

**Before the World Trade Organization**

**Panel Proceedings**

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

(DS598)

**AUSTRALIA'S SECOND WRITTEN SUBMISSION**

**Business Confidential Information - REDACTED**

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<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , <a href="#">WT/DS337/R</a> , adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/AB/R</a> , adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , <a href="#">WT/DS219/R</a> , adopted 18 August 2003, as modified by Appellate Body Report <a href="#">WT/DS219/AB/R</a> , DSR 2003:VII, p. 2701
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , <a href="#">WT/DS211/R</a> , adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , <a href="#">WT/DS473/AB/R</a> and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , <a href="#">WT/DS442/AB/R</a> 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> , <a href="#">WT/DS486/AB/R</a> and Add.1, adopted 28 May 2018, DSR 2018:IV, p. 1615

Short Title	Full Case Title and Citation
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/AB/R</a> and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , <a href="#">WT/DS295/AB/R</a> , adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Morocco - Definitive AD Measures on Exercise Books (Tunisia)</i>	Panel Report, <i>Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia</i> , <a href="#">WT/DS578/R</a> and Add.1, circulated to WTO Members 27 July 2021 [appealed; adoption pending]
<i>Pakistan – BOPP Film (UAE)</i>	Panel Report, <i>Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates</i> , <a href="#">WT/DS538/R</a> and Add.1, circulated to WTO Members 18 January 2021 [appealed; adoption pending]
<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , <a href="#">WT/DS479/AB/R</a> and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/R</a> , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , <a href="#">WT/DS471/R</a> and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589
<i>US – Carbon Steel (India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , <a href="#">WT/DS436/R</a> and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189
<i>US – Countervailing Duty Investigation on DRAMs</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , <a href="#">WT/DS296/AB/R</a> , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , <a href="#">WT/DS437/AB/R</a> , adopted 16 January 2015, DSR 2015:I, p. 7

Short Title	Full Case Title and Citation
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/R</a> , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – OCTG (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea</i> , <a href="#">WT/DS488/R</a> and Add.1, adopted 12 January 2018, DSR 2018:I, p. 7
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , <a href="#">WT/DS264/R</a> , adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , <a href="#">WT/DS277/AB/RW</a> , adopted 9 May 2006, and Corr.1, DSR 2006:XII, p. 4865
<i>US – Stainless Steel (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , <a href="#">WT/DS179/R</a> , adopted 1 February 2001, DSR 2001:IV, p. 1295
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117

Short Title	Full Case Title and Citation
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/AB/R</a> , adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , <a href="#">WT/DS322/AB/R</a> , adopted 23 January 2007, DSR 2007:I, p. 3

**LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS**

Abbreviation	Full Form or Description
ADM Trading	ADM Trading Australia Pty Ltd
Agracom	Agracom Pty Ltd
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Imported Barley from Australia", 18 May 2020
Anti-Dumping Final Disclosure	MOFCOM, "Facts on which the final award in the barley anti-dumping case will be based", 8 May 2020
AUVs	Average unit values
BCI	business confidential information
Bunge	Bunge Agribusiness Australia Pty Ltd
CBH	CBH Grain Pty Ltd
CHS Broadbent	CHS Broadbent Pty Ltd
CICC	China International Chamber of Commerce
CIF	Cost, insurance and freight
Committee Notification	Australia, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures, <a href="#">G/SCM/N/315/AUS</a> , 16 April 2018,
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
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FAQ	fair average quality
FOB	Free on board
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Grain Growers	Grain Growers Limited
GrainCorp	GrainCorp Operations Limited
Grain Trade Australia	Grain Trade Australia Ltd
Haycroft	Haycroft Enterprises
Iluka Trust	The Iluka Trust
Injury POI	Injury period of investigation (1 January 2014 to 30 September 2018)
Kalgan	Kalgan Nominees Pty Ltd
kg	kilogram
Louis Dreyfus	Louis Dreyfus Company Australia
McDonald	JW & JI McDonald & Sons
MOFCOM	Ministry of Commerce of the People's Republic of China
POI	period of investigation (1 October 2017 to 30 September 2018)
Riordan	Riordan Group Pty Ltd
RMB	<i>Ren Min Bi</i> (Chinese Yuan)
SARMS Program	South Australian River Murray Sustainability Program
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SRWUI Program	Sustainable Rural Water Use and Infrastructure Program
VAIJ Fund	Agriculture Infrastructure and Jobs Fund – Victoria
WTO	World Trade Organization



**LIST OF EXHIBITS**

<b>Exhibit No.</b>	<b>Exhibit Name</b>	<b>Short Title</b>
AUS-99	Speak Your Language, "Expert assessment of selected translations", Table and Cover Letter, 20 April 2022	Expert assessment of selected translations
AUS-100	CICC, Comments on Initiation of the Anti-Dumping Investigation, 5 March 2019 (English translation) (pages renumbered)	CICC Comments on Initiation of Anti-Dumping Investigation
AUS-101	China Alcoholic Drinks Association, Comments on Initiation of the Anti-Dumping Investigation, 5 December 2018 (English translation) (pages renumbered)	China Alcoholic Drinks Association Comments on Initiation of Anti-Dumping Investigation
AUS-102	Guangdong Holdings Supertime Malting, Comments on Initiation of the Anti-Dumping Investigation, 5 December (English translation)	Guangdong Holdings Supertime Malting Comments on Initiation of Anti-Dumping Investigation

## I. INTRODUCTION

### A. CHINA HAS FAILED TO PROVIDE ANY LEGAL OR FACTUAL BASIS TO REBUT AUSTRALIA'S *PRIMA FACIE* CASE

1. Australia has set out in its submissions to date, including its first written submission, a *prima facie* case establishing 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 in this dispute. Australia maintains all of those claims. Moreover, for the reasons Australia sets out below, the Panel should also find that China has failed to provide any legal or factual basis to rebut Australia's *prima facie* case in respect of any of the claims advanced.

2. This dispute traverses legal obligations that are fundamental to the proper conduct of anti-dumping and countervailing duties investigations. The errors Australia sets out in its claims demonstrate not only a complete disregard for the requirements of due process and transparency that underpin the relevant trade rules, but also demonstrate that such errors have been compounded by MOFCOM's failure, time and time again in the course of the investigations, to conduct an unbiased and objective assessment of the evidence on the record.

3. China has responded to Australia's claims with misinterpretations of the relevant provisions, impermissible *ex post facto* rationalisations of MOFCOM's failures, and irrelevant and unsupported allegations of errors in Australia's translations. In this submission Australia will respond in detail to China's attempted justifications. Australia trusts the Panel will see these arguments for what they are – a flawed and unsuccessful attempt by China to evade its obligations under the relevant Agreements and to distract the Panel from MOFCOM's serious and voluminous failings.

4. More inexplicably, China also attempts to exploit MOFCOM's complete failure to undertake genuine investigations or comply with disclosure obligations as a basis for justifying MOFCOM's actions. For example, China cites Australia's failure to provide information which MOFCOM itself was required to disclose, and failed to, as the basis for its assertions that Australia has not made out a *prima facie* case with respect to certain claims. China also

attempts to justify several of MOFCOM's failings, including its improper recourse to facts available, on the actions or omissions of Australian interested parties, whereas it was MOFCOM's conduct, in particular its failure to engage in any dialogue with Australian interested parties, that directly precipitated those failings. China should not be permitted to evade its obligations on this basis.

5. China's approach is to distract the Panel from the evidence on the record that demonstrates the fundamental errors underlying the measures at issue. In so doing, China fails entirely to engage with key arguments and evidence. Perhaps this is unsurprising. It is difficult to see how China could attempt to explain how a grain commodity freely traded at the prevailing world price could attract a dumping margin of the magnitude of 73.6%; or how producers of an unirrigated crop like barley could "benefit" from irrigation programs. China's approach does nothing to rebut the clear facts of this case, as set out by Australia in its submissions. Those facts demonstrate the failures in MOFCOM's investigations which led to errors in its findings and determinations.

6. These, and other errors of law and fact that Australia will discuss in its submission, can only lead the Panel to reject China's attempted rebuttal of Australia's claims and confirm that Australia has demonstrated the measures at issue are in breach of China's obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994.

## **B. TRANSLATIONS**

7. China contests certain translations which have no impact on Australia's claims or the substantive issues before the Panel. That said, Australia disagrees with many of China's proposed translations, which appear to be intended to mislead, obfuscate, and distract from the relevant issues and the substantive merits of the case. To the extent that the Panel may find it helpful, Australia has obtained independent, objective assessments of the contested translations from accredited professional translation services, Speak Your Language.<sup>1</sup>

8. In the expert opinion of Speak Your Language, China's proposed translations "tend to be more formal and precise in word choice", but they "contained grammatical mistakes and

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<sup>1</sup> Speak Your Language, "Expert assessment of selected translations", Table and Cover Letter, 20 April 2022 (Expert assessment of selected translations) (Exhibit AUS-99).

unidiomatic expressions", and on some occasions contained "unjustified additions that are not found in the original Mandarin or word/phrase choices that are significantly different in meaning from the original Mandarin".<sup>2</sup> In contrast, Speak Your Language assessed Australia's proposed translations documents to be "more idiomatic and correct in grammar", observing that in some cases, the translations contained "omissions that may affect the meaning" and "a tendency to simplify certain sentences".<sup>3</sup>

9. Speak Your Language finds agreement with some of China's proposed translations in some instances. However, in other cases they find that China's proposed translations are incorrect, inappropriate, or add terms and phrases that are simply not present in the original Mandarin, all of which create a risk of *ex post facto* rationalisations of MOFCOM's determinations. To the extent that such translations are relevant to the Panel's consideration of Australia's claims, Australia will address them in greater detail below.

## II. AUSTRALIA'S CLAIMS CONCERNING THE DOMESTIC INDUSTRY

### A. INTRODUCTION

10. MOFCOM's flaws with respect to domestic industry stem from CICC's Applications and continue through to MOFCOM's flawed injury and causation determinations. In its first written submission and responses to questions from the Panel, Australia has established a *prima facie* case that China has breached its obligations under the Anti-Dumping Agreement and the SCM Agreement as follows:

- Article 5.2(i) of the Anti-Dumping Agreement and Article 11.2(i) of the SCM Agreement because MOFCOM failed to provide a list of known producers;
- Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement because CICC did not make the Applications on behalf of the domestic industry, but instead made them on behalf of [REDACTED];

<sup>2</sup> Expert assessment of selected translations (Exhibit AUS-99), p. 4.

<sup>3</sup> Expert assessment of selected translations (Exhibit AUS-99), p. 4.

- Articles 5.1 and 5.4 of the Anti-Dumping Agreement and Articles 11.1 and 11.4 of the SCM Agreement because CICC did not have "standing"; and
- Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement because MOFCOM failed to identify and define the domestic industry, and it appears that there was no domestic industry involvement in the injury and causation analysis.

11. China has failed to rebut Australia's claims. Below, Australia summarises the key points for the benefit of the Panel.

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

**1. Introduction**

12. Rather than provide a defence for MOFCOM's actions, China's arguments and evidence confirm that CICC's Applications were not made "by or on behalf of the domestic industry". As for standing, the only evidence China points to concerning MOFCOM's purported standing assessment is in the texts of the Final Determinations. This is insufficient to meet China's obligations.

**2. A list of known domestic producers is mandatory**

13. CICC failed to include in its Applications a list of all known domestic producers (or associations of domestic producers) pursuant to Article 5.2(i) of the Anti-Dumping Agreement and Article 11.2(i) of the SCM Agreement, and MOFCOM failed to require CICC to provide this list. China's only attempt to defend these omissions is its explanation that "'a list of all known producers of the like product' is for a specific purpose to 'identify the industry on behalf of which the application is made'", and that such a list "was not relevant to the definition of the scope of the domestic industry" because "the domestic industry on behalf of which the applications were made is the Chinese barley industry with all Chinese barley producers, and there are numerous barley growers".<sup>4</sup>

<sup>4</sup> China's first written submission, paras. 558-560; response to Panel question No. 55, para. 203.

14. China's arguments have no basis in the text of the Anti-Dumping Agreement or the SCM Agreement. The list of known producers or producer associations is a mandatory requirement in cases where an application is being "made on behalf of the domestic industry". The wording of the second sentence of Articles 5.2(i) and 11.2(i) — i.e. "the application *shall* identify the industry on behalf of which the application is made *by a list*" — is clear that the list is required for the express purpose of identifying the domestic industry. Neither the applicant nor the investigating authority has any discretion to dismiss this requirement as "not relevant" to an application that is made on behalf of the domestic industry. Moreover, there is no discretion as to the methodology an applicant can use to identify the domestic industry.<sup>5</sup> The only circumstance in which a list is not required is where the applicant itself constitutes the domestic industry (as provided for in the first sentence of Articles 5.2(i) and 11.2(i)), in which case the applicant must identify itself and provide the volume and value of its domestic production of the like product.

15. China argues that "[t]he situations with barley are very different from those of industrial products and industries. MOFCOM found the approach taken by CICC a feasible way to make it possible for such a fragmented industry to apply for trade remedy investigations."<sup>6</sup> There is no scope in the text of the Agreements for MOFCOM to make such an assessment and, on that basis, assert that a list of known domestic producers is not required. In any event, there is no evidence that MOFCOM considered the so-called "very unique situation"<sup>7</sup> of the domestic barley industry at the time of initiation.

16. China's attempt to rely on footnote 13 of the Anti-Dumping Agreement and footnote 38 of the SCM Agreement to support its position is also misplaced. These provisions are relevant in the context of standing, i.e. ascertaining the "individual positions of domestic producers to determine whether there is, in the aggregate, adequate support for the application."<sup>8</sup> They do not provide methods of identifying the domestic producers *in the first instance*.

<sup>5</sup> See Canada's third party submission, para. 12.

<sup>6</sup> China's first written submission, para. 554. See also China's response to Panel question No. 55, paras. 199-200.

<sup>7</sup> China's response to Panel question No. 55, para. 199.

<sup>8</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.132. See also United States' third party submission, para. 73.

17. China further argues that a list of domestic barley producers that are "known" to the applicant "could not assist MOFCOM to identify the numerous barley producers in China" because "the unique feature of the Chinese domestic barley industry is that there are numerous barley growers".<sup>9</sup> Leaving aside the fact that "numerous barley growers" is not at all a feature that is unique to China, Articles 5.2(i) and 11.2(i) require "a list of all known domestic producers of the like product (or associations of domestic producers of the like product)" based on "such information as is reasonably available to the applicant".<sup>10</sup> If an application is genuinely being made "on behalf of the domestic industry", then the applicant will necessarily know specific domestic producers, or associations of domestic producers with whom it has consulted, cooperated, and collaborated on the preparation and submission of the application. If the applicant fails to list those producers or producer associations that are known to it, this omission calls into question whether, or to what extent, the application is genuinely being made on behalf of the domestic industry. As Australia set out in its first written submission, it is implausible for CICC to purport to be acting as a "representative" and on "request" of the domestic industry on the one hand, and on the other suggest that the information identifying the domestic industry was not "reasonably available" to it.<sup>11</sup> Further, the list required under Articles 5.2(i) and 11.2(i) provides essential information that is directly relevant to the assessment of "standing" under Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

18. China has failed to rebut Australia's claims. For the foregoing reasons and those set out in Australia's first written submission, China acted inconsistently with Article 5.2(i) of the Anti-Dumping Agreement and Article 11.2(i) of the SCM Agreement.

**3. The evidence submitted by China confirms that the Applications were not made by or on behalf of the domestic industry**

19. MOFCOM failed to assess whether the Applications contained sufficient evidence about the identity of the domestic industry in order to justify the initiation of the

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<sup>9</sup> China's response to Panel question No. 55, paras. 199-200.

<sup>10</sup> The scope of the information that must be provided by an applicant is only qualified by the phrases "known producers" and "reasonably available to the applicant". Neither of these circumstances are relevant on the facts, and nor does China purport to rely on them. See Australia's first written submission, para. 766; response to Panel question No. 55, para. 161.

<sup>11</sup> Australia's first written submission, para. 766.

investigations.<sup>12</sup> China has not rebutted Australia's claims pursuant to Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement, as set out in Australia's first written submission.

20. Rather than substantiating that the Applications had been made by CICC on behalf of the domestic industry or otherwise providing a justification for MOFCOM's decision to initiate the investigations on the basis of CICC's Applications, the [REDACTED] submitted by China in fact confirm that the Applications did not provide sufficient evidence to either (i) identify the domestic industry on whose behalf they were purportedly made; or (ii) establish that they were being made on behalf of the domestic industry.<sup>13</sup> These [REDACTED] do not contain any evidence concerning:

- how many producers in each province were consulted in relation to the Applications, or requested that CICC make the Applications on their behalf, or cooperated or collaborated in the preparation and submission of the Applications;
- what proportion that group of producers accounted for in each province, in terms of the number of growers and their production volumes; or
- whether any data was omitted or excluded, such as data for any of the growers within the six provinces whose "relevant organizations [...] jointly authorized the applicant", or data for any growers or groups of growers within the other barley-producing provinces, which were not involved in authorising the Applicant.<sup>14</sup>

The [REDACTED] fail to identify any actual domestic producers or producer associations on whose behalf CICC was purportedly making the Applications and therefore fail

<sup>12</sup> Australia's first written submission, para. 771.

<sup>13</sup> Relevant organizations (Exhibit CHN-15 (BCI)).

<sup>14</sup> See Australia's response to Panel question No. 43, para. 145. This response was to the Panel's question concerning MOFCOM's flawed definition of domestic industry. While it is clear that the obligations concerning the definition of domestic industry and standing are separate, in the underlying investigations China's violations of the relevant provisions, in part, stemmed from the same issues. Australia also notes that, in the Final Determinations, MOFCOM considered that "Chinese barley growers are distributed in more than 20 provinces, autonomous regions and municipalities directly under the Central Government". (Countervailing Duties Final Determination (Exhibit AUS-11), p. 19; Anti-Dumping Final Determination (Exhibit AUS-2), p. 19).



to establish that the Applications were genuinely being made on behalf of the domestic industry.

21. China has failed to rebut Australia's claims. For the foregoing reasons and those set out in Australia's first written submission, China acted inconsistently with Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement.

#### **4. The Applicant did not have standing**

22. China asserts that MOFCOM properly assessed whether the Applicant had standing.<sup>15</sup> The only support that China offers for this assertion is an assessment that MOFCOM made in the Final Determinations for the purpose of rejecting arguments submitted by the Australian Government and other interested parties.<sup>16</sup> China points to no evidence of MOFCOM's assessment of standing *at the time of initiation*, being the point in time when such an assessment was required. As a prerequisite for initiation, the standing requirements in Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement must be satisfied *before* an investigation is initiated.

23. Moreover, the evidence on which MOFCOM purported to rely to determine standing does not, in fact, demonstrate that the requisite quantitative criteria had been met.<sup>17</sup> As set out above, the [[REDACTED]] do not provide any information about:

- how many producers in each province were consulted in relation to the Applications, requested that CICC make the Applications on their behalf, agreed to be represented by CICC, or cooperated in any way with the preparation and submission of the Applications;
- what proportion that group of producers accounted for in each province, in terms of the number of growers and their production volumes; and

<sup>15</sup> China's first written submission, paras. 551-552 and 561-562

<sup>16</sup> MOFCOM stated that "[t]he Australian Government, several chambers of commerce and associations, and several responding enterprises submitted comments stating that the China Chamber of International Commerce is a department of the Chinese Government. [...] To sum up, the Investigating Authority found that the claims made by the Australian Government, several chambers of commerce and associations, and several responding companies lacked factual basis, and the Applicant is qualified to apply for investigation on behalf of the domestic industry". (China's first written submission, para. 552 and fn 386, citing the Anti-Dumping Final Determination English Translation (Exhibit CHN-1), pp. 13-14, and Countervailing Duties Final Determination English Translation (Exhibit CHN-4), pp. 13-14.).

<sup>17</sup> China's first written submission, para. 551.

- whether any data or other information relevant to the identification of the domestic industry was omitted or excluded.

MOFCOM could not have made the quantitative assessment required by Articles 5.4 and 11.4 in the absence of this information.

24. As such, China has failed to rebut Australia's claims. For the foregoing reasons and those set out in Australia's first written submission, China acted inconsistently with Articles 5.1 and 5.4 of the Anti-Dumping Agreement and Articles 11.1 and 11.4 of the SCM Agreement.

## **5. Conclusion**

25. For the foregoing reasons and for those in Australia's first written submission, China acted inconsistently with Articles 5.1, 5.2(i), 5.3 and 5.4 of the Anti-Dumping Agreement and Articles 11.1, 11.2(i), 11.3 and 11.4 of the SCM Agreement.

26. China has also failed to rebut Australia's claims under Article 5.3 of the Anti-Dumping Agreement and Article 11.3 of the SCM Agreement with respect to the lack of sufficient evidence of alleged dumping, subsidisation, injury and causation in order to justify the initiation of the investigations. These claims are addressed below.<sup>18</sup>

## **C. MOFCOM'S DEFINITION OF DOMESTIC INDUSTRY LACKED ANY EVIDENTIARY BASIS**

### **1. Introduction**

27. Australia maintains its claim that MOFCOM's "determination of the domestic industry"<sup>19</sup> was inconsistent with China's obligations under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement because it failed to establish "a major proportion of the total domestic production" of the like product in accordance with the definition of "domestic industry".<sup>20</sup> Australia prepared its first written submission without having seen China's exhibit, "Relevant organizations" (Exhibit CHN-15 (BCI)). As Australia emphasised in its opening statement at the Panel's first meeting, this exhibit provided no

<sup>18</sup> See below, section III.

<sup>19</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 13-14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

<sup>20</sup> Australia's first written submission, paras. 538-550.

positive evidence of the composition of the Chinese domestic industry.<sup>21</sup> What has become clear is that there was a total lack of evidence to support MOFCOM's determination of the "domestic industry" for the purposes of its investigations.<sup>22</sup> MOFCOM's failure in this regard has its origins in the improper initiation of the anti-dumping and countervailing duties investigations, which has been addressed above.

## **2. China has failed to rebut Australia's arguments**

28. Australia contended that MOFCOM purported to define the "domestic industry" on the basis of the "relevant organizations" which supported CICC's Applications for the initiation of anti-dumping and countervailing duties investigations.<sup>23</sup> These organisations were described in the Final Determinations as "the relevant organizations of the six major production areas in Yunnan, Jiangsu, Inner Mongolia, Sichuan, Gansu and Henan provinces".<sup>24</sup> The word "relevant" suggested that the organisations had a connection to the production of barley in the six provinces — i.e. associations of domestic barley producers or associations of domestic producers of cereal crops including barley. It is clear that the "relevant organizations" had no such connection; they were merely [REDACTED] with no regular or direct association to barley producers or the domestic production of barley.<sup>25</sup>

29. China has attempted to use MOFCOM's purported assessment of standing in the Final Determinations to support its assertion that MOFCOM defined the "domestic industry" as the producers as a whole under Articles 4.1 and 16.1.<sup>26</sup> China refers, in particular, to MOFCOM's statement in the Final Determinations that "the barley output of the above six provinces (autonomous regions) which authorized the Applicant accounted for more than 50% of the total domestic barley output".<sup>27</sup> China argues that MOFCOM's comparison of the "barley output of the [...] six provinces (autonomous regions)" to "the total barley production in China from the data of the National Statistics Bureau, i.e. the total production of the

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<sup>21</sup> Australia's opening statement at the first meeting of the Panel, paras. 15-16.

<sup>22</sup> Australia's opening statement at the first meeting of the Panel, para. 14.

<sup>23</sup> Australia's first written submission, para. 546.

<sup>24</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14.

<sup>25</sup> Relevant organizations (Exhibit CHN-15 (BCI)).

<sup>26</sup> China's response to Panel question No. 43, para. 144.

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

domestic industry defined, not the production quantity represented by the Applicant or producers supporting the Applications" is "clear evidence that the domestic industry defined is all barley producers in China".<sup>28</sup> This laboured attempt to derive implications from MOFCOM's assessment of the Applicant's "standing" to make the Applications in order to elucidate how it defined the "domestic industry" for the purposes of the investigations is clearly an *ex post facto* rationalisation on the part of China, which should be rejected by the Panel.

30. MOFCOM's flawed determination of the standing of CICC under Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement should not be conflated with its purported definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement. The Appellate Body explained in *EC—Fasteners (China)* that "Articles 4.1 and 5.4 concern two different aspects of an anti-dumping investigation".<sup>29</sup> Subsequently, the Appellate Body elaborated in *EC—Fasteners (China) (Article 21.5 China)* that:

Article 5.4 serves a different purpose than Articles 4.1 and 3.1, since Article 5.4 is intended at ensuring that the application for initiation of an anti-dumping investigation is supported by a sufficiently large proportion of domestic producers such that an investigation is warranted. By contrast, the definition of the domestic industry in accordance with Articles 4.1 and 3.1 carries with it both quantitative and qualitative components, since the proportion relied upon should be representative of the domestic industry as a whole and be unbiased, without favouring the interests of any interested party, or group thereof.<sup>30</sup>

31. China has also asserted that MOFCOM conducted its injury and causation analyses on the basis of the domestic industry as a whole, and not as a "major proportion of the total domestic production" of the like product.<sup>31</sup> In support for this assertion China relied on the following text from the Final Determinations:

In this case, the Applicant submitted the domestic producer questionnaire to the Investigating Authority. After the investigation, the Investigating Authority conducted injury

<sup>28</sup> China's response to Panel question No. 43, para. 144. See also China's first written submission, paras. 432-433.

<sup>29</sup> Appellate Body Report, *EC—Fasteners (China)*, para. 418.

<sup>30</sup> Appellate Body Report, *EC—Fasteners (China) (Article 21.5—China)*, para. 5.323.

<sup>31</sup> China's first written submission, para. 434.

and causal link analysis based on the overall situation of the Chinese barley industry reflected in the submitted questionnaires.<sup>32</sup>

China argued that the reference to "the overall situation of the Chinese barley industry" made it clear that the definition of the domestic barley industry applied by MOFCOM was the "overall" industry.<sup>33</sup> China continued to make this assertion in its answers to Panel question Nos. 43, 44, and 55.<sup>34</sup>

32. Australia submits that China's *ex post facto* rationalisation is not supported by the evidence on the records of the investigations. As Australia stated in its opening statement at the first meeting of the Panel, "there is no evidence on MOFCOM's record that the domestic producers *as a whole* participated" in answering the questionnaires.<sup>35</sup> In fact, China acknowledges that "the information and data about the domestic industry submitted by the CICC in its questionnaire responses were not collected by CICC from the individual producers that it contacted in the six provinces".<sup>36</sup>

33. CICC relied in part on a third-party confidential report for data on the Chinese barley industry and market to answer the questionnaires. CICC purported to annex a non-confidential summary of the report to its questionnaire responses.<sup>37</sup> As Australia observed in its opening statement, there is no evidence that MOFCOM "verified the [...] report [...] to confirm that the report accurately represented the domestic industry, both nationally and regionally".<sup>38</sup> Further, as Australia also noted in its response to Panel question No. 43, "the report has not been disclosed to Australia, and Australia is not aware of the sources of the data or the methodologies used to collect or prepare the data".<sup>39</sup>

34. In its response to Panel question No. 55, China states that defining the domestic industry "as domestic producers as a whole [...] enables MOFCOM to rely on certain professional third party source [*sic*] to obtain information and data for the domestic industry

<sup>32</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 14; China's first written submission, para. 434.

<sup>33</sup> China's first written submission, para. 435.

<sup>34</sup> China's responses to Panel question Nos. 43, 44 and 55.

<sup>35</sup> Australia's opening statement at the first meeting of the Panel, para. 19. (emphasis original)

<sup>36</sup> China's response to Panel question No. 44, para. 152.

<sup>37</sup> CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 52-53; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), pp. 45-46.

<sup>38</sup> Australia's opening statement at the first meeting of the Panel, para. 19.

<sup>39</sup> Australia's response to Panel question No. 43, para. 147.

defined for its injury analysis".<sup>40</sup> Leaving aside for the moment that this is clearly *ex post facto* rationalisation, China's answer suggests that, in its view, the identification, participation, or evidence of any actual domestic producer is unnecessary in an investigation where MOFCOM chooses to define the domestic industry as the "domestic producers as a whole", which "enables" MOFCOM to instead rely upon data from a "third party source" (ostensibly covering the entire domestic industry, that is, all domestic producers). However, in the same paragraph, China claims that "it is also not possible to collect information and data from each of these individual barley growers",<sup>41</sup> which begs the question of how and from whom the unidentified third-party source obtained its data, let alone how the data was prepared, constructed, adjusted, or curated for MOFCOM's injury determinations.

35. China's characterisation of MOFCOM's approach to defining the domestic industry would effectively dispense with any need for the identification, participation, or evidence of the actual domestic industry in an investigation. In Australia's view, it seems absurd that (i) the identification, participation, and evidence of the actual domestic producers who are allegedly being injured and on whose behalf the Application has been made could be considered unnecessary for the purposes of examining the key issues of injury and causation; or (ii) the evidence of an unidentified "third party source" is somehow preferable to the identification, participation, and evidence of any actual domestic producers. The foregoing illustrates that China's arguments are untenable and entirely without merit.

### 3. Conclusion

36. China has failed to rebut Australia's *prima facie* case. For the foregoing reasons and for those set out in Australia's first written submission, China acted inconsistently with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.

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<sup>40</sup> China's response to Panel question No. 55, para. 200. (emphasis added)

<sup>41</sup> China's response to Panel question No. 55, para. 200.

### III. AUSTRALIA'S OTHER CLAIMS CONCERNING THE INITIATION OF THE INVESTIGATIONS

#### A. INTRODUCTION

37. In addition to the claims concerning domestic industry and initiation, set out above, Australia has also established in its first written submission and responses to questions from the Panel a *prima facie* case that China has breached its obligations under the Anti-Dumping Agreement and SCM Agreement as follows:

- Articles 5.2 and 5.3 of the Anti-Dumping Agreement and Articles 11.2 and 11.3 of the SCM Agreement because the Applications did not contain sufficient evidence of dumping, subsidisation, injury and causation to justify the initiation of the investigations; and
- Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement because MOFCOM failed to reject the Applications.

38. For the reasons set out below, China has failed to rebut Australia's claims on each of these points.

#### B. THERE WAS NOT SUFFICIENT EVIDENCE OF DUMPING TO JUSTIFY INITIATION

39. Australia explained in detail in its first written submission how CICC's Application to initiate the anti-dumping investigation did not contain sufficient evidence of normal value, export price, and fair comparison.<sup>42</sup> In fact, the Application contained no "actual evidence" that dumping was occurring.<sup>43</sup> China has failed to rebut those arguments, and Australia does not intend to repeat them here. However, in response to statements made by China in its first written submission, Australia wishes to highlight for the Panel two points with respect to normal value and export price.

40. *First*, China argues that that the issue of "representativeness" does not arise with respect to the "information" submitted by CICC as evidence for normal value.<sup>44</sup> The

<sup>42</sup> Australia's first written submission, paras. 784-803.

<sup>43</sup> See Australia's first written submission, paras. 752 and 791.

<sup>44</sup> China's first written submission, paras. 572-573.

information for normal value was prepared by a third-party institution. As Australia explained in its response to the Panel's questions, the "standard of representativeness" relates both to the "accuracy and adequacy" of evidence and whether there is "sufficient evidence" within the meaning of Article 5.3 of the Anti-Dumping Agreement.<sup>45</sup> The information prepared by the third-party organisation clearly did not meet the requisite standard. Contrary to China's assertions, the third-party report did not explain the [REDACTED] used to collect data. The report merely states that the company [REDACTED] and that the price is the [REDACTED] [REDACTED]<sup>46</sup> No further explanation was provided.

41. China's defence relies entirely on the [REDACTED] set out in the third-party report to demonstrate sufficiency of evidence for normal value. As the report contains no such explanation, China has failed to rebut Australia's claim.

42. *Second*, in respect of the export price and adjustments made to the export price, China argues that the adjustments related to the "appropriate expenses".<sup>47</sup> However, contrary to China's assertions, both MOFCOM, and China in its first written submission, fail to explain how the adjustments were appropriate. As Australia explained in its first written submission, the adjustments had no connection with the export of barley from Australia to China.<sup>48</sup> China relies on the sources of the data and states that they are "reliable".<sup>49</sup> However, sourcing figures from the World Bank does not, without more, mean the figures pertain to the export of barley from Australia to China and therefore are "sufficient evidence". China has failed to rebut Australia's claim.

43. Moreover, there is no evidence that MOFCOM made any inquiries as to the evidence submitted by CICC. It appears that MOFCOM merely accepted the Application. This is not the conduct of an unbiased and objective investigating authority. In the absence of any inquiry or

<sup>45</sup> Australia's response to Panel question No. 58, paras. 167-173.

<sup>46</sup> Annex X of the Application, "Investigation Report on the Market Price of Barley" (Exhibit CHN-16 (BCI)), p. 2.

<sup>47</sup> China's first written submission, para. 584.

<sup>48</sup> Australia's first written submission, paras. 794-799. For example, the inland freight cost of USD 525 appears to be based on the domestic transport cost associated with the export of meat and edible meat offal to Japan from a Sydney port. Neither MOFCOM nor China explain how this is representative of the export of barley to China from various ports across Australia.

<sup>49</sup> China's first written submission, para. 584.



corroboration, no unbiased and objective investigating authority could have determined that the evidence submitted by CICC in relation to dumping was sufficient to justify the initiation of an investigation.

44. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 5.2 and 5.3 of the Anti-Dumping Agreement.

**C. THERE WAS NOT SUFFICIENT EVIDENCE OF SUBSIDISATION TO JUSTIFY INITIATION**

45. Australia has explained in detail how MOFCOM failed to make any inquiries with respect to the 32 subsidy programs CICC alleged in its Application for the initiation of a countervailing duties investigation.<sup>50</sup> China has not rebutted this claim. In light of the evidence that was before MOFCOM at the time of initiation, and for the reasons set out in Australia's first written submission, no unbiased and objective investigating authority could have determined that the Application contained sufficient evidence with respect to all 32 subsidy programs CICC alleged benefitted barley producers in Australia. As such, China acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement.

**D. THERE WAS NOT SUFFICIENT EVIDENCE OF INJURY AND CAUSATION TO JUSTIFY INITIATION**

46. In its first written submission and written responses to the Panel's questions, Australia set out in detail its claims and arguments with respect to the lack of evidence concerning injury and causation in both of CICC's Applications.<sup>51</sup>

47. It is clear that CICC had no contact at all with any individual firms — that is, producers or producer associations — in the Chinese barley industry. Given that CICC failed to list any known producers of barley in China, it is also clear that MOFCOM did not corroborate or make any inquiries at the time of initiation with respect to the alleged injury, and cause of that injury. China argues that the Applications contained "direct relevant data as the basis of

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<sup>50</sup> Australia's first written submission, paras. 804-810; response to Panel question No. 59, para. 174.

<sup>51</sup> See Australia's first written submission, paras. 811-820; responses to Panel question Nos. 60-62, paras. 175-186.

injury",<sup>52</sup> yet China has failed to provide this data. During the investigation, the Australian Government and other interested parties were not even informed of the name of the "relevant authoritative institutions"<sup>53</sup> who authored the report which allegedly contained the "direct relevant data", and nor were they provided with an adequate non-confidential summary of the information provided.<sup>54</sup> This is not the conduct of an unbiased and objective investigating authority.

48. In the absence of a proper evidentiary basis against which the Panel may review China's defence, the Applications merely contained "simple assertion" that there was injury to the domestic industry, and that it was being caused by alleged dumping and subsidisation. As such, China acted inconsistently with Articles 5.2 and 5.3 of the Anti-Dumping Agreement and Articles 11.2 and 11.3 of the SCM Agreement.

## **E. CONCLUSION**

49. CICC's Applications did not contain the "sufficient evidence" of dumping, subsidisation, injury and causation required to justify the initiation of the investigations. An unbiased and objective investigating authority could not, nor would not, have initiated the investigations without undertaking any inquiry or corroboration of the information submitted by CICC. Rather, an unbiased and object investigating authority would have rejected the Applications. As such, for the reasons set out above and in Australia's first written submission, Australia has established a *prima facie* case that MOFCOM acted inconsistently with Article 5.2 of the Anti-Dumping Agreement and Articles 11.2 and 11.3 of the SCM Agreement with respect to MOFCOM's initiation of the investigations without sufficient evidence, and China has failed to rebut this case.

50. China has also failed to rebut Australia's *prima facie* case that MOFCOM acted inconsistently with Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement with respect to MOFCOM's failure to reject the Applications.

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<sup>52</sup> China's first written submission, para. 598.

<sup>53</sup> China's first written submission, para. 596.

<sup>54</sup> Annex VII of the Anti-Dumping Application and Countervailing Duties Application both purported to be a non-confidential summary of the report to which Australia refers. See CICC Application for Anti-Dumping Investigation, Annexes (Exhibit AUS-80), p. 47; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 47.

#### **IV. IMPORTANCE OF THE DUE PROCESS FRAMEWORK**

##### **A. INTRODUCTION**

51. Australia's claims with respect to MOFCOM's conduct of the investigations, including the lack of transparency with which MOFCOM acted and the quality of the reasons it provided, form a significant part of this dispute.<sup>55</sup> In this section, Australia addresses key issues concerning the due process framework in Articles 6 and 12 of the Anti-Dumping Agreement and Articles 12 and 22 of the SCM Agreement, including rebuttal of certain arguments advanced by China in relation to cross cutting issues. Australia's specific claims under Articles 6 and 12 of the Anti-Dumping Agreement and Articles 12 and 22 of the SCM Agreement are addressed below in the relevant sections.<sup>56</sup>

##### **B. CHINA'S INFERENCES THAT PROCEDURAL OBLIGATIONS SHOULD BE AFFORDED LESS WEIGHT HAVE NO LEGAL BASIS**

52. In framing the errors MOFCOM made as "procedural", China attempts to divert the Panel's attention away in favour of the "substantive" errors.<sup>57</sup> There is no basis in the text of the Anti-Dumping Agreement, the SCM Agreement, or the DSU to make such a distinction in relative importance between "procedural" and "substantive" obligations or to suggest that there is a priority to the resolution of claims concerning such obligations in dispute settlement. Moreover, there is no legitimate basis upon which China may assign less importance or "weight" to procedural obligations, or in any way judge their relative importance *vis-à-vis* "substantive" legal obligations.

53. Australia submits that the so-called "procedural" errors MOFCOM committed are significant in respect of their nature, frequency, and consequence. These errors commenced when MOFCOM received CICC's Applications and continued throughout the investigations. The record of both investigations makes clear that the nature and extent of MOFCOM's so-called "procedural" errors contributed to, and exacerbated, the "substantive" errors. Only

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<sup>55</sup> See Australia's first written submission, section VIII.

<sup>56</sup> See below, sections V.F, VI.E and VII.F.

<sup>57</sup> See China's first written submission, paras. 177, 277, 626 and 632.

deeply flawed investigations could have resulted in the dumping and subsidy margins MOFCOM imposed on Australian barley.

54. Australia has set out in detail in its first written submission the legal framework established by Articles 6 and 12 of the Anti-Dumping Agreement and Articles 12 and 22 of the SCM Agreement.<sup>58</sup> The obligations within this framework are inter-related; they have reciprocal relationships with other so-called "procedural" obligations, but also with the so-called "substantive" provisions.

55. For example, in the countervailing duties investigation, MOFCOM failed to satisfy itself of the accuracy of the information on which it based its determination of financial contribution, as required by Article 12.5 of the SCM Agreement. Meanwhile, the Australian Government and Australian interested parties had no knowledge of MOFCOM's particular interest in the three programs which were ultimately countervailed, given that the programs were clearly irrelevant to the production or export of Australian barley. MOFCOM then subsequently failed to provide timely opportunities for all interested parties to see information on which it based its determination of financial contribution, failed to provide meaningful disclosure of the essential facts under consideration concerning financial contribution, failed to take into account comments made in response to the Final Disclosure that there were no financial contributions, and failed to provide reasons such that interested parties could understand the basis for MOFCOM's decision that financial contributions existed. As a result, MOFCOM not only committed these "procedural" errors in relation to Articles 12 and 22 of the SCM Agreement, but these errors also contributed to MOFCOM's inconsistent conduct with respect to Articles 1.1(a), 1.1(b), 2.1, 2.4 and 12.7 of the SCM Agreement. Had MOFCOM attempted to satisfy itself of the accuracy of the information, it could not have found that there was a financial contribution in any of the three programs, let alone that the financial contribution conferred a benefit and was specific to the export or production of Australian barley.

56. Another example is MOFCOM's injury and causation determinations. MOFCOM merely accepted CICC's blanket requests to treat information in a confidential manner and

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<sup>58</sup> Australia's first written submission, paras. 829-856.

failed to require CICC to furnish adequate non-confidential summaries, as required by Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement. CICC did not even identify names of third-party organisations who provided information, or properly identify if a document contained confidential information. As a result, interested parties had no knowledge as to how the domestic industry was defined and what information formed the basis of the injury and causation determinations. MOFCOM's "procedural" errors with respect to confidentiality contributed to MOFCOM's errors with respect to establishing standing, the definition of the domestic industry and the determination that there was material injury and that injury was caused by the allegedly dumped and subsidised exports of barley.

57. These are clear examples of the interrelationship between the "procedural" and "substantive" obligations, all of which should be afforded equal weight by the Panel.

### **C. CHINA'S INTERPRETATION OF THE FUNDAMENTAL DUE PROCESS OBLIGATIONS WOULD DEPRIVE THEM OF MEANING**

58. Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement are the embodiment of "fundamental" due process rights.<sup>59</sup> Something which is "fundamental" forms an essential, or indispensable part of the system. In this context, the relevant system is the imposition of dumping or countervailing duties to remedy or prevent injurious dumping and subsidisation.<sup>60</sup> As such, affording interested parties due process in an investigation is an *essential part* of the proper imposition of dumping or countervailing duties.

59. China proposes an interpretation of these fundamental due process obligations which would deprive them of any practical effect. China argues that Australia's claims under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement are based on a misconstruction of the scope of those obligations.<sup>61</sup> For example, MOFCOM found the

<sup>59</sup> See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

<sup>60</sup> According to the Appellate Body, the object and purpose of the Anti-Dumping is to "recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures." (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25).

<sup>61</sup> China's first written submission, para. 620.

extensive information submitted by Australian interested parties to be deficient. It therefore rejected the entirety of the information supplied by interested parties and used facts available in making its determinations of dumping and subsidies. Despite the important role these alleged deficiencies had in shaping the course and contours of the investigations, China argues the obligation to give "ample opportunity" did not arise with respect to notifying parties of those deficiencies<sup>62</sup> because "MOFCOM did not 'require' any information from interested parties" as part of that process.<sup>63</sup>

60. China's interpretation has no basis in the text of the Anti-Dumping Agreement or the SCM Agreement. The requirements to give "ample opportunity" to present all evidence and give notice within the meaning of Articles 6.1 and 12.1 are "distinct yet closely related" obligations.<sup>64</sup> However, the panel's description of the two obligations as "inextricably linked" in *China – Broiler Products (Article 21.5)* – the dispute to which China refers – does not mean that the scope of the obligation to give "ample opportunity" is limited in scope by the obligation to give notice.<sup>65</sup> That the notice requirement "imparts meaning" to the requirement to give "ample opportunity" does not limit the scope of the latter obligation. China's interpretation – that the obligation to give "ample opportunity" only arises when "notice" has been given – would largely render Articles 6.1 and 12.1 devoid of meaning. Such an interpretation is contrary to the "fundamental due process" rights enshrined in those provisions, and the requirement to give "liberal opportunities" for parties to defend their interests.<sup>66</sup>

61. China also argues that the adequacy of MOFCOM's reasons is governed by Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement and therefore cannot "simultaneously also be subject to another obligation under Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement."<sup>67</sup> According to China, particular conduct of an investigating authority can be subject to only one obligation under the Agreements. This is demonstrably not the case. It is well understood that obligations

<sup>62</sup> China's first written submission, para. 623.

<sup>63</sup> China's first written submission, para. 623.

<sup>64</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.218.

<sup>65</sup> China's first written submission, para. 622, referring to Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.218. China's reliance on the panel's decision in *China – Broiler Products (Article 21.5 – US)* is misplaced.

<sup>66</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

<sup>67</sup> China's response to Panel question No. 66, para. 222.

over-lap and the conduct of an investigating authority may be simultaneously subject to numerous obligations.

62. In any event, China's rebuttal in response to Panel question No. 66 is misplaced. Australia set out in its first written submission that, given MOFCOM published the Final Determinations on the same day it received comments, it is implausible that MOFCOM considered those comments in any meaningful way.<sup>68</sup> This is inconsistent with Articles 6.1 and 6.2 of the Anti-Dumping Agreement, and Article 12.1 of the SCM Agreement. The fact that MOFCOM did not include any reasoning in its Final Determinations as to why it rejected all comments made by Australian interested parties is evidence of MOFCOM's failure to give meaningful consideration to those comments. The quality of MOFCOM's reasoning is further addressed below.

**D. CHINA CANNOT JUSTIFY THE COMPLETE LACK OF REASONS PROVIDED BY MOFCOM**

63. A key part of the "due process" framework is an investigating authority's obligation to provide reasons for its decisions, as set out in Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement.<sup>69</sup> This "entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures."<sup>70</sup>

64. Australia has canvassed in detail in its first written submission the deficiencies with respect to MOFCOM's public notices.<sup>71</sup> Australia will not repeat those arguments here. China's only defence of MOFCOM's public notices is that the deficiencies raised by Australia were, in fact, "sufficiently addressed" in the Final Determinations.<sup>72</sup> This argument is insufficient to rebut Australia's claims. MOFCOM's Final Determinations are inadequate, most often indecipherable, and do not meet the standard required by Articles 12.2 and Article 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

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<sup>68</sup> Australia's first written submission, paras. 871-874.

<sup>69</sup> See Australia's first written submission, paras. 849-856.

<sup>70</sup> Appellate Body Report, *China – GOES*, para. 258.

<sup>71</sup> Australia's first written submission, paras. 948-951 and 956-958.

<sup>72</sup> China's first written submission, paras. 690-694 and 697-709.

65. Ensuring the quality of reasons provided by an investigating authority is of systemic importance. Interested parties are entitled to know, as a matter of fairness and due process, that facts, law and reasons that have led to the imposition of duties.<sup>73</sup> It also ensures that interested parties are able to pursue judicial review of a determination,<sup>74</sup> and for the "relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures".<sup>75</sup> The systemic importance of the quality of reasons provided by an investigating authority is evidenced in third party submissions in this dispute. As the United States observed:

The analyses contained in the final anti-dumping and subsidy determinations (as appended to the parties' written submissions) are very brief. They are often lacking in evidentiary support concerning key elements of the dumping, subsidy, injury, and causation determinations. In some cases it is difficult even to discern the basis for MOFCOM's conclusions. The Panel will need to determine whether China could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement and Articles 22.3 and 22.5 of the SCM Agreement based on the content of such abbreviated, unsubstantiated, and indecipherable analyses.<sup>76</sup>

66. In relation to MOFCOM's rejection of all arguments made by interested parties, Canada observed that:

An [investigating authority] does not meet this standard by simply recognizing that an interested party has made a claim, identifying a fact without explaining its relevance, and then stating whether it accepts or rejects the claim. Rather, the requirement to give reasons requires an investigating authority to adequately explain why it accepts or rejects the claim.<sup>77</sup>

67. These statements from third parties not only highlight the systemic importance of the obligations in Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement, but also confirm MOFCOM's complete failure to publish public notices that meet these important obligations.

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<sup>73</sup> Appellate Body Report, *China – GOES*, para. 258.

<sup>74</sup> Appellate Body Report, *China – GOES*, para. 258.

<sup>75</sup> Panel Report, *China – X-Ray Equipment*, para. 7.459.

<sup>76</sup> United States' third party submission, para. 79.

<sup>77</sup> Canada's third party submission, para. 42.



## **E. CONCLUSION**

68. The due process obligations are fundamental to the proper imposition of anti-dumping and countervailing duties. This means they form an essential part of an investigation leading to the proper imposition of dumping and countervailing duties. It is clear that MOFCOM's numerous and significant failures to comply with these fundamental obligations, including through China's attempts to deprive Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement of meaning, exacerbated MOFCOM's errors with respect to the "substantive" obligations. This is a theme that runs through the sections that follow in this submission.

69. Finally, the quality of MOFCOM's reasons is indefensible. Ensuring transparency and providing reasons such that an investigating authority's determinations can be understood by interested parties and WTO Members alike is of systemic importance. It is only through providing meaningful disclosure and reasons that interested parties and WTO Members can make informed decisions about whether to seek review of an investigating authority's determinations, either domestically or under the auspices of the WTO. MOFCOM provided no such disclosure or reasons, and China's reliance on MOFCOM's determinations as justification for its inconsistent conduct, with respect to both the "substantive" and "procedural" obligations, must fail.

## **V. AUSTRALIA'S CLAIMS CONCERNING THE DUMPING DETERMINATION**

### **A. INTRODUCTION**

70. In its first written submission and responses to questions from the Panel, Australia has established a *prima facie* case that MOFCOM's Final Determination was inconsistent with the following obligations under the Anti-Dumping Agreement:

- Article 6.10 because MOFCOM failed entirely to determine individual dumping margins for traders and, following its flawed decision to determine margins of dumping for producers, it also failed to determine individual dumping margins for producers;

- Article 6.8 and Annex II because the circumstances required to permit recourse to facts available were not met and because MOFCOM's subsequent application of facts available, including its selection of facts, was flawed;
- Article 2.4 because MOFCOM failed to make the necessary adjustments to undertake a "fair comparison" and because it failed to inform the interested parties of the information it required to ensure a fair comparison;
- Article 2.4.2 because MOFCOM failed to take the separate product categories into account in order to ensure a comparison between the normal value and *comparable* export transactions; and
- Articles 6.1, 6.2, 6.4, 6.5.1, 6.9, 12.2 and 12.2.2 because MOFCOM failed to ensure interested parties were accorded due process in the conduct of the investigation and its determinations.

71. For the reasons set out below, China has failed to rebut these claims.

**B. CHINA FAILED TO DETERMINE INDIVIDUAL DUMPING MARGINS IN ACCORDANCE WITH ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT**

**1. Introduction**

72. MOFCOM's dumping determination was flawed from the outset. MOFCOM proceeded on a flawed legal assumption that it was only required to determine individual dumping margins for either barley producers or barley traders, but not both; contrary to the ordinary meaning of Article 6.10 of the Anti-Dumping Agreement and the object and purpose of that Agreement. MOFCOM then, without explanation, chose to focus its dumping assessment on Group 1 producers, despite clear evidence that Australian barley producers did not export barley to China. Rather, all exports to China were made by traders. As defined in Article 2.1, margins of dumping are determined in relation to the "product exported from one country to another". Thus, the focus is on the actual exports, in this instance exports by traders. In the circumstances of the investigation into Australian barley, margins of dumping had to be calculated for traders, not for producers.

73. Despite the full cooperation of Group 2 traders, in supplying information on which MOFCOM could have undertaken individual assessments of normal values, export prices and dumping, MOFCOM assigned traders the same grossly flawed margin as determined for producers. This margin has no legal or factual basis. Australia emphasises that once the Panel rejects China's completely unfounded interpretation of the first sentence of Article 6.10 of the Anti-Dumping Agreement, China has no defence whatsoever for the dumping margins and duties assigned to Australian traders. China has also failed to rebut Australia's claim that MOFCOM did not determine individual margins for Group 1 producers.

## 2. Group 2 traders

74. China has repeatedly confirmed that MOFCOM did not determine individual dumping margins for Group 2 traders – the only entities that actually export barley to China – and instead allocated the margins determined for Group 1 producers to traders.<sup>78</sup> In other words, MOFCOM fundamentally failed to undertake any assessment whatsoever of dumping, or any of its constituent elements such as normal value, export price and price comparisons, with regard to the traders.

75. China's attempts to defend MOFCOM's failure by a flawed interpretation of Article 6.10 should be rejected. China's interpretation of the phrase "each known exporter or producer concerned" is contrary to its ordinary meaning, in its context and in light of the object and purpose of the Anti-Dumping Agreement.

(a) The proper interpretation of "each known exporter of producer concerned"

i. *The ordinary meaning of "each known exporter or producer concerned"*

76. The ordinary meaning of the phrase "each known exporter or producer concerned" requires investigating authorities to determine dumping margins for each known exporter *and* each known producer.

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<sup>78</sup> China's first written submission, para. 278; opening statement at the first meeting of the Panel, para. 35.

77. China's contrary argument places much emphasis on the use of the term "or" in the first sentence of Article 6.10.<sup>79</sup> However, China's interpretation ignores the ordinary meaning of the term "each" and the grammatical construction of the relevant phrase. "Each" is defined as "[u]sed so as to indicate distribution of a plurality of things among the members of a set [...] Distributing a plural subject or object (e.g. *the labourers will each receive a reward*)."<sup>80</sup> "Concern" is relevantly defined as "[t]o refer or relate to; to be about".<sup>81</sup>

78. In the first sentence of Article 6.10, the relevant "set", and the subject of the sentence, is "known exporters or producers concerned". When interpreted in its context as establishing the parameters of the set, the term "or" clearly has a conjunctive meaning. That is, that set comprises every entity that is: (i) known; (ii) concerned in the investigation; and (iii) an exporter or a producer. The object of the sentence is "an individual margin of dumping". Therefore, the first sentence of Article 6.10 requires that the authorities determine an individual margin of dumping for each entity within the set of "known exporters or producers concerned".

79. Further, in Australia's view, if the drafters had intended that the first sentence of Article 6.10 had the meaning China suggests – that is, investigating authorities have a discretion to determine margins of dumping for either each known exporter or, alternatively, each known producer, but not necessarily both – the sentence would have been drafted

<sup>79</sup> China's first written submission, paras. 280-281. Australia notes that past reports have highlighted that the word "or" may have different meanings in different contexts. For instance, in the context of Article 2.1 of the Agreement on Safeguards, the Appellate Body observed:

*The New Shorter Oxford English Dictionary* provides several definitions of the word "or". The dictionary definitions accommodate both usages. *The New Shorter Oxford English Dictionary* recognizes that the word "or" can have an inclusive meaning as well as an exclusive meaning. (Appellate Body Report, *US – Line Pipe*, para. 163).

With specific reference to the Anti-Dumping Agreement, the panel in *EC – Salmon (Norway)* indicated:

Because of the nature of the functions of the word "or", its meaning in different provisions of the AD Agreement will very much depend upon the obligations at issue and the specific context in which it appears. (Panel Report, *EC – Salmon (Norway)*, para. 7.171).

<sup>80</sup> Oxford English Dictionary online, definition of "each", <https://www.oed.com/view/Entry/58924> (accessed 6 May 2022). (emphasis original)

<sup>81</sup> Oxford English Dictionary online, definition of "concern", <https://www.oed.com/view/Entry/38153> (accessed 6 May 2022).

differently. For instance, the first sentence would have been drafted as follows so as to make this meaning clear:

The authorities shall, as a rule, determine an individual margin of dumping for either each known exporter concerned or each known producer concerned of the product under investigation.<sup>82</sup>

Such a construction would make clear that "known exporters concerned" and "known producers concerned" are *separate* sets, such that investigating authorities are only required to determine individual margins of dumping for one or the other set.

80. While China places much weight on the fact that the word "or", rather than "and" is used in the first sentence of Article 6.10,<sup>83</sup> this in fact *supports* Australia's interpretation. Had the term "each known exporter *and* producer concerned" been used in the first sentence of Article 6.10, this formulation would require individual margins of dumping only for entities that are *both* exporters and producers. Instead, the word "or" provides for a broader set of "exporters or producers" to be the subject of the relevant obligation. The structure of the first sentence of Article 6.10 also recognises the reality that some exporting entities may also be producers of the product concerned, while other exporting entities are non-producing exporters.<sup>84</sup> The phrase "each known exporter or producer concerned" in the first sentence of Article 6.10 allows for the possibility of non-producing exporters on the one hand, and exporter-producers on the other.

ii. *The context of the phrase "each known exporter or producer concerned"*

81. Australia's interpretation of the phrase "each known exporter or producer concerned" is supported by the broader context of Article 6.10 of the Anti-Dumping Agreement.

82. The first sentence of Article 6.10 creates the "general rule" that individual margins must be determined.<sup>85</sup> The second sentence sets out a specific circumstance in which

<sup>82</sup> Hypothetical amendments to Article 6.10 of the Anti-Dumping Agreement indicated in underline.

<sup>83</sup> China's first written submission, paras. 280-281.

<sup>84</sup> Australia recalls that in any anti-dumping investigation, the focus the dumping assessment must be the entities exporting the product, in accordance with the definition of dumping in Article 2.1. See below, para.114.

<sup>85</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 320.

derogation from the "general rule" is permitted, in cases where the number of exporters, producers, importers, or types of products is so large as to make such determinations impracticable. In such circumstances, Article 6.10 permits investigating authorities to use a practice commonly known as "sampling" by which they limit their examination either: (i) to a reasonable number of interested parties or products by using samples, which are statistically valid; or (ii) to the largest percentage of the volume of exports from the country in question that can reasonably be investigated.<sup>86</sup>

83. In search of support for its argument, China has taken statements from past reports out of context, seeking to ascribe comments relating to the second sentence of Article 6.10 to the general rule in the first sentence. As the United States highlighted in its third party submission, when the panel in *EC – Salmon (Norway)* found that the word "or" "suggests that the drafters intended that Members be left with discretion to choose the focus of their investigations", this related to an investigating authority choosing which companies to select in a sampling exercise.<sup>87</sup> That was the issue before the panel in that case.

84. In the paragraph immediately preceding that cited by China in its first written submission, the panel in *EC – Salmon (Norway)* had indicated as follows:

Thus, the threshold question that is before us under this part of Norway's claim is whether it is permissible under Article 6.10 of the [Anti-Dumping] Agreement for an investigating authority to exclude nonproducing exporters from the "known exporter[s] or producer[s]" that serve as the starting point for the selection of the interested parties investigated pursuant to the second limited investigation technique described in the second sentence of Article 6.10.<sup>88</sup>

85. The panel's comments must be read in this light – it was not commenting on the interpretation of the general obligation to determine individual margins for each known exporter or producer in the first sentence of Article 6.10. Rather, it was discussing the identification of the known exporters or producers that serve as the starting point for the selection of the interested parties investigated pursuant to the sampling method in the second sentence of Article 6.10. Its comments cannot be extrapolated out of context, as attempted

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<sup>86</sup> See Appellate Body Report, *EC – Fasteners (China)*, para. 318.

<sup>87</sup> United States' third party submission, para. 27.

<sup>88</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.164.

by China, to alter the ordinary meaning and long-established interpretation of the first sentence of Article 6.10.

86. Australia also draws attention to the use of the term "or" in Article 6.10.1, which provides:

Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

To apply the same interpretive approach to the use of "or" in Article 6.10.1 as suggested by China in relation to the same term in Article 6.10, would require the investigating authorities only to consult with and obtain the consent of *either* the exporters concerned, *or* the producers concerned, *or* the importers concerned. This interpretation of Article 6.10.1 is inconsistent with the ordinary meaning of the terms and would deprive two groups of their due process rights. Hence, just as the phrase "each known exporter or producer concerned" in the first sentence of Article 6.10 creates an inclusive set of entities for whom an individual margin must be determined, the phrase "exporters, producers or importers concerned" in Article 6.10.1 creates an inclusive set of entities who must be consulted and whose consent must be obtained in the sampling exercise.

87. Other provisions within the Anti-Dumping Agreement also provide useful contextual support for Australia's interpretation of the phrase "each known exporter or producer concerned" in Article 6.10. The phrase "exporter or producer" is used, with slight variations, in several places throughout the Anti-Dumping Agreement.<sup>89</sup> While each term must be interpreted in its specific context, the ordinary meaning of the phrase "exporter or producer", properly interpreted, in many of these provisions is, as in Article 6.10, to create an inclusive set, rather than a choice of alternatives.

88. For example, Article 5.2(ii) requires that an application for an anti-dumping investigation contain "the identity of each known exporter or foreign producer". Similarly, Article 6.1.1 requires that "[e]xporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply". In both cases, an

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<sup>89</sup> See, in addition to examples cited below, "the exporter or producer under investigation" in Articles 2.2.1.1 and 2.2.2.

interpretation of the phrase "exporter or producer" that creates an alternative such that the respective obligations only apply with respect to *either* the exporters *or* the producers, but not both, would lead to illogical outcomes and would clearly be inconsistent with the ordinary meaning of the text, properly interpreted.

*iii. The object and purpose of the Anti-Dumping Agreement*

89. The object and purpose of the Anti-Dumping Agreement includes to "ensure objective decision-making based on facts".<sup>90</sup> China's proposed interpretation of Article 6.10 is contrary to this object and purpose.

90. *First*, as Australia highlighted to the Panel during the first substantive meeting, interpreting Article 6.10 to mean an investigating authority has discretion to determine individual margins for only producers *or* only exporters would leave a practical, legal and factual void for the other category.

91. If Article 6.10 allows individual margins to be determined only for producers, for instance, it leaves uncertain:

- how the margins for exporters are to be determined;
- the factual and evidentiary basis for the margins for exporters; and
- what guides the investigating authority in determining or assigning margins to exporters.

In other words, such an interpretation of Article 6.10 runs precisely counter to the objective of ensuring *objective decision-making based on facts*, as there is no obligation on an investigating authority to determine margins of dumping in an objective manner, nor to base such determinations on facts.

92. *Second*, Australia emphasises that China's interpretation would significantly deprive Article 6.10 of meaning and effect. If the clear, mandatory<sup>91</sup> requirement to determine individual dumping margins in fact only requires investigating authorities to determine

<sup>90</sup> Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391.

<sup>91</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 316-317.



individual margins for one category of investigated entities, the obligation is significantly weakened. China is asking the Panel to accept that Article 6.10 allows a margin of dumping to be arbitrarily assigned to an entire category of entities with no factual foundation, as was the case in the underlying investigation. Such a position is impossible to reconcile with the object and purpose of the Agreement and the detailed requirements throughout the Anti-Dumping Agreement that govern the determination of dumping margins.

93. *Third*, if a consequence of China's suggested interpretation of the first sentence of Article 6.10 is that the margins determined for producers can simply be assigned to the exporters then this is akin to a *de facto* application of the sampling method. Such an approach would appear to permit sampling under both the first and second sentences, with only the second sentence attaching stringent requirements to both the circumstances in which sampling is permitted and the methods of conducting sampling.<sup>92</sup> As a result, China's interpretation is not only irreconcilable with the text, it would improperly render the second sentence of Article 6.10 *inutile*.<sup>93</sup>

#### *iv. Conclusion*

94. In sum, a proper interpretation of the phrase "each known exporter or producer concerned", in its context, and in light of the object and purpose of the Anti-Dumping Agreement, requires investigating authorities to determine individual margins of dumping for both each known exporter and each known producer. In contrast, China's interpretation is not supported by a proper interpretation of the text and would have implications that clearly run counter to the object and purpose of the Anti-Dumping Agreement.

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<sup>92</sup> Australia further notes that this approach in which margins determined for producers can simply be assigned to exporters would fail to take into account and make adjustments for differences in levels of trade, costs and prices between producers and exporters.

<sup>93</sup> Similarly, China's interpretation cannot be read coherently with Article 6.10.2 of the Anti-Dumping Agreement, which provides that, where an investigating authority conducts sampling, it must nevertheless "determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information". China's interpretation of the first sentence of Article 6.10 does not countenance such a requirement, and indeed MOFCOM did not determine individual margins for traders despite each submitting all necessary information. This reading of Article 6.10, wherein there are more requirements, and the interests of exporters and producers are more thoroughly protected, where sampling is used, is illogical.

(b) All information necessary to determine traders' individual margins of dumping was on MOFCOM's record

95. As set out above, a proper interpretation of the obligation under Article 6.10 of the Anti-Dumping Agreement required MOFCOM to determine individual dumping margins for each known trader. MOFCOM failed to do so, even though it had all necessary information for this purpose. As Australia set out in its first written submission,<sup>94</sup> Group 2 traders provided individual information on their domestic sales in the ordinary course of trade, and their export sales to China. There was no justification for MOFCOM's decision to disregard all information submitted by traders and allocate them a collective dumping margin that had no legal, factual or logical basis. Its actions in this regard breached China's obligations under Article 6.10 of the Anti-Dumping Agreement.

**3. Group 1 producers**

(a) The proper interpretation of "individual" in Article 6.10 of the Anti-Dumping Agreement

96. Australia has clearly explained that as Group 1 producers were not exporting barley, the correct focus of the dumping assessment was on Group 2 traders. However, to the extent that MOFCOM chose to determine dumping margins for producers, it was required to comply with the obligations under Article 6.10 of the Anti-Dumping Agreement. That is, it was required to determine "individual" margins for each known producer. As Australia set out in its first written submission, MOFCOM failed to do so, and instead assigned the same dumping margin to all known producers.<sup>95</sup>

97. China now attempts to explain MOFCOM's failure to determine "individual" margins by asserting that the obligation in Article 6.10 to determine individual dumping margins does

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<sup>94</sup> See Australia's first written submission, paras. 125-129 and 138-139.

<sup>95</sup> Australia's first written submission, para. 352.

not require the investigating authority to determine *different* dumping margins.<sup>96</sup> China indicates as follows:

MOFCOM selected the same value for normal value and the same value for export price for the four Australian producers, and as a result, the same *individual* dumping margin was calculated for each and all of the four Australian producers.<sup>97</sup>

98. China's interpretation of the word "individual" is contrary to its ordinary meaning in its context and in light of the object and purpose of the Anti-Dumping Agreement, and should not be entertained by the Panel.

99. *First*, the dictionary definition of "individual" suggests that being *different from others* is inherent in the concept of being *individual*. In particular, it is defined as "[d]istinguished in nature or attributes from others; having a striking or unusual character; distinctive".<sup>98</sup>

100. *Second*, Article 2 of the Anti-Dumping Agreement provides relevant context, setting out the requirements for determining a margin of dumping. Specifically, it requires the determination of normal value and export price and the making of a "fair comparison". In that context the term "individual" requires dumping determinations and dumping margins to be based on individual data. It is a fundamental discipline of the Anti-Dumping Agreement that dumping is the result of the behaviour of individual exporters.<sup>99</sup>

101. *Third*, China's interpretation would deprive the word "individual", and thus Article 6.10, of any meaning. If, as China appears to argue, Article 6.10 permits an investigating authority to: make no efforts to disaggregate data to identify individual exporters and producers; use the same normal value and same export price to determine the same dumping margin for all investigated exporters and producers; and then simply describe that uniform dumping margin as "individual", this would render the obligation in Article 6.10 meaningless. This would undermine the object and purpose of the Anti-Dumping Agreement and cannot be what the drafters intended.

<sup>96</sup> China's first written submission, para. 274.

<sup>97</sup> China's first written submission, para. 275.

<sup>98</sup> Oxford English Dictionary online, definition of "individual", <https://www.oed.com/view/Entry/94633> (accessed 6 May 2022).

<sup>99</sup> Appellate Body Report, *US — Zeroing (Japan)*, para. 111.

102. Finally, Australia notes that China has attempted to draw support for its position by quoting past reports out of context. It misconstrues comments in *EC – Fasteners (China)*, in which the Appellate Body dismissed an argument that the application of facts available is a permissible derogation from the obligation to determine individual dumping margins. The Appellate Body was not implying, as China appears to suggest, that whenever facts available is used, the dumping margins so calculated may be applied to as many exporters and producers as the investigating authority wishes and still be labelled "individual". This is clear when the quote China selects<sup>100</sup> is read in its full and proper context:

We observe, however, that Article 6.8 of the Anti-Dumping Agreement allows an investigating authority to rely on "facts available" if an exporter or producer does not cooperate, and that the margin applied to the noncooperating exporter or producer would still be an individual one even if it is calculated based on facts available rather than on information provided by the exporter or producer.<sup>101</sup>

103. It is clear from the Appellate Body's use of the singular terms "an exporter or producer" and "the noncooperating exporter or producer" that it was describing a situation where the dumping margin for only *one* exporter or producer was determined based on facts available.<sup>102</sup> Of course, in this situation, it is still an individual dumping margin. This is not, however, the situation in the case before the Panel.

#### 4. Conclusion

104. China's attempt to justify MOFCOM's failure to properly determine individual dumping margins for Group 1 producers and Group 2 traders, by re-interpreting and fundamentally weakening the obligation in Article 6.10 of the Anti-Dumping Agreement, should be rejected by the Panel. A correct interpretation of the first sentence of Article 6.10, taking the ordinary meaning of the relevant terms in their context and in light of the object and purpose of the Anti-Dumping Agreement confirms that, in the circumstances at issue, MOFCOM was under an obligation to determine individual dumping margins for each Group 2 trader. MOFCOM breached Article 6.10 by failing to do so, and by instead arbitrarily assigning

<sup>100</sup> See China's first written submission, para. 276.

<sup>101</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 322.

<sup>102</sup> See also Australia's first written submission, paras. 346-347, and the statement of the panel in *Argentina – Poultry Anti-Dumping Duties* that "Article 6.8 "expressly allow[s] investigating authorities to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided" (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.216). (emphasis added)

the margin determined for producers to traders. MOFCOM also breached Article 6.10 by assigning the same margin of dumping for all Group 1 producers and thus failing to determine individual margins as it was required to do.

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

**1. Introduction**

105. China argues that MOFCOM: (i) did not use facts available for Group 2 traders; (ii) properly had recourse to facts available for Group 1 producers; (iii) properly applied facts available with respect to those producers; and (iv) selected a reasonable replacement resulting in a dumping margin of 73.6%.

106. Each one of these assertions from China is incorrect. Australia has extensively canvassed its claims and arguments with respect to China's violations of Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II in its first written submission and written responses to the Panel's questions. Below, Australia addresses only certain arguments made by China.

**2. The conditions to resort to facts available were not met**

107. Australia first rebuts China's claim that MOFCOM did not use facts available to determine dumping margins for Group 2 traders.

108. Australia will then recall the "necessary information" required for MOFCOM to make a dumping determination with respect to Australian barley by reference to first principles and Article 2 of the Anti-Dumping Agreement. In the circumstances of this investigation, the export sales to China were made by Group 2 traders. As such, the necessary information was that required to determine normal values and export prices for those traders. Australia highlights that all such necessary information was provided by Australian interested parties.

**(a) It is evident from the determinations that MOFCOM used  
facts available with respect to the Group 2 traders**

109. China argues that MOFCOM did not apply the domestic regulation concerning facts available for the Group 2 traders and therefore Article 6.8 of the Anti-Dumping Agreement

does not apply with respect to its determination of the margin of dumping for Group 2 traders.<sup>103</sup> According to China, MOFCOM "determined not to calculate individual dumping margins" for Group 2 traders.<sup>104</sup>

110. China's assertion that it did not rely on the domestic regulation concerning facts available is not dispositive as to what obligations in the Anti-Dumping Agreement apply to MOFCOM's conduct. Rather, the Panel must consider MOFCOM's conduct in light of the evidence on the record in order to assess the scope of relevant obligations.

111. In relation to the measure at issue, MOFCOM allegedly "reviewed the questionnaires submitted by" Group 2 traders<sup>105</sup> and determined that they did not provide "complete" questionnaires.<sup>106</sup> As a result, MOFCOM asserted that this "caus[ed] [it] to be unable to obtain the information necessary to calculate the margins of dumping" and therefore MOFCOM "was unable to calculate separate margins of dumping".<sup>107</sup> It is therefore evident from MOFCOM's determination that it was because of the alleged lack of necessary information that it purported to resort to other available "facts" on the record. MOFCOM did not use the information submitted by the Group 2 traders in determining their dumping margins, but rather it used the dumping margin assigned to "other Australian companies".<sup>108</sup> As such, MOFCOM's conduct with respect to Group 2 traders is a clear application of "facts available", and is therefore subject to Article 6.8 and Annex II of the Anti-Dumping Agreement.

112. Australia explained in its first written submission that there was no necessary information missing from the record for MOFCOM to determine dumping margins for the Group 2 traders and therefore its use of facts available was inconsistent with Article 6.8 of the Anti-Dumping Agreement.<sup>109</sup> China has not provided any rebuttal in response to these arguments.

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<sup>103</sup> China's first written submission, paras. 37-39.

<sup>104</sup> China's first written submission, para. 38.

<sup>105</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 10.

<sup>106</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 11. This mirrors the language MOFCOM used, and findings made, with respect to Group 1 producers.

<sup>107</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

<sup>108</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 11. This is same selection of facts MOFCOM made for the Group 3 companies.

<sup>109</sup> Australia's first written submission, paras. 115-141.

(b) MOFCOM had all the "necessary information" in order to make a determination of dumping

i. *The necessary information to determine dumping was information on Group 2 traders' domestic and export sales*

113. Article 6.8 of the Anti-Dumping Agreement allows investigating authorities to use facts available when interested parties refuse access to or otherwise do not provide necessary information. Australia and China agree that what is "necessary information" depends on the substantive provisions at issue.<sup>110</sup> For a determination of dumping, the key substantive provisions are contained within Article 2 of the Anti-Dumping Agreement.

114. As Australia set out in its response to Panel question No. 2,<sup>111</sup> the definition of dumping in Article 2.1 of the Anti-Dumping Agreement refers to the product being "introduced into the commerce of another country". The starting point, and one of the fundamental aspects, of the dumping assessment must therefore be the export sales of the product under investigation into the importing country – the sales by which the product is "introduced into the commerce of another country". The subsequent reference in Article 2.1 to "the export price of the product exported from one country to another" confirms that the focus is on the actual exports to the importing country. The price of these export sales must be compared to the "normal value" of the product. In essence, the investigating authority is assessing the pricing behaviour of the entities that export the product to the importing country. It is the margins of dumping of those entities that are relevant. The proper focus of a dumping investigation by an objective and unbiased investigating authority is, therefore, those exporting entities.

115. It is indisputable from the record of evidence in this investigation that all export sales of barley to China are undertaken exclusively by Australian traders. Australian barley producers do not directly export barley, are not affiliated with the traders that export barley, and supply their barley to warehouses where it is co-mingled and hence becomes untraceable

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<sup>110</sup> Australia's first written submission, para. 102; and China's first written submission, para. 44; response to Panel question No. 1, para. 6.

<sup>111</sup> Australia's response to Panel question No. 2, para 10.

to end markets.<sup>112</sup> Producers' commercial and legal interest in barley is extinguished at the point that they sell to traders.

116. Therefore, in the circumstances of this investigation, the proper focus for the dumping assessment by an objective and unbiased investigating authority was on Group 2 traders.<sup>113</sup>

117. Accordingly, the "necessary information" required to determine whether Australian barley was being dumped into China was:

- information on traders' domestic sales, including the costs of those sales and whether those sales were in the ordinary course of trade, to determine normal values; and
- information on traders' export sales, to determine export prices.

Australia will demonstrate below that all of this information was provided by Australian interested parties.

*ii. Australian interested parties provided all necessary information to determine dumping for Group 2 traders*

118. In the circumstances of this investigation, MOFCOM had all necessary information to determine normal values based on Group 2 traders' domestic sales in the ordinary course of trade, and export prices based on Group 2 traders' export sales.

119. With respect to normal values, as Australia set out in its first written submission, Group 2 traders supplied domestic sales data to MOFCOM.<sup>114</sup> China has not disputed this.

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<sup>112</sup> See Australia's first written submission, paras. 126, 184 and 185 and evidence cited therein.

<sup>113</sup> Australia acknowledges that there is nothing preventing an investigating authority from determining dumping margins for producers of the product under investigation. However, in the circumstances of MOFCOM's investigation into Australian barley, it was not permissible for MOFCOM to determine margins for producers *to the exclusion of exporters*, such that the dumping margins so determined had no connection with the actual exports of the product. Moreover, it was not permissible for MOFCOM to disregard all information provided by exporters and arbitrarily assign the margin determined for producers to exporters.

<sup>114</sup> This includes data related to the costs associated with those sales. See Australia's first written submission, paras. 118-119 and 125-128.



120. Australia has further established Group 1 producers and Group 2 traders provided all necessary information for MOFCOM to determine that the domestic sales reported by traders were in the ordinary course of trade. The evidence before MOFCOM established that Group 1 producers sell barley to traders in arms-length, above cost sales.<sup>115</sup> Therefore, the recorded costs of acquisition of barley reported by Group 2 traders was the correct starting point for determining production costs in MOFCOM's analysis of whether traders' domestic sales were in the ordinary course of trade.<sup>116</sup>

121. This is further confirmed by the fact that in the Australian market, traders acquire barley from co-mingled stocks that include barley from large numbers of producers, each of whom will have different costs, and each of whom will contribute only a portion of the co-mingled stocks. Moreover, logistics, sorting, grading, and other costs are incurred in creating the co-mingled stocks. The full amounts of these costs are reflected in the arms-length acquisition costs of the Group 2 traders, which themselves are based on GAAP-consistent inventory management and other applicable cost allocation methods plus amounts for profit associated with any intermediaries.

122. Given the above facts, which were on the record before MOFCOM, there was no necessary information missing to determine that Group 2 traders' domestic sales were in the ordinary course of trade, and accordingly to determine normal values for the traders based on those domestic sales.

123. With respect to export prices, as Australia set out in its first written submission, Group 2 traders supplied export sales data to MOFCOM.<sup>117</sup> China has not disputed this. There was therefore no necessary information missing for MOFCOM to determine export prices for those traders, in accordance with Article 2.1 of the Anti-Dumping Agreement.

124. In sum, in the circumstances of the investigation at issue, the only necessary information to determine whether Australian barley was being dumped into China was that

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<sup>115</sup> Australia's first written submission, paras. 120-126.

<sup>116</sup> [REDACTED]

[REDACTED] See CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-23 (BCI)), p. 129.

<sup>117</sup> Australia's first written submission, para. 138.

information relevant to the determination of normal values and export prices of barley sold by Group 2 traders. The necessary information to determine normal values was information on traders' costs, and information on traders' domestic sales, and the information necessary to determine export prices was information on traders' export sales. All of this information was provided to MOFCOM.<sup>118</sup>

- iii. *To the extent that MOFCOM determined dumping for Group 1 producers, Australian interested parties provided all necessary information for this determination*

125. While Australia maintains that an objective and unbiased investigating authority would have determined normal values, export prices and dumping exclusively for Group 2 traders, to the extent that MOFCOM chose to do so for Group 1 producers, it had all necessary information to do so in the information supplied by Australian interested parties.

126. China's justification for MOFCOM's recourse to facts available in respect of producers hinges on two premises: China's erroneous *ex post facto* interpretation of the phrase "destined for consumption in the exporting country" with regard to domestic sales; and China's unfounded insistence that Australian barley be traced from production to end market. Australia will demonstrate that both premises are flawed, and accordingly MOFCOM had all necessary information to determine dumping in respect of producers.

- a. China's *ex post facto* interpretation of "destined for consumption in the exporting country" should be rejected

127. China argues, *ex post facto*, that, in order for domestic sales transactions to be considered as "destined for consumption in the exporting country" and thus qualify for normal value under Article 2.1 of the Anti-Dumping Agreement, record evidence must demonstrate that the product is "intended for", or "set apart for or devoted to", domestic consumption.<sup>119</sup>

<sup>118</sup> See Australia's first written submission, paras. 126-128 and 138-139.

<sup>119</sup> China's first written submission, paras. 51-52.

128. As Australia set out in detail in its response to Panel question No. 4, China's interpretation of the phrase "destined for consumption in the exporting country" in Article 2.1 of the Anti-Dumping Agreement is contrary to its ordinary meaning in its context and in light of the object and purpose of the Anti-Dumping Agreement.<sup>120</sup> As such, China's interpretation should be rejected by the Panel. Below, Australia elaborates further on the flaws in China's argument.

129. As Australia has established,<sup>121</sup> the context provided by Article 2.2 demonstrates that the price of sales "destined for consumption in the exporting country" referred to in Article 2.1 is simply the price of sales in the domestic market of the exporting country, without any additional requirement that this be a domestic price for sales "intended for" or "set apart for or devoted to" domestic consumption.<sup>122</sup> This interpretation recognises that, with a limited exception, the prevailing price for the like product in the market of the exporting country comprises all sales in its domestic market irrespective of the ultimate destination of those sales. Thus, sales made to a domestic buyer at the domestic price that may or may not be subsequently exported by that buyer, or by another domestic buyer where the product is purchased from the original buyer, are accounted for in assessing the prevailing domestic price. The limited exception is where it is known, at the time of sale, that the product will be sold in a third country and, therefore, may not reflect the prevailing price in the domestic market.<sup>123</sup>

130. China also does not explain how its proposed interpretation is consistent with the object and purpose of the Anti-Dumping Agreement. China refers to the Appellate Body's description of the object and purpose in *EU – Biodiesel (Argentina)* as "to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures."<sup>124</sup> Australia agrees, but

<sup>120</sup> Australia's response to Panel question No. 4, paras. 13-23.

<sup>121</sup> Australia's response to Panel question No. 4, para. 15.

<sup>122</sup> Australia also notes the symmetry of language in the precursor provisions, Articles VI:1(a) and VI:1(b) of GATT 1994. In a similar fashion, the context provided by Article VI:1(b) of GATT 1994, in particular the term "such domestic price", suggests that the phrase "the [...] price [...] for the like product when destined for consumption in the exporting country" in Article VI:1(a) be interpreted simply as the "domestic price", without the additional evidential requirements China proposes.

<sup>123</sup> See Australia's response to Panel question No. 4, para. 20, and Panel Report, *EC – Salmon (Norway)*, fn 339 to para 7.167.

<sup>124</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25; China's response to Panel question No. 4, para 51.

questions how the Appellate Body's characterisation of the object and purpose of the Agreement supports China's interpretation.<sup>125</sup> In addition, in the preceding paragraph, the Appellate Body refers to normal value as "the price of the like product in the ordinary course of trade in the *domestic market* of the exporting country".<sup>126</sup> In this way, the Appellate Body confirms Australia's view that the reference to sales "destined for consumption in the exporting country" in Article 2.1 merely means sales in the domestic market of the exporting country.

131. Moreover, China appears to concede that it might not always be possible to identify the final destination of sales, but states that this commercial reality "does not diminish the legal criteria" in Article 2.1.<sup>127</sup> China has no explanation as to how, in light of its recognition of such limitations, its evidentiary requirement could be met. If Article 2.1 is interpreted in a way that would create a "case-by-case" evidentiary standard for domestic sales,<sup>128</sup> it would in many cases lead to an inaccurate determination of the true normal value of the product under consideration, and consequently an inaccurate dumping determination, thus undermining the object and purpose of the Anti-Dumping Agreement.<sup>129</sup>

132. Australia reiterates that China's proposed interpretation of the concept of domestic sales in Article 2.1 of the Anti-Dumping Agreement finds no support in the text of the Agreement, properly interpreted, nor in past reports. Once China's attempt to reinterpret Article 2.1 is rejected, it is clear that there was no justification for MOFCOM's rejection of domestic sales data provided by Group 1 producers.<sup>130</sup> Accordingly, Group 1 producers

<sup>125</sup> The "substantive conditions" to which the Appellate Body refers are substantive conditions on a Member's ability to take anti-dumping measures. One of these substantive conditions is that facts available may only be used when an interested party refuses access to or otherwise does not provide necessary information. MOFCOM failed to comply with this substantive condition.

<sup>126</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24. (emphasis added)

<sup>127</sup> China's response to Panel question No. 4, para. 52.

<sup>128</sup> See China's response to Panel question No. 4, para. 53.

<sup>129</sup> See para. 89 above; Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391.

<sup>130</sup> As the Panel suggested in Panel question No. 9 to China, even if China's interpretation of "destined for consumption in the exporting country" were accepted, this does not explain MOFCOM's rejection of data from two producers, Kalgan and Iluka Trust, who reported domestic sales directly to end-users. China attempts to justify MOFCOM's conduct based on the fact that they were "very limited" and a "small percentage" (see China's response to Panel question No. 9(b), para. 64). Australia first notes that Form 4-1 to Iluka Trust's Questionnaire Response Data shows a total of [REDACTED] tonnes of barley sold to end-users, representing [REDACTED] % of Iluka Trust's domestic sales. Kalgan's sales to end-users totalled [REDACTED], representing [REDACTED] % of its domestic sales. Therefore, the volume and proportion of domestic sales to end-users in Australia by these two domestic producers [REDACTED] the volume and proportion of Australia's exports to Egypt during the POI. Australia's 54 tonnes of barley exported to Egypt were 0.004 % of Australia's non-China exports during the POI, and 0.00089 % of Australia's total exports. It is difficult to understand how China can maintain that the domestic sales to end-users reported by these two producers were not appropriate bases for normal values, but Australia's export sales to Egypt were.

provided all necessary information for MOFCOM to determine normal values based on their domestic sales in the ordinary course of trade.<sup>131 132</sup>

- b. Australian interested parties provided all necessary information to determine export prices for Group 1 producers

133. As Australia established in its first written submission<sup>133</sup> and will elaborate below, it was neither necessary nor possible for Group 1 producers to trace their sales of barley to end markets, including export markets. Producers sell barley to traders and commercial warehouses with no knowledge of where their barley will be on-sold.<sup>134</sup>

134. However, all four Group 1 producers submitted their questionnaire responses jointly with traders, as instructed by MOFCOM. Therefore, to the extent that MOFCOM decided to determine dumping in respect of producers, it was required to consider traders' and producers' information together. In the circumstances, an objective and unbiased investigating authority would have used the export sales data provided by the traders who submitted their responses jointly with producers as the basis for export price.<sup>135</sup> Accordingly, Group 1 producers and Group 2 traders together provided all necessary information for MOFCOM to determine export prices for producers.

135. In sum, Australian interested parties provided all necessary information for MOFCOM to make dumping determinations for Group 1 producers.

Australia also notes that the weighted average price of Iluka Trust's domestic sales to end-users was [REDACTED], and the weighted average price of Kalgan's domestic sales to end-users was [REDACTED]. Both figures are [REDACTED] the normal value MOFCOM determined, and [REDACTED]. See Iluka Trust Anti-Dumping Questionnaire Response Data (Exhibit AUS-18 (BCI)), Sheet 4-1; Kalgan Anti-Dumping Questionnaire Response Data (Exhibit AUS-20 (BCI)), Sheet 4-1; and Reserve Bank of Australia Exchange Rates (Exhibit AUS-39).

<sup>131</sup> As Australia demonstrates in its first written submission, producers' domestic sales were at above-cost prices. There was no evidence to suggest that producers' domestic sales were not in the ordinary course of trade for any other reason. See Australia's first written submission, paras. 118-122.

<sup>132</sup> Australia acknowledges that Haycroft did not provide domestic sales data. However, Haycroft submitted its questionnaire response jointly with a trader, GrainCorp. Therefore, to the extent that MOFCOM decided to determine dumping in respect of Haycroft, it was open to MOFCOM to use GrainCorp's data on domestic sales in the ordinary course of trade to determine the normal value for Haycroft.

<sup>133</sup> Australia's first written submission, paras. 184-185.

<sup>134</sup> Australia's first written submission, para. 184 and fn 227 thereto.

<sup>135</sup> CBH for Iluka Trust, Kalgan and McDonald, and GrainCorp for Haycroft.

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

136. Australia reiterates that the investigation record contained all necessary information for an objective and unbiased authority to determine normal values and export prices for both Group 1 producers and Group 2 traders. Australia *further* submits that MOFCOM improperly resorted to Article 6.8 of the Anti-Dumping Agreement on the basis that Group 1 producers and Group 2 traders did not provide alleged "necessary information", when it was clear from the record that such information did not exist in the normal course of business in the circumstances of the Australian market and was therefore impossible to produce.<sup>136</sup> China has failed to rebut this argument of Australia.

137. China's approach fails to give full effect to the ordinary meaning of the phrase "necessary information" in its context, and in light of the object and purpose of the Agreement. It is well established that "[i]nterpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components."<sup>137</sup> China has failed to undertake a "holistic exercise". Moreover, China's position is contrary to a good faith interpretation of Article 6.8 of the Anti-Dumping Agreement. Among other things, the principle of good faith underlies the concept that an interpretation should not lead to a result which is manifestly absurd or unreasonable.<sup>138</sup> China's interpretation that necessary information includes information that does not exist is manifestly absurd and unreasonable.

138. China fails to give meaning to "information". The ordinary meaning of "information" is "[k]nowledge communicated concerning some particular fact, subject, or event".<sup>139</sup> When interpreted in context, Article 6.8 of the Anti-Dumping Agreement applies when an interested party refuses access to or otherwise does not provide knowledge communicating a particular

<sup>136</sup> Australia reiterates its position that information that does not "exist" cannot be derived from other information that does exist. See Australia's first written submission, fn 161. Thus, investigating authorities can request information in forms other than available on the records of an exporter.

<sup>137</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 176.

<sup>138</sup> Panel Report, *US – Gambling*, para. 6.49 and fn 605 thereto.

<sup>139</sup> Australia's response to Panel question No. 1, para. 2.

fact, subject or event.<sup>140</sup> The particular fact, subject or event must, therefore, be something which exists and is *capable* of being communicated. If something does *not* exist, it cannot be communicated, only the non-existence of the thing can be communicated. This was the case in the investigation at issue, where, for example, Group 1 producers provided responses to MOFCOM that they did not export goods to China (i.e. export sales made by producers did not exist), and Group 2 traders provided information that it was not possible to trace their sales of barley back to specific producers.

139. Unlike Australia's interpretation,<sup>141</sup> China's interpretation would also result in the term "necessary information" having a different meaning depending on whether it applies to the first or second scenario listed in Article 6.8. It is nonsensical that the meaning of necessary information can change depending on whether an interested party "refused access to" or "otherwise did not provide" that information.

140. In particular, China appears to agree with Australia that information which an interested party "refuses access to" is information which "is in existence".<sup>142</sup> China argues that "[f]irst, the failure to provide information is the intention or intentional choice of the interested party. Second, the information that is failed to be provided is in existence and/or in the possession of the interested parties."<sup>143</sup> Therefore, on China's own admission, it was not possible for interested parties to "refuse access to" the information in the investigation at issue because it was not "in existence".

141. The point of distinction between the parties therefore lies in the meaning of "otherwise does not provide". Contrary to China's assertions, the meaning of the phrase "otherwise does not provide" does *not* refer to a "simple objective scenario" and "regardless

<sup>140</sup> Australia submits that Article 12.7 of the SCM Agreement is to be interpreted in the same manner as Article 6.8 of the Anti-Dumping Agreement. China argues that "information that "does not exist or is not in the possession of the interested parties" is mostly relating to Australia's claim in relation to MOFCOM's dumping determination." China erroneously asserts that "information relating to MOFCOM's countervailing investigation is not information of such category, but information that was simply not provided to MOFCOM." (China's response to Panel question No. 1, para. 14). Australia addresses the meaning of "necessary information" in the context of Article 12.7 of the SCM Agreement in greater detail, below, at section VII.D.2.

<sup>141</sup> Australia's response to Panel question No. 1, paras. 1 and 8.

<sup>142</sup> China's response to Panel question No. 1, para. 2.

<sup>143</sup> China's response to Panel question No. 1, para. 2. Australia does not agree that a party's intention is relevant to whether it has "refused access to" necessary information. However, even if it were, there is no evidence in the Final Determination, or elsewhere on the record, that MOFCOM gave any consideration to the interested parties' intention when determining that they did not provide the allegedly necessary information.

whether the information is in existence and/or in the possession of the interested parties."<sup>144</sup> The text does *not* support the view that "whether a particular piece of information 'does not exist or is not in the possession of the interested party' are not conditions to determine whether that information is 'necessary' within the meaning of Article 6.8 and Article 12.7."<sup>145</sup> To the contrary, the meaning of "otherwise does not provide" confirms Australia's interpretation.

142. As Australia explained in response to Panel question No. 1, the use of the term "otherwise", meaning "[i]n another way or ways; in a different manner; by other means; in other words; differently", is a reflection on the action of the interested party, and does not speak to the nature of information to be provided.<sup>146</sup> The context of Article 6.8 confirmed that what was "otherwise not provided" by the interested party must still be "necessary information". It is clear from the ordinary meaning of the words, in context, that when an interested party "otherwise" does not provide information, the information must be something that could be provided, but was not provided by means other than a "refusal" by the interested party.

143. China also argues that its interpretation is supported by the context of Article 2 of the Anti-Dumping Agreement. China argues that "[n]othing in Article 2 provides that if such mandatory information is 'not in the possession of the interested party', the investigating authority would be excused from the legal obligations under Article 2 to rely on such information in its dumping determination."<sup>147</sup> Furthermore, China's argument that "Article 2 specifically envisages certain situations that such mandatory information might not be in existence in business reality, and provides specific alternative approaches for dumping margin calculation in such scenarios"<sup>148</sup> misses the point. Article 2.2 provides alternatives for specific situations where domestic sales are not a suitable basis for normal value. For example, there may be no domestic sales during the period of investigation, but there were domestic sales at other times. This is distinguishable from a situation where information on the record

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<sup>144</sup> China's response to Panel question No. 1, para. 3.

<sup>145</sup> China's response to Panel question No. 1, para. 4.

<sup>146</sup> Australia's response to Panel question No. 1, para 6.

<sup>147</sup> China's response to Panel question No. 1, para. 7.

<sup>148</sup> China's response to Panel question No. 1, para. 8.



demonstrates that certain requested information does not, in fact, exist in the ordinary course of business, and never would, or could, exist.

144. Finally, the object and purpose of the Anti-Dumping Agreement does *not* support China's interpretation. While the parties express the object and purpose of the Agreement in different ways, it is clear from both iterations that the object and purpose is to put in place detailed procedural rules to ensure the integrity and robustness of an investigating authority's decisions.<sup>149</sup> Any determination made on the basis of facts available when information on the record demonstrates that the "necessary information" does not, in fact, exist, cannot be a decision based on facts and complying with detailed procedural rules of the Agreement.

(c) Conclusion

145. Based on the above, China has failed to rebut Australia's claim that there was no necessary information missing from the record. The only information necessary to determine whether Australian barley was being dumped into China was information on Group 2 traders' domestic sales in the ordinary course of trade, and export sales – all of which was provided to MOFCOM by Australian interested parties. To the extent that MOFCOM chose to determine dumping margins for Group 1 producers, all necessary information for such determinations was provided by Australian interested parties. Moreover, MOFCOM has failed to rebut Australia's argument that information which does not exist cannot be necessary.

146. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement by resorting to facts available with respect to Group 1 producers and Group 2 traders.

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<sup>149</sup> China, referring to the Appellate Body in *EU – Biodiesel (Argentina)*, states that the object and purpose of the Anti-Dumping Agreement is "to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures." (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25; China's response to Panel question No. 1, para. 11). Australia has also described the object and purpose of the Agreement as seeking to "ensure objective decision-making based on facts". (Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391; Australia's response to Panel question No. 1, para. 8).

**3. China acted inconsistently with paragraph 1 of Annex II of the Anti-Dumping Agreement by failing to specify in detail information required from Group 1 producers**

147. Australia demonstrated in its first written submission that MOFCOM *first*, failed to inform the Group 1 producers of the information required, and *second*, failed to ensure that the producers were aware that if information was not supplied within a reasonable time, MOFCOM would be free to make its determination on the basis of the facts available. China has failed to rebut Australia's claims.

148. China argues that MOFCOM requested "specific and detailed" information from Group 1 producers.<sup>150</sup> This is factually inaccurate. The notice did not contain specific or detailed instructions as to the information required. No request was made directly to Group 1 producers. MOFCOM instructed traders to forward copies of the questionnaire to producers so that producers and traders could "work together" on questionnaires.<sup>151</sup> MOFCOM recognised that producers and traders jointly submitted questionnaires.<sup>152</sup> Yet, it is clear from the Final Determination that MOFCOM considered the questionnaire responses from producers and traders in isolation. Given MOFCOM chose to structure its investigation such that the Group 1 producers were the primary respondents in the investigation, it was required under paragraph 1 of Annex II to notify those interested parties directly and ensure they were aware of the consequences of failing to comply with the request.<sup>153</sup> China asserts that past panels have found MOFCOM's conduct to be "sufficient to discharge its notification obligations".<sup>154</sup> However, the panel in the dispute to which China refers made findings with respect to the "all others rate", and not the entities whom the investigating authority had determined were the primary respondents.<sup>155</sup>

149. The fact that the Group 1 producers responded is also not dispositive of whether the notice satisfied the requirements of paragraph 1 of Annex II.<sup>156</sup> Given MOFCOM had no

<sup>150</sup> China's first written submission, para. 113.

<sup>151</sup> Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), p. 4, para 6.

<sup>152</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 6.

<sup>153</sup> Australia's response to Panel question No. 7, paras. 37-39.

<sup>154</sup> China's first written submission, para. 110.

<sup>155</sup> See Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.220.

<sup>156</sup> China relies on the panel in *China – Autos (US)* as support for its assertion that because the Group 1 producers "came forward" to submit a questionnaire response, this confirmed that the notice was effective. (China's first written submission,

contact whatsoever with the Group 1 producers at any stage of the investigation there is no way those producers could have had the requisite degree of knowledge concerning the information required, or that they would even be assigned dumping margins given they have no knowledge regarding, or involvement with, the export of barley.<sup>157</sup>

150. China has failed to rebut Australia's claim that MOFCOM failed to specify in detail the information required from Group 1 producers, and to ensure they were aware of the consequences of not providing information within a reasonable time. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraph 1 of Annex II with respect to the Group 1 producers.

**4. China acted inconsistently with paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement by failing to take into account information which was verifiable, appropriately submitted, and supplied in a timely fashion**

**(a) MOFCOM failed to consider the rejected information in light of the criteria in paragraph 3 of Annex II**

151. As Australia set out in its first written submission, MOFCOM failed to take into account information that was verifiable, appropriately submitted, and supplied in a timely fashion. China has failed to rebut this claim. China has been unable to point to any evidence in the Final Determination or elsewhere on the record that MOFCOM considered the information submitted by Group 1 producers *and* Group 2 traders in light of the criteria listed in paragraph 3 of Annex II of the Anti-Dumping Agreement.

152. The parties agree that an investigating authority must "explain in what way the information that it is rejecting does not meet the requirements of paragraph 3".<sup>158</sup> It is clear that MOFCOM failed to do so and China's attempts to demonstrate to the contrary must fail.

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fn 71). Contrary to China's assertions, the panel did not find that a response to questionnaire demonstrated notice was effective *per se*, but rather that public notice "can be effective". (Panel Report, *China – Autos (US)*, para. 7.131). As Australia has explained, in this investigation, given MOFCOM had no contact whatsoever with the Group 1 producers, there is no way it could have made sure that those producers were "aware" of the consequences of not responding, as required by paragraph 1 of Annex II.

<sup>157</sup> Australia's response to Panel question No. 7, para. 38.

<sup>158</sup> China's first written submission, para. 130. See also Australia's first written submission, para. 170.

153. China asserts that the phrase "the respondents 'failed to provide complete and accurate information on the domestic sales of like products in Australia'" indicated that MOFCOM did, in fact, consider the necessary criteria in paragraph 3 of Annex II, and proceeded to reject the information submitted by the Group 1 producers because it could not be used without "undue difficulties".<sup>159</sup> There is no factual basis for China's assertion that the record demonstrates MOFCOM "evaluated the difficulties associated with using" the data.<sup>160</sup> Moreover, to the extent that China argues the record showed the data was "inaccurate" or "incomplete",<sup>161</sup> China does not explain how these alleged deficiencies relate to MOFCOM's ability to use the data without "undue difficulties" as opposed to the data being "verifiable". In any event, China points to no evidence on the record demonstrating that MOFCOM considered the information in light of whether the information was "verifiable", or any of the other criteria of paragraph 3 of Annex II.

154. Despite a lack of record evidence to support China's assertions, China now argues, *ex post facto*, that MOFCOM did consider the *other* factors in paragraph 3, namely whether the information was verifiable, appropriately submitted, and supplied in a timely fashion.

155. China alleges that no export price data was provided and therefore it could not consider this information in light of the criteria of paragraph 3.<sup>162</sup> This is wholly inaccurate. Group 1 producers provided information that they do not export barley. MOFCOM did not consider this information despite it meeting the criteria of paragraph 3 of Annex II. Further, Group 2 traders, the entities responsible for the export of barley, provided complete export sales listings.<sup>163</sup> Again, MOFCOM failed to consider this information in light of the criteria of paragraph 3 of Annex II.

156. As for "production cost and expenses data", China asserts that Australia "did not specifically challenge MOFCOM's rejection of such information".<sup>164</sup> This is incorrect. China's reference to "sales" in the passage to which it refers is taken from MOFCOM's own

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<sup>159</sup> China's response to Panel question No. 9(a), para. 63.

<sup>160</sup> China's response to Panel question No. 9(a), para. 63.

<sup>161</sup> China's response to Panel question No. 9(a), para. 63. See also China's first written submission, para. 135.

<sup>162</sup> China's response to Panel question No. 10, para. 67.

<sup>163</sup> Australia's first written submission, paras. 138-139.

<sup>164</sup> China's response to Panel question No. 10, para. 68.

determination by way of illustration, and does not in any way limit the scope of Australia's claim. Australia submitted that:

In reaching its conclusions that interested parties refused access to or otherwise did not provide necessary information in order to ascertain the normal value and export price, MOFCOM failed to address the quality and quantity of the information that *was* provided, in the manner required by paragraph 3 of Annex II.<sup>165</sup>

157. Australia concluded that:

In summary, MOFCOM had an obligation to take the information submitted by the Group 1 producers and Group 2 traders into account. The information submitted met the criteria of paragraph 3 of Annex II and therefore MOFCOM should have taken it into account in the determinations of normal value and export price. Furthermore, the interested parties acted to the best of their abilities within the meaning of paragraph 5 of Annex II, and therefore MOFCOM was not justified in disregarding the information in the event that it may not have been ideal in all respects.<sup>166</sup>

158. MOFCOM rejected *all information* submitted by Group 1 producers and Group 2 traders, not just "sales" information. It is clear that Australia's claim covers MOFCOM's rejection of *all submitted information*.

159. China also argues that the obligation under paragraph 5 of Annex II does not arise because the information submitted did not satisfy the requirements of paragraph 3 of Annex II.<sup>167</sup> This is incorrect. It is well established that:

[I]nformation that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable.<sup>168</sup>

In *Egypt – Steel Rebar*, the panel considered the criterion of "verifiable", however there is nothing in the text of the Agreement to suggest that a different standard would apply to the other criteria of paragraph 3.

160. There is no evidence on the record to support a finding that Australian interested parties did *not* act to the best of their abilities. As such, to the extent that MOFCOM

<sup>165</sup> Australia's first written submission, para. 175. (emphasis original)

<sup>166</sup> Australia's first written submission, para. 188.

<sup>167</sup> China's first written submission, para. 158.

<sup>168</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.161. (footnotes omitted). See also Australia's first written submission, paras. 172-174.

considered the information submitted was "not ideal in all respects", MOFCOM was *not* permitted to reject that information as the interested parties acted to the best of their abilities. China has failed to rebut this claim.

161. China has failed to rebut Australia's claims that MOFCOM did not take into account information which verifiable, appropriately submitted and supplied in a timely fashion. Even if MOFCOM did consider the information was not ideal in all respects, there is no evidence on the record that the interested parties did not act to the best of their ability and nor did MOFCOM find otherwise. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

(b) MOFCOM failed to consider information submitted by Louis Dreyfus despite it being "timely"

162. The questionnaire response by Louis Dreyfus was submitted one day after the deadline.<sup>169</sup> It is beyond doubt that this information was submitted within a reasonable period of time – particularly in light of the ensuing 15-month period until the Final Disclosure was issued.<sup>170</sup> As such, MOFCOM was not permitted to reject the information as being "untimely" in the absence of considering whether the information was submitted in a "timely fashion".<sup>171</sup>

163. Whether Louis Dreyfus did or did not submit evidence as to the reason for the one-day delay is not, in isolation, dispositive. Whether the delay was explained or not does not detract from the obligation on an investigation authority to consider whether the information was submitted in a "timely fashion" before rejecting it as being untimely.

164. China has failed to rebut Australia's claim that MOFCOM rejected information submitted by Louis Dreyfus as untimely without considering whether it was, nonetheless, submitted within a reasonable period. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

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<sup>169</sup> China's response to Panel question No. 11, para. 69.

<sup>170</sup> Australia's first written submission, para. 190.

<sup>171</sup> Australia's first written submission, para. 168.

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

165. China argues that, contrary to Australia's claim, the Final Disclosure satisfied the requirements of paragraph 6 of Annex II.<sup>172</sup> China's position is untenable. There is no factual or legal basis for China to defend MOFCOM's conduct by maintaining that the Final Disclosure satisfied the requirements of paragraph 6 of Annex II.<sup>173</sup> Australia's position with respect to China's inconsistent conduct is set out extensively in its first written submission and written responses to the Panel's questions.<sup>174</sup>

166. China has failed to rebut Australia's claim that MOFCOM failed to inform parties forthwith that the information was not accepted, failed to provide an opportunity to provide further explanations and failed to consider explanations that were provided. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraph 6 of Annex II of the Anti-Dumping Agreement.

**6. China acted inconsistently with paragraph 7 of Annex II in its selection of facts available**

167. Australia canvassed China's inconsistent conduct with respect to MOFCOM's *selection* of facts extensively in its first written submission.<sup>175</sup> China attempts to defend this conduct by claiming that MOFCOM did, in fact, undertake a comparative evaluation. There is no factual basis for China's position in the Final Determination or elsewhere on the record.

<sup>172</sup> China's first written submission, paras. 162-166; response to Panel question No. 13, paras. 73-75.

<sup>173</sup> See Australia's response to Panel question No. 12, paras. 45-48.

<sup>174</sup> Australia's first written submission, paras. 198-213; response to Panel question No. 12, paras. 45-48.

<sup>175</sup> Australia's first written submission, paras. 214-258.

- (a) China failed to establish why the selected information was a reasonable replacement for the missing necessary information for Group 1 producers

168. China argues that the "steps taken by MOFCOM in its selection of facts to replace the missing necessary information were explicitly described by MOFCOM in the Anti-Dumping Final Determination."<sup>176</sup> This is demonstrably not the case. A review of the Final Determination reveals no such process was undertaken by MOFCOM. This is confirmed by China's attempt to answer questions from the Panel.<sup>177</sup>

169. Most notable is China's assertion that MOFCOM undertook a comparative evaluation of the information on the record in order to select the "most reasonable information".<sup>178</sup> As "direct support" for China's position, China highlights two references to the phrase "comparative analysis" in the Final Determination.<sup>179</sup> Despite the inclusion of the phrase, MOFCOM failed to demonstrate *how* it undertook such an exercise. China similarly fails to point to any supporting evidence.

170. *Even if* China's assertion that MOFCOM did undertake a comparative analysis was supported by the record, no unbiased and objective investigating authority could have arrived at the prices of Australia's exports to Egypt recorded in Global Trade Atlas as "the most reasonable" information.<sup>180</sup> China argues that:

MOFCOM compared all the export destinations of Australia's barley and considered, *inter alia*, whether the destination countries are major producers of barley, whether the countries are at level of economic development similar to China and has open market, and determined Australia's export to Egypt was the reasonable basis for the determination of normal value.<sup>181</sup>

There is no evidence of this evaluation in the Final Determination, or elsewhere on the record, and even if there was, China has failed to explain why "whether the countries are at level of economic development similar to China" would be a relevant factor to determine a reasonable replacement for the prevailing price of barley sold in Australia.

<sup>176</sup> China's response to Panel question No. 16, para. 82.

<sup>177</sup> China's response to Panel question No. 16, paras. 82-84.

<sup>178</sup> China's first written submission, paras. 181. See also China's first written submission, paras. 193-209.

<sup>179</sup> China's response to Panel question No. 16, para. 83.

<sup>180</sup> China's first written submission, para. 181.

<sup>181</sup> China's first written submission, para. 199.



(b) China failed to rebut Australia's claims that the selected information was not a reasonable replacement for the Group 2 traders and Group 3 companies

171. China has failed to rebut Australia's claims that MOFCOM did not engage in a process of reasoning and evaluation of all substantiated facts on the record in order to select facts with a view to arriving at an accurate determination of dumping for Group 2 traders and Group 3 companies.<sup>182</sup>

172. As explained above, China's assertion that MOFCOM did not reference the domestic law concerning the use of facts available with respect to Group 2 traders is not dispositive as to what obligations in the Anti-Dumping Agreement apply. MOFCOM assigned the same dumping margin to all companies in the absence of any explanation as to why that margin was a reasonable replacement for Group 2 traders and Group 3 companies. As such, China acted inconsistently with Article 6.8 and paragraph 7 of Annex II with respect to Group 2 traders and Group 3 companies.

(c) Conclusion

173. China has failed to rebut Australia's claims that MOFCOM failed to select a reasonable replacement for the allegedly missing necessary information for Group 1 producers, Group 2 traders and Group 3 companies. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraph 7 of Annex II.

## **7. Conclusion**

174. China has failed to rebut Australia's claim that MOFCOM incorrectly had recourse to and applied facts available. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement.

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<sup>182</sup> Australia's first written submission, paras. 254-255.

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

**1. Introduction**

175. Given the competitive global market in which grain commodity products such as barley are sold, *any* comparisons between sales of barley would need to take into account factors affecting the price comparability of those sales. This is because even small differences between such sales could affect their comparability. An objective and unbiased investigating authority would not only have recognised this as a basic feature of the markets for the product under investigation, but would also have accepted the clear, objective evidence placed on the record by interested parties to this effect.

176. In this investigation, MOFCOM's selection of facts for normal value made it *even more important* that proper adjustments be made to ensure a fair comparison under Article 2.4. In the circumstances, MOFCOM's failure to make any price adjustments whatsoever is a clear breach of China's obligations under the Anti-Dumping Agreement.

**2. MOFCOM failed to compare sales at the same level of trade**

177. China's justification for MOFCOM's decision to make no price adjustments to ensure sales were compared at the same level of trade hinges on its assertion that because the sales data used to determine normal value and export price were both on an FOB basis, they are at the same level of trade.<sup>183</sup> Australia emphasises that this is an *ex post facto* explanation from China. Nowhere in MOFCOM's Final Determination or Final Disclosure was it made apparent that these sales were on an FOB basis.<sup>184</sup> Rather, MOFCOM's explanation for its decision is limited to the unsubstantiated claim that "[t]he Investigating Authority held that it had made a fair comparison between the export price and normal value at the same level of trade."<sup>185</sup>

<sup>183</sup> China's first written submission, paras. 232-233.

<sup>184</sup> Contrary to China's claim at paragraph 232 of its first written submission that the Global Trade Atlas database, and specifically the information regarding the sources and valuation of Global Trade Atlas' pricing data, is "public information", Global Trade Atlas is a subscription database and available only to those who pay the fee for service.

<sup>185</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 12.

178. However, setting aside the *ex post facto* nature of China's argument, its explanation that normal value and export price were both on an FOB basis does *not*, without more, establish that these sales were at the same level of trade. Determining whether sales are at the same level of trade requires an examination of (i) the delivery terms, which Article 2.4 of the Anti-Dumping Agreement indicates should normally be on an ex-factory basis; and (ii) the actual level of trade of the purchaser, for example, a distributor, wholesaler, retailer or end-user, or, in the present case, a trader.<sup>186</sup> China's explanation only addresses the first element, but does not address the second.

179. In particular, MOFCOM made no determination regarding whether the sales that formed the basis for normal value and export price were to purchasers at the same level of trade. Indeed, given MOFCOM's selection of data from Global Trade Atlas to determine normal value and export price, it would have been unable to do so. Global Trade Atlas does not record information about the level of trade of the purchasers.

180. However, it was clearly improper for MOFCOM to simply assume, as it appeared to do, that the two containerised 27-tonne sales of barley to Egypt that comprised the normal value were at the same level of trade as the thousands of sales to China that comprised the export price. To the contrary, evidence from Australian traders suggested that sales to China were to [REDACTED].<sup>187</sup> Hence, the export price was based on sales [REDACTED].

181. Moreover, evidence from Australian traders demonstrated that the level of trade of purchasers had an impact on price, [REDACTED]. The weighted average ex-factory price of CBH's export sales to China [REDACTED]

<sup>186</sup> MOFCOM's questionnaire, in the attached forms seeking sales data, had a column for "Types of Clients", with the instruction "Please clarify the type of sale channels of each type of transactions", and a separate column for "Terms of Delivery", with the instruction "Please specify the terms of delivery". See Anti-Dumping Foreign Trader or Producer Questionnaire (Exhibit AUS-12), pp. 15-16 and 23-24. Australian interested parties provided entries under Customer Classification or Level of Trade such as [REDACTED] and [REDACTED], and under General Terms of Delivery or General Terms of Payment, entries such as [REDACTED]. See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheets 3-4 and 4-1. See CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-23 (BCI)), pp. 26-30 and 57-60 for explanations of each term of delivery.

<sup>187</sup> See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheets 3-4, Column E (Customer Classification). [REDACTED]. See also CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-29 (BCI)), p. 26.

■■■■■]], while the weighted average ex-factory price of CBH's export sales to China [■■■■■  
■■■■■]].<sup>188</sup>

182. Therefore, there was evidence on the record establishing that sales of barley by Australian traders are made to purchasers at different levels of trade, and that the level of trade of a purchaser will affect the price of barley sales. This evidence provides further confirmation that MOFCOM was required to make adjustments to ensure sales were compared at the same level of trade. MOFCOM failed to do so.

183. In sum, Australia recalls that the obligation to conduct a fair comparison, and in doing so to ensure sales are compared at the same level of trade, lies with the investigating authority.<sup>189</sup> Given the information it used to determine normal value and export price, MOFCOM did not and cannot have ensured that it compared sales made at the same level of trade, in breach of China's obligations under Article 2.4 of the Anti-Dumping Agreement. In this regard, the Panel should reject China's attempts to argue that Australia has not made a *prima facie* case in respect of this claim.<sup>190</sup> In order for Australia to make a *prima facie* case, it is not necessary, as China appears to suggest, for Australia to seek out information that MOFCOM itself did not seek out. Indeed, such evidence is not necessary for Australia to make out its claims in this regard. As Australia has demonstrated above, and in its first written submission, it is clear from the evidence on the record that as a result of its failure to make *any* adjustments, MOFCOM did not compare normal value and export price at the same level of trade. China has failed to rebut Australia's claims and arguments in this regard.

<sup>188</sup> CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 3-4, Column E (Customer Classification), Column S (Quantity (MT) and Column BM (Price ex-factory (AUD) - total value). CBH's evidence of domestic sales showed the same correlation: the weighted average domestic sale price [■■■■■]], and the weighted average domestic sale price [■■■■■]]. See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 4-1, Column D (Level of Trade), Column G (Total quantity of the subject merchandise sold to the Customer) and Column H (Total value of the subject merchandise sold to the Customer).

<sup>189</sup> Appellate Body Reports, *US — Hot-Rolled Steel*, para. 178; *EC — Fasteners (China) (Article 21.5 — China)*, para. 5.163; and *EU — Fatty Alcohols (Indonesia)*, para. 5.20. See also European Union's third party submission, para. 25.

<sup>190</sup> China's first written submission, paras. 230-231.

**3. MOFCOM failed to compare sales made at as nearly as possible the same time**

- (a) Using the same period of investigation for normal value and export price is not sufficient to meet the obligation in Article 2.4 of the Anti-Dumping Agreement

184. As Australia demonstrated in its first written submission, MOFCOM also failed to compare sales at as nearly as possible the same time, as it was required to do under Article 2.4 of the Anti-Dumping Agreement.<sup>191</sup> China's attempt to justify MOFCOM's approach by improperly interpreting the obligations in the Anti-Dumping Agreement in a manner that would render provisions meaningless should be rejected by the Panel.

185. China argues that by using the same time period, namely the *period of investigation*, and using average prices, MOFCOM complied with the requirement to compare sales made at as nearly as possible the same time.<sup>192</sup> Such an approach improperly conflates the obligation to compare sales made at as nearly as possible the same time with the general parameter that investigating authorities must set a period of investigation for dumping investigations. If China's argument were accepted then in any situation where the investigating authority determines the normal value and export price based on sales within the period of investigation, it has complied with the obligation in Article 2.4. This would render the obligation in Article 2.4 to compare sales made at the same time essentially meaningless. The period of investigation "form[s] the basis for an objective and unbiased determination by the investigating authority" and ensures "a consistent and reasonable methodology for determining present dumping".<sup>193</sup> The period of investigation is therefore one of the fundamental requirements of an anti-dumping investigation. It does not discharge the investigating authority's obligation under Article 2.4 to compare sales made at the same time.

186. China acknowledges that "price fluctuations of a product over the POI are common circumstances".<sup>194</sup> Australia agrees, and considers that this fact confirms why the obligation

<sup>191</sup> Australia's first written submission, paras. 294-297.

<sup>192</sup> China's first written submission, paras. 236-238.

<sup>193</sup> Appellate Body Report, *EC — Tube or Pipe Fittings*, para. 80 (citing Panel Report, *EC — Tube or Pipe Fittings*, paras. 7.101-7.102).

<sup>194</sup> China's first written submission, para. 238.

to compare sales made at as nearly as possible the same time is important to ensure a fair comparison between normal value and export price, and is a separate undertaking to the determination of the period of investigation.

187. By way of illustration of the arbitrary outcomes of China's proposed approach, in the present case, the only exports of barley from Australia to Egypt occurred in December 2017 and May 2018. Therefore, if, hypothetically, MOFCOM had used a short, six-month period of investigation of December 2017 to May 2018, it would have arrived at the same normal value, but a different export price, and ultimately a different dumping margin.

188. In search of support for its argument, China takes the findings of a past report out of context. As China's own submission acknowledges,<sup>195</sup> the finding of the panel in *US – Stainless Steel (Korea)* was in the context of Article 2.4.2.<sup>196</sup> The panel's comments with regard to the comparability requirement in Article 2.4.2 cannot be read, as China seems to suggest, to dilute the requirement in Article 2.4 to compare sales made at as nearly as possible the same time.

189. Further, in a paragraph China itself cites, the panel in *US – Stainless Steel (Korea)* stated:

We note that, where changes in normal value, export price or constructed export price during the course of the POI are combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the POI.<sup>197</sup>

In a footnote to this paragraph, the panel indicates:

A particularly dramatic example of this situation would arise where, during a substantial portion of the POI, there were *no* sales in one of the two markets.<sup>198</sup>

190. The panel therefore considered that a situation, as in the present case, where there were no sales in one of the two markets during a substantial portion of the period of investigation, would emphatically be one in which the use of weighted averages for the entire

<sup>195</sup> China's first written submission, para. 237.

<sup>196</sup> Panel Report, *US – Stainless Steel (Korea)*, paras. 6.110-6.125. The issue before that panel was the investigating authority's use of shorter averaging periods during the POI, due to variations in the normal value as a result of significant changes in currency exchange rates.

<sup>197</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.123.

<sup>198</sup> Panel Report, *US – Stainless Steel (Korea)*, fn 125 to para. 6.123. (emphasis original)

period of investigation could provide an inaccurate indication of whether dumping was occurring. This reasoning provides support for Australia's arguments in the current context.

191. For the forgoing reasons, the Panel should reject China's argument that MOFCOM complied with the requirement to compare sales made at as nearly as possible the same time by using average prices of sales during the period of investigation.

(b) The evidence on the record clearly established that the sales on which normal value and export price were based were made at different times, and this affected price comparability

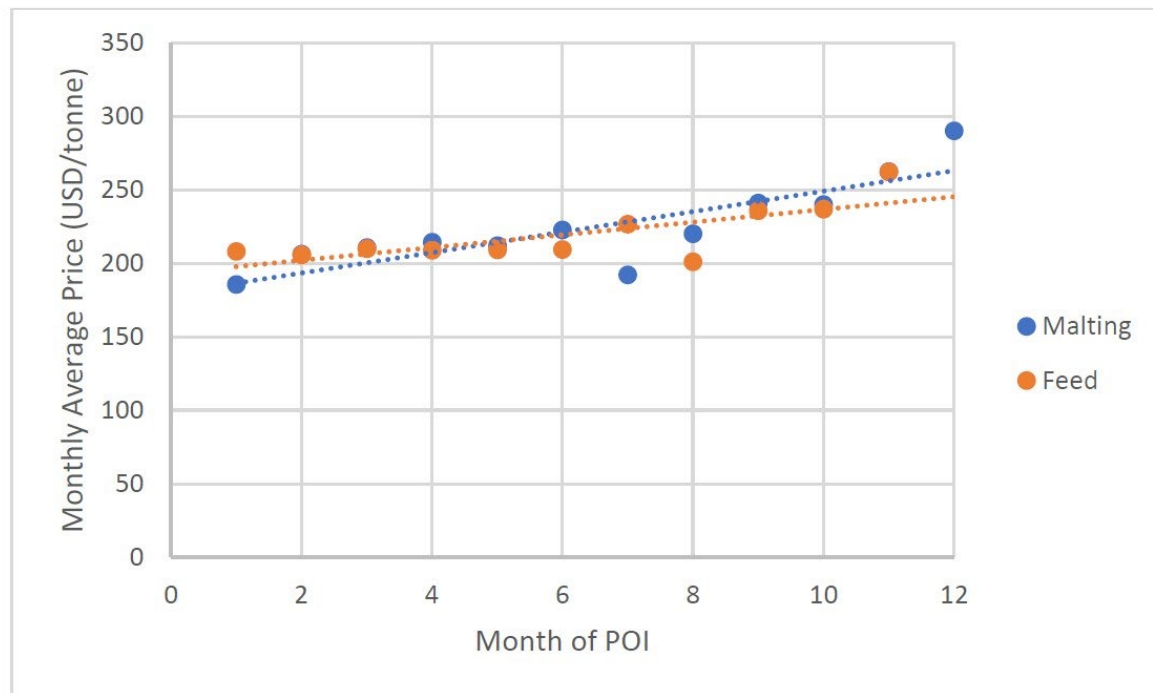
192. China has not responded to Australia's argument, nor to the inescapable reality, that the sales that formed the basis of normal value and export were made at different times – specifically, that exports to Egypt only occurred on two discrete occasions, while exports to China occurred throughout the POI.<sup>199</sup>

193. China has also not disputed the extensive evidence establishing that the timing of sales has an effect on price. For instance, the Global Trade Atlas data MOFCOM used to determine export price showed the variability of the export price of barley to China over time. As shown in the graphic below, the malting and feed barley prices of exports to China trended upwards over the POI.<sup>200</sup> The monthly average price for malting barley changed by over 100 USD between the first and last months of the POI, from USD 185.53 per tonne to USD 290.31 per tonne. These facts were apparent in the data MOFCOM used, but were ignored.

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<sup>199</sup> See Australia's first written submission, para. 294.

<sup>200</sup> Graphic produced by Australia based on data from Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40).

**Figure 1 Price of Australian Barley Exports to China Over the POI**

194. Finally, China accuses Australia of speculation in respect of the timing of contract dates – that is, the dates terms of sale were agreed – of export sales to Egypt.<sup>201</sup> Australia again recalls that the obligation to conduct a fair comparison ultimately lies with the investigating authority.<sup>202</sup> Given the information it used to determine normal value and export price, MOFCOM did not and cannot have ensured that it compared sales for which the contract dates were at as nearly as possible the same time.<sup>203</sup> It is MOFCOM's claim to have complied with this obligation which is "pure speculation". In any event, as Australia has demonstrated above, and in its first written submission,<sup>204</sup> the evidence was clear that the sales that formed the basis of normal value and export price were not made at as nearly as possible the same time. As a result, MOFCOM did not compare normal value and export price at as nearly as possible the same time, in breach of China's obligations under Article 2.4 of the

<sup>201</sup> China's first written submission, para. 240.

<sup>202</sup> Appellate Body Reports, *US — Hot-Rolled Steel*, para. 178; *EC — Fasteners (China) (Article 21.5 — China)*, para. 5.163; and *EU — Fatty Alcohols (Indonesia)*, para. 5.20. See also European Union's third party submission, para. 25.

<sup>203</sup> As Australia established in its first written submission, the evidence was clear that the *contract dates* are the most important dates in terms of comparing sales at as nearly as possible the same time, as the price and other terms of sale are set on these dates. There may be a difference of some months between the contract dates and shipping dates, during which the market price of barley will fluctuate. See Australia's first written submission, para. 296 and evidence cited therein.

<sup>204</sup> Australia's first written submission, para. 294.



Anti-Dumping Agreement. China has failed to rebut Australia's claims and arguments in this regard.

#### **4. MOFCOM failed to make due allowance for factors affecting price comparability**

195. As Australia demonstrated in its first written submission, MOFCOM failed to make due allowance for factors affecting price comparability, as it was required to do in accordance with Article 2.4 of the Anti-Dumping Agreement.<sup>205</sup> China attempts to defend MOFCOM's failure by arguing that Australian interested parties failed to provide evidence that differences in quantities between exports to Egypt and exports to China affected price comparability,<sup>206</sup> and by reiterating MOFCOM's insufficient justification of its treatment of malting and feed barley as a single product.<sup>207</sup> China's arguments misconstrue the obligations in Article 2.4, including the respective roles of investigating authorities and interested parties with respect to due allowance, and are contradicted by the extensive objective evidence on the record establishing that the quality, quantity and conditions of sale of barley sales affected price.

##### **(a) Respective roles of investigating authorities and interested parties**

196. In attempting to defend MOFCOM's failures, China quotes selectively from the Appellate Body report in *EC – Fasteners (China)*,<sup>208</sup> and fails to acknowledge the Appellate Body's clear finding in the very same paragraph China cites, that with respect to requests for adjustment, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".<sup>209</sup> In this respect, Australia agrees with the following observations of the European Union:

- "the investigating authority must first clearly identify to the parties the data that it considers would be necessary to make the demonstration of differences affecting price comparability, and in this context also provide information about the method that it will use for this purpose". This is "a

<sup>205</sup> Australia's first written submission, paras. 298-306.

<sup>206</sup> China's first written submission, paras. 244-245.

<sup>207</sup> China's first written submission, paras. 247-249; response to Panel question No. 18, para. 87.

<sup>208</sup> China's first written submission, para. 244.

<sup>209</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488. (citing Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

*prerequisite* for triggering interested parties' obligation to substantiate their requests for adjustments";<sup>210</sup> and

- the "steps to achieve clarity" referred to by the Appellate Body "presuppose communication in a constructive spirit (instead of outright rejecting requests for adjustments without engaging with those requests)".<sup>211</sup>

197. In the underlying investigation, there was a complete absence of communication from MOFCOM with the Australian interested parties. Australian interested parties were only alerted to the use of export sales to Egypt as the basis for normal value in the Anti-Dumping Final Disclosure, and then allowed 10 days (only 5 of which were business days) to provide comments on the Final Disclosure as a whole.

198. Thus, MOFCOM failed in all respects with regard to the steps required to achieve clarity as to the adjustments claimed. Having done so, it consequentially failed to determine whether and to what extent those adjustments were merited. MOFCOM's failure in this regard cannot be, as China attempts, displaced on to the Australian interested parties.

199. Moreover, it is Australia's understanding that none of the Australian interested parties who provided responses in the investigation actually exported barley to Egypt during the POI. Australia observes that Article 2.4 must be read as a whole, and the final sentence requires that the investigating authority not impose an unreasonable burden of proof on the parties. In the circumstances, requiring concrete evidence of differences affecting price comparability between exports to Egypt and exports to China is clearly imposing an unreasonable burden of proof.

(b) Objective evidence demonstrating that quality and categories of barley affected price

200. As Australia set out in its first written submission,<sup>212</sup> the evidence that was before MOFCOM clearly demonstrated that the quality of barley is a factor affecting price

<sup>210</sup> European Union's third party submission, para. 26. (emphasis added)

<sup>211</sup> European Union's third party submission, para. 28.

<sup>212</sup> Australia's first written submission, fn 343 to para. 300 and evidence cited therein, fn 347 to para. 301 and evidence cited therein, and para. 303.

comparability and MOFCOM was required to make adjustments accordingly. It failed to do so in breach of China's obligations under Article 2.4 of the Anti-Dumping Agreement.

201. Barley is categorised into different categories such as malting, FAQ and feed, based on differences in quality discerned by reference to physical characteristics.<sup>213</sup> As Australia has already demonstrated to the Panel, the evidence on the record clearly demonstrated that the quality of barley, and specifically the different product categories of malting and feed barley, are factors affecting price comparability.<sup>214</sup> In addition to the evidence already highlighted, Australia also draws attention to the following comments from CICC in response to the initiation of the investigation:

[T]he divisions between brewing-grade barley and barley products of other specifications mainly consist of classification concerning technical product indicators, usage in segmented markets, and other aspects.

[T]he differences between brewing-grade barley and other barley products in terms of price are reasonable and standard differences between products of different specifications in the same type.<sup>215</sup>

These comments from CICC support the conclusion, and corroborate the extensive other evidence, that malting and feed barley have different specifications. The fact that the differences between these product categories in terms of price are, in CICC's opinion, "reasonable and standard" does not detract from the fact that the differences between malting and feed barley affect price, and MOFCOM should therefore have accounted for those differences through appropriate adjustments under Article 2.4.

202. In response to this clear evidence, China's simply re-states MOFCOM's findings with regard to product categories. These findings are not only contrary to the evidence on the record, they also misconstrue the requirements of Article 2.4 of the Anti-Dumping Agreement.

203. *First*, MOFCOM, and China, have applied the wrong legal standard. In defending MOFCOM's failure to make due allowance for differences in quality, China cites MOFCOM's conclusions with regard to the scope of the product under consideration, and concludes that

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<sup>213</sup> Australia's first written submission, paras. 338-339.

<sup>214</sup> Australia's response to Panel question No. 18, paras. 57-63.

<sup>215</sup> CICC, "Comments on Initiation of the Anti-Dumping Investigation", 5 March 2019 (English translation) (pages renumbered) (CICC Comments on Initiation of Anti-Dumping Investigation) (Exhibit AUS-100), pp. 5, 6.

"there is no basis for MOFCOM to treat the barley exported to Egypt and exported to China as different products".<sup>216</sup> However, the question under Article 2.4 is whether there are differences, for example in quality or physical characteristics, that are demonstrated to affect price comparability. It is not necessary for interested parties to establish that there are separate *products* in order to substantiate a request for an adjustment under Article 2.4. Australia nevertheless maintains that the evidence established that malting and feed barley are separate *product categories*.

204. *Second*, MOFCOM's justifications for rejecting the evidence of quality and product category differences<sup>217</sup> are each incorrect or irrelevant. Specifically:

- MOFCOM claims malting and feed barley are substantially the same in terms of physical and chemical characteristics. MOFCOM's use of the word *substantially* acknowledges that there are, in fact, differences in the physical and chemical characteristics of these categories. This was well established on the record: malting barley and feed barley are different in terms of the moisture and protein content, colour, shape, size and level of impurities or defective grains.<sup>218</sup> These differences are well-recognised in the industry and affect the end uses to which the barley can be put (specifically, whether it can be used for malting, and the quality of malt produced), and therefore the price.
- MOFCOM claims that barley grown in the same field can be used for malting, feed, human consumption or seed. This is entirely irrelevant. Barley is a rotational crop and can be grown in the same field as other crops such as wheat, rapeseed, chickpeas and lupins.<sup>219</sup> Clearly, these cannot be treated as the same products simply because they are grown in the same field. What is relevant is not where or how barley is grown, but the precise specifications, quality and physical characteristics of barley products, which affect their end uses, and price.

<sup>216</sup> See China's first written submission, paras. 248-249.

<sup>217</sup> See China's first written submission, para. 248.

<sup>218</sup> See Australia's first written submission, para. 338 and evidence cited therein.

<sup>219</sup> See, for example, Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 12.

- MOFCOM claims there is no clear line of demarcation in uses by downstream users of barley. As Australia highlighted in its first written submission, this is contrary to evidence submitted to MOFCOM by Chinese interested parties, which identified a clear distinction between malting and feed barley made by the end-users themselves.<sup>220</sup>
- MOFCOM claims there is no evidence to establish a clear and unified international classification standard for barley products. This is irrelevant. A clear and unified international classification standard is not a prerequisite for investigating authorities to recognise quality and physical differences as factors affecting price comparability. Moreover, Australian interested parties provided evidence of the clear classification standards used in Australia to segregate malting and feed barley.<sup>221</sup>

205. In sum, the evidence on the record clearly demonstrated that the quality of barley is a factor affecting price comparability. MOFCOM's failure to make adjustments to ensure a fair comparison breached China's obligations under Article 2.4 of the Anti-Dumping Agreement. China has failed to rebut Australia's *prima facie* case in this regard.

(a) Objective evidence demonstrating that quantities and terms and conditions of sale affected price

206. As Australia set out in its response to Panel question No. 18, it is an inescapable reality of economics and market-based trade, particularly in the context of a grain commodity product such as barley, that smaller quantities will generally attract higher prices. China does not dispute the fact that the normal value was based on sales that were of substantially smaller quantities and were containerised, in contrast to the sales constituting the export

<sup>220</sup> Australia's first written submission, fn 381 to para. 337 and evidence cited therein. See also China Alcoholic Drinks Association, "Comments on Initiation of the Anti-Dumping Investigation", 5 December 2018 (English translation) (pages renumbered) (China Alcoholic Drinks Association Comments on Initiation) (Exhibit AUS-101), p. 3 "Based on its intended uses, barley can be classified into feed barley, edible barley, and malting barley [...] Malts from malting barley serve as the main raw material for beer brewing and are thus non-substitutable"; and Guangdong Holdings Supertime Malting, "Comments on Initiation of the Anti-Dumping Investigation", 5 December (English translation) (Guangdong Holdings Supertime Malting Comments on Initiation) (Exhibit AUS-102), p. 2 "barley is divided into malting barley and feed barley, and malting barley has better quality and higher price compared to feed barley".

<sup>221</sup> Australia's first written submission, fn 232 to para. 185 and evidence cited therein. See also Glencore Anti-Dumping Questionnaire Response (Exhibit AUS-15), pp. 26-28; Emerald Anti-Dumping Questionnaire Response (Exhibit AUS-31), pp. 8-9; CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-33), pp. 21-22; and Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), pp. 14-15.

price.<sup>222</sup> However, China argues that these factors were not demonstrated to affect price comparability.<sup>223</sup> This argument is not consistent with the facts on the record.

207. Australia set out for the Panel a collection of objective evidence that was on the record before MOFCOM demonstrating that the quantity of a sale of barley is a factor affecting price comparability.<sup>224</sup> In addition to the evidence already highlighted, Australia also draws attention to the following evidence from CBH:

[[REDACTED]]  
[REDACTED]  
[REDACTED]]<sup>225</sup>

208. Objective evidence also demonstrated that the terms and conditions of sale, specifically whether barley is shipped in bulk or containerised, affects price comparability. CBH's export sales data to China supports the conclusion that [[REDACTED]]  
[REDACTED]]. The average ex-factory price of CBH's sales with delivery terms [[REDACTED]]  
[REDACTED]], whereas the average ex-factory price of [[REDACTED]]  
[REDACTED]].<sup>226</sup> [[REDACTED]]  
[REDACTED]]  
[REDACTED]]

209. Evidence from other Australian interested parties confirmed that containerised shipments of grain attract higher prices:

[T]onnes shipped in containers cannot be compared to tonnes shipped in bulk as the export pathways have different cost structures; container exports in most parts are more expensive due to the smaller quantities involved.<sup>227</sup>

[T]he barley exports to Egypt cannot reflect the market conditions and cannot be compared in any form because ... Container transport (rather than bulk cargo transport) is involved in the Australian barley exported to Egypt, which will affect the goods price ...<sup>228</sup>

<sup>222</sup> China's first written submission, para. 244.

<sup>223</sup> China's first written submission, paras. 244-245.

<sup>224</sup> Australia's response to Panel question No. 18, paras. 65-67.

<sup>225</sup> CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-23 (BCI)), p. 38.

<sup>226</sup> See CBH Anti-Dumping Questionnaire Response Data (Exhibit AUS-29 (BCI)), Sheet 3-4, Column P (Terms of Delivery), Column S (Quantity (MT)) and Column BM (Price ex-factory (AUD) - total value).

<sup>227</sup> ADM Trading Comments on Anti-Dumping Final Disclosure (Exhibit AUS-46), para. 16.

<sup>228</sup> Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Duties Final Disclosures (Exhibit AUS-41), p. 6.

210. In such circumstances, Australia submits that an unbiased and objective investigating authority would have recognised both quantities and terms and conditions of sale as factors affecting price comparability and sought out more information to make an appropriate adjustment.

**5. MOFCOM failed to make a fair comparison between normal value and export price**

211. In response to Australia's claim that MOFCOM failed to make a fair comparison, as required under Article 2.4 of the Anti-Dumping Agreement,<sup>229</sup> China explains MOFCOM's actions as follows:

MOFCOM, for comparison purpose, used export price to Egypt and export price to China in a fair and even-handed manner, by using the same period, i.e., Dumping POI; by using all the export transactions during the period; and by using data from the same third-party source.<sup>230</sup>

China's explanation demonstrates China's fundamental misconstruction of the obligation to conduct a fair comparison under Article 2.4 of the Anti-Dumping Agreement. Contrary to China's suggestion, in order to discharge its obligation, it is not sufficient for an investigating authority to simply ensure it did the following in determining normal value and export price:

- use the POI;
- use all transactions during the POI; and
- use the same information source.

212. Once again, China appears to be conflating the basic requirement to determine normal value and export price accurately for the POI, with the investigating authority's obligation to conduct a fair comparison. Australia has already explained why, contrary to China's argument, using the POI is not sufficient to discharge the obligation to compare sales made at as nearly as possible the same time.<sup>231</sup> For the same reason, basing normal value and export price on all export transactions during the POI is not, without more, sufficient to ensure a fair comparison.

<sup>229</sup> Australia's first written submission, paras. 307-310.

<sup>230</sup> China's first written submission, para. 252.

<sup>231</sup> See section V.D.3(a).

213. China's further suggestion that using information from the same third-party source is a means to ensure a fair comparison between the normal value and export price continues its incorrect application of Article 2.4. Normal value and the export price are price variables, based on the prices of sales. What is important is that those *prices*, and the constituent *sales* on which those prices are determined, are subject to a fair comparison. Ensuring that the data on those sales are derived from the same source may, depending on the facts of the case, assist with the comparison process,<sup>232</sup> but it does not absolve the investigating authority from its obligation to comply with the various obligations of Article 2.4. In the present case, it is clear that, despite using data from the same third-party source, MOFCOM failed to make a fair comparison, including by failing to compare sales at the same level of trade, made at the same time, and by failing to make adjustments for factors including quality, quantity and terms and conditions of sale.

**6. MOFCOM failed to indicate to the parties the information necessary to ensure a fair comparison**

214. China has conceded that the only communication to Australian interested parties regarding the fair comparison process during the investigation was in the Final Disclosure.<sup>233</sup> In so doing, China does not explain how this fact accords with the clear statements in past reports that the "dialogue" between the investigating authority and interested parties under Article 2.4 "necessarily starts in the early stages of an investigation and thus precedes the disclosure of essential facts under Article 6.9".<sup>234</sup>

215. Instead, China attempts to justify MOFCOM's failure to engage in such a timely dialogue by pointing to the fact that some Australian interested parties managed to submit comments on the Final Disclosure.<sup>235</sup> However, this fact does not, as China appears to suggest, demonstrate that MOFCOM provided a "meaningful opportunity to request adjustments". Whether an opportunity is meaningful depends on the investigating authority's actions, not

<sup>232</sup> For example, using information from the same source which uses the same currency may remove the need to make currency conversions.

<sup>233</sup> See, for instance, China's first written submission, para. 257, citing the Final Disclosure as the basis for China's claim that "MOFCOM has disclosed all the relevant information on the normal value and export price it determined to the interested parties."

<sup>234</sup> See Australia's first written submission, para. 287; Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.191.

<sup>235</sup> China's first written submission, para. 263.



those of interested parties. MOFCOM's Final Disclosure did not provide a meaningful opportunity to request adjustments, in light of its late timing, inadequate substance, and the fact that the Final Determination was released on the same day as comments on the Final Disclosure were due.

216. Even if, *arguendo*, it was possible for MOFCOM to have complied with its procedural obligation in Article 2.4 by means of the Final Disclosure, the substance of the communication in the Final Disclosure also fell short of MOFCOM's obligations. China argues that "MOFCOM had disclosed as much information on the normal value and export price as 'the foreign producer would need in order to meaningfully participate in the fair comparison process'".<sup>236</sup> However, this argument is hard to reconcile with China's concession that MOFCOM simply indicated the source of information it used for normal value and export price, the fact that it compared weighted averages, and the final figures.<sup>237</sup> This information was neither sufficient to indicate to interested parties what information was necessary to ensure a fair comparison, nor to enable interested parties to meaningfully participate in the fair comparison process. MOFCOM disclosed no information whatsoever regarding the sales underlying the determinations of normal value and export price, making it almost impossible for interested parties to identify and provide evidence regarding factors affecting price comparability between those sales.

## 7. Conclusion

217. MOFCOM's choice of information source for normal value and export price provided no information as to the level of trade, contract dates and terms and conditions of sale of the sales of barley which formed the basis for normal value and export price. In these circumstances, MOFCOM's claim to have compared normal value and export price in a fair and even-handed manner is patently false. Australia again emphasises the well-established principle that the obligation to ensure a fair comparison lies with the investigating authority.<sup>238</sup> MOFCOM rendered itself unable to comply with this obligation.

<sup>236</sup> China's first written submission, para. 258.

<sup>237</sup> China's first written submission, para. 257.

<sup>238</sup> Appellate Body Reports, *US – Hot-Rolled Steel*, para. 178; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.163; and *EU – Fatty Alcohols (Indonesia)*, para. 5.20.

218. Moreover, the evidence on the record clearly established that the sales on which normal value and export price were based were not at the same level of trade, were not made at the same time, and bore differences in quality, quantity and conditions of sale that affected price comparability. MOFCOM ignored this evidence and indeed objective reality. It also failed to engage with interested parties whatsoever regarding the comparison process.

219. In sum, China has failed to rebut Australia's *prima facie* case as set out in its first written submission and responses to Panel questions that MOFCOM breached China's obligations under Article 2.4 of the Anti-Dumping Agreement by:

- failing to compare sales at the same level of trade;
- failing to compare sales made at as nearly as possible the same time;
- failing to make due allowances for factors affecting price comparability;
- failing to make a fair comparison between the normal value and the export price; and
- failing to indicate to the parties the information necessary to ensure a fair comparison.

**E. CHINA FAILED TO ESTABLISH THE MARGIN OF DUMPING ON THE BASIS OF A COMPARISON OF "COMPARABLE" EXPORT TRANSACTIONS IN ACCORDANCE WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT**

**1. China failed to address Australia's claim under Article 2.4.2**

220. China does not engage with the legal basis of the claim set out in Australia's first written submission<sup>239</sup> that MOFCOM breached China's obligations under Article 2.4.2 of the Anti-Dumping Agreement. Instead, China's response is limited to a reference to MOFCOM's finding that there was "no clear and uniformed standard to classify barley into different categories, and there is no clear boundary for barley products used for different purposes".<sup>240</sup>

<sup>239</sup> Australia's first written submission, paras. 321-342.

<sup>240</sup> China's first written submission, paras. 266-269.

221. As Australia has set out above and in its first written submission,<sup>241</sup> the evidence on the record comprehensively established the differences between feed and malting barley in terms of physical characteristics, end uses, tariff classifications and price. This evidence established that feed and malting barley are in fact separate product categories within the product under consideration. The separation of barley into these product categories is governed by industry-wide standards in Australia, and Chinese importers and end-users recognise and conduct business according to these product categories.

222. Hence, as Australia established in its first written submission, in order to comply with the requirement in Article 2.4.2 to calculate margins of dumping based on a comparison between the normal value and *comparable* export transactions, MOFCOM was required to take these separate product categories into account. It failed to do so.

223. In its first written submission, Australia highlighted the Appellate Body's finding in *EC – Fasteners (China) (Article 21.5 – China)* that making adjustments under Article 2.4 is a means by which an investigating authority can comply with Article 2.4.2 where there are product categories on the export price side that are not matched on the normal value side.<sup>242</sup> However, Australia observes that another means to ensure compliance would be to account for different product categories at an earlier stage, by determining separate normal values and export prices for different product categories. In fact, several Australian interested parties suggested that this is what MOFCOM should have done in the underlying investigation.<sup>243</sup>

224. However, MOFCOM did none of these things. Instead, MOFCOM ignored the fact that the sales of malting and FAQ barley to China were non-comparable export transactions with sales of feed barley to Egypt and, as a result, its calculation of the dumping margin was in breach of Article 2.4.2.

## 2. Conclusion

225. China has failed to rebut or even engage with Australia's claim that MOFCOM's calculation of the dumping margin was in breach of Article 2.4.2. Australia recalls the finding

<sup>241</sup> See section V.D.4; Australia's first written submission, para. 338.

<sup>242</sup> Australia's first written submission, para. 328; Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.271 (citing Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.272).

<sup>243</sup> See CBH Anti-Dumping Questionnaire Response (confidential version) (Exhibit AUS-23 (BCI)), pp. 129-130; GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), pp. 250-251.

of the panel in *US – Softwood Lumber V* that the word "comparable" must have been included in Article 2.4.2 for a reason and must serve a purpose.<sup>244</sup> MOFCOM failed to consider the clear evidence that feed and malting barley are separate product categories, affecting comparability, and failed to comply with the requirement to calculate margins of dumping based on *comparable* export transactions.

**F. CHINA ACTED INCONSISTENTLY WITH THE DUE PROCESS FRAMEWORK  
CONCERNING THE DUMPING DETERMINATION**

**1. Introduction**

226. Australia has explained, above, the significance of the "due process" framework established by Articles 6 and 12 of the Anti-Dumping Agreement, and Articles 12 and 22 of the SCM Agreement.<sup>245</sup> In this section, Australia addresses China's "due process" errors pertaining to MOFCOM's dumping determination.

**2. MOFCOM failed to give interested parties ample opportunity to  
present all evidence and full opportunity for the defence of their  
interests**

227. Australia has established in its first written submission that MOFCOM failed to provide interested parties with a full opportunity for the defence of their interests. This is demonstrated through the specific claims Australia set out in its first written submission, but also through the *totality* of MOFCOM's conduct and management of the anti-dumping investigation.<sup>246</sup> When taken as a whole, the effect of MOFCOM's conduct was that interested parties had no meaningful opportunity to defend their interests as required under Articles 6.1 and 6.2, let alone the "full opportunity" as required by these provisions. China has failed to rebut this claim.

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<sup>244</sup> Australia's first written submission, para. 325; Panel Report, *US – Softwood Lumber V*, para. 7.203.

<sup>245</sup> See section IV.

<sup>246</sup> Australia's first written submission, paras. 858-877.

228. Australia has established that MOFCOM failed to give timely notice of deficiencies in the information submitted, and failed to give ample opportunities to present all evidence interested parties considered relevant in relation to MOFCOM's dumping determination.<sup>247</sup>

229. China argues that the rights of interested parties to defend their interests, including the right to comment on MOFCOM's assessment of the data collected, "were observed by MOFCOM" through the publication of the Final Disclosure.<sup>248</sup> This disclosure was not a meaningful disclosure and could not satisfy China's obligations under Articles 6.1 and 6.2.<sup>249</sup>

230. Finally, MOFCOM failed to take into account all of the comments received in response to the Final Disclosure.<sup>250</sup> China argues that there are "ample illustrations" in the Final Determination where MOFCOM took comments into account.<sup>251</sup> Contrary to China's assertion, the Final Determination merely notes comments were received and does not, in any way, explain how the comments were taken into account.

231. China further attempts to evade its obligations under Articles 6.1 and 6.2 by arguing that the "issues raised by Australia was concerning MOFCOM's application of facts available" and "[d]iscussion on the application of facts available, including the relevant procedural issues," are more appropriately dealt with under Article 6.8 and Annex II.<sup>252</sup> This is incorrect. MOFCOM's failure to give notice infected the entire dumping determination, including MOFCOM's obligation to make a fair comparison.<sup>253</sup> In any event, as Australia explained in its written responses to the Panel's questions, to the extent that obligations contained in Article 6.1 overlap with other provisions of Article 6, including the application of facts available, this does not deprive either provision of meaning.<sup>254</sup>

232. China has failed to rebut Australia's claims that MOFCOM failed to give ample opportunities to interested parties to present evidence and failed to give full opportunity for the defence of their interests. For the reasons set out above and in Australia's first written

<sup>247</sup> Australia's first written submission, paras. 868-870. See also Australia's response to Panel question No. 63, paras. 187-194.

<sup>248</sup> China's first written submission, para. 625.

<sup>249</sup> See below, section V.F.4. See also Australia's first written submission, paras. 909-939; response to Panel question No. 12, paras. 45-48.

<sup>250</sup> Australia's first written submission, paras. 871-874.

<sup>251</sup> China's first written submission, para. 630.

<sup>252</sup> China's first written submission, para. 626.

<sup>253</sup> China's failure to comply with the obligations in Article 2.4 is set out above, at section V.D and in Australia's first written submission, section II.C.

<sup>254</sup> Australia's response to Panel question No. 63, para. 194.

submission, China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement.

### **3. MOFCOM failed to provide timely opportunities to see all information**

233. As Australia has explained in its first written submission and written responses to the Panel's questions, MOFCOM failed to provide timely opportunities to see all information, in particular, the data it relied upon to determine normal value and export price.<sup>255</sup> China has failed to rebut this claim. China argues that Global Trade Atlas data is "accessible to all parties."<sup>256</sup> This statement is misleading as Global Trade Atlas data is a subscription service and available only to those who pay the fee for service.

234. In any event, MOFCOM had an obligation to provide *timely* opportunities to see the Global Trade Atlas data. It failed to do so. This is evidenced by the fact that China argues, *ex post facto*, that sales data used to determine normal value and export price were both on an FOB basis, and therefore they are the same level of trade.<sup>257</sup> As the Global Trade Atlas data was never disclosed, this information was not available to interested parties despite it being relevant to the presentation of their cases.

235. China has failed to rebut Australia's claims that MOFCOM failed to provide timely opportunities to see the Global Trade Atlas data relevant to the presentation of their cases and that was used by MOFCOM. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement.

### **4. MOFCOM failed to disclose essential facts**

236. Australia has established that MOFCOM failed to disclose the precise basis for its resort to facts available, and the facts underlying MOFCOM's determination not to make any adjustments.<sup>258</sup> China argues that MOFCOM disclosed these elements in the Final Disclosure.<sup>259</sup> However, the Final Disclosure was clearly not a meaningful disclosure,

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<sup>255</sup> Australia's first written submission, paras. 884-887; response to Panel question No. 64, paras. 195-199.

<sup>256</sup> China's response to Panel question No. 64, para. 219.

<sup>257</sup> See above, para. 177.

<sup>258</sup> Australia's first written submission, paras. 909-938; response to Panel question No. 12, paras. 45-48.

<sup>259</sup> China's first written submission, paras. 670-672.

both because it was not made in sufficient time for the defence of interests and because it did not "fully disclose" the essential facts.<sup>260</sup>

237. *First*, MOFCOM published the Final Determination on the same day that it received comments on the Final Disclosure. As such, there was no meaningful opportunity for parties to defend their interests. Based on the clear terms of Article 6.9 of the Anti-Dumping Agreement, "[s]uch disclosure should take place in sufficient time for the parties to defend their interests." In other words, the purpose of making a disclosure under Article 6.9 is, *inter alia*, for the parties to be able to defend their interests. This necessarily entails that an investigating authority must allow sufficient time to engage with comments from interested parties in defence of their interests. The document MOFCOM published did *not* meet this standard and China has not demonstrated any differently.

238. *Second*, MOFCOM did not "fully disclose" the essential facts, despite China's assertion to the contrary.<sup>261</sup> Australia has explained in detail that MOFCOM failed to explain the precise basis for its resort to and selection of facts available and the factual basis for its refusal to make any adjustments to account for differences in barley quality and product categories, quantities and terms and conditions of sale.<sup>262</sup>

239. China has failed to rebut Australia's claims that MOFCOM failed to inform interested parties of the essential facts in sufficient time for parties to defend their interests. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

**5. MOFCOM failed to give public notice containing sufficient detail of the findings and conclusions reached on all issues of fact and law**

240. China's only defence of MOFCOM's public notice is that the deficiencies raised by Australia were "sufficiently addressed" in the Final Determination.<sup>263</sup> Given the poor quality of MOFCOM's Final Determination, this argument is insufficient to rebut Australia's claims.

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<sup>260</sup> See Australia's first written submission, paras. 909-939.

<sup>261</sup> China's first written submission, para. 674.

<sup>262</sup> Australia's first written submission, paras. 909-938. See above, sections V.C.2, V.C.6 and V.D.4.

<sup>263</sup> China's first written submission, paras. 690-694 and 697-709.

241. China has failed to rebut Australia's claims that MOFCOM failed to set out in sufficient detail the findings and conclusions reached on all issues of fact and law, all relevant information on the matters of law, fact and reasons which led to the imposition of anti-dumping duties, and the reasons for rejecting all arguments made by Australian interested parties. For the reasons set out above and in Australia's first written submission China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

## **6. Conclusion**

242. It is abundantly clear that Australian interested parties had no meaningful opportunity to defend their interests throughout the course of MOFCOM's investigation. MOFCOM failed to notify Australian interested parties of deficiencies in the information they provided, it then failed to provide opportunities to see the Global Trade Atlas data, the purported "reasonable replacement", and the information on which it determined that absolutely no adjustments were required in order to ensure a fair comparison, it failed to disclose the essential facts on which its determination of dumping was based, and then failed to give reasons explaining how it reached its determination, including reasons as to why it rejected all arguments made by Australian interested parties.

243. In light of the totality of MOFCOM's errors concerning the due process framework, MOFCOM's grossly flawed dumping margin of 73.6% is, to some extent, unsurprising, but it is by no means excusable.

244. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 6.1, 6.2, 6.4, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement.

## **G. CONCLUSION**

245. China has failed to rebut Australia's claims that it acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement in respect of MOFCOM's use of facts available in the anti-dumping investigation; Articles 2.4, 2.4.2 and 6.10 of the Anti-Dumping Agreement in respect of MOFCOM's dumping determination; and Articles 6.1, 6.2, 6.4, 6.9, 12.2 and 12.2.2 in respect of MOFCOM's conduct of the investigation regarding the dumping determination.



## VI. AUSTRALIA'S CLAIMS CONCERNING THE SUBSIDY DETERMINATION

### A. INTRODUCTION

246. In its first written submission and responses to questions from the Panel, Australia has established a *prima facie* case that MOFCOM's Final Determination was inconsistent with China's obligations under the SCM Agreement as follows:

- Articles 1.1(a) and 1.1(b) because MOFCOM failed to properly establish that the programs at issue were subsidies consisting of financial contributions that conferred benefits on the barley industry, including because:
  - the SRWUI and the SARMS Programs supported irrigation and water efficiency measures, and the evidence on the record showed that barley is not grown with the aid of artificial irrigation in Australia;
  - the overwhelming majority of payments made pursuant to the SRWUI Program and the VAIJ Fund were payments from one government entity to another;
  - to the extent that any payments were made to non-governmental entities, including under the SARMS Program, MOFCOM erred in characterising such payments (i.e. government purchases of goods) as "direct payments" under Article 1.1(a)(i); and
  - MOFCOM failed entirely to make any determination that a benefit was *conferred* on a recipient.
- Articles 1.2, 2.1 and 2.4 because MOFCOM failed to conduct a proper specificity analysis under Article 2.1, failed to substantiate on the basis of positive evidence that the alleged subsidies were specific to the barley industry and nonetheless subjected the alleged subsidies to the provisions of Part V by imposing countervailing duties;

- Article 12.7 because the circumstances required to permit recourse to facts available were not met and because MOFCOM's subsequent application of facts available, including its selection of facts, was flawed; and
- Articles 12.1, 12.3, 12.4.1, 12.5, 12.8, 22.3 and 22.5 because MOFCOM failed to ensure interested parties were accorded due process in the conduct of the investigation and its determinations.

247. As Australia sets out below, China has failed to rebut these claims. Instead, it referred to or repeated MOFCOM's insufficient findings, sometimes verbatim, and alleged, without substance, that Australia had not made out a *prima facie* case in relation to certain claims. China's inability to put forward any reasoned defence of MOFCOM's flawed and inadequate countervailing duties investigation underscores the weakness of the resulting determination's legal and factual foundation.

## **B. THE EVIDENCE ON THE RECORD DOES NOT SUPPORT MOFCOM'S FINANCIAL CONTRIBUTION OR BENEFIT DETERMINATIONS**

### **1. Introduction**

248. Australia established in its first written submission that the evidence on the record did not support MOFCOM's determination of the existence of either financial contributions to, or benefits conferred upon, Australian barley production.<sup>264</sup>

249. China has failed to rebut Australia's claims. Instead, China has advanced unfounded, novel arguments,<sup>265</sup> or failed to engage with issues entirely.<sup>266</sup> These approaches do nothing to illuminate the Panel or interested parties as to the evidentiary basis for MOFCOM's findings. This is because not only did MOFCOM fail to provide an explanation such that the reasons for its conclusions could be discerned and understood, but the evidence on the record does not support, and in fact directly contradicts, MOFCOM's determinations as Australia sets out below.

<sup>264</sup> Australia's first written submission, paras. 395-418.

<sup>265</sup> See for example, China's first written submission, paras. 309-310 and 329-332.

<sup>266</sup> See for example, China's response to Panel question No. 24(b).

## 2. Irrigation programs did not provide a financial contribution or benefit to Australian barley production

250. As established below, the evidence on the record shows that Australian barley was not produced with the aid of artificial irrigation.<sup>267</sup> It also shows that funds distributed pursuant to the SRWUI and SARMS Programs were applied to irrigation projects. The record shows this to be equally true of those separate and independently administered projects that were implemented with funds received pursuant to the SRWUI Program.<sup>268</sup> Taken together this evidence shows that neither financial contributions nor benefits were provided to Australian barley producers pursuant to these programs.

251. In light of this evidence, an objective and unbiased investigating authority could not have made determinations of financial contributions and benefits pursuant to the SRWUI and SARMS Programs. MOFCOM's determinations in this regard were therefore not consistent with China's obligations under Articles 1.1(a) and 1.1(b) of the SCM Agreement.

### (a) Australian barley is not produced with the aid of artificial irrigation

252. As Australia has set out in prior submissions, Australian interested parties with particular expertise and special knowledge of Australian grain production practices provided evidence to MOFCOM explaining that Australian barley is a rain-fed winter crop, and that the use of artificial irrigation is not cost effective in Australian barley production.<sup>269</sup>

253. *First*, in its response to the countervailing duties questionnaire, the Australian Government explained that "[i]n Australia, barley is overwhelmingly a dryland agricultural crop",<sup>270</sup> "irrigation of barley is exceptionally unlikely",<sup>271</sup> and "there is negligible, if any, barley crop grown under irrigation in South Australia".<sup>272</sup>

<sup>267</sup> See, below section VI.B.2(a).

<sup>268</sup> Australia reiterates its position that these projects are not parts of the SRWUI Program and that MOFCOM did not request information about the projects in its questionnaire.

<sup>269</sup> Australia's first written submission, paras. 390 and 466; responses to Panel question No. 21(a), paras. 84-85 and No. 30, paras. 105-107.

<sup>270</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 7.

<sup>271</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 7.

<sup>272</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 162.

254. *Second*, in response to the anti-dumping questionnaire a number of interested parties provided information substantiating the Australian Government's responses.<sup>273</sup> ADM Trading explained that "Australian barley is a winter crop nourished by rain and *does not grow depending on irrigation*."<sup>274</sup> GrainCorp explained that "Australian barley is a winter crop irrigated by rain but *does not rely on artificial irrigation*."<sup>275</sup> CHS Broadbent explained that "Australian barley is a *rain-fed* overwintering crop, so *irrigation conditions are not necessary* for the growing of barley."<sup>276</sup> Grain Producers Australia also explained that "Australian barley growing is *not artificially irrigated*".<sup>277</sup> Grain Growers also commented that "Australian barley crops do not generally receive artificial irrigation".<sup>278</sup>

255. *Third*, the first indication the interested parties had that MOFCOM's investigation was focused on the SRWUI and SARMS Programs, two programs related to irrigation efficiency, was when MOFCOM issued its Final Disclosure.<sup>279</sup> Indeed, given the irrelevance of artificial irrigation to Australian barley production they could not have anticipated MOFCOM's focus on these programs. Accordingly, interested parties provided more detailed evidence in response to the Final Disclosure explaining that artificial irrigation is not used in Australian barley production in an effort to remedy MOFCOM's erroneous assumptions about Australian barley production methods.

256. Grain Producers Australia commented that "[t]he assumptions used by MOFCOM to estimate Australian costs of production are not an accurate representation of farming costs in

<sup>273</sup> Given the issue of inputs was directly relevant to the anti-dumping investigation it is not surprising the interested parties were deliberate in putting these observations on the record. In contrast, because irrigation is irrelevant to Australian barley production, interested parties had no reason to suspect that evidence relating to irrigation would be of interest to MOFCOM in its countervailing duties investigation. Once this evidence became known to MOFCOM during the anti-dumping investigation, it was also obliged to consider it in the parallel countervailing duties investigation. In the context of considering what factors were known to the investigating authority for the purposes of Article 3.5 of the Anti-Dumping Agreement, the Appellate Body has given broad, practical guidance which provides strong support for the view that where, as is the cases here, an investigating authority receives relevant evidence in one investigation it is obliged to consider it in any parallel investigation. The Appellate Body decided in *EC – Tube or Pipe Fittings* that "a factor is either 'known' to the investigating authority, or it is not 'known'; it cannot be 'known' in one stage of the investigation and unknown in a subsequent stage." (Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178). Given the close connection between the parallel anti-dumping and countervailing duties investigations, as demonstrated in the identical text used throughout MOFCOM's parallel Final Determinations, it would be unrealistic to deem evidence or information known to MOFCOM in the anti-dumping investigation as not being "known" to it in the countervailing duties investigation.

<sup>274</sup> ADM Trading Anti-Dumping Questionnaire Response (Exhibit AUS-32), p. 67. (emphasis added)

<sup>275</sup> GrainCorp Anti-Dumping Questionnaire Response (Exhibit AUS-14), p. 220. (emphasis added)

<sup>276</sup> CHS Broadbent Anti-Dumping Questionnaire Response (Exhibit AUS-33), p. 108. (emphasis added)

<sup>277</sup> Grain Producers Australia Anti-Dumping Questionnaire Response (Exhibit AUS-35), p. 67. (emphasis added)

<sup>278</sup> Grain Growers Comments on Anti-Dumping Final Disclosure and Questionnaire Response (Exhibit AUS-22), p. 95.

<sup>279</sup> MOFCOM could have given an indication of this interest during the intervening 15 months when it had no communication with the interested parties at all.

Australian *dryland* barley production systems."<sup>280</sup> Similarly, Grain Trade Australia observed that "barley grown in Australia is mainly a *dryland crop (i.e., non-irrigated planting)*."<sup>281</sup>

257. CBH was more specific, explaining that:

[The SRWUI and SARMS Programs] are aimed at benefiting farmers for irrigation. However, *the barley sold by CBH Grain is grown on (non-irrigated) dryland*. Therefore, CBH Grain and its affiliated company would in no way be able to benefit from these [alleged subsidies].<sup>282</sup>

258. Grain Producers Australia also concluded that "Australian grain production is generally produced under *dryland agriculture, not using irrigation* and receives no benefit from the Australian Government [SRWUI Program]."<sup>283</sup> The Australian Government also clarified, in relation to the SARMS Program which operated in South Australia only, that "there is no irrigation water available to grow barley in South Australia, so barley producers have not received any benefits under a program that is focused on irrigation."<sup>284</sup>

259. Other comments explained that dryland agriculture was not merely the preferred practice in Australia, but that the cost of artificial irrigation made its use in barley production uneconomical. GrainCorp explained that "[d]ue to cost reasons, irrigation water is usually used for high-value horticultural and grape crops rather than grain crops."<sup>285</sup> The Australian Government also explained that "[i]rrigation water (due to cost) is used on high value horticulture and grape crops, not normally cereal crops."<sup>286</sup>

260. Thus, the evidence on the record makes it clear that the overwhelming preponderance of agricultural practice in Australia is to produce barley without the aid of artificial irrigation.<sup>287</sup> The Australian interested parties included large traders such as CBH and GrainCorp which had knowledge of the production practices of their suppliers, as well as industry associations for grain producers that had specialised knowledge of the practices of

<sup>280</sup> Grain Producers Australia Comments on Countervailing Duties Final Disclosure (Exhibit AUS-60), p. 2. (emphasis added)

<sup>281</sup> Grain Trade Australia and GIMAF Comments on Anti-Dumping and Countervailing Final Disclosure (Exhibit AUS-41), p. 9. (emphasis added)

<sup>282</sup> CBH Comments on Countervailing Duties Final Disclosure (Exhibit AUS-58), p. 4. (emphasis added)

<sup>283</sup> Grain Producers Australia Comments on Countervailing Duties Final Disclosure (Exhibit AUS-60), p. 3. (emphasis added)

<sup>284</sup> Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 19.

<sup>285</sup> GrainCorp Comments on Countervailing Duties Final Disclosure (Exhibit AUS-57), p. 5. (emphasis added)

<sup>286</sup> Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), p. 6. (emphasis added)

<sup>287</sup> The evidence given by Australian interested parties shows that they have no knowledge of Australian commercial barley production being performed in reliance on artificial irrigation. While they do not foreclose the possibility that it may occur in isolated instances, they observe that in the usual course of commercial farming in Australia the cost of artificial irrigation makes it uneconomical for use in barley production.

their members. The consistency of the evidence given by the Australian interested parties and the reasoned explanations provided in support adds weight to its probative value.

261. In contrast, CICC's assertion that Australian barley is produced in reliance on artificial irrigation<sup>288</sup> is not supported by any evidence or explanation. CICC is not an industry association and conceded that it does not have any expertise on Australian agricultural practices, particularly when compared to the expertise of Australian interested parties. Nor did MOFCOM provide any reasoning to explain why it appeared to accept CICC's assertion as against the preponderance of evidence to the contrary.

262. The evidence on the record showed that the SRWUI and SARMS Programs supported irrigation efficiency and water savings measures only.<sup>289</sup> MOFCOM determined this to be true,<sup>290</sup> and China does not contest this fact. Accordingly, taken together with the evidence provided and explanations given that Australian barley is not produced with the aid of artificial irrigation, an unbiased and objective investigating authority could not have reached the conclusion that these programs provided financial contributions to, or conferred benefits upon Australian barley producers. Australia submits that the Panel must therefore find that MOFCOM's finding to the contrary was in error

263. In sum, MOFCOM did not provide a reasoned and adequate explanation as to how the evidence on the record supported its factual findings that barley was produced with the aid of artificial irrigation,<sup>291</sup> nor did it explain why it discounted the information provided by Australian interested parties.<sup>292</sup> These were not the actions of an objective and unbiased investigating authority and the Panel should find that MOFCOM's factual determination and consequential determinations with regard to financial contribution and benefit were inconsistent with Articles 1.1(a) and 1.1(b) of the SCM Agreement.

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<sup>288</sup> CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 13.

<sup>289</sup> The SRWUI Program also included limited "water supply" measures intended to reduce impediments to natural water flows through particular river systems.

<sup>290</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 7 and 9.

<sup>291</sup> See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186.

<sup>292</sup> See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

(b) MOFCOM was not permitted to use CICC's Application as an evidentiary basis to determine financial contribution

264. In response to questions from the Panel, China confirmed that it did not use facts available to determine financial contribution, but rather it used information from CICC's Application and Annex.<sup>293</sup> These statements from China cannot be reconciled.

265. As MOFCOM did not use facts available, it was not permitted use information from CICC as an evidentiary basis to determine that a financial contribution existed. Article 12.7 permits an investigating authority to use facts that are otherwise available, or secondary information, to fill in gaps when necessary information is not supplied by the interested party from whom it was requested.<sup>294</sup> In the context of a determination of financial contribution pursuant to Article 1.1(a), the relevant request for information was from the Australian Government. It is only in the absence of information supplied by the Australian Government that MOFCOM was permitted to use secondary information, including CICC's Application and Annex. By using information from CICC to determine that a financial contribution existed, China acted inconsistently with Article 1.1(a) of the SCM Agreement.

**3. Intra-governmental payments are not financial contributions and did not benefit Australian barley production**

266. As Australia explained in its first written submission, financial transfers from one government entity to another do not amount to financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.<sup>295</sup> China does not dispute this.<sup>296</sup> As Australia sets out below, the evidence on the record in relation to both the SRWUI Program and the VAIJ Fund confirmed that payments were made to other government entities, and not to economic entities. Accordingly, Australia submits MOFCOM was not permitted to determine that the disbursements of funds pursuant to the SRWUI Program and VAIJ Fund to government recipients were financial contributions for the purposes of the SCM Agreement.

<sup>293</sup> China's responses to Panel question No. 22, para. 93, and No. 23(a), para. 94.

<sup>294</sup> See Australia's first written submission, paras. 371-379.

<sup>295</sup> Australia's first written submission, paras. 397-402; response to Panel question No. 20(b).

<sup>296</sup> China has not made submissions or provided responses to questions from the Panel contradicting Australia's submission in this regard.

267. Nonetheless, China now seeks to justify *ex post facto* MOFCOM's inaccurate determination by advancing a novel argument to the effect that, even though MOFCOM requested information about the SRWUI Program and VAIJ Fund only, and even though the scope of these programs is limited to providing funds to other government entities, Australia was obliged to anticipate MOFCOM's unarticulated desire to obtain information on how the recipient government entities applied those funds under separate projects with no organisational connection to the SRWUI Program or VAIJ Fund. In order to make this argument, China is forced to propose new interpretations of the terms "recipient" and "government" but offers no legal or logical argument or reasons in support.<sup>297</sup> These claims are baseless, given the organisational separation between the SRWUI Program and VAIJ Fund and the projects implemented by the recipient government entities with the funds received and MOFCOM's failure to request any information about these projects even though it had knowledge of them.<sup>298</sup>

268. China argues that there "is no record basis for Australia to argue before the Panel that an intermediate allocation of funds internally within the Australian "government" under the two programs are [sic] *end in itself* for the two programs."<sup>299</sup> This is demonstrably untrue. The purpose of the SRWUI Program, as Australia has explained, was to reallocate funds to state and territory governments and other federal government entities to allow them to achieve water savings to ensure the ecological sustainability of the Murray-Darling River system.<sup>300</sup> Similarly, under the VAIJ Fund, funds were allocated to government agencies to allow them to implement projects within their spheres of responsibility. These are common funding models within all governments. Given MOFCOM was aware of the existence of the projects implemented with funds received pursuant to these programs, once the Australian Government provided this explanation, it was incumbent on MOFCOM not to remain passive in the face of this evidence,<sup>301</sup> and to conduct additional enquiries rather than deem that the information was not provided when MOFCOM did not request it. The Australian Government

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<sup>297</sup> China's first written submission, paras. 329-332.

<sup>298</sup> MOFCOM was made aware of the existence of these projects through CICC's Application. An extract of Australia's Committee Notification was annexed to the Application and contained descriptions of these projects. See CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 53-61.

<sup>299</sup> China's first written submission, para. 331.

<sup>300</sup> Australia's first written submission, paras. 383-384; Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 1.

<sup>301</sup> Panel Report, *China – Broiler Products*, para. 7.261; Appellate Body Report, *US – Wheat Gluten*, para. 55.



stood ready to assist with any such enquiries.<sup>302</sup> Australia now sets out the evidence supporting these propositions.

(a) The SRWUI Program is a funding measure limited to providing funds to other government entities

269. China has explained that in determining a financial contribution existed in relation to the SRWUI Program, MOFCOM had recourse to Australia's Committee Notification<sup>303</sup> and the Australian Government's response to the countervailing duties questionnaire.<sup>304</sup> Those documents demonstrated that the transfers in question were made between government entities only. Moreover, as Australia explained in its first written submission, further information provided by the Australian Government for verification purposes via weblink confirmed the reliability of that conclusion.

*i. The SRWUI Program was separate to the so-called "sub-programs"*

270. In its response to the countervailing duties questionnaire, the Australian Government explained that the SRWUI Program was a funding arrangement between the Australian Government and the governments of the various states and territories. Specifically, the Australian Government stated that "[u]nder SRWUIP the Commonwealth provides funding to states and territories",<sup>305</sup> and that the program was "an arrangement between the Commonwealth and State Governments of Australia."<sup>306</sup>

271. Similarly, the Committee Notification, explicitly relied upon by MOFCOM,<sup>307</sup> described the same program structure. *First*, the Notification identifies the organisational separation between the federal SRWUI Program, and the nine projects funded by the recipient state governments and federal government agencies.

<sup>302</sup> Australia has established that, by failing to satisfy itself as to the accuracy of information on which the determination of financial contribution was based, MOFCOM acted inconsistently with Article 12.5 of the SCM Agreement. See below paras. 371-372; Australia's first written submission, paras. 900-908.

<sup>303</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 53-61. See also, fn 296 above.

<sup>304</sup> As explained above, as MOFCOM did not use facts available to determine financial contribution, there was no basis for it to use evidence from CICC's Application and Annex.

<sup>305</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1 and 4.

<sup>306</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-4 and 6.

<sup>307</sup> China's response to Panel question No. 23(a), para. 94.

272. *Second*, under the headings "Background and Authority for the subsidy", the Notification describes six of the nine separate projects as "State-led" indicating that they are administered by state government entities.<sup>308</sup> The remaining three projects are described as "Commonwealth-led",<sup>309</sup> indicating that they are administered by the federal government agencies that received funds under the SRWUI Program and were responsible for administering those irrigation projects. Thus, the description in the Committee Notification makes it plain that that these projects are controlled and administered by those separate state or federal government agencies responsible for administering the irrigation projects. The SRWUI Program, being a funding measure, was separate to the irrigation projects run by those recipient government entities.<sup>310</sup>

273. *Third*, the evidence on the record does not support China's unsubstantiated assertions that these irrigation projects are "integral parts" of the SRWUI Program.<sup>311</sup> The Australian Government's questionnaire response is clear that this is not the case.<sup>312</sup> The Committee Notification on which MOFCOM relied does not support this assertion but, rather, indicates that they were "funded under" the Program. This is consistent with the Australian Government's questionnaire response that the SRWUI Program is a funding measure that allocates funds to government entities that independently administer separate projects that ultimately provided funding to irrigation infrastructure operators in a manner that met the needs of the administering entity's constituency.<sup>313</sup>

274. *Fourth*, as China points out,<sup>314</sup> the Committee Notification was not prepared for the purpose of a dispute. Rather it was drafted in order to provide a short summary of a range of extensive and complex measures and consistent with the notification format agreed by the WTO Subsidies and Countervailing Measures Committee. It therefore is cast in simple language and broad terms. In spite of this, it is accurate and consistent with the Australian Government's questionnaire response and the information provided to verify that

<sup>308</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 55-60.

<sup>309</sup> These are the Private Irrigation Infrastructure Operators Program for New South Wales, the Private Irrigation Infrastructure Program for South Australia, and the On-Farm Irrigation Efficiency Project (Including Pilot Projects).

<sup>310</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 55-60.

<sup>311</sup> China's responses to Panel question Nos. 27(a) and (b).

<sup>312</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 1-6.

<sup>313</sup> The parties do not dispute that the projects were directed to irrigation or water efficiency measures.

<sup>314</sup> China's first written submission, para. 364.

response. China has merely sought to treat a range of independent projects, administered by different authorities, as though they were a single program. Such an approach is not justified on the basis of the evidence on the record.

275. For the foregoing reasons, the information which China has confirmed that MOFCOM relied upon shows that the SRWUI Program was separate and independent to the irrigation projects.

*ii. MOFCOM's questionnaire did not address the  
irrigation projects funded "under" the SRWUI  
Program*

276. Given this structural separation between the SRWUI Program and the projects funded "under" it, Australia could not have interpreted MOFCOM's questionnaire as seeking information about these other projects because they were not "integral parts" of the SRWUI Program and were not referred to in the questionnaire.

277. MOFCOM's questionnaire poses a common set of questions in relation to 32 programs. The questions are not tailored to each program. Each program, including the SRWUI Program, is identified by its title and a brief description. No aspect of the name of the program or the summary paragraph indicates that MOFCOM sought information in relation to the irrigation projects that were implemented by government entities that received funding through the SRWUI Program.

278. Given MOFCOM had before it CICC's Application, including the Committee Notification, MOFCOM had notice of the separate identity of the irrigation projects implemented in reliance on SRWUI Program funding. If MOFCOM intended to include those separate projects within the scope of its investigation and required information about them from the Australian Government, it had ample opportunity to indicate this in its questionnaire or subsequently. It did not do so.

279. Moreover, given that the projects were directed at irrigation and water efficiency measures that were *prima facie* not relevant to barley, in the absence of an express request from MOFCOM, it was reasonable for Australia not to voluntarily provide such information.

*iii. Conclusion*

280. The SRWUI Program was a funding program administered by the Australian Government. It did not encompass the projects pursuant to which funds were ultimately disbursed to irrigation infrastructure operators to undertake irrigation efficiency upgrades. These projects were separately administered, generally by state government agencies and a small number of federal government agencies.

281. In the context of this organisational separation, the Australian Government could only have interpreted MOFCOM's questionnaire as seeking evidence in relation to the SRWUI Program itself and not any of the separately administered irrigation efficiency projects. The Australian Government provided a complete and timely response to MOFCOM's questionnaire.

282. The evidence on the record, including the Committee Notification, which China indicated MOFCOM relied upon, clearly demonstrated that pursuant to the SRWUI Program funds were only transferred from one government entity to another. In light of this evidence, an unbiased and objective investigating authority could not have reached the conclusion that the SRWUI Program provided a financial contribution and benefit to the barley industry. Thus, MOFCOM's determination to the contrary is inconsistent with China's obligations under Articles 1.1(a) and 1.1(b) of the SCM Agreement.

(b) The VAIJ Fund did not provide financial contributions or benefits to barley production

283. As Australia set out in prior submissions, the Australian Government provided detailed records of all payments made pursuant to the VAIJ Fund in its questionnaire response to assist MOFCOM in its investigation.<sup>315</sup> These records demonstrated that all but one of the payments made pursuant to the VAIJ Fund during the POI were from one government entity to another; were therefore not financial contributions; and that none conferred a benefit to the barley industry. Despite the detailed and comprehensive nature of these records, MOFCOM failed to consider them in both its financial contribution and benefit analyses.<sup>316</sup>

<sup>315</sup> Australia's first written submission, paras. 427-428; response to Panel question No. 21, paras. 86-88.

<sup>316</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10-11. As set out above, in the absence of resorting to facts available pursuant to Article 12.7 of the SCM Agreement to determine financial contribution, there was no basis for

Australia notes that the mere fact that financial records are reproduced in the body of a questionnaire response rather than being attached to them does not provide a rational basis for deciding that they do not constitute evidence.<sup>317</sup> As explained below and in Australia's first written submission, the Australian Government provided complete and detailed questionnaire responses in relation to this program, and no necessary information was missing from the record.<sup>318</sup> MOFCOM was obliged to use all of this information in its investigation, but failed to do so.

284. These records show that the funds provided to other government entities were in fact used by those entities. Certain remaining funds were distributed further through grants or other means. Yet, even assuming *arguendo* that these disbursements under separate programs were to be treated as though they were made pursuant to the VAIJ Fund, none of these funds were ultimately provided to barley producers. As such, under the VAIJ Fund no financial contributions nor benefits were provided to barley producers.

285. As Australia explained in its first written submission,<sup>319</sup> the record shows that the VAIJ Fund included two funding streams, the Program Stream and the Infrastructure Stream. The Infrastructure Stream consisted of two programs, being the Major Capital Works program and the Local Roads to Market Program. The Local Roads to Market Program provided funds exclusively to local councils, the lowest of the three tiers of government within the Australian system. All payments were for the purposes of "[u]pgrad[ing] local roads" or conducting "[b]ridge and road stud[ies]" to determine the feasibility of upgrading bridges and roads.<sup>320</sup> Records of these payments are set out at pages 210-215 of the Australian Government's questionnaire response. Australia notes that some 77 such payments were made, though only 40 were within the POI and of those, 12 were not paid in spite of receiving approval.

286. Similarly, pursuant to the Major Capital Works program 14 grant payments were approved between April 2016 and May 2018, but only two were approved during the POI. Of these two payments one was paid to the Victorian Government "Department of Economic

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MOFCOM to disregard the information provided by the Australian Government to determine a financial contribution within the meaning of Article 1.1(a).

<sup>317</sup> China's first written submission, para. 316-328 and 331.

<sup>318</sup> Australia's first written submission, paras. 419-420 and 427-428. See also, section VI.D.2 below.

<sup>319</sup> Australia's first written submission, para. 393.

<sup>320</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 210-215.

Development, Transport, Jobs & Resources, Agriculture Industry Development" for the purpose of conducting "Internet of Things Trials [to] support improved understanding of on-farm IoT networks through trials in four councils."<sup>321</sup> The second payment was made to the "Wimmera Development Association", a non-government regional industry association, for the purpose of conducting a "[s]tudy to explore the opportunities for a Networked Grains Centre of Excellence."<sup>322</sup> The questionnaire response therefore made clear that the first payment was made to a government entity, which used it for the purpose of conducting a technology trial, while the second was made to an industry association for the purpose of conducting a feasibility study.

287. Finally, pursuant to the Program Stream nine payments were approved between July 2016 and June 2018 to agencies of the Victorian Government to allow those agencies to undertake certain government programs and to SproutX, an agricultural technology incubator supported by the Victorian Government. This represents a typical allocation of resources across government entities. Of these nine payments, only five fell within the POI. Of these five, two were not ultimately paid (indicated by "0.00" in the "Actual Paid" column). The remaining three payments were all received by government entities for the purpose of undertaking government programs. Those programs were aimed at facilitating community based on-farm safety programs, undertaking sustainability planning for animal industries, and offsetting agricultural energy costs.<sup>323</sup>

288. The Australian Government provided comprehensive responses to MOFCOM's questions in relation to the VAIJ Fund. These indicated the amount, date, purpose and recipient of all payments made pursuant to the Fund. The evidence on the record confirmed that with one exception,<sup>324</sup> all payments pursuant to the VAIJ Fund within POI were provided to Victorian Government entities to undertake government programs. Accordingly, because the evidence shows that payments were made to government recipients for the purposes of undertaking government programs, MOFCOM's findings of financial contribution and benefit

<sup>321</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210.

<sup>322</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 210.

<sup>323</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), p. 208-209.

<sup>324</sup> This was the payment to the Wimmera Development Association.

are directly contradicted by the evidence on the record and are inconsistent with Articles 1.1(a) and 1.1(b).

#### 4. GrainCorp did not receive funds under the VAIJ Fund

289. MOFCOM determined that GrainCorp, a major exporter of Australian barley, received funds pursuant to the VAIJ Fund. As Australia set out in its first written submission, this determination was contradicted by the evidence on the record.<sup>325</sup> Specifically the Australian Government wrote to MOFCOM explaining that this grant had not in fact been paid because the project did not ultimately proceed. In support of this explanation, the Australian Government provided email correspondence from the responsible agency of the Victorian State Government confirming that this payment was not made.<sup>326</sup>

290. In spite of this explanation and supporting evidence, MOFCOM still determined that this grant payment was made. China, in an attempt at an *ex post facto* rationalisation of MOFCOM's arbitrary and baseless findings, explained in response to Panel question No. 29 that MOFCOM had declined to accept the correspondence as evidence because it did not bear certain official markings or signatures and that even if it had done, it was a mere statement that the grant had not been paid rather than evidence of this fact.<sup>327</sup>

291. Both MOFCOM's and China's positions in relation to this evidence are absurd. The Australian Government attested to the authenticity of the documents in its Comments on the Final Disclosure.<sup>328</sup> Further, official markings, email signatures and personal data were removed from the documents during translation as is common practice. Finally, the correspondence is a confirmation from the agency administering the relevant grant program that it retained the funds that had been approved for payment to GrainCorp in its account. MOFCOM's rejection of this evidence is capricious and entirely without justification.

292. It is clear that MOFCOM's failure to account for this evidence in its Final Determination was not the conduct of an objective and unbiased investigating authority.

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<sup>325</sup> Australia's first written submission, paras. 415-417.

<sup>326</sup> Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 22 and Attachments 1 and 2.

<sup>327</sup> China's response to Panel question No. 29, paras. 114-117.

<sup>328</sup> Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 22.

**5. MOFCOM did not determine that any benefit was conferred**

293. MOFCOM failed to make any determination that any of the three programs *conferred* a benefit on Australian barley production or export. Article 19.4 of the SCM Agreement prohibits the levying of countervailing duties in excess of the amount of the subsidy found to exist. Article 1.1(b) in turn defines a subsidy as existing only where, as a result of the identified financial contribution, "a benefit is thereby conferred". This definition requires the investigating authority not merely to calculate an amount based on certain assumptions, but to establish that as a result of the identified financial contribution, a benefit is conferred upon identified recipients that produce or export the product under consideration. As MOFCOM did not determine that any benefit was actually conferred upon the production or export of Australian barley, one of the essential elements of a subsidy, China was prohibited from levying countervailing duties in any amount on Australian barley.

294. The Final Determination provides two paragraphs in relation to the "Subsidized interest" under the SRWUI Program. China confirmed in its response to Panel question No. 25 that these two paragraphs were the specific statements in the Final Determination which reflected MOFCOM's findings that barley producers or exporters had received a benefit from financial contributions.<sup>329</sup> The first paragraph deals with MOFCOM's baseless recourse to facts available and is not relevant here. The second paragraph states relevantly:

According to the application, the amount of subsidy for the Program is AUD 10 billion. The Investigating Authority determined that the amount of subsidy under this Program was AUD 10 billion and calculated the amount of benefit during the investigation period based on the 10-year amortization term. The Investigating Authority calculated the amount of subsidy received by the barley industry based on the proportion of the cultivated area of barley to the total crop area in 2017-2018, then calculated the amount of subsidy per unit weight of barley based on the total national output of barley, and finally calculated the ad valorem subsidy rate of the Investigated Product, which is 5.82%, based on the CIF weighted average export price during the investigation period by China Customs.<sup>330</sup>

295. Nowhere in this passage does MOFCOM determine that any benefit was conferred on barley production or export. Instead, it merely states that certain calculations were performed on the basis of particular assumptions. The link between these assumptions and

<sup>329</sup> China's response to Panel question No. 25, para. 100.

<sup>330</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9.



the evidence on the record is not explained. Nor is it explained how these assumptions or any of the evidence indicate that any benefit was conferred on barley producers. The *ad valorem* rate proposed is not stated as being the result of any reasoning that indicates that barley production or export in fact benefited from the alleged subsidy programs. In the absence of any determination that a benefit had been conferred on the production or export of Australian barley, let alone supporting reasoning based on evidence, MOFCOM did not determine that a subsidy – as defined by Article 1.1 of the SCM Agreement – existed. Hence, China was prohibited by Article 19.4 from imposing any countervailing duties.

296. MOFCOM similarly failed to determine that a benefit was conferred by the financial contributions it identified in relation to the SARMS Program and the VAIJ Fund. The passages of the Final Determination in relation to these two programs are remarkably similar to that in relation to the SRWUI Program and they suffer from the same absence of evidentiary reasoning.<sup>331</sup> There is no determination that as a result of the financial contributions determined to exist pursuant these two programs, a benefit was thereby conferred.<sup>332</sup> By failing to make this essential determination, MOFCOM failed to determine that the programs under investigation conferred a benefit as defined under Article 1.1(b). For this reason, it was prohibited from imposing countervailing duties by Article 19.4.

## 6. Conclusion

297. MOFCOM disregarded nearly all of the evidence on the record that provided detailed information about the structure, purpose and operation of the three programs it countervailed. In doing so, MOFCOM made determinations that were not only unsupported by the evidence on the record, in many cases they were directly contradicted by that evidence. For this reason, Australia submits that the Panel should find that MOFCOM's investigation was not conducted in accordance with, *inter alia*, Articles 1.1(a) and 1.1(b).

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<sup>331</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10 and 11.

<sup>332</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 10 and 11.

## C. MOFCOM'S SPECIFICITY DETERMINATIONS DID NOT CONFORM TO ARTICLE 2 OF THE SCM AGREEMENT

298. As Australia set out in its first written submission, MOFCOM's determinations of specificity in relation to the three alleged subsidy programs did not proceed in conformity with Article 2.1 of the SCM Agreement and did not meet the standard of clear substantiation on the basis of positive evidence required by Article 2.4.

### 1. Order of analysis

299. As Australia observed in its first written submission,<sup>333</sup> MOFCOM did not engage in a *de jure* specificity analysis. In its first written submission,<sup>334</sup> China argues that the Appellate Body report cited by Australia, *US – Countervailing Measures (China)*, in fact indicates that a *de jure* specificity analysis is only "ordinarily" or "normally" necessary, but that it is not necessary in every case.<sup>335</sup>

300. Australia accepts that the Appellate Body acknowledged that there might be extraordinary or unusual cases in which a *de jure* analysis is not required. However, that is not the case in the matter at issue. In this case, all three countervailed programs are defined in legislation or program documents which were provided to MOFCOM. Further, the evidence on which MOFCOM relied included documents that described the purpose of each program and indicated the scope of eligibility for all three programs.<sup>336</sup> In any event, neither MOFCOM nor China have referred to any evidence on the record nor provided any explanation justifying MOFCOM's approach. This case was "ordinary" and "normal" and not only was it possible for MOFCOM to assess *de jure* specificity on the basis of the evidence before it, but it was also necessary for it to do so. In such circumstances, MOFCOM's failure to conduct a *de jure* analysis before turning to its *de facto* analysis not only defied logic, but was also inconsistent with China's obligations under Article 2.1. China has failed to rebut Australia's claim in this regard.

<sup>333</sup> Australia's first written submission, paras. 488-490, 497-500 and 504-507.

<sup>334</sup> China's first written submission, para. 384.

<sup>335</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.120.

<sup>336</sup> CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), pp. 18-20, 38-39, and 43-44; Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), pp. 53-61; and Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 2-6, 162-171, and 198-215.

## 2. A determination of specificity must always comply with Article 2

301. As explained in detail in section VI.D below and in Australia's first written submission, in making its specificity determinations, MOFCOM used facts available contrary to Article 12.7 of the SCM Agreement. Setting aside the question of whether such recourse was permitted in the circumstances of this case, an investigating authority that legitimately has recourse to facts available under Article 12.7 to determine specificity must nonetheless comply with Article 2, including the obligation to make determinations on the basis of positive evidence.<sup>337</sup> This is because a determination of specificity is made, either implicitly or explicitly, whenever an investigating authority finds a subsidy falls within the scope of the SCM Agreement.<sup>338</sup>

302. Moreover, the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* explained that Article 12.7 "permits the use of facts on record *solely* for the purpose of replacing information that may be missing, in order to arrive at an *accurate* subsidization or injury determination."<sup>339</sup> The use of facts available does not permit an investigating authority to circumvent other obligations set out in the Agreement.<sup>340</sup>

303. As Australia set out in its first written submission, MOFCOM's subsidy determination did not meet the applicable legal and evidentiary standards under the SCM Agreement, including with respect to its finding of specificity. China now attempts, *ex post facto*, to justify this failure by reference to Article 12.7 of the SCM Agreement. However, neither Article 2 nor Article 12.7 permit this.

304. Articles 2.1 and 2.4 required MOFCOM to establish, on the basis of positive evidence, that the alleged subsidy programs were subject to some restriction on access, whether *de jure* or *de facto*, that limited access to the alleged subsidy to certain enterprises or industries. As Australia set out in its first written submission, MOFCOM failed to do so. Moreover, China has failed to rebut this claim.

<sup>337</sup> See Australia's first written submission, para. 365.

<sup>338</sup> Panel Report, *US – Carbon Steel (India)*, para. 7.118.

<sup>339</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293. (emphasis added)

<sup>340</sup> Unless it is expressly permitted, such as in Article 12.5 which states "[e]xcept in circumstances provided for in paragraph 7".

**3. The evidence indicates that barley production was not a predominant user of the funds**

305. MOFCOM did not state the nature of its specificity determinations in its Final Determination. However, China has since explained, *ex post facto*, that MOFCOM's determinations in relation to all three programs were made on the basis of *de facto* specificity.<sup>341</sup> MOFCOM's *de facto* specificity analyses were not clear and were made without reference to any positive evidentiary support. As such, MOFCOM's determinations fall short of requirements of Articles 2.1(c) and 2.4 of the SCM Agreement.

(a) The SRWUI Program was not specific to the barley industry

306. In relation to the SRWUI Program, MOFCOM stated in its determination that "[t]he evidence suggests that the Australian Government gives priority to agriculture and that the Program serves the agriculture."<sup>342</sup> This statement does not refer to any specific evidence at all, and certainly does not indicate that there is any "positive evidence" supporting these propositions.

307. China has explained that MOFCOM's conclusion is drawn from the statements of the SRWUI Program's purpose set out in the Australian Government's questionnaire response where it said the Program's purpose was "to address rural water use, management, and efficiency issues",<sup>343</sup> and the Committee Notification where it was stated that the purpose of this Program "is to improve water use efficiency of the irrigators".<sup>344</sup> China claims that this evidence supports the conclusions that "the Australian Government gives priority to agriculture and that the Program serves the agriculture".<sup>345</sup> This is clearly not the case. The SRWUI Program is focused on irrigation and water efficiency only, and as the evidence on the record clearly indicates, Australian barley production does not use artificial irrigation. Accordingly, the statements of the purpose of the Program cannot indicate that there was some *de facto* limitation on access that favoured the barley industry.

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<sup>341</sup> China's first written submission, paras. 388-392.

<sup>342</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

<sup>343</sup> Australian Government's response to Program-Specific Questions Concerning the Three Programs at Issue in the Government Questionnaire (Exhibit CHN-11), p. 1, as cited at China's first written submission, para. 414.

<sup>344</sup> CICC Application for Countervailing Duties Investigation (Exhibit AUS-8), p. 18, as cited at China's first written submission, para. 414.

<sup>345</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

308. MOFCOM also stated that barley was one of the three crops that together accounted for "about 80% of all crops in terms of the cultivated area, yield and output value in 2017-2018".<sup>346</sup> In its Final Determination, MOFCOM did not indicate the source of this data. China now asserts that it was drawn from statistical data Australia made available to MOFCOM via a weblink in its questionnaire response. Even if this were the case, China's *ex post facto* explanation does not support the conclusion that MOFCOM draws from it – that the SRWUI Program was predominantly used by the barley production industry. Evidence indicating that barley is one of the top three crops in Australia has no probative value with respect to the question of whether or not the SRWUI Program, which is relevant only to irrigation and not agriculture generally, was used predominantly by barley producers. Taken together with the evidence demonstrating that artificial irrigation is not used in the production of Australian barley, it is clear that this evidence does not support MOFCOM's determination.

309. Neither of the two pieces of evidence MOFCOM relied on support its determination that the SRWUI Program was *de facto* specific. For this reason, MOFCOM's determination is not consistent with Article 2.1(c). Given the absence of *any* evidence, it necessarily follows that the determination cannot be said to be "clearly substantiated on the basis of positive evidence" and hence it also fails to conform to the evidentiary standard in Article 2.4.

(b) The SARMS Program was not specific to the barley industry

310. Similarly, in relation to the SARMS Program, MOFCOM stated in its determination that "[t]he evidence suggests that the Government of South Australia gives priority to agriculture. The Program serves the agriculture, aiming to support agriculture and to maintain the productivity of South Australia's primary industry and agribusinesses".<sup>347</sup> MOFCOM also stated that barley was one of the three crops in South Australia that together accounted for "about 86% of all crops in terms of the cultivated area and nearly 100% in terms of yield in 2017-2018".<sup>348</sup>

311. While MOFCOM did not refer to any evidence in support of these statements, China has explained, *ex post facto*, that this assessment was made on the basis of the statements of

<sup>346</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

<sup>347</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

<sup>348</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 9.

purpose in the Australian Government's questionnaire response and information annexed to CICC's Application,<sup>349</sup> and statistical data Australia made available to MOFCOM via a weblink in its questionnaire response.<sup>350</sup>

312. MOFCOM's statements, and the purported evidence underlying them, do not support MOFCOM's conclusion that they provide "reason to suspect that the barley industry is a major user of the funds."<sup>351</sup> Nor do they justify MOFCOM's finding of *de facto* specificity.

313. *First*, MOFCOM's "suspicion" is not one of the "other factors" indicating the presence of *de facto* specificity set out in Article 2.1(c).<sup>352</sup> *Second*, even if this "suspicion" were sufficient to ground a specificity determination, it is not supported by the evidence on which MOFCOM purportedly relied.

314. As was the case in relation to the SRWUI Program, the evidence referred to has no probative value with respect to the question of whether or not the SARMS Program, which is relevant only to one aspect of agriculture, i.e. irrigation, is used by barley producers. This lack of evidentiary support is especially clear in the face of the fact that artificial irrigation is not used in the production of Australian barley at all.<sup>353</sup>

315. Accordingly, MOFCOM's statements, and the purported evidence underlying them, are insufficient to support its determination that the SARMS Program was *de facto* specific. For this reason, this determination is not consistent with Article 2.1(c). Given the absence of *any* evidence, it necessarily follows that the determination cannot be said to be "clearly substantiated on the basis of positive evidence" and hence it also fails to conform to the evidentiary standard in Article 2.4.

<sup>349</sup> China's first written submission, para 419. This includes a description of the purpose of the program in an OECD estimate of agricultural supports. See CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 105.

<sup>350</sup> China's first written submission, para. 419.

<sup>351</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 9. MOFCOM made the same assertion in relation to the SRWUI Program and VAIJ Fund. As such, Australia's arguments in this respect equally apply to those programs. (See Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8 and 11).

<sup>352</sup> China does not contest this translation of MOFCOM's determination. Accordingly, as Australia established in its first written submission, MOFCOM did not establish the existence of any of the "other factors" required by Article 2.1(c) of the SCM Agreement.

<sup>353</sup> See section VI.B.2(a) above.

(c) The VAIJ Fund was not specific to the barley industry

316. In relation to the VAIJ Fund, MOFCOM committed the same error as evidenced in relation to the other two programs. It makes assertions as to the purpose of the VAIJ Fund and the function of the administering authority, while again failing to refer to any evidence in support.<sup>354</sup> On the basis of these two assertions MOFCOM finds that the purpose of the VAIJ Fund is to provide general, broad-based support to "strengthen the performance of the agriculture sector". In attempting to justify MOFCOM's finding, China points to a general description of the purpose of the Fund in an OECD report annexed to CICC's Application.<sup>355</sup>

317. MOFCOM also stated that barley was one of the top three crops in Victoria that together accounted for "84% of all crops in terms of the cultivated area and nearly 89% in terms of yield in 2017-2018".<sup>356</sup> While MOFCOM failed to indicate the source of this data, China asserts this was drawn from the same statistical data Australia made available to MOFCOM via a weblink in its questionnaire response.<sup>357</sup>

318. MOFCOM's statements and the underlying data do not support the conclusion that MOFCOM draws from them, namely that together they provide "reason to suspect that the barley industry is a major user of the funds."<sup>358</sup> As noted above, a "suspicion" is not one of the criteria indicating the presence of *de facto* specificity set out in Article 2.1(c). However, even if this "suspicion" were sufficient to ground a specificity determination, it is not supported by the evidence on which MOFCOM purportedly relies.

319. As with the SRWUI and SARMS Programs, the evidence has no probative value with respect to the question of whether or not the VAIJ Fund, which in reality predominantly funded public road upgrades,<sup>359</sup> was used by barley producers at all. Indeed, as Australia has established,<sup>360</sup> no funds were provided to barley producers. In that light, general statements

<sup>354</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

<sup>355</sup> China's first written submission, para. 422; CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 107. This document includes a description of the program as investing in "enabling economic infrastructure and agriculture supply chains". This is a clear reference to the investment in public roads described in detail in the Australian Government's questionnaire response. It is bewildering that China seeks to deploy this evidence in support of a determination that so clearly contradicts it.

<sup>356</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

<sup>357</sup> China's first written submission, para. 424.

<sup>358</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

<sup>359</sup> Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 210-215.

<sup>360</sup> See above, section VI.B.3.

of purpose and crop yield statistics, the two pieces of evidence on which MOFCOM relied, do not support its determination that the VAIJ Fund was *de facto* specific. For this reason, this determination is not consistent with Article 2.1(c). Given the absence of *any* evidence, it necessarily follows that the determination cannot be said to be "clearly substantiated on the basis of positive evidence" and hence it also fails to conform to the evidentiary standard in Article 2.4.

(d)      Conclusion

320. MOFCOM's findings and the evidence it purportedly relied upon in its specificity determinations had no probative value with respect to the question at issue. These determinations were therefore inconsistent with Article 2.1(c) of the SCM Agreement. Moreover, by failing to substantiate its determinations on the basis of *any* evidence, MOFCOM also failed to substantiate its specificity determination on the basis of "positive evidence" in breach of Article 2.4. China has failed to rebut Australia's claims in this regard.

**4. Conclusion**

321. Australia established in its first written submission that MOFCOM's determination of specificity was inconsistent with China's obligations under Article 2 of the SCM Agreement, including because it did not conform to the relevant legal standard, contradicted the evidence on the record, and was not made on the basis of positive evidence. China's response is merely a repetition of MOFCOM's flawed findings and does nothing to rebut Australia's claims in this regard.

**D. CHINA ACTED INCONSISTENTLY WITH ARTICLE 12.7 OF THE SCM AGREEMENT**

**1. Introduction**

322. There was no basis pursuant to Articles 1 and 2 of the SCM Agreement for MOFCOM to determine that the three "programs" were countervailable subsidies. In its first written submission, and above, Australia has explained how there were no financial contributions within the meaning of Article 1.1(a) of the SCM Agreement. Australia has also established that China acted inconsistently with Articles 1.1(b) and 2 of the SCM Agreement in determining that the alleged financial contributions conferred a benefit and were specific. MOFCOM



attempted to rely on facts available in order to provide a legal basis for its decision. However, MOFCOM failed to properly apply Article 12.7 of the SCM Agreement, including by failing to notify interested parties of the decision to reject information. China has failed to rebut Australia's claims.

323. In this section, Australia reiterates its arguments and rebuts China's attempted defence with respect to MOFCOM's use of facts available. Australia first addresses MOFCOM's resort to facts available with respect to its determinations of benefit and specificity for the three programs at issue. Australia then addresses MOFCOM's selection of facts.

**2. The Australian Government provided complete questionnaire responses showing that no benefit was conferred and the alleged subsidies were not specific**

324. Australia has already explained how there was no necessary information missing from the record for MOFCOM to determine that no benefit was conferred and that the alleged subsidies were not specific.<sup>361</sup> Australia will not repeat the arguments set out in its first written submission and written responses to the Panel's questions, but rather addresses certain arguments made by China.

325. It is clear that MOFCOM was not permitted to resort to facts available, and the Panel must find that China acted inconsistently with Article 12.7 of the SCM Agreement.

**(a) There was no necessary information missing to determine whether a benefit was conferred**

326. China argues that necessary information was missing because no producers or traders provided responses to the questionnaire,<sup>362</sup> and the Australian Government limited its responses to "just one level of the Australian 'government'" in relation to the SRWUI Program and VAIJ Fund,<sup>363</sup> and allegedly did not provide "the list of applicants, eligibility criteria and specific recipients of assistance, and other requested information in the questionnaire response"<sup>364</sup> in relation to the SARMS Fund. Contrary to China's assertions,

<sup>361</sup> Australia's first written submission, paras. 419-440 and 513-525; response to Panel question No. 21.

<sup>362</sup> China's first written submission, paras. 292-293.

<sup>363</sup> China's first written submission, paras. 308, 324, 347 and 351.

<sup>364</sup> China's first written submission, paras. 319 and 350.

MOFCOM had all the necessary information on the record to determine that no benefit was conferred.

327. As for the information in relation to SRWUI Program and VAIJ Fund, Australia explained in its written responses to the Panel's questions,<sup>365</sup> and above,<sup>366</sup> that information concerning the further distribution of funds was not requested. MOFCOM's need of the information was not apparent given the irrelevance of the programs to barley and was not subsequently disclosed to the Australian Government.<sup>367</sup> On that basis, the further distribution of funds pursuant to "sub-programs" wholly unrelated to the programs at issue is not "necessary information". The parties agree that the scope of "necessary information" is informed by the substantive provisions relevant to the determination to be made.<sup>368</sup> On that basis, the necessary information is whether the financial contribution as alleged by MOFCOM conferred a benefit. There was no information missing from the Australian Government's questionnaire response for MOFCOM to determine that the alleged financial contributions under the SRWUI Program and VAIJ Fund did *not* confer a benefit.

328. In any event, China's reliance on the lack of this information as a justification to resort to facts available was not explained by MOFCOM in the Final Disclosure or Final Determination. This is clearly an *ex post facto* rationalisation by China and should be rejected by the Panel.

329. In relation to the SARMS Program, the evidence on the record demonstrated that no barley producers applied for the Program. The Australian Government clearly provided all information in this regard in its questionnaire response. Australia has explained in response to Panel question No. 33 how the information provided by the Government which was not in Simplified Chinese was not required by MOFCOM to determine that no benefit was conferred.<sup>369</sup>

330. It was clear from the evidence on the record that there was no necessary information missing for MOFCOM to determine that no benefit was conferred. In any event, as set out

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<sup>365</sup> Australia's response to Panel question No. 21, paras. 78-80.

<sup>366</sup> See above, section VI.B.3(a)ii.

<sup>367</sup> Australia's response to Panel question No. 21, para. 78.

<sup>368</sup> Australia's first written submission, para. 373; China's first written submission, para. 286. See also China's first written submission, para. 44.

<sup>369</sup> Australia's response to Panel question No. 33, paras. 110-111.

above,<sup>370</sup> it appears from China's response to the Panel's questions that rather than using facts available consistently with Article 12.7 of the SCM Agreement, MOFCOM failed to determine whether a benefit was conferred *at all*.

331. China points to certain sections of the Final Determination where it asserts MOFCOM made these determinations.<sup>371</sup> However, rather than reveal a proper basis to use facts available, these sections *confirm* that MOFCOM simply assumed a benefit was conferred with no evidentiary or legal basis to do so.<sup>372</sup>

(b) There was no necessary information missing to determine whether the programs were specific

332. Australia has clearly explained how there was no financial contribution within the meaning of Article 1.1(a). There was also clearly no benefit conferred to barley producers. As such, there was no subsidy within the meaning of Article 1 of the SCM Agreement and there was no basis for MOFCOM to determine the alleged subsidies were specific.

333. In any event, Australia has explained in detail how there was no necessary information missing for MOFCOM to determine that the alleged subsidies were not specific to the production or export of barley.<sup>373</sup>

334. China does not appear to dispute that an investigating authority makes an assessment of specificity within the meaning of Article 2 of the SCM Agreement even if it uses facts available.<sup>374</sup> Moreover, China does not dispute that the question of whether information is "necessary" within the meaning of Article 12.7 is informed by the determination an investigating authority must make. Rather, China argues that MOFCOM determined the three alleged subsidies were *de facto* specific within the meaning of Article 2.1(c), on the basis of facts available.<sup>375</sup> China goes on to argue that the table included in its exhibit, Questions and Responses Relating to Specificity (Exhibit CHN-12), "clearly demonstrated, for each of the

<sup>370</sup> See section VI.B.5.

<sup>371</sup> China's response to Panel question No. 26, para. 103.

<sup>372</sup> MOFCOM appears to have taken the same approach with respect to its determination of financial contribution. Although China now asserts it did not use facts available for these determinations, it is unclear on the face of the Final Determination how, and on what basis, MOFCOM ascertained there to be a financial contribution in each of the three subsidy programs. It appears MOFCOM just deemed a financial contribution to exist, without any evidentiary basis to do so.

<sup>373</sup> Australia's first written submission, paras. 513-525.

<sup>374</sup> Australia's first written submission, para. 365.

<sup>375</sup> China's first written submission, para. 388.

programs at issue, Australian Government failed to provide information necessary for MOFCOM's determination of *de facto* specificity of the programs".<sup>376</sup> A review of the "relevant information requested by MOFCOM" (second column of the Exhibit) in light of the "Response provided by Australian Government" (third column of the Exhibit) and in light of the above explanations regarding "necessary information", clearly establishes that none of the information that was missing was allegedly "necessary" for MOFCOM's specificity finding.

335. In any event, China provides no explanation as to where MOFCOM determined that the necessary information to determine *de jure* specificity, an element of specificity which it completely ignored, was requested and not provided.<sup>377</sup>

(c) An interested party cannot refuse access to information  
which does not exist

336. Australia has explained in detail, above, how an interested party cannot refuse access to information which does not exist in the normal course of business in the industry in question.<sup>378</sup>

337. China asserts that "the information relating to MOFCOM's countervailing investigation is not information of such category, but information that was simply not provided to MOFCOM."<sup>379</sup> China's assertion is incorrect. MOFCOM used facts available, *inter alia*, because it alleged application and approval documents for the subsidy programs were not provided.<sup>380</sup> The Australian Government provided information in its questionnaire response about applicants and recipients of funds from the programs as requested and *where applicable*.<sup>381</sup> If documents did not exist, because, for example, no barley producer or trader applied for funding under the VAIJ Fund, the SRWUI Program, or the SARMS Program,<sup>382</sup> the

<sup>376</sup> China's first written submission, paras. 396-397.

<sup>377</sup> See above, section VI.C.1.

<sup>378</sup> See above, section.V.C.2(b)iv. See also Australia's written response to Panel question No. 1, paras. 1-8; first written submission, paras. 429-433.

<sup>379</sup> China's response to Panel question No. 1, para. 14.

<sup>380</sup> China argues that it is not appropriate for Australia "to raise application and approval documents in isolation as if that was the sole basis for MOFCOM [sic]." (China's first written submission, para. 353).

<sup>381</sup> See Australian Government Countervailing Duties Questionnaire Response, Section 2 (Exhibit AUS-50), pp. 208-215, providing precise detail about the identity, purpose and amount of all funds applied for, approved and paid out, under this program.

<sup>382</sup> The single exception to this is GrainCorp. GrainCorp did not receive any funding under the program as the funded project did not proceed. See above, section.VI.B.4; Australian Government Comments on Countervailing Duties Final Disclosure (Exhibit AUS-59), para. 22 and Attachments 1 and 2.

Australian Government could not, and therefore did not, provide them. As Australia explained in its first written submission, the *absence* of the information which MOFCOM claimed interested parties had not provided supported *negative* determinations under Article 1.1 and, where applicable, Article 2 of the SCM Agreement, rather than recourse to facts available under Article 12.7.

(d) MOFCOM improperly rejected questionnaire responses as  
being untimely

338. China has confirmed that submissions from Louis Dreyfus, Bunge, Agracom and Riordan were received four to seven days after the deadline.<sup>383</sup>

339. Given the ensuing 15-month period until MOFCOM published the Final Disclosure, it is implausible that MOFCOM could not have considered submissions that were, at most, received seven days after the deadline.<sup>384</sup> In any event, there is no evidence on the record that MOFCOM considered whether, despite being submitted after the deadline, the questionnaire responses were submitted within a reasonable period.<sup>385</sup>

(e) MOFCOM failed to notify interested parties of its decision  
to use facts available

340. Finally, and perhaps most importantly, China has failed to provide any defence to MOFCOM's complete failure to give notice of its decision to reject all the information submitted and its use of facts available.

341. At the outset, the parties agree that Article 12.7 contains an obligation to notify interested parties that their information has been rejected.<sup>386</sup> China argues that MOFCOM did, in fact, properly notify interested parties of its decision in the Final Disclosure.<sup>387</sup> Australia has explained how the Final Disclosure was *not* a meaningful disclosure and does not satisfy the obligation in Article 12.7.<sup>388</sup>

<sup>383</sup> China's response to Panel question No. 40(a), para. 137.

<sup>384</sup> Australia's first written submission, para. 435.

<sup>385</sup> As explained in Australia's first written submission, even if information is submitted after a deadline, but within a reasonable period, an investigating authority is not entitled to resort to facts available. See Australia's first written submission, paras. 434-435.

<sup>386</sup> China's response to Panel question No. 41, para. 139.

<sup>387</sup> China's first written submission, paras. 360-362 and 401-402.

<sup>388</sup> Australia's response to Panel question No. 41, paras. 129-135.

342. China repeatedly alleges that there were "serious deficiencies" in the information submitted by the Australian Government. Australia does not accept that the questionnaire response from the Government was deficient, however to the extent that MOFCOM considered information it required was not provided, these deficiencies could have been addressed had the Australian Government received adequate notice.<sup>389</sup> MOFCOM was not permitted to use facts available in the absence of *any* notification of its decision to reject information.

(f) Conclusion

343. As set out above, in responses to the Panel's questions and in Australia's first written submission, there was no necessary information missing from the record for MOFCOM to determine that no benefit was conferred under the three alleged subsidies, and that the alleged subsidies were not specific. China has failed to rebut Australia's claims that there was no necessary information missing from the record, and that information which does not exist in the normal course of business cannot be necessary information within the meaning of Article 12.7. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

344. China has also failed to rebut Australia's claims that MOFCOM improperly rejected questionnaire responses from Louis Dreyfus, Bunge, Agracom and Riordan as being untimely and did not consider whether those responses were, nonetheless, submitted with a "reasonable period". For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

345. Finally, China has failed to rebut Australia's claims that MOFCOM failed to notify the Australian Government and interested parties that the entirety of the information they submitted was rejected and MOFCOM was making determinations on the basis of facts available. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

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<sup>389</sup> See also Australia's response to Panel question No. 42, paras. 136-142.

**3. MOFCOM failed to select a reasonable replacement for the allegedly missing necessary information**

346. Assuming, *arguendo*, MOFCOM was permitted to resort to facts available to determine benefit and specificity, China has failed to demonstrate how MOFCOM undertook a process of reasoning and evaluation in order to arrive at an accurate determination of benefit, specificity and ultimately, its determination that there were countervailable subsidies. It is clear that MOFCOM failed to select reasonable replacements for the allegedly missing necessary information, and as such, China acted inconsistently with Article 12.7 of the SCM Agreement. Below, Australia does not repeat the arguments made in detail in its first written submission but addresses the main deficiencies in China's attempted defence of MOFCOM's selection of facts.

**(a) MOFCOM failed to select a reasonable replacement to determine benefit**

347. MOFCOM's determination in relation to each of the programs at issue was fundamentally flawed and completely disregarded the evidence on the record. That evidence clearly identified individual payments made pursuant to each of the three investigated programs. Rather than examine these individual payments, MOFCOM decided to treat general budget amounts for entire programs as though they were payments to producers, even though the evidence made plain that this was not the case. MOFCOM clearly failed to select a reasonable replacement to arrive an accurate determination of subsidisation. China has failed to rebut this claim.

***i. MOFCOM's determination of benefit under the SRWUI Program***

348. MOFCOM "determined that the amount of subsidy under [the SRWUI] Program was AUD 10 billion".<sup>390</sup> The only reasoning it provided to explain the evidentiary basis for this determination was that it "considered the information submitted by the Applicant to be an available fact. According to the Application, the amount of subsidy for the Program is

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<sup>390</sup> Countervailing Duties Final Determination (Exhibit AUS-11), pp. 8-9.

AUD 10 billion."<sup>391</sup> The information on the record, including the Australian Government questionnaire response and the Committee Notification, does not support this determination. In fact, this information confirms that MOFCOM's selected facts were *not* a reasonable replacement.

349. In its Application, CICC does not claim that the AUD 10 billion was the benefit conferred, only that this was the total value of the SRWUI Program, i.e. that this was the Program budget. The statement that the SRWUI Program was an "AUD 10 billion program" was drawn from the Committee Notification. In the Notification this phrase is used to describe the total budget of the Program over some 16 years. It is never suggested that this amount represents any grant amount actually paid to any recipient or group of recipients. To the contrary, the Committee Notification sets out amounts that were actually paid under the various irrigation infrastructure projects listed therein. These amounts are set out in Annex A, below. However, these payments were not part of the SRWUI Program, were made to government recipients, outside the POI, and conferred no benefit on barley production and export. Even if these payments were relevant, MOFCOM was also required to consider whether the payments provided recurring grants or needed to be apportioned over an appropriate period. MOFCOM was required to evaluate all evidence on the record in selecting a reasonable replacement in order to arrive at an accurate determination of subsidisation. It failed to do so. Accordingly, there was no basis for MOFCOM to determine that any benefit was conferred on barley production or export under this program.

*ii. MOFCOM's determination of benefit under the  
SARMS Program*

350. MOFCOM determined simply that it "regard[ed] the budget of AUD 65 million of the [SARMS] Program in 2017-2018 provided in the answers as the subsidy for the Program".<sup>392</sup> MOFCOM's determination is based not on facts or evidence but on its decision to "regard" the budget of a program as though it were an amount paid out as a grant. In circumstances where the evidence on the record demonstrates this to be false, this is not a permissible basis for a determination.

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<sup>391</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 8.

<sup>392</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 10.



351. Evidence of all payments made pursuant to the SARMS Program were set out in the financial records attached to the Australian Government's questionnaire response.<sup>393</sup> These records indicate both grant amounts that were approved and the amounts actually paid. They provide dates for all payments and indicate the industries to which recipients belong. Accordingly, the evidence on the record made it possible for MOFCOM to calculate the actual amounts paid during the POI. These records indicate, for example, that the total funds actually distributed during the POI pursuant to the SARMS Program Irrigation Industry Improvement Program (of which Investment Stream One – Irrigation Efficiency is a part) sum to [REDACTED],<sup>394</sup> substantially less than the AUD 65 million budget amount MOFCOM chose to use in its calculations. MOFCOM was required to evaluate all evidence on the record in selecting a reasonable replacement in order to arrive at an accurate determination of subsidisation. It failed to do so.

352. MOFCOM was required to consider the actual amounts paid, whether they were paid to barley producers or exporters, whether receipt of these funds benefited barley production or export, whether in light of the proper characterisation of the payments (i.e. as part of government purchases of goods) benefit needed to be assessed in terms of adequacy of remuneration against the prevailing market conditions, whether or not they were paid during the POI, and whether the program provided recurring grants or needed to be apportioned over an appropriate period. China points to no evidence on the record where MOFCOM considered any of these issues when selecting replacement facts or at any stage in its determination, confirming that MOFCOM's selection of facts was *not* a reasonable replacement.

*iii. MOFCOM's determination of benefit under the  
VAIJ Fund*

353. Instead of considering the detailed evidence provided in relation to the VAIJ Fund, MOFCOM dismissed it without any evaluation and chose to "regard the budget amount of

<sup>393</sup> SARMS Program, Grant Payments, (Exhibit AUS-54 (BCI)); SARMS Program, 3IP Applicants by Industry (Exhibit AUS-55 (BCI)). Australia notes that given the absence of any narrative in these records no substantial translation was required.

<sup>394</sup> To arrive at this figure, Australia calculated the sum of all amounts in the "Actuals Paid" column with corresponding dates during the POI, as set out in SARMS Program, Grant Payments (Exhibit AUS-54 (BCI)), pp. 6-8. This analysis is also set out at section III.D.2(b)(ii) of Australia's first written submission.

AUD 66.84 million of the Program in 2017-2018 provided in the answers as the subsidy for the Program".<sup>395</sup> Analysis of the payments made under the Fund is set out above.<sup>396</sup> MOFCOM was required to evaluate all evidence on the record in order to arrive at an accurate determination of subsidisation. It failed to do so. Moreover, China points to no evidence on the record where MOFCOM considered the evidence on the record indicating the vast bulk of the payments under the Fund were provided to government entities, outside the POI, and that all payments were provided for purposes that did not benefit barley production or export. Even if these payments had been relevant, MOFCOM was also required to consider whether the payments provided recurring grants or needed to be apportioned over an appropriate period. The absence of any evidence of this consideration by MOFCOM confirms its selection of facts was *not* a reasonable replacement.

#### *iv. Conclusion*

354. China argues that "MOFCOM's whole process of subsidy amount calculation was based on facts, not assumptions".<sup>397</sup> To the contrary, the only determination based on facts would have been that the financial contributions pursuant to each alleged program did *not* confer a benefit.

355. China points to *no evidence at all*, either in the Final Determinations or elsewhere on the record, showing MOFCOM evaluated all evidence on the record in order to arrive at an accurate determination of subsidisation.<sup>398</sup> To the extent that the Panel may consider China's arguments offer some justification for MOFCOM's actions, those arguments are entirely *ex post facto* and should be disregarded.

356. China does not explain how MOFCOM could have arrived at a benefit determination for the SRWUI Program and SARMS Program when there was evidence on the record that barley is an unirrigated crop in Australia. In relation to the SARMS Program and VAIJ Fund, after rejecting all information provided by the Australian Government because of the "defects", China does not explain why information from the same questionnaire response was nonetheless "reasonable information" and why only that information was "reasonable" in

<sup>395</sup> Countervailing Duties Final Determination (Exhibit AUS-11), p. 11.

<sup>396</sup> See above, section VI.B.3(b).

<sup>397</sup> China's first written submission, paras. 368, 374 and 378.

<sup>398</sup> See China's first written submission, paras. 363-379. In this section China does not refer to any evidence on the record.

light of the extensive *other* information provided by the Australian Government.<sup>399</sup> As Australia explained in its first written submission, MOFCOM's use of the information was highly selective.<sup>400</sup> MOFCOM arbitrarily excluded from consideration all other information provided by the Australian Government.

357. Rather than undertaking the required evaluation of all evidence on the record, MOFCOM selectively chose to use evidence such as budget amounts that improperly inflated its determination of benefit, and ultimately its subsidy calculations. In reality the figures chosen by MOFCOM have no probative value. MOFCOM failed to consider whether funds were in fact provided to barley producers or exporters, in what amounts, and for what purposes. Instead of undertaking this type of analysis MOFCOM merely deemed certain amounts to be the "amount of subsidy" in relation to each program. MOFCOM was required to consider all the evidence on the record when selecting a reasonable replacement for the allegedly missing information in order to arrive at an accurate determination of subsidisation. It failed to do so.

358. China has failed to rebut Australia's claims in this regard. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

(b) MOFCOM's selection of facts for specificity was not based on any evidence

359. China argues that MOFCOM's determinations of specificity were substantiated on the basis of positive evidence<sup>401</sup> and were reasonable replacements.<sup>402</sup> To the contrary, China's attempted defence of MOFCOM's actions *confirm* that the alleged subsidies could not have been specific, and MOFCOM had no positive evidence to demonstrate otherwise.

360. MOFCOM's specificity determinations for all three programs were based on the alleged "purpose" of each of the programs, coupled with "the importance of barley products among all crops in Australia".<sup>403</sup> As Australia explained in its first written submission and

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<sup>399</sup> China's first written submission, paras. 374 and 378.

<sup>400</sup> Australia's first written submission, paras. 463-464 and 473-474.

<sup>401</sup> China's first written submission, para. 412.

<sup>402</sup> China's first written submission, para. 425.

<sup>403</sup> China's first written submission, paras. 414-415, 418-419 and 422-423.

above, even assuming that MOFCOM's unsubstantiated factual premise concerning the relative "importance" of barley is accurate, it does not explain how the programs are specific to the barley industry.<sup>404</sup> These were clearly determinations made on the basis of mere assumptions, not positive evidence as China asserts.<sup>405</sup>

361. China has failed to rebut Australia's claim that MOFCOM failed to select a reasonable replacement to determine whether the alleged subsidies were specific. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

#### **4. Conclusion**

362. China has failed to rebut Australia's claim that MOFCOM incorrectly had recourse to and applied facts available in order to determine benefit and specificity for the three alleged subsidies. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.7 of the SCM Agreement.

### **E. CHINA ACTED INCONSISTENTLY WITH THE DUE PROCESS FRAMEWORK CONCERNING THE SUBSIDY DETERMINATION**

#### **1. Introduction**

363. In this section, Australia addresses China's "due process" errors pertaining to MOFCOM's subsidy determination.

#### **2. MOFCOM failed to give interested parties ample opportunity to present all evidence**

364. Australia has established that, as was the case with MOFCOM's anti-dumping investigation, MOFCOM failed to provide interested parties with ample opportunities to present evidence. This is demonstrated through the specific claims Australia set out in its first written submission, but also through the *totality* of MOFCOM's conduct and management of the countervailing duties investigation.<sup>406</sup> When taken as a whole, the effect of MOFCOM's

<sup>404</sup> Australia's first written submission, para. 529. See above, section VI.C.3.

<sup>405</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.143.

<sup>406</sup> Australia's first written submission, para. 859.

conduct was that interested parties had no meaningful opportunity to defend their interests as required under Article 12.1. China has failed to rebut this claim.

365. *First*, the parties agree that extensions should be granted where "practicable".<sup>407</sup> China asserts that the length of time is at the discretion of the investigating authority for its consideration of the need to control its inquiry and reach a timely completion of the proceeding.<sup>408</sup> After questionnaires were issued, MOFCOM proceeded to take 15 months to complete its investigation. China has failed to establish why granting an extension of a longer period of time would have prevented MOFCOM from reaching a timely completion, given the context of MOFCOM's extended investigation.

366. China also argues that Australia failed to show that the rights of interested parties to present evidence was "prevented".<sup>409</sup> The fact that interested parties complied with the deadline imposed on them, despite them asking for a longer period, cannot be used as evidence that a longer of period of time was not practicable or that interested parties had ample opportunity to present evidence. By providing an extension of only two business days to respond to the questionnaire, MOFCOM failed to give interested parties time to prepare evidence they considered relevant. Interested parties demonstrated cause as to why an extension was warranted, and MOFCOM did not explain why an extension of a period longer than two business days, and closer to what was requested, was not "practicable". Thus, for the reasons set out above, China has failed to rebut Australia's claim that an extension of two business days was inconsistent with Article 12.1 of the SCM Agreement.<sup>410</sup>

367. *Second*, MOFCOM failed to give notice of the information required concerning the so called "sub-programs" China now maintains were part of the SRWUI Program and VAIJ Fund. China maintains that information concerning these sub-programs was necessary, yet it was not requested.<sup>411</sup>

368. *Third*, Australia has established that MOFCOM failed to give timely notice of deficiencies in the information submitted.<sup>412</sup> This was particularly egregious in the

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<sup>407</sup> Australia's first written submission, para. 862; China's first written submission, para. 608.

<sup>408</sup> China's first written submission, para. 608.

<sup>409</sup> China's first written submission, para. 609.

<sup>410</sup> Australia's first written submission, paras. 860-863.

<sup>411</sup> See above section. VI.B.3.

<sup>412</sup> Australia's first written submission, paras. 868-870.

countervailing duties investigation because, had MOFCOM notified the Australia Government of its inquiries into the "sub-programs", the Australian Government could have provided further information.<sup>413</sup> Moreover, had MOFCOM notified the Australian Government that supporting documents referred to in its questionnaire response were essential to MOFCOM's inquiries, the Australian Government could have provided further information. Instead, MOFCOM failed to communicate at all with the Australian Government. As such, MOFCOM failed to afford the Australian Government the fundamental due process right of having ample opportunity to present all evidence.

369. *Finally*, Australia has also established that MOFCOM failed to take into account comments on the Final Disclosure. The Australian Government and interested parties provided extensive submissions in response to the Final Disclosure, arguing, *inter alia*, that barley in Australia is not grown with the aid of irrigation and as such, Australian barley producers cannot benefit from alleged subsidy programs concerning irrigation.<sup>414</sup> It is clear MOFCOM did not take this information, or any other information received in response to the Final Disclosure, into account. China's mere references to passages in the Final Determination where MOFCOM noted a submission had been received are in no way sufficient to rebut this claim.

370. China has failed to rebut Australia's claim that MOFCOM failed to give interested parties ample opportunity to present all evidence they considered relevant. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.1 of the SCM Agreement.

### **3. MOFCOM failed to satisfy itself of the accuracy of the information concerning its determination of financial contribution**

371. China has failed to rebut Australia's claim that MOFCOM did not satisfy itself as to the accuracy of information on which it based its determination that there was a financial contribution within the meaning of Article 1.1(a) of the SCM Agreement.<sup>415</sup> China has not

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<sup>413</sup> Australia does not accept that not providing information concerning the "sub-programs" was a "deficiency". However, to the extent that MOFCOM considered the questionnaire response deficient because it did not contain this information, MOFCOM was obliged to notify the Australian Government in a timely manner so as to afford it ample opportunity to present all evidence it considered relevant. MOFCOM failed to do so.

<sup>414</sup> See above, section. VI.B.2(a).

<sup>415</sup> Australia's first written submission, paras. 900-908.

addressed when, where or how it satisfied itself as to the accuracy of the information supplied by the Australian Government,<sup>416</sup> and attempts to misdirect the Panel's attention by asserting that Australia has not demonstrated that the information was inaccurate.<sup>417</sup> As clearly explained by Australia in its first written submission, an investigating authority has a positive obligation to satisfy itself that the information it uses is accurate.<sup>418</sup> This obligation is not dependant on demonstrations that evidence is "inaccurate". In any event, the Australian Government and interested parties submitted extensive evidence that Australian barley producers did not receive financial contributions which conferred a benefit. As such, China's attempts to rely on its misstatement of the obligation in Article 12.5 of the SCM Agreement must fail.

372. China has failed to rebut Australia's claims that MOFCOM did not satisfy itself as to the accuracy of information on which its determinations of financial contribution were based. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.5 of the SCM Agreement.

#### **4. MOFCOM failed to disclose essential facts**

373. Australia has already established, above, that the Anti-Dumping Final Disclosure did not meet the standard required under the Anti-Dumping Agreement for the disclosure of essential facts. For the same reasons, Australia has established that the Countervailing Duties Final Disclosure did not meet the requirements of Article 12.8 of the SCM Agreement.

374. In particular, MOFCOM failed to disclose the basis for its determination that there was a financial contribution. MOFCOM's lack of clarity in this regard is confirmed by both Australia's first written submission and the Panel's questions to China.<sup>419</sup> In addition, Australia

<sup>416</sup> China's first written submission does not address this category of information. Moreover, China confirmed to the Panel that MOFCOM relied on the questionnaire response from the Australian Government. (China's response to Panel question No. 23(a), para. 94). Despite purporting not to use facts available to determine financial contribution, China also states that MOFCOM relied on information in the Annex to CICC's Application. (China's response to Panel question No. 22, para. 93 and No. 23(a), para. 94). Nowhere does China explain the legal basis which permitted MOFCOM to use other information on the record, not provided by the Australian Government or interested parties, in order to determine that a financial contribution existed. See above, section. VI.B.2(b).

<sup>417</sup> China's first written submission, para. 655.

<sup>418</sup> Australia's first written submission, paras. 842-843 and 900-908.

<sup>419</sup> In its first written submission, Australia stated it understood that MOFCOM did not use facts available to determine financial contribution. (Australia's first written submission, fn 410). The Panel asked questions of China to clarify this. The Panel also asked questions as to what information MOFCOM relied on to determine financial contribution. (Panel question Nos. 22-23).

explained in its first written submission that MOFCOM failed to disclose the precise basis for resorting to facts available to determine benefit and specificity.<sup>420</sup> China has failed to rebut these claims.

375. China has failed to rebut Australia's claims that MOFCOM failed to inform interested parties of the essential facts in sufficient time for parties to defend their interests. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 12.8 of the SCM Agreement.

**5. MOFCOM failed to give public notice containing sufficient detail of the findings and conclusions reached on all issues of fact and law**

376. Australia has established that China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement with respect to MOFCOM's failure to explain the basis on which it determined the existence of a subsidy for the three programs found to be countervailable, and the reasons for rejecting relevant arguments and claims made by the Australian Government and Australian interested parties.<sup>421</sup>

377. The reasons provided by MOFCOM concerning its determination that three programs were countervailable subsidies were particularly indecipherable. After receipt of China's first written submission and written responses to the Panel's questions, the evidentiary and legal basis for MOFCOM's determination that the SRWUI Program, SARMS Program and VAIJ Fund were countervailable subsidies is still not clear.<sup>422</sup> MOFCOM was required to publish a public notice setting out the "matrix of facts, law, and reasons that logically fit together to render the decision to impose final measures."<sup>423</sup> It failed to do so, and China has failed to rebut Australia's claims in this regard.

<sup>420</sup> Australia's first written submission, paras. 913-918.

<sup>421</sup> Australia's first written submission, paras. 942-947 and 956.

<sup>422</sup> For example, in questions directed to China, the Panel requested China to point to "specific statements" in MOFCOM's determination concerning MOFCOM's determinations of financial contribution, benefit and specificity. China was unable to respond with "specific statements" but rather merely directed the Panel to the indecipherable "sections" of the Final Determination. (See Panel question Nos. 25, 26, 27(b), and 28(b)).

<sup>423</sup> Panel Report, *US – OCTG (Korea)*, para. 7.299. See also, Appellate Body Report, *China – GOES*, para. 258.



378. Furthermore, neither MOFCOM nor China explain the reasons for rejecting the extensive comments the Australian Government and Australian interested parties made that, *inter alia*, barley in Australia is not grown with the aid of artificial irrigation.

379. China has failed to rebut Australia's claims that MOFCOM failed to set out in sufficient detail the findings and conclusions reached on all issues of fact and law, all relevant information on the matters of law, fact and reasons which led to the imposition of countervailing duties, and the reasons for rejecting all arguments made by the Australian Government and interested parties. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement.

## **6. Conclusion**

380. The record evidence clearly shows that the Australian Government and Australian interested parties did not have ample opportunity to present evidence or defend their interests. In fact, they had no opportunity to do so. MOFCOM failed to notify the Australian Government and interested parties of the information required, and of the alleged deficiencies in the extensive information they provided. In the absence of any communication from MOFCOM and any attempts to satisfy itself as to the accuracy of the extensive information provided, the Australian Government could not possibly have anticipated MOFCOM's focus of the investigation would be on three out of the 32 subsidy programs CICC alleged were countervailable, especially because two of those programs concerned irrigation. MOFCOM then proceeded to issue a document purporting to be a Final Disclosure, yet it provided no meaningful disclosure. The Final Determination similarly was not meaningful and did not comply with the obligations to provide reasons and explain the legal and factual basis for MOFCOM's subsidy determination. Given no legal or factual basis could possibly exist to determine that the three programs were subsidies and countervailable, this is not surprising.

381. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 12.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement.

## **F. CONCLUSION**

382. For the reasons set out above and in Australia's first written submission, China has failed to rebut Australia's claims that it acted inconsistently with Article 12.7 of the SCM Agreement in respect of MOFCOM's use of facts available in the countervailing duties investigation; Articles 1.1(a), 1.1(b), 1.2, 2.1, and 2.4 in respect of MOFCOM's subsidy determination; and Articles 12.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement in respect of MOFCOM's conduct of the investigation regarding the subsidy determination.

## **VII. AUSTRALIA'S CLAIMS CONCERNING THE INJURY AND CAUSATION DETERMINATIONS**

### **A. INTRODUCTION**

383. In its first written submission and responses to questions from the Panel, Australia has established a *prima facie* case that MOFCOM's Final Determinations are inconsistent with the following obligations under the Anti-Dumping Agreement and the SCM Agreement:

- Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the first sentence of Article 15.2 of the SCM Agreement, because MOFCOM failed to conduct an objective examination of import volumes during the Injury POI;
- Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement because MOFCOM failed to conduct an objective examination of price effects on the basis of positive evidence, including with respect to its finding that allegedly dumped and subsidised imports of Australian barley caused a "significant reduction" in the price of like domestic products in China's market during the Injury POI;
- Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement, because MOFCOM failed to properly evaluate all relevant economic factors and indices having a bearing on the state of the Chinese barley industry;

- Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM failed to undertake a proper causation and non-attribution analysis; and
- Articles 6.1, 6.2, 6.5.1, 6.6, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 12.1, 12.4.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to ensure interested parties were accorded due process in the conduct of the investigation and its determinations.

384. For the reasons set out below, China has failed to rebut these claims.

**B. CHINA ACTED INCONSISTENTLY WITH THE FIRST SENTENCE OF ARTICLE 3.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.2 OF THE SCM AGREEMENT**

**1. Introduction**

385. Australia maintains that MOFCOM's findings of significant increases in allegedly dumped and subsidised imports of Australian barley are inconsistent with China's obligations under Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the first sentence of Article 15.2 of the SCM Agreement because MOFCOM did not conduct an objective examination based on positive evidence. In particular, MOFCOM: (i) proceeded on the basis of flawed determinations of dumping and subsidisation; (ii) failed to explain how it took into account evidence that conflicted with its conclusions (including fluctuations in the data); (iii) failed to address relevant data; and (iv) applied an internally inconsistent methodology that made a final determination of injury more likely.<sup>424</sup>

**2. MOFCOM's flawed determinations of dumping and subsidisation vitiated its analyses under the first sentences of Articles 3.2 and 15.2**

386. Australia argued in its first written submission that MOFCOM, building on its flawed determinations of dumping and subsidisation, presumed that 100% of imported

<sup>424</sup> Australia's first written submission, para. 557.

Australian barley was dumped and subsidised for the purposes of its analyses under the first sentences of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>425</sup> By proceeding on this basis, MOFCOM rendered its analyses invalid because they failed to meet the fundamental, overarching obligations to be "based on positive evidence" and to "involve an objective examination" under Articles 3.1 and 15.1. As such, Australia contended that MOFCOM's determinations that subject imports increased significantly during the Injury POI (from 2014-2018) were *prima facie* inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement.<sup>426</sup>

387. In response, China contends that there is no "legal basis" for Australia's argument because "[t]he obligations relating to the determination of dumping and subsidies are separate from the obligations relating to the consideration of volume of dumped and subsidised imports in the injury analysis".<sup>427</sup> China's attempt to draw a line between these obligations is without merit. WTO-consistent determinations of dumping and subsidisation are prerequisites for the analysis of injury and causation under Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement.

388. China ignores that Article 3.1 and Article 15.1 explicitly require a determination of injury to be based on, *inter alia*, an examination of the volume of *dumped* or *subsidised* imports. Moreover, the wording of the first sentence of Article 3.2 and the first sentence of Article 15.2 clearly provides that "[w]ith regard to the volume of the *dumped* / *subsidised* imports, the investigating authorities shall consider whether there has been a significant increase in *dumped* / *subsidised* imports". Thus, there can be no examinations under Articles 3.2 or 15.2 and no injury determinations in relation to imports that are not dumped or subsidised. China has failed to rebut Australia's arguments.

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<sup>425</sup> Australia's first written submission, para. 565.

<sup>426</sup> Australia's first written submission, para. 566.

<sup>427</sup> China's first written submission, para. 444.

### 3. Imports of Australian barley in absolute terms and relative to domestic production

#### (a) MOFCOM's improper endpoint-to-endpoint analysis and large year-to-year fluctuations in the data

389. In response to Australia's arguments on the import volume in absolute terms<sup>428</sup> and in relation to domestic production,<sup>429</sup> China asserts that MOFCOM examined the volume of imports<sup>430</sup> and the ratio of imports to domestic production<sup>431</sup> in each year of the Injury POI, as well as changes in the data on a year-to-year basis. China's *ex post facto* rationalisation suggests that MOFCOM engaged in an examination of these data that a review of its Final Disclosures and Final Determinations reveal it clearly did not undertake.

390. With respect to the examination of whether subject imports increased in absolute terms, MOFCOM merely recited, without any analysis: (i) the total quantities of Australian barley imported in each year of the Injury POI; and (ii) the percentage change on a year-to-year basis.<sup>432</sup> Merely listing these data does not constitute an examination of the data. For example, in *Pakistan – BOPP Film (UAE)*, the panel considered how the investigating authority described "fluctuating trends" — i.e. "a *decrease* of 1.5 percentage points [...], an *increase* of 6.1 percentage points [...], and a *decrease* of 1.6 percentage points" — "and then, without more", found that the subject imports had "increased significantly".<sup>433</sup> The panel found that the investigating authority had failed to make an objective examination because it "did not explain how it reconciled the conflicting trends in the data before it to reach its conclusion", and "it did not explain how the sequence of downward and upward movements it observed led it to conclude that the increase in imports relative to domestic production was 'significant'".<sup>434</sup> Although the panel's findings were made in the context of the investigating

<sup>428</sup> Australia's first written submission, paras. 570-575.

<sup>429</sup> Australia's first written submission, paras. 580-585.

<sup>430</sup> China's first written submission, para. 447.

<sup>431</sup> China's first written submission, para. 457.

<sup>432</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 14-15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

<sup>433</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.279. (emphasis original)

<sup>434</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 280. Although Pakistan has appealed elements of the panel's report, it did not appeal this finding. See *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/5, Notification of an Appeal by Pakistan Under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, and under Rule 20(1) of the Working Procedures for Appellate Review, 25 February 2021.

authority's analysis of volume trends relative to domestic production, its reasoning is equally applicable to an analysis of volume trends in absolute terms.

391. In the current dispute, MOFCOM considered data showing the following large year-to-year fluctuations in subject import volumes during the Injury POI:

- in 2014-2015, an increase of 12.51%;
- in 2015-2016, a decrease of 25.45%;
- in 2016-2017, an increase of 99.29%; and
- in 2017-2018, a decrease of 35.52%.

If MOFCOM had engaged in the examination required, it would have considered the impact and significance of the large year-to-year fluctuations, and explained how it took these fluctuations — that is, "the sequence of downward and upward movements" — into account in arriving at its conclusion that a substantially *smaller* change over the entire Injury POI (i.e. an increase of 7.78% between 2014 and 2018) was "significant".<sup>435</sup> MOFCOM failed to do so.

392. China asserts that MOFCOM did consider "the circumstances of decrease of volume of dumped and subsidized imports in 2018", explaining that it was the result, *inter alia*, of the initiation of the anti-dumping investigation.<sup>436</sup> It is difficult to understand how the initiation of the anti-dumping investigation in late 2018 (19 November) could contribute to a decline in imports in 2017-2018.

393. With respect to the examination of whether subject imports increased relative to domestic production, MOFCOM merely recited, again without analysis, the ratios of imported Australian barley to Chinese barley production in each year of the Injury POI and listed the percentage change year-to-year.<sup>437</sup> As with the data for import volume in absolute terms, the data for import volume relative to domestic production evidenced large fluctuations during the Injury POI. There was an increase in the ratio of 204 percentage points between 2016 and

<sup>435</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

<sup>436</sup> China's first written submission, para. 453.

<sup>437</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 15-16; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 15-16.

2017 and a decrease of 146 percentage points between 2017 and 2018. Again, MOFCOM failed to explain how the fluctuations evident in the data were considered and taken into account in arriving at its conclusion that a substantially *smaller* overall change during the Injury POI (an increase of 30 percentage points between 2014 and 2018) was "significant".<sup>438</sup>

394. In response, China provides the following *ex post facto* rationalisation of MOFCOM's determination in relation to the import volume in absolute terms:

MOFCOM stated in the Final Determinations that 'the quantity of dumped imported product generally showed an increasing trend during the Period of the Dumping Investigation.' By stating 'generally' showed increasing trend, MOFCOM objectively considered import volumes, though fluctuated on year-by-year basis, has presented an increasing trend based on observation of the Injury POI as a whole.<sup>439</sup>

China makes a similar argument in relation to the determination of increased imports in relation to domestic production of like domestic products.<sup>440</sup>

395. China's arguments suggest that MOFCOM met the obligation to conduct an objective examination based on positive evidence by considering the significance of the year-to-year fluctuations in the data in arriving at its conclusion regarding the increasing trend over the Injury POI as a whole. There is no reasoning evident in the Final Determinations which shows that MOFCOM did so. In suggesting that it focused "generally" on the overall trend during the Injury POI "as a whole", MOFCOM sought to downplay the relative significance of the year-to-year fluctuations in the data.

396. In its first written submission, Australia drew support from the panel report in *Pakistan – BOPP Film (UAE)*.<sup>441</sup> China's attempt to distinguish the report is without merit.<sup>442</sup> There is no point of distinction in that the investigating authority in that case focused its finding on a single year in the period of investigation, whereas MOFCOM's finding was based on the "general" trend covering the five-year Injury POI. The flaw in the actions of the investigating authorities in both cases was that each authority "did not explain how it

<sup>438</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

<sup>439</sup> China's first written submission, para. 450.

<sup>440</sup> China's first written submission, para. 458.

<sup>441</sup> Australia's first written submission, para. 572.

<sup>442</sup> China's first written submission, para. 451.

reconciled the conflicting trends before it and, in particular, it did not explain how those conflicting trends supported its conclusion that the increase was 'significant'".<sup>443</sup>

397. Although China seeks to distinguish *Pakistan – BOPP Film (UAE)*, it does not address Australia's use<sup>444</sup> of the Appellate Body Report in *US – Steel Safeguards*. The Appellate Body explained that, in the analysis of increased imports in absolute and relative terms under Article 4.2(a) of the Agreement on Safeguards, the competent authorities have "to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)".<sup>445</sup> According to the Appellate Body, such consideration is necessary because "in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points".<sup>446</sup> Australia contends that, as there was not "a clear and uninterrupted upward trend" in import volumes of Australian barley, the Appellate Body's reasoning is equally applicable to MOFCOM's endpoint-to-endpoint comparisons of the entire Injury POI.

(b) MOFCOM's improper analysis of imports relative to consumption

398. Australia argued in its first written submission, that MOFCOM examined imports of Australian barley relative to domestic consumption under the first sentences of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, but failed, in breach of these provisions, to make any finding on whether there had been a "significant increase" in the imports on that basis.<sup>447</sup> China responds that "MOFCOM did not make an explicit finding or determination of significant increase of import volume relative to the domestic consumption because there was no obligation under the relevant Agreement for it to make one".<sup>448</sup> China goes on to acknowledge that the data contained in the Final Determinations "clearly showed there was no such a finding [*sic*] for MOFCOM to make".<sup>449</sup>

<sup>443</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 782.

<sup>444</sup> Australia's first written submission, para. 574.

<sup>445</sup> Appellate Body Report, *US – Steel Safeguards*, para. 354. (emphasis original; footnote omitted) (citing Appellate Body Report, *Argentina – Footwear (EC)*).

<sup>446</sup> Appellate Body Report, *US – Steel Safeguards*, para. 354.

<sup>447</sup> Australia's first written submission, para. 578.

<sup>448</sup> China's first written submission, para. 465.

<sup>449</sup> China's first written submission, para. 465.



399. China argues that the first sentences of Article 3.2 and Article 15.2 do not require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped or subsidised imports is 'significant' relative to consumption.<sup>450</sup> Australia agrees.

400. That said, MOFCOM commenced an analysis of Australian barley imports relative to domestic consumption. Having done so, MOFCOM was required by the first sentences of Article 3.2 and Article 15.2 to "consider"<sup>451</sup> whether there had been a significant increase in Australian barley imports relative to consumption. MOFCOM not only failed to do so, but it substituted the finding that it should have made (i.e. the volume of subject imports decreased relative to consumption) with a finding that made a determination of injury more likely (i.e. that "the ratio of dumped imported product to Chinese market share [...] remained at a relatively high level most of the time", "exceeded 60% in 2017", and "dumping imported product accounted for almost half of the apparent consumption of barley in the Chinese market" by 2018).<sup>452</sup> If MOFCOM did not intend to comply with the required examination under Articles 3.2 and 15.2, it is not clear why it commenced the analysis on import volumes relative to consumption in the first place.

401. China asserts that "MOFCOM relied on its consideration for the import increase in absolute terms and relative to domestic production as the basis for the overall causation analysis".<sup>453</sup> Australia contends that MOFCOM also relied upon the outcome of its flawed analysis of Australia's barley imports relative to consumption in the causation analyses of both Final Determinations. This is shown at the beginning of the causation analysis in the Anti-Dumping Final Determination, where MOFCOM states that, during the Injury POI, "dumped imported product always occupied a considerable proportion of the market share in China, with the highest exceeding 60%".<sup>454</sup> MOFCOM also notes that "[d]umped imported

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<sup>450</sup> Appellate Body Report, *China – GOES*, para. 130.

<sup>451</sup> Appellate Body Report, *China – GOES*, para. 130.

<sup>452</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 15. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 15.

<sup>453</sup> China's first written submission, para. 469.

<sup>454</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 20. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 21.

product accounts for a considerable proportion of China's domestic market and holds a dominant position in market competition".<sup>455</sup>

402. China acknowledges such statements in its response to Panel question No. 45.<sup>456</sup> However, it argues that "MOFCOM did not rely [on] the import increase relative to domestic consumption, but relied on the absolute level of market share of the subject imports".<sup>457</sup> China's argument has no merit. The examination of whether there has been a significant increase in subject imports relative to consumption under Article 3.2 and Article 15.2 is concerned with whether the volume of subject imports has increased relative to the overall volume of consumption in the market of the importing Member and, if so, whether that increase is "significant". MOFCOM substituted a finding that the volume of subject imports relative to consumption "remained at a relatively high level most of the time" for the finding that was evident from the data it considered and which an objective and unbiased investigating authority would have made: that the volume of subject imports *decreased* relative to consumption during the Injury POI.

403. By making this substitution in its examination under Article 3.2 and Article 15.2, MOFCOM breached those provisions. By then relying upon this alternate finding for the purposes of the causation analyses, to the *exclusion* of the relevant finding that it should have made on the basis of the facts before it, MOFCOM also breached Articles 3.5 and 15.5. As the Appellate Body explained in *China – GOES*, the outcomes of the inquiries under Articles 3.2 and 3.4 and Articles 15.2 and 15.4 lay the foundation for the causation analyses under Articles 3.5 and 15.5.<sup>458</sup> If the outcomes of the former inquiries are flawed, the causation analysis and its outcomes will also be flawed.

(c) MOFCOM failed to address the relevant data concerning consumption in the domestic market

404. Australia also argued in its first written submission that, in dealing with the import volume in absolute terms, MOFCOM "failed to address the relevant data concerning

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<sup>455</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 20. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 21.

<sup>456</sup> China's response to Panel question No. 45, para. 156.

<sup>457</sup> China's response to Panel question No. 45, para. 157.

<sup>458</sup> Appellate Body Report, *China – GOES*, para. 143.

consumption in the domestic market".<sup>459</sup> China contends that Australia's argument is a "misconstruction of the legal obligations of the investigating authority" in relation to considering the import volume in absolute terms,<sup>460</sup> citing *China – Cellulose Pulp* as support for its position.<sup>461</sup> Australia disagrees.

405. As a starting point, Australia acknowledges that an analysis of subject import volumes under the first sentences of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement can be limited to any one or combination of the three measures. An investigating authority may, for example, consider whether the volume of subject imports increased significantly in absolute terms, and end its analysis at that point. There is no obligation to further consider whether there has also been a significant increase in relative terms.

406. However, Australia draws the Panel's attention to *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, in which the panel explained that "Article 3.1 applies to the analysis of the volume of dumped imports and does not distinguish between mandatory analyses and discretionary analyses that an authority may undertake under Article 3.2".<sup>462</sup> As such, the panel reasoned that, "if the authority chose to undertake an analysis of the evolution of the volume of imports not only in absolute terms but also in relative terms and to base its conclusions on that analysis, the analysis must comply with the requirements of Article 3.1 *in its entirety*".<sup>463</sup>

407. MOFCOM considered all three of the import volume measurements in its analysis. The question before the Panel is whether this constituted three distinct analyses in isolation from one another, such that an investigating authority may pick and choose what it considers to be a "significant" to the exclusion of other relevant facts, or a holistic analysis of import volume based on all of the relevant evidence on the record. In this case, the relevant evidence before MOFCOM included the following facts:

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<sup>459</sup> Australia's first written submission, para. 571.

<sup>460</sup> China's first written submission, para. 454.

<sup>461</sup> China's first written submission, para. 455.

<sup>462</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.257.

<sup>463</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.257. (emphasis added)

- there was substantial growth in the volume of apparent consumption — that is, in the demand for barley in the domestic market — of 18% during the Injury POI; and
- the "market share" of imports of Australian barley (i.e. the volume of subject imports relative to consumption) actually declined by 4.65 percentage points over the course of the Injury POI, despite the expanding market.

408. These factors call into question whether an absolute increase in volume is "significant" for the purposes of the entire analysis under the first sentence of Article 3.2. For the analysis in this case to comply with the overarching obligations in Article 3.1, an objective and unbiased investigating authority would have taken these factