

Before the World Trade Organization

Panel Proceedings

**CHINA – ANTI-DUMPING AND COUNTERVAILING DUTIES
MEASURES ON BARLEY FROM AUSTRALIA
(DS598)**

**AUSTRALIA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE
MEETING OF THE PANEL AND THE PARTIES**

Business Confidential Information redacted on pages: 7-8

8 March 2022

TABLE OF CONTENTS

TABLE OF CASES	2
LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS	3
I. INTRODUCTION	4
II. DOMESTIC INDUSTRY	7
III. USE OF FACTS AVAILABLE.....	8
IV. OTHER DUMPING CLAIMS	13
V. OTHER COUNTERVAILING DUTIES CLAIMS	14
VI. INJURY AND CAUSATION CLAIMS.....	16
VII. INITIATION AND CONDUCT CLAIMS	20
VIII. CHINA'S FIRST WRITTEN SUBMISSION	21
IX. CONCLUSION	23

TABLE OF CASES

Short Title	Full Case Title and Citation
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R , adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
<i>EU – PET (Pakistan)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615
<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>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

Short Title	Full Case Title and Citation
<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 – 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 – 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

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Imported Barley from Australia", 18 May 2020
Baoying Malting	Supertime (Baoying) Malting Company Ltd
CHS (Shanghai)	CHS (Shanghai) Trading Co., Ltd
CICC	China International Chamber of Commerce
Countervailing Duties Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Countervailing Duty Investigation into Imported Barley from Australia", 18 May 2020
Dalian Xingze Malt	Dalian Xingze Malt Processing Co., Ltd.
Grain Growers	Grain Growers Limited
Guangzhou Malting	Guangzhou Malting Co., Ltd.
MOFCOM	Ministry of Commerce of the People's Republic of China
Ningbo Malting	Ningbo Malting Co., Ltd.
Qinhuangdao Malting	Supertime (Qinhuangdao) Malting Company Ltd
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

I. INTRODUCTION

1. Madam Chair, members of the Panel, I advise that Australia's opening statement will include business confidential information.

2. I will begin with a brief comment on third party participation. Australia takes note of the Panel's communication of 7 March and its decision to postpone the third party session until further notice. Australia remains concerned Ukraine has been prevented from exercising its right to be heard at this time as a direct result of Russia's unprovoked and unjustified attack. We stand ready to work with the Panel to explore options that would enable third parties to be heard in these proceedings in a timely manner.

3. I now turn to the matter at hand in these proceedings. Australia is committed to promoting global trade and safeguarding the rules-based system. We have demonstrated this strong commitment through our conduct and action over many years. We take our trade obligations seriously and expect other WTO Members to do the same. We also recognise the WTO dispute settlement system's central importance, holding Members to account in fulfilling their obligations and providing the certainty and stability that underpins the global trading system.

4. Australia greatly values its relationship with China. We have worked closely together on a range of multilateral trade issues, including in the WTO. However, Australia was compelled to bring this dispute to protect our farmers' interests. Australian farmers and traders have, for decades, enjoyed a collaborative, mutually supportive relationship with Chinese importers, maltsters and brewers. They are now faced with wholly unjustified anti-dumping and countervailing duties, abruptly cutting that relationship and causing Australia's barley trade to China to effectively cease from May 2020. This is not the only incidence of unjustified measures imposed by China which have disrupted bilateral trade. The measures which give rise to this dispute stand alongside a broader suite of trade disruptive measures, imposed by China, that have targeted a wide range of Australian exports.

5. At the outset, Australia would like to emphasize key facts concerning the normal course of business in the production and sale of barley in Australia and in export markets. These facts stand at odds with MOFCOM's flawed findings. Tens of thousands of individual

farms grow barley in Australia as a dryland crop.¹ Producers do not sell directly to export markets. In the normal course of business, they sell their barley to commercial warehouses, or traders, where it is co-mingled with barley from other growers and stored according to grade.² Producers have no way of knowing whether barley sold to warehouses will then be sold into the domestic market or export markets. Traders purchase the entitlement to a specific quantity of barley from the co-mingled stock and sell to domestic end-users and export markets. It is impossible and unnecessary to trace barley from individual growers, through the traders, to the ultimate end users. There is nothing unusual or unique about these circumstances. They are the same for the barley industry in every major exporting country.

