

**Before the World Trade Organization
Panel Proceedings**

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

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

**Business Confidential Information redacted on pages: 4, 5, 6,
14, 15, 16 and 19**

27 July 2022

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Short Title	Full Case Title and Citation
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , <u>WT/DS331/R</u> , adopted 24 July 2007, DSR 2007:IV, p. 1207

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
The Applicant	China International Chamber of Commerce
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Imported Barley from Australia", 18 May 2020
Anti-Dumping Final Disclosure	MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020
BCI	business confidential information
CICC	China International Chamber of Commerce
Countervailing Duties Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Countervailing Duty Investigation into Imported Barley from Australia", 18 May 2020

Abbreviation	Full Form or Description
Countervailing Duties Final Disclosure	MOFCOM, "Basic facts based on which final determination on the countervailing duty investigation is made", 8 May 2020
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GrainCorp	GrainCorp Operations Limited
Injury POI	Injury period of investigation (1 January 2014 to 30 September 2018)
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	period of investigation (1 October 2017 to 30 September 2018)
SARMS Program	South Australian River Murray Sustainability Program
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SRWUI Program	Sustainable Rural Water Use and Infrastructure Program
USD	United States dollars
VAIJ Fund	Agriculture Infrastructure and Jobs Fund – Victoria
WTO	World Trade Organization

I. INTRODUCTION

1. Chair, members of the Panel – good morning.
2. Before I begin, I advise that Australia's opening statement will include business confidential information.
3. Australia has set out its claims in detail in its first written submission and its rebuttal arguments in its second written submission. Australia has clearly established a *prima facie* case that China has violated the relevant provisions of the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994 in relation to the measures at issue. China has failed to rebut Australia's claims.
4. Rather than repeat all of Australia's claims and arguments today, I will take this opportunity to set out key issues that highlight the egregious failings in MOFCOM's investigations and determinations, and China's failed attempts to justify them.

II. CHINA'S LATE DISCLOSURE OF EVIDENCE

5. The first issue I will address is China's late disclosure of the allegedly confidential information contained in Exhibits CHN-22 and 23. Australia makes four points with respect to these exhibits.
6. First, the information contained in Exhibits CHN-22 and 23 *confirms* that there was no involvement from the domestic Chinese barley industry at any stage of the investigation — from the application, through initiation of the investigations, to the final determinations of injury and causation. Australia has long suspected this to be the case. However, the key information needed to resolve this issue was kept from the record, including: (1) the identities of the so-called "third-party authoritative organisations"¹ behind the confidential reports supporting CICC's application and MOFCOM's Final Determinations; and (2) the nature of the confidential data sets and methodologies presumably set out in those reports to substantiate the broad public values that MOFCOM relied upon in the Final Determinations. Australia and the Panel now know that the reports were provided by the [[XXX]]. The [[XXX]] is

¹ Anti-Dumping Final Determination, Exhibit AUS-2, p. 17, and Exhibit CHN-1, p. 17; and CVD Final Determination, Exhibit AUS-11, p. 17, and Exhibit CHN-4, p. 17. See also China's first written submission, paras. 596 and 639, referring to "relevant authoritative institutions".

self-described in CHN-22 as an [[XXX]].² This [[XXX]] is not the barley industry in China and does not consist of domestic barley producers.

7. Second, the scant data contained in these exhibits were not, in fact, confidential at all. This data consisted only of the same average and aggregate values that were reproduced on MOFCOM's public record, including in each of the Final Determinations. Neither exhibit contains the underlying data sets, nor any description of how such data were gathered, modelled, estimated, adjusted, curated, or otherwise prepared for the report. However, the name of the allegedly "authoritative" organisation and its [[XXX]] were kept under the cloak of confidentiality without any proper basis to do so. As a result, Australian interested parties were placed at a profound disadvantage during the course of the investigations because they could not check, verify, or critically analyse the data against the sources, nor challenge the data or methodologies used to prepare them. Moreover, by withholding this information until now, China has impeded Australia's ability to make arguments before the Panel in support of its initiation, domestic industry, and injury and causation claims.

