programs across this period was AUD 335.7 million.⁵⁵⁶ In this light, MOFCOM's selection of AUD 10 billion completely disregards the relevant evidence on the record, and constitutes an arbitrary selection of "replacement facts". This figure clearly could *not* provide a reasonable replacement for the information that MOFCOM alleged was missing.

453. Moreover, the evidence showed that none of the AUD 335.7 million of dispersed funds were provided to barley producers or exporters. The Australian Government explained in its submission in response to the Final Disclosure that:

The AUD 10 billion budget for this program does not relate to actual funding under the particular sub-programs but is the overarching envelope of funding available to State and Territory governments for sub-programs. As noted previously, no funding was provided directly to any Australian barley producer under this program.⁵⁵⁷

454. Furthermore, MOFCOM's method of calculating the benefit demonstrated it did not engage in a process of reasoning and evaluation in order to arrive at an accurate determination of subsidisation. MOFCOM did so without properly examining whether the alleged benefits of the subsidies were recurring or non-recurring. The Final Determination provides that MOFCOM:

[D]etermined the amount of subsidy under this Program was AUD 10 billion and calculated the amount of benefit during the investigation period based on the 10-year amortization

⁵⁵² ANNEX A sets out the funding allocated for the nine sub-projects, and the amount actually spent, including the recipients of that funding.

⁵⁵³ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 11.

⁵⁵⁴ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 12.

⁵⁵⁵ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 19.

⁵⁵⁶ This being the sum of the actual expenditure figures under the three sub-programs referred to.

⁵⁵⁷ Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 18.

term. The Investigating Authority calculated the amount of subsidy received by the barley industry based on the proportion of the cultivated area of barley to the total crop area in 2017-2018, then calculated the amount of subsidy per unit weight of barley based on the total national output of barley, and finally calculated the ad valorem subsidy rate of the Investigated Product, which is 5.82%, based on the CIF weighted average export price during the investigation period by China Customs.⁵⁵⁸

455. MOFCOM proceeded on the assumption that all barley production in Australia should be treated as benefiting from this program without referring to any evidence on the record to support that conclusion and without evaluating all evidence on the record, including evidence which precluded that conclusion. This included the evidence submitted by the interested parties which established that because barley is not produced with the aid of irrigation in Australia, funding for irrigation infrastructure cannot be understood to benefit its production.⁵⁵⁹

456. Instead, MOFCOM purported to quantify the benefit conferred by allocating it by proportion of the "total crop area in 2017-18" that was devoted to the cultivation of barley.⁵⁶⁰ MOFCOM failed to explain how it arrived at its final ad valorem figure. MOFCOM stated that it employed a "10-year amortization term". MOFCOM did not indicate how it arrived at this amortization term and on what basis this was selected. Nor did MOFCOM examine whether the subsidy was recurring, nor whether it ought properly to be expensed. Next, MOFCOM assumed that the amount of AUD 10 billion was received by all crop producers in proportion to the amount of land they had cultivated. This can be seen in MOFCOM's explanation that it "calculated the amount of subsidy received by the barley industry based on the proportion of the cultivated area of barley to the total crop area in 2017-2018".⁵⁶¹

457. Once again, MOFCOM failed to explain how this approach was reasonable in light of the reality of the structure of the grants provided under SRWUI Program, as clearly established in the evidence on the record. Nor did MOFCOM explain how its approach was supported by the evidence on the record, including the Committee Notification adduced by CICC. MOFCOM then divided this arbitrary and inaccurate allocation by the total volume of barley produced in

⁵⁵⁸ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9.

⁵⁵⁹ See evidence provided Grain Trade Australia, Grains Industry Market Access Forum, GrainCorp, CBH, Grain Producers Australia and the Australian Government to the effect that barley is not produced with the aid of artificial irrigation in Australia above at fn 481.

⁵⁶⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

⁵⁶¹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

Australia in the 2017-18 financial year to achieve a benefit rate per unit of weight of barley produced. The premise of MOFCOM's calculation was that all barley produced in Australia benefited uniformly without any evidential support and ignored evidence on the record that none of the producers received any funding under this program.⁵⁶² It was presumed that the programs required a method of attributing the subsidy over an arbitrarily selected period rather than examining whether the subsidy was recurring or non-recurring and whether the payments needed to be expensed.

458. As such, an evaluation of the facts on the record reveals that the subsidy amount of AUD 10 billion was entirely incorrect, not related to the POI, lacking in any factual foundation, and in no way provided a reasonable replacement for the information MOFCOM purports was missing. There is no connection between the subsidy amount MOFCOM selected and the information MOFCOM purported was missing. Had MOFCOM undertaken a proper process of evaluation or reasoning of the facts on the record, it could not have determined that AUD 10 billion was a reasonable replacement for the necessary information that it alleged to be missing.

459. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement as a result of MOFCOM failing to select a reasonable replacement for the allegedly missing necessary information in order to arrive at an accurate determination of subsidisation.

ii. SARMS Program

460. MOFCOM determined that pursuant to the SARMS Program's 3IP – Irrigation Efficiency Investment Stream, the Government of South Australia provided a subsidy in the amount of AUD 65 million. In its Final Determination, MOFCOM stated:

(II) South Australian River Murray Sustainability Program-Irrigation Efficiency Element

The Applicant claimed that the Australian Government was funding the Irrigation Efficiency Element under the Program. The Irrigation Efficiency Element aims to increase the efficiency of water supply and use by irrigators in South Australia and ensure a long-term average annual yield of water of approximately 16.8 gigabit litres for the federal environment.

⁵⁶² See, for example, CBH Comments on Countervailing Duties Final Disclosure (Exhibit AUS-58), p. 4.

1. Financial contribution

The Government of South Australia was funding agriculture to improve water irrigation efficiency and the productivity of agribusinesses. [...] The Investigating Authority determined that the subsidy under this Program provided by the Government of South Australia constituted the financial contribution.⁵⁶³

461. In determining the amount of the subsidy, MOFCOM observed simply that:

The Investigating Authority, regard[ed] the budget of AUD 65 million of the Program in 2017-2018 provided in the answers as the subsidy for the Program [...]⁵⁶⁴

462. MOFCOM did not indicate the evidentiary basis for its determination, only that this amount was "provided in the answers". Australia notes that the Australian Government's questionnaire response listed the funding for this program in the 2017-18 financial year as AUD 65 million.⁵⁶⁵

463. MOFCOM's selection of replacement facts from the questionnaire response was highly selective. MOFCOM arbitrarily excluded from consideration all other information provided by the Australian Government.⁵⁶⁶ Most notably, MOFCOM arbitrarily excluded from consideration the evidence that "no barley industry entities were funded under this program".⁵⁶⁷ The list of applicants, provided as an attachment, clearly showed that the barley industry did not receive a benefit under the program.

464. In addition, and as made clear in the Australian Government's questionnaire response, the amount of AUD 65 million represents the total program budget for the entire SARMS Program for the 2017-18 financial year, spread across the two sub-programs and the administrative costs of the program.⁵⁶⁸ Moreover, evidence provided by the Australian Government further established that, during the 2017-18 financial year,

⁵⁶³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

⁵⁶⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

⁵⁶⁵ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 165. This amount was for the 2017 – 2018 financial year, which is 1 July 2017 to 30 June 2018. This period does not align with the POI. This is yet another example of how MOFCOM's selection of facts has no factual foundation, or connection with the allegedly missing necessary information.

⁵⁶⁶ See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293).

⁵⁶⁷ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 163. The list of applicants under the program was provided as an attachment. (See SARMS Program, 3IP List of Approved Applicants (Exhibit AUS-56 (BCI)).)

⁵⁶⁸ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 165 (see row six of the table, labelled "Funding"); SARMS Program, 3IP Guidelines, Round 1 (Exhibit AUS-51), p. 7.

[[REDACTED]] was actually provided to grant recipients pursuant to all three of the 3IP investment streams.⁵⁶⁹ On this basis, it is evident that the amount of funding actually provided to grant recipients pursuant to the fourth round of funding under one of those three 3IP investment streams, the Irrigation Efficiency Investment Stream, would have been significantly less. The amount of AUD 65 million clearly was not a reasonable replacement for the necessary information that MOFCOM considered was not provided.

465. Furthermore, MOFCOM's method of calculating the benefit demonstrated it did not engage in a process of reasoning and evaluation in order to arrive at an accurate determination of subsidisation. MOFCOM determined that:

The Investigating Authority, regarding the budget of AUD 65 million of the Program in 2017-2018 provided in the answers as the subsidy for the Program, calculated the amount of subsidy received by the barley industry based on the proportion of the cultivated area of barley to the total crop area in South Australia in 2017-2018, then calculated the amount of subsidy per unit weight of barley based on the total national output of barley, and finally calculated the ad valorem subsidy rate of the Investigated Product, which is 0.52%, based on the CIF weighted average export price during the investigation period by China Customs.⁵⁷⁰

466. MOFCOM proceeded on the basis that all barley production in South Australia should be treated as benefiting from this program without evaluating all evidence on the record, including evidence which provided that because barley is not produced with the aid of artificial irrigation in Australia, funding for irrigation infrastructure cannot be understood to benefit its production.⁵⁷¹

467. Instead, MOFCOM purported to quantify the benefit conferred by allocating it by proportion of the "cultivated area of barley to the total crop area in South Australia in 2017-18".⁵⁷² MOFCOM failed to explain how it arrived at its final ad valorem figure. MOFCOM assumed that the alleged financial contribution of AUD 65 million was received by all

⁵⁶⁹ SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)), pp. 6-8.

⁵⁷⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵⁷¹ See above, fn 481 for evidence provided by Grain Trade Australia, Grains Industry Market Access Forum, GrainCorp, CBH, Grain Producers Australia and the Australian Government to the effect that barley is not produced with the aid of artificial irrigation in Australia. Further, the Australian Government questionnaire response explained that the purpose of the program was to return 40 gigalitres of water to the River Murray to improve environmental health, "which is achieved through less water being supplied to the agricultural sector". (Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 164.) Australia's response also made clear that "[t]here is negligible, if any, barley crop grown under irrigation in South Australia." (Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 162.)

⁵⁷² Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

producers of barley in proportion to the amount of land each devoted to barley production. MOFCOM stated that it "calculated the amount of subsidy per unit weight of barley based on the total national output of barley".⁵⁷³

468. The premise of MOFCOM's calculations was that barley was the only crop cultivated in South Australia that was benefiting from the alleged subsidy, and that all barley produced in South Australia benefited uniformly. MOFCOM did not undertake an evaluation of the evidence on the record that would support these conclusions. Had it done so, it would have found that no such evidence existed. On the basis of the evidence on the record, which was sufficient to determine whether a benefit was conferred, MOFCOM could not have determined that any barley producers received a benefit, let alone that all barley producers benefitted uniformly.

469. An evaluation of the facts on the record reveals that the subsidy amount of AUD 65 million is entirely incorrect, with no factual foundation, and in no way provided a reasonable replacement for the information MOFCOM purports was missing. There is no logical connection between the subsidy amount MOFCOM selected and the information MOFCOM purported was missing. Had MOFCOM undertaken a process of evaluation or reasoning of the facts on the record, rather than arbitrarily excluding this information from consideration, it could not have determined that AUD 65 million was a reasonable replacement for the necessary information that it alleged to be missing. On the basis of the foregoing, China acted inconsistently with Article 12.7 of the SCM Agreement by failing to select a reasonable replacement for the missing necessary information in order to arrive at an accurate determination of subsidisation.

iii. VAIJ Fund

470. MOFCOM determined the amount of the VAIJ Fund subsidy to be AUD 66.84 million. MOFCOM stated:

(III) Agriculture infrastructure and Jobs Fund-Victoria

The Applicant claimed that in 2016, the Government of the State of Victoria provided AUD 200 million as the Agriculture Infrastructure and Jobs Fund, aiming at improving the

⁵⁷³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

performance and resilience of farmers and agricultural sectors. The Fund plays an essential role in government-driven economic growth. Funding in the infrastructure and agricultural supply chain can improve productivity, increase exports, reduce costs and ensure the competitiveness of farmers, enterprises and industries in Victoria.

1. Financial contribution

The Government of the State of Victoria provides financial support for agriculture to promote economic growth, create jobs, increase productivity, reduce costs, improve access to markets and promote exports. [...] The Investigating Authority determined that the subsidy under this Program provided by the Government of the State of Victoria constituted the financial contribution.⁵⁷⁴

471. In determining the amount of the alleged subsidy, MOFCOM observed simply:

The Investigating Authority, regard[ed] the budget of AUD 66.84 million of the Program in 2017-2018 provided in the answers as the subsidy for the Program [...].⁵⁷⁵

472. MOFCOM did not indicate the evidentiary basis for its determination. Australia notes that the Australian Government questionnaire response listed the funding for this program in the 2017-18 financial year as AUD 66.84 million.⁵⁷⁶

473. MOFCOM's selection of replacement facts was arbitrary and excluded from consideration relevant facts on the record. MOFCOM failed to undertake any analysis in relation to the structure of the VAIJ Fund, examine the receipts of the funding, or confine its consideration to funds actually dispersed within the POI.

474. As indicated by the information on the record,⁵⁷⁷ funds were distributed from the VAIJ Fund over a number of years. In order to ensure that its assessment related only to funds allocated to the relevant time period, MOFCOM could have assessed the amounts actually paid *in that period*.⁵⁷⁸ Specifically, evidence provided by the Australian Government confirmed that of the AUD 17.44 million of payments made pursuant to this program during the POI, all but AUD 0.25 million were reallocations of funds within the Victorian Government or

⁵⁷⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.

⁵⁷⁵ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵⁷⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 203.

⁵⁷⁷ See detail above in section III.B.3.

⁵⁷⁸ See list of amounts actually dispersed included in Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

provisions to local governments in Victoria.⁵⁷⁹ This evidence also clearly indicated that the balance of AUD 0.25 million was also not provided to producers or exporters of Australian barley.⁵⁸⁰

475. Accordingly, the evidence on the record before MOFCOM established that no barley producer or exporter received funding pursuant to the VAIJ Fund.⁵⁸¹ This fact was also clear from an examination of the complete list of all funding recipients provided to MOFCOM in the course of its investigation.⁵⁸² In spite of this, MOFCOM determined that the total program budget for the 2017-18 financial year of AUD 66.84 million was a reasonable replacement for the necessary information that it alleged to be missing. As the foregoing demonstrates, no information necessary for MOFCOM to make its determination was missing from the record and, even if such information had been missing, the figure selected by MOFCOM was clearly not a "reasonable replacement".

476. Furthermore, MOFCOM's method of calculating the benefit demonstrated it did not engage in a process of reasoning and evaluation in order to arrive at an accurate determination. MOFCOM determined that:

The Investigating Authority, regarding the budget of AUD 66.84 million of the Program in 2017-2018 provided in the answers as the subsidy for the Program, calculated the amount of subsidy received by the barley industry based on the proportion of the cultivated area of barley to the total crop area in the State of Victoria in 2017-2018, then calculated the amount of subsidy per unit weight of barley based on the total national output of barley, and finally calculated the ad valorem subsidy rate of the Investigated Product, which is 0.56%, based on the CIF weighted average export price during the investigation period by China Customs.⁵⁸³

⁵⁷⁹ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215. This figure was arrived at by adding together the amounts recorded in the "actual paid" column for all parts of the Fund, made between 1 October 2017 to 30 September 2018, to entities other than local and state government entities, as set out in the table in Australia's questionnaire response.

⁵⁸⁰ This payment was provided to the Wimmera Development Association, which does not produce or trade barley, to conduct a study to explore the opportunities for a Networked Grains Centre of Excellence. See Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210.

⁵⁸¹ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 198-200 and 205-206. MOFCOM identified GrainCorp, an interested party and barley exporter, as a recipient of funding from the VAIJ Fund. Indeed, GrainCorp is listed as an approved grant recipient in Australia's questionnaire response. However, this funding was approved in April 2016, prior to the period of investigation. More importantly, Australia provided MOFCOM with updated evidence during the investigation, explaining that GrainCorp had not in fact accepted the funds allocated as the funded project did not go ahead. (Australian Government Comments on Final CVD Disclosure (Exhibit AUS-59), para. 22 and Attachments 1 and 2). MOFCOM acknowledged receiving this information, but failed to take into account this evidence on the record in selecting a reasonable replacement for the missing necessary information.

⁵⁸² Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215.

⁵⁸³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

477. MOFCOM proceeded on the basis that all barley production in Victoria should be treated as benefiting from this program without evaluating all evidence on the record, including evidence showing that no expenditure under the program was provided to barley producers.

478. Instead of basing its calculation on funds actually spent during the relevant period, MOFCOM purported to quantify the benefit conferred by allocating it by proportion of the "cultivated area of barley to the total crop area in the State of Victoria in 2017-2018".⁵⁸⁴ MOFCOM failed to explain how it arrived at its final ad valorem figure. MOFCOM assumed that the alleged financial contribution of AUD 66.84 million was received by all producers of barley in proportion to the amount of land each devoted to barley production.⁵⁸⁵ This assumption by MOFCOM had no relationship to the reality of the recipients of the grants provided by the VAIJ Fund and had no logical connection with the facts on the record. It assumed that the funds were evenly distributed by area of land cultivated for crops but in so doing failed to consider the eligibility criteria for the various components of the scheme as explained in the Australian Government's questionnaire response.⁵⁸⁶

479. MOFCOM also failed to explain the next step in its calculation other than opaquely to observe that it "then calculated the amount of subsidy per unit weight of barley based on the total national output of barley".⁵⁸⁷ MOFCOM assumed that all barley produced in Victoria benefited uniformly without any evaluation of the facts on the record. MOFCOM also failed to explain how the "national output" is relevant given the assessment appears to be concerned with the output of the State of Victoria, rather than that of Australia as a whole.

480. An evaluation of the facts on the record reveals that the subsidy amount of AUD 66.84 million is entirely incorrect, with no factual foundation, and in no way provides a reasonable replacement for the information MOFCOM purports was missing. There is no connection between the subsidy amount MOFCOM selected and the information MOFCOM purported was missing. Even if barley producers or exporters did receive funding under this program, which Australia has made clear they did not, it could not possibly be in the amount

⁵⁸⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵⁸⁵ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵⁸⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 205.

⁵⁸⁷ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

of AUD 66.84 million. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement as a result of MOFCOM failing to select a reasonable replacement for the necessary information that it alleged to be missing in order to arrive at an accurate determination of subsidisation.

(c) Conclusion

481. Australia submits that there was no necessary information missing from the record. The Australian Government provided all necessary information to determine whether a benefit was conferred. To the extent that MOFCOM found there to be information missing, it was not "necessary" information within the meaning of Article 12.7 of the SCM Agreement. As the requirements in Article 12.7 were not met, there was no proper basis for MOFCOM to have recourse to facts available in its determination of benefit. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement in relation to MOFCOM's determination that the programs conferred a benefit on the basis of facts available.

482. Furthermore, MOFCOM failed to conduct the requisite process of reasoning and evaluation in selecting a reasonable replacement for the allegedly missing necessary information. MOFCOM's determination that a benefit was conferred on Australian producers or traders of barley had no logical connection with the facts on the record. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement in MOFCOM's selection of facts available.

3. Conclusion

483. MOFCOM determined that a benefit was conferred despite the clear evidence on the record that there were no relevant "recipients" within or any "advantage" to the barley industry. A benefit cannot be conferred in the abstract, yet this is precisely the determination that MOFCOM made. On that basis, China acted inconsistently with Article 1.1(b) of the SCM Agreement.

484. Furthermore, there was no necessary information missing from record in order for MOFCOM to determine whether a benefit was conferred. MOFCOM failed to consider whether certain responses were submitted in a reasonable time, and failed to notify interested parties that the determination of benefit was being made on the basis of facts

available. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement as the conditions for MOFCOM to resort to facts available were not met. In relation to MOFCOM's selection of facts, it failed to take into account the questionnaire responses from the Australian Government and interested parties. It was obliged to do so, even if it considered those responses were incomplete. As a result, MOFCOM failed to undertake a process of reasoning or evaluation of all information before it in order to arrive at an accurate determination of benefit. On that basis, China acted inconsistently with Article 12.7 of the SCM Agreement.

E. CHINA FAILED TO PROPERLY DETERMINE IF THE ALLEGED SUBSIDIES WERE SPECIFIC

485. Australia submits that China acted inconsistently with Articles 1.2, 2.1, 2.4 and 12.7 of the SCM Agreement in relation to MOFCOM's determination that the alleged subsidies were specific.

486. *First*, Australia submits that in determining that the alleged subsidies were specific, MOFCOM acted inconsistently with Article 2.1 by failing to undertake the structured analysis of the evidence on the record required by that provision. In so doing MOFCOM also failed to substantiate its findings on the basis of positive evidence as required by Article 2.4. *Second*, Australia submits that MOFCOM acted inconsistently with Article 12.7 by having recourse to facts available in order to determine specificity because there was no necessary information missing from the record. *Third*, Australia submits that MOFCOM acted inconsistently with Article 12.7 by failing to select a reasonable replacement for the allegedly missing necessary information.

1. MOFCOM failed to determine specificity consistent with Articles 2.1 and 2.4 of the SCM Agreement

487. China failed to make determinations of specificity consistent with Articles 2.1 and 2.4 of the SCM Agreement. MOFCOM failed to undertake the structured analysis of the evidence on the record as required by Article 2.1 and in so doing failed to substantiate its findings on the basis of positive evidence. Australia will address MOFCOM's errors with its assessments of each of the programs at issue below.

(a) SRWUI Program

488. In relation to the SRWUI Program MOFCOM concluded that:

The evidence suggests that the Australian Government gives priority to agriculture and that the Program serves the agriculture, aiming at expanding irrigated areas, improving rural water-use efficiency, developing agriculture in a sustainable manner and enhancing the agricultural competitiveness. As the top three crops in Australia, wheat, barley and rape accounted for about 80% of all crops in terms of the cultivated area, yield and output value in 2017-2018. The Investigating Authority shall have the reason to suspect that the barley industry is a major user of the funds.⁵⁸⁸

489. This analysis does not conform to the principles governing an assessment of specificity set out in Article 2.1 of the SCM Agreement. As a starting point, MOFCOM completely failed to undertake any assessment or reach any determination of whether the alleged subsidy programs at issue were *de jure* specific under Article 2.1(a) and (b). In particular, MOFCOM failed to identify or provide any analysis of any explicit limits on access to the Program.

490. Had MOFCOM undertaken such an analysis, based on the evidence on the record, it could not reasonably have found the SRWUI Program to be specific under 2.1(a). To meet the definition of specificity set out in Article 2.1(a), there must be an explicit limitation on access to the subsidy in favour of a particular, ascertainable enterprise, industry or group of enterprises or industries. The only explicit limitation on the access to the SRWUI Program sub-programs at issue was the condition that applicants be able to transfer a certain volume of Water Access Entitlements to the Australian Government. Hence, access to these sub-programs was limited to enterprises that owned such entitlements. However, this group is clearly not limited to a particular industry, or group of industries or enterprises with some particular factor in common. Rather, it is a neutral criterion, economic in nature and horizontal in application. Water Access Entitlements are held and used by various enterprises involved in a range of industries producing numerous varied products. For this reason, had MOFCOM completed the required analysis on the basis of the evidence on the record, it could not have found the measure to be specific to certain enterprises or industries as required by Article 2.1(a).

⁵⁸⁸ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

491. Having failed entirely to undertake this necessary first step in a specificity analysis under Article 2.1, MOFCOM states that its determination of specificity was made on the basis of Article 4 of China's Countervailing Regulation. The terms of the regulation are reminiscent of Article 2.1(c), providing that:

[S]ubsidies obtained by some enterprises or industries which are determined by the Government of the exporting country (region) shall be deemed to have the characteristic of special orientation. When the characteristic of the special orientation of the subsidy is determined, such factors as the number of enterprises subsidized, the amount, proportion, duration and means, etc. of the subsidy granted to the enterprises shall also be considered.⁵⁸⁹

492. As a threshold issue, the factual – and legal – bases for MOFCOM's determinations of specificity for each alleged subsidy are unclear. While it is never stated as such, Australia is left to assume that MOFCOM made a determination of *de facto* specificity. For the reasons outlined above, MOFCOM's determination was inconsistent with the examination required under Article 2.1 because it ignored the steps that are normally required before an investigating authority may consider whether "there are reasons to believe that the subsidy may *in fact* be specific". However, even setting aside MOFCOM's failure to conduct an assessment of *de jure* specificity through the proper application of the principles set out in Articles 2.1(a) and (b), its determination of *de facto* specificity did not meet the standard required under Articles 2.1(c) and 2.4 of the SCM Agreement.

493. Australia recalls that Article 2.4 of the SCM Agreement requires that "any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence." However, in arriving at its determination, MOFCOM failed to provide any explanation as to how the evidence on the record supported its finding of *de facto* specificity. Instead, it merely asserted, without reference to any evidence, that the program "serves the agriculture, aiming at expanding irrigated areas, improving rural water-use efficiency, developing agriculture in a sustainable manner and enhancing the agricultural competitiveness", and that barley was one of the top three crops by cultivated area, yield and output in 2017-18.⁵⁹⁰ MOFCOM fails entirely to provide any evidential support for these

⁵⁸⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

⁵⁹⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

assertions. Without this, these assertions do not constitute "positive evidence" and are insufficient to substantiate a finding of specificity under Article 2.1.

494. Moreover, even if MOFCOM's unsubstantiated factual assertions were accepted, in Australia's view, they would have been wholly insufficient to support the conclusion that the program was *de facto* specific to the barley industry. MOFCOM's analysis refers to the SRWUI Program, but does not specify the scope of conduct alleged to amount to the "unwritten subsidy programme" for the purpose of its analysis under Article 2.1(c).

495. Article 2.1(c) identifies specific "other factors" that may be considered in a *de facto* specificity assessment such as:

use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.

MOFCOM's purported factual premise for its determination did not suggest the presence of any of these factors. The first factual assertion describes a vague policy orientation, the second is a statement as to the alleged, general objectives of the measure at issue, and the third is a statement as to the composition of the crop production in Australia in a particular year. Even if all are true, taken together they do not indicate that there exists a limitation on access to the measure at issue that favours any particular group of enterprises or industries.

496. In sum, MOFCOM's determination of specificity with respect to the SRWUI Program failed to conform to China's obligations under Articles 2.1 and 2.4 of the SCM Agreement because it failed to undertake any assessment as to the existence of *de jure* specificity before making a determination of *de facto* specificity, and because it failed to clearly substantiate its determination on the basis of positive evidence.

(b) SARMS Program

497. In relation to the SARMS Program, MOFCOM concluded that:

The evidence suggests that the Government of South Australia gives priority to agriculture. The Program serves the agriculture, aiming to support agriculture and to maintain the productivity of South Australia's primary industry and agribusinesses. As the top three crops in South Australia, wheat, barley and rape accounted for about 86% of all crops in terms of

the cultivated area and nearly 100% in terms of yield in 2017-2018. The Investigating Authority shall have the reason to suspect that the barley industry is a major user of the funds.⁵⁹¹

498. Once again, MOFCOM's analysis did not conform to the order mandated by Article 2.1 for the determination of specificity. In particular, MOFCOM failed to undertake the first step of the required analysis under Articles 2.1(a) and (b) of whether the Program was *de jure* specific.

499. Had MOFCOM undertaken such an analysis, based on the evidence on the record, it could not reasonably have found the SARMS Program to be specific under Article 2.1(a). To meet the definition of specificity set out in Article 2.1(a), there must be an explicit limitation on access to the subsidy in favour of a particular, ascertainable enterprise, industry or group of enterprises or industries. A principal condition on access to the SARMS Program Irrigation Efficiency Investment Stream was that applicants be able to transfer a certain volume of Water Access Entitlements to the Government of South Australia. Hence, access to the Irrigation Efficiency Investment Stream was limited to enterprises that owned such entitlements. However, this limitation is not in favour of "certain enterprises or industries" as required by Article 2.1. This is because the group of enterprises or industries that owns Water Access Entitlements is clearly not limited to a particular, identifiable industry or group of industries or enterprises.

500. Water Access Entitlements are held and used by various enterprises involved in a range of industries producing numerous varied products. This is clearly evidenced in the breadth of industries in which the applicants participated. [[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

]]⁵⁹² For this reason, had MOFCOM completed the required analysis on the basis

⁵⁹¹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

⁵⁹² SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)), p. 9.

of the evidence on the record, it could not have found the measure to be specific to certain enterprises or industries as required by Article 2.1(a).

501. As with its finding in relation to the SRWUI Program, Australia must assume that MOFCOM determined that the SARMS Program was *de facto* specific under Article 2.1(c).⁵⁹³ However, it failed to clearly substantiate its determination on the basis of positive evidence, as required under Article 2.4. Instead, MOFCOM merely asserted, without reference to any evidence, that the program "serves the agriculture, aiming to support agriculture and to maintain the productivity of South Australia's primary industry and agribusinesses", and that barley was one of the top three crops by cultivated area, yield and output in 2017-18.⁵⁹⁴ MOFCOM fails entirely to provide any evidential support for these assertions. Without this, these assertions do not constitute "positive evidence" and are insufficient to substantiate a finding of specificity under Article 2.1.

502. Moreover, even if MOFCOM's unsubstantiated assertions were accepted, they do not themselves support the conclusion that the SARMS Program was *de facto* specific to the barley industry. MOFCOM's assertions did not suggest the existence of any of the "other factors" set out at Article 2.1(c) which may have supported MOFCOM's finding. Even if all are true, taken together MOFCOM's assertions do not indicate that there exists some *de facto* limitation on access to the measure at issue that favours any particular group of enterprises or industries, as required for a determination of specificity under Article 2.1(c).

503. In sum, MOFCOM's determination of specificity with respect to the SARMS Program failed to conform to China's obligations under Articles 2.1 and 2.4 of the SCM Agreement because it failed to undertake any assessment as to the existence of *de jure* specificity before making a determination of *de facto* specificity, and because it failed to clearly substantiate its determination on the basis of positive evidence.

⁵⁹³ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

⁵⁹⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

(c) VAIJ Fund

504. With respect to the VAIJ Fund, MOFCOM concluded that:

The evidence suggests that the Program is started by the Government of the State of Victoria in 2016 and remains valid. The Program is designed to strengthen the performance of the agricultural sector, boost economic growth, create jobs, promote exports, reduce costs and increase productivity through significant investment by the Government in agriculture. Agriculture Victoria Services of the Department of Employment, Regions and Districts of Australia is responsible for the approval and implementation of programs. Its main functions include providing support to increase agricultural productivity, maintaining existing export markets and facilitating access to new export markets. As the top three crops in the State of Victoria, wheat, barley and rape accounted for about 84% of all crops in terms of the cultivated area and nearly 89% in terms of yield in 2017-2018. The Investigating Authority shall have the reason to suspect that the barley industry is a major user of the funds. One of the purposes of the Program is to maintain the barley exports.⁵⁹⁵

505. This analysis also fails to conform to the order of analysis mandated by Article 2 for the determination of specificity. In particular, MOFCOM failed to undertake the first step of the required analysis under Articles 2.1(a) and (b) of whether the Program was *de jure* specific.

506. Had MOFCOM undertaken such an analysis, based on the evidence on the record, it could not reasonably have found the VAIJ Fund to be specific under 2.1(a). To meet the definition of specificity set out in Article 2.1(a), there must be an explicit limitation on access to the subsidy in favour of a particular, ascertainable enterprise, industry or group of enterprises or industries. There are no explicit limitations on the access to those VAIJ Fund investment streams that provided a financial contribution. As explained in the Australian Government's questionnaire response:

The Major Capital Works program is open to most businesses and industries where the project provides an agriculture benefit. The Local Roads to Market Program is open only to local council as they have responsibility for local road maintenance. [...]

The Program Stream is predominately delivered via a Government Partnership approach and delivered through a third party and/or government agency. There are no specific eligibility criteria for this stream.⁵⁹⁶

⁵⁹⁵ Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

⁵⁹⁶ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 205.

507. Given the demonstrated absence of any explicit access limitation and that the program relates to the provision of infrastructure, had MOFCOM completed the required analysis on the basis of the evidence on the record, it could not have found the measure to be specific to certain enterprises or industries as required by Article 2.1(a).

508. Further, as with its determinations in relation to the other programs, MOFCOM's failure to explain its analysis forces Australia to assume that it has made a determination that the VAIJ Fund was *de facto* specific under Article 2.1(c). However, it failed to clearly substantiate its determination on the basis of positive evidence, as required under Article 2.4. Instead, MOFCOM merely asserted, without reference to any evidence, that the program "is designed to strengthen the performance of the agricultural sector", that it was administered by a Victorian Government agency responsible for agricultural programs, and that barley was one of the top three crops by cultivated area, yield and output in 2017-18.⁵⁹⁷ MOFCOM failed entirely to provide any evidential support for these assertions. Without this, these assertions do not constitute "positive evidence" and are insufficient to substantiate a finding of specificity under Article 2.1.

509. Further, even if these unsubstantiated assertions were accepted, they do not themselves support the conclusion that the Fund was *de facto* specific to the barley industry. MOFCOM's assertions did not suggest the existence of any of the "other factors" set out at Article 2.1(c) which may have supported MOFCOM's determination. Nor do they, taken together, indicate that there exists some *de facto* limitation on access to the measure at issue that favours any particular group of enterprises or industries, as required for a determination of specificity under Article 2.1(c).

510. In sum, MOFCOM's determination of specificity with respect to the VAIJ Fund failed to conform to China's obligations under Articles 2.1 and 2.4 of the SCM Agreement because it failed to undertake any assessment as to the existence of *de jure* specificity before making a determination of *de facto* specificity, and because it failed to clearly substantiate its determination on the basis of positive evidence.

⁵⁹⁷ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

(d) Conclusion

511. As a result of MOFCOM's failure to conduct the analysis of the evidence as required by Article 2.1 in relation to any of the programs at issue, China acted inconsistently with Articles 2.1 and 2.4 of the SCM Agreement.

2. China acted inconsistently with Article 12.7 in relation to the use of facts available to determine specificity

512. MOFCOM determined specificity on the basis of facts available. Thus, the relevant "necessary information" was the information required to make such a determination. Australia submits that there was no necessary information missing from the record. The Australian Government and Australian traders submitted all necessary information in response to MOFCOM's sole request. There was sufficient evidence on the record for MOFCOM to determine that the programs were not specific. On that basis, the conditions in Article 12.7 to resort to facts available were not met as no interested party in the investigation refused access to, or otherwise did not provide, necessary information. Therefore, China acted inconsistently with Article 12.7 of the SCM Agreement.

(a) No necessary information was missing from the record

i. The Australian Government provided the necessary information to determine that the programs were not specific

513. The Australian Government provided all necessary information in response to MOFCOM's questionnaire concerning potential limitations on access to the alleged subsidy for all three programs. Australia has set out, above, how the evidence on the record clearly demonstrated that the alleged subsidies were not specific within the meaning of Article 2 of the SCM Agreement.⁵⁹⁸

⁵⁹⁸ See above, section III.E.1.

514. In its determination of specificity, MOFCOM made similar findings in relation to all three programs. It found that:

The Australian Government did not answer questions about the specific content of the Program, the scope of agricultural products covered, the role and functions of the Applicant in the Program, the procedures and conditions for the application and implementation of the Program, and the program budget. It also failed to provide the industries participating in the Program, and the number of applications in each industry and the total benefits as required. In addition, *no information on how the barley industry benefited from the Program was provided*, nor evidence that proves the barley industry did not benefit.⁵⁹⁹ (emphasis added)

515. Not only did the Australian Government provide all necessary information in order to determine specificity, an assessment of *benefit* is not dispositive of whether a subsidy is *specific*. Requiring proof that barley producers did *not* benefit (from programs that, as established by the evidence submitted by the Australian Government, had transferred no funds whatsoever to barley producers) was not relevant to an assessment of whether the alleged subsidy program was specific as required by Article 2.⁶⁰⁰ The relevant inquiry, and therefore the "necessary information" required to determine whether an alleged subsidy is "specific", is not concerned with whether a benefit was conferred, but rather with whether there were *limitations* on access to the subsidy.

516. Accordingly, there was no proper basis for MOFCOM to resort to facts available within the meaning of Article 12.7 of the SCM Agreement in order to determine whether the alleged subsidies were specific.

ii. *An interested party cannot refuse to, or otherwise not provide, information which does not exist*

517. Where programs were a funding arrangement between the Australian Government and state and territory governments, there was no "applicant". Further, no barley producers

⁵⁹⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 8. With respect to the SARMS Program, MOFCOM found that "[n]or did [the Australian Government] provide conclusive evidence proving that the barley industry had not benefited."; with respect to the VAJ Fund MOFCOM found that "[n]or did [the Australian Government] provide conclusive evidence proving that the barley industry had not benefited". (Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.)

⁶⁰⁰ An assessment of specificity is only relevant after a subsidy has been found to exist, i.e. where a benefit has been conferred to a relevant recipient. Had MOFCOM properly conducted the analysis required under the provisions of Article 1.1 of the SCM Agreement on the basis of the evidence submitted by the interested parties, it would have determined with respect to each of the programs at issue that: (i) there was no direct transfer of funds or any other financial contribution to any Australian producer or exporter of barley; and (ii) no benefit was thereby conferred to any Australian producer or exporter of barley. Under these circumstances, the analysis could not have proceeded to the examination of specificity under Article 2.

applied for funding under the programs. The programs were not targeted, limited, or applied in any way to producers or exporters of a select "scope of agricultural products". This information which MOFCOM claimed was not provided clearly did not exist, could not have been provided to MOFCOM by interested parties, and therefore was not necessary information within the meaning of Article 12.7.

518. MOFCOM's claim that the Australian Government did not provide evidence to prove a negative assertion, i.e. the request for proof that the barley industry did not benefit, erroneously shifted the burden of proof on to the Australian Government. It fabricated a situation where the Australian Government was required to produce documents that did not exist.

519. The Appellate Body has held "that authorities charged with conducting an investigation 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted'".⁶⁰¹ Notwithstanding that the evidence provided by the Australian Government was sufficient to clearly establish that no benefit had been conferred to the Australian barley industry, it was not for the Australian Government to provide "conclusive proof" that the barley industry had not benefitted under the investigated programs. The Australian Government responded to MOFCOM's questionnaire, providing sufficient relevant information in relation to all three programs to allow MOFCOM to make the determinations required under Article 2. If MOFCOM considered otherwise, it had an obligation to take action. It failed to do so.

iii. MOFCOM failed to notify interested parties it was making determinations on the basis of facts available

520. MOFCOM failed to notify the Australian Government and Australian traders and producers that it was making a determination of specificity on the basis of facts available. Furthermore, it did not provide these interested parties with any opportunity to provide further explanations with respect to the alleged deficiencies in the information submitted.

⁶⁰¹ Appellate Body Report, *US – Washing Machines*, para. 5.268. (footnotes omitted)

MOFCOM failed to afford interested parties any due process with respect to its decision to disregard their submitted information.