6. Industry-wide standards govern barley grading.³ The predominant grades used globally are feed barley and malting barley. Many varieties planted in Australia were specifically cultivated with the requirements of the Chinese malting and brewing industry in mind.⁴

7. Major malting companies in China have established supply relationships with Australian traders to ensure reliable supply.⁵ This is essential, because there is a significant gap between China's domestic barley production and its domestic demand.⁶ Chinese-grown barley is of inferior quality, whereas, and I quote, "the quality of Australian malting barley is extremely fit for China's brewing business".⁷ This comes directly from Chinese malting and brewing companies' questionnaire responses submitted to MOFCOM. One Chinese company indicated that Australian barley is "irreplaceable" in the Chinese beer industry.⁸

8. Members of the Panel, in the dispute before you, a cursory read of the Final Determinations in both the anti-dumping and countervailing duties investigations is enough

¹ An Australian industry body indicated to MOFCOM that this number is 23,000. See Australia's first written submission, para. 185.

² Australia's first written submission, para. 185 and footnotes thereto.

³ Australia's first written submission, footnotes 232 and 236 to para. 185.

⁴ Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 25 and Australia's first written submission, para. 338.

⁵ Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), p. 59; Ningbo Malting Anti-Dumping Questionnaire Response (Exhibit AUS-76), p. 60; Baoying Malting Anti-Dumping Questionnaire Response (Exhibit AUS-77), p. 59; Qinhuangdao Malting Anti-Dumping Questionnaire Response (Exhibit AUS-78), p. 59.

⁶ Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), pp. 41-42; Ningbo Malting Anti-Dumping Questionnaire Response (Exhibit AUS-76), p. 42; Baoying Malting Anti-Dumping Questionnaire Response (Exhibit AUS-77), p. 42; Qinhuangdao Malting Anti-Dumping Questionnaire Response (Exhibit AUS-78), pp. 41-42.

⁷ Dalian Xingze Malt Anti-Dumping Questionnaire Response (Exhibit AUS-48), pp. 32-33, 36.

⁸ Dalian Xingze Malt Anti-Dumping Questionnaire Response (Exhibit AUS-48), pp. 36, 37.

to raise serious doubts about whether MOFCOM conducted an objective, unbiased examination. What is revealed is not a rigorous investigation conforming to the essential due process obligations in the Anti-Dumping and SCM Agreements, but rather a deeply flawed process in which MOFCOM selectively chose facts, deprived interested parties of their rights, and made determinations without adequate justification or explanation.

9. In fact, *only* a deeply flawed investigation could have resulted in anti-dumping and countervailing duties of this magnitude on a freely traded grain commodity like barley. Barley is traded in a competitive global market dictated by supply and demand. This is not only a widely understood reality of global trade in commodities, but both Chinese and Australian companies put this evidence before MOFCOM.⁹ Whether in Australia's domestic market, Australia's export markets, or the domestic or export markets of other major barley producers, barley is traded at the prevailing world price.

10. Prices for Australian barley are bounded by export parity. If traders can obtain a higher price in the export market than domestically, they will export. This limits domestic supply and eventually domestic prices return to the export parity price. In these circumstances, the prices of barley in Australia's domestic market and the export market to China are similar. While fluctuations in the domestic and export markets, and the effect of long-term forward contracts, might cause the occasional appearance that traders are selling at lower (or higher) prices overseas, the margins between domestic and export prices would always be small, and short-lived. They certainly would not be anywhere in the realm of 73.6 per cent.

11. In relation to the countervailing duties investigation, MOFCOM's findings are equally unable to be reconciled with the simple factual context. For example, Australian farmers grow barley without irrigation, and therefore it is impossible to understand how MOFCOM determined that two government irrigation programs were countervailable.

12. In sum, an objective and unbiased investigating authority could not have found the existence of dumping or subsidisation, let alone a margin of this magnitude. Only an

⁹ Australia's first written submission, para. 296 and footnote 339 thereto. See also Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), pp. 46-47; Ningbo Malting Anti-Dumping Questionnaire Response (Exhibit AUS-76), p. 47; Baoying Malting Anti-Dumping Questionnaire Response (Exhibit AUS-77), pp. 46-47; Qinhuangdao Malting Anti-Dumping Questionnaire Response (Exhibit AUS-78), pp. 46-47.

investigation departing from the requirements in the Anti-Dumping and SCM Agreements, and indeed commercial reality, could have come to such an unlikely conclusion. Australia will demonstrate that this is the only explanation for the measures in this dispute.

13. Australia sets out its claims in detail in its first written submission and we will not repeat all of them today. Moreover, Australia will not present an issue-by-issue rebuttal of China's first written submission; Australia's second written submission will do this. I will instead take this opportunity to set out key issues that highlight the egregious failings of both MOFCOM's investigations and determinations.

II. DOMESTIC INDUSTRY

14. Australia first addresses a fundamental error that vitiates MOFCOM's initiation of the investigations and its subsequent definition of the domestic industry. This has only become evident following the filing of China's first written submission. Specifically, there is a complete lack of evidence to support MOFCOM's identification and definition of the "domestic industry". This error results in breaches of China's obligations in relation to initiation, causation, and injury, and it is fatal to both the anti-dumping and countervailing duty investigations.

15. Starting with initiation, it is clear from China's first written submission that the applications made by the China International Chamber of Commerce (or CICC) to initiate the investigations were made on behalf of [[XXX]], *not* domestic producers or associations of domestic producers.

16. The confidential exhibit evidencing domestic industry support¹⁰ contains mere [[XXX]] without disclosing any domestic producer or other supporting evidence. Specifically, there is no positive evidence of the composition of the domestic industry and the nature of [[XXX]]. Nor is there evidence of the number of domestic producers contacted in a region compared to the total number of producers in that region and how the contacted producers were chosen. Moreover, the statements relate to only six provinces of more than twenty

¹⁰ Relevant organizations (Exhibit CHN-15 (BCI)).

provinces in which barley is produced. MOFCOM's purported assessment of standing therefore lacks a legal and factual basis.

17. China asserts that standing was determined by a process that was [[XXX:

- XXX]]

18. Yet, there is no evidence on the record to support these assertions, including in the confidential documents China has exhibited in its first written submission.¹¹ Moreover, relying on data from [[XXX]] is not a credible basis for a claim of representativeness. MOFCOM should have rejected the applications from CICC in light of the complete lack of any evidence of domestic industry support.

19. This error is continued in MOFCOM's definition of the "domestic industry" for the purposes of its injury and causation determinations. China argues that MOFCOM defined the domestic industry as the domestic producers "as a whole". However, there is no evidence on MOFCOM's record that the domestic producers *as a whole* participated, or that MOFCOM verified the third party confidential report on the Chinese barley industry and market, including the data contained therein, to confirm that the report accurately represented the domestic industry, both national and regionally.¹²

20. Australia emphasises that these flaws are fatal to the foundation of MOFCOM's injury and causation analyses in both investigations.

III. USE OF FACTS AVAILABLE

21. I will now address Australia's claims concerning MOFCOM's use of facts available.

22. Rules governing use of facts available in dumping and countervailing duties investigations are clear and well-settled. Nothing in China's first written submission contradicts the legal standard that Australia outlined in its first written submission. Moreover,

¹¹ See Relevant organizations (Exhibit CHN-15 (BCI)).

¹² See Anti-Dumping Final Determination (Exhibit AUS-2), p. 17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17. Australia understands that the single third-party report was provided by CICC in its questionnaire responses. See CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 28 and 52-53; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), pp. 24 and 44-46.

all third parties who filed submissions highlighted the importance of these well-established rules.

23. As a general premise, if an interested party supplies relevant information in a reasonable period, an investigating authority must use that information. Australian traders, producers, and the Australian Government all responded to MOFCOM's questionnaires. They provided detailed information and data, as requested, within a reasonable time. An investigating authority cannot simply decide to discard such information and resort to facts available in these circumstances, without further examination.

24. An investigating authority can only resort to facts available when an interested party refuses access to, or otherwise does not provide, necessary information. This was not the situation before MOFCOM.

25. The mere fact that an investigating authority requested information does not, without more, make it "necessary" within the meaning of Article 6.8 of the Anti-Dumping Agreement or Article 12.7 of the SCM Agreement. As Australia explained in detail in its first written submission,¹³ necessary information is "essential knowledge or facts, which cannot be done without"; information that is required to complete a determination.

26. Further, we agree with the United Kingdom's observation that, necessary information must be "held by" or "possessed by" an interested party.¹⁴ Australia understands this to mean that an interested party cannot fail to provide information which does not exist in the ordinary course of its business. This is distinguished from information that could be derived from the record of an exporter. However, MOFCOM's determination fails to recognise this distinction.

27. In regard to its anti-dumping investigation, MOFCOM erred in resorting to facts available in part because MOFCOM failed to recognise the difference between barley producers and exporters. MOFCOM focused its investigation on barley "producers" – that is, the growers. Australian producers do not export barley. Australian traders do. In determining normal values and export prices, MOFCOM's focus should have been on traders' domestic prices, costs of production, and export prices. In this calculation, the trader's input costs would

¹³ Australia's first written submission, paras. 99-102.

¹⁴ The United Kingdom's third party submission, para. 12.

include the cost of barley purchased from producers. To determine whether exports of Australian barley to China were dumped, it was unnecessary to determine normal values and export prices for Australian barley producers.

28. China attempts to justify MOFCOM's resort to facts available in its normal value determination on two principal grounds. Both turned on information that does not exist in the ordinary course of business in the barley industry.