8. Third, contrary to China's assertions that these reports "provided reliable data" for determining injury and causation,³ the information did not constitute the positive evidence required under Article 3 of the Anti-Dumping Agreement or Article 15 of the SCM Agreement. Due to the inherent lack of transparency in the unsupported values, and MOFCOM's unjustified use of confidential treatment to prevent interested parties from checking them against their sources and their underlying data sets, the data in the [[XXX]] reports were neither verifiable nor objective in character, and lacked credibility. As such, it did not form a proper basis for the initiation of the investigations, the definition of domestic industry, or the analyses of injury and causation.

9. Fourth and finally, the data appears to be an arbitrary mixture of production data covering the whole country (in which barley is produced in more than 20 provinces) and pricing and profitability data covering only six of those 20 provinces. MOFCOM provided no explanation concerning the omission of the pricing and profitability data from the other 14 provinces, which allegedly account for about 30% of domestic production, or how this

² Exhibit CHN-22, p. 3.

³ China's second written submission, para. 202, see also para. 176.

omission was taken into account in its analysis. Given that the reports [[XXX]], it is impossible to ascertain how this substantial omission impacts the reliability of the data for the purposes of determining injury or causation. It is clear, however, that the information on which China based its injury and causation determinations did not cover the "domestic producers as a whole". Ultimately, the reports were not a reliable basis for either the initiation of the investigations or MOFCOM's final determinations.

10. I will address Exhibits CHN-22 and 23 in greater detail in respect of Australia's specific claims later in this statement. Now, I will address MOFCOM's dumping determination.

III. DUMPING CLAIMS

11. From the outset, this determination departed from the most basic legal foundations of the Anti-Dumping Agreement, and indeed from the objective facts of the investigation. I will highlight four key errors that go to the heart of MOFCOM's flawed dumping determination.

12. First, while it is not clear from MOFCOM's record, MOFCOM apparently decided that it had a discretion to determine dumping margins for either Australian producers or Australian traders. Article 6.10 of the Anti-Dumping Agreement provides no such discretion. Australia has engaged in a genuine interpretive exercise encompassing the ordinary meaning of the relevant terms in Article 6.10 in their context, and in light of the object and purpose of the Anti-Dumping Agreement. By contrast, China's attempt to reinterpret the basic obligations in Article 6.10 relies solely on the use of the word "or". China's interpretation ignores both the other terms of the provision and their context. Moreover, it runs counter to the object and purpose of the Anti-Dumping Agreement. Australia recalls that once China's incorrect interpretation of Article 6.10 is rejected, it has no defence to MOFCOM's failure to determine individual dumping margins for Australian traders.

13. Second, MOFCOM, without a proper basis, decided to focus its investigation on Australian barley producers to the exclusion of the traders. This was despite the fact – which China does not dispute – that the evidence on the record before MOFCOM clearly established that Australian barley exports are undertaken exclusively by traders, not producers. In fact, the evidence in this investigation was clear that producers have no connection with the export

of barley. MOFCOM's conduct cannot be reconciled with the definition of dumping in Article 2.1 of the Anti-Dumping Agreement, which makes clear that the export of a product is a fundamental component of dumping.

14. By focusing its investigation on producers to the exclusion of traders, MOFCOM fundamentally misconstrued the "necessary information" needed for the dumping determination. Australia has demonstrated that MOFCOM had, in the records supplied by traders, all of the necessary information to determine whether Australian barley was being dumped. The conditions to resort to facts available were therefore not met, and MOFCOM breached Article 6.8 and Annex II of the Anti-Dumping Agreement by doing so.

15. In this context, Australia observes that China has tried to distract the Panel with another misguided attempt to reinterpret the Anti-Dumping Agreement — in this case, the phrase "destined for consumption in the exporting country" in Article 2.1 — and has again failed to conduct a proper interpretative exercise. Instead, China's interpretation of the terms of Article 2.1 relies solely upon dictionary definitions considered in isolation from their context.⁴ In contrast, Australia has set out before the Panel the proper interpretation of the relevant terms in their context and in light of the object and purpose of the Anti-Dumping Agreement.⁵

16. Third, MOFCOM's decision to reject *all* information submitted by interested parties in the absence of any notification is inexcusable. Notifying interested parties "forthwith" that their information is not accepted, and engaging those parties in a dialogue about *why* the information was not accepted, is fundamental to the proper application of the facts available provisions in Article 6.8 and Annex II. Australia has already set out in detail why MOFCOM's Final Disclosure did not meet the notification requirements.⁶ China's attempt to excuse MOFCOM's conduct by arguing that it is common practice for investigating authorities "in most jurisdictions"⁷ to provide this notice in a preliminary determination or statement of essential facts is not only inaccurate and not supported by any evidence, but also irrelevant to whether China acted consistently with its WTO obligations.

⁴ China's first written submission, paras. 51-54.

⁵ Australia's second written submission, paras. 128-132; Australia's response to Panel question No. 4, paras. 13-23.

⁶ Australia's first written submission, paras. 199-202; second written submission, paras. 165-166.

⁷ China's second written submission, para. 106.

17. Fourth, while MOFCOM's recourse to facts available was not justified in the first place, Australia also maintains that MOFCOM's *selection* of facts was not reasonable and ultimately played a significant part in the magnitude of the dumping margins determined. China has offered no coherent explanation as to why the price of Australia's negligible exports to Egypt was a reasonable replacement for the normal value of Australian barley. China has also failed to engage with the facts on the record, which established that the price of Australia's exports to Egypt was far higher than almost all other available data regarding the price of Australian barley.

18. As a result of these compounding errors, and others Australia has set out in its prior submissions, MOFCOM determined a dumping margin for Australian producers that was implausibly high and had no logical connection to the facts on the record. MOFCOM then inexplicably allocated that same margin to Australian traders. The dumping margin allocated to traders – the entities that actually export barley to China – had no legal, factual or logical basis.

19. I will make two final observations relevant to MOFCOM's dumping determination. First, China has made it challenging to disentangle arguments concerning MOFCOM's use of facts available, in breach of Article 6.8 and Annex II, and MOFCOM's failure to determine individual dumping margins, in breach of Article 6.10. This is partly a result of MOFCOM's incomplete and imprecise explanations in its Final Disclosure and Final Determination. It is also a result of the fundamental flaws in MOFCOM's approach to its dumping assessment. For instance, China argues that MOFCOM did not use facts available to determine margins for Australian traders. Australia has demonstrated that this is simply untrue, and MOFCOM's conduct with respect to traders was a clear application of facts available.⁸ Australia stands ready to assist the Panel in its examination of the multitude of overlapping errors in MOFCOM's dumping determination.

20. Second, with complete disregard to the advanced stage of these proceedings, China argues that certain of Australia's *arguments* concerning MOFCOM's rejection of information is inconsistent with Article 6.2 of the DSU, and not properly before the Panel. In doing so, China confuses arguments, which are not constrained by a panel request, with claims, which are the

⁸ Australia's second written submission, paras. 109-112.

subject matter of a panel request. Australia's Panel Request satisfies all of the requirements in Article 6.2 of the DSU pertaining to its claims.

21. In particular, the relevant claims in Australia's Panel Request unambiguously identify not only the provisions of the Anti-Dumping Agreement that Australia alleges to be infringed – that is, Article 6.8 and paragraphs 3 and 5 of Annex II – but also the relevant obligations therein. The Request plainly connects these obligations to elements of the anti-dumping measure at issue in a manner sufficient to present the problem clearly. More specifically, the Panel Request clearly provides that MOFCOM's rejection of the interested parties' information was contrary to the specified obligations. No categories of information were excluded from the Request. This was confirmed in Australia's first written submission which stated, on numerous occasions, that MOFCOM's rejection of *all information* submitted by interested parties was inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II. China cannot use Australia's first written submission to unduly narrow the scope of the Panel Request, contrary to the clear wording of both. China's inability to defend MOFCOM's actions does not mean that Australia's Panel Request is contrary to Article 6.2 of the DSU.

22. Moreover, China was obliged to raise any objections at the earliest possible opportunity. It cannot, in its second written submission, legitimately raise this objection. As such, the Panel should not entertain it further.

IV. COUNTERVAILING DUTIES CLAIMS

23. Australia will now highlight four issues central to its countervailing duties claims.

24. First, Australian barley is not produced with the aid of artificial irrigation. The evidence for this is clear on the face of the record. MOFCOM erroneously determined that irrigation programs, such as the SRWUI and SARMS Programs, benefited Australian barley production. This is not supported by a proper consideration of the evidence.