521. MOFCOM found that for two programs, the Australian Government did not provide *supporting* evidence translated into Chinese.⁶⁰² This finding contributed to MOFCOM's decision to make a determination on the basis of facts available, and its conclusion that each program was specific.⁶⁰³

522. The Australia Government provided additional supporting information in its questionnaire response without translation in order to facilitate verification. If MOFCOM was dissatisfied with the information provided in the Australian Government's response, it was incumbent on MOFCOM to first "actively seek out pertinent information", and second, notify the Australian Government the information was deficient. As set out above, it was not permissible for MOFCOM to remain "passive in the face of possible shortcomings" in the Australian Government's response.

523. It was MOFCOM's responsibility to indicate to the Australian Government that there was some deficiency in the information provided in its questionnaire responses and to seek additional information to fill any alleged deficiencies. Further, if, after considering the questionnaire responses, MOFCOM required further information to satisfy itself as to the accuracy of the information provided,⁶⁰⁴ it was incumbent on MOFCOM to engage with the Australian Government to seek that information. This could have been done in many ways. For example, a verification visit could have been facilitated as proposed by the Australian Government in its response to MOFCOM's Final Disclosure.⁶⁰⁵ Similarly, translations of specific supporting materials that would have assisted MOFCOM to verify the comprehensive information provided in the questionnaire response could have been supplied on request.

⁶⁰² The Australian Government's questionnaire response was translated into Simplified Chinese, in accordance with MOFCOM's instructions.

⁶⁰³ MOFCOM's finding in this regard is an example of its fundamental misapplication of the purpose of the specificity assessment. As Australia has explained, an assessment of specificity is an inquiry into whether there is a limitation on access to a subsidy, as already found to exist. Thus, the question of whether a benefit is conferred on a recipient is not central to this inquiry.

⁶⁰⁴ See Article 12.5 of the SCM Agreement.

⁶⁰⁵ Australian Government Comments on Countervailing Duties Disclosure (Exhibit AUS-59), paras. 14 and 19.

524. In contrast to its approach to the supporting material provided by the Australian Government, MOFCOM was content to accept and take into account the lengthy and complex English language materials submitted by CICC in support of the Application. Given this approach to the initiation of the investigation, it is clear that an unbiased and objective investigating authority would not have rejected equivalent material submitted in support of the Australian Government's questionnaire response without first engaging with the Australian Government on the very same issue. Instead, MOFCOM's only indication of its intentions with respect to Australia's information and supporting evidence was given in its Final Disclosure. In this disclosure, MOFCOM indicated not only that it would *not* take into account the supporting evidence provided by the Australian Government, but that it also refused to consider the primary information provided in the Australian Government's questionnaire response, which was comprehensive and provided in Simplified Chinese in full compliance with the questionnaire instructions.

*iv. MOFCOM failed to consider whether information
was provided within a reasonable period*

525. For the same reasons as set out above in relation to MOFCOM's determination of benefit on the basis of facts available, MOFCOM was obliged to consider whether the questionnaire responses it rejected as being submitted past the deadline were none the less submitted within a reasonable time.⁶⁰⁶

(b) MOFCOM failed to select a reasonable replacement for the
allegedly missing necessary information

526. Australia submits that China acted inconsistently with Article 12.7 of the SCM Agreement as a result of MOFCOM's failure to select a reasonable replacement for the allegedly missing information with respect to the determination that each of the three programs were specific to the barley industry. There is no evidence that MOFCOM undertook a process of evaluation or reasoning of the evidence on the record in selecting a reasonable replacement for the necessary information alleged to be missing in order to arrive at an accurate determination.

⁶⁰⁶ See above, section III.D.2.

527. The three programs were not subsidies within the meaning of Article 1.1 of the SCM Agreement. Even if they were, MOFCOM failed to select a reasonable replacement for the missing necessary information in order to demonstrate that access to those subsidies was limited to "certain enterprises" within the meaning of Article 2 of the SCM Agreement. A determination of specificity is made, either explicitly or implicitly, every time an investigating authority finds that a subsidy falls within the scope of the SCM Agreement as stipulated by Article 1.2. As such, MOFCOM was required to comply with the "general concept" of specificity as set out in Article 2,⁶⁰⁷ and select information to replace the missing necessary information that enabled it to undertake a specificity analysis in accordance with Article 2 of the SCM Agreement. MOFCOM failed to do so.

528. As Australia has already observed, the factual – and legal – bases for MOFCOM's determinations of specificity for each alleged subsidy are unclear. MOFCOM asserted that the "evidence *suggests*" that the Australian Government "gives priority to agriculture",⁶⁰⁸ and that it had "*reason to suspect* that the barley industry is a major user of the funds."⁶⁰⁹ The latter assertion appears to be based on MOFCOM's understanding that barley, together with wheat and rape, "accounted for about 80% of all crops in terms of cultivated area, yield and output value in 2017-2018."⁶¹⁰ MOFCOM does not provide any evidence in support of its assertion, or to clarify the "facts" that were otherwise available on which its determination was based. Thus, its determinations were not based on positive evidence pursuant to Article 2.4 of the SCM Agreement.

529. Assuming, *arguendo*, that MOFCOM's unsubstantiated factual premise is accurate, it does not explain how the programs are specific to the barley industry. That barley, wheat and rape together (in unknown and unspecified proportions) make up 80% of a "cultivated area", albeit unknown and unspecified, does not constitute a factual foundation for an affirmative determination of "specificity" within the meaning of Article 2. Article 12.7 of the SCM Agreement permits an investigating authority to rely on *facts* that are otherwise

⁶⁰⁷ See Panel Report, *US – Upland Cotton*, para. 7.1142.

⁶⁰⁸ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9, and 11.

⁶⁰⁹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9 and 11. (emphasis added) MOFCOM made the same determination with respect to each subsidy program.

⁶¹⁰ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9 and 11.

available, and not on the basis of mere assumptions or inferences.⁶¹¹ MOFCOM failed to provide any explanation as to the factual foundation for its findings that the alleged subsidies were specific.

530. As to MOFCOM's selection of facts – whatever those *facts* might be – it is clear that MOFCOM disregarded all evidence on the record in relation to whether the programs were specific. MOFCOM explained in the Final Determination that, "[t]he Australian Government reported the overall situation and explained the nature and content of the Program in the answers."⁶¹² MOFCOM went on to explain that "there was no complete information in the answers."⁶¹³ As established above, this was not the case. The Australian Government provided a complete response to MOFCOM's questionnaire, including extensive information with respect to all 32 programs under investigation. This information *was* sufficient for MOFCOM to make the determinations required under Article 2 of the SCM Agreement. MOFCOM's decision to disregard all evidence provided by the interested parties on the basis that certain items of information (which did not, in fact, exist) had not been provided was clearly inconsistent with Article 12.7 of the SCM Agreement. MOFCOM was under an obligation to take into account the questionnaire response from the Australian Government in making a determination of specificity *even if* it considered the information submitted to be incomplete.⁶¹⁴ By disregarding all evidence submitted, MOFCOM failed to undertake a process of reasoning or evaluation of all information before it, as required by Article 12.7 of the SCM Agreement.

531. Had MOFCOM engaged in a process of reasoning or evaluation, it would have found that each of the three programs at issue were broad-based environmental, or infrastructure programs that were in no way targeted or limited to the barley industry.⁶¹⁵

532. Accordingly, China acted inconsistently with Article 12.7 of the SCM Agreement as a result of MOFCOM's failure to select reasonable replacements for the allegedly missing necessary information.

⁶¹¹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.143.

⁶¹² Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9-10.

⁶¹³ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9, 11 and 12.

⁶¹⁴ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

⁶¹⁵ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1, 162 and 205.

(c) Conclusion

533. Australia submits that no necessary information was missing from the record. *First*, there was no necessary information missing from the record for MOFCOM to determine that the alleged subsidies were neither specific *per se*, nor specific to the barley industry. *Second*, the information MOFCOM asserted was not provided did not, in fact, exist, could not have been provided to MOFCOM by interested parties, and therefore could not be considered "necessary information" within the meaning of Article 12.7 of the SCM Agreement. MOFCOM had an obligation to actively seek out pertinent information if it considered there was possible shortcomings in the evidence. *Third*, MOFCOM failed to notify parties it was making a determination on the basis of facts available. *Fourth*, MOFCOM failed to consider whether certain questionnaire responses which were submitted outside the deadline were nonetheless submitted within a reasonable period. It was not permissible for MOFCOM to simply disregard the information and evidence submitted on the record. Accordingly, the conditions to resort to facts available were not met, and China acted inconsistently with Article 12.7 of the SCM Agreement in respect of MOFCOM's determination that the three programs were countervailable on the basis of facts available.

534. *Finally*, MOFCOM failed to select a reasonable replacement for the allegedly missing information. MOFCOM was required to take into account the questionnaire response from the Australian Government in making a determination of specificity, *even if* it considered the information submitted to be incomplete. MOFCOM failed to do so, and therefore China acted inconsistently with Article 12.7 of the SCM Agreement.

3. Conclusion

535. MOFCOM determined that each alleged subsidy was specific despite the clear evidence on the record to the contrary. MOFCOM failed to properly apply the principles set out in Articles 2.1 and 2.4 and conduct an assessment of specificity as required by those provisions. Furthermore, MOFCOM improperly had recourse to facts available, despite there being no missing necessary information, and failed to take into account all information in selecting a reasonable replacement.

536. On that basis, China acted inconsistently with Articles 2.1, 2.4 and 12.7 of the SCM Agreement.

F. CONCLUSION

537. For the reasons set out above, Australia has established that China acted inconsistently with Articles 1.1(a), 1.1(b), 1.2, 2.1, 2.4 and 12.7 of the SCM Agreement.

IV. AUSTRALIA'S CLAIMS CONCERNING THE DEFINITION OF THE "DOMESTIC INDUSTRY"

A. CHINA HAS BREACHED ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 16.1 OF THE SCM AGREEMENT

538. Australia submits that MOFCOM's "determination of the domestic industry"⁶¹⁶ is inconsistent with China's obligations under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement because it failed to establish "a major proportion of the total domestic production" of the like product in accordance with the definition of "domestic industry". Consequently, MOFCOM's injury and causation analyses are fundamentally flawed and, therefore, also inconsistent with the requirements of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

539. MOFCOM's failure in this regard has its origins in the improper initiation of the anti-dumping and countervailing duties investigations. As Australia will discuss below,⁶¹⁷ CICC's applications failed to provide the information required in Article 5.2(i) of the Anti-Dumping Agreement and Article 11.2(i) of the SCM Agreement, including a list identifying all known domestic producers of the like product (or associations of domestic producers of the like product). The applications contained no information concerning individual firms or associations in the Chinese domestic barley industry, including the volume and value of their production of the like product.

⁶¹⁶ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 13-14; Countervailing Duties Final Determination (Exhibit AUS-11), p.14.

⁶¹⁷ See below, section VII.B.

540. MOFCOM compounded this error by failing to properly define the "domestic industry" for the purposes of its investigations, as required under Article 4 of the Anti-Dumping Agreement and Article 16 of the SCM Agreement.⁶¹⁸ Its failure to do so inevitably undermined its subsequent examinations and determinations of injury and causation under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

1. Legal framework

541. The definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement sets the scope of the investigation and lays the foundation for the injury and causation analyses required under the Agreements. It is a "keystone" of the investigations.⁶¹⁹

542. Panels in previous disputes have considered that: (i) Article 4.1 imposes an express obligation on Members to interpret the term "domestic industry" in a specified manner, and (ii) this obligation can be the basis of a finding of a violation, even though Article 4.1 is a "definitional provision".⁶²⁰ In Australia's view, the same considerations apply to Article 16.1, given that the "respective definitions in AD Article 4.1 and SCM Article 16.1 are identical to one another in pertinent part",⁶²¹ and these provisions are "inextricably linked".⁶²²

543. Both provisions state that the "domestic industry" can be defined in two ways: either (i) "the domestic producers as a whole of the like products", or (ii) "those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".⁶²³ Articles 4.1 and 16.1 do not indicate that the two definitions

⁶¹⁸ The Appellate Body explained in *EC – Fasteners (China)* that the determination of standing under Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement is a distinct determination from the definition of the entire universe of the domestic industry under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement. (Appellate Body Report, *EC – Fasteners (China)*, para. 418.) See also Panel Report, *China – Broiler Products*, fn 655.

⁶¹⁹ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.397.

⁶²⁰ Panel Report, *EC – Salmon (Norway)*, paras. 7.117-7.119.

⁶²¹ Panel Report, *US – Lamb*, fn 109.

⁶²² Panel Report, *China – Broiler Products*, para. 7.408. In this regard, the panel in *US – DRAMS* explained that a claim of inconsistency relating to the investigating authorities' definition of the domestic industry must be made under Article 16 of the SCM Agreement. (Panel Report, *US – DRAMS*, para. 7.385.)

⁶²³ See Appellate Body Report, *EC – Fasteners (China)*, para. 411:

Article 4.1 thus juxtaposes two methods for defining the term "domestic industry". By using the term "a major proportion", the second method focuses on the question of *how much* production must be represented by those producers making up the domestic industry when the domestic industry is defined as less than the domestic producers as a whole. (emphasis original)

are subject to a "hierarchy or sequencing".⁶²⁴ As found by the panel in *China – Broiler Products*, the use of the disjunctive "or" to separate the two definitions gives an investigating authority a choice of which definition to employ.⁶²⁵ MOFCOM purported to apply the second definition.⁶²⁶

544. With respect to the second definition, the Appellate Body has explained the requirement that domestic producers' output of the like product constitute a "major proportion" of total domestic production has "both quantitative and qualitative connotations".⁶²⁷ As to the quantitative element, the Appellate Body has considered that "'a major proportion' should be properly understood as a relatively high proportion of the total domestic production" that "substantial[ly]" reflects the total domestic production.⁶²⁸ With regard to the qualitative element, the Appellate Body has considered that this element "is concerned with ensuring that the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production".⁶²⁹ These quantitative and qualitative aspects of the definition of the domestic industry are closely connected in that the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used sufficiently represents the total domestic production.⁶³⁰

545. The Appellate Body considered footnote 9 to Article 3 of the Anti-Dumping Agreement, as well as the context provided in Articles 3.1 and 3.4, relevant for the interpretation of Article 4.1.⁶³¹ Referring to these provisions, it explained that "the domestic

⁶²⁴ Panel Report, *China – Broiler Products*, para. 7.416.

⁶²⁵ Panel Report, *China – Broiler Products*, para. 7.416.

⁶²⁶ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 13-14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

⁶²⁷ Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302; *Korea – Pneumatic Valves (Japan)*, para. 5.40; and Panel Report, *Russia – Commercial Vehicles*, para. 7.15.

⁶²⁸ See Appellate Body Report, *EC – Fasteners (China)*, para. 412:

[T]he term "a major proportion" is immediately followed by the words "of the total domestic production". "A major proportion", therefore, should be understood as a proportion defined by reference to the total production of domestic producers as a whole. "A major proportion" of such *total* production will standardly serve as a substantial reflection of the total domestic production. Indeed, the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole. (emphasis original)

⁶²⁹ Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.13; *Korea – Pneumatic Valves (Japan)*, para. 5.40.

⁶³⁰ Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.40 (citing Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.13); *EC – Fasteners (China)*, para. 412.

⁶³¹ Appellate Body Report, *EC – Fasteners (China)*, paras. 413-414.

industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers", and this determination "must be based on 'positive evidence'".⁶³² Such positive evidence "includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry", and "requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered".⁶³³ Thus, "'a major proportion of the total domestic production' should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis".⁶³⁴ Moreover, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product".⁶³⁵

2. MOFCOM failed to satisfy Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement

546. In the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM purported to define the "domestic industry" on the basis of the organisations which supported CICC in its applications for the initiation of an anti-dumping investigation and a countervailing duties investigation. The Final Determinations refer generally to "the relevant organizations of the six major production areas in Yunnan, Jiangsu, Inner Mongolia, Sichuan, Gansu and Henan provinces" which "jointly authorized" CICC to submit the applications for anti-dumping and countervailing duties investigations.⁶³⁶ The Final Determinations do not: (i) identify any of these "relevant organizations" by name or provide how many producers (or how much production) were represented by each of them; (ii) otherwise identify the producers making up the "major proportion of total domestic production"; (iii) provide the aggregate production volumes of those producers, including in comparison to total domestic production; (iv) provide those producers' proportion of total

⁶³² Appellate Body Report, *EC – Fasteners (China)*, para. 413.

⁶³³ Appellate Body Report, *EC – Fasteners (China)*, para. 413.

⁶³⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 413.

⁶³⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 414.

⁶³⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

domestic production, as calculated by MOFCOM; or (v) provide any explanation as to how MOFCOM determined those producers' proportion of total domestic production and on what basis MOFCOM considered this to represent a "major proportion" capable of "substantially reflecting" the total domestic production.⁶³⁷ As such, MOFCOM failed to satisfy both the "quantitative" and the "qualitative" elements required under the second definition of the "domestic industry" in Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.

547. In each of the Final Determinations, under the heading "determination of the domestic industry", MOFCOM simply states that "the relevant organizations of the six major production areas in Yunnan, Jiangsu, Inner Mongolia, Sichuan, Gansu and Henan provinces (autonomous regions) jointly authorized the Applicant to submit investigation applications", and that "according to data from the National Bureau of Statistics of China, the barley output of the [...] six provinces (autonomous regions) which authorized the Applicant accounted for more than 50% of the total domestic barley output during the same period".⁶³⁸ In this regard, MOFCOM not only failed to assess the standing of the Applicant at the time of initiating the investigation,⁶³⁹ the Final Determinations appear to conflate that standing requirement with the definition of the "domestic industry" for the purposes of the investigations.⁶⁴⁰

548. MOFCOM provided no further explanation, no supporting data, and no other figures with respect to its "determination of the domestic industry". Further, it is not clear that MOFCOM's reference to the "six provinces [...] which authorized the Applicant" is synonymous with the "relevant organizations of the six major production areas in" those provinces. Moreover, MOFCOM later considers in its injury analyses that "Chinese barley growers are distributed in more than 20 provinces, autonomous regions and municipalities directly under the Central Government".⁶⁴¹ There is nothing in the Final Determinations to indicate that MOFCOM turned its mind to the question of how its definition of the "domestic industry" –

⁶³⁷ See Appellate Body Report, *EC – Fasteners (China)*, para. 412.

⁶³⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

⁶³⁹ See section VII.B.

⁶⁴⁰ The determination of standing under Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement is a distinct determination from the definition of the entire universe of the domestic industry under Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement. See Appellate Body Report, *EC – Fasteners (China)*, para. 418; Panel Report, *China – Broiler Products*, fn 655.

⁶⁴¹ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 18-19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

which was purportedly based on certain "relevant organizations" in only six provinces, apparently to the exclusion of producers in the remainder of the "20 provinces, autonomous regions and municipalities directly under the Central Government" – was capable of substantially reflecting the total domestic production and providing ample data to ensure an accurate injury analysis.

549. MOFCOM's failure in respect of the proper identification of the "domestic industry" is particularly significant in the context of its injury and causation analyses. The Appellate Body has warned that, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry".⁶⁴² Similarly, the panel in *China – Autos (US)* explained that "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent" with the Anti-Dumping Agreement and the SCM Agreement.⁶⁴³ In this case, MOFCOM's Final Determinations provide: (i) no indication that the "domestic industry" was properly defined for the purposes of the investigations; (ii) no explanation as to why domestic producers from certain regions were not included in the purported "determination of the domestic industry"; and (iii) insufficient information to establish that the "domestic industry" determined by MOFCOM constitutes "a major proportion of the total domestic production" within the meaning of Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.

3. Conclusion

550. For the reasons set out above, Australia has established that China breached Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement as a result of MOFCOM's failure to establish "a major proportion of the total domestic production" of the like product in accordance with the definition of "domestic industry". As a consequence of these breaches, which vitiate a "keystone" of each investigation, the subsequent examinations

⁶⁴² Appellate Body Report, *EC – Fasteners (China)*, para. 414. The Appellate Body was referring to the obligation imposed by Article 3.1 of the Anti-Dumping Agreement to conduct an "objective examination". Australia submits that this warning also applies to the application of the definition of "domestic industry" to Article 15.1 of the SCM Agreement.

⁶⁴³ Panel Report, *China – Autos (US)*, para. 7.210. The panel expressed its agreement with the earlier finding of the panel in *EC – Salmon (Norway)* on this point (Panel Report, *EC – Salmon (Norway)*).

and determinations of injury and causation are in breach of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

V. AUSTRALIA'S CLAIMS CONCERNING THE INJURY AND CAUSATION DETERMINATIONS

551. Australia will now turn to its claims under Article 3 of the Anti-Dumping Agreement in relation to the Anti-Dumping Final Determination and its claims under Article 15 of the SCM Agreement in relation to the Countervailing Duties Final Determination. Australia will deal with its claims under equivalent provisions of the Agreements together because of the near identical text of these provisions and the similarity of the injury and causation analyses in the Final Determinations.

A. CHINA HAS BREACHED 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

552. MOFCOM's determinations that allegedly dumped and subsidised imports of barley from Australia were causing material injury to the domestic industry in China are inconsistent with China's obligations under Articles 3 of the Anti-Dumping Agreement and 15 of the SCM Agreement because MOFCOM failed to base its determinations of injury on positive evidence and an objective examination of: (i) the volume of allegedly dumped and subsidised imports from Australia; (ii) the effects of those imports on prices in China's domestic market for like products; and (iii) the consequent impact of those imports on China's domestic producers of such products. As explained below:

- MOFCOM's findings that there were significant absolute and relative increases in allegedly dumped and subsidised imports of Australian barley during the Injury POI are inconsistent with 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;
- MOFCOM's findings that allegedly dumped and subsidised imports of Australian barley caused significant price depression in China's domestic

market for like products during the Injury POI are inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement;

- MOFCOM's evaluations of economic factors bearing on the state of the Chinese barley industry in the context of its examination of injury are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement; and
- MOFCOM's causation analyses in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination are inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

1. Overarching legal framework

553. Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement establish a Member's overarching obligations with respect to the determination of injury in anti-dumping and countervailing duties investigations, respectively. Article 3.1 provides:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Article 15.1 is drafted in near identical terms to Article 3.1 except that it covers "subsidized imports".

554. The Appellate Body addressed the relationship between Article 3.1 and the other provisions in Article 3 in *Thailand – H-Beams*, stating that "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs".⁶⁴⁴ The Appellate Body explained in similar terms in *US – Carbon Steel (India)* that Article 15.1 is "an

⁶⁴⁴ Appellate Body Report, *Thailand – H-Beams*, para. 106.

overarching provision setting forth Members' fundamental substantive obligations in the context of a determination of injury and informing the more detailed obligations in the subsequent paragraphs of Article 15 concerning the determination of injury by an investigating authority".⁶⁴⁵

555. Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement establish an overarching obligation that determinations under Articles 3 and 15, respectively, "shall be based on positive evidence and involve an objective examination". The Appellate Body confirmed in *US – Hot-Rolled Steel*, when addressing Article 3.1, that the term "positive evidence" relates to "the quality of the evidence that authorities may rely upon in making a determination", with "positive" requiring that it "must be of an affirmative, objective and verifiable character, and [...] credible".⁶⁴⁶

556. As to the term "objective examination", the Appellate Body explained that the use of "objective" requires that examination to "conform to the dictates of the basic principles of good faith and fundamental fairness".⁶⁴⁷ This means that "the identification, investigation and evaluation of the relevant factors must be even-handed".⁶⁴⁸ To perform an objective examination, the authority "must also take into account the evidence that appears to conflict with its own hypotheses, and explain how it has reconciled conflicting evidence in reaching its conclusions".⁶⁴⁹ According to the Appellate Body, this means that "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".⁶⁵⁰ The Appellate Body's statements concerning both terms also apply to Article 15.1 of the SCM Agreement.⁶⁵¹

⁶⁴⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.580. (footnote omitted)

⁶⁴⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

⁶⁴⁷ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. (footnote omitted)

⁶⁴⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

⁶⁴⁹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.258. (footnote omitted) (citing Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93-94 and 97).

⁶⁵⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196; Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.272.

⁶⁵¹ The near identical texts of Article 3.1 and Article 15.1 led the Appellate Body in *US – Carbon Steel (India)* to observe that "Article 3.1 of the Anti-Dumping Agreement and relevant jurisprudence provide useful guidance for the interpretation of Article 15.1 of the SCM Agreement". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.582.)

2. MOFCOM's findings of significant increases in subject imports breach 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

557. MOFCOM's findings that there had been significant increases in allegedly dumped and subsidised imports of Australian barley are inconsistent with China's obligations under 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 because MOFCOM's examination of import volumes was not conducted in an objective manner. MOFCOM failed to address relevant data, failed to explain how it took into account evidence that conflicted with its conclusions (including conflicting trends in the data), and applied an internally inconsistent methodology that made a final determination of injury more likely.

(a) The examination required under the first sentence of Article 3.2 of the Anti-Dumping Agreement and the first sentence of Article 15.2 of the SCM Agreement

558. The Appellate Body has explained that the obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement are "absolute", "[t]hey provide for no exceptions, and they include no qualifications", and "[t]hey must be met by every investigating authority in every injury determination".⁶⁵² In Australia's view, these considerations apply equally to the equivalent obligations under Articles 15.1 and 15.2 of the SCM Agreement.⁶⁵³

559. The first sentence of Article 3.2 of the Anti-Dumping Agreement requires that, "[w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". The phrase "[w]ith regard to the volume of the dumped imports" refers back to the "fundamental substantive obligations" under Article 3.1, as discussed above, for a determination of injury to be "based on positive evidence" and "involve an objective examination" of, *inter alia*, "the volume of the dumped imports". The first sentence of Article 15.2 of the SCM Agreement requires, in

⁶⁵² Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109.

⁶⁵³ See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.582.

language that is virtually identical, the same examination with respect to subsidised imports.⁶⁵⁴

560. In interpreting these provisions, the Appellate Body has noted that the meaning of the word "consider" includes "look at attentively", "think over", and "take into account",⁶⁵⁵ and that "[t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision".⁶⁵⁶ Thus, Article 3.2 "requires an investigating authority to assess whether there has been an increase in the volume of dumped imports, and to take those findings into account".⁶⁵⁷

561. The Appellate Body has explained the role of the word "consider" in shaping the obligations under Articles 3.2 and 15.2 as follows:

By the use of the word "consider", Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make *a definitive determination* on the volume of subject imports [...] Nonetheless, an authority's *consideration* of the volume of subject imports [...] pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.⁶⁵⁸

562. Further, what the investigating authority must consider is whether there has been an increase in the volume of dumped imports that is "significant".⁶⁵⁹ Panels have noted that the ordinary meaning of the word "significant", based on the dictionary definition, is "important", "notable", "noteworthy", "consequential", and "influential".⁶⁶⁰ The panel in *China – Cellulose Pulp* considered that "[t]he inquiry as to the significance of any increase in dumped imports

⁶⁵⁴ The first sentence of Article 15.2 of the SCM Agreement requires that, "[w]ith regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member". Again, the phrase "[w]ith regard to the volume of the subsidized imports" refers to the "fundamental substantive obligations" under Article 15.1 for a determination of injury to be "based on positive evidence and involve an objective examination of", *inter alia*, "the volume of the subsidized imports".

⁶⁵⁵ Appellate Body Report, *China – GOES*, fn 216. This meaning is consistent with the meaning provided in the current online edition of the Oxford English Dictionary, which is "to examine, inspect, scrutinize [...], to take note of". Oxford English Dictionary online, definition of "consider", <https://www.oed.com/view/Entry/39593> (accessed 29 October 2021).

⁶⁵⁶ Appellate Body Report, *China – GOES*, para. 130. (emphasis original)

⁶⁵⁷ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.262. (footnote omitted)

⁶⁵⁸ Appellate Body Report, *China – GOES*, para. 130. (emphasis original)

⁶⁵⁹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.263.

⁶⁶⁰ Panel Reports, *China – Cellulose Pulp*, para. 7.40; *Pakistan – BOPP Film (UAE)*, para. 7.263; and *Thailand – H-Beams*, para. 7.163. These definitions are consistent with the meaning provided in the current online edition of the Oxford English Dictionary, which is "noticeable, substantial, considerable, large [...]; noteworthy; consequential, influential". Oxford English Dictionary online, definition of "significant", <https://www.oed.com/view/Entry/179569> (accessed 29 October 2021).

implies a consideration of developments, that is, changes or trends, in the volume of dumped imports over the period of the injury investigation",⁶⁶¹ and that "the significance of any particular volume of or increase in dumped imports is, in the first instance, a question of the magnitude of that increase".⁶⁶² It further explained that the question of "[w]hether any given volume of or increase in dumped imports may be significant in the ultimate determination of whether dumped imports cause material injury to the domestic industry will [...] depend on the evaluation of all the relevant facts in each case" which is undertaken in the analysis of causation under Article 3.5.⁶⁶³

563. Similarly, the panel in *EC – Countervailing Measures on DRAM Chips* considered that the "ordinary meaning of 'significant'" in the context of the first sentence of Article 15.2 of the SCM Agreement, "encompasses 'important', 'notable', 'major', as well as 'consequential', which all suggest something that is more than just a nominal or marginal movement".⁶⁶⁴

564. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement provide three ways in which an investigating authority may consider whether there has been a significant increase in the subject imports: either (i) in absolute terms; or (ii) relative to production; or (iii) relative to consumption in the importing country.⁶⁶⁵ The use of the disjunctives "either [...] or [...] or" indicates that an investigating authority has discretion to select one or more of these metrics for its examination, but only needs to consider whether there has been a significant increase *either* in absolute terms *or* in relative terms.⁶⁶⁶

(b) MOFCOM did not conduct an objective examination of whether subject imports had increased

565. MOFCOM's examination of dumped imports in the Anti-Dumping Final Determination⁶⁶⁷ was identical to its examination of subsidised imports in the Countervailing

⁶⁶¹ Panel Report, *China – Cellulose Pulp*, para. 7.40.

⁶⁶² Panel Report, *China – Cellulose Pulp*, para. 7.45.

⁶⁶³ Panel Report, *China – Cellulose Pulp*, para. 7.45.

⁶⁶⁴ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307. (footnote omitted)

⁶⁶⁵ Panels and the Appellate Body have referred to these as three "ways", "perspectives", "methods", "parameters", or "metrics" for the consideration of whether there has been a significant increase in subject imports. By way of example, in *Korea – Pneumatic Valves (Japan)*, the panel found that "[t]he first sentence of Article 3.2 sets out three parameters for the consideration of the volumes of the dumped import: in absolute terms, or relative to production, or relative to consumption in the importing country." (Panel Report, *Korea – Pneumatic Valves (Japan)*, fn 358.)

⁶⁶⁶ Panel Report, *Korea – Pneumatic Valves (Japan)*, fn 358.

⁶⁶⁷ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 14-15.

Duties Final Determination.⁶⁶⁸ Based on its determinations of normal value, export price, dumping, and subsidizing on the basis of facts available, MOFCOM presumed that: 100% of the barley imported from Australia throughout the POI was dumped for the purposes of its examination of import volume under Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement; and 100% of the barley imported from Australia throughout the POI was also subsidised for the purposes of its examination of import volume under Article 15.1 and the first sentence of Article 15.2 of the SCM Agreement. It determined in each case that subject imports of Australian barley had increased in absolute quantities and relative to Chinese domestic consumption and production.

566. Australia submits that, due to the WTO-inconsistent manner in which MOFCOM determined the volumes of dumped and subsidised barley from Australia, MOFCOM's consideration of whether there had been significant increases in dumped and subsidised imports could not meet the fundamental, overarching obligations to be "based on positive evidence" and to "involve an objective examination". For this reason alone, MOFCOM's determinations that subject imports increased significantly during the period 2014–2018 are *prima facie* inconsistent with the requirements under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

567. Even if the Panel determines that MOFCOM's examination of the volume of dumped and subsidised imports was "based on positive evidence", MOFCOM nonetheless failed to conduct this examination in an "objective" manner. This is because, for the reasons explained below, MOFCOM: (i) failed to address relevant data; (ii) failed to explain how it took into account evidence that conflicted with its conclusions, including conflicting trends in the data; and (iii) examined the metrics that it used in an inconsistent manner that made a final determination of injury more likely.

⁶⁶⁸ Countervailing Duties Final Determination (Exhibit AUS- 11), p. 15.

(c) MOFCOM failed to conduct an objective examination of whether there had been significant increases in the volumes of subject imports

568. In both the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM used all three of the metrics provided in the first sentence of Article 3.2 of the Anti-Dumping Agreement and in the first sentence of Article 15.2 of the SCM Agreement to consider whether there had been a significant increase in subject imports of barley from Australia: (i) in absolute terms;⁶⁶⁹ (ii) relative to "the apparent consumption of barley in the Chinese market";⁶⁷⁰ and (iii) relative to "Chinese domestic barley production".⁶⁷¹ The outcomes of MOFCOM's analyses are summarized in the table below.

Table 7 MOFCOM's Examination of Import Volumes of Australian Barley⁶⁷²

Year	1. Absolute Quantities (tonnes)	2. Relative to Consumption in China (Market Share)	3. Relative to Domestic Production in China
2014	3,877,100	53.66%	214%
2015	4,362,000	34.62%	234%
Change 14-15	+ 12.51%	- 19.04 pp	+ 20 pp
2016	3,251,800	48.13%	186%
Change 15-16	- 25.45%	+ 13.51 pp	- 48 pp
2017	6,480,400	61.57%	390%
Change 16-17	+ 99.29%	+ 13.45 pp	+ 204 pp
2018	4,178,400	49.01%	244%
Change 17-18	- 35.52%	- 12.56 pp	- 146 pp
2014–2018	301,300 (+ 7.78%)	- 4.65 pp	+ 30 pp

⁶⁶⁹ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 14-15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷² The abbreviation "pp" used in the table represents the term "percentage points". This term was not used in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination. It describes the arithmetic difference of two percentages.

569. In its analyses of import volumes in absolute terms (column 1.) and relative to domestic production in China (column 3.), MOFCOM found that there had been a significant increase based on a simple comparison of the data in 2014 with the data in 2018.⁶⁷³ However, in its analysis of the import volume relative to domestic consumption in China (column 2.), MOFCOM departed from this methodology. Rather than making any finding with respect to the general downward trend in the market share of Australian barley between 2014 and 2018, MOFCOM instead observed that it "remained at a relatively high level most of the time".⁶⁷⁴ MOFCOM did not consider any of these data in the context of its finding, later in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, that the "apparent domestic consumption" in China "experienced a cumulative increase (i.e. market growth) of 18.00%" during the Injury POI.⁶⁷⁵

i. Analysis of import volumes in absolute terms

570. In its analysis of the "absolute quantity" of barley imported from Australia, MOFCOM simply recited the total quantities imported in each year from 2014 to 2018 and the percentage change year-to-year.⁶⁷⁶ MOFCOM noted the upward or downward changes in annual import volumes, which ranged between 12.51% in 2014–2015 and 99.29% in the period 2016–2017, but did not explain how it took these large fluctuations into account. Instead, MOFCOM concluded that the "absolute quantity" of dumped and subsidised imports from Australia had "increased significantly" during the Injury POI on the sole basis that, between 2014 and 2018, imports "increased by 301,300 tons [*sic*], an increase of 7.78%".⁶⁷⁷

571. 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, including the decreases of 25.45% (1.1 million tonnes) between 2015 and 2016 and 35.52% (2.3 million tonnes) between 2017 and 2018. Further, in making this determination, MOFCOM failed to address the relevant data concerning consumption in the domestic market, which showed that the total domestic consumption of barley in China *increased* by 18.00% from 2014 to 2018, while the share of

⁶⁷³ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 14-15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 18; Countervailing Duties Final Determination (Exhibit AUS-11), p. 18.

⁶⁷⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁷⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

Australian barley imports supplying domestic consumption (i.e. market share) *decreased* by 4.65 percentage points over the same period (as discussed below).

572. In *Pakistan – BOPP Film (UAE)*, the panel 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".⁶⁷⁸ In that dispute, the panel found that the investigating authority was "faced with fluctuating trends", and "described those trends", but "without more, concluded that the volume of dumped imports relative to domestic production had '*increased significantly*' during the POI".⁶⁷⁹ On the basis of those circumstances, the panel considered that:

[I]n finding that imports relative to domestic production had "increased significantly", the [investigating authority] did not explain how it reconciled the conflicting trends in the data before it to reach its conclusion. Specifically, it did not explain how the sequence of downward and upward movements it observed led it to conclude that the increase in imports relative to domestic production was "significant".⁶⁸⁰

The panel concluded that the investigating authority had "acted inconsistently with Articles 3.1 and 3.2, because it did not explain how it reconciled the conflicting trends before it and in particular it did not explain how those conflicting trends supported its conclusion that the increase was 'significant'".⁶⁸¹

573. Similarly, in the current dispute, MOFCOM acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement because it failed to offer any explanation as to how it reconciled the "conflicting trends" in the fluctuating data before it and how those fluctuations supported its conclusion that a relatively *smaller* change over the Injury POI was "significant". Moreover, MOFCOM ignored the relevant data relating to the *decrease* in Australian imports relative to domestic consumption *in the same period of time* that domestic consumption *increased* by a significant amount, failing to explain how it took this evidence into account in arriving at its conclusion.

⁶⁷⁸ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.271. (footnotes omitted)

⁶⁷⁹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.279. (emphasis original)

⁶⁸⁰ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.280.

⁶⁸¹ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.282. (footnote omitted)

574. In *US – Steel Safeguards*, the Appellate Body explained that, in the analysis of increased imports in absolute and relative terms required under Article 4.2(a) of the Agreement on Safeguards, the competent authorities have "to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)" because "in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points".⁶⁸² In Australia's view, as there was not "a clear and uninterrupted upward trend in import volumes of Australian barley", the Appellate Body's reasoning is equally applicable to MOFCOM's endpoint-to-endpoint comparisons of 2014 and 2018 data under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.

575. In addition, Australia submits that MOFCOM failed to give proper weight to the decrease of 35.52% (2.3 million tonnes) in the absolute quantity of subject imports in 2018 relative to 2017. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body explained that, although "historical data" from a "past period, known as the period of investigation" may be used in order to determine whether injury caused by dumping exists when the investigation takes place, "more recent data is likely to provide better indications about current injury".⁶⁸³ In this regard, the 35.52% decrease of imports from Australia in 2018 was more relevant to MOFCOM's analysis of current injury than the much smaller change of 7.78% across the entire Injury POI.

ii. Analysis of import volumes relative to domestic consumption in China

576. In its analysis of the "market share" of subject imports of Australian barley "based on the ratio" of such imports to "the apparent consumption of barley in the Chinese market", MOFCOM recited the ratios of the quantity of subject imports to the quantity of apparent domestic consumption in each year of the period 2014–2018, and the percentage change year-to-year.⁶⁸⁴ Although MOFCOM briefly observed that "[d]uring the Period of the Injury

⁶⁸² Appellate Body Report, *US – Steel Safeguards*, para. 354. (emphasis original) (footnote omitted)

⁶⁸³ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166. (footnotes omitted)

⁶⁸⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

Investigation, the ratio of [dumped] [subsidized] imported product to Chinese market share fluctuated",⁶⁸⁵ it did not further explain how it took these fluctuations into account in its analysis.

577. In examining subject imports relative to domestic consumption, MOFCOM departed from the methodology it applied to the examination of subject imports in absolute terms (as discussed above) and relative to domestic production in China (discussed below) — that is, an endpoint-to-endpoint comparison of the data in 2014 with the data in 2018. If it had applied this methodology consistently, it would have found that the "market share" of subject imports from Australia *decreased* by 4.65 percentage points in the Injury POI (from 53.66% down to 49.01%). This represented a relative decrease of 8.67%. Moreover, this contraction in the market share of subject imports is all the more striking in the context of the 18.00% growth in the Chinese market.

578. Rather than making an objective and unbiased finding that there had not been a significant increase in subject imports relative to domestic consumption during the period 2014–2018, MOFCOM instead found that the ratio of such imports "remained at a relatively high level most of the time, and even exceeded 60% in 2017", and that "[b]y 2018, [dumped] [subsidized] imported product accounted for almost half of the apparent consumption of barley in the Chinese market".⁶⁸⁶ However, the examination called for under the first sentence of Article 3.2 of the Anti-Dumping Agreement and the first sentence of Article 15.2 of the SCM Agreement is "whether there has been a significant increase" of subject imports, and not whether imports are "at a relatively high level most of the time". MOFCOM failed to make any determination regarding the relevant question in respect of this metric.

579. Thus, MOFCOM ignored relevant data and failed to conduct its examination of the subject imports in an impartial and even-handed manner. If MOFCOM had acknowledged the downward trend in the "market share" of Australian barley imports, this finding would have further undermined its findings under the other metrics. More importantly, this would have called into question whether the injury allegedly being experienced by the domestic barley industry in China was being caused by imports from Australia. MOFCOM's failure to make this

⁶⁸⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁸⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

finding, let alone to acknowledge the outcome which is apparent on the face of the data, made a final determination of injury more likely, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

*iii. Analysis of import volumes relative to domestic
production in China*

580. In its analysis of the "ratio" of subject imports of Australian barley "relative to Chinese domestic barley production", MOFCOM recited the ratios of the quantity of subject imports to the quantity of Chinese barley production in each year of the period 2014–2018, and the percentage change year-to-year.⁶⁸⁷ Returning to the same methodology it applied to the examination of subject imports in absolute terms, MOFCOM did not address the large fluctuations in the ratio — which involved a decrease of 48 percentage points (2015–2016), an increase of 204 percentage points (2016–2017), and another decrease of 146 percentage points (2017–2018) — and failed to explain how it took these conflicting trends into account in its analyses.⁶⁸⁸

581. Instead, MOFCOM again relied on an endpoint-to-endpoint comparison of the data in 2018 with the data in 2014 to observe that "the ratio of dumped imported product to the total production of Chinese barley *generally showed an upward trend*".⁶⁸⁹ On this basis, it concluded that the quantity of subject imports had increased significantly compared to the quantity of domestically produced barley. However, MOFCOM failed to explain how the difference in the ratio between 2014 and 2018, which was shown to be 30 percentage points, was "significant" given the much larger year-on-year fluctuations referenced above.

582. In addition, MOFCOM failed to give proper weight to the decrease of 146 percentage points in the ratio in 2018 relative to 2017. This decrease was more relevant to MOFCOM's analysis of current injury than the much smaller change of 30 percentage points across the period of almost five years, from 2014 to 2018 (up from 214% in 2014 to 244% in 2018). This represented a relative change of 14%.

⁶⁸⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁸⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁶⁸⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15. (emphasis added)

583. Thus, for many of the same reasons discussed above, in the context of the examination of subject imports in absolute terms, MOFCOM's examination of subject imports relative to domestic production was not conducted in an objective manner. Rather, it was conducted in a manner that ignored relevant data and failed to explain how MOFCOM had reconciled the conflicting trends in the data before reaching its conclusion. As such, this analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.

584. Moreover, MOFCOM's examination failed to acknowledge that the data indicated the existence of another important factor in the Chinese market that was not being taken into account. While MOFCOM was not required under Article 3.2 of the Anti-Dumping Agreement or Article 15.2 of the SCM Agreement to examine subject imports from Australia under all three of the metrics provided, it elected to do so, and, accordingly, it was obligated to conduct this examination in an objective manner. If MOFCOM had applied the same methodology to its examination under all three of the metrics, it would have found that, during the period from 2014 to 2018, subject imports from Australia increased by 7.78% in absolute terms (which was significantly *less* than the 18.00% growth in the Chinese market in terms of increased domestic consumption), but the market share of such imports *decreased* by 4.65 percentage points (suggesting that even while subject imports were increasing in absolute terms, something else was reducing their share of the market). At the same time, subject imports increased by 30 percentage points relative to domestic production in China, indicating that something else was causing or contributing to the relative decrease in domestic production.

585. In this regard, the evidence on the record before MOFCOM indicates that non-subject imports from third countries clearly played an important role in China's domestic market during the Injury POI. Moreover, as discussed below,⁶⁹⁰ an objective and unbiased investigating authority would have examined whether the alleged injury to the domestic industry was being caused, in whole or in part, by such third country imports.

⁶⁹⁰ See para. 624 and section V.A.5(d)iv.

(d) Conclusion

586. For the reasons set out above, Australia has established that China breached 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 as a result of MOFCOM's failure to conduct an objective examination of the volumes of the allegedly dumped and subsidised imports of Australian barley.

3. MOFCOM's findings in relation to significant price depression are inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement

587. MOFCOM stated in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination that the subject imports of Australian barley "caused a significant reduction in the price of similar domestic product".⁶⁹¹ This finding of "price depression" is inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement because MOFCOM's analysis was not based on an objective examination of the evidence on the record. It did not account for the different segments in China's domestic barley market in its analysis. As such, MOFCOM: (i) failed to ensure price comparability; (ii) did not address relevant data; (iii) did not explain how it took into account evidence that conflicted with its conclusions (including conflicting trends in the data); and (iv) applied a methodology that made a final determination of injury more likely.

(a) The examination of price effects required under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement

588. The second sentence of Article 3.2 of the Anti-Dumping Agreement requires that:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of

⁶⁹¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

The phrase "[w]ith regard to the effect of the dumped imports on prices" refers back to the "fundamental substantive obligations" under Article 3.1, as discussed above, for a determination of injury to be "based on positive evidence" and "involve an objective examination" of, *inter alia*, "the effect of the dumped imports on prices in the domestic market for like products". The second sentence of Article 15.2 of the SCM Agreement requires, in language that is virtually identical, the same examination with respect to subsidised imports.⁶⁹²

589. Consideration of the effects of the subject imports on prices is "a step in the logical progression" towards determining whether injury is caused by the subject imports.⁶⁹³ However, even significant price undercutting, price depression, or price suppression "may not, standing alone, suffice to demonstrate" that subject imports are causing material injury to the domestic industry.⁶⁹⁴ In *China – Cellulose Pulp*, the panel explained that "[t]he need for a contextual analysis in respect of prices derives from the requirement to consider the *effects* of dumped imports on prices in the second sentence of Article 3.2. Simply to observe the trends in prices does not suffice, as those trends may be the effect of different factors other than dumped imports, as well as of the dumped imports".⁶⁹⁵

590. The Appellate Body in *China – GOES* summarised the analysis required in relation to "price depression" as follows:

Price depression refers to a situation in which prices are pushed down, or reduced, *by something*. An examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices.⁶⁹⁶ (emphasis original)

⁶⁹² The second sentence of Article 15.2 of the SCM Agreement requires that, "[w]ith regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree". Again, the phrase "[w]ith regard to the effect of the subsidized imports on prices" refers to the "fundamental substantive obligations" under Article 15.1 for a determination of injury to be "based on positive evidence and involve an objective examination" of, *inter alia*, "the effect of the subsidized imports on prices in the domestic market for like products".

⁶⁹³ Panel Report, *China – Cellulose Pulp*, para. 7.64. (footnote omitted)

⁶⁹⁴ Panel Report, *China – Cellulose Pulp*, para. 7.64.

⁶⁹⁵ Panel Report, *China – Cellulose Pulp*, para. 7.65. (emphasis original)

⁶⁹⁶ Appellate Body Report, *China – GOES*, para. 141.

The Appellate Body explained further that it is:

[A]n inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.⁶⁹⁷

591. The Appellate Body went on to state that an investigating authority may not "disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices".⁶⁹⁸ Rather, the Appellate Body underlined that:

[W]here an authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices [...] [and] by taking into account evidence pertaining to such elements, an authority also ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1.⁶⁹⁹

592. It is well-established that price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence. In *China – GOES*, the Appellate Body explained:

[W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.⁷⁰⁰ (footnote omitted)

593. The panel in *China – X-Ray Equipment* underscored the logic of the Appellate Body's position when it stated that "[i]f two products being analysed in an undercutting analysis are not comparable, for example in the sense that they *do not compete* with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation

⁶⁹⁷ Appellate Body Report, *China – GOES*, para. 136.

⁶⁹⁸ Appellate Body Report, *China – GOES*, para. 152.

⁶⁹⁹ Appellate Body Report, *China – GOES*, para. 152.

⁷⁰⁰ Appellate Body Report, *China – GOES*, para. 200.

question".⁷⁰¹ The panel was of the view that "price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence".⁷⁰²

(b) MOFCOM's finding of significant price depression was not made on the basis of positive evidence

594. As a starting point, MOFCOM's price effects analysis was based on the Chinese domestic prices for barley provided by CICC's responses to the questionnaires for domestic producers or growers in the anti-dumping and countervailing duties investigations.⁷⁰³ There is no evidence on the public record that MOFCOM undertook any sort of activity to satisfy itself as to the accuracy of *any* of the information supplied by CICC, or indeed any other interested party.⁷⁰⁴

595. As noted above, the Appellate Body confirmed in *US – Hot-Rolled Steel*, that the term "positive evidence" relates to "the quality of the evidence that authorities may rely upon in making a determination", with "positive" requiring that it "must be of an affirmative, objective and verifiable character, and [...] credible".⁷⁰⁵ Absent action from MOFCOM to assure itself of the accuracy of the information in this regard, and drawing on the guidance of the Appellate Body, the domestic barley prices provided by CICC could not reasonably be found to be "positive evidence" and MOFCOM's reliance on this evidence in the context of its price effects analysis, therefore, resulted in a breach of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement.

⁷⁰¹ Panel Report, *China – X-Ray Equipment*, para. 7.50. (emphasis added)

⁷⁰² Panel Report, *China – X-Ray Equipment*, para. 7.68.

⁷⁰³ CICC, Response to the Anti-Dumping Questionnaire for Domestic Producers or Growers, 1 February 2019 (English translation) (CICC Anti-Dumping Questionnaire Response) (Exhibit AUS-65), p. 29; CICC, Response to the Countervailing Duty Questionnaire for Domestic Producers or Growers, 1 February 2019 (English translation) (CICC Countervailing Duties Questionnaire Response) (Exhibit AUS-66), p. 25.

⁷⁰⁴ See below, section VIII.B.4.

⁷⁰⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

(c) MOFCOM failed to ensure price comparability between the product under consideration and the domestic "like product" which vitiated its price effects analysis

596. MOFCOM conducted its purported analysis under the second sentence of Article 3.2 of the Anti-Dumping Agreement and the second sentence of Article 15.2 of the SCM Agreement without ensuring price comparability between the product under consideration, imported Australian barley, and the domestic "like product", Chinese domestic barley. MOFCOM should have determined that there was price comparability by: (i) establishing that the prices being compared were at the same level of trade; (ii) making all necessary price adjustments to the prices for imported Australian barley; and (iii) taking into account evidence that identified Australia's barley exports to China were comprised of different types of barley, including malting barley, FAQ barley and feed barley, which were sold into different segments of the market at different "price points".^{706, 707}

597. There are significant shortcomings in the price data relied upon by MOFCOM as the basis for its analysis of price effects under Articles 3.2 and 15.2. These data: (i) consist of averages of prices that are at different levels of trade, that are not comparable, and cannot be meaningfully averaged; (ii) lack the necessary adjustments to the prices of imported Australian barley to make them comparable to Chinese domestic prices; and (iii) because they are averages, do not account for the different segments and prices of malting barley, FAQ barley and feed barley.

598. MOFCOM's failure to ensure price comparability vitiated the price effects analyses under Articles 3.2 and 15.2 and breached the requirements under Article 3.1 of the

⁷⁰⁶ Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 24; Australian Government, Submission in response to Initiation of a Countervailing Duties Investigation into imports of Barley from Australia, 10 January 2019 (Australian Government Comments on Initiation of Countervailing Duties Investigation) (Exhibit AUS-67), para. 24.

⁷⁰⁷ In responses to questionnaires, Australian traders recorded different types of barley, such as "Malting Barley", "Feed Barley" and "FAQ Barley". See, for example, Glencore, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 25 February 2019 (public version) (English translation) (Glencore Countervailing Duties Questionnaire Response) (Exhibit AUS-68), pp. 14-15; CBH, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 18 February 2019 (public version) (English translation) (CBH Countervailing Duties Questionnaire Response) (Exhibit AUS-69), pp. 11-12; and GrainCorp, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, 25 February 2019 (public version) (English translation) (pages renumbered) (GrainCorp Countervailing Duties Questionnaire Response) (Exhibit AUS-70), p. 22.

Anti-Dumping Agreement and Article 15.1 of the SCM Agreement to conduct an "objective examination" based on "positive evidence".

- i. MOFCOM failed to ensure that the domestic and subject import prices being compared were at the same level of trade*

599. To properly compare the prices of Chinese domestic barley and imported Australian barley, the prices being compared must be at the same level of trade.

600. MOFCOM "held that the CIF prices of dumped imported product calculated by China Customs were basically at the same trade level as the barley sales prices of domestic growers after taking into account factors such as exchange rates, customs duties, value-added import tax and customs clearance costs".⁷⁰⁸ MOFCOM did not elaborate on the basis for this determination.

601. The level of trade of particular import prices cannot be ascertained simply from CIF customs values because the level of trade is dictated by, *inter alia*, whether the customer in China is a wholesaler, distributor, or end-user. Prices to wholesalers are generally lower than prices to distributors, and prices to distributors are generally lower than prices to end-users. Prices are generally comparable within each group and are generally not comparable between groups. The evidence on the record establishes that import prices included sales to, *inter alia*, traders (i.e. wholesalers and/or distributors) as well as to end-users.⁷⁰⁹ The prices to each of these two groups are not comparable. There is no indication in the Final Determinations that these different levels of trade were considered by MOFCOM. Further, none of the adjustments made to the CIF prices account for these different levels of trade.

602. For these reasons, any comparisons made by MOFCOM between the prices of imported Australian barley and Chinese domestic barley were made without a proper

⁷⁰⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 15-16.

⁷⁰⁹ CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 3-4, Exports to China, column E [REDACTED] shows that [REDACTED]. Since CBH accounted for over [REDACTED] of Australia's barley exports to China during the POI, it is clear that import prices were not at the same level of trade.

establishment of the facts and were therefore based on an evaluation of the facts that was neither unbiased nor objective.

ii. MOFCOM failed to make the necessary adjustments to the prices of subject imports

603. MOFCOM also failed to make all necessary adjustments to the prices of subject imports to make them comparable to domestic prices. MOFCOM's Final Determinations indicate that adjustments to CIF import prices were made for exchange rates, customs duties, value-added import tax and customs clearance costs.⁷¹⁰ In the case of imported Australian barley, these adjustments do not account for, *inter alia*, vessel unloading costs, transportation and logistics costs for shipment from the vessel to a warehouse or silo, storage costs (at the warehouse or silo), and costs related to the operations of the importer. The appropriate logistics point for comparing sales to Chinese customers from domestic producers and importers is at the warehouse or silo from which such sales are made. From this point forward, imported and domestic barley will generally face the same transportation and logistics costs for delivery to customers. For the same level of trade, the prices from the warehouse or silo are, therefore, generally comparable.

604. However, adjustments in addition to the ones made by MOFCOM are necessary to determine the comparable price of imported Australian barley at a warehouse or silo. As noted, this includes vessel unloading costs, transportation and logistics costs for shipment from the vessel to a warehouse or silo, storage costs at the warehouse or silo, and costs related to the operations of the importer. The sum of the barley acquisition costs (e.g. CIF cost), the costs associated with the adjustments made by MOFCOM, and the costs associated with these additional adjustments, form the cost-base for pricing imported barley. No Chinese importer would reasonably sell at prices below the sum of these costs. By excluding these costs from its adjustments, MOFCOM's price estimates for imported Australian barley are significantly understated.

605. For these reasons, any comparisons made by MOFCOM between the prices of subject imports and the prices of domestically produced barley were made without a proper

⁷¹⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 15-16.

establishment of the facts and were based on an evaluation of the facts that was neither unbiased nor objective.

*iii. MOFCOM failed to ensure price comparability
between product categories supplying different
market segments*

606. To the extent that imported Australian barley competed with "like" domestic Chinese barley, it was competition between "like" products of the same category in the different market segments.

607. While MOFCOM acknowledged submissions from interested parties identifying grades of barley, including "brewing-grade barley", and that "the product uses are different", it concluded they were "substantially the same".⁷¹¹ MOFCOM stated in its Final Determinations that "[b]arley grown in the same field can be used for food, brewing or feed, or as seed".⁷¹² The evidence on the record demonstrates the superficial nature of this statement. Barley can be grown for the various purposes listed by MOFCOM. However, the key issue is not what is grown in a field, but the segment of China's domestic barley market for which the harvested product is destined. Contrary to MOFCOM's baseless assertion that there was "no evidence to prove that downstream users had a line of demarcation in using barley",⁷¹³ downstream users, in the various segments of the market, have product requirements to be satisfied. For example, malting companies and breweries have technical requirements for malting barley that will not be satisfied by feed barley. These downstream users have a "line of demarcation" between malting barley and feed barley, which sets the parameters for competition. Imported Australian malting barley was not competing with Chinese feed or seed barley, but principally with malting barley imported from third countries that met the technical requirements of malting companies and breweries.

608. Tsingtao Brewery, in its reply to the anti-dumping questionnaire for domestic importers/traders/downstream users, identified three segments of the domestic barley

⁷¹¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 5; Countervailing Duties Final Determination (Exhibit AUS-11), p. 5.

⁷¹² Anti-Dumping Final Determination (Exhibit AUS-2), pp. 5-6; Countervailing Duties Final Determination (Exhibit AUS-11), p. 5.

⁷¹³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 6; Countervailing Duties Final Determination (Exhibit AUS-11), p. 6.

market: "malting barley", "feed barley" and "edible barley".⁷¹⁴ In relation to "malting barley", Tsingtao Brewery commented that "[a]s far as brewing performance is concerned, currently the quality of domestic malting barley is quite behind that of imported barley, and domestic malting barley can only be used for brewing ordinary low-grade beer".⁷¹⁵ As such, domestic malting barley could not meet the demand for the barley required to produce malt for "medium" and "high-grade" beer.⁷¹⁶ This demand was met by imports. On this point, Dalian Xingze Malt stated that "[d]ue to its high quality and large quantity, Australian barley has long been regarded as the primary source of raw materials for malting barley in the Chinese beer industry".⁷¹⁷

609. During MOFCOM's visit to domestic industry and downstream industry in Jiangsu in December 2018,⁷¹⁸ various of MOFCOM's interlocutors also provided information on "malting barley" and "feed barley" which also clearly identified the segmented nature of China's barley market.⁷¹⁹ In addition, MOFCOM was given information on the pricing of the different types of barley by JSFEC Malting, which advised that "Australian barley is divided into Superior Barley, FAQ Barley, and Feed Barley. Superior Barley is generally 10-15 USD/ton higher than FAQ Barley in terms of prices. The difference in the prices of Feed Barley and Malting Barley is about 15 USD/ton".⁷²⁰

610. The evidence on the record confirmed Australian traders exported "premium malting barley" into the Chinese market which "is separated from other varieties and marketed on the basis of [...] variety only [...] [and] requires very high purity of barley variety".⁷²¹ Traders also

⁷¹⁴ Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), pp. 25-26.

⁷¹⁵ Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 25.

⁷¹⁶ Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), pp. 30-31.

⁷¹⁷ Dalian Xingze Malt Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 36.

⁷¹⁸ The Anti-Dumping Final Determination and the Countervailing Duties Final Determination both refer to the visit, stating that "[t]he Investigating Authority investigated farms, grain and oil stations, malt production enterprises, grain traders, research institutions, etc. through conducting site visits, holding symposiums and collecting relevant information and evidence by inquiry and verification". See Anti-Dumping Final Determination (Exhibit AUS-2), p. 4; Countervailing Duties Final Determination (Exhibit AUS-11), p. 4.

⁷¹⁹ See, for example, comment of the Institute of Barley Research, Yangzhou University, in MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu conducted on 11-13 December 2018, 20 February 2019 (English translation) (MOFCOM, Records on the Survey Results of Barley in Yancheng, Jiangsu) (Exhibit AUS-71), p. 1.

⁷²⁰ Comment of JSFEC Malting in MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71), p. 3.

⁷²¹ CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), p. 11. See also Glencore Countervailing Duties Questionnaire Response (Exhibit AUS-68), pp. 14-15; Emerald, Response to the Countervailing Duty Questionnaire for Foreign Exporters or Producers, date unknown (public version) (English translation) (pages renumbered) (Emerald Countervailing Duties Questionnaire Response) (Exhibit AUS-72), pp. 8-9.

sold FAQ barley into the Chinese market, which is an intermediate malting grade that is not variety specific and "used to produce malt of lower qualities for economic and middle-class beer brewing".⁷²²

611. In addition, information from Australian traders showed a price difference between sales of feed and malting barley into the Chinese domestic market. For example, Form 3-4 to CBH's anti-dumping questionnaire response showed a weighted average invoice price of USD [[REDACTED]] per tonne for sales of malting barley to China, and USD [[REDACTED]] per tonne for sales of feed barley to China during the period 2014–2018.⁷²³

612. Turning to the evidence concerning the feed barley segment of China's barley market, it was clear that feed barley has a different use to malting barley. In its countervailing duties questionnaire, CBH stated that its sale of "feed barley" into the Chinese market was for use in the animal feed market.⁷²⁴ CBH observed that "feed barley" is of "lower" quality than premium malting barley and FAQ barley.⁷²⁵ It commented that "[f]eed barley usually consists of many different varieties and cannot replace brewing barley".⁷²⁶

613. The Australian Government also observed, in response to the Anti-Dumping Final Disclosure, that feed and malt barley have different tariff classifications, as demonstrated in the database used by MOFCOM.⁷²⁷ Global Trade Atlas recorded Australia's exports to China of Barley for Malting (Excl. Seed) under Tariff Line Code 10039010, and Barley (Excl. Seed and Barley For Malting), being feed barley, under Tariff Line Code 10039020.⁷²⁸ In the Anti-Dumping Final Determination, MOFCOM dismissed this point, stating that "[a]fter an investigation, the classification of the above tariff numbers was found to be inconsistent with the facts".⁷²⁹ As the different tariff classifications and their separate Tariff Line Codes constitute a fact, Australia questions how they can be "inconsistent with the facts". Moreover,

⁷²² CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), p. 12.

⁷²³ See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 3-4, columns S and T. These are [[REDACTED]] prices. The weighted average price of sales of FAQ barley was USD [[REDACTED]] per tonne.

⁷²⁴ CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), p. 12.

⁷²⁵ CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), p. 4.

⁷²⁶ CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), p. 12.

⁷²⁷ Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), para. 9.

⁷²⁸ Global Trade Atlas Data on Australia's Exports to All Partners during the Injury Period of Investigation, 1 January 2014 - 30 September 2018 (Global Trade Atlas Data – Australia's Injury POI Exports to All Partners) (Exhibit AUS-73).

⁷²⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 6.

MOFCOM failed to identify the "facts" with which it found "the classification of the [...] tariff numbers" to be inconsistent or to explain what those inconsistencies were.

614. In sum, MOFCOM failed to conduct an objective examination by dismissing the extensive evidence on the record concerning the different product categories and segmented structure of China's barley market and, as a result, China breached Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement. MOFCOM was obligated to ensure the comparability of the prices of the different product categories of subject imports and like products for the purposes of its price effects analysis, but it failed entirely to do so. Recognising the segmentation of the domestic barley market was key to delimiting the competitive relationship between imported Australian barley and domestic barley, thereby ensuring price comparability for the price effects analyses under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. MOFCOM's failure to ensure price comparability vitiated its price effects analyses under these provisions.

(d) MOFCOM failed to conduct an objective examination
based on positive evidence of price effects

615. MOFCOM made a determination in relation to price depression but not on price suppression. The Anti-Dumping Final Determination and the Countervailing Duties Final Determination state on price depression that the subject imports "caused a significant reduction in the price of similar domestic product".⁷³⁰ MOFCOM described the prices of subject imports and Chinese domestic barley,⁷³¹ but did not make a determination of price undercutting.

616. Australia submits that, in relation to its price depression analyses and determination, MOFCOM failed to give proper consideration to all of the positive evidence on the record and failed to conduct an "objective examination"⁷³² as required by Articles 3.1 of the Anti-Dumping

⁷³⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

⁷³¹ Note the following extract from the Anti-Dumping Final Determination (Exhibit AUS-2), p. 16:

[D]uring the Period of the Injury Investigation, except for the relatively high price of dumped imported product due to the rapid growth in domestic demand and other factors in 2015, the price of dumped imported product was lower than in the same period in 2014, 2016, 2017 and 2018. The price difference of similar domestic product was 0.03 RMB/kg, 0.29 RMB/kg, 0.35 RMB/kg and 0.14 RMB/kg.

See also the Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

⁷³² See Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

Agreement and Article 15.1 of the SCM Agreement. This failure, in turn, vitiated MOFCOM's inquiries under the second sentence of Article 3.2 of the Anti-Dumping Agreement and the second sentence of Article 15.2 of the SCM Agreement.

617. *First*, MOFCOM adopted a flawed methodology, offering no explanation or reasoning as to how the price and volume of imported Australian barley interacted to produce a depressing effect on Chinese domestic barley prices. *Second*, MOFCOM failed to properly identify or take into account "other factors" that may have been responsible for the relevant pricing trends. Nor did it explain why such factors did not affect the conclusion it reached regarding the purported linkage between the prices of imported Australian barley and Chinese domestic barley. *Third*, MOFCOM's analysis was skewed towards establishing the basis for a determination that the Chinese domestic barley industry had been injured.

618. In its analysis of price depression in both the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM divides the Injury POI into two segments: one between 2014–2017 and the other covering 2018. The Final Determinations dealt with the period 2014–2017 as follows (key differences between the texts are identified in square brackets):

During the Period of the Injury Investigation, from 2014 to 2017, the price of [*dumped imported product*] [*subsidized imports*] dropped from 2.11 RMB/kg to 1.55 RMB/kg, and the quantity of [*dumped imported product*] [*subsidized imports*] increased from 3.8771 million tons to 6.4804 million tons. The share of [*dumped imported product*] [*subsidized imports*] in the Chinese domestic market increased from 53.66% to 61.57%, an increase of nearly 8%. Under the influence of the increase in quantity and decrease in the price of [*dumped imported product*] [*subsidized imports*], the selling price of similar domestic product dropped from 2.14 RMB/kg to 1.90 RMB/kg. The market share of a similar domestic product also dropped from 25.08% in 2014 to 15.78% in 2017, a decrease of nearly 10%.⁷³³

619. The Final Determinations go on to address the situation in 2018 in the following terms (key differences between the texts are identified in square brackets):

Affected by factors such as the initiation of the [*anti-dumping*] [*countervailing duty*] investigation and the decline in total domestic production in Australia, the amount of [*dumped imported product*] [*subsidized imports*] decreased year-on-year, the price of [*dumped imported product*] [*subsidized imports*] increased year-on-year, and the price and market share of a similar domestic product also rebounded in 2018. However, throughout

⁷³³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 16; Countervailing Duties Final Determination (Exhibit, AUS-11), p.16.

the whole Period of the Injury Investigation, compared with 2014, the price of [dumped imported product] [subsidized imports] still fell sharply in 2018, and the quantity of [dumped imported product] [subsidized imports] still increased substantially. Affected by this, the price of similar domestic product dropped substantially.⁷³⁴

620. MOFCOM's analytical approach is flawed by its failure to address the "explanatory force" of imported Australian barley in relation to the price of Chinese domestic barley. The statement that "[u]nder the influence of the increase in quantity and decrease in the price" of imported Australian barley, the selling price and market share of Chinese barley "dropped" falls well short of what is required in this regard. As stated by the Appellate Body in *China – GOES*, "[a]n examination of price depression, by definition, calls for more than a simple observation of a price *decline*, and also encompasses an analysis of *what* is pushing down the prices".⁷³⁵ The assertion that imported Australian barley influenced the drop in the price and market share of Chinese barley is not an explanation of how that "influence" resulted in the drop in price and market share. MOFCOM's analysis is superficial and offers no reasoning as to how the price and volume of imported Australian barley interacted to produce the alleged depressing effect on the price and market share of Chinese barley.

621. MOFCOM stated that "throughout the whole Period of the Injury Investigation, compared with 2014, the price of [dumped imported product] [subsidized imports] still fell sharply in 2018, and the quantity of [dumped imported product] [subsidized imports] still increased substantially. Affected by this, the price of similar domestic product dropped substantially".⁷³⁶ This is a return to the flawed endpoint-to-endpoint approach used by MOFCOM in relation to the absolute and relative volumes of imported Australian barley under the first sentences of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.

622. MOFCOM claimed that "during the Period of the Injury Investigation, the price change trends of [dumped imported product] [subsidized imports] and similar domestic product were the same, both falling first and then rising, with the overall trend decreasing".⁷³⁷

⁷³⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 16; Countervailing Duties Final Determination (Exhibit, AUS-11), pp. 16-17.

⁷³⁵ Appellate Body Report, *China – GOES*, para. 141. (emphasis original)

⁷³⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 16; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

⁷³⁷ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 16-17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

It asserted that, on this basis, the prices of imported Australian barley and Chinese domestic barley were "linked" during the Injury POI.⁷³⁸ This assertion is not supported by the evidence on the record.

623. For example, in 2015, the prices of imported Australian barley and Chinese domestic barley moved in opposite directions. The former increased marginally (to RMB 2.12 per kg from RMB 2.11 per kg in 2014), while the latter suffered its largest decrease during the Injury POI (falling to RMB 2.01 per kg from RMB 2.14 per kg in 2014). MOFCOM claimed that the price of imported Australian barley was "due to the rapid growth in Chinese domestic demand and other factors".⁷³⁹ If the prices of imported Australian barley and Chinese domestic barley were "linked", the latter should have also responded positively to these factors, including the growth in demand.

624. Although MOFCOM acknowledged the existence of "other factors" operating in relation to the price of imported Australian barley in 2015, it did not assess their continuing relevance in its price depression analysis. The Appellate Body in *China – GOES* stated that an investigating authority may not "disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices".⁷⁴⁰ Australia submits that MOFCOM should have addressed the implications of the "rapid growth in Chinese domestic demand" for its price depression analysis, in particular, the growth in imports from third countries, which reached a market share of 50.55% in 2015.⁷⁴¹ MOFCOM should have considered evidence pertaining to the level of third country imports to understand whether subject imports had a depressive effect on domestic prices.⁷⁴²

625. Investigating authorities cannot "conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".⁷⁴³ Australia submits that MOFCOM's approach to its examination of the evidence in its price depression analysis was aimed at

⁷³⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 16; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

⁷³⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 16; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

⁷⁴⁰ Appellate Body Report, *China – GOES*, para. 152.

⁷⁴¹ See Table 11.

⁷⁴² Appellate Body Report, *China – GOES*, para. 152.

⁷⁴³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

precisely this outcome and, as such, was not an objective examination as required under Articles 3.1 of the Anti-Dumping Agreement and 15.1 of the SCM Agreement.

(e) Conclusion

626. For the reasons set out above, Australia has established that China breached Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement as a result of MOFCOM's failure to conduct an objective examination based on positive evidence of the price effects of the allegedly dumped and subsidised imports of Australian barley.

4. MOFCOM's evaluations of economic factors bearing on the state of the Chinese barley industry are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement

627. MOFCOM's evaluations of economic factors bearing on the state of the Chinese barley industry in its examination of injury are inconsistent with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement, because it failed to:

- identify properly the "domestic industry" as required by Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement, leading to a risk of material distortion of its analysis;
- assess "the role, relevance and relative weight" of factors, adopting instead a "checklist approach";
- explain its conclusions as to lack of relevance or significance with respect to identified factors;
- evaluate all of the listed factors in Articles 3.4 and 15.4; and
- conduct objective examinations and consider all the positive evidence on the record.

Further, MOFCOM's evaluations were improperly skewed towards establishing the basis for a determination that the Chinese domestic barley industry had been injured.

(a) The evaluation of economic factors required under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement

628. Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement set forth a Member's substantive obligations with respect to the evaluation of economic factors which bear on the state of the domestic industry concerned in the context of an examination of injury. Article 3.4 provides as follows:

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 15.4 is drafted in nearly identical terms, with the addition of a reference to "government support programs" in the case of agriculture.

629. As with the analysis 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. The Appellate Body addressed this point in *China – GOES*:

Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry.⁷⁴⁴ (emphasis original)

630. As to the factors to be addressed under Articles 3.4 and 15.4, the panel in *Guatemala – Cement II* considered that:

Article 3.4 establishes a rebuttable presumption that those factors listed are relevant in giving guidance on whether the dumped imports have had an effect on the domestic

⁷⁴⁴ Appellate Body Report, *China – GOES*, para. 149.

industry. It is only after consideration of the listed factors that the investigating authority may dismiss some of them as not being relevant for the particular industry, thus in effect rebutting the presumption established in Article 3.4.⁷⁴⁵

The panel in *Thailand – H-Beams* explained that "all of the listed factors [...] must be considered in all cases".⁷⁴⁶ This view was endorsed by the Appellate Body in *Thailand – H-Beams*.⁷⁴⁷

631. The list of factors is not exhaustive. The panel in *Mexico – Corn Syrup* observed that "[t]here may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required".⁷⁴⁸

632. The panel in *Thailand – H-Beams* also observed that "a mere 'checklist approach'", consisting of a "mechanical exercise" which referred to each of the factors in some way, would not satisfy the requirements of Article 3.1 [and 15.1] to conduct an objective examination.⁷⁴⁹ The panel in *Korea – Certain Paper*, with the benefit of the panel's findings in *Thailand – H-Beams*, stated that:

Article 3.4 requires the [investigating authority] to carry out a reasoned analysis of the state of the industry. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 lead to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury.⁷⁵⁰ (footnote omitted)

633. In order to avoid the "checklist approach", an investigating authority must "assess the role, relevance and relative weight of each factor" in evaluations under Articles 3.4 and 15.4.⁷⁵¹ To this end, an investigating authority must take into account the "intervening trends" in each of the factors, rather than engage in "a comparison of 'end-points'".⁷⁵² The panel in *US – Hot-Rolled Steel* expressed the view that an analysis by endpoints, "by ignoring

⁷⁴⁵ Panel Report, *Guatemala – Cement II*, para. 8.283.

⁷⁴⁶ Panel Report, *Thailand – H-Beams*, para. 7.229.

⁷⁴⁷ Appellate Body Report, *Thailand – H-Beams*, para. 125.

⁷⁴⁸ Panel Report, *Mexico – Corn Syrup*, para. 7.128.

⁷⁴⁹ Panel Report, *Thailand – H-Beams*, para. 7.236.

⁷⁵⁰ Panel Report, *Korea – Certain Paper*, para. 7.272.

⁷⁵¹ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

⁷⁵² Panel Report, *EC – Tube or Pipe Fittings*, para. 7.316.

intervening changes in circumstances and conditions in which the industry is operating, would present a less complete picture of the impact of dumped imports".⁷⁵³

634. Further, where a factor is assessed as not relevant or not significant, an investigating authority must explain its conclusion as to the lack of relevance or significance.⁷⁵⁴

(b) MOFCOM's evaluations of factors under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement are inconsistent with those provisions and the requirements of Articles 3.1 and 15.1

635. Australia recalls MOFCOM's failure to properly define the "domestic industry" for the purpose of its analysis under both its anti-dumping and countervailing duties investigations in breach of Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. MOFCOM's failure in this regard necessarily undermines the legitimacy of its subsequent injury analyses. In particular, if MOFCOM failed to define the "domestic industry", it follows that its "evaluation of all relevant economic factors and indices having a bearing on the state of the [domestic] industry", as required under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, must be at material risk of distortion.

636. The definition of "domestic industry" operates to ensure that the investigating authority has the required "wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered".⁷⁵⁵ Australia submits that MOFCOM's failure to properly apply this definition in identifying the "domestic industry" gives rise to "a material risk of distortion"⁷⁵⁶ in respect of its purported analyses under Articles 3.4 and 15.4 and, accordingly, the Panel should find MOFCOM breached those provisions.

637. Further, Australia submits that MOFCOM also failed to conduct an objective examination of all of the relevant economic factors and indices as required under Articles 3.4 and 15.4.

⁷⁵³ Panel Report, *US – Hot-Rolled Steel*, para. 7.234. (footnote omitted)

⁷⁵⁴ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314. (footnote omitted)

⁷⁵⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 413.

⁷⁵⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 414.

638. In its Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM addressed the following factors listed in Articles 3.4 and 15.4: output; market share; sales price; sales revenue; and dumping margin. It also addressed the following non-listed factors: planting area; apparent consumption; production per *mu*; planting cost; income per *mu*; and profit per *mu*. The table below draws together the data from the listed and non-listed factors for ease of reference.