29. *First*, China argues *ex post facto* that MOFCOM disregarded domestic sales for the four Australian producers and their traders because it was not proven that every domestic sale of the like product was "intended for" or "set apart for or devoted to a particular purpose" – being "consumed by use" in Australia. This is a novel and unfounded legal interpretation of what it means for goods to be "destined for home consumption". The text of Article 2.1 of the Anti-Dumping Agreement does not support this position.

30. In the normal course of business in a free market like the Australian barley market, it is impossible for a seller to determine the ultimate destination of its sales to its domestic customers. Since the information did not "exist", it could not be "necessary". China's interpretation creates an impossible evidentiary hurdle. Australia acknowledges that if a seller knows in advance that a sale to a domestic customer is destined for export, it is not appropriate to include it in domestic sales "destined for consumption in the exporting country" within the meaning of Article 2.1. However, that is not the case here.

31. *Second*, MOFCOM disregarded extensive information from Australian producers and traders about their domestic and export sales and determined it was necessary for interested parties to track each grain of barley from production to end market. Australia has explained such information does not and cannot exist. In the normal course of trade, barley from many farms is consolidated, comingled, and stored in stockpiles, from which traders purchase an allocation. MOFCOM determined non-existent information to be "necessary". Parties cannot withhold or fail to provide information that does not exist.

32. In any event, such information was not "necessary" to make determinations. MOFCOM had on record all necessary information to determine normal values *for traders*.

33. As I explained, traders should have been the focus of this dumping determination. In determining normal values, the cost of barley from producers is treated as an input cost to which generally accepted accounting principles apply. Under these principles, inventories of fungible inputs like barley can be co-mingled and costed using various methods including averaging. There is no need to segregate and track barley sourced from different producers.

34. For MOFCOM's export price determination, China attempts to justify MOFCOM's resort to facts available by arguing that "[i]t is not disputed that information of export sales to China of each of [the] four Australian producers was missing from the record in the underlying investigation".¹⁵ Of course, since producers do not export, such information does not exist and cannot be necessary. China further argues that traders who did submit questionnaire responses "did not provide the information on the export sales ... *purchased from the [four] producers* to China as requested in the questionnaires".¹⁶ As I explained, what is relevant is the *traders'* export prices to China, which were clearly available on MOFCOM's record. It is not necessary to link those exports and prices to a particular producer's specific grains of barley.

35. Similarly, in the countervailing duties investigation, MOFCOM determined that certain subsidy program application documents were missing "necessary information". Neither the Australian exporters nor the Australian producers had ever applied for the subsidy programs. Interested parties cannot provide non-existent application documents.

36. The question before the Panel is this: did Australian interested parties refuse access to, or otherwise not provide necessary information? The answer, in relation to both investigations, is clearly "no". MOFCOM had all necessary information on the record. MOFCOM's recourse to facts available was unjustified.

37. Turning to MOFCOM's selection of facts. Even where circumstances exist allowing an investigating authority recourse to facts available, the authority does not have unlimited discretion when selecting facts. *First*, the replacement must relate to the specific information requested, and which is missing from the record. *Second*, the replacement must be reasonable and have a logical connection with the facts on the record. *Finally*, selection of the

¹⁵ China's first written submission, para 77.

¹⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 9 (emphasis added).

replacement must be made with a view to arriving at an accurate determination of dumping or subsidisation. MOFCOM failed on all counts.

38. Not only did MOFCOM selectively exclude certain facts from consideration, it then offered no explanation as to why it chose the information it did.

39. For example, in its dumping determination, MOFCOM failed to give any explanation as to why the export price of barley from Australia to Egypt was a reasonable replacement for the normal value. Australia exported 54 tonnes of barley to Egypt during the period of investigation, compared with 4.71 million tonnes to China. The average price to Egypt was the third highest of Australia's 23 barley export markets during the period of investigation. Nowhere does MOFCOM explain why the export price of barley to Egypt was a reasonable replacement, let alone the "best information available" on the record.

40. In the Countervailing Duties Final Determination regarding the Sustainable Rural Water Use and Infrastructure Program, which I will refer to as the "Federal Program", MOFCOM determined that Australian barley producers received a benefit of 10 billion Australian dollars over a ten-year period. It made this determination in spite of this being a budgeted amount, not a disbursed amount. MOFCOM had information on the record that this program was an intra-governmental arrangement between the Australian Federal Government and Australian state and territory governments, and therefore did not confer a benefit on a recipient. MOFCOM made similar improper determinations regarding the other two programs at issue.