25. The Australian Government and multiple interested parties with expertise and experience in the Australian barley industry provided clear evidence that, in Australia, it is unnecessary and uneconomical to use artificial irrigation in barley production.⁹ In contrast,

⁹ See in particular GrainCorp Comments on Countervailing Duties Final Disclosure (Exhibit AUS-57), p. 6; Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), pp. 3-4.

the only support for MOFCOM's conclusion consisted of a single, unsubstantiated assertion made, in passing, by CICC in its Application.¹⁰

26. MOFCOM had an obligation to consider all of the evidence on the record, to balance and weigh evidence for and against a particular proposition, and to provide reasoning based on that evidence to justify its conclusions. The evidence Australian interested parties provided on this point was factual, consistent, and based on direct knowledge of, and expertise in, the Australian barley industry.¹¹ This evidence was central to the merits of MOFCOM's countervailing duties determination. Even so, MOFCOM improperly dismissed this evidence without explanation.¹²

27. China attempts to justify MOFCOM's refusal to consider this evidence by claiming that it was not in fact "evidence" at all.¹³ China's argument attempts impermissibly to narrow the scope of "evidence" that an investigating authority is required to consider. It falsely seeks to distinguish between information directly provided by interested parties in questionnaire responses, and which is subject to signed declarations of completeness, accuracy, and reliability, on the one hand, and supplementary information provided in support of those responses on the other. China's observation that MOFCOM's questionnaire purported to require supplementary support for primary evidence given by interested parties does nothing to support China's argument in this regard.¹⁴ Further, given that the interested parties certified their questionnaire responses as being complete, accurate and reliable to the best of their ability, such an obligation is more unreasonable still. There is clearly no basis for an investigating authority to use such a requirement to avoid its obligation to consider *all of the evidence* on the record.

28. If China's approach were accepted, it would confer on investigating authorities an unfettered power to impose unjustified evidentiary thresholds. This would arbitrarily encumber interested parties' fair participation in investigations, particularly given the short

¹⁰ CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 13 ("Cultivation methods of two products in question are essentially the same, including land preparation (plough), sowing, fertilization, irrigation, pest and disease management, and harvest.").

¹¹ Australia's second written submission, paras. 252-260.

¹² Countervailing Duties Final Determination (Exhibit AUS-11), p. 13. MOFCOM determined simply that "[t]he Investigated Product uses the same planting method as domestically cultivated barley. The basic steps for planting include [...] irrigation [...].").

¹³ China's second written submission, paras. 298-299.

¹⁴ China's second written submission, para. 301.

timeframes given for questionnaire responses. Moreover, it would permit investigating authorities to do what MOFCOM has done here — to ground a determination of subsidisation upon a completely incorrect factual assumption that was made without any supporting evidence and despite evidence to the contrary. In reality, China's claim is an attempt to justify MOFCOM's reversal of the burden of proof in the underlying investigation. By imposing these arbitrary evidentiary thresholds, MOFCOM effectively required interested parties to furnish evidence disproving the existence of the alleged subsidies, rather than requiring MOFCOM to limit its determinations to conclusions that are supported by the evidence on the record. China's argument in this regard should be rejected.

29. I now turn to the second key issue: that the Australian Government's response to MOFCOM's countervailing duties questionnaire was reasonable and complete.

30. MOFCOM's questionnaire sought information about 32 programs, identified by name and, at times, by obscure and inaccurate descriptions that did not reach the required level of detail. There was nothing in the terms of MOFCOM's questions that could have put the Australian Government on notice that MOFCOM had an interest in any additional unnamed programs. It was impossible for the Australian Government to guess that MOFCOM was interested in the diverse, separate programs administered by the sub-central government entities that received funding from the SRWUI Program and the VAIJ Fund. This was particularly difficult given the structural separation and administrative independence of these programs,¹⁵ the autonomy of the government entities responsible for them, and their clear irrelevance to barley production and export.¹⁶ Moreover, by identifying the alleged subsidies as it did, MOFCOM indicated that questionnaire responses were only required to address those programs identified and, hence, they could only relate to the government entities administering them. This implication is especially clear given MOFCOM's prior knowledge of the existence of the additional programs administered by the recipient sub-central government entities. Had it required information about these or any other programs, it needed to request that information.

¹⁵ Australia's second written submission, paras. 270-275.

¹⁶ Australia's second written submission, paras. 264-263, 283-288.

31. Australia is unable to reconcile China's allegation of deficiencies in the Australian Government's questionnaire responses both with the terms and context of the questionnaire I've just described, and with MOFCOM's failure to seek any additional information from the Australian Government for 15 months before issuing its Final Disclosure. In these circumstances, MOFCOM alone had the power to remedy any alleged limitations of the evidence on the record simply by requesting further information. In the absence of any such request, or for that matter any dialogue with the interested parties, China's attempt to justify MOFCOM's complete disregard for the evidence provided by the Australian Government is without merit.

32. The third, and related, key issue is that China's argument that necessary information was missing from the record is without foundation. Australia has established that all the information necessary was present on the record for MOFCOM to determine that the three alleged subsidy programs did not benefit Australian barley production or export,¹⁷ and were not specific.¹⁸

33. Australia has previously taken the Panel through the evidence on the record in this regard. This showed that irrigation programs, such as the SRWUI and SARMS Programs, were irrelevant to Australian barley production,¹⁹ and that payments under the VAIJ Fund did not benefit barley production.²⁰ MOFCOM had the necessary information to correctly determine that none of the programs in question conferred any benefit to the production or export of Australian barley and, moreover, that none were "specific" within the meaning of Article 2. In this context, China's attempt to justify MOFCOM's recourse to facts available must fail.

34. Finally, while MOFCOM's recourse to facts available was not justified, Australia also maintains that MOFCOM's *selection* of replacement facts was not reasonable and did not conform to Article 12.7 of the SCM Agreement. In selecting replacement facts, an investigating authority is required to select reasonable replacements in order to arrive at an accurate determination of subsidisation. MOFCOM failed to do so.

¹⁷ Australia's first written submission, paras. 419-440; second written submission, paras. 326-331.

¹⁸ Australia's first written submission, paras. 513-525; second written submission, paras. 332-335.

¹⁹ Australia's first written submission, paras. 17, 390-391, 446 and fn. 481; second written submission, paras. 252-263.

²⁰ Australia's first written submission, paras. 413-417; second written submission, paras. 283-292.

35. For example, in relation to the alleged benefit to Australian barley, the evidence on the record clearly identified all individual payments made pursuant to each of the three investigated programs. Yet, rather than examine these individual payments, MOFCOM decided to treat general budget amounts for entire programs as though they were payments to barley producers, even though the evidence made plain that this was not the case.

36. Similarly, in relation to specificity, MOFCOM selected facts it claimed showed the purpose of each program and statistics it asserted showed the relative value, yield, or cultivated area devoted to barley. This information had no logical connection, and therefore no probative value, with respect to the question of whether eligibility for each of the subsidies in question was limited to certain enterprises or industries.

37. For these reasons, and those Australia has already addressed in its previous written and oral submissions, MOFCOM's countervailing duties investigation and determination did not conform to China's obligations under the SCM Agreement and the GATT 1994, were not supported by the facts on the record, and accordingly do not support the imposition of countervailing duties.

V. DOMESTIC INDUSTRY CLAIMS

38. China's rebuttal of Australia's claims under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement relies on *ex post facto* arguments that MOFCOM defined the "domestic industry" as the "domestic producers as a whole" of barley.²¹

39. If China's assertion is correct, MOFCOM's purported definition should be contained in the section of the Final Determinations entitled "Determination of the Domestic Industry".²² In the first sentence of that section, MOFCOM observed correctly that there were alternative definitions of "domestic industry" available: either "all domestic producers of like products in China" or "producers whose total production accounts for a major proportion of the total production of like products in China". However, MOFCOM failed to identify which of these definitions it was applying for the purposes of the investigations. Instead, it merely stated, in the very next sentence, without any further explanation, that: "The Investigating Authority

²¹ China's second written submission, para. 134.

²² Anti-Dumping Final Determination (Exhibit AUS-2), pp. 13-14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

investigated and confirmed the domestic industry".²³ This omission suggests that MOFCOM was purposefully ambiguous about which definition would be applied.

40. China now attempts to remedy this ambiguity by relying on MOFCOM's purported assessment of standing to support the *ex post facto* proposition that MOFCOM defined the "domestic industry" as the producers as a whole.²⁴ China points to MOFCOM's statement that "the barley output of the above six provinces [...] which authorized the Applicant accounted for more than 50% of the total domestic barley output",²⁵ arguing that the reference to the "total domestic barley output" represents the definition of the domestic industry.²⁶ In Australia's view, the production volume denominator used to determine the Applicant's standing cannot replace a proper determination of how the domestic industry is defined for the purposes of the investigations. MOFCOM had both the opportunity and the obligation to determine on which basis the domestic industry was defined, and it failed to do so.