Table 8 Economic Factors

	2014	2015	2016	2017	2018	2014-18
Market (t)	7,224,800	12,599,900	6,756,900	10,524,500	8,525,300	
Change		+ 74.40%	- 46.37%	+ 55.76%	- 19%	18%
Area (mu) (hectares)	7,032,000 (468,800)	6,699,000 (446,600)	6,429,000 (428,600)	6,027,800 (401,853)	6,145,000 (409,667)	
Change		- 4.74%	- 4.03%	- 6.24%	+ 1.94%	-12.61%
Output (t)	1,812,000	1,868,000	1,752,000	1,661,100	1,710,000	
Change		+ 3.09%	- 6.21%	- 5.19%	+ 2.94%	- 5.63%
Market share	25.08%	14.83%	25.93%	15.78%	20.06%	
Change⁷⁵⁷		- 10.25 pp	+ 11.1 pp	- 10.15 pp	+ 4.27 pp	+ 5.02 pp
Sale price (RMB/kg)	2.14	2.01	1.96	1.90	1.97	
Change		- 6.07%	- 2.49%	- 3.06%	+ 3.68%	- 7.94%
Sales revenue (RMB-billion)	3.878	3.755	3.434	3.156	3.369	
Change		- 3.17%	- 8.54%	- 8.09%	+ 6.74%	- 13.13%
Production (kg/mu)	257.68	278.85	272.52	275.57	278.28	
Change		+ 8.22%	- 2.27%	+ 1.12%	+ 0.98%	+ 7.99%
Planting costs (RMB/mu)	731.52	799.91	823.09	825.48	832.88	
Change		+ 9.35%	+ 2.9%	+ 0.29%	+ 0.9%	+ 13.86%
Income (RMB/mu)	551.43	560.48	534.13	523.59	548.20	
Change		+ 1.64%	- 4.7%	- 1.97%	+ 4.7%	- 0.59%
Profit (RMB/mu)	- 180.09	- 239.43	- 288.96	- 301.89	- 284.68	
Change		- 32.95%	- 20.69%	- 4.47%	+ 5.7%	- 58.08%

⁷⁵⁷ The abbreviation "pp" used in the table represents the term "percentage points". This term is not used in the Anti-Dumping Final Determination (Exhibit AUS-2) and the Countervailing Duties Final Determination (Exhibit AUS-11). It describes the arithmetic difference of two percentages.

639. As this table demonstrates, the Anti-Dumping Final Determination and the Countervailing Duties Final Determination deal in similar terms with planting area, output, apparent consumption, market share, sales price, sales revenue, production per *mu*, planting costs, income per *mu* and profit per *mu*. For each of these factors, the Final Determinations provide annual figures for the period 2014–2018 and note year-on-year changes.⁷⁵⁸ They also provide endpoint-to-endpoint changes for factors.

640. As it did with its analyses under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, MOFCOM engaged in an endpoint-to-endpoint analysis and did not consider "intervening trends". In so doing, MOFCOM engaged in a "mechanical exercise"⁷⁵⁹ which did not satisfy the obligation imposed by Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement to examine "the explanatory force of subject imports on the state of the domestic industry through an evaluation of *all* the relevant factors *collectively*".⁷⁶⁰ In particular, MOFCOM did not assess "the role, relevance and relative weight"⁷⁶¹ of all the listed and non-listed factors it identified. Rather, MOFCOM simply concluded that "[a]fter review, the Investigating Authority found that barley sales prices and income are important factors that affect China's barley cultivation and industrial development".⁷⁶² In doing so, MOFCOM offered no evaluation of these factors to support their asserted importance.

641. MOFCOM also failed to explain why the evaluation of the injury factors it had identified which seemed "to lead in the other direction [...] [did] not, overall, undermine the conclusion of material injury".⁷⁶³ In this regard, MOFCOM appeared to acknowledge that the decrease in revenue *and* the increase in planting costs are both causes of the lack of profitability in the domestic barley industry. In particular, MOFCOM states that the decrease in sales revenue, resulting from the decline in the price of Chinese domestic barley, and the

⁷⁵⁸ The Anti-Dumping Final Determination also deals with the alleged dumping margin, finding that "[t]he Investigating Authority also reviewed the margin of dumping of the imported Investigated Product. The evidence shows that the margin of dumping was 73.6%, a significant amount of dumping, which was sufficient to affect domestic market prices adversely". (Anti-Dumping Final Determination (Exhibit AUS-2), p. 19.)

⁷⁵⁹ Panel Report, *Thailand – H-Beams*, para. 7.236.

⁷⁶⁰ Appellate Body Report, *Korea – Pneumatic Valves*, para.5.172. (emphasis original)

⁷⁶¹ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

⁷⁶² Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

⁷⁶³ Panel Report, *Korea – Certain Paper*, para. 7.272. (footnote omitted)

increase in planting costs "led to the constant deterioration of the profitability" of Chinese domestic barley production.⁷⁶⁴

642. The table below analyses the positive evidence on the record to show that planting costs were, in fact, a significant factor in relation to the losses in the domestic industry during the Injury POI.

⁷⁶⁴ Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 20.

Table 9 Planting Costs/Revenue/Loss: 2014–2018

	2014	2015	2016	2017	2018
Area (mu)⁷⁶⁵ (hectares)	7,032,000 (468,800)	6,699,000 (446,600)	6,429,000 (428,600)	6,027,800 (401,853)	6,145,000 (409,667)
Costs/mu⁷⁶⁶ (RMB)	731.52	799.91	823.09	825.48	832.88
Total costs (RMB)	5,144,048,640	5,358,597,090	5,291,645,610	4,975,828,344	5,118,047,600
				Total Cost for Injury POI:	↓ 25,888,167,284
Revenue/m⁷⁶⁷ (RMB)	551.43	560.48	534.13	523.59	548.20
Revenue/year⁷⁶⁸ (RMB)	3,877,655,760	3,754,655,520	3,433,921,770	3,156,095,802	3,368,689,000
				Total Revenue for Injury POI:	↓ 17,591,017,852
Loss/mu⁷⁶⁹ (RMB)	- 180.09	- 239.43	- 288.96	- 301.89	- 284.68
Loss/year⁷⁷⁰ (RMB)	1,266,392,880	1,603,941,570	1,857,723,840	1,819,732,542	1,749,358,600
				Total Loss for Injury POI:	↓ 8,297,149,432

643. The table highlights the very significant financial burden that planting costs imposed on Chinese barley producers during the Injury POI. The cumulative total of planting costs for the period was RMB 25,888,167,284 while the cumulative revenue from the sale of domestic barley was RMB 17,591,017,852. This resulted in a cumulative loss (planting costs minus revenue) on the sale of domestic barley of RMB 8,297,149,432 in the Injury POI. Having

⁷⁶⁵ The figures for the area (mu) used for barley production are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), p. 17, and the Countervailing Duties Final Determination (Exhibit AUS-11), pp. 17-18. The conversion of mu to hectares is based on the same conversion factor used for Table 8.

⁷⁶⁶ The figures for costs/mu are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), p. 18, and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 18.

⁷⁶⁷ The figures for revenue/mu are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), p. 18, and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

⁷⁶⁸ See the entry for "Sales Revenue (RMB 100 million)" in the data table attached to the Anti-Dumping Final Determination (Exhibit AUS-2), p. 23, and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 23.

⁷⁶⁹ The figures for loss/mu are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), p. 18, and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

⁷⁷⁰ See entry for "Profit (RMB 100 million)" in the data table, CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 35-36; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), pp. 30-31.

identified and acknowledged the relevance of this factor, MOFCOM failed to place proper weight on planting costs as a determinative factor in the economic circumstances of the Chinese barley industry. In doing so, MOFCOM also failed entirely to explain why this factor did not undermine its material injury determination.

644. Instead, MOFCOM asserts a link between the domestic industry and the subject imports, unsupported by the positive evidence on the record. Specifically, MOFCOM states that the decrease in the price, and increase in the volume, of imported Australian barley "forced" the Chinese domestic industry to lower the prices of domestic barley. Specifically, the Final Determinations state that:

[dumped imported products] [subsidized imports] hold a dominant position in competition in China's domestic market, and the price is an essential factor influencing downstream users to make purchasing decisions. During the Period of the Injury Investigation, the prices of *[dumped imported products] [subsidized imports]* generally declined, while the amount of *[dumped imported products] [subsidized imports]* increased significantly. Affected by this, similar products in the domestic industry were forced to lower prices, with a cumulative decrease of 7.94% in 2018 compared to 2014.⁷⁷¹

645. As Australia has already outlined above, in its analysis of MOFCOM's deficient price depression analysis, MOFCOM's assertions in this regard are not supported by an objective examination of the facts on the record and only serve to expose the clear deficiencies in MOFCOM's approach.⁷⁷²

646. In sum, MOFCOM's evaluation of listed and non-listed economic factors failed to consider all the positive evidence on the record and was not an objective examination. Australia submits that MOFCOM's combined failures in this respect point towards an approach that was improperly skewed towards establishing the basis for a determination that the Chinese domestic barley industry had been injured.

⁷⁷¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

⁷⁷² See above, section V.A.3.

(c) MOFCOM did not evaluate all the factors listed under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement

647. The Appellate Body has confirmed that "it is mandatory for investigating authorities to evaluate all of the fifteen injury factors listed in Article 3.4 of the Anti-Dumping Agreement".⁷⁷³ The same obligation also applies in relation to Article 15.4 of the SCM Agreement.⁷⁷⁴

648. MOFCOM did not properly evaluate the following mandatory factors listed in Articles 3.4 and 15.4: cash flow; inventories; employment; wages; growth; and financing or investment. The Final Determinations explain that:

The Investigating Authority investigated the actual and potential negative impacts of cash flow, inventory, employment, wages, growth and financing or investment capacity. After the investigation, the domestic industry did not count the above indicators. There are 290 million people in China engaged in agricultural production. Chinese barley growers are distributed in more than 20 provinces, autonomous regions and municipalities directly under the Central Government, and the production and operation of primary agricultural products have their characteristics with no available statistics on the above relevant indicators.⁷⁷⁵

649. MOFCOM's explanation as to why it "did not count the above indicators" is that there are "no available statistics" on them. Rather than providing an explanation that these factors were not evaluated because they are not relevant to the investigation, MOFCOM actually refers to them as "relevant indicators". In circumstances where "data was not even collected for all the factors listed in Article 3.4 [of the Anti-Dumping Agreement], let alone evaluated" by the investigating authorities, the panel in *EC – Bed Linen* considered that "[s]urely a factor cannot be evaluated without the collection of relevant data".⁷⁷⁶ Considering that the evaluation of these factors is mandatory, and MOFCOM is obligated to conduct an objective

⁷⁷³ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 156. (footnote omitted)

⁷⁷⁴ The panel in *EC – Countervailing Measures on DRAM Chips* found that "Article 15.4 requires a mandatory evaluation of all individual factors listed in that Article, including 'wages'." (Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.359. (footnote omitted)) The panel in *US – Carbon Steel (India)* also stated, "[t]he Appellate Body in *US – Hot-Rolled Steel* stated that 'Article 3.4 [of the AD Agreement] lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities.' Given the close identity of the texts, we consider that this understanding applies with equal force to Article 15.4 of the SCM Agreement". (Panel Report, *US – Carbon Steel (India)*, para. 7.399. (footnotes omitted))

⁷⁷⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

⁷⁷⁶ Panel Report, *EC – Bed Linen*, para. 6.167.

examination and make determinations on the basis of positive evidence, MOFCOM acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement to the extent that it failed to obtain data for its evaluation of the mandatory factors in question and thereby precluded itself from evaluating them.

650. Moreover, data were in fact available in relation to the mandatory "wages" factor. In this regard, CICC provided the following breakdown of "planting costs", including "labour costs", in its responses to the questionnaire for domestic producers or growers in the anti-dumping investigation and the questionnaire for domestic producers or growers in the countervailing duties investigation:⁷⁷⁷

Table 10 Breakdown of Planting Costs: 2014–2018

Costs Breakdown	2014 RMB/mu	2015 RMB/mu	2016 RMB/mu	2017 RMB/mu	2018 RMB/mu
Seeds	51.39	53.81	55.05	54.79	56.43
Pesticides	13.93	15.28	15.52	15.43	16.62
Fertilisers	107.67	116.22	119.32	118.89	116.86
Mechanical	97.47	100.37	106.24	105.67	108.72
Labour	155.91	189.81	199.84	206.34	206.71
Land rental	284.25	301.67	302.26	299.52	300.49
Irrigation	9.14	9.69	11.23	11.38	13.31
Other	11.76	13.06	13.63	13.46	13.74
Total	731.52	799.91	823.09	825.48	832.88

651. This table shows that MOFCOM was in error when it claimed there were no available statistics on wages. The table highlights that labour costs grew more quickly than any of the other listed elements of planting costs in the Injury POI. In fact, the growth in labour costs contributed half of the overall increase in planting costs between 2014 and 2018.

652. In sum, MOFCOM's purported "investigation" of, and failure to evaluate, the mandatory factors of cash flow, inventories, employment, wages, growth and financing or investment breached China's obligations under Article 3.4 of the Anti-Dumping Agreement

⁷⁷⁷ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 53; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 46.

and Article 15.4 of the SCM Agreement because MOFCOM did not attempt to address "the role, relevance and relative weight" of these factors. This was also inconsistent with the overarching obligations under Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement to conduct an objective examination and make determinations on the basis of positive evidence.

(d) Conclusion

653. For the reasons set out above, Australia has established that China breached Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement as a result of MOFCOM's failure to conduct an objective evaluation based on positive evidence of the economic factors (listed and non-listed) bearing on the state of China's barley industry in its examination of injury.

5. MOFCOM failed to conduct its causation analyses in accordance with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

654. MOFCOM's causation analyses in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination are inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement, respectively, because MOFCOM:

- used the outcomes of the flawed inquiries and evaluations under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and under Articles 15.2 and 15.4 of the SCM Agreement in its causation analyses, vitiating the analyses;
- failed to conduct proper causation analyses to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between subject imports of Australian barley and injury to the Chinese barley industry;
- failed to conduct non-attribution analyses in relation to other "known" factors; and
- failed to undertake an objective examination of causation or to make determinations based on positive evidence.

(a) The conduct of causation analyses required under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement

655. 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. Article 3.5 provides as follows:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

Article 15.5 is drafted in nearly identical terms.

656. The first two sentences of Article 3.5 "identify the *causal link* that must be shown in reaching an injury determination", ⁷⁷⁸ as do the first two sentences of Article 15.5. ⁷⁷⁹ That link must be established between the dumped or subsidised imports and the injury to the domestic industry. The Appellate Body in *US – Anti-Dumping Measures on Oil Country Tubular Goods* underlined the central importance of establishing the causal link under the Anti-Dumping Agreement, stating:

It is clear from Article VI of the GATT 1994 and the above-mentioned provisions of the *Anti-Dumping Agreement*, and indeed from the design and structure of that Agreement as a whole, that the *Anti-Dumping Agreement* deals with counteracting injurious dumping and that an anti-dumping duty can be imposed and maintained *only* if the dumping (as properly established) causes injury to the domestic industry. ⁷⁸⁰ (emphasis original)

⁷⁷⁸ Appellate Body Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.225. (emphasis original)

⁷⁷⁹ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.170.

⁷⁸⁰ Appellate Body, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 117.

657. 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 [subsidized] imports".⁷⁸¹ The list of factors in the fourth sentences of Articles 3.5 and 15.5 is "illustrative", and each of these factors may or may not be relevant in a given case.⁷⁸²

i. What constitutes a "known factor"

658. The Appellate Body stated in *EC – Tube or Pipe Fittings* that, in order to fall within the scope of the term "known factor" in Article 3.5 of the Anti-Dumping Agreement, a factor must:

- (a) be "known" to an investigating authority;
- (b) be a factor "other than dumped imports" [*other than subsidized imports*]; and
- (c) be injuring the domestic industry at the same time as the dumped imports [*the subsidized imports*].⁷⁸³

The Appellate Body went on to observe that the Anti-Dumping Agreement "does not expressly state how [...] factors should become 'known' to the investigating authority, or if and in what manner they must be raised by interested parties, in order to qualify as 'known'".⁷⁸⁴ The panel in *EU – Footwear (China)* considered that "known" other factors would "at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the anti-dumping investigation".⁷⁸⁵

659. The panel in *China – GOES* considered that the obligation placed on an investigating authority to "examine any known factors" required that an authority investigate a factor which became "known" to it, with the implication being that there was not an obligation on the interested party raising the factor to do the investigating.⁷⁸⁶ Other panels have reasoned that "if there is no relevant evidence before an investigating authority [...] there is no requirement [...] to proceed to conduct a non-attribution analysis".⁷⁸⁷ This view should not be taken to require that a full dossier of evidence must be submitted to an investigating authority before it is required to examine a factor. In this regard, the statement is apposite by the panel

⁷⁸¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

⁷⁸² Panel Report, *Thailand – H-Beams*, para. 7.274.

⁷⁸³ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

⁷⁸⁴ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 176.

⁷⁸⁵ Panel Report, *EU – Footwear (China)*, para. 7.484. (footnote omitted)

⁷⁸⁶ Panel Report, *China – GOES*, para. 7.636.

⁷⁸⁷ Panel Report, *China – X-Ray Equipment*, para. 7.267.

in *EU – Fatty Alcohols (Indonesia)* that "an investigating authority need only address an alleged factor raised by an interested party where *sufficient* evidence has been provided that the factor causes injury".⁷⁸⁸

660. Australia contends that the evidence required should be assessed on a case-by-case basis. For example, where the factor is a government measure, much of the evidence about its impact on an industry is more likely to be in the possession of the government (and, therefore, accessible to an investigating authority) than available to interested parties in anti-dumping or countervailing investigations.

ii. *How a non-attribution analysis is to be conducted*

661. The Appellate Body has considered the Agreement on Safeguards for guidance on interpreting the elements of a non-attribution analysis under both Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.⁷⁸⁹

662. In particular, in interpreting Article 3.5, the Appellate Body in *US – Hot-Rolled Steel*, referred to its previous consideration of the non-attribution language of Article 4.2(b) of the Agreement on Safeguards.⁷⁹⁰ The Appellate Body explained in *US – Wheat Gluten* that the non-attribution assessment concerned "the proper 'attribution' [...] of 'injury' caused to the domestic industry by 'factors other than increased imports'".⁷⁹¹ It further emphasised that an investigating authority had to "determine [...] whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a *genuine and substantial relationship* of cause and effect between these two elements".⁷⁹²

⁷⁸⁸ Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.196. (emphasis added)

⁷⁸⁹ The Appellate Body stated in *US – Hot-Rolled Steel* at para. 230 that:

Although the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language [...]. In these circumstances, we agree with the Panel that adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.

The Appellate Body similarly drew on its own guidance on the non-attribution language of Article 4.2(b) of the Agreement on Safeguards in its interpretation of Article 15.5 of the SCM Agreement in *EU – PET (Pakistan)*. (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.168.)

⁷⁹⁰ Appellate Body Report, *US – Hot-Rolled Steel*, para. 229.

⁷⁹¹ Appellate Body Report, *US – Wheat Gluten*, para. 68.

⁷⁹² Appellate Body Report, *US – Wheat Gluten*, para. 69. (emphasis added)

663. In *EU – PET (Pakistan)*, the Appellate Body drew on the same guidance from its report in *US – Wheat Gluten* in considering the issue of non-attribution in the context of Article 15.5 of the SCM Agreement. In particular, it stated that "a showing of a 'causal relationship' between the subsidised imports and the injury requires the existence of a 'genuine and substantial relationship of cause and effect' between those elements".⁷⁹³ The Appellate Body went on to explain that:

[I]n order for a "genuine and substantial" causal relationship to exist between the subsidized imports and the injury to the domestic industry, such imports need not be the *sole* cause of that injury. Rather, the existence of a "genuine and substantial" causal relationship is a function of *both*: (i) the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry; and (ii) the comparative significance of such a link in relation to the contributions of other known factors to that injury. As the Appellate Body has explained, the "genuine" component of the "genuine and substantial" causation test requires that the nexus between the causal agent and the consequence at issue be "real" or "true". The "substantial" component of the test concerns the "relative importance" of the causal agent in bringing about the consequence. As such, Article 15.5 requires an investigating authority to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.⁷⁹⁴ (emphasis original; footnotes omitted)

This guidance may also be applied in the context of Article 3.5 of the Anti-Dumping Agreement.

664. As to the methodology to be used in a non-attribution analysis, the panel in *US – Coated Paper* explained that the analysis may include a "'quantitative assessment' of the impact of other factors", but there is no requirement for such an assessment, and "an adequately reasoned explanation of the qualitative effects of other factors based on the evidence before [the investigating authority] will suffice".⁷⁹⁵ Although an investigating authority has significant discretion in choosing the methodology it will employ in conducting a non-attribution analysis, that discretion is bounded by the obligations imposed under Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, respectively, to undertake an objective examination based on positive evidence.

⁷⁹³ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.168. (footnote omitted)

⁷⁹⁴ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.

⁷⁹⁵ Panel Report, *US – Coated Paper (Indonesia)*, para. 7.210. (footnote omitted)

- (b) The inconsistencies of MOFCOM's analyses under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement vitiated its causation analyses under Articles 3.5 and 15.5

665. In *China – GOES*, the Appellate Body explained the relationship between Article 3.5 and Articles 3.2 and 3.4, and the equivalent provisions of the SCM Agreement, in the following terms:

[T]he inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries *form the basis for the overall causation analysis* contemplated in Articles 3.5 and 15.5.⁷⁹⁶ (emphasis added)

As such, if the analyses of the volume of subject imports and the price effects of those imports are flawed, or if the analyses of the economic factors bearing on the state of the domestic industry are flawed, those flaws will vitiate the investigating authority's "overall causation analysis".

666. The Appellate Body acknowledged this point in *Korea – Pneumatic Valves* as follows:

[B]y virtue of the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in the first sentence of Article 3.5, to the extent that a panel finds that an investigating authority's volume, price effects, and impact analyses are inconsistent with its obligations under Articles 3.2 and 3.4, such inconsistencies would likely undermine an investigating authority's overall causation determination and *consequently* lead to an inconsistency with Article 3.5.⁷⁹⁷ (emphasis original; footnote omitted)

A number of panels have taken this view. For example, the panel in *China – GOES* found that shortcomings in MOFCOM's findings on price depression and price suppression "undermine[d] MOFCOM's conclusion on the causal link between subject imports and the material injury

⁷⁹⁶ Appellate Body Report, *China – GOES*, para. 149.

⁷⁹⁷ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.196. Australia contends that the reasoning of the Appellate Body in *Korea – Pneumatic Valves (Japan)* is equally applicable in relation to Articles 15.2, 15.4 and 15.5 of the SCM Agreement.

suffered by the domestic industry".⁷⁹⁸ The panel in *China – Autos (US)* determined that MOFCOM's price effects analysis was flawed and therefore that:

[I]t would be difficult, if not impossible, to make a determination of causation consistent with the requirements of the Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements.⁷⁹⁹

667. Australia has shown above that MOFCOM acted inconsistently with:

- 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 by failing to conduct an objective examination based on positive evidence of the volumes of the allegedly dumped and subsidised imports of Australian barley;
- Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement by failing to conduct an objective examination based on positive evidence of the price effects of the allegedly dumped and subsidised imports of Australian barley; and
- Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement by failing to conduct an objective evaluation based on positive evidence of the economic factors bearing on the state of China's barley industry in the context of its examination of injury.

668. MOFCOM compounded these failures by relying on the outcomes of the inquiries under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, and Articles 15.2 and 15.4 of the SCM Agreement, respectively, in the causation analyses in the Final Determinations,⁸⁰⁰ vitiating those analyses. As a result, MOFCOM's determinations that subject imports from Australia caused material injury to the domestic barley industry in China are inconsistent with

⁷⁹⁸ Panel Report, *China – GOES*, para. 7.620.

⁷⁹⁹ Panel Report, *China – Autos (US)*, para. 7.327.

⁸⁰⁰ Anti-Dumping Final Determination (Exhibit AUS-2) pp. 20-21; Countervailing Duties Final Determination (Exhibit-AUS-11), pp. 21-22.

Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement, respectively.

(c) MOFCOM failed to establish a "genuine" causal relationship between Australian barley imports and injury to the Chinese barley industry

669. Australia submits, in the alternative, that MOFCOM erred in relying on the outcomes of the inquiries under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, without further analysis, to assert that a causal relationship exists between the allegedly dumped⁸⁰¹ and subsidised⁸⁰² Australian barley imports and injury to the Chinese barley industry.

670. MOFCOM was required for the purposes of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement to go beyond its analyses under Articles 3.2 and 3.4 and Articles 15.2 and 15.4, respectively, to support its assertion that a causal relationship exists between the allegedly dumped and subsidised Australian barley imports and injury to the Chinese barley industry. To interpret the obligation otherwise would render Articles 3.5 and 15.5, at least in part, redundant. Australia submits that without this analysis, MOFCOM could not demonstrate the existence of a "genuine and substantial relationship of cause and effect" between Australian barley imports and injury to the Chinese barley industry.

671. By way of example, the Anti-Dumping Final Determination asserts in its causation analysis that "low price competition from dumped imported product has caused a substantial reduction in the prices of similar products in the domestic industry".⁸⁰³ The same assertion is made in the Countervailing Duties Final Determination.⁸⁰⁴ This assertion is key to MOFCOM's finding that a causal relationship exists between imported Australian barley and injury to China's barley industry. However, neither Final Determination undertakes any further analysis for the purposes of establishing such a causal relationship. As previously discussed, the

⁸⁰¹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 20.

⁸⁰² Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸⁰³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 20.

⁸⁰⁴ Countervailing Duties Final Determination (Exhibit AUS-11), p. 21.

positive evidence on the record before MOFCOM in each investigation did not support MOFCOM's assertion.⁸⁰⁵

672. In sum, MOFCOM's determinations under Articles 3.5 and 15.5 were in effect nothing more than a restatement of the outcome of its inquiries under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement, respectively. This was insufficient to explain how the record evidence established a causal relationship between the subject imports of Australian barley and the alleged "substantial injury suffered by the domestic industry" under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. MOFCOM's failure to undertake any further analysis for the purposes of establishing the required causal relationship resulted in a breach of China's obligations under Articles 3.5 and 15.5.

(d) MOFCOM failed to conduct non-attribution analyses in relation to "known" factors in accordance with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement

673. Australia submits that MOFCOM failed to conduct a proper non-attribution analysis in relation to the following "known" factors in its Anti-Dumping Final Determination as required by Article 3.5 of the Anti-Dumping Agreement: (i) the support policies of the Chinese Government for the production of wheat and corn; (ii) the uncompetitive production costs of the Chinese domestic industry; (iii) Chinese domestic users purchasing imported Australian barley rather than domestic barley because of "factors other than price"; and (iv) the effects of non-subject imports from third countries.⁸⁰⁶

674. In its Countervailing Duties Final Determination, MOFCOM claimed that it had "reviewed all known factors that may cause injury to the domestic industry".⁸⁰⁷ However, it failed to conduct a proper non-attribution analysis as required by Article 15.5 of the SCM Agreement of: (i) the support policies of the Chinese Government for the production of

⁸⁰⁵ See above, section V.A.3.

⁸⁰⁶ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21.

⁸⁰⁷ Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

wheat and corn;⁸⁰⁸ and (ii) the effects of non-subject imports from third countries.⁸⁰⁹ Although MOFCOM included planting costs as an economic factor bearing on the state of China's barley industry in its analysis under Article 15.4 of the SCM Agreement, it failed to consider the impact of those costs in its non-attribution analysis under Article 15.5. It also failed to consider that Chinese domestic users purchased imported Australian barley rather than domestic barley because of "factors other than price".

675. Further, MOFCOM acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement by failing to take into account positive evidence on the record concerning these "known" factors and failing to conduct an objective examination.

i. Chinese Government support policies for wheat and corn

676. In the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM concluded that "[a]lthough the Chinese Government's wheat and corn policy is a consideration, the substantial injury caused to the domestic industry by [*the dumping of the imported product*] [*subsidized imports*] cannot be denied".⁸¹⁰ MOFCOM made this point again in the Anti-Dumping Final Determination, stating that China's "wheat and corn policy does not negate the causal relationship between the import of the Investigated Product and the substantial injury to the domestic industry".⁸¹¹ MOFCOM simply made these statements, providing no further explanation or reasons to demonstrate how MOFCOM considered the relevant evidence and arrived at this conclusion. These statements demonstrate that MOFCOM misunderstands the obligations imposed by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement with regard to non-attribution analyses. The following statement by the Appellate Body in *EU – PET (Pakistan)* is apposite:

[I]n order for a "genuine and substantial" causal relationship to exist between the subsidized imports and the injury to the domestic industry, such imports need not be the *sole* cause of

⁸⁰⁸ Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸⁰⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸¹⁰ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸¹¹ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21.

that injury. Rather, the existence of a "genuine and substantial" causal relationship is a function of *both*: (i) the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry; and (ii) the comparative significance of such a link in relation to the contributions of other known factors to that injury.⁸¹² (emphasis original; footnote omitted)

The Appellate Body clarifies in this statement that an investigating authority has to assess the "comparative significance" of the link between the subject imports and injury to the affected domestic industry in relation to the contributions made by other known factors to that injury. MOFCOM made no attempt to assess the contribution of the Chinese Government's support policies for wheat and corn to the injury suffered by China's domestic barley industry. MOFCOM did concede that the Chinese Government's wheat and corn policy was a "consideration" taken into account by Chinese growers when deciding on whether or not to plant barley, but maintained it was only one of several considerations, including the "comprehensive income" of growers.⁸¹³

677. The Anti-Dumping Final Determination refers to the claim of the Australian Government that "China's supporting policy for corn has made corn prices high, and China's minimum wheat purchase price policy has made Chinese farmers less motivated to grow barley".⁸¹⁴ MOFCOM asserts that the Australian Government "failed to provide supporting evidence" for its claim.⁸¹⁵ Australia rejects this assertion. The Australian Government raised the impact of China's support policies in its comments on the initiation of the anti-dumping investigation⁸¹⁶ and in its comments on the Anti-Dumping Final Disclosure.⁸¹⁷ It also addressed the issue in its submission following the consultations between MOFCOM and the Australian Department of Foreign Affairs and Trade held on 13 February 2019.⁸¹⁸

⁸¹² Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.

⁸¹³ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸¹⁴ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21; See also, Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸¹⁵ Anti-Dumping Final Determination (Exhibit, AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸¹⁶ Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 44.

⁸¹⁷ Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), para. 9.

⁸¹⁸ Australian Government, Extract of Submission following meeting with MOFCOM on 13 February 2019 to discuss initiation, 7 March 2019 (Australian Government Submission Following Initiation Consultations) (Exhibit AUS-74), p. 2.

678. Further, in its anti-dumping questionnaire response, Tsingtao Brewery observed that "[d]omestic barley is affected by government policies on agricultural products to a large extent. As no national grain subsidy policy is provided for barley, and the comparative benefits from planting barley are lower than those from planting other grain crops, farmers' enthusiasm for planting barley is not high".⁸¹⁹ CHS (Shanghai), in its countervailing duties questionnaire response, stated that "we mainly resell the imported barley to feed mills, who purchase the barley for replacing domestic wheat and corn for price considerations, so the most prominent factor affecting barley price is the changes in prices of domestic wheat and corn".⁸²⁰

679. Australia also contends that, where a factor is a government measure such as China's wheat and corn support policies, the evidence about its impact on an industry is much more likely to be in the possession of that government than available to interested parties in anti-dumping and countervailing investigations. In the present case, China was obligated to conduct an objective examination of the injury caused by its own wheat and corn support policies, which was a known factor raised by a number of interested parties.

680. In sum, despite there being sufficient evidence to support a non-attribution analysis, MOFCOM failed to conduct an objective examination of the impact of China's wheat and corn support policies on the domestic barley industry. In failing to do so, MOFCOM acted inconsistently with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

ii. Uncompetitive production costs of the Chinese domestic barley industry

681. The Australian Government raised the uncompetitive production cost of the Chinese domestic industry in its submission of 10 December 2018 on the initiation of the anti-dumping investigation,⁸²¹ stating that China's domestic barley production "has never been profitable, even in 2015 when domestic demand was at its highest, the market share held by Australian imports was at its lowest and the import price from Australia was higher than the domestic

⁸¹⁹ Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 29.

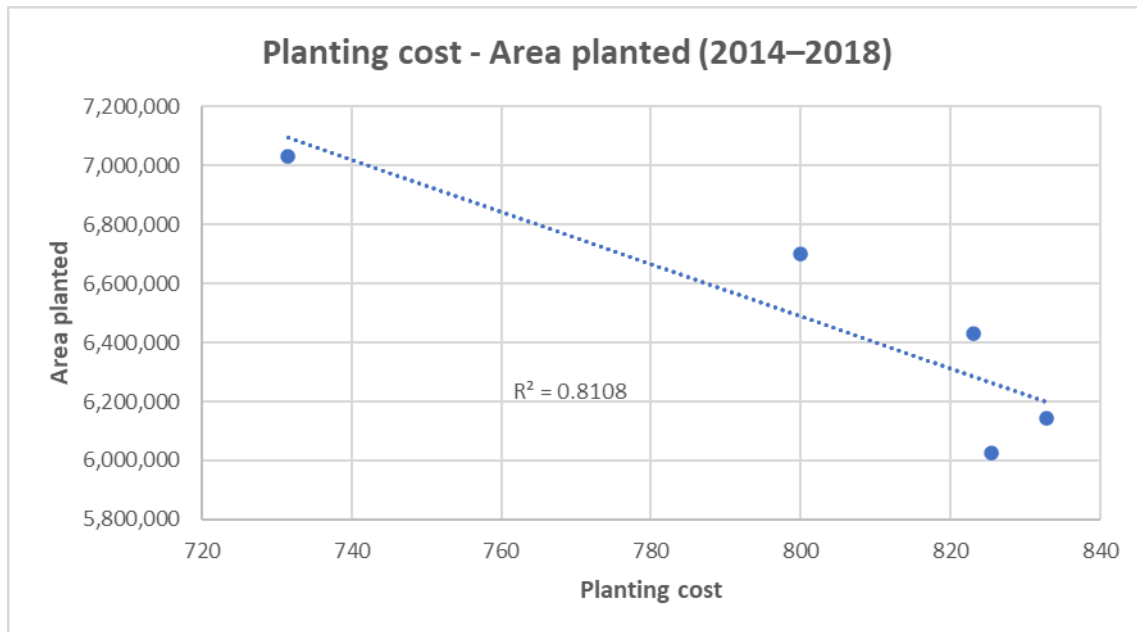
⁸²⁰ CHS (Shanghai) Anti-Dumping Questionnaire Response (Exhibit AUS-49), pp. 31-32.

⁸²¹ This factor was only addressed in the Anti-Dumping Final Determination (Exhibit AUS-2) and not in the Countervailing Duties Final Determination (Exhibit AUS-11).

price".⁸²² The Australian Government identified this factor again in its comments on the Anti-Dumping Final Disclosure.⁸²³ As Table 9 above shows, the cumulative loss (planting costs minus revenue) on the sale of domestic barley for the Injury POI was RMB 8,297,149,432.

682. As to the impact of increased planting costs on the area of land planted with barley during the Injury POI, the following scatterplot⁸²⁴ demonstrates a clear negative correlation between increased costs and the reduction in land planted with barley.

Figure 1 Correlation between Planting Costs and Area of Land Planted with Barley



683. This trend is consistent with the information provided in the responses of CICC to the questionnaires for domestic producers or growers in the anti-dumping investigation and the countervailing duties investigation, which pointed to the importance of profitability as a factor in decisions by domestic growers, stating that "[t]he land that grows barley can grow other crops, such as wheat and corn" and "[t]he more profitable crop will be planted".⁸²⁵

684. In line with its response on China's wheat and corn policies, MOFCOM appears to dismiss the impact of increased planting costs as a factor pertinent to its analysis, stating in

⁸²² Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 36.

⁸²³ Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), para. 9.

⁸²⁴ Prepared by Australia for the purposes of these proceedings.

⁸²⁵ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 31; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 26. This statement also points to the impact of the Chinese Government's support policies for wheat and corn (see above, section V.A.5(d)i). It is evident that a policy which encourages the production of wheat and corn will be to the detriment of the production of barley on the same land and, as a result, injure the barley industry.

the Anti-Dumping Final Determination that "whether the production cost of the domestic industry is competitive does not negate the injury caused by the dumping of the imported Investigated Product".⁸²⁶ This response once again shows that MOFCOM misunderstood the purpose of a non-attribution analysis. As identified above, an investigating authority must assess the "comparative significance" of the link between the subject imports and injury to the affected domestic industry in relation to the contributions made by other known factors to that injury. MOFCOM made no attempt to assess the contribution of planting costs to the injury suffered by China's domestic barley industry.

685. As with the "known" factor of China's wheat and corn support policies, there was sufficient evidence to support a non-attribution analysis of the known factor of China's uncompetitive production costs of barley, but MOFCOM failed to conduct that analysis in the Anti-Dumping Final Determination. In addition, MOFCOM also failed to address the impact of those production costs in its non-attribution analysis under Article 15.5 of the SCM Agreement. As a result, MOFCOM acted inconsistently with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement, respectively.

iii. Purchase of imported Australian barley rather than Chinese domestic barley because of factors other than price

686. A further "known" factor addressed in the Anti-Dumping Final Determination (but not the Countervailing Duties Final Determination) is Chinese domestic users purchasing imported Australian barley rather than domestic barley for reasons other than price.⁸²⁷ MOFCOM stated that:

[S]ome domestic malt companies also purchase similar domestic products at the same time as purchasing the Investigated Product; differences in individual indicators between the Investigated Product and similar domestic products are not the main factors affecting downstream users' purchases, and the price is a crucial factor affecting domestic downstream users.⁸²⁸

⁸²⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 21.

⁸²⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 21.

⁸²⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 21.

In this statement MOFCOM maintains that price is "a crucial factor" affecting purchasing by domestic downstream users. In doing so, MOFCOM failed to take account of the evidence on the record before it of the segmentation of the Chinese barley industry supplied by different product categories at different price points.

687. MOFCOM disregarded evidence showing that China's domestic barley market was segmented like other barley markets throughout the world, including segments for high-quality malting barley, FAQ barley, and lower-quality feed barley. The evidence relating to the malting barley sector showed that the price was not the most important factor affecting domestic downstream users, contrary to MOFCOM's assertion. The record evidence clearly established that there are technical requirements critical for the use of malting barley, and this results in Chinese malting companies and brewers having a strong preference for malting barley of consistently high, uniform quality, the likes of which is not supplied by the Chinese barley industry and must therefore be imported, particularly from Australia. This evidence was provided, *inter alia*, in the anti-dumping questionnaire responses of various Chinese malting companies.

688. The Guangzhou Malting response stated that:

Supertime Development owns five malt production sites located in Guangzhou of Guangdong province, Ningbo of Zhejiang province, Baoying of Jiangsu province, Changle of Shandong province, and Qinhuangdao of Hebei province, with a total production capacity of 920,000 tons and an annual barley consumption of about 1.1 million tons.⁸²⁹

The response indicates that more than 90% of the barley consumed by the companies was imported, mainly from Australia, Canada, France, Denmark and Argentina.⁸³⁰ Guangzhou Malting used very little domestic barley in the period 2014–2018, stating that:

As the varieties of the barley purchased by our company were subject to the influence of the order structure of our beer customers, we did not purchase any barley from domestic market in 2014, 2015, 2016 and 2018, and 3,000 tons of barley was purchased in 2017.⁸³¹

⁸²⁹ Guangzhou Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 3 January 2019 (public version) (English translation) (Guangzhou Malting Anti-Dumping Questionnaire Response) (Exhibit AUS-75), p. 44.