41. Before moving on to our next topic, it is important to highlight what the facts available mechanism is *not* intended to be or to do. It is not a mechanism that an investigating authority can rely upon to avoid undertaking an objective, unbiased, and complete investigation. It cannot be used to justify or excuse the omission of essential due process activities, such as notifying interested parties that the information they provided has not been accepted, or verifying the information provided. In addition, and perhaps most importantly, it is not a license for an investigating authority to choose just any information that will make affirmative determinations more likely or skew margins higher. The obligation is to use the facts available mechanism, where there is missing necessary information, in order to arrive at accurate determinations of dumping and subsidisation. This clearly was not the case in the

investigations. Nothing in China's first written submission provides any justification for MOFCOM's failures in this regard.

IV. OTHER DUMPING CLAIMS

42. Having improperly resorted to and selected facts available, MOFCOM compounded these errors by fundamentally failing to comply with the obligations in Article 2.4 of the Anti-Dumping Agreement.

43. As the European Union emphasised in its third party submission, the fair comparison obligation in Article 2.4 is a "cornerstone" of any dumping calculation.¹⁷ The obligations are well-known. An investigating authority must ensure that it compares sales made at the same time and at the same level of trade, and makes due allowances for factors affecting price comparability. In order to facilitate this, investigating authorities must indicate to interested parties what information is necessary and take steps to clarify adjustments claimed, thereby creating a dialogue.¹⁸

44. An investigating authority has an overarching obligation to make a fair comparison between normal value and export price. If proper allowances are not made, the comparison will be, by definition, not "fair".¹⁹ The comparison must also be unbiased, objective and even-handed.²⁰

45. MOFCOM compared a normal value based on 54 tonnes of barley exported from Australia to Egypt with an export price based on 4.71 million tonnes of barley exported from Australia to China. The exports to Egypt comprised two containerised shipments of feed barley, in December 2017 and May 2018. The exports to China comprised thousands of predominantly bulk shipments of a combination of malting, Fair Average Quality, and feed barley, in every month of the period of investigation.

¹⁷ The European Union's third party submission, para. 21.

¹⁸ Australia's first written submission, paras. 286-287. See also the European Union's third party submission, paras. 25-28.

¹⁹ Australia's first written submission, para. 280; Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para 5.22. (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 176); See also the European Union's third party submission, para. 21.

²⁰ Australia's first written submission, para. 276; Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.20-5.21. See also the United Kingdom third party submission, para. 23.

46. That is the information we know. However, MOFCOM's chosen source, Global Trade Atlas, provides no information as to the buyer and seller, level of trade, contract dates, and terms and conditions of sale of barley products.

47. Despite this, MOFCOM made no adjustments whatsoever to the normal value and export price, in clear breach of the obligations at Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

48. I would also like briefly to address MOFCOM's failure to determine individual dumping margins, contrary to Article 6.10 of the Anti-Dumping Agreement. MOFCOM used a single normal value and single export price to determine a single dumping margin for the four Australian producers, and then assigned this margin to the 15 investigated traders. China appears to confirm this was the case in its first written submission. MOFCOM's approach was fundamentally flawed and is contrary to the well-established rules governing the use of trade remedies.

V. OTHER COUNTERVAILING DUTIES CLAIMS

49. Australia now turns to its claims under the SCM Agreement.

50. The fault at the heart of MOFCOM's countervailing duties investigation was its failure to properly substantiate, *by positive evidence*, the allegation that the investigated programs provided subsidies to Australian barley. More disturbing is MOFCOM's abject failure to account for any of the evidence on the record which clearly established that the investigated programs were not subsidies to the production or export of barley within the meaning of the SCM Agreement.

51. I will now take the Panel through examples of MOFCOM's most significant errors.

52. *First*, MOFCOM determined that financial transfers between government entities were financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.²¹ It also determined that these transfers, which it characterised as direct transfers of funds, conferred benefits on Australian barley producers.

²¹ Countervailing Duties Final Determination (Exhibits AUS-11), pp. 7-8 and 10, and Countervailing Duties Final Determination English Translation (Exhibit CHN-4), pp. 7 and 10.

53. These determinations cannot be reconciled with the text of the SCM Agreement and Appellate Body reports. The Appellate Body has explained that Article 1.1(a)(1), "captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available *to a recipient*".²² The Appellate Body has further clarified that a "recipient" is the economic entity, as distinct from a government entity, that receives the benefit.²³ As such, a direct transfer of funds from one part of government to another cannot involve a "recipient" of a financial contribution within the meaning of Article 1.1(a)(1). I note that China does not take issue with this position.²⁴

54. It follows logically that such intra-governmental transfers are also incapable of conferring a benefit on economic entities. MOFCOM determined that all payments under the investigated programs were direct transfers. Assuming this characterisation was accurate, which Australia disputes, any benefit derived from those contributions would be the funds that the recipient in fact received. In this case, however, the facts on the record establish that, with one minor exception, financial transfers under the Federal Program and the Victorian Agriculture Infrastructure and Jobs Fund, which we will refer to as the "Victorian Fund", were payments from one government entity to another. These payments could not have conferred a benefit on any economic entity, as required by Article 1.1(b). Accordingly, MOFCOM's determinations that the programs conferred a benefit on barley producers were contrary to the SCM Agreement.