41. China relies on *ex post facto* argument again when it cites the concluding sentence in the section on the "Determination of the Domestic Industry", which states that "[t]he Investigating Authority conducted injury and causal link analysis based on the overall situation of the Chinese barley industry reflected in the submitted questionnaires".²⁷ According to China, the reference to "the overall situation of the Chinese barley industry" clarifies that the definition of the domestic barley industry applied by MOFCOM related to the "overall" industry.²⁸ However, Australia considers that the word "overall" describes the word "situation" and not the phrase "Chinese barley industry". As such, this provides no support to China's *ex post facto* rationalisation.

42. China further contends that the data provided by the [[XXX]] at Annex VII of CICC's Applications and the Annexes to CICC's Questionnaire Responses are "clearly [...] the data of 'domestic producers as a whole' of barley, or representative of the state of the 'domestic producers as a whole' of barley".²⁹ This does not address MOFCOM's definition of the "domestic industry". Rather, CICC's Applications are relevant to the standing of CICC and the

²³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

²⁴ Australia's second written submission, para. 29.

²⁵ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

²⁶ China's response to Panel question No. 43, para. 144; see also China's first written submission, paras. 432-433.

²⁷ Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

²⁸ China's first written submission, para. 435.

²⁹ China's second written submission, para. 140.

sufficiency of evidence to initiate an investigation, and CICC's Questionnaire Responses relate to the evidence upon which MOFCOM's injury and causation analyses were based. Moreover, China's assertion that the data relates to "domestic producers as a whole" is incorrect, considering that they are an arbitrary mixture of the whole country production data with pricing and profitability information covering only six of the more than 20 provinces that produce barley.

43. Further, the data in Exhibits CHN-22 and 23 were not [[XXX]]. Rather, they are purportedly [[XXX]]. However, the reports do not explain how the data were collected, estimated or modelled, or what inputs were included or excluded from the data. In Australia's view, Exhibits CHN-22 and 23 confirm the lack of evidence on the record from actual domestic barley producers, let alone the "domestic producers as a whole".

44. To conclude on the definition of the "domestic industry", Australia stresses that Exhibits CHN-22 and 23 were prepared by an [[XXX]] organisation of [[XXX]], rather than actual barley producers. This mirrors the situation of CICC as the Applicant, which does not have barley producers as members. These circumstances, which were kept from interested parties by a cloak of unjustified confidentiality, highlight the astonishing fact that MOFCOM's investigations concerning China's barley industry were conducted without participation by China's barley producers.

45. It would be an unsustainable outcome, systemically, if MOFCOM's investigations were allowed to stand without the identification, participation, or evidence of the actual domestic industry.

VI. INJURY AND CAUSATION CLAIMS

46. Turning to Australia's claims under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement, I will now address certain key elements of China's second written submission.

47. The first element concerns the confidential reports prepared by the [[XXX]] — in particular, the report provided as Exhibit CHN-23. I referred to this report earlier in this statement. It was the key source of data for MOFCOM's injury and causation determinations. As I observed earlier, it is clear that [[XXX]]. In short, MOFCOM's investigations were not conducted on the basis of positive evidence.

48. China contends in its second written submission that MOFCOM "examined and determined" that the [[XXX]] reports "provided reliable data" for determining injury and causation.³⁰ Clearly, MOFCOM erred in concluding that the data were "reliable".

49. Far from being "reliable", the data were not fit for purpose. Australia has emphasised that MOFCOM failed to ensure that the average unit prices for imports of Australian barley and like domestic barley were comparable. This is because MOFCOM failed to take into account or adjust for sales prices at different levels of trade, additional costs related to imports, product mix differences between the baskets of imported and domestic barley, and the pricing differences of malting barley and feed barley sold into different market segments.