⁸³⁰ Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), p. 44.

⁸³¹ Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), p. 60. See also Ningbo Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, undated (public version) (English translation) (Ningbo Malting Anti-Dumping Questionnaire Response) (Exhibit AUS-76), p. 61; Baoying Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping,

689. The strong preference of these malting companies for imported barley, particularly Australian barley, is based on the significant difference in quality between imported and domestic malt barley. Guangzhao Malting addresses the issue of quality in the following observation on the state of the domestic industry:

[B]arley is seldom cultivated on a large scale, mainly by small and medium-sized farmers in a sporadic pattern. As such, the standards for varieties selection, field management, and harvesting and storage cannot be unified, resulting in large fluctuations in quality.⁸³²

Ningbo Malting,⁸³³ Baoying Malting,⁸³⁴ Qinhuangdao Malting⁸³⁵ and Changle Malting⁸³⁶ made similar statements in their responses. Australia notes CICC similarly described that "domestic barley is planted in a scattered manner, involving a large number of farmers".⁸³⁷

690. In light of such evidence, MOFCOM's statement that "price is a crucial factor affecting domestic downstream users"⁸³⁸ does not reflect the domestic market for malting barley and the "other factors" influencing the decision on whether to purchase imported Australian barley or Chinese domestic barley. The significant difference in quality between Australian and Chinese barley was the key factor bearing on the purchasing decisions of malting companies and, as such, should have been accounted for by MOFCOM in its determination.

691. Again, despite there being sufficient evidence to support a non-attribution analysis of this known factor, MOFCOM failed to conduct that analysis in either the Anti-Dumping Final Determination or the Countervailing Duties Final Determination. As a result of MOFCOM's failure to do so, MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement, respectively.

undated (public version) (English translation) (Baoying Malting Anti-Dumping Questionnaire Response) (Exhibit AUS-77), p. 60; Qinhuangdao Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 December 2018 (public version) (English translation) (Qinhuangdao Malting Anti-Dumping Questionnaire Response) (Exhibit AUS-78), p. 60; and Changle Malting, Response to the Anti-Dumping Questionnaire for Domestic Importers/ Traders/ Downstream Users Anti-Dumping, 25 December 2018 (public version) (English translation) (Changle Malting Anti-Dumping Questionnaire Response) (Exhibit AUS-79), p. 59.

⁸³² Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), p. 48.

⁸³³ Ningbo Malting Anti-Dumping Questionnaire Response (Exhibit AUS-76), p. 48.

⁸³⁴ Baoying Malting Anti-Dumping Questionnaire Response (Exhibit AUS-77), p. 48.

⁸³⁵ Qinhuangdao Malting Anti-Dumping Questionnaire Response (Exhibit AUS-78), p. 47.

⁸³⁶ Changle Malting Anti-Dumping Questionnaire Response (Exhibit AUS-79), p. 46.

⁸³⁷ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 28; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 24.

⁸³⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 21.

iv. *Non-subject imports from third countries*

692. MOFCOM asserted in respect of both its Anti-Dumping and Countervailing Duties Final Determinations that there was "no evidence to show that factors such as the impact of imported products from other countries (regions) [...] caused substantial injury to the domestic industry".⁸³⁹ However, the evidence on the record does not support that assertion. The following table provides a breakdown in market share between imported Australian barley, Chinese domestic barley and barley imported from third countries:

Table 11 Market Share: 2014–2018

	Chinese Market	Imports from Australia ⁸⁴⁰		Chinese Domestic Barley ⁸⁴¹		Imports from Other Countries ⁸⁴²	
	Tonnes (a)	% of Market Share (b)	Tonnes (b)	% of Market Share (c)	Tonnes (c)	% of Market Share (d)	Tonnes (d)
2014	7,224,800	53.66%	3,877,100	25.08%	1,812,000	21.26%	1,535,700
2015	12,599,900	34.62%	4,362,000	14.83%	1,868,000	50.56%	6,369,900
2016	6,756,900	48.13%	3,251,800	25.93%	1,752,000	25.95%	1,753,100
2017	10,524,500	61.57%	6,480,400	15.78%	1,661,100	22.64%	2,383,000
2018	8,525,300	49.01%	4,178,400	20.06%	1,710,000	30.93%	2,636,900
Relative change % 2014-2018		- 8.7% ⁸⁴³		- 20%		+ 45.5%	

693. Demand for barley in China increased between 2014 and 2018 by 1.3 million tonnes or 18%. However, imports of Australian barley 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 between 2014 and 2018. In contrast, imports from third countries increased over the same period by 1.1 million tonnes, capturing 85% of the growth, showing

⁸³⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

⁸⁴⁰ The figures concerning imports from Australia are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), pp. 14-15 and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

⁸⁴¹ The figures concerning domestic production are drawn from the Anti-Dumping Final Determination (Exhibit AUS-2), pp. 17-18 and the Countervailing Duties Final Determination (Exhibit AUS-11), p. 18.

⁸⁴² The figures for barley imported from third countries were obtained by adding the figures for imported Australian barley and Chinese domestic barley and subtracting that total from the figures for the domestic market as a whole: $a - (b + c) = d$.

⁸⁴³ The relative change in percentages between 2014 and 2018 was calculated by Australia: $(2018) - (2014) / (2014) \times 100$.

a 45.5% relative increase in market share, and ultimately taking market share from Chinese domestic barley and imports of Australian barley. Clearly, non-subject imports from third countries played an important role in China's domestic market during the Injury POI.

694. It is also striking that, notwithstanding the significance of imports from third countries, MOFCOM did not analyse the prices of those imports in relation to domestic prices and Australian import prices. The data tables attached to its determinations do not even mention such prices.

695. As with the other "known" factors, despite there being sufficient evidence to support a non-attribution analysis, MOFCOM failed entirely to conduct that analysis in relation to non-subject imports from third countries. As a result of MOFCOM's failure to do so, China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

(e) Conclusion

696. For the reasons set out above, Australia has established that China breached Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because MOFCOM: *first*, relied on examinations and determinations that were inconsistent with Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement; *second*, failed to conduct proper causation analyses to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between Australian barley imports and injury to the Chinese barley industry; and *third*, dismissed positive evidence on the record concerning other "known" factors and failed to conduct non-attribution analyses in relation to those factors.

B. CONCLUSION

697. For the reasons set out above, Australia has established that China breached 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.

VI. AUSTRALIA'S CLAIMS CONCERNING THE IMPOSITION OF DUTIES

698. Australia submits that China's imposition of anti-dumping duties 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. Australia further claims that 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.

699. Australia has established above the various errors that undermine the entire foundation of MOFCOM's determinations in respect of both dumping and countervailable subsidies. As a result of these errors, China incorrectly imposed anti-dumping and countervailing duties, in breach of its obligations under the Anti-Dumping Agreement, SCM Agreement and GATT 1994.

A. CHINA'S IMPOSITION OF ANTI-DUMPING DUTIES WAS CONTRARY TO ARTICLES 1, 9.1, 9.2 AND 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

700. Australia submits that China's imposition of anti-dumping duties 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. In particular, China improperly imposed anti-dumping duties where all requirements for their imposition had not been fulfilled; did not impose anti-dumping duties in appropriate amounts; did not name the suppliers of the product concerned; and imposed anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement.

1. Legal framework

701. Article 1 of the Anti-Dumping Agreement provides that "[a]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this

Agreement". Thus, Article 1 establishes that the ensuing provisions of the Anti-Dumping Agreement govern the application of Article VI of GATT 1994 as to anti-dumping action.⁸⁴⁴

702. Article 9.1 of the Anti-Dumping Agreement provides:

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

Thus, an anti-dumping duty may only be imposed where "all requirements for the imposition have been fulfilled".⁸⁴⁵

703. Article 9.2 of the Anti-Dumping Agreement relevantly provides:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.

704. "Appropriate" is relevantly defined in the dictionary as "[s]pecially fitted or suitable, proper".⁸⁴⁶ The interpretive task is then to determine what an anti-dumping duty must be "fitted", "suitable" or "proper" for. The context provided by other provisions of Article 9 is illustrative. Article 9.1 provides that the decision whether to impose "the full dumping margin or less" is one for the investigating authorities. In addition, Article 9.3 provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The context provided by Article 9.1 and Article 9.3 suggests that the objectives of an anti-dumping duty include to offset any dumping found to be occurring, the level of which would be reflected in the dumping margin. Reading Article 9.2 and Article 9.3 harmoniously, a dumping duty that exceeded the margin of dumping established under Article 2 would not be "appropriate".

⁸⁴⁴ Panel Report, *Thailand – H-Beams*, para. 7.210.

⁸⁴⁵ Panel Report, *EC – Salmon (Norway)*, para 7.705.

⁸⁴⁶ Oxford English Dictionary online, definition of "appropriate", <https://www.oed.com/view/Entry/9870> (accessed 29 October 2021).

705. Prior panels have found that an "appropriate" amount of anti-dumping duty is the amount of duty that is "proper" or "fitting" in the context of an anti-dumping investigation,⁸⁴⁷ and "must be an amount that results in offsetting or preventing dumping".⁸⁴⁸ The panel in *Argentina – Poultry Anti-Dumping Duties* found that "an anti-dumping duty meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be 'appropriate' within the meaning of Article 9.2".⁸⁴⁹

706. An anti-dumping duty will therefore be "appropriate" if it is "suitable", "fitting" or "proper" for the objective of offsetting dumping and removing injury. Taking the inverse of the panel's finding in *Argentina – Poultry Anti-Dumping Duties*, an anti-dumping duty that does not meet the requirements of Article 9.3, by exceeding the margin of dumping that should have been established under Article 2, would not be an "appropriate amount" and would breach Article 9.2. If the anti-dumping duty imposed exceeds the margin of dumping that should have been established under Article 2 it is not "suitable", "fitting" or "proper" for the objective of offsetting dumping, as it would be in excess of the level of dumping that is actually occurring, if any. Therefore, where errors under Article 2 have led to an incorrectly high margin of dumping, this amounts to a breach not only of Article 9.3, but also of the obligation in Article 9.2 to impose anti-dumping duties in "appropriate amounts".

707. Article 9.2 contains an additional obligation on investigating authorities, to name the suppliers of the allegedly dumped product. The second and third sentence provide:

The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned.

708. The Appellate Body has interpreted this "mandatory"⁸⁵⁰ obligation as "a requirement to specify duties for each supplier".⁸⁵¹ It observed "significant parallelism" between Article 9.2 and Article 6.10 of the Anti-Dumping Agreement.⁸⁵² The obligation under Article 6.10 to determine individual margins of dumping "corresponds to the obligation to impose

⁸⁴⁷ Panel Report, *EC – Salmon (Norway)*, para 7.704.

⁸⁴⁸ Panel Report, *EC – Salmon (Norway)*, para 7.705.

⁸⁴⁹ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.

⁸⁵⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 336.

⁸⁵¹ Appellate Body Report, *EC – Fasteners (China)*, para. 341.

⁸⁵² Appellate Body report, *EC – Fasteners (China)*, para. 344.

anti-dumping duties on an individual basis in Article 9.2".⁸⁵³ The obligation in Article 9.2 to name individual suppliers is "closely related to the imposition of individual anti-dumping duties".⁸⁵⁴

709. Article 9.3 requires that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article VI:2 of GATT 1994 similarly requires that anti-dumping duties are not "greater" than the "margin of dumping [...] determined in accordance with the provisions of paragraph 1".

710. The Appellate Body has confirmed that the "margin of dumping" indicated in Article 9.3 means a margin of dumping that is established in a manner consistent with the requirements of Article 2 of the Anti-Dumping Agreement.⁸⁵⁵ The term "in accordance with" in Article VI:2 of GATT 1994 "prohibits the levying of anti-dumping duties in excess of the dumping margin *determined consistently* with Article VI:1 of the GATT 1994 in the same way as the phrase 'as established under Article 2' does in Article 9.3".⁸⁵⁶ To establish a breach of Article 9.3, "the complainant must show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2".⁸⁵⁷

711. The Appellate Body has found that the considerations that guide the assessment of a claim under Article 9.3 also apply, *mutatis mutandis*, to the assessment of claims under Article VI:2 of GATT 1994.⁸⁵⁸

2. China's imposition of anti-dumping duties failed to comply with the requirements under the Anti-Dumping Agreement

712. China imposed anti-dumping duties at the same rate as the dumping margin it determined, 73.6%.⁸⁵⁹

⁸⁵³ Appellate Body report, *EC — Fasteners (China)*, para. 344.

⁸⁵⁴ Appellate Body Report, *EC — Fasteners (China)*, para. 341.

⁸⁵⁵ Appellate Body Reports, *EU — Biodiesel (Argentina)*, para. 6.112 and *US — Zeroing (Japan)*, para. 155.

⁸⁵⁶ Appellate Body Report, *EU — Biodiesel (Argentina)*, para 6.98. (emphasis original)

⁸⁵⁷ Appellate Body Report, *EU — Biodiesel (Argentina)*, para. 6.104.

⁸⁵⁸ Appellate Body Report, *EU — Biodiesel (Argentina)*, para. 6.112.

⁸⁵⁹ See Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 2.

713. As Australia has demonstrated, MOFCOM did not determine the margin of dumping in a manner consistent with Article 2 of the Anti-Dumping Agreement.⁸⁶⁰

714. Australia further submits that MOFCOM's failure to determine the margin of dumping in accordance with Article 2 resulted in a margin of dumping that was higher than would have been the case if properly in accordance with Article 2. The evidence regarding normal value alone is sufficient to demonstrate a *prima facie* case that MOFCOM's errors resulted in a higher dumping margin. If, instead of unjustifiably rejecting all information provided by Australian companies, MOFCOM had used that information to determine normal value in accordance with Article 2, it would have determined a far lower normal value, and as a result a far lower or zero dumping margin.⁸⁶¹ Even if MOFCOM were justified in using facts available, including the Global Trade Atlas data, a proper selection of facts would have resulted in a lower normal value and hence lower or zero dumping margin.⁸⁶²

715. Further, MOFCOM's failure to determine export price based on the information supplied by Australian traders resulted in an incorrectly low export price for at least some of those traders. Given MOFCOM used Australia-wide aggregate export data to determine export price, the individual export prices for some traders would presumably have been higher than the country-wide average price. Had export price been determined correctly in accordance with Article 2, the export prices for those traders would have been higher and their dumping margins would have been lower or zero.

716. In addition to its incorrect determination of normal value and export price, MOFCOM's failures to adjust for factors affecting price comparability in accordance with Article 2.4 further entrenched an incorrectly high dumping margin. For example, the evidence demonstrated that the small quantities and containerised nature of the sales to Egypt resulted in higher prices compared to the average price of sales to China. Had MOFCOM made price adjustments for factors such as quantity and conditions of sale, a smaller margin would have resulted.

⁸⁶⁰ See sections II.B, II.C and II.D.

⁸⁶¹ See section II.A.7(b)i.c.

⁸⁶² See section II.A.7(b)i.d.

717. Hence, the evidence clearly demonstrates that, 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%.

718. Accordingly, Australia submits that China breached Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties greater than the margin that would have been "established under Article 2", and breached Article VI:2 of GATT 1994 by imposing anti-dumping duties in excess of the dumping margin that would have been determined consistently with Article VI:1.

719. China's breach of Article 9.3 in imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 also amounts to a breach of the requirement in Article 9.2 to impose anti-dumping duties in appropriate amounts. The amount of anti-dumping duty imposed was not suitable, proper or fitting to offset dumping, as China's breaches of Article 2 resulted in the determination of a level of dumping that was much higher than it would have been had it complied with Article 2, and much higher than the level of dumping that was actually occurring, which Australia submits was none. Accordingly, Australia submits that China breached the requirement in Article 9.2 to impose anti-dumping duties in appropriate amounts.

720. In addition, contrary to the obligation in the second sentence of Article 9.2, China did not name suppliers individually or specify duties for each supplier in the Anti-Dumping Duty Announcement. Only the four Group 1 producers were listed individually, with the 15 traders in Groups 2 and 3 presumably included in the "All Others" category.⁸⁶³ Group 2 and 3 traders were not suppliers that were unknown to MOFCOM, nor were they suppliers that were not examined. China did not determine that it would be impracticable to name all the suppliers, as envisaged in the third sentence of Article 9.2. Hence, there appears to be no justification for China's failure to comply with the simple, mandatory obligation under Article 9.2 to name the suppliers of the product concerned.

721. China's approach to assigning anti-dumping duties mirrored MOFCOM's approach to determining the margins of dumping, wherein it listed the four Group 1 producers individually

⁸⁶³ Anti-Dumping Duty Announcement (Exhibit AUS-3), p. 2.

when it assigned them the same margin of dumping, and then applied that margin to "other Australian companies". Hence, just as China breached the obligation under Article 6.10 to determine individual dumping margins, it also breached the obligation under Article 9.2 to list suppliers individually in imposing anti-dumping duties.

722. Accordingly, Australia submits that by failing to name the Group 2 and 3 companies in the Anti-Dumping Duty Announcement, China has breached the obligation in the second sentence of Article 9.2 to "name the suppliers of the product concerned".

723. In light of MOFCOM's failure to meet a multitude of substantive and procedural requirements under the Anti-Dumping Agreement in its investigation and determination of dumping, China has imposed anti-dumping duties despite having not fulfilled the requirements for their imposition. Accordingly, Australia submits that China breached Article 9.1.

724. Finally, as a consequence of the violations of the Anti-Dumping Agreement, outlined in this submission, China also breached Article 1 of the Anti-Dumping Agreement.

3. Conclusion

725. For the reasons set out above, Australia has established that China acted inconsistently with Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in its imposition of anti-dumping duties.

B. CHINA'S IMPOSITION OF COUNTERVAILING DUTIES WAS CONTRARY TO ARTICLES 10, 19.4 AND 32.1 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

726. Australia submits that 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 acted inconsistently with these provisions by imposing countervailing duties pursuant to MOFCOM's countervailing duties investigation because it was not initiated and conducted in compliance with Article VI of the GATT 1994 and the SCM Agreement.

1. Legal framework

727. Article 10 of the SCM Agreement requires importing Members to impose countervailing duties only pursuant to investigations initiated and conducted in compliance with Article VI of the GATT 1994. Article 19.4 of the SCM Agreement prohibits importing Members from levying countervailing duties in an amount greater than the subsidy found to exist, in terms of per unit subsidisation of the imported product. Article 32.1 of the SCM Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".⁸⁶⁴

2. China's imposition of countervailing duties failed to comply with the requirements under the SCM Agreement

728. As demonstrated above, none of the three programs subject to MOFCOM's determinations provided any countervailable subsidies to the production or export of Australian barley. MOFCOM's erroneous determinations result from its failure to conduct its investigation in compliance with Article VI:3 of GATT 1994 as interpreted by the SCM Agreement. As confirmed by the Appellate Body, 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. In particular, the Appellate Body has stated:

[T]hat, where it has not been established that the essential elements of the subsidy definition in Article 1 are present, the right to impose a countervailing duty has not been established and this, as a consequence, means that the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement.⁸⁶⁵

729. Further, in relation to Article 19.4, the Appellate Body has also taken the view that:

By virtue of the ordinary meaning of its text, Article 19.4 of the SCM Agreement imposes a maximum limit on the amount of duties that may be "levied", corresponding to the amount of the subsidy that is found to exist. By necessary implication, Article 19.4 also provides that no countervailing duties may be imposed on an imported product if no subsidy is found to exist given that in such a case, the amount of subsidy found to exist would be zero.⁸⁶⁶

⁸⁶⁴ SCM Agreement, Article 32.1.

⁸⁶⁵ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

⁸⁶⁶ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.108. (footnotes omitted)

3. Conclusion

730. Accordingly, by imposing countervailing duties at all, in any amount, on barley imported from Australia, because MOFCOM's investigation and determinations did not conform to the requirements of GATT 1994 and the SCM Agreement, China breached Articles 10, 19.4 and 32.1 of the SCM Agreement, and therefore also Article VI:3 of the GATT 1994.

C. CONCLUSION

731. For the reasons set out above, because MOFCOM's investigation and determinations did not conform to the requirements of GATT 1994 and the SCM Agreement, by imposing countervailing duties at all, in any amount, on barley imported from Australia, China breached Articles 10, 19.4 and 32.1 of the SCM Agreement, and therefore also Article VI:3 of the GATT 1994.

VII. AUSTRALIA'S CLAIMS CONCERNING THE INITIATION OF INVESTIGATIONS

732. Australia submits that China acted inconsistently with the Anti-Dumping Agreement and SCM Agreement by initiating anti-dumping and countervailing duties investigations following receipt of applications by CICC.

733. *First*, Australia submits that the applications for anti-dumping and countervailing duties investigations were not made "by or on behalf of the domestic industry". *Second*, Australia submits that the applications did not contain "sufficient evidence to justify the initiation of an investigation."

734. As a result, Australia submits that China acted inconsistently with Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement and Articles 11.1, 11.2, 11.3, 11.4 and 11.9 of the SCM Agreement.

A. LEGAL FRAMEWORK**1. An investigation shall be initiated upon a written application "by or on behalf of the domestic industry"**

735. Article 5 of the Anti-Dumping Agreement and Article 11 of the SCM Agreement set out procedural rules and evidentiary requirements that must be satisfied before an investigating authority may initiate an investigation. In particular, Article 5.1 of the Anti-Dumping Agreement provides that:

Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

The equivalent provision in the SCM Agreement, Article 11.1, is set out in almost identical terms.

736. The use of the word "shall" in Articles 5.1 and 11.1 indicates that a "written application" is mandatory.⁸⁶⁷ This application is the starting point in the investigative process.⁸⁶⁸ The purpose of an application is to provide an evidentiary basis for the initiation of an investigation into the relevant matters, namely the existence, degree, and effect of any alleged dumping or subsidy.⁸⁶⁹

737. The Anti-Dumping Agreement and SCM Agreement both regulate *who* may make an application, and *what* the application must contain. An application must be made "by or on behalf of the domestic industry". Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement provide that an application shall be considered to have been made "by or on behalf of the domestic industry":

[I]f it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the

⁸⁶⁷ A written application is mandatory, except if, in "special circumstances", the authorities decide to initiate an investigation without having received a written application. On the basis of record evidence, Australia does not understand that the presence of "special circumstances" to be relevant to either investigation at issue.

⁸⁶⁸ See Panel Report, *US – Softwood Lumber V*, paras. 7.50 and 7.54.

⁸⁶⁹ See Panel Report, *US – Softwood Lumber V*, para. 7.54.

application account for less than 25 per cent of total production of the like product produced by the domestic industry.

738. "Domestic industry" is a defined term for the purposes of the Anti-Dumping Agreement and SCM Agreement. Pursuant to Article 4.1 of the Anti-Dumping Agreement, and Article 16.1 of the SCM Agreement, "domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".⁸⁷⁰

739. An investigating authority must determine if a written application made pursuant to either Article 5.1 or 11.1 has been made by or on behalf of domestic industry and that it has the support of the domestic industry, otherwise known as "standing".⁸⁷¹ The standing requirements set out in Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement are an important step in order to provide interested parties potentially subject to the investigation a meaningful test of whether the application has the required support of the industry.⁸⁷²

740. The first sentence of Articles 5.4 and 11.4 sets out "the general rule" that no investigation can be initiated pursuant to Articles 5.1 or 11.1 unless the investigating authorities determine that the application has been made by or on behalf of the domestic industry producing the like product in the importing country.⁸⁷³

741. The following two sentences of Articles 5.4 and 11.4 set out "specific numerical criteria for this determination", both of which must be satisfied *before* an investigation is initiated.⁸⁷⁴ Apart from satisfying the specified numerical criteria, Articles 5.4 and 11.4 do not set out a particular process or methodology by which the determinations are to be made.⁸⁷⁵ Rather, in order to establish whether the obligations in Articles 5.4 and 11.4 have been

⁸⁷⁰ See above, section IV.

⁸⁷¹ See Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 282; Panel Reports, *EC – Bed Linen*, para. 6.213; and *Argentina – Poultry Anti-Dumping Duties*, fn 221.

⁸⁷² See Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.63.

⁸⁷³ Panel Report, *EC – Fasteners (China)*, para. 7.156. See also Panel Report, *EC – Bed Linen*, para. 6.213.

⁸⁷⁴ Panel Report, *EC – Fasteners (China)*, para. 7.156.

⁸⁷⁵ Panel Report, *EC – Bed Linen*, para. 6.213.

complied with, a panel must examine an investigating authority's determination, in light of the evidence before the authority at the time the determination was made.⁸⁷⁶

742. Finally, an investigating authority can only initiate an investigation if an application is made *on behalf of* the domestic industry. The ordinary meaning of the phrase "on behalf of" in the context of Articles 5.1 and 11.1 is "[o]n the part of (another), in the name of, as the agent or representative of, on account of, for, instead of. (With the notion of official agency.)"⁸⁷⁷ As such, if an application is made "on behalf of" the "domestic industry", it is made by another body acting as agent or representative of the "domestic industry". In these circumstances, it is implicit that both parties must be known to each other.

2. An application must contain such information as is reasonably available to the applicant

743. An application made pursuant to Article 5.1 of the Anti-Dumping Agreement or Article 11.1 of the SCM Agreement must comply with the requirements set out in paragraph 2 of those provisions.⁸⁷⁸

744. Article 5.2 provides, in relevant part, as follows:

An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

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

⁸⁷⁶ Panel Report, *EC – Bed Linen*, para. 6.213.

⁸⁷⁷ Oxford English Dictionary online, definition of "on behalf of", <https://www.oed.com/view/Entry/17187> (accessed 29 October 2021).

⁸⁷⁸ See Panel Report, *US – Softwood Lumber V*, para. 7.51.

Article 11.2 of the SCM Agreement is set out in almost identical terms. The chapeau provides, in relevant part, that:

An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

745. The chapeau of Articles 5.2 and 11.2 provides that the application must contain "such information as is reasonably available to the applicant". The ordinary meaning of "available" in the context of Article 5.2 is "capable of being made use of, at one's disposal, within one's reach",⁸⁷⁹ while "reasonably" is defined as "[f]airly or pretty well; sufficiently, suitably; moderately, fairly."⁸⁸⁰ Finally, the chapeau refers to "*such* information". The use of the qualifier "such", meaning "[o]f the character, degree, or extent described",⁸⁸¹ denotes that it is not "*all* information", but rather only the information as described paragraphs (i) to (iv) and that is fairly within the applicant's reach.

746. This understanding is consistent with the interpretation of the panel in *US – Softwood Lumber V*, which explained that:

It seems to us that the "reasonably available" language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality.⁸⁸² (emphasis original)

747. If an application is made on behalf of the domestic industry paragraph (i) of Article 5.2 of the Anti-Dumping Agreement and paragraph (i) of Article 11.2 of the SCM Agreement require that it must contain a list of all known domestic producers of the like product or "associations" of domestic producers of the like product.

⁸⁷⁹ Oxford English Dictionary online, definition of "available", <https://www.oed.com/view/Entry/13583> (accessed 29 October 2021).

⁸⁸⁰ Oxford English Dictionary online, definition of "reasonably", <https://www.oed.com/view/Entry/159074> (accessed 29 October 2021).

⁸⁸¹ Oxford English Dictionary online, definition of "such", <https://www.oed.com/view/Entry/193400> (accessed 29 October 2021).

⁸⁸² Panel Report, *US – Softwood Lumber V*, para. 7.54.

748. An applicant is not required to list *all* domestic producers, but rather "all *known* domestic producers" based on the information that is reasonably available to it. However, paragraph (i) of Articles 5.2 and 11.2 does not contemplate a situation where the domestic producers are *unknown* to the applicant.⁸⁸³ In such a situation, an application could not be made "on behalf of the domestic industry".

3. An application must contain sufficient evidence of dumping or subsidisation, injury and causation

749. Separate and additional to the specific requirements of Articles 5.2 and 11.2, an investigating authority must examine whether an application contains "sufficient evidence".⁸⁸⁴ Article 5.3 of the Anti-Dumping Agreement provides that:

The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

Article 11.3 of the SCM Agreement is set out in almost identical terms.

750. The ordinary meaning of "sufficient", within the context of Articles 5.3 and 11.3, is "[o]f a quantity, extent, or scope adequate to a certain purpose or object."⁸⁸⁵ "Evidence" is defined as "[i]nformation (in the form of personal or documented testimony or the production of material objects), tending or used to establish facts in a legal investigation."⁸⁸⁶ Thus, in the context of Articles 5.3 and 11.3, an investigating authority must determine whether there is

⁸⁸³ Both Applications made by CICC provided that CICC's "Early Warning Center for Economic and Trade Frictions in Agricultural Industry has long been engaged in information collection, business exchange, early injury warning and policy research, covering barley plantation and production zones" in China. (CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 5.) See also CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 5). This indicates that CICC either has direct knowledge of domestic producers and/or associations of domestic producers or that such information is at least "reasonably available" to it. To the extent that CICC did not identify a list of producers or associations of producers supporting the application, Australia submits that this calls into question not only the identification of the domestic industry but also whether and to what extent the domestic industry's support has been properly established. See below, paras. 766-767.

⁸⁸⁴ The panel in *Mexico – Steel Pipes and Tubes* explained that, "'reasonable availability' of the evidence to the applicant is not determinative as to the 'sufficiency', in the sense of Article 5.3, of that evidence as the basis for an investigating authority's decision to initiate." (See Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.23.)

⁸⁸⁵ Oxford English Dictionary online, definition of "sufficient", <https://www.oed.com/view/Entry/193543> (accessed 29 October 2021). See also Panel Reports, *Pakistan – BOPP Film (UAE)*, para. 7.21; and *China – GOES*, para. 7.54.

⁸⁸⁶ Oxford English Dictionary online, definition of "evidence", <https://www.oed.com/view/Entry/65368> (accessed 29 October 2021). See also Panel Reports, *Pakistan – BOPP Film (UAE)*, para. 7.19; and *China – GOES*, para. 7.54.

information that might be used to establish dumping, subsidisation, injury and a causal link, of a quantity and scope to justify the *initiation* of an investigation.⁸⁸⁷

751. The object and purpose of making a determination of "sufficient evidence" under Articles 5.2 and 5.3, and Articles 11.2 and 11.3, is to "balanc[e] two competing interests, namely the interest of the domestic industry 'in securing the initiation of an investigation' and the interest of respondents in ensuring that 'investigations are not initiated on the basis of frivolous or unfounded suits'."⁸⁸⁸

752. The chapeau of Articles 5.2 and 11.2 states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." The panel in *Argentina – Poultry Anti-Dumping Duties* agreed with the panel in *Guatemala – Cement II* that "[i]t is well settled that 'statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence within the meaning of Article 5.3.'⁸⁸⁹ It is also well settled that "sufficient evidence" constitutes a standard *higher* than "simple assertion" but is something *less* than that required to make a final determination.⁸⁹⁰ As the panel in *Mexico – Steel Pipes and Tubes* explained:

[F]or the purpose of Article 5.2, the applicant must submit a degree of actual evidence of alleged dumping allegedly causing injury, and for the purpose of Article 5.3, that evidence must constitute an objectively *sufficient* factual basis to initiate an investigation. While the absolute threshold of sufficiency will depend upon the circumstances of a given case, Article 5.3 makes clear that the determination of sufficiency must be based on an assessment of the "accuracy" and "adequacy" of the information.⁸⁹¹

753. An investigating authority is not excused from its obligation to assess whether there is sufficient evidence even in the event that information is not "reasonably available" to an

⁸⁸⁷ The panel in *US – Softwood Lumber V* explained that "the *quantity and the quality* of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination". (Panel Report, *US – Softwood Lumber V*, para. 7.84. (emphasis added)) See also Panel Reports, *Pakistan – BOPP Film (UAE)*, paras. 7.19-7.24; *Guatemala – Cement II*, paras. 8.35-8.39 and 8.45; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.61 and 7.80; *Mexico – Steel Pipes and Tubes*, para. 7.21; *China – GOES*, para. 7.54; and *US – Supercalendered Paper*, para. 7.146.

⁸⁸⁸ Panel Report, *China – GOES*, para. 7.54 (citing Panel Reports, *US – Offset Act (Byrd Amendment)*, para. 7.61; and *Guatemala – Cement I*, para. 7.52).

⁸⁸⁹ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60.

⁸⁹⁰ Panel Report, *Mexico – Corn Syrup*, paras. 7.94-7.95 (citing Panel Report, *Guatemala – Cement I*, para. 7.55 (citing *United States – Measures Affecting Imports of Softwood Lumber from Canada (SCM/162)*, para. 332.)) See also Panel Reports, *Guatemala – Cement I*, para. 7.64; *Guatemala – Cement II*, para. 8.35; *Argentina – Poultry Anti-Dumping Duties*, para. 7.67; *US – Softwood Lumber V*, paras. 7.83-7.84; and *China – GOES*, paras. 7.55-7.56.

⁸⁹¹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

applicant. The panel in *China – GOES* explained that "an investigation cannot be justified where, for example, there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not 'reasonably available' to the applicant."⁸⁹²

754. Although Articles 5.3 and 11.3 mandate that an investigating authority must examine the accuracy and adequacy of the evidence in order to determine whether there is sufficient evidence, the provisions are silent as to how such an examination is to take place.⁸⁹³ A panel must therefore examine the evidence before the investigating authority *at the time the decision was made*, "in the light of the investigating authority's own methodology and to review the decision on its own terms".⁸⁹⁴ Therefore, the task of the Panel in this dispute is to assess whether an unbiased and objective investigating authority could have found that the evidence before MOFCOM – at the relevant time – was sufficient to justify initiation of the investigations.⁸⁹⁵

4. An application must be rejected if there is not sufficient evidence

755. If an investigating authority is "satisfied that there is not sufficient evidence" of either dumping, subsidisation, injury or causation, it must reject the application and terminate an investigation. Article 5.8 of the Anti-Dumping Agreement provides that:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.

756. Article 11.9 of the SCM Agreement is set out in almost identical terms with the exception that for the purpose of paragraph 9 of Article 11, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1% *ad valorem*.

⁸⁹² Panel Report, *China – GOES*, para. 7.56.

⁸⁹³ See Panel Report, *EC – Bed Linen*, para. 6.198.

⁸⁹⁴ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

⁸⁹⁵ See Panel Reports, *US – Softwood Lumber V*, para. 7.87; *Mexico – Corn Syrup*, para. 7.95; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.

757. Articles 5.8 and 11.9 contain two separate obligations.⁸⁹⁶ *First*, if an application does not contain sufficient evidence, it must be rejected. *Second*, if an investigation is initiated, it must be terminated "promptly" as soon as an investigating authority is satisfied that there is not sufficient evidence.

758. If an investigating authority errs in its determination that there is "sufficient evidence" to justify the initiation of an investigation, pursuant to Article 5.3 of the Anti-Dumping Agreement or Article 11.3 of the SCM Agreement, it necessarily follows that an investigating authority acts inconsistently with Articles 5.8 and 11.9 by failing to reject an application.⁸⁹⁷

B. THE APPLICATIONS WERE NOT MADE "BY OR ON BEHALF OF THE DOMESTIC INDUSTRY"

759. Australia submits that China acted inconsistently with Articles 5.1, 5.2, 5.3 and 5.4 of the Anti-Dumping Agreement and Articles 11.1, 11.2, 11.3 and 11.4 of the SCM Agreement as a result of MOFCOM initiating anti-dumping and countervailing duties investigations on the basis of applications that did not meet the requirements set out in those provisions. CICC purported to act as a representative for, and on request and authorisation of, the Chinese barley industry. Yet, neither CICC nor MOFCOM identified a single Chinese barley producer or association of producers during the initiation stage of the investigations.

760. *First*, Australia submits that MOFCOM acted inconsistently with paragraph (i) of Article 5.2 and Articles 5.1 and 5.3 of the Anti-Dumping Agreement and paragraph (i) of Article 11.2 and Articles 11.1 and 11.3 of the SCM Agreement because the applications in both investigations did not properly "identify the industry on behalf of which the applications were made" and no unbiased and objective investigating authority could have determined that there was sufficient evidence concerning the identity of the domestic industry.

⁸⁹⁶ See Panel Report, *US – Softwood Lumber V*, para. 7.134.

⁸⁹⁷ Panels have explained that "Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application." (Panel Report, *Mexico – Corn Syrup*, para. 7.99.) See also, Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.25. The inverse of this must therefore be true, such that where an investigating authority acts inconsistently with Article 5.3 or 11.3, it also acts inconsistently with Article 5.8 or 11.9 by failing to reject an application.

761. *Second*, Australia submits that MOFCOM acted inconsistently with Articles 5.4 and 5.1 of the Anti-Dumping Agreement and Articles 11.4 and 11.1 of the SCM Agreement because MOFCOM failed to examine the degree of support, or opposition, to the applications.

1. The Applications did not contain a list of all known domestic producers

762. CICC is self-described as:

[A] national and joint non-profit social organization approved by the State Council in 1988. Its purpose is to build a platform for members to provide services, safeguard their legitimate rights and interests, maintain fair trade order and promote the healthy development of industries.⁸⁹⁸

763. In the supporting documentation to the applications, CICC explained that its business scope is "[t]rade promotion, information consultant, legal services, conference and exhibition, international liaisons, training and publicity, and intellectual property services".⁸⁹⁹ As such, CICC is not a producer of barley in its own right. This was evident from the information before MOFCOM at the time the Applications were made.⁹⁰⁰

764. CICC claimed in the Applications that it was acting as "a representative" of the domestic barley industry.⁹⁰¹ CICC further asserted that the applications were "[u]pon the request and with the authorization of interested parties".⁹⁰²

765. Pursuant to paragraph (i) of Articles 5.2 and 11.2, where an application is made on behalf of the domestic industry, it must contain a list of all known domestic producers of the like product (or associations of domestic producers of the like product). The applications from

⁸⁹⁸ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 5; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 5.

⁸⁹⁹ CICC, Attachment of the application for the anti-dumping investigation of barley, All Annexes (pages renumbered) (CICC Application for Anti-Dumping Investigation, Annexes) (Exhibit AUS-80), p. 4; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 4.

⁹⁰⁰ Australia claims that it was evident that CICC did not produce barley on the basis of information before MOFCOM at the time the Applications were made. This information was reinforced shortly after initiation in CICC's response to the domestic industry questionnaire in which CICC made clear that it did not produce barley. CICC stated that "[t]he Applicant [...] is a nationwide joint non-profit social organisation not engaged in the cultivation or operation of barley products." (CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 20-21; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 17).

⁹⁰¹ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 5-6. See also, CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 5, where CICC claimed that it was acting "on behalf of the domestic barley industry".

⁹⁰² CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 5; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 5.