55. This is unsurprising given MOFCOM did not refer to any evidence whatsoever in support of its determination that the Federal Program and the Victorian Fund provided direct transfers of funds to an economic entity.²⁵

56. *Second*, MOFCOM disregarded evidence on the record showing that Australian barley is not produced with the aid of artificial irrigation. The Federal Program and the South Australian River Murray Sustainability Program were concerned with water preservation, in

²² Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 614 (emphasis added).

²³ Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 112; *US – Lead and Bismuth II*, paras. 57-58.

²⁴ China's first written submission, paras. 329-330.

²⁵ Countervailing Duties Final Determination (Exhibits AUS-11), pp. 7-8, 10, and Countervailing Duties Final Determination English Translation (Exhibit CHN-4), pp. 7, 10.

particular artificial irrigation system improvements.²⁶ Taken together with evidence that Australian barley is not artificially irrigated,²⁷ these two programs had nothing to do with Australian barley production and could not have conferred any benefit upon Australian barley producers. MOFCOM disregarded this evidence.

57. The two issues I have highlighted are examples of MOFCOM's disregard for evidence on the record. However, an examination of the Countervailing Duties Final Determination reveals that MOFCOM based its determination largely on select information in CICC's application which, even if accepted, could not provide sufficient support for that determination.

58. MOFCOM's approach is inconsistent with the obligation to substantiate each element of a countervailable subsidy with evidence. In particular, it is contrary to the obligation in Article 2.4 of the SCM Agreement to substantiate determinations of specificity on the basis of positive evidence.

59. In the absence of positive evidence, an investigating authority is not entitled to arbitrarily deem that a countervailable subsidy exists. Moreover, it is not entitled to reject evidence establishing no such subsidy exists. However, this is precisely what MOFCOM did, in breach of China's obligations under the SCM Agreement.

VI. INJURY AND CAUSATION CLAIMS

60. I next turn to Australia's claims concerning MOFCOM's injury and causation analyses. In addition to the flaws in defining the domestic industry, other fundamental flaws vitiate those analyses and place China in breach of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement. Australia provides a detailed account of these flaws in its first written submission. Rather than rehearse that account today, I will highlight two elements of Australia's claims.

61. *First*, in failing to base its injury determinations on positive evidence and objective examinations, MOFCOM breached Article 3.1 of the Anti-Dumping Agreement and Article 15.1

²⁶ The other elements of these programs concerned measures to purchase water access rights and to improve water supply, neither of which are relevant to barley production due to its nature as a dryland crop in Australia.

²⁷ See for example, Australia's first written submission, para. 390.

of the SCM Agreement. *Second*, MOFCOM failed to ensure it did not attribute the injurious effects of other "known" factors to the allegedly dumped and subsidised imports of Australian barley, in breach of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

62. Article 3.1 of the Anti-Dumping Agreement and Article 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. These obligations inform the implementation of the provisions which follow, including Articles 3.2, 3.4 and 3.5 in the Anti-Dumping Agreement and Articles 15.2, 15.4 and 15.5 of the SCM Agreement.

63. The first obligation requires an investigating authority to rely on "positive evidence" in its injury determination. Such evidence "must be of an affirmative, objective and verifiable character, and [...] credible".²⁸ The second obligation directs an investigating authority to conduct an "objective examination" in making an injury determination. To satisfy this obligation, an investigation must "conform to the dictates of the basic principles of good faith and fundamental fairness".²⁹ For example, an investigating authority must "explain how it has reconciled conflicting evidence in reaching its conclusions".³⁰

64. The words "good faith", "objective", "credible" and "fundamental fairness" all point to the analytical robustness and even-handed approach required by an injury determination. As Australia has demonstrated in its first written submission, these were not features of MOFCOM's injury determinations.

65. MOFCOM disregarded price comparability between imported Australian barley and Chinese domestic barley when conducting the price effects analyses under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. That disregard encapsulates MOFCOM's failure to rely on "positive evidence" and to conduct an "objective examination". It is worth recalling the Appellate Body's observation in *China – GOES* that:

[it could] 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

²⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

²⁹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

³⁰ Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.258.

on "positive evidence" and involve an "objective examination" of ... the effect of subject imports on the prices of domestic like products.³¹

66. The essence of price comparability is that the product mix in the basket of imported products and the product mix in the basket of domestic like products must be comparable in terms of price competition. Where this is not the case, adjustments must be made to ensure that the price effects of imported goods are measured with respect to the like domestic products with which they compete in the importing market. MOFCOM failed to ensure price comparability. It declined to give proper weight to credible evidence on the record, from both Australian traders and Chinese malting companies, that the basket of subject barley products from Australia consisted of a different mix of barley grades and varieties which were sold into different segments of the market at different price points, in comparison to the mix of barley grades and varieties in the basket of domestic like products. Contrary to MOFCOM's assertion that there was "no evidence to prove that downstream users had a line of demarcation in using barley", malting companies and breweries provided MOFCOM with evidence outlining technical requirements for malting barley that feed barley could not satisfy.

67. To the extent that imported Australian barley competed with domestic Chinese barley, that competition occurred between Australian and Chinese malting barley and between Australian and Chinese feed barley.

68. By failing to recognise the reality of the segmented domestic market, MOFCOM's price comparability analysis fell far short of the standard required for an objective examination.

69. I will now turn to MOFCOM's failure to ensure that the injurious effects of other "known" factors were not attributed to the allegedly dumped and subsidised imports of Australian barley. As Japan emphasised in its third party submission, "[i]f there were any effects caused by the [...] factors, those effects should not be attributed to the subject imports".³² Canada also stressed that "[i]njury caused by the subject imports and that caused by other factors cannot be 'lumped together' and made 'indistinguishable'".³³

³¹ Appellate Body Report, *China – GOES*, para. 200.

³² Japan's third party submission, para. 48.

³³ Canada's third party submission, paras. 31, 36.

70. These factors are:

- Chinese Government support policies for the production of wheat and corn;
- the uncompetitive production costs of the Chinese domestic industry;
- Chinese domestic users purchasing imported Australian barley rather than domestic barley because of factors other than price; and
- the effects of non-subject imports from third countries.

71. In order to establish a "genuine and substantial" causal relationship between the allegedly dumped and subsidised imports of Australian barley and injury to China's domestic barley industry, MOFCOM should have conducted a non-attribution analysis to test the "comparative significance"³⁴ of the alleged causal relationship against the contributions of the "known" factors to the injury.

72. As Australia details in its first written submission, there was evidence on the record relating to all four factors. This was sufficient to warrant conducting a non-attribution analysis for each factor.

73. For example, Chinese company, CHS (Shanghai), in its anti-dumping 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".³⁵

74. By way of further example, Australia raised to MOFCOM the uncompetitive production costs of the Chinese domestic industry. Australia stated 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 price".³⁶

³⁴ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.

³⁵ CHS (Shanghai) Anti-Dumping Questionnaire Response (Exhibit AUS-49), pp. 31-32.

³⁶ Australian Government Comments on Initiation of Anti-Dumping Investigation (Exhibit AUS-45), para. 36.

75. Yet, despite this evidence, MOFCOM failed to conduct a proper non-attribution analysis on any of the four identified factors. China is therefore in breach of Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

VII. INITIATION AND CONDUCT CLAIMS

76. I now turn to Australia's claims concerning MOFCOM's errors in relation to the initiation and conduct of its investigations. Contrary to China's attempts to dismiss the significance of these procedural obligations, they are intrinsically related to its breaches of China's substantive obligations. They warrant separate and close attention from the Panel in their own right. These procedural obligations are integral to the WTO rules-based trading system and, in particular, to the trade remedies system.

77. MOFCOM's failure to properly initiate or conduct its investigations both led to and exacerbated errors in its determinations. Thus, a Panel cannot address errors in the determinations without also addressing the procedural errors underpinning and compounding these substantive errors. For example, MOFCOM failed to notify interested parties that their information was deficient or rejected, failed to disclose the facts on which the dumping and subsidy margins were based, and failed to provide a full, or in fact, *any* real explanation of why it made its determinations and rejected every single argument from Australian interested parties. MOFCOM's failures strike at the core of a robust trade remedies system.

78. As you can see in Australia's first written submission, our initiation and conduct claims are numerous. This reflects the poor quality of MOFCOM's so-called "investigation". An investigation is a process. It requires cooperation and dialogue between the investigating authority and interested parties. It is a process that is designed to ensure an investigating authority affords interested parties due process before imposing measures that may have significant trade restrictive effects. MOFCOM failed to engage in any such process.

79. I would like to briefly touch on one example, namely, the importance of transparency. In order to ensure effective cooperation, and a meaningful dialogue between an investigating authority and interested parties, the authority must be transparent. It must provide reasons for its actions, such that an interested party can discern the basis for its decisions. Only then

can interested parties be assured of opportunities to fully defend their interests. MOFCOM provided no such explanations.

80. Even after receiving China's submission, Australia has no clarity as to the basis for MOFCOM's actions, or what took place in the 15 months between MOFCOM receiving questionnaire responses and publishing disclosures. MOFCOM failed to afford interested parties the fairness and due process that are fundamental to a proper investigation.

81. China appears now to attempt to exploit MOFCOM's failures in conducting a transparent investigation by alleging that, as a consequence of this knowledge gap, Australia has not made a *prima facie* case. China is relying on MOFCOM's lack of transparency to circumvent the very due process obligations that seek to ensure investigations are transparent and robust. China's position is untenable.

82. Australia respectfully requests that the Panel give considerable weight to the initiation and conduct claims.

VIII. CHINA'S FIRST WRITTEN SUBMISSION

83. The claims Australia has highlighted for the Panel today are amongst many more failings in MOFCOM's investigations and determinations set out in Australia's first written submission. And what has been China's response? Rather than engage substantively with Australia's arguments, in its first written submission China invites the Panel to consider arguments that are intended to deflect its attention from the serious failings of MOFCOM. China does not illuminate the key issues, it obscures them.

84. *First*, China engages in a series of improper legal interpretations. These novel interpretations have no grounding in the text of the agreements. Australia will detail these concerns in its second written submission, but for present purposes draws the Panel's attention to one particularly egregious example regarding Article 6.10 of the Anti-Dumping Agreement. Selectively quoting panel and Appellate Body reports out of context, China contends that Article 6.10 permits investigating authorities to determine individual dumping margins for only all known *producers*, and simply decide not to do so for all known *exporters*. China also advances an interpretation of the term "individual" whereby identical dumping margins, calculated using the same normal value and same export price, somehow meet the

requirement of being "individual" when applied to all companies. These are remarkable attempts to hollow out the obligation in Article 6.10. They deprive the word "individual" of any meaning and ignore the reality that dumping is the result of the pricing behaviour of exporters.

85. *Second*, China not only provides no explanation for MOFCOM's complete failure to undertake genuine investigations, but it also appears to use such inactivity to justify its determinations and, in particular, its decision to resort to facts available. China provides no explanation as to why, from the time the questionnaires were issued until its Final Disclosures, MOFCOM made no attempts to engage in dialogue with interested parties and appeared to make no verification attempts.

86. *Third*, China engages in *ex post facto* rationalisations of MOFCOM's actions and determinations, which should be disregarded by the Panel. For example, China argues MOFCOM could not use interested parties' submitted information in the dumping investigation without "undue difficulties", within the meaning of paragraph 3 of Annex II of the Anti-Dumping Agreement. There is no evidence of this consideration, explicit or implicit, in MOFCOM's determination or elsewhere on the record.³⁷ China's response that it was not required to "sign-post" its analysis³⁸ merely provides *more* evidence of MOFCOM's overwhelming failure to meet its transparency obligations. As Japan observes in its third party submission, the question for the Panel is not whether China "can craft a defensible rationale" for MOFCOM's determinations now, but whether MOFCOM provided 'a defensible rationale' when making the determinations".³⁹

87. *Fourth*, China argues that Australia has not made a *prima facie* case in relation to certain claims, arguing that Australia is somehow requiring China to "self-substantiate" its claims. Australia confirms the burden of proof falls to a complaining party and submits that it has met that burden, having made out a *prima facie* case with respect to *all* claims set out in its first written submission. Australia finds China's attempts to avoid responding to Australia's

³⁷ See Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para 5.165.

³⁸ China's first written submission, para. 130.

³⁹ Japan's third party submission, para. 50.

claims telling. China should not be permitted to evade its obligations to properly conduct investigations, justify determinations and meet transparency obligations.

88. *Fifth*, China fails to engage with key arguments and evidence in Australia's first written submission. For example, as we stated, in Australia barley is not irrigated. Evidence of this was on the record before MOFCOM. China failed to engage with this evidence. It did not explain how MOFCOM found that irrigation infrastructure programs could benefit an unirrigated barley industry.

89. *Finally*, Australia does not accept China's challenges to translations of the Final Determinations. In any event, China's alleged differences generally have no meaningful impact on the issues before the Panel.

IX. CONCLUSION

90. As I made clear at the outset of this opening statement, Australia has brought this dispute to protect its farmers from China's unjustified duties and the resulting harm to a once thriving trade in barley between Australia and China. Australia has also initiated this dispute because its claims are systemically important. It is critical that Members adhere to the rules when imposing anti-dumping and countervailing duties. Where an investigating authority fails to adhere to these rules it disrupts trade and damages traders, including importers and industries in the importing country. It also diminishes the confidence of WTO Members in the proper functioning of the trade remedies system. Preserving the rights of WTO Members and ensuring each Member observes its obligations is integral to safeguarding the rules-based trading system.

91. Australia is confident that the Panel will carefully consider its claims in this light. It looks forward to responding to any questions the Panel may have.