50. Moreover, the data provided in the confidential reports did not constitute the positive evidence required to determine whether China's domestic barley industry was being injured or whether such injury was being caused by the alleged dumping of Australian barley. The previously undisclosed Exhibits CHN-22 and 23 now reveal that the data did not come from Chinese barley producers who were allegedly suffering injury or from any association thereof, but rather from an [[XXX]] organisation of [[XXX]]. The cloak of unjustified confidentiality prevented the interested parties from checking, verifying, critically analysing, or understanding the broad values provided in the reports. Further, neither report provides the underlying data sets or any explanation of the methodologies applied to obtain the data

³⁰ China's second written submission, para. 202.

and derive the broad values from it. As such, this information lacked the objective and verifiable character and the credibility of positive evidence.

51. In addition, Australia notes China's clarification concerning the values presented in the report in Annex VII of CICC's application and how they were used to extrapolate values for "total revenue".³¹ This indicates that the reports contain an arbitrary combination of production data covering the whole country and average price and profitability data covering only six provinces, out of more than 20 barley-producing provinces. The omitted data from at least 14 other provinces, which together account for about 30% of total production, gives rise to a material risk of distortion in the averages and extrapolated values that MOFCOM used for its analyses of injury and causation. MOFCOM failed to explain how this omission was taken into account in its examinations, or what steps were taken to ensure that it would not result in distortions. Under these circumstances, it cannot be said that MOFCOM conducted objective examinations based on positive evidence.

52. I now turn to the translation issue relating to whether MOFCOM dealt with "price depression" or "price undercutting" in its price effects analysis. I will not deal at length with China's arguments in this statement.

53. I reiterate that Australia does not accept China's proposed translation or *ex post facto* interpretation of MOFCOM's price effects analysis.³² Australia's translation is consistent with the substantive content of MOFCOM's own analysis of price effects, which clearly indicates an assessment of "price reduction" and a finding that dumped imports caused a reduction in the average unit prices of domestic barley.³³

54. To be clear, Australia's claim does not depend on whether MOFCOM's price effects analysis is ultimately characterised as a "price depression" analysis, a "price undercutting" analysis, or both.³⁴ The claim addresses MOFCOM's failure to conduct an objective examination based on positive evidence and to ensure price comparability.³⁵

³¹ China's second written submission, para. 207.

³² Australia's second written submission, para. 415.

³³ Australia's second written submission, para. 418.

³⁴ Australia's second written submission, para. 423.

³⁵ Australia's second written submission, para. 423.

55. There is one further point I wish to address in this section of the opening statement. It is MOFCOM's failure to conduct a non-attribution analysis in relation to the impact of third-country imports under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

56. China takes issue with Australia's contention that MOFCOM did receive comments from interested parties concerning third-country imports.³⁶ Australia detailed those comments in its response to Panel question No. 50, observing, for example, that CICC had alerted MOFCOM to third-country imports.³⁷ CICC submitted data which showed that the average "landed price" in USD per tonne of third-country imports was less than the average price of like domestic products in three out of five years during the Injury POI and substantially the same in the other two years.³⁸ As Australia stated in its response to Panel question No. 50, "[t]his information alone was sufficient to make third country imports a 'known factor' that warranted a proper non-attribution analysis".³⁹

57. China asserts that CICC did not present any evidence of the "injurious effect" of third-country imports.⁴⁰ In response, Australia reiterates that "an objective and unbiased investigating authority would have recognised that a non-attribution analysis was required to ensure that any injury being caused by increasing volumes of lower-priced third-country imports would not be attributed to Australian barley imports".⁴¹ MOFCOM's conduct therefore falls far short of the standard mandated by the covered Agreements.

³⁶ China's second written submission, paras. 235-237.

³⁷ Australia's response to Panel question No. 50, para. 155.

³⁸ CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 46-47

³⁹ Australia's response to Panel question No. 50, para. 156.

⁴⁰ China's second written submission, para. 237.

⁴¹ Australia's response to Panel question No. 50, para. 157.

VII. INITIATION CLAIMS

58. China's late disclosure of Exhibits CHN-22 and 23 is also relevant to Australia's initiation claims. The data from the [[XXX]] contained in Exhibit CHN-22 *prove* that CICC's Applications were not made on behalf of the domestic industry. The evidence now before the Panel clearly establishes that the Applications contained neither sufficient evidence of the existence of the identity of the domestic industry, nor of the injury that the industry was alleged to have experienced, let alone any evidence that the injury was being caused by the dumping or subsidisation of the subject imports of Australian barley. As both Australia and the Panel have become aware of the extent of the evidence that was actually on the record before MOFCOM, this has helped to crystallise the issues concerning initiation. There was clearly no basis for MOFCOM to initiate either of the investigations.

VIII. CONDUCT CLAIMS

59. Before concluding, I'd like to address one particular aspect of MOFCOM's conduct of the investigations, being MOFCOM's treatment of confidential information. This is yet another example of MOFCOM's inactivity and failure to engage in a genuine investigative process, and is relevant to the initiation of the investigations, MOFCOM's injury and causation analyses, through to the ultimate decision to impose duties.

60. As a result of China's late disclosures of Exhibits CHN-22 and 23, we now know that the information contained in these exhibits was not, in fact, confidential at all. These exhibits contain *no substantive additions* to the non-confidential summaries, despite indications to the contrary by both CICC and MOFCOM. It appears the only information in each of these three exhibits that was not publicly disclosed in the Final Determinations, and therefore the only information that was truly withheld from Australia and the interested parties, is the name of the organisation that provided the data on which MOFCOM based its determinations of injury and causation. No explanation was provided as to the basis on which the identity of these organisations, and the so-called reports they provided to CICC, warrant confidential treatment. As I mentioned previously, this improper confidential treatment placed Australian interested parties at a profound disadvantage during the investigations because they could

not verify or assess the data as against their sources. This prevented them from challenging the data or the methodologies used to prepare them or filing their own data in response.

61. MOFCOM had an obligation to require CICC to provide adequate non-confidential summaries of any confidential information submitted. If the summaries were, in fact, a full reproduction of all confidential information provided, then not only is there no basis for the information to be designated as confidential, but this should have been made clear in the summary.

62. The panel in *Mexico – Steel Pipes and Tubes* explained how designating information as "confidential" may affect another interested party's ability to have full access to that information and, as such, affect their ability to defend their interests. This could lead to, in the words of that panel, "the potential for abuse of the possibility to designate information as confidential so as to consciously place other interested parties at a disadvantage in the investigation."⁴² For this reason, the panel said preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation, as set out in Article 6.5.1 and its chapeau, was of "critical importance".⁴³

63. By failing to require CICC to properly identify which information it was seeking to designate as confidential and furnish an adequate non-confidential summary, MOFCOM failed to preserve the careful balance created by Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, and Articles 12.4 and 12.4.1 of the SCM Agreement. As a result, Australian interested parties were under the false impression that MOFCOM's determinations were based on a more comprehensive body of data than they were. Consequently, in the words of the panel in *Mexico – Steel Pipes and Tubes*, Australian interested parties were "consciously place[d] [...] at a disadvantage in the investigation".⁴⁴ It is incumbent on this Panel to review MOFCOM's treatment of confidential information "strictly" in order to enforce the relevant obligations in the Anti-Dumping and SCM Agreements.⁴⁵

⁴² Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

⁴³ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

⁴⁴ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

⁴⁵ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

64. I have addressed only MOFCOM's treatment of confidential information here, but this is one of many errors MOFCOM committed in relation to the conduct of the investigations and the quality of the public notices. The obligations governing an investigating authority's conduct of investigations afford fundamental due process rights to interested parties. These rights are systemically important to the proper functioning of the rules-based trading system. In its second written submission, Australia explained that there is no legitimate basis upon which China can assign less importance to these so called "procedural" obligations. For example, and as I explained earlier, obligations concerning treatment of confidential information are of critical importance. All of MOFCOM's failures with respect to the conduct of the investigations are serious violations in their own right, which also contributed to and exacerbated the "substantive" errors. China has failed to rebut Australia's claims in this regard.

IX. CONCLUSION

65. Madam Chair, members of the Panel, it is critical that Members adhere to the rules when imposing anti-dumping and countervailing duties. Where a Member fails to do so, it undermines the functioning of the rules-based trading system, it disrupts trade, and it damages both traders and the market. China's egregious measures do precisely this.

66. Resolution of this matter would benefit both Chinese importers and Australian traders and producers who have cultivated strong commercial ties over many years. Australia remains open to working with China on this.

67. For the reasons set out in Australia's written submissions, Australia respectfully requests that the Panel find China's measures are inconsistent with its obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

68. Australia looks forward to responding to any further questions the Panel may have.