CICC contained no such list. Both the anti-dumping and countervailing duties applications contained a list of known "producers and exporters" of barley in Australia, but did *not* include any list of domestic producers of barley in China.⁹⁰³

766. Applicants must submit "such information as is reasonably available" to them. In Australia's view, it is implausible for CICC to purport to be acting as a "representative" and on "request" of the domestic industry on the one hand, and on the other suggest that the information identifying the domestic industry was not "reasonably available" to it. It is self-evident that an applicant cannot act on "behalf" or at the "request" of a party that is unknown to it.

767. Australia submits that at the very least, CICC could have, for example, submitted the "request" it asserted that domestic industry issued to it to make the application. This would have identified the domestic producers making the request. In addition, the supporting documentation to the Applications explained that CICC "established the Economic and Trade Friction Early Warning Centre in the Agricultural Industry" which is "engaged in specific work such as information collection, business communication, early warning of injury and policy research".⁹⁰⁴ According to CICC "[t]he total output of barley growers involved in the Early Warning Center has accounted for the majority of the national total since 2014."⁹⁰⁵ The information to support this assertion could have comprised a list of domestic barley producers and therefore would have been "reasonably available" to CICC.

768. The notices announcing the initiation of the anti-dumping and countervailing duties investigations do not contain any explanation by MOFCOM as to how the domestic industry was identified or why the information required under paragraph (i) of Articles 5.2 and 11.2 was not submitted. There is no evidence to suggest that MOFCOM made any inquiries with CICC as to why its applications did not contain information to properly identify the domestic

⁹⁰³ See CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), pp. 8-10; CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 10-12.

⁹⁰⁴ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 7; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 7.

⁹⁰⁵ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 7; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 7.

producers on behalf of whom the Applications were purportedly made. According to the initiation notices:

MOFCOM conducted an investigation into the qualification of the Applicant, relevant situations of the products in question and the products of the same kind in China, impact of the imported products on domestic industry and the relevant situations of countries (regions) involved.⁹⁰⁶

MOFCOM did not provide any explanation with respect to the "investigation into the qualification of the Applicant" that it purported to conduct.

769. By initiating an investigating on the basis of applications that did not contain the information required in paragraph (i) of Articles 5.2 and 11.2, including a list of all known domestic producers or associations of domestic producers of the like product, MOFCOM acted inconsistently with paragraph (i) of Article 5.2 of the Anti-Dumping Agreement and paragraph (i) of Article 11.2 of the SCM Agreement. As a consequence of MOFCOM's initiation of investigations where the applications did not meet the requirements of Articles 5.2 and 11.2, China acted inconsistently with Article 5.1 of the Anti-Dumping Agreement and Article 11.1 of the SCM Agreement.

770. An application is the starting point of an investigation. It provides an evidentiary basis for initiating an investigation. Adequately identifying the domestic industry on behalf of whom an application is made is an integral part of this evidentiary basis. MOFCOM failed to do so.

771. In addition, MOFCOM was required to assess whether the information concerning the identity of domestic industry provided in the Applications was sufficient to justify an investigation. The Applications contained no information concerning individual firms in the Chinese domestic barley industry. In the absence of *any* information of this type, no unbiased and objective investigating authority could have determined that there was sufficient evidence that the Applications were made "on behalf of" the domestic industry. On that basis, China also acted inconsistently with Article 5.3 of the Anti-Dumping Agreement, and Article 11.3 of the SCM Agreement.

⁹⁰⁶ Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-6), p. 1; Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 1.

2. The Applicant did not have standing

772. Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement set out "the general rule" that no investigation can be initiated pursuant to Articles 5.1 or 11.1 unless the investigating authorities determine that the application has been made by or on behalf of the domestic industry producing the like product in the importing country. In order to so determine, these provisions require an investigating authority to make findings as to the level of support provided by the domestic industry in accordance with specific numeric criteria.⁹⁰⁷ The provisions provide for a meaningful test to ensure the application has the necessary degree of support from the domestic industry, being the party alleged to have been injured by the measures at issue.

773. There is no evidence in the notices announcing the initiation of investigations that MOFCOM made the determinations required by Articles 5.4 and 11.4. As explained above, MOFCOM claimed that it "conducted an investigation into the qualification of the Applicant".⁹⁰⁸ However, MOFCOM did not examine whether the application was supported by domestic producers whose collective output constitutes more than 50% of the total production of the like product. Nor did MOFCOM examine whether the domestic producers supporting the application account for less than 25% of total production. Both criteria must be satisfied before an investigating authority may initiate an investigation.

774. In light of CICC's failure to provide a list of all known domestic producers, and MOFCOM's failure to inquire as to the domestic producers on behalf of whom the Applications were made, it is unsurprising that MOFCOM did not examine the degree of support for the Applications. However, gaps in the information provided by the applicant, as was the case with the information provided by CICC, do not excuse an investigating authority from the obligation to assess whether the requisite degree of support is present. MOFCOM was obliged to consider whether CICC's Applications were supported by domestic producers in accordance with Articles 5.4 and 11.4. MOFCOM failed to do so.

⁹⁰⁷ See above, para. 741.

⁹⁰⁸ Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-6), p. 1; Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 1

775. On that basis, China acted inconsistently with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. As a consequence of MOFCOM's initiation of investigations in the absence of examining whether the Applications had the requisite degree of support pursuant to Articles 5.4 and 11.4, China also acted inconsistently with Article 5.1 of the Anti-Dumping Agreement and Article 11.1 of the SCM Agreement.

3. Conclusion

776. Taken as a whole, the requirements in Article 5 of the Anti-Dumping Agreement and Article 11 of the SCM Agreement ensure that only investigations that have merit are initiated.

777. The Applications from CICC failed entirely to identify any of the firms in the Chinese barley industry. CICC purported to make Applications on behalf of the domestic industry, however CICC did not provide the list of all known domestic producers in either Application, as required by Article 5.2 of the Anti-Dumping Agreement and Article 11.2 of the SCM Agreement. MOFCOM failed to inquire as to the domestic producers on behalf of whom CICC purported to make the Applications and did not determine whether the information provided in the Applications pertaining to the identify of domestic industry was "sufficient evidence" within the meaning of Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement.

778. In addition, MOFCOM failed to assess whether the Applications had the requisite degree of support from domestic producers, as required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. MOFCOM initiated anti-dumping and countervailing duties investigations with no proper basis to do so. Remarkably, MOFCOM initiated the investigations without naming one domestic producer or association of barley producers in China. The applications made by CICC were unfounded and did not have the requisite degree of support from domestic industry.

779. On that basis, China acted inconsistently with Articles 5.1, 5.2, 5.3 and 5.4 of the Anti-Dumping Agreement, and Articles 11.1, 11.2, 11.3 and 11.4 of the SCM Agreement.

C. MOFCOM INITIATED THE INVESTIGATIONS WITHOUT "SUFFICIENT EVIDENCE"

780. Australia next considers its claims that MOFCOM failed to determine whether the Applications contained "sufficient evidence" of alleged dumping, subsidisation, injury and causation, and initiated investigations in the absence of such evidence.

781. Australia submits that China acted inconsistently with Articles 5.1, 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement and Articles 11.1, 11.2, 11.3 and 11.9 of the SCM Agreement in relation to MOFCOM's decision that there was sufficient evidence to initiate anti-dumping and countervailing duties investigations and the failure to reject the applications on the basis of insufficient evidence. Australia submits that the information provided by CICC lacked the "quantity and quality" required to meet the threshold of "sufficient evidence" within the meaning of Articles 5.3 and 11.3.⁹⁰⁹

782. Australia first considers the information provided in the Application pertaining to alleged dumping, followed by the information pertaining to alleged subsidisation. Finally, Australia considers the information provided in the Applications pertaining to CICC's allegations of injury and causation.

783. The question before the Panel is whether an unbiased and objective investigating authority could properly have determined that the evidence before MOFCOM in relation to dumping, subsidisation and injury at the time the determination was made was sufficient for purposes of initiating the anti-dumping and countervailing duties investigations.

1. The Application did not contain sufficient evidence of dumping

784. Article 5.2 of the Anti-Dumping Agreement provides that an application must include "evidence of (a) dumping, (b) injury [...] and (c) a causal link between the dumping imports and the alleged injury." Sufficient evidence of all three elements must be present in order to justify the initiation of an investigation.⁹¹⁰ In relation to the first element, an application must

⁹⁰⁹ Panel Report, *US – Softwood Lumber V*, para. 7.84. See above, para. 750.

⁹¹⁰ See Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

include evidence of the constituent elements of dumping, namely the normal value, export price, and adjustments for differences affecting price comparability.⁹¹¹

(a) Normal value

785. The information submitted by CICC for normal value was "provided by a third-party organization to the attorney representing the Applicant."⁹¹² The name of the organisation was not disclosed, nor was the full text of the report on which the normal value information was based. CICC claimed that the information comprised "the average sale prices of Australian barley products in the local market" as follows.⁹¹³

Period	Sale price (Unit: AUD/ton)
Q1 2017	221
Q2 2017	266
Q3 2017	294
Q4 2017	310

786. The prices were described as "average purchase prices of barley products with different specifications and uses, excluding the costs for other links such as taxes and freight."⁹¹⁴

787. It is clear from the record that MOFCOM did not make any inquiries with CICC or corroborate the information it provided. MOFCOM's announcement notice concerning the initiation of an anti-dumping investigation states:

Upon review, the MOFCOM believes that the application contains the contents and relevant evidence as required in Article 14 and Article 15 of the Anti-dumping Regulations of the People's Republic of China for an anti-dumping investigation.

⁹¹¹ The panel in *Guatemala – Cement II* explained that "the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation." The "the only clarification of the term 'dumping' in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2." (See Panel Report, *Guatemala – Cement II*, para. 8.35.)

⁹¹² CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 58.

⁹¹³ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 58.

⁹¹⁴ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 58.

As per the above-mentioned results, the MOFCOM decides, according to Article 16 of the Anti-dumping Regulations of the People's Republic of China, to file an anti-dumping investigation against imports of barley originating in Australia as of November 19, 2018.⁹¹⁵

788. Where the information provided in the application has limited product coverage, or where "it is obvious on its face that the normal value evidence before the authority at the time of initiation does not pertain to a producer or exporter",⁹¹⁶ an investigating authority must take steps to ensure that the information is representative of the full product range, "and to seek further information, including as to any adjustments, that would be necessary to render it so representative."⁹¹⁷ An investigating authority "should make its best endeavours to verify that that evidence reflects the prevailing home market pricing".⁹¹⁸ In *Mexico – Steel Pipes and Tubes*, the product in question had variations in terms of thickness and dimensions. The panel explained that:

[W]e do not see on what basis it was possible for [the investigating authority] to have assumed, with no further inquiry or corroboration, that the very small subset reflected in the invoice and price quote, was representative of the prices for the overall investigated dimensional range.⁹¹⁹

789. As such, given the quantity and quality of the information provided by CICC, MOFCOM was obliged to clarify whether the information was representative, or seek further information that would render the information provided by the third-party organisation representative.⁹²⁰ There was no basis for MOFCOM to assume, with no further inquiry or corroboration, that the "average purchase prices" were representative.

790. In particular, Australia submits that MOFCOM made no attempts to clarify the product scope covered by the "average purchase prices", the volume of barley on which the average prices were based, and whether the average prices were a weighted or simple average. In this respect, the Application contained information pertaining to the different specifications of barley produced in Australia.⁹²¹ In light of this information, an unbiased and objective investigating authority would have sought clarification concerning, *first*, whether

⁹¹⁵ Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-6), p. 1.

⁹¹⁶ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.35.

⁹¹⁷ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.40.

⁹¹⁸ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.35.

⁹¹⁹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.38.

⁹²⁰ See Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.40.

⁹²¹ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), pp. 72-74.

different specifications of barley attracted different prices in the market, and *second*, whether the "average purchase prices" reflected the different specifications of barley sold in Australia, and the volumes in which they were sold.

791. In addition, MOFCOM made no attempts to clarify whether the "average purchase prices" provided by the third-party organisation were reflective of prices achieved by any producer, trader or exporter of barley in Australia, and in particular, the exporters nominated in the application. In accordance with Article 5.2 of the Anti-Dumping Agreement, an applicant must submit a degree of "actual evidence" of alleged dumping.⁹²² For the purpose of Article 5.3, that evidence must constitute an objectively sufficient factual basis to initiate an investigation.⁹²³ No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that "average purchase prices" provided by an anonymous third-party organisation constituted "actual evidence" of domestic sales used to assert that dumping was occurring. In the absence of any "actual evidence", the claims made by CICC that dumping occurred in calendar year 2017 was "[s]imple assertion". CICC itself submitted that, "[a]t present, there is no evidence which shows the Australian firms are selling at a price under abnormal conditions in the Australian local market, for instance at a price under per unit costs."⁹²⁴

792. In light of this admission from CICC that there was "no evidence", it is unreasonable that MOFCOM made no inquiries whatsoever with CICC, and did not seek to corroborate the information submitted, in order to ascertain whether there was sufficient evidence that dumping was actually occurring.

793. No unbiased and objective investigating authority could have determined that the evidence submitted by CICC concerning the normal value was "sufficient evidence" on which to justify the initiation of an investigation.

⁹²² See above, para. 752; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

⁹²³ See above, para. 752; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

⁹²⁴ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 23.

(b) Export price

794. The evidence provided by CICC for the export price was a single price of USD 198.05 per tonne based on "Customs Statistics of Barley Import and Export".⁹²⁵ After allowances, the export price was USD 98.50 per tonne.⁹²⁶ CICC made no allowance for import tariffs, VAT, and importers' profits.⁹²⁷ In relation to shipping and insurance, CICC stated, "[t]he Applicant is temporarily unable to obtain the actual ocean freight and insurance premium for barley products from Australia to China during the investigation period."⁹²⁸ CICC claimed to "make reasonable allowance to the ocean freight and insurance premium on the basis of the preliminary price of bulk shipping" from Fremantle, Australia to Tianjin, China.⁹²⁹ In relation to domestic fees, CICC claimed it was "not able to obtain the actual domestic fees of the products subject to investigation."⁹³⁰ CICC estimated fees based on data from the World Bank Group.⁹³¹ Finally, CICC made no allowance for quantity or "physical and chemical characteristics" on the basis that the quantity was representative and the barley exported to China was "basically the same".⁹³²

795. In short, CICC provided no "actual evidence" of export prices of barley from Australia to China from the exporters listed in the application, or any exporter in Australia.⁹³³ MOFCOM accepted the information provided by CICC without any inquiry or corroboration.

796. In relation to the adjustments proposed by CICC, MOFCOM made no attempts to corroborate the quantum of the adjustments. After a downward adjustment of USD 99.55 per tonne, the export price was USD 98.50 per tonne. The individual amounts constituting the adjustment were purely speculative. MOFCOM made no attempts to even corroborate the adjustments against the information *already available to it*. CICC stated that the "specific information of imports, such as contracts, duplicate bills of lading, commercial

⁹²⁵ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 24.

⁹²⁶ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 26.

⁹²⁷ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 24.

⁹²⁸ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 50.

⁹²⁹ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 25; CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 50.

⁹³⁰ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 25.

⁹³¹ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 25; CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), pp. 54-56.

⁹³² CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 25-26.

⁹³³ See above, para. 752.

invoices, packing lists and addresses, are on file with the Customs of the People's Republic of China."⁹³⁴ An unbiased and objective investigating authority would have used the information available to it, such as the "contracts, duplicate bills of lading, commercial invoices, [and] packing lists" to corroborate the estimates provided. MOFCOM did not do this.

797. The downward adjustment of USD 69.91 per tonne for "domestic links in Australia" was purely speculative,⁹³⁵ and of a punitive magnitude such that it almost halved the "established export price". The adjustment was based on a report concerning the "ease of doing business in Australia" from the World Bank Group, and was not connected, in any way, to costs incurred in the export of barley from Australia to any destination, least of all China. For example, the inland freight cost of USD 525 appears to be based on the domestic transport cost associated with the export of "HS 02: Meat and edible meat offal" to Japan from a Sydney port.⁹³⁶ No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that this was representative of the domestic transport costs associated with the export of barley from Australia to China.

798. The adjustments described as "export border compliance fee" and "export document compliance fee" were not explained or broken down into their constituent parts. MOFCOM made no attempts to clarify what these components comprised, and whether they were representative of costs incurred in the exportation of barley from Australia to China.

799. In the absence of any "actual evidence" relating to export prices of Australian barley to China made by any individual exporter, let alone the particular exporters nominated in the Application, CICC's claims were "simple assertion".

(c) Fair comparison

800. CICC claimed it "constructed [the] dumping margin through making reasonable allowance and benchmarking the prices at as nearly as possible the same level of the trading process."⁹³⁷ No unbiased and objective investigating authority could have assumed, without

⁹³⁴ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 12.

⁹³⁵ See CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 54.

⁹³⁶ This appears to be inconsistent with the information used to establish the ocean freight, which was based on shipping from Fremantle in Western Australia to China.

⁹³⁷ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 23.

inquiry or corroboration, that the applicant made "reasonable allowance[s]" in order to ensure a "fair comparison" between the normal value and export price.

801. *First*, based on information submitted by CICC itself, barley grown in Australia is comprised of different varieties with different qualities.⁹³⁸ The supporting documentation to the Application stated that "30-40% of the yield achieves malting grade, with the remainder used for human consumption or stock feed."⁹³⁹ It also stated that Australia supplies "30-40% of the world's exported malting barley, and 20% of global feed barley."⁹⁴⁰ This information indicates that barley is grown to different standards, with malting barley being a higher quality than feed barley. This difference in quality was not reflected anywhere in CICC's normal value or export price information, despite it being reasonable to assume that it was a difference affecting price comparability. CICC's assertion that "the physical and chemical characteristics [of barley exported to China] are basically the same" is not supported by its own information contained in the application. No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that barley of different qualities attracted the same price in the market, and that a fair comparison could be made between a normal value and export price potentially ascertained on the basis of different qualities of barley.

802. *Second*, CICC failed to address how the average prices used for the normal value and export price allowed for a comparison of sales made "at as nearly as possible the same time."⁹⁴¹ The nature of the export barley industry is that there is a difference in timing from when grain is acquired from the producer to when it is shipped.⁹⁴² The quarterly prices submitted by CICC for the normal value would not align with the time the grain was purchased. An unbiased and objective investigating authority could not have assumed, without inquiry or

⁹³⁸ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), pp. 69-74.

⁹³⁹ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 69.

⁹⁴⁰ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 69.

⁹⁴¹ See Article 2.4 of the Anti-Dumping Agreement.

⁹⁴² Given barley is a commodity sold in a competitive global marketplace, the price varies substantially over time according to market forces. (See, for example Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), pp. 3 and 7; Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), p. 19; CBH Anti-Dumping Questionnaire Response (Exhibit AUS-13), p. 25; and CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-33), pp. 45, 49-50.) Exports of barley from Australia to China are often based on forward contracts, with the contract term terms and pricing agreed months in advance of the delivery of the barley. (See, for example GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 70 and 84.)

corroboration, that the normal value and export prices information represented sales made at the same time and permitted a fair comparison.

(d) Conclusion

803. CICC failed to submit any actual evidence that dumping was occurring, as is required by Article 5.2 of the Anti-Dumping Agreement. The information submitted did not provide a sufficient factual basis of the normal value, export price or fair comparison to initiate an investigation, but was rather "simple assertion". Despite this, MOFCOM accepted the information of alleged dumping contained in the Application without any inquiry or corroboration. No unbiased and objective investigating authority could have determined that there was sufficient evidence of dumping to justify the initiation of an investigation. On that basis, China acted inconsistently with Articles 5.2 and 5.3 of the Anti-Dumping Agreement.

**2. The Application did not contain sufficient evidence of
subsidisation**

804. The chapeau of Article 11.2 of the SCM Agreement provides that an application must include "sufficient evidence of the existence of a subsidy and, if possible, its amount". According to paragraph (iii) of Article 11.2, an application must contain evidence with regard to the existence, amount and nature of the subsidy in question. As such, an applicant must include evidence of all elements of a subsidy, including a financial contribution by a government, a benefit to the recipient, as well as its specificity, to the extent that information is available to it. An investigating authority must determine whether there is sufficient evidence of all these elements of a subsidy.

805. CICC alleged the existence of 32 subsidy programs in the application. MOFCOM was therefore required to determine whether there was sufficient evidence of a financial contribution by a government, benefit and specificity with respect to each program in order to justify initiation of an investigation with respect to that program.

806. In the announcement notice concerning the initiation of a countervailing duties investigation, MOFCOM claimed "[a]fter preliminary review and considering the claims submitted by the Australian government before the filing of the case, the MOFCOM decided

to investigate" all 32 subsidies.⁹⁴³ Rather than having "sufficient evidence" to justify the initiation of an investigation, there was *little to no* evidence that any of the programs alleged by CICC involved a financial contribution by a government, conferred a benefit on Australian barley producers, or were specific to the barley industry. An unbiased and objective investigating authority could not have determined that there was sufficient evidence to justify the initiation of an investigation.

807. The Australian Government made detailed submissions to MOFCOM before initiation about the alleged subsidy programs:

The applicant has not provided evidence of its claims or established that the cited programs exist or benefited the barley industry. For example, the applicant has cited the WTO subsidy notifications but failed to draw MOFCOM's attention to the fact that the notification proves the expiry of programs prior to the period of investigation.

As Australia outlined during the pre-initiation consultations, the programs the applicant has listed are either broad-based agricultural programs or broad-based environmental programs which are not targeted at the barley sector or whether the barley sector has not received any benefits. Australia is of the view that a number of the cited programs do not benefit the Australian barley industry and for that reason, these are not countervailable in this investigation.

From our initial review of the programs listed by the applicant, we have identified that:

- Four programs ceased prior to the period of investigation (programs 12, 15, 17, 18)
- Twelve programs ceased during the period of investigation (programs 2, 3, 4, 5, 8, 14, 16, 19, 20, 27, 30, 32)
 - These are not countervailable because there are no ongoing benefits to Australian barley exporters irrespective of the date they ceased
 - In any case, no benefits were provided to the Australian barley industry (programs 3; 20)
 - If there were benefits, they were very small and did not have an impact on the export price (programs 8, 14, 19, 20, 27, 30, 32).
- Eleven programs are broad based programs not targeted at the grains sector, including eight environment or animal welfare programs (programs 1, 2, 4, 5, 6, 16, 21, 22, 24, 29, 31)

⁹⁴³ Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), pp. 2-3.

- Australian barley producers and exporters did not benefit in fact as these programs were not available to the barley industry, for example, animal welfare for drought affected livestock
- If the barley industry did benefit, there was only small-scale, indirect benefits that did not have an impact on export prices for example, clean energy programs weed and pest management, irrigation programs.
- Three programs describe departmental funding for government agencies (programs 11, 13).⁹⁴⁴

There is no evidence that MOFCOM considered the Australian Government submission.

808. Not only did MOFCOM have before it information from the Australian Government that barley producers were not in receipt of countervailable subsidies, CICC itself submitted that it was not able to determine if any subsidies were received, let alone in what amounts:

[D]ue to the difficulty in collecting evidence, especially given the subsidy information involves the government's internal confidential information, the applicant cannot obtain and calculate the actual amount of subsidy received by the barley industry during the applied investigation period through other sensible public channels, and thus cannot calculate the scale of the subsidy.⁹⁴⁵

809. In light of this admission from CICC and the information provided by the Australian Government, it is unreasonable that MOFCOM made no inquiries whatsoever with CICC, or attempt to corroborate the information submitted, in order to determine whether there was sufficient evidence that the programs alleged in the application were countervailable subsidies. Even if information pertaining to alleged subsidisation was not available to CICC, MOFCOM was still required to determine whether there was "sufficient evidence" to justify an initiation.⁹⁴⁶ An investigation cannot be justified where there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not "reasonably available" to the applicant.⁹⁴⁷

810. No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that the Application contained sufficient evidence that each of the

⁹⁴⁴ Australian Government Comments on Initiation of Countervailing Duties Investigation (Exhibit AUS-67), pp. 5-6.

⁹⁴⁵ CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 49. CICC claimed that there was "difficulty in collecting evidence" however it failed to draw on extensive information available on public websites.

⁹⁴⁶ See above, para. 753.

⁹⁴⁷ See Panel Report, *China – GOES*, para. 7.56.

32 programs involved a financial contribution by a government which conferred a benefit and was specific. On that basis, China acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement.

3. The Applications did not contain sufficient evidence of injury and causation

811. Assuming, *arguendo*, the evidence pertaining to dumping or subsidisation was sufficient within the meaning of Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement, the Applications did not provide sufficient evidence of injury to the domestic industry, and that injury was caused by either dumping or subsidisation.

812. The chapeau of both Articles 5.2 and 11.2 provides that an application must contain evidence of injury and a causal link. Paragraph (iv) of Article 5.2 of the Anti-Dumping Agreement specifies that an application must contain:

[I]nformation on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

Paragraph (iv) of Article 11.2 of the SCM Agreement is set out in almost identical terms.

813. The Applications contained no "actual evidence" of injury suffered by firms in the Chinese domestic barley industry.⁹⁴⁸ As set out above, CICC failed to provide a list of the domestic industry.⁹⁴⁹ Not one Chinese barley producer was named in the Applications. The information in support of CICC's claims that domestic industry experienced injury was contained in Annex VII to both applications, entitled "Explanation of Barley Planting and Market Status in China".⁹⁵⁰ The "explanation" was provided "by an authoritative third-party

⁹⁴⁸ See above, para. 752; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.

⁹⁴⁹ See above, section VII.B.1.

⁹⁵⁰ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), Annex VII; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), Annex VII.

institution to the attorney representing the Applicant."⁹⁵¹ The entirety of the information provided by CICC about injury experienced by domestic industry was comprised as follows:

According to investigations and statistics, the production and business indicators of domestic barley from 2014 to 2017 are as follows:

Items	Units	2014	2015	2016	2017
Total planting area	10,000 mu	703.20	669.90	642.90	602.78
Total output	10,000 tons	181.20	186.80	175.20	166.11
Average output per mu	Ton/mu	0.258	0.279	0.273	0.276
Sale price	RMB/kg	2.14	2.01	1.96	1.90
Net profit per mu	RMB/mu	-180.09	-239.43	-288.96	-301.89

Notes: (1) The data concerning the barley planting area and total output in China are from the National Bureau of Statistics and relevant authoritative institutions;

(2) Average output per mu = total output/planting area;

(3) The price and net profit per mu are the average data of the producing areas including Yunnan, Jiangsu, Inner Mongolia, Gansu, Sichuan and Henan. The barley output of these areas accounts for more than 70% of the country's total output.⁹⁵²

814. There was no explanation about the information on which these "production and business indicators" were based. For example, there was no explanation if the indicators represented the performance of all firms in Chinese barley industry, or only those firms that supported the application, or that CICC claimed that the Chinese barley industry had instructed them to file dumping and countervailing applications. It is beyond doubt that CICC's claims about injury were "simple assertion". No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that "production and business

⁹⁵¹ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), Annex VII; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), Annex VII.

⁹⁵² CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 48; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 48.

indicators of domestic barley",⁹⁵³ divorced from the performance of firms within the industry, was sufficient evidence of injury and causation to justify the initiation of an investigation.

815. One of CICC's main contentions concerning injury to the domestic industry was that the import price of barley "declined significantly" during the period of investigation which negatively impacted the prices of similar domestic products because a "direct price competition exists between the products".⁹⁵⁴ The premise that "direct price competition" exists was not supported by any evidence. MOFCOM did not even identify the Chinese barley producers, let alone what specification of barley they produced, and whether this was substitutable for the high-quality malting barley provided by Australian barley exporters. The analysis contained in the Application did not specify whether the volumes and prices were for barley seed, or barley (including what type of barley), or both. There was evidence before MOFCOM concerning the different specifications of barley relating to different end uses. An unbiased and objective investigating authority would not have assumed, without inquiry or corroboration, that all barley attracted the same price given the different specifications and end uses of barley in the market.

816. Furthermore, despite information from CICC itself that "seasons for barley planting and harvesting vary in different areas" and were "[i]nfluenced by the climate and geographic position",⁹⁵⁵ MOFCOM made no inquiries with CICC as to how these factors were represented in the yearly "production and business indicators" provided. There was no explanation, for example, about how the climate and geography of the different areas affected the cost of production, profitability, or capacity utilisation of the Chinese barley producers, or how these factors were represented in the "production and business indicators". As such, not only did the "production and business indicators" not pertain to any actual firms in the Chinese domestic barley industry, this information clearly did not contain the level of detail required in order to support the claims made by CICC.

⁹⁵³ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 48; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 48.

⁹⁵⁴ CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 53; CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 32.

⁹⁵⁵ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 48; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 48.

817. Assuming, *arguendo*, there was sufficient evidence of injury, there was no evidence of causation. The Applications contained inconsistencies and contradictions in the arguments that material injury was caused by alleged dumped and subsidised imports from Australia. For example, the Applications stated that, during 2015, domestic demand grew considerably yet Australia's import share declined by 19.04%.⁹⁵⁶ The Applications also stated that in 2016 domestic demand reduced but so too did the level of imports from Australia.

818. In addition, MOFCOM failed to consider whether injury was being caused by factors *other* than dumping or subsidisation. For example, MOFCOM did not assess the type of barley produced by the domestic industry, and whether the domestic industry even had the capability and capacity to produce barley to the specifications required by end-users in China.

819. Given the apparent inconsistencies in the Application which MOFCOM made no attempts to clarify or corroborate, and in light of the complete lack of data pertaining to the performance of individual firms in the domestic industry, no unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that there was sufficient evidence that alleged dumped or subsidised imports from Australia caused material injury to the domestic industry.

820. For the reasons set out above, no unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that the Application contained sufficient evidence that there was material injury to domestic industry, and that the injury was caused by alleged dumped and subsidised imports of barley from Australia. On that basis, China acted inconsistently with Article 5.3 of the Anti-Dumping Agreement, and Article 11.3 of the SCM Agreement in relation to MOFCOM's decision to nonetheless initiate an investigation.

4. The Applications should have been rejected

821. The Applications did not contain "sufficient evidence" of dumping, subsidisation, injury or causation, within the meaning of Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement. As such, MOFCOM was required to reject the applications

⁹⁵⁶ CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 51; CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 30.

in accordance with China's obligations under Article 5.8 of the Anti-Dumping Agreement, and Article 11.9 of the SCM Agreement.

822. On that basis, MOFCOM's determination to initiate anti-dumping and countervailing duties investigations following its failure to determine whether there was "sufficient evidence" necessarily means that China acted inconsistently with Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement by failing to reject the Applications made by CICC.

5. Conclusion

823. An investigation is "a process where certainty on the existence of all of the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward."⁹⁵⁷ At no stage of the process, including at initiation, did MOFCOM have the requisite degree of "certainty" that there was dumping, subsidisation, injury or causation. The investigations should never have been initiated as no unbiased and objective investigating authority could have determined there was sufficient evidence to justify doing so. The Applications made by CICC were "frivolous or unfounded" and should have been rejected.

824. As a result, China acted inconsistently with Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement, and Articles 11.1, 11.2, 11.3, 11.4 and 11.9 of the SCM Agreement.

D. CONCLUSION

825. For the reasons set out above, China acted inconsistently with Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement, and Articles 11.1, 11.2, 11.3, 11.4 and 11.9 of the SCM Agreement.

VIII. AUSTRALIA'S CLAIMS CONCERNING THE CONDUCT OF THE INVESTIGATIONS

826. Australia submits that 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 in respect of MOFCOM's conduct of the investigations.

⁹⁵⁷ Panel Reports, *Guatemala – Cement II*, para. 8.35; *Mexico – Steel Pipes and Tubes*, para. 7.22.

827. MOFCOM had a duty to seek out relevant information and to evaluate it in an objective manner.⁹⁵⁸ In conducting its investigation, MOFCOM was required to observe the framework established by Articles 6 and 12 of the Anti-Dumping Agreement and Articles 12 and 22 of the SCM Agreement, which set out important procedural and due process obligations. These obligations, although distinct, operate together to ensure that interested parties can properly defend their interests during an investigation. The framework also operates to ensure that WTO Members can, where appropriate, seek review of a measure before a WTO panel. This relies on an investigating authority providing adequate *reasons* for its determinations. The reasons for why an investigating authority concluded as it did must be sufficiently detailed such that they can be discerned and are understood.⁹⁵⁹

828. MOFCOM failed to carry out *any* systematic inquiry of the issues before it. Australia will demonstrate that MOFCOM failed to observe the framework of procedural and due process obligations set out in the Anti-Dumping Agreement and SCM Agreement. Despite ostensibly being the primary source of information in the investigations,⁹⁶⁰ interested parties were not given ample opportunities to present relevant evidence. Extensive evidence was submitted by interested parties but left unverified. It was ultimately disregarded without any deficiencies identified in its quantity or quality. Information was collected by MOFCOM but not disclosed; submissions were made but received no response; and determinations were published by MOFCOM that were completely lacking in substance such that interested parties were not able to discern the reasons why MOFCOM acted in the way it did.

A. LEGAL FRAMEWORK

1. Full opportunity to defend interests

829. Article 6.1 of the Anti-Dumping Agreement provides, in relevant part:

All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

⁹⁵⁸ See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 344.

⁹⁵⁹ See Panel Reports, *China – X-Ray Equipment*, para. 7.472; *EU – Footwear (China)*, para. 7.844.

⁹⁶⁰ See Appellate Body Report, *US – Wheat Gluten*, para. 54.

Article 12.1 of the SCM Agreement is set out in almost identical terms.⁹⁶¹

830. Article 6.2 of the Anti-Dumping Agreement provides, in relevant part:

Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.⁹⁶²

831. Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement enshrine fundamental due process rights.⁹⁶³ These provisions require an investigating authority to give all interested parties notice of the information the authority requires and ample opportunity to present evidence in writing. The obligation to provide interested parties with opportunities for the full defence of their interests also entails the right to comment on how the data collected by the authorities is assessed.⁹⁶⁴ There should be "liberal opportunities for respondents to defend their interests" throughout an investigation.⁹⁶⁵

832. The obligation to give interested parties ample opportunity to submit evidence means that an investigating authority must take this evidence into account. The Appellate Body has explained that:

This due process obligation—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party.⁹⁶⁶

⁹⁶¹ Article 12.1 of the SCM Agreement requires that interested Members as well as all interested parties are given notice of the information which the authorities require.

⁹⁶² The SCM Agreement does not contain an equivalent of the first sentence of Article 6.2 of the Anti-Dumping Agreement. However, Australia submits that it would be erroneous to interpret the specific provisions of Article 12 of the SCM Agreement as affording interested parties *less* due process than what must be afforded to interested parties in an investigation pursuant to the Anti-Dumping Agreement because of this textual difference. In this respect, it is relevant to note that Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement contain largely identical due process obligations. Furthermore, Article 12.8 of the SCM Agreement specifically refers to disclosure of facts in order for "parties to *defend their interests*." (emphasis added). In these circumstances, it would be anomalous to interpret the scope of due process obligations in SCM Agreement as being markedly different than those in the Anti-Dumping Agreement.

⁹⁶³ Panel Report, *China – Broiler Products (Article 21.5)*, para. 7.218; Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241; *EC – Fasteners (China)*, para. 609.

⁹⁶⁴ Panel Report, *Korea – Certain Paper (Article 21.5)*, para. 6.80.

⁹⁶⁵ Appellate Body Report, *US–Oil Country Tubular Goods Sunset Reviews*, para. 241.

⁹⁶⁶ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

2. Opportunities to see information

833. Interested parties have a right to see information used by investigating authorities.

Article 6.4 of the Anti-Dumping Agreement provides that:

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

Article 12.3 of the SCM Agreement is set out in almost identical terms.⁹⁶⁷

834. Thus, for information to be captured by Articles 6.4 and 12.3, it must meet the following criteria:

- the information is relevant to the presentation of the interested Members' or interested parties' cases;
- the information is not confidential; and
- the information is used by the investigating authority.⁹⁶⁸

835. Importantly, the obligation in Articles 6.4 and 12.3 extends to information provided by interested parties as well as information collected by investigating authorities, provided it meets the criteria set out above.⁹⁶⁹ In this respect, information which is "used by" an investigating authority is not limited to information which the authority is *required* to consider, or which it does, in fact, consider in the course of an investigation.⁹⁷⁰ Information which is "used by" an investigating authority is broad, and will depend on the circumstances of the investigation.⁹⁷¹ Such an interpretation is necessary in order to give effect to the purpose of Articles 6.4 and 12.3, that interested parties must be able to prepare presentations on the basis of information which is before the investigating authority which they consider

⁹⁶⁷ Article 12.3 of the SCM Agreement provides that investigating authorities must wherever practicable provide interested Members as well as interested parties timely opportunities to see all information that is relevant.

⁹⁶⁸ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142.

⁹⁶⁹ Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82.

⁹⁷⁰ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286.

⁹⁷¹ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286

relevant, and which they are to be given opportunities to see under the first part of the provisions.⁹⁷²

836. The "relevance" of the information must be assessed from the perspective of the interested party,⁹⁷³ and with reference to the issues under consideration.⁹⁷⁴ The obligation on the investigating authority to "provide timely opportunities" to see relevant information is not conditional on receiving a request from an interested party.⁹⁷⁵ Interested parties cannot request to see information that they may not know exists.⁹⁷⁶

3. Confidential information

837. Article 6.5 provides, in relevant part:

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

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

Articles 12.4 and 12.4.1 of the SCM Agreement are set out in almost identical terms.

838. The protection of confidential information is an integral part of an anti-dumping or countervailing duties investigation in order to ensure the effective administration of a trade

⁹⁷² Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286.

⁹⁷³ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145; Panel Report, *China – Broiler Products (Article 21.5)*, para. 7.291.

⁹⁷⁴ See Panel Report, *EU – Footwear (China)*, para. 7.601.

⁹⁷⁵ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.

⁹⁷⁶ The panel in *China – Broiler Products (Article 21.5 – US)* noted the evidentiary difficulties with a claim based on an alleged omission, in that it may be difficult to prove the *absence* of an opportunity to see information. The panel explained that from an evidentiary perspective, it may be useful if a complainant can demonstrate that an interested party requested to see information. However, this does not mean that a request is *necessary* in order to demonstrate a violation of Articles 6.4 or 12.3. The fact remains that a failure to provide opportunities to see information which meets the criteria in Articles 6.4 and 12.3 is a violation by omission. (See Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.292.)

remedy system. However, the protection of confidential information must be balanced against the "fundamental due process rights" enjoyed by interested parties, including the right to see information used by authorities in the course of its investigation. The conditions set out in Articles 6.5 and 12.4 are of "critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an [...] investigation."⁹⁷⁷ It is important for panels to strictly enforce these conditions in order to maintain this balance.⁹⁷⁸

839. Information must be treated in a confidential manner, and not be disclosed without consent of the party submitting it, following a showing of "good cause".⁹⁷⁹ A showing of "good cause" is necessary for the two categories of information covered by Articles 6.5 and 12.4. *First*, information which is by its nature confidential, and *second*, information which is provided on a confidential basis.⁹⁸⁰

840. Articles 6.5.1 and 12.4.1 state that investigating authorities must require interested parties provide a non-confidential summary of the information claimed to be confidential. These summaries must be of sufficient detail to permit a reasonable understanding of the substance of the information. Without such summaries, other interested parties could not meaningfully engage in the investigative process and have "full opportunity for the defence of their interests".⁹⁸¹ The purpose of Articles 6.5.1 and 12.4.1 is to "balance the goal of ensuring that availability of confidential treatment does not undermine the transparency of the investigative process".⁹⁸²

841. A non-confidential summary must be provided by the interested party submitting the information. Subsequent analysis or summation by the investigating authority cannot remedy the lack of non-confidential summary.⁹⁸³ A summary must contain sufficient detail to

⁹⁷⁷ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

⁹⁷⁸ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

⁹⁷⁹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.101.

⁹⁸⁰ See Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95; *EC – Fasteners (China)*, paras. 536-537.

⁹⁸¹ Appellate Body Report, *EC – Fasteners (China)*, paras. 541-542. See also Panel Reports, *China – Broiler Products*, para. 7.50; *China – GOES*, para. 7.188; *Mexico – Steel Pipes and Tubes*, paras. 7.379-7.380; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.133.

⁹⁸² Appellate Body Report, *EC – Fasteners (China)*, para. 542.

⁹⁸³ Panel Report, *China – Broiler Products*, para. 7.53.

understand the "substance" of the information provided. It is insufficient for the non-confidential summary to provide only a description of the "nature" of the information.⁹⁸⁴

4. Accuracy of information

842. Article 6.6 provides that:

Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

Article 12.5 of the SCM Agreement is set out in almost identical terms except that it covers information provided by interested Members, in addition to interested parties.

843. Articles 6.6 and 12.5 do not prescribe the activities which an investigating authority must undertake in order to satisfy itself as to the accuracy of the information.⁹⁸⁵ Investigating authorities are not necessarily required to undertake "on-the-spot" verification. However, they nonetheless have a "general obligation" to satisfy themselves as to the accuracy of the information upon which their findings are based.⁹⁸⁶

5. Disclosure of essential facts

844. Article 6.9 of the Anti-Dumping Agreement provides that:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

845. Article 12.8 of the SCM Agreement is set out in almost identical terms and similarly obliges investigating authorities to disclose the essential facts to interested Members and parties.

846. What must be disclosed pursuant to Articles 6.9 and 12.8 are "the essential facts under consideration". The Appellate Body in *China – GOES*, found that the word "essential [...]"

⁹⁸⁴ Panel Report, *China – GOES*, paras. 7.198-7.200.

⁹⁸⁵ See Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *US – DRAMS*, para. 6.78; and *US – Steel Plate*, fn 67.

⁹⁸⁶ Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *US – Steel Plate*, fn 67.

carries a connotation of significant, important, or salient."⁹⁸⁷ What is "significant, important, or salient" must be understood in light of the substantive obligations at issue and the factual circumstances of the investigation.⁹⁸⁸ The Appellate Body explained that:

[W]e understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.⁹⁸⁹

847. Investigating authorities must disclose the essential facts in a coherent manner.⁹⁹⁰ Interested parties are not required to engage in "back-calculations and inferential reasoning" in order to ascertain the essential facts.⁹⁹¹

848. The disclosure of essential facts must take place "before a final determination is made", and with "sufficient time for the parties to defend their interests." The sufficiency of time afforded to interested parties to respond will depend on, *inter alia*, the nature and complexity of the issue to which the parties have to respond in order defend their interests.⁹⁹²

6. Public notices must contain all relevant information

849. Article 12.2 of the Anti-Dumping Agreement provides that:

Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

⁹⁸⁷ Appellate Body Report, *China – GOES*, para. 240. See also, Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.130.

⁹⁸⁸ Appellate Body Report, *China – GOES*, para. 241.

⁹⁸⁹ Appellate Body Report, *China – GOES*, para. 240.

⁹⁹⁰ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

⁹⁹¹ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

⁹⁹² Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.

Article 22.3 of the SCM Agreement is set out in almost identical terms.

850. Article 12.2.2 of the Anti-Dumping Agreement provides that:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

Article 22.5 of the SCM Agreement is set out in almost identical terms.

851. Articles 12.2 and 22.3 require notice of preliminary and final determinations, whether affirmative or negative, and set forth the information to be included in such notices.⁹⁹³ Each notice must include, in sufficient detail, the findings and conclusions reached on all issues of fact and law considered material by the investigating authority, and contain all relevant information on the matters of fact and law and reasons, which have led to the imposition of final measures.⁹⁹⁴ Articles 12.2.2 and 22.5 provide that the notices must contain the information listed in Articles 12.2.1 and 22.4.⁹⁹⁵

852. Turning first to the requirement in Articles 12.2 and 22.3 that the notice (or separate report) must set out in "sufficient detail" findings and conclusions on all issues of fact and law considered "material" by the investigating authorities. The ordinary meaning of "sufficient" is "of a quantity, extent, or scope adequate to a certain purpose or object."⁹⁹⁶ The panel in *Mexico – Corn Syrup* determined that the purpose of Article 12.2 of the Anti-Dumping Agreement is to provide transparency of the authority's decision-making at crucial points of the investigation.⁹⁹⁷ As such, in the context of Articles 12.2 and 22.3, and in light of the object

⁹⁹³ Panel Report, *EC – Bed Linen*, para. 6.260.

⁹⁹⁴ Panel Report, *China – Broiler Products*, para. 7.327.

⁹⁹⁵ The obligations in Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement are inter-related. A WTO Member's compliance with Article 12.2 of the Anti-Dumping Agreement will be determined, in part, by compliance with Article 12.2.2. Similarly, compliance with Article 22.3 of the SCM Agreement will be determined, in part, by compliance with Article 22.5. (Panel Report, *China – Broiler Products*, para. 7.521.)

⁹⁹⁶ Oxford English Dictionary online, definition of "sufficient", <https://www.oed.com/view/Entry/193543> (accessed 29 October 2021).

⁹⁹⁷ Panel Report, *Mexico – Corn Syrup*, para. 7.104.

and purpose of the provisions, the notices must contain details of a quantity, extent, and scope adequate to make transparent the authority's decision making. An investigating authority is therefore required to provide explanations of an adequate quantity, extent and scope. Simply reciting data is not a sufficient explanation to meet the requirements of Articles 12.2 and 22.3.⁹⁹⁸

853. Next, Articles 12.2 and 22.3 require the notices to contain explanations of an adequate quantity, extent and scope of findings and conclusions reached on all issues of fact and law considered "material" by the investigating authority. The ordinary meaning of "material", in the context of Articles 12.2 and 22.3, is "of serious or substantial import; significant, important, of consequence."⁹⁹⁹ This is consistent with the interpretation of the panel in *EC – Tube or Pipe Fittings*.¹⁰⁰⁰ The panel explained that, although it seems that there is a degree of subjectivity on the part of the investigating authority, there are still "certain objective requirements that would necessarily require reflection in the public report of the investigation".¹⁰⁰¹ As such, a "material issue" is "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination."¹⁰⁰²

854. Finally, Articles 12.2.2 and 22.5 require disclosure of "all relevant information". The Appellate Body has explained that:

The obligation of disclosure under Articles 12.2.2 and 22.5 is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Articles 12.2.2 and 22.5 seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the Anti-Dumping Agreement and Article 23 of the SCM Agreement.¹⁰⁰³

⁹⁹⁸ Panel Report, *Mexico – Corn Syrup*, fn 610.

⁹⁹⁹ Oxford English Dictionary online, definition of "material", <https://www.oed.com/view/Entry/114923> (accessed 29 October 2021).

¹⁰⁰⁰ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.423.

¹⁰⁰¹ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.422.

¹⁰⁰² Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.

¹⁰⁰³ Appellate Body Report, *China – GOES*, para. 258.

855. The reasons for *why* an investigating authority concluded as it did must be discernible from the published notice.¹⁰⁰⁴ That the notice must contain the requisite level of detail is important not only because it seeks to guarantee that interested parties are able to seek judicial review, but also "to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary."¹⁰⁰⁵

856. In this respect, the Appellate Body has explained that where a panel is required to undertake an "objective assessment" of an investigating authority's determination, the panel's assessment must consider whether:

[T]he agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.¹⁰⁰⁶

B. MOFCOM FAILED TO AFFORD INTERESTED PARTIES DUE PROCESS IN THE INVESTIGATIONS

857. Australia now turns to consider its claims that 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.

1. MOFCOM failed to provide interested parties with ample opportunities to present evidence they considered relevant

858. Australia submits that China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement, and Article 12.1 of the SCM Agreement. Giving parties adequate notice, as required by Articles 6.1 and 12.1 is an integral part of the procedural and evidentiary

¹⁰⁰⁴ Panel Report, *EU – Footwear (China)*, para. 7.844. See also, Panel Report, *China – X-Ray Equipment*, para. 7.459.

¹⁰⁰⁵ Panel Report, *China – X-Ray Equipment*, para. 7.459.

¹⁰⁰⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186. (footnotes omitted) Although the Appellate Body's findings were made in respect of Article 22.5 of the SCM Agreement, the same obligations apply in respect of a panel reviewing a determination in an anti-dumping investigation, in accordance with Article 12.2.2 of the Anti-Dumping Agreement. See above, section I.E.

framework established by Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement. It is only when interested parties are aware of what information is required, and have the time to prepare and present relevant evidence in response, that those interested parties can actively engage in the investigative process.

859. In both investigations, MOFCOM failed to provide interested parties with a full opportunity for the defence of their interests and the ample opportunities to present evidence to which they were entitled. This manifested not only in the specific instances which Australia sets out below, but also when considering the totality of MOFCOM's conduct and management of the investigations.

(a) Extension requests for responses to questionnaire

860. In respect of the countervailing duties investigation, MOFCOM issued the questionnaire to foreign exporters or producers on 15 January 2019. The Australian Government and certain Australian interested parties requested an extension to respond to the questionnaire of between two to four weeks.¹⁰⁰⁷ Interested parties

¹⁰⁰⁷ The Australian Government requested an extension of 28 calendar days (Australian Government, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation) (Australian Government Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-81), p. 1); Emerald requested an extension of 14 days (Emerald, Request for extension to file questionnaire response in the countervailing duty investigation, 31 January 2019 (English translation) (pages renumbered) (Emerald Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-82), p. 1; Grain Trade Australia requested an extension of 28 calendar days (Grain Trade Australia, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation) (Grain Trade Australia Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-83), p. 1); Grain Growers requested an extension of 28 calendar days (Grain Growers, Request for extension to file questionnaire response in the countervailing duty investigation, 11 February 2019 (English translation) (pages renumbered) (Grain Growers Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-84), p. 1); ADM Trading requested an extension of 14 calendar days (ADM Trading, Extract of Request for extension to file questionnaire response in the countervailing duty investigation, 8 February 2019 (English translation) (pages renumbered) (ADM Trading Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-85), p. 1); Agracom requested an extension of 21 calendar days (Agracom, Request for extension to file questionnaire response in the countervailing duty investigation, 5 February 2019 (English translation) (pages renumbered) (Agracom Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-86), p. 1); Bunge requested an extension of 21 calendar days (Bunge, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered) (Bunge Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-87), p. 1); CHS Broadbent requested an extension of 30 calendar days (CHS Broadbent, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (CHS Broadbent Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-88), p. 1); CBH requested an extension of 21 calendar days (CBH, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered) (CBH Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-89), p. 2); Cargill requested an extension of 14 calendar days (Cargill, Request for extension to file questionnaire response in the countervailing duty investigation, 3 February 2019 (English translation) (Cargill Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-90), p. 1); CL Commodities did not specify a length of time in its request but nonetheless requested an extension (CL Commodities, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (CL Commodities Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-91),

substantiated their requests claiming an extension was required, *inter alia*, due to the large volume of work involved resulting from the anti-dumping investigation being conducted concurrently and the large number of alleged subsidy programs,¹⁰⁰⁸ company resources were required to engage in the barley harvest in Australia,¹⁰⁰⁹ the time required to translate documents, and difficulties accessing translation services due to the Chinese holiday period.¹⁰¹⁰

861. MOFCOM granted an extension of four days (of which only two were business days).¹⁰¹¹ MOFCOM did not provide reasons as to why a period of only four days – two business days – was granted when longer periods were requested.

862. Pursuant to Article 12.1 of the SCM Agreement, interested parties must be given ample opportunity to present in writing all evidence they consider relevant. Implicit in the right to present evidence is being granted the time necessary to prepare that evidence.¹⁰¹²

p. 1); GIMAF requested an extension of 28 calendar days (GIMAF, Request for extension to file questionnaire response in the countervailing duty investigation, 14 February 2019 (English translation) (GIMAF Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-92), p. 1); GrainCorp requested an extension of 14 calendar days (GrainCorp, Request for extension to file questionnaire response in the countervailing duty investigation, 13 February 2019 (English translation) (GrainCorp Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-93), p. 2); Glencore requested an extension of "at least" 21 calendar days (Glencore, Request for extension to file questionnaire response in the countervailing duty investigation, 12 February 2019 (English translation) (pages renumbered) (Glencore Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-94), p. 2); and Quadra requested an extension of 21 calendar days (Quadra, Request for extension to file questionnaire response in the countervailing duty investigation, 8 February 2019 (English translation) (Quadra Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-95), p. 1); COFCO requested an extension of 21 calendar days (COFCO, Request for extension to file questionnaire response in the countervailing duty investigation, 13 February 2019 (English translation) (COFCO Request for Extension to file Countervailing Duties Questionnaire Response) (Exhibit AUS-98), pp. 1-2).

¹⁰⁰⁸ See Grain Trade Australia Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-83), p. 1; CBH Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-89), pp. 1-2; GIMAF Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-92), p. 2; Glencore Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-94), pp. 1-3; Quadra Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-95), p. 1; and GrainCorp Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-93), p. 2.

¹⁰⁰⁹ See Grain Trade Australia Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-83), p. 1; Grain Growers Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-84), p. 1; Cargill Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-90), p. 2; and GIMAF Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-92), p. 1.

¹⁰¹⁰ See Grain Trade Australia Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-83), p. 1; Grain Growers Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-84), p. 1; CBH Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-89), p. 1; Cargill Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-90), p. 2; Glencore Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-94), p. 3; Quadra Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-95), p. 1; and GrainCorp Request for Extension to file Countervailing Duties Questionnaire Response (Exhibit AUS-93), pp. 1-2.

¹⁰¹¹ MOFCOM, Reply letter on the request for extension to file countervailing duties questionnaire, 15 February 2019 (English translation) (pages renumbered) (MOFCOM Reply letter on the request for extension to file CVD questionnaire) (Exhibit AUS-96), p. 1. The revised deadline was Monday, 25 February 2019.

¹⁰¹² Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.218.

Article 12.1.1 provides context for the interpretation of the scope of the obligation in Article 12.1 that interested parties must be provided with "ample opportunity". Article 12.1.1 provides that interested parties must be given at least 30 days to respond. In addition, Article 12.1.1 provides that due consideration should be given to any request for an extension and, upon cause shown, an extension should be granted whenever practicable.

863. By providing an extension of only two business days to respond to the questionnaire, MOFCOM failed to give interested parties time to prepare evidence they considered relevant. Interested parties demonstrated cause as to why an extension was warranted, and MOFCOM did not explain why an extension of a period longer than two business days, and closer to what was requested, was not "practicable". In light of MOFCOM's decision to grant a 14-day extension (to many of the same interested parties) in the context of the anti-dumping investigation, the decision to grant an extension of only two business days in the countervailing duties investigation is particularly arbitrary.

(b) Notice regarding information required from Chinese
barley producers and end-users

864. MOFCOM visited "the prominent barley producing areas in Jiangsu" from 11-13 December 2018 in relation to both investigations.¹⁰¹³ During this visit, MOFCOM "investigated farms [...] through conducting site visits, holding symposiums and collecting relevant information and evidence by inquiry and verification."

865. MOFCOM failed to give notice to other interested parties of the information required and collected at the December industry visit. Pursuant to Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement, an investigating authority must give notice to *all* interested parties of the information required. The scope of the notice requirement is not limited to the recipient of the information requests.¹⁰¹⁴ It also entails the right for parties to comment on how data that may be collected is assessed. Therefore, interested parties must be aware of what information is requested. As such, MOFCOM was under an obligation to give

¹⁰¹³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 4; Countervailing Duties Final Determination (Exhibit AUS-11), p. 4. This visit took place even though MOFCOM had not yet decided to initiate a countervailing duties investigation. MOFCOM issued its notice to file a "countervailing investigation [...] as of December 21, 2018." (Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9), p. 1.).

¹⁰¹⁴ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.221.

notice to the Australian exporters of barley (and the Australian Government in the countervailing duties investigation) of the information requested from the participants of the December visit. MOFCOM failed to do so.

866. The first public admission by MOFCOM that the December visit had occurred was in a record of the visit, dated 20 February 2019 (the Record).¹⁰¹⁵ At some point in the investigations, this Record was made available in hard copy at the Trade Remedy Public Information Office. However, interested parties were given no indication whatsoever that this had occurred. Articles 6.1 and 12.1 require a positive act from an investigating authority – MOFCOM was required to actively provide notice to all interested parties by "reaching out and making all interested parties aware of the information in question."¹⁰¹⁶ Making information available in a single hardcopy for in-person review at a government office location without bringing it to the attention of interested parties is not sufficient.¹⁰¹⁷ The panel considered similar circumstances in *China – Broiler Products (Article 21.5)*. It found that "[m]erely making information available in this room without, in any way, calling the attention of the interested parties to this information is, however, not sufficient for purposes of Articles 6.1 and 12.1."¹⁰¹⁸ MOFCOM's passive and opaque act of making the Record of the December visit available in the Trade Remedy Public Information Office clearly does not meet the standard required by Articles 6.1 and 12.1.

867. The content of the Record of the December visit also failed to meet the standard required by Articles 6.1 and 12.1. The Record did not contain the "information which the authorities require[d]". Although the document appears to describe the information collected, it does not set out what information was requested or required. It cannot be assumed that the information collected was precisely the information MOFCOM had requested or required. Information required but *not* collected, and the reasons why any such information was not collected, is equally relevant to the presentation of other interested parties' evidence. A notice informing other interested parties of the information actually submitted (if, indeed,

¹⁰¹⁵ MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71), p. 7.

¹⁰¹⁶ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.229.

¹⁰¹⁷ See Panel Report, *China – Broiler Products Article 21.5 – US*, para. 7.256.

¹⁰¹⁸ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.256.

that is what the Record even is) does not constitute notice as required by Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.¹⁰¹⁹

(c) Notice of deficiencies in information submitted and
opportunities to present all evidence interested parties
considered relevant

868. Despite being in receipt of extensive and detailed questionnaire responses from interested parties, including the Australian Government, Australian barley exporters, and Australian barley producers, MOFCOM rejected the information in its entirety. Interested parties were not aware of MOFCOM's decision to reject all information until the publication of the Final Disclosure in each investigation, more than 12 months after the information was submitted.

869. In order for interested parties to have full opportunities to defend their interests and ample opportunity to present evidence, they must be given notice of the "contours of the investigation".¹⁰²⁰ This includes the "right to comment on how the data collected by the authorities have to be assessed."¹⁰²¹

870. 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 Disclosure. In order to have "ample opportunity" to present evidence, an investigating authority must give notice in a timely manner. Waiting until the Final Disclosure clearly does not meet this requirement.¹⁰²² Furthermore, during the investigation, interested parties and the Australian Government made representations to MOFCOM concerning their willingness to facilitate any sort of verification activity. MOFCOM did not respond. In fact, there is no evidence on the record to suggest that MOFCOM made any attempts to verify the information provided by interested parties. Rather, MOFCOM elected not to communicate that the information submitted by the interested was not the information it required, or all of the information it required, until the Final Disclosure. In the absence of any notification, it was reasonable for the interested parties

¹⁰¹⁹ See Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.234.

¹⁰²⁰ Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.218.

¹⁰²¹ Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.80.

¹⁰²² This is particularly the case because MOFCOM did not give meaningful consideration any comments made in response to the Final Disclosure and failed to provide reasons for the rejection of the arguments presented by the Australian Government and Australian traders and producers. See below, section VIII.B.6.

to assume that MOFCOM had not identified any deficiencies in their information. The fact that MOFCOM left providing a notification to such a late stage in the investigations deprived interested parties of the "ample opportunity" to present evidence and full defence of their interests.

(d) Failure to take into account comments on the Final Disclosures

871. The Final Disclosures in each investigation were published on 8 May 2020. MOFCOM directed interested parties to submit comments on the Final Disclosures by 18 May 2020. Interested parties submitted their comments by the deadline, in accordance with MOFCOM's instructions. That *same day*, MOFCOM published the Final Determination in each investigation.

872. The rights enshrined in Articles 6.1 and 12.1 for interested parties to have "ample opportunity" to present all relevant evidence concomitantly means investigating authorities must take that information into account.¹⁰²³ At most, MOFCOM had a matter of hours to read and consider the comments made by the interested parties in response to the Final Disclosures, incorporate those comments and considerations into its reasoning and determinations, and draft written reasons addressing same in the Final Determinations. In these circumstances, it is entirely implausible that MOFCOM considered, in any meaningful way, the responses to the Final Disclosures. This was demonstrated by the lack of reasoning in the Final Determinations as to why MOFCOM rejected the arguments proffered by interested parties.¹⁰²⁴

873. The timeframe set by MOFCOM was particularly egregious given that the Final Disclosures were the first communication interested parties received from MOFCOM in relation to either investigation since MOFCOM issued the questionnaires, more than 12 months earlier. This was also the first indication of the course and contours of the investigations.

¹⁰²³ See above, para. 832.

¹⁰²⁴ Australia separately claims that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement by failing to provide reasons for the rejection of arguments and claims by interested parties in the investigations. See below, section VIII.B.6.

874. Articles 6.1 and 12.1 do not require the obligations contained therein to be met through any particular form, including through setting time-limits for the submission of evidence.¹⁰²⁵ However, to the extent that an investigating authority does elect to set time-limits, it must allow for interested parties to have ample opportunity to present evidence and the full opportunity for the defence of their interests. What matters is whether, in practice, sufficient opportunities were provided to interested parties.¹⁰²⁶ MOFCOM's conduct of the investigations clearly deprived interested parties of such opportunities.

(e) Conclusion

875. There was no genuine opportunity for interested parties to defend their interests in the underlying investigations. The responses to questionnaires were disregarded, extensive data was submitted but left unverified, submissions went unanswered, and the Final Determinations were published on the *same day* that comments were due following the Final Disclosures.

876. An investigation conducted in these circumstances, where there is no contact from the investigating authority at all during the course of investigation, is clearly inconsistent with the Anti-Dumping Agreement and SCM Agreement and deprived interested parties of the "fundamental due process" rights to which they were entitled.

877. As such, China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement, and Article 12.1 of the SCM Agreement in relation to MOFCOM's failure to provide interested parties with ample opportunity to present all evidence those parties considered relevant, and therefore allow a full opportunity for the defence of those parties' interests.

2. MOFCOM failed to provide interested parties opportunities to see all information

878. Australia submits that China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement. MOFCOM was required to provide timely opportunities for interested parties to see information that met the criteria in Articles 6.4 and 12.3, including the definition of the domestic industry and standing of the Applicant, in

¹⁰²⁵ Panel Report, *Guatemala – Cement II*, para. 8.119.

¹⁰²⁶ Panel Report, *Guatemala – Cement II*, para. 8.119.

addition to the Global Trade Atlas data. Access to information is essential for an interested party to have a full opportunity for the defence of its interests.

(a) Definition of the domestic industry and standing of the Applicant

879. CICC did not provide a list of all known domestic producers of barley in its anti-dumping and countervailing duties applications. Similarly, MOFCOM did not identify domestic producers in the notices of initiation or demonstrate that the applications were supported by those domestic producers whose collective output constituted more than 50% of the total production of the like product or that the level of domestic producers accounted for not less than 25% of total production.

880. This information formed the basis of the decision to initiate anti-dumping and countervailing duties investigations. But for this decision to initiate, Australian traders and producers would not have been required to participate in the investigations. The information was relevant to the presentation of interested parties' cases, "used by" MOFCOM, and MOFCOM did not indicate that the information was confidential. On this basis, the information clearly fell within the scope of the obligations under Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement.

881. Certain interested parties submitted to MOFCOM that CICC did not have standing.¹⁰²⁷ In response to these submissions, MOFCOM still failed to provide timely opportunities to see the information and denied the interested parties the ability to prepare presentations on the basis of the information.¹⁰²⁸

¹⁰²⁷ Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), pp. 1 and 4; Australian Government Comments on Initiation of Countervailing Duties Investigation (Exhibit AUS-67), pp. 1 and 4; and Australian Government Submission Following Initiation Consultations (Exhibit AUS-74), p. 3; Grain Trade Australia Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-34), p. 8; CBH, Comments on initiation of anti-dumping investigation, 10 December 2018 (English translation) (CBH Comments on Initiation of Anti-Dumping Investigation) (Exhibit AUS-97), pp. 2-3; and CBH Comments on Anti-Dumping Final Disclosure (Exhibit AUS-42), pp. 2-3.

¹⁰²⁸ MOFCOM made available the Report of its visit to barley producing regions in China. (MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71)). However, Australia has no knowledge whether this document lists *all* known barley producers as neither MOFCOM, nor CICC, adequately defined the domestic industry members of behalf of whom the applications were ostensibly made. In this respect the document itself purports to be a "survey" rather than a comprehensive study of the domestic barley producers in China. In any event, the document does not set out the collective output of those domestic producers who supported the application. Even if the Panel considered this document did contain the information to which Australia refers, MOFCOM did not provide *timely* opportunities to see this document. As set out above, it is not clear from the record *when* MOFCOM made this document available as no notice was provided alerting interested parties to its existence.

882. Accordingly, China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement.

883. As a result of MOFCOM's failure to provide timely opportunities to see the information regarding the definition of the domestic industry, MOFCOM failed to provide interested parties with a full opportunity for the defence of their interests and therefore China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

(b) Global Trade Atlas data

884. MOFCOM ascertained the normal value and export price in the anti-dumping investigation using data from Global Trade Atlas. The information was not provided to the interested parties.

885. The Global Trade Atlas information was used by MOFCOM and relevant to the presentation of interested parties' cases as it formed the basis of the dumping margin calculated by MOFCOM. There was no indication anywhere on the record that the information from Global Trade Atlas was confidential and could not be disclosed on that basis. As such, the Global Trade Atlas data fell within the scope of the obligation under Article 6.4 of the Anti-Dumping Agreement.

886. Interested parties only became aware of MOFCOM's decision to use Global Trade Atlas data in the context of its Anti-Dumping Final Disclosure, more than 12 months after it had received questionnaire responses from the interested parties. Australia recalls that the obligation under Article 6.4 of the Anti-Dumping Agreement requires "timely opportunities" for interested parties to see relevant information, and yet, even at this stage in the investigation, MOFCOM did not provide the data it was purporting to use. In response to the Anti-Dumping Final Disclosure, interested parties made submissions concerning MOFCOM's use of the Global Trade Atlas data.¹⁰²⁹ Despite these submissions, MOFCOM did not provide any opportunity for interested parties to see the Global Trade Atlas data. This failure is

¹⁰²⁹ ADM Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), pp. 2-3; Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 8; Australian Government Comments on Anti-Dumping Final Disclosure (Exhibit AUS-36), pp. 4-5; Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), pp. 4-6; CBH Comments on Anti-Dumping Final Disclosure (Exhibit AUS-42), pp. 7-8; and GrainCorp Comments on Anti-Dumping Final Disclosure (Exhibit AUS-43), pp. 7-8.

compounded by MOFCOM's decision to publish its Final Determination on the same day that those comments were due.

887. On that basis, China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement. As a result of MOFCOM's failure to provide timely opportunities to see the Global Trade Atlas information and accordingly provide interested parties with a full opportunity for the defence of their interests, China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

3. MOFCOM failed to require interested parties to furnish non-confidential summaries

(a) Confidential information provided by CICC

888. Australia submits that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement in relation to MOFCOM's failure to require CICC to furnish adequate non-confidential summaries.

889. In the Applications, CICC requested "materials and annexes in this application be treated confidentially".¹⁰³⁰ The request for confidentiality included the name of the "third-party authority" responsible for providing the data. CICC explained:

For the evidentiary materials provided to the applicant's attorney by the relevant third-party authority in the public text of this application and its annexes, in view of the confidentiality obligation of the applicant's attorney, the name of the third-party authoritative body shall not be disclosed publicly without permission. The disclosure of the name of the third-party authoritative body may harm its interests or adversely affect it. Therefore, the application for confidentiality of the evidence provided by the relevant third-party authority will not be disclosed in the full text. However, the relevant information and data in the evidentiary materials have been disclosed by the Applicant in the form of a non-confidential summary in the open text of the application and the annexes.¹⁰³¹

890. Apart from the name of the third-party authority, it was not apparent from the non-confidential versions of the Applications what "material" in the body of the documents CICC claimed to be confidential.

¹⁰³⁰ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 56. See also CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 74.

¹⁰³¹ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 53; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 75.

891. As for the Annexes, CICC claimed that Annex VII "Explanation of Barley Planting and Market Status" to both Applications was confidential in its entirety. CICC also claimed that Annex X "Investigation Report on the Market Price of Barley" to the Anti-Dumping Application was confidential in its entirety.¹⁰³² In Annex VII, CICC claimed that:

In view of the fact that the Applicant's attorney has an obligation to keep the authoritative third-party organization confidential and shall not publicly disclose the name of the authoritative third-party organization without permission because disclosing the name of the organization may harm its interests or adversely affect it, the application for the confidential treatment of evidence materials is made hereby, and the full text of the report will not be disclosed to the public, but the following non-confidential summary is provided [...].¹⁰³³

CICC produced what it claimed was a non-confidential summary of both Annex VII to both Applications, and Annex X to the Anti-Dumping Application.¹⁰³⁴

892. CICC also appears to have relied on the *same* information provided by the *same* third-party organisation in its response to the domestic producer questionnaire in both investigations.¹⁰³⁵ The Annex to CICC's questionnaire response is entitled "Explanation of Barley Planting and Market Status in China". CICC made a request for confidentiality in exactly the same terms as that included in the application.¹⁰³⁶

(b) MOFCOM did not require CICC to furnish non-confidential summaries of sufficient detail

893. MOFCOM failed to require CICC to furnish non-confidential summaries, and as such, China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement. Australia makes two claims in this respect. The first is in relation to the allegedly confidential information contained in the body of the Applications, and the second is in relation to the Annexes to the Applications.

¹⁰³² CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 58.

¹⁰³³ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 48; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 48.

¹⁰³⁴ CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), pp. 48 and 58; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 48.

¹⁰³⁵ See CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 52-53; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), pp. 45-46. As the name of the third-party organisation was accorded confidential treatment by MOFCOM, Australia can only assume that the "third-party organisation" providing the confidential information to CICC in the applications and response to the domestic producer questionnaire was one and the same.

¹⁰³⁶ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 52; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 45.

894. CICC requested that "materials and annexes in this application be treated confidentially". CICC asserted that "the relevant information and data in the evidentiary materials have been disclosed by the Applicant in the form of a non-confidential summary in the open text of the application and the annexes."¹⁰³⁷ The body of the application did not indicate where the confidential material was contained, or the extent of that confidential information. For example, CICC did not employ redactions – or any other method – in order to indicate that it was asserting certain information was confidential.

895. In order for a non-confidential summary to permit a reasonable understanding of the substance of the information, an interested party must, in the first instance, identify what information it is providing on a confidential basis. Alternatively, an interested party must indicate, by some means, what information it considers to be confidential by its nature. This cannot be done through a blanket request, such as that made by CICC, that "materials [...] in this application be treated confidentially".¹⁰³⁸ The treatment of confidential information is a necessary exception to the fundamental due process rights enjoyed by other interested parties in an investigation. The purpose of requiring a non-confidential summary is to still afford procedural fairness, to the extent possible, to those parties who cannot access that confidential information to allow them a "full defence of their interests". As such, it cannot be left to the guesswork of interested parties to determine what "materials" CICC was asserting as confidential.

896. Turning next to the Annexes to CICC's Applications and questionnaire responses. CICC asserted that the Annexes were confidential in their entirety. Australia submits that a non-confidential summary which purports to summarise an entire document but gives no indication of the nature or extent of the underlying information, cannot permit a reasonable understanding of that confidential information. CICC provided no indication, for example, about the length of the documents it was purporting to summarise, or the type of information or analysis contained therein. Interested parties accessing the non-confidential summary had

¹⁰³⁷ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 56; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 75.

¹⁰³⁸ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), p. 56; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 75.

no way of knowing if the confidential information comprised qualitative or quantitative analysis, and the extent of that analysis.

897. Targeted and limited redactions, by their nature, can function to provide a detailed understanding of the underlying information, whilst still protecting that information. A non-confidential summary of that information therefore may not need to contain a high level of detail in order to permit a reasonable understanding of the information. On the contrary, in instances where confidentiality is asserted over entire documents, the non-confidential summary must provide context for the underlying information in order to permit a reasonable understanding of the material. MOFCOM failed to require CICC to furnish non-confidential summaries which met this standard.

898. On that basis, China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.

899. As a result of MOFCOM's failure to require CICC to furnish non-confidential summaries of the requisite standard, MOFCOM failed to provide interested parties with a full opportunity for the defence of their interests. On that basis, China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

4. MOFCOM failed to satisfy itself as to the accuracy of the information

900. Australia submits that China acted inconsistently Article 6.6 of the Anti-Dumping Agreement and Article 12.5 of the SCM Agreement in relation to MOFCOM's failure to satisfy itself of the accuracy of the information on which its findings were based.

901. Despite conducting the anti-dumping and countervailing duties investigations for over 18 months, and the assertions in the Final Disclosures and Final Determinations that it "verified" information provided,¹⁰³⁹ there is no evidence on the public record that MOFCOM undertook any sort of activity to satisfy itself as to the accuracy of *any* of the information supplied by interested parties. It was permissible for MOFCOM to satisfy itself as to the

¹⁰³⁹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 4; Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 4; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 4 and 8; and Countervailing Duties Final Determination (Exhibit AUS-11), p. 4.

accuracy of the information – and thereby satisfy the obligations in Articles 6.6 and 12.5 – in a number of ways. MOFCOM chose none.

902. In particular, Australia submits that MOFCOM failed to satisfy itself as to the accuracy of the following information supplied by interested parties, and upon which its findings were based:

- the questionnaire responses from CICC¹⁰⁴⁰ and all other information on which the determination of injury and causation was based, including the domestic prices of barley in China, the "relevant economic factors and indicators of the domestic industry",¹⁰⁴¹ and other known factors of injury (including the operation of the Chinese Government's domestic wheat policy);
- the definition of the domestic industry supplied by CICC which formed the basis for the determinations that, *first*, there was sufficient evidence on which to initiate anti-dumping and countervailing duties investigations,¹⁰⁴² and *second*, that the domestic industry suffered material injury caused by dumped and subsidised imports of barley from Australia;¹⁰⁴³
- the information supplied by CICC alleging that there was a direct transfer of funds from the Australian Government to Australian barley producers in the three subsidy programs found to be countervailable;¹⁰⁴⁴ and

¹⁰⁴⁰ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65); CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66). MOFCOM found that Australian exporters' questionnaire responses were not complete because of their alleged failure to report the entire trading process and list all producers of barley. Notably, CICC made similar claims in its questionnaire responses in that it stated it could not provide data from all growers of barley in China. MOFCOM appears to have accepted this assertion from CICC. (See CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 5, 6, 16, 28, 31, 33, 37 and 38; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), pp. 4, 5, 13, 24, 26, 29, 32, 33 and 34.) Furthermore, MOFCOM found that the Australian Government's questionnaire response in the countervailing duty investigation was not complete because translations of certain supporting documentation were not provided. Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9, 10 and 12.) Notably, CICC similarly provided information in English in its application which was not translated into Simple Chinese in its entirety. (See, for example CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), pp. 70-74.) MOFCOM appears to have accepted this information.

¹⁰⁴¹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 17; Anti-Dumping Final Determination (Exhibit AUS-2), p. 17.

¹⁰⁴² Australia separately claims that CICC failed to identify the domestic industry in both its applications. MOFCOM similarly failed to disclose the definition of the domestic industry as it was required to do.

¹⁰⁴³ CICC Application for Anti-Dumping Investigation (Exhibit AUS-5), pp. 29-54; CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), pp. 50-72.

¹⁰⁴⁴ CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), pp. 18-19.

- the information provided by the Australian Government that there were no direct transfers of funds received by Australian barley producers in the three subsidy programs found to be countervailable.¹⁰⁴⁵

903. This information listed above satisfies the criteria of Articles 6.6 and 12.5 in that it was "information supplied by interested parties" upon which MOFCOM's findings were based. As such, MOFCOM was obliged to satisfy itself as to the accuracy of the information.

904. It is clear from the public records of the anti-dumping and countervailing duties investigations that MOFCOM failed to undertake *any* verification activities, or any other activities in order to reach the requisite level of satisfaction concerning the accuracy of the information upon which its findings were based. The only reference by MOFCOM to a "visit" was in connection with the "domestic industry", which took place from 11-13 December 2018.¹⁰⁴⁶ It is implausible that MOFCOM satisfied itself as to the accuracy of the information supplied by CICC at this visit, as the questionnaire responses from CICC in neither investigation had been received by MOFCOM at that time. In fact, the countervailing duties investigation *had not even been initiated* when the visit took place.¹⁰⁴⁷ In these circumstances, it is clear that MOFCOM could not have satisfied itself as to the accuracy of the information on which its findings were based.

905. In the Anti-Dumping Final Determination, MOFCOM makes one single reference to "verification" in its assertion that it "verified the information obtained during the investigation".¹⁰⁴⁸ This assertion was made in the context of MOFCOM's determination of the normal value on the basis of facts available. However, it is unclear to which "information" MOFCOM refers. In addition, MOFCOM does not explain *how* it verified the information. Article 6.6 does not necessarily require "on-the-spot" verification, however MOFCOM was nonetheless obligated to do *something* to satisfy itself as to the accuracy of the information submitted. Given MOFCOM found the information provided by Australian traders and

¹⁰⁴⁵ Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-6, 162-171 and 198-215.

¹⁰⁴⁶ Countervailing Duties Final Determination (Exhibit AUS-11), p. 4; Anti-Dumping Final Determination (Exhibit AUS-2), p. 4.

¹⁰⁴⁷ The countervailing duties investigation was initiated on 21 December 2018. MOFCOM did not include any reference to the visit of domestic injury in the notice of initiation of the countervailing duty investigation. (See Countervailing Duties Initiation of Investigation Announcement (Exhibit AUS-9).)

¹⁰⁴⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 8.

producers in the anti-dumping investigation to be deficient¹⁰⁴⁹ in the absence of any consultation, inquiry, verification or other activity, it is unclear what, exactly, MOFCOM purports to have "verified". If MOFCOM's belief that the omission of certain documents meant that the questionnaire responses relevant to ascertaining the normal value could not be "verified", and the omission of those documents formed the basis of the decision to resort to facts available, MOFCOM was obligated to inform the Australian traders as to what information was required. MOFCOM was not permitted to disregard information and resort to facts available pursuant to Article 6.8 of the Anti-Dumping Agreement on the basis that an interested party failed to provide sufficient supporting documentation that may have been required for verification purposes.¹⁰⁵⁰ This is especially the case in circumstances where interested parties cooperated and responded with all necessary information MOFCOM required in order to make determinations concerning dumping and subsidisation.

906. Apart from the reference to "visiting the domestic industry", the Countervailing Duties Final Determination makes no other reference to verification activity of any sort. In particular, MOFCOM failed to undertake any investigative process in order to determine that the direct transfers of funds, as alleged by CICC, even existed. As with MOFCOM's anti-dumping investigation, if MOFCOM's belief that the omission to provide translations of certain supporting documents¹⁰⁵¹ meant that the questionnaire responses relevant to ascertaining a financial contribution (or any other elements of a subsidy, including whether an alleged subsidy was specific) could not be "verified", and the omission of those documents formed the basis of the decision to resort to facts available, MOFCOM was obligated to inform the Australian Government and Australian traders as to what information was required. This includes notifying the Australian Government of its requirement to provide translations of certain supporting documents. MOFCOM was not permitted to disregard information and resort to facts available pursuant to Article 12.7 of the SCM Agreement on the basis that an interested party failed to provide sufficient supporting documentation that may have been required for verification purposes.¹⁰⁵²

¹⁰⁴⁹ As set out in detail above in section II.A, MOFCOM failed to inform interested parties that the information submitted by them was not accepted and thereby acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement.

¹⁰⁵⁰ Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

¹⁰⁵¹ See Countervailing Duties Final Determination (Exhibit AUS-11), pp. 9-10 and 12.

¹⁰⁵² See Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

907. In the absence of any explanation or documentary evidence about activities undertaken to ascertain the accuracy of the information submitted, including any communication with interested parties identifying alleged deficiencies in information supplied or requesting clarifications or rectifications, there is no factual foundation for the Panel to conclude that MOFCOM satisfied itself as to the accuracy of the information on which its determinations were based. As such, China acted inconsistently with Article 6.6 of the Anti-Dumping Agreement and Article 12.5 of the SCM Agreement.

908. As a result of MOFCOM's failure to satisfy itself of the accuracy of the information supplied in the anti-dumping investigation, MOFCOM failed to provide interested parties with a full opportunity for the defence of their interests. On that basis, China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

5. MOFCOM failed to disclose the essential facts under consideration

909. Australia submits that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement by failing to inform all interested parties of the essential facts under consideration in sufficient time for parties to defend their interests. Australia makes two claims in this regard. *First*, Australia submits that MOFCOM acted inconsistently with Articles 6.9 and 12.8 by failing to inform parties of the following essential facts under consideration:

- the factual foundation for the determination that there was a "direct transfer of funds" pursuant to the three programs found to be countervailable in the countervailing duties investigation;
- the alleged deficiencies in the information provided by the interested parties in the anti-dumping and countervailing duties investigations and the basis for disregarding such information and making determinations of dumping and subsidisation on the basis of facts available;
- the definition of the domestic industry, including the standing of the domestic industry; and

- the factual foundations for its determination of injury and causation. Particularly the assertions that:
 - there had been significant increases in allegedly dumped and subsidised imports of Australian barley;
 - domestically cultivated barley is the same or has no material difference from barley exported from Australia;
 - differences in specifications between types of barley are not the main factors affecting downstream users' purchases; and
 - the corn and wheat policies of the Chinese Government do not negate the causal relationship between imports of barley and injury to the domestic industry.

In relation to these essential facts, MOFCOM failed to make *any* disclosure to interested parties.

910. *Second*, Australia submits that MOFCOM failed to disclose *all* essential facts under consideration which formed the basis for its decision to apply definitive measures in the anti-dumping and countervailing duties investigations in sufficient time for parties to defend their interests.

(a) Failure to inform interested parties of essential facts under consideration

i. Factual foundation that there was a direct transfer of funds

911. In the three programs found to be countervailable, MOFCOM failed to disclose the factual foundation for its determination that in each program there was a financial contribution in the form of a direct transfer of funds made by a government.

912. MOFCOM refers to no supporting evidence in each section entitled "Financial contribution" in relation to the three programs.¹⁰⁵³ As such, the factual foundation for

¹⁰⁵³ Countervailing Duties Final Disclosure (Exhibit AUS-10), pp. 7, 9-10.

MOFCOM's determination that there was a financial contribution – an essential fact in the definition of a subsidy – is entirely unclear. On that basis, China acted inconsistently with Article 12.8 of the SCM Agreement.

*ii. Alleged deficiencies in information and facts used
to replace the allegedly missing necessary
information*

913. Whether a fact is "essential" depends on the nature and scope of the particular substantive obligation.¹⁰⁵⁴ In the context of the use of facts available pursuant to Articles 6.8 and 12.7, it is well established that the essential facts an investigating authority must disclose are:

(i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information.¹⁰⁵⁵

914. In the anti-dumping and countervailing duties investigations, MOFCOM failed to disclose the "precise basis" for its decision to resort to facts available, the information requested from interested parties, and the facts used to replace the missing information. Australia has set out, above, MOFCOM's purported basis for its resort to facts available in the anti-dumping investigation.¹⁰⁵⁶ MOFCOM rejected *all information* provided by Australian traders and producers. It did so without adequately identifying the information it alleged was either insufficient or not provided, how that information related to what was requested of interested parties, and to what specific determination it related such that it was "necessary information" for a determination of dumping. MOFCOM similarly failed to disclose the facts used to replace the missing information. For the normal value and export price for all interested parties, MOFCOM used data from Global Trade Atlas. The information from Global Trade Atlas was not disclosed at any stage throughout the anti-dumping investigation.

¹⁰⁵⁴ See above, para. 846; Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.130 (referring to Appellate Body Report, *China – GOES*, para. 241); Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.115.

¹⁰⁵⁵ 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.

¹⁰⁵⁶ See above, section II.A.2.

915. In the countervailing duties investigation, MOFCOM rejected all information provided by the Australian Government and Australian traders and producers in a similarly opaque manner.¹⁰⁵⁷ MOFCOM did not adequately identify the information it alleges was either insufficient or not provided by the Australian Government and Australian traders and producers, how that information allegedly not provided was connected to the information requested, and to what specific determination it related, such that it was "necessary information" for a determination of subsidisation.

916. Further, MOFCOM failed to disclose the facts used to replace the allegedly missing information. In relation to benefit, MOFCOM did not disclose the facts used in its determination of the existence of a benefit. In respect of the SARMS Program and VAIJ Fund, MOFCOM stated that the number it had chosen as the basis of its benefit "calculations" was "filled in the response".¹⁰⁵⁸ As for the SRWUI Program, MOFCOM stated that the "petition indicated that the amount of the subsidy was AUD 10 billion."¹⁰⁵⁹ In no instance does MOFCOM reference the precise source of information. In addition, MOFCOM did not disclose the facts underpinning the subsidy benefit calculations, including "demonstrating "the proportion of barley area to the total area crops in 2017-18",¹⁰⁶⁰ "[t]otal national production of barley",¹⁰⁶¹ "[t]he proportion of barley area in the total crop area of the South Australia State from 2017 to 2018",¹⁰⁶² and "[t]he proportion of barley area in the total crop area of Victoria from 2017 to 2018".¹⁰⁶³ These metrics appeared integral to MOFCOM's calculation of the amount of subsidy, yet the facts supporting these statements were never disclosed. In relation to MOFCOM's determination that the three subsidies were specific, MOFCOM did not disclose the facts used to determine that for each program, "the barley industry was the main user of the fund."¹⁰⁶⁴ Interested parties are not required to engage in "back-calculations and inferential reasoning in order to ascertain the essential facts",¹⁰⁶⁵ yet this was precisely what interested parties were required to do in the countervailing duties investigation.

¹⁰⁵⁷ See above, section III.B.

¹⁰⁵⁸ Countervailing Duties Final Disclosure (Exhibit AUS-10), pp. 9 and 11.

¹⁰⁵⁹ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 8.

¹⁰⁶⁰ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 8.

¹⁰⁶¹ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 8.

¹⁰⁶² Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 10.

¹⁰⁶³ Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 11.

¹⁰⁶⁴ Countervailing Duties Final Disclosure (Exhibit AUS-10), pp. 8-9 and 11.

¹⁰⁶⁵ See above, para.847; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

917. For the reasons set out above, MOFCOM failed to disclose (i) the precise basis for its decision to resort to facts available in the anti-dumping and countervailing duties investigations, and (ii) the facts used to replace the missing information. On this basis, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.

918. As a result of MOFCOM's failure to disclose the precise basis for its decision to resort to facts available, interested parties were not provided with a full opportunity for the defence of their interests. Therefore, China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

iii. Facts underlying the determination domestically cultivated barley is the same or has no material difference from barley exported from Australia

919. In anti-dumping and countervailing duties investigations, MOFCOM found that:

[D]omestically cultivated barley is basically the same or has no material difference from the Products Subject to Investigation in terms of physical characteristics, planting methods, the product uses, sales channels and customer groups. Even if there is a slight difference between them in certain indexes, that does not prevent them from being used to produce malt for brewing beer and as raw material for fodder. There are similarities, substitutability and competitive relations between them.¹⁰⁶⁶

920. MOFCOM did not disclose the factual information or evidence underlying these conclusions. Specifically, MOFCOM did not disclose the facts to support its assertion that domestically cultivated barley and barley exported from Australia had no material differences in terms of physical characteristics or end uses and that domestic barley and barley exported from Australia had a "competitive" relationship. These were "essential facts" within the meaning of Articles 6.9 and 12.8 in that they were significant, important or salient for *first*, MOFCOM's calculation of the margin of dumping and *second*, the determination that the domestic industry experienced material injury caused by dumped or subsidised barley.

¹⁰⁶⁶ Anti-Dumping Final Disclosure (Exhibit AUS-7), pp. 10-11. See also Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 5.

921. *First*, as for the calculation of the margin of dumping, MOFCOM did not make any allowances for differences affecting price comparability. MOFCOM asserted that it "compared the normal value and export price at the same level fairly and reasonably."¹⁰⁶⁷ In the absence of any explanation, it is assumed that the factual foundation for MOFCOM's assertion is its finding that "domestically cultivated barley is the same or has no material difference from the Investigated Product in terms of physical characteristics, planting methods, the product uses, selling channels and customer groups." As such, this was an essential fact under consideration by MOFCOM that formed a salient part of its calculations and therefore formed part of the basis of its decision to impose definitive measures.

922. *Second*, MOFCOM stated in the Final Disclosures that the subject imports of Australian barley "caused a significant reduction in the price of domestic like product",¹⁰⁶⁸ and that "low price competition from dumped imported products caused a substantial reduction in domestic like product price".¹⁰⁶⁹ MOFCOM found that there was no evidence to prove that a "clear boundary" existed for barley products used for different purposes,¹⁰⁷⁰ and that "price is an essential factor influencing downstream users to make purchasing decisions."¹⁰⁷¹ In the absence of any explanation, it is assumed that the factual foundation for MOFCOM's assertions were that domestically produced barley and barley exported from Australia had a competitive relationship. In addition, MOFCOM failed to disclose the factual foundation as how the price and volume of imported Australian barley interacted to produce a depressing effect on Chinese domestic barley prices, the presence of "other factors" that may have accounted for pricing trends, or their continuing relevance in the price depression analysis. These were essential facts under consideration by MOFCOM that formed part of MOFCOM's

¹⁰⁶⁷ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 9. Australia separately claims that MOFCOM acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the export price and normal value. See above, section II.C.

¹⁰⁶⁸ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 13; Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 21. Australia separately claims that MOFCOM acted inconsistently with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement by failing to conduct an objective examination based on positive evidence of the price effects of the allegedly dumped and subsidized imports of Australian barley. See section V.A.3.

¹⁰⁶⁹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 17. See also Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 16.

¹⁰⁷⁰ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 14; and Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 17. There was contrary evidence on the record at the time the Final Disclosures were made. See, for example, MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71), p. 1; Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), pp. 25-26; CBH Countervailing Duties Questionnaire Response (Exhibit AUS-69), pp. 11-12.

¹⁰⁷¹ Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 16. See also Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 19.

injury and causation assessment and therefore formed part of the basis of its decision to impose definitive measures.

923. As such, MOFCOM failed to disclose the facts to support its assertions that (i) domestically cultivated barley and barley exported from Australia had no material differences in terms of physical characteristics or end uses, and (ii) that domestic barley and barley exported from Australia have a competitive relationship. These were essential facts with respect to MOFCOM's determination of dumping, and injury and causation (in both investigations). On that basis, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.

924. As a result of MOFCOM's failure to disclose the essential facts under consideration, interested parties were not provided with a full opportunity for the defence of their interests, and therefore China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

iv. Facts underlying the determination that the Chinese Government's corn and wheat policies did not negate the causal relationship between imports of barley and injury to the domestic industry

925. In the Anti-Dumping Final Determination and the Countervailing Duties Final Determination, MOFCOM found that "[a]lthough the Chinese government's wheat and corn supporting policy is a consideration, the material injury caused to the domestic industry by the dumped imported product cannot be denied."¹⁰⁷²

926. MOFCOM failed to conduct an objective examination of the impact of China's wheat and corn support policies on the domestic barley industry.¹⁰⁷³ In so doing, MOFCOM failed to disclose the facts on which it based its determination that *first*, the corn and wheat policy was "a consideration", and *second*, despite it being a consideration, how it did not negate the causal relationship between the allegedly dumped and subsidised imports, and the alleged injury to domestic industry. These were essential facts under consideration by MOFCOM that

¹⁰⁷² Anti-Dumping Final Disclosure (Exhibit AUS-7), p. 18. See also Countervailing Duties Final Disclosure (Exhibit AUS-10), p. 21.

¹⁰⁷³ See section V.A.5(d).

formed part of MOFCOM's causation assessment and therefore formed part of the basis of its decision to impose definitive measures. As the panel explained in *China – GOES*, "a mere reference to the existence of evidence to support a certain finding does not disclose or summarize the "essential facts" underlying the finding."¹⁰⁷⁴

927. On that basis, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in relation to MOFCOM's failure to disclose the facts underlying its determination that the Chinese Government's corn and wheat policies did not negate the causal relationship between imports of barley and injury to the domestic industry.

928. As a result of MOFCOM's failure to disclose the essential facts under consideration, interested parties were not provided with a full opportunity for the defence of their interests, and therefore China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

v. Definition of the domestic industry

929. MOFCOM failed to disclose the definition of the domestic industry in the anti-dumping and countervailing duties investigations.

930. The definition of the domestic industry was an "essential fact" in that it was significant, important, or salient to MOFCOM's decision to impose definitive measures. Indeed, although it was the alleged material injury to that domestic industry that the definitive measures were imposed to remedy, the entities composing that industry remain unknown.

931. MOFCOM published a document that purported to detail the results of the visit to the "domestic industry".¹⁰⁷⁵ While, on its face, this document appears to address the definition of the Chinese domestic barley industry, it does not meet the criteria in Articles 6.9 and 12.8 in that it does not disclose facts in coherent manner.¹⁰⁷⁶ On closer inspection, it is apparent that not all entities MOFCOM visited were barley producers.¹⁰⁷⁷ Furthermore, it is

¹⁰⁷⁴ Panel Report, *China – GOES*, para. 7.572.

¹⁰⁷⁵ MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71).

¹⁰⁷⁶ See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

¹⁰⁷⁷ Some entities are clearly downstream users of barley. For example, JSFEC Malting Co Ltd and Hyrline Maltin Co Ltd are both producers of malt, not barley. (MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71), pp. 2-3).

unclear from the document whether the entities MOFCOM visited constituted the entirety of the domestic industry, or only a certain proportion of production of barley in China.¹⁰⁷⁸

932. On that basis, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in relation to MOFCOM's failure to disclose the definition of the domestic industry.

933. As a result of MOFCOM's failure to disclose the definition of the domestic industry, interested parties were not provided with a full opportunity for the defence of their interests and therefore China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

(b) Failure for disclosure to take place in sufficient time

934. Australia submits that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in relation to MOFCOM's failure to inform parties of the essential facts under consideration with sufficient time for them to defend their interests.

935. Articles 6.9 and 12.8 do not prescribe any particular timeframe for when disclosure must take place.¹⁰⁷⁹ Whether sufficient time has been provided will depend on the particular circumstances of the issues at hand.¹⁰⁸⁰

936. Interested parties were provided with 10 days to respond to the Final Disclosures. Due to the timing of MOFCOM's publication, the period was comprised of a mere five clear business days. The Final Disclosures were the *first time* that the Australian Government and Australian traders and producers had any notice regarding the factual foundation of MOFCOM's determinations with respect to the scope of the product under investigation, dumping, subsidisation, material injury and causation. For example, the Anti-Dumping Final Disclosure was the *first time* that Australian traders and producers were notified that the extensive information submitted by them in their questionnaire responses had not been accepted in its entirety, and that the determination of dumping was being made on the basis of facts available using information from Global Trade Atlas concerning exports of barley to

¹⁰⁷⁸ Australia recalls that at initiation, MOFCOM failed to assess whether CICC had standing. See above, section VII.B.2.

¹⁰⁷⁹ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.

¹⁰⁸⁰ See above, para. 848; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.

Egypt. Australian traders and producers had received no prior notice that their information had not been accepted, let alone that MOFCOM had determined exports to Egypt to be a reasonable replacement for the allegedly missing information. The Countervailing Duties Final Disclosure was the *first time* that the Australian Government was notified that the information it submitted concerning all 32 alleged subsidy programs had not been accepted in its entirety, and that MOFCOM had found three programs to be countervailable on the basis of facts available.

937. The breadth of the information contained in the Final Disclosures, being the essential facts pertaining to MOFCOM's determinations of dumping, subsidisation, injury and causation, in addition to this being the first time MOFCOM made interested parties aware of the factual foundation of these determinations, added to the complexity of the issues to which the Australian Government and Australian traders and producers had to respond.¹⁰⁸¹ In these circumstances, five business days was clearly insufficient time for the parties to defend their interests. The disclosure enshrined in Articles 6.9 and 12.8 is "paramount" for ensuring the ability of interested parties to defend their interests.¹⁰⁸² As such, no unbiased and objective investigating authority could have determined that five business days was a sufficient period of time in order to satisfy the obligations in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.¹⁰⁸³

(c) Conclusion

938. For the reasons set out above, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in relation to MOFCOM's failure to disclose *at all* the essential facts under consideration. Furthermore, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in relation to MOFCOM's failure to disclose all essential facts under consideration with sufficient time for parties to defend their interests.

¹⁰⁸¹ See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.253.

¹⁰⁸² See above, para. 846; Appellate Body Report, *China – GOES*, para. 240.

¹⁰⁸³ Australia recalls that, not only did MOFCOM fail to provide timely disclosure of essential facts, it then proceeded to issue the Final Determination in each investigation imposing definitive measures *on the very same day* that comments on the Final Disclosures were due. In these circumstances, it was a foregone conclusion that comments made in the response to the Final Disclosure, albeit within such timeframe of only five business days, were never going to be taken into account by MOFCOM.

939. As a result of MOFCOM's failure to disclose the essential facts under consideration in the anti-dumping investigation, China acted inconsistently with Article 6.2 of the Anti-Dumping Agreement in relation to MOFCOM's failure to provide interested parties with a full opportunity for the defence of their interests.

6. MOFCOM's public notices failed to contain all relevant information

940. Australia submits that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement because MOFCOM's Final Determinations failed to contain all relevant information on the matters of fact, law and reasons which led to the imposition of final measures. In particular, Australia submits that MOFCOM's Final Determinations did not disclose:

- the basis on which it determined the existence of a subsidy for the three programs found to be countervailable;
- a full explanation of the reasons for the methodology used in the establishment and comparison of normal value and export price under Article 2 for the dumping margin established for Group 1 producers;
- a full explanation of the reasons for assigning the same dumping margin assigned to the Group 1 producers to all other Australian traders and producers (including the Group 2 traders, and the "all others rate");
- the considerations relevant to the injury determination in the anti-dumping and countervailing duties investigations; and
- the reasons for rejecting relevant arguments and claims made by the Australian traders and producers in the anti-dumping and countervailing duties investigations, as well as the Australian Government in the countervailing duties investigation.

941. The Australian Government and Australian traders and producers were entitled to know, "as a matter of fairness and due process, the facts, law and reasons that [...] led to the

imposition of such duties."¹⁰⁸⁴ MOFCOM was required to provide explanations of an adequate quantity, extent and scope of the matters above. It failed to do so.

i. Basis on which the existence of a subsidy was determined

942. MOFCOM's Countervailing Duties Final Determination failed to contain all relevant information on the matters of facts and law and reasons regarding the basis on which the existence of a subsidy was determined. Specifically, the obligations in Articles 22.3 and 22.5 of the SCM Agreement required MOFCOM to establish the existence of an actionable subsidy — namely, that there was a financial contribution by a government that conferred a benefit, and such subsidy was "specific" within the meaning of Article 2 of the SCM Agreement.¹⁰⁸⁵ MOFCOM failed to do so. In addition, MOFCOM failed to explain why it was appropriate to apply the single *ad valorem* subsidy rate of 6.9% to *all* Australian companies.

943. *First*, in relation to the existence of a financial contribution, MOFCOM failed to explain how the three programs provided a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. In each instance, MOFCOM cited its domestic law and then made the illogical assertion that "the subsidy under this Program constituted the financial contribution."¹⁰⁸⁶ A subsidy is deemed to exist only if, *inter alia*, there is a financial contribution within the meaning of Article 1.1(a)(1). MOFCOM cannot presume there is a "subsidy" under a "Program" in order to demonstrate that a "financial contribution" exists in the form of a direct transfer of funds. Such assertion is clearly insufficient in that it does not contain details of the requisite "quantity, extent, or scope" to make transparent how MOFCOM determined a financial contribution existed.¹⁰⁸⁷ It is entirely unclear on what basis MOFCOM characterised the contribution at issue as a direct transfer of funds. In light of MOFCOM's descriptions of each program involving "the *purchase and supply* of water for agricultural production",¹⁰⁸⁸ "ensur[ing] a long-term average annual *yield of water*",¹⁰⁸⁹ and

¹⁰⁸⁴ Appellate Body Report, *China – GOES*, para. 258.

¹⁰⁸⁵ Australia has set out, above, how MOFCOM's subsidy determinations were inconsistent with Articles 1.1(a), 1.1(b), 2.1, 2.4 and 12.7 of the SCM Agreement. See above, section III.

¹⁰⁸⁶ See Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-10.

¹⁰⁸⁷ See above, para. 852.

¹⁰⁸⁸ Countervailing Duties Final Determination (Exhibit AUS-11), p. 7. (emphasis added)

¹⁰⁸⁹ Countervailing Duties Final Determination (Exhibit AUS-11), p. 9. (emphasis added)

"[f]unding in [...] *infrastructure*",¹⁰⁹⁰ it is not clear on what basis MOFCOM concluded there was a direct transfer of funds. MOFCOM referred to no evidence in support of its factual finding that a direct a transfer of funds had occurred in each instance.

944. *Second*, MOFCOM failed to explain for each program how the amount it determined was the "amount of subsidy received by the barley industry" was the benefit actually conferred within the meaning of Article 1.1(b), including how (or why) the amount was attributed to the product under consideration. In two instances, the SARMS Program and VAIJ Fund, MOFCOM also failed to explain from what source it determined the amount. MOFCOM stated only that the amount was "provided in the answers".¹⁰⁹¹

945. *Third*, MOFCOM completely failed to establish that the alleged subsidies were "specific" in accordance with Article 2 of the SCM Agreement or explain on what basis it determined that they were specific. In each instance, MOFCOM asserted that it "had reason to suspect that the barley industry is a major user of the funds."¹⁰⁹² Yet MOFCOM provided no explanation as to the factual foundation for the statement, or why it resulted in a determination of specificity within the meaning of Article 2. MOFCOM's basis for determining that the alleged subsidies were specific appears to be an assertion that the programs prioritise agriculture and nothing more.

946. *Finally*, MOFCOM failed to explain why the same *ad valorem* subsidy rate of 6.9% was appropriate for all responding companies in the investigation, regardless of the individual circumstances of each company.

947. For the reasons set out above, MOFCOM failed to explain the basis on which the existence of a subsidy was determined for any of the three programs that it found to be countervailable. This information was required to be contained in the public notice pursuant to Article 22.5 of the SCM Agreement in that it was "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". On that basis, China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement in relation to MOFCOM's failure to explain the basis on which the existence of a subsidy was determined.

¹⁰⁹⁰ Countervailing Duties Final Determination (Exhibit AUS-11), p. 10. (emphasis added)

¹⁰⁹¹ Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10-11.

¹⁰⁹² Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9 and 11.

ii. *Full explanation of the reasons for the methodology used in the establishment and comparison of normal value and export price*

948. MOFCOM determined the normal value and export price on the basis of facts available.¹⁰⁹³ Australia has set out in detail, above, how MOFCOM failed to select a reasonable replacement for the missing necessary information.¹⁰⁹⁴ It therefore follows that MOFCOM failed to give a full explanation of the reasons for the methodology used in the establishment of normal value and export price.

949. In relation to the comparison of normal value and export price, Article 2.4 of the Anti-Dumping Agreement required MOFCOM to make any due allowances for differences of price comparability in order to ensure a fair comparison. MOFCOM declined to make any price adjustments and merely asserted that "[t]he determination of these two items was conducted in the same stage, so they are comparable."¹⁰⁹⁵ MOFCOM goes on to state that it "held it had made a fair comparison between the export price and normal value at the same level of trade."¹⁰⁹⁶ No factual foundation, reasoning or explanation was provided in support of these assertions. A mere declaration that a fair comparison has been made, in the absence of any explanation or factual foundation,¹⁰⁹⁷ is clearly insufficient.

950. In addition, MOFCOM failed to give any explanation as to why the dumping margin ascertained with respect to the Group 1 producers was assigned to all other Australian companies in the investigation. MOFCOM purported to ascertain a margin for four Australian producers of barley, and then proceeded to assign the "All Others" rate to all other respondents.¹⁰⁹⁸ MOFCOM failed to give a full explanation of the reasons for the methodology used in establishing the "All Others" rate. For example, in relation to the Group 2 traders, MOFCOM stated that it "decided that the 12 traders including CBH Grain Pty Ltd would be subject to the margins of dumping of other Australian companies."¹⁰⁹⁹ As for the Australian

¹⁰⁹³ See above, section II.A.2.

¹⁰⁹⁴ See above, section II.A.7.

¹⁰⁹⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

¹⁰⁹⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹⁰⁹⁷ In this respect, Australia notes that the calculations of the dumping margin were never disclosed to any Australian trader or producer throughout the course of the investigation.

¹⁰⁹⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹⁰⁹⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

companies not in Groups 1 or 2, MOFCOM stated that it "decided to determine the margins of dumping of other Australian companies based on the margins of dumping of [the Group 1 producers]".¹¹⁰⁰ In both instances, MOFCOM provided no further explanation as to the factual basis underlying its determination or the reasons as to why it applied the "All Others" rate.¹¹⁰¹

951. For the reasons set out above, MOFCOM failed to give a full explanation for the methodology used in the establishment of *any* dumping margin established in the investigation. Pursuant to Article 12.2.1, this information was required to be contained in the public notice. In addition, MOFCOM's Final Determinations failed to satisfy the criteria in Article 12.2.2 of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". As such, China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in relation to MOFCOM's failure to give a full explanation for the methodology used in the establishment of *any* dumping margin established in the investigation, including reasons as to why it was appropriate to assign the "All Others" rate to all companies in the investigation apart from the Group 1 producers.

iii. Considerations relevant to the injury determination

952. MOFCOM was required to give reasons of the considerations relevant to its determination of injury as set out in Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

953. As set out above, MOFCOM acted inconsistently with Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.¹¹⁰² It therefore follows that MOFCOM's public notices with respect to its erroneous injury and causation determinations did not meet the requisite standard. On that basis, China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement.

¹¹⁰⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

¹¹⁰¹ This situation is analogous to that before the panel in *China – Broiler Products*. In that dispute, the panel held that, "[a]lthough the determination states that the 'best information' available was used in determining the 'all others' countervailing duty rate of 30.3%, it does not explain the factual bases underlying MOFCOM's determination of the rate. Consequently, the information provided by MOFCOM in its Final Determination is not sufficient to enable interested parties to verify the conformity of that Determination with the relevant domestic law and the SCM Agreement". (Panel Report, *China – Broiler Products*, para. 7.366.)

¹¹⁰² See above, section V.

954. Assuming, *arguendo*, MOFCOM did *not* act inconsistently with the provisions of Article 3 or Article 15, Australia submits that MOFCOM nonetheless failed to give reasons as to the considerations relevant to its injury determination. In particular, MOFCOM failed to explain or provide reasons as to its conclusions: that there had been significant increases in the volumes of subject imports;¹¹⁰³ that subject imports caused significant price depression;¹¹⁰⁴ concerning the role, relevance and relative weight of economic factors within the meaning of Article 3.4 of the Anti-Dumping Agreement Article 15.4 of the SCM Agreement;¹¹⁰⁵ and that there was a genuine and substantial relationship of cause and effect between subject imports of Australian barley and injury to the Chinese barley industry, including by failing to conduct a proper non-attribution analysis in relation to other known factors.¹¹⁰⁶

955. The reasons *why* MOFCOM concluded as it did with respect to these considerations were plainly not discernible from the published notices. As such, MOFCOM's public notices failed to give reasons for its conclusions relevant to its injury determinations within the meaning of Article 12.2.2 and Article 22.5. On that basis, China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

iv. Reasons for accepting or rejecting relevant arguments

956. MOFCOM failed to give reasons for rejecting all arguments made by the Australian Government and Australian traders and producers in the anti-dumping and countervailing duties investigations.¹¹⁰⁷ Despite the cooperation from these interested parties

¹¹⁰³ For the reasons set out above in section V.A.2, Australia claims MOFCOM acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22. 5 of the SCM Agreement.

¹¹⁰⁴ For the reasons set out above in section V.A.3, Australia claims MOFCOM acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22. 5 of the SCM Agreement.

¹¹⁰⁵ For the reasons set out above in section V.A.4, Australia claims MOFCOM acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22. 5 of the SCM Agreement.

¹¹⁰⁶ For the reasons set out above in section V.A.5, Australia claims MOFCOM acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22. 5 of the SCM Agreement.

¹¹⁰⁷ Although MOFCOM rejected *all* arguments without reasons, Australia raises the following specific examples of MOFCOM's inconsistent conduct. *First*, in the anti-dumping investigation, interested parties argued that it was not possible to track barley from production to end market. MOFCOM failed to engage with the argument and provided an incomprehensible response that "the interested parties only focused on the sales process and particularities of logistics, but did not explain the different roles in sales transaction of traders and producers". MOFCOM provided no other explanation as to why it did not accept the interested parties' position that barley could not be tracked from production to end market. (Anti-Dumping Final

and the extensive submissions made by them throughout the investigations, MOFCOM failed to give reasons showing its consideration of any submission it received. The obligation to provide reasons will be satisfied if an interested party can "clearly understand from the explanations given by the investigating authority in resolving the issue to which they pertain."¹¹⁰⁸ It is clear from MOFCOM's perfunctory statements in its Final Determinations that interested parties were not able to have any such understanding. On this basis, China acted inconsistently with Article 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

Determination (Exhibit AUS-2), p. 11.) *Second*, in the countervailing duties investigation, the Australian Government specified that GrainCorp did *not*, in fact, receive a payment pursuant to the VAI Fund. MOFCOM responded that "no evidence was attached." The Australian Government did provide evidence. MOFCOM did not explain why this evidence was not taken into account and why the Australian Government's argument with respect to GrainCorp not receiving any funds was rejected. (Countervailing Duties Final Determination (Exhibit AUS-11), p. 12.) *Third*, the Australian Government argued that the 10 year period to apportion the subsidy was incorrect. Despite this submission, MOFCOM responded that "no interested party [...] raised objections or submitted different claims for the apportion period." MOFCOM failed to respond to the Australian Government's argument concerning the 10 year period. (Countervailing Duties Final Determination (Exhibit AUS-11), p. 12.) *Fourth*, in the anti-dumping and countervailing duties investigations, the Australian Government and interested parties argued that CICC did not correctly describe barley, erroneously included seed barley in the product under consideration, and downstream products made from domestic barley have impurities and are lower in quality. MOFCOM responded that domestically cultivated barley is the same or has no material difference from imported barley. MOFCOM did not engage with the submissions. Nor did it provide any explanation for its assertion that "[e]ven if there is a slight difference between them in certain indexes, that does not prevent them from being used to produce malt for brewing beer and as raw material for fodder", and why this assertion provided a factual basis for rejecting the arguments made by interested parties. (Countervailing Duties Final Determination (Exhibit AUS-11), pp. 13-14; Anti-Dumping Final Determination (Exhibit AUS-2), p. 13.) *Fifth*, in the anti-dumping investigation, the Australian Government argued that the point-to-point analysis conducted by MOFCOM ignored the downward trend in imports from Australia. MOFCOM rejected this argument with no explanation, asserting it conducted an "objective analysis". (Anti-Dumping Final Determination (Exhibit AUS-2), p. 15.) *Sixth*, in the anti-dumping and countervailing duties investigations, the Australian Government and interested parties argued that MOFCOM did not refer to the type of barley in its analysis of injury and causation, and that the price of different specifications of barley should be considered as they occupy different market segments. MOFCOM provided no meaningful explanation as to why it did not accept these arguments. (Countervailing Duties Final Determination (Exhibit AUS-11), p. 17; Anti-Dumping Final Determination (Exhibit AUS-2), p. 17.) *Seventh*, in the anti-dumping and countervailing duties investigations, the Australian Government argued that all economic factors and indicators related to China's barley industry must be assessed in the injury and causation determination. MOFCOM simply asserted that it conducted a "comprehensive assessment of the relevant economic factors and indicators of China's domestic barley industry." (Countervailing Duties Final Determination (Exhibit AUS-11), p. 21; Anti-Dumping Final Determination (Exhibit AUS-2), p. 20.) *Finally*, in the anti-dumping and countervailing duties investigations, the Australian Government argued that the effect of Chinese Government's policies with respect to corn and wheat must be considered. MOFCOM claimed that "although the [policy] is a consideration, the substantial injury caused to the domestic industry by subsidized imports cannot be denied." MOFCOM did not provide any explanation as to why it rejected the Australian Government's argument. (Countervailing Duties Final Determination (Exhibit AUS-11), p. 22; Anti-Dumping Final Determination (Exhibit AUS-2), p. 21.) All of these arguments made by the Australian Government and interested parties were "relevant" in that they pertained directly to MOFCOM's determination of dumping, subsidisation, injury or causation. MOFCOM was therefore obliged to provide reasons for the rejection of these arguments in its published reports. MOFCOM failed to do so. On this basis, China acted inconsistently with Article 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

¹¹⁰⁸ Panel Report, *US – OCTG (Korea)*, para. 7.301.

v. *Conclusion*

957. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement require an investigating authority to disclose the "matrix of facts, law, and reasons that logically fit together to render the decision to impose final measures."¹¹⁰⁹ Rather than a matrix, MOFCOM's determinations were a maze revealing a paucity of evidence, absent reasoning, and a departure from the legal standards and procedures required under the WTO agreements. There was no factual foundation on which MOFCOM made its determinations. This is evident in the deficiencies of the public notices published in both investigations.

958. MOFCOM's public notices failed to contain a basis on which the existence of a subsidy was determined, a full explanation of the reasons for the methodology used in establishing dumping and subsidisation, considerations relevant to the injury determinations, and the reasons for rejecting relevant arguments made by the Australian Government and Australian traders and producers. On that basis, China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 22.3 and 22.5 of the SCM Agreement.

C. CONCLUSION

959. For the reasons set out above, 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.

IX. CONCLUSION

960. For the reasons set out in this submission, Australia respectfully requests that the Panel find that China's measures, as set out above, are inconsistent with China's 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;

¹¹⁰⁹ Panel Report, *US – OCTG (Korea)*, para. 7.299. See also, Appellate Body Report, *China – GOES*, para. 258.

- 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.

961. 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.

ANNEX A SWRUI PROGRAM IRRIGATION INFRASTRUCTURE COMPONENT FUNDING

<i>Subprogram</i>	<i>Total budget (AUD million)</i>	<i>Actual spend (AUD million)</i>	<i>Funding recipient</i>
(i) Private Irrigation Infrastructure Operators Program for New South Wales	750 or 917 ¹¹¹⁰	59 (FY 15/16) 136 (FY 16/17)	Private Irrigation Infrastructure Operators ¹¹¹¹
(ii) Private Irrigation Infrastructure Program for South Australia	14.4	0.4 (FY 15/16) 0.1 (FY 16/17)	Successful grant applicants (private irrigation infrastructure operators, delivery partners or an individual irrigators) ¹¹¹²
(iii) Queensland Healthy Headwater Water Use and Efficiency Program	155	18.1 (FY 15/16) 15.4 (FY 16/17)	Government of Queensland ¹¹¹³
(iv) Goulburn Murray Water Connection Project Stage 2	956	Nil (FY 15/16) 151.9 (FY 16/17)	Government of Victoria ¹¹¹⁴
(v) Victorian Farm Modernisation Project	100	10.6 (FY 15/16) 32.9 (FY 16/17)	Government of Victoria ¹¹¹⁵
(vi) New South Wales State Basin Pipe – Stock and Domestic	137	Nil (FY 15/16) Nil (FY 16/17)	Government of New South Wales ¹¹¹⁶
(vii) New South Wales State Water Metering Scheme (Including Pilot)	55.4	15 (FY 15/16) 2.5 (FY 16/17)	Government of New South Wales ¹¹¹⁷
(viii) New South Wales State Irrigated Farm Modernisation Project (And Pilot)	119.9	13.4 (FY 15/16) 31.7 (FY 16/17)	Government of New South Wales ¹¹¹⁸
(ix) On-Farm Irrigation Efficiency Project (Including Pilot Projects)	509	62.2 (FY 15/16) 78 (FY 16/17)	Local [irrigation] delivery partners ¹¹¹⁹

¹¹¹⁰ These two different budget amounts are listed respectively in paragraphs 4 and 7 of page 11 of the Committee Notification. This appears to be the result of an error. (Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 11.)

¹¹¹¹ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 11.

¹¹¹² Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 12.

¹¹¹³ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 13.

¹¹¹⁴ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 14.

¹¹¹⁵ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 15.

¹¹¹⁶ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 16.

¹¹¹⁷ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 17.

¹¹¹⁸ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 18.

¹¹¹⁹ Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, 16 April 2018, G/SCM/N/315/AUS, p. 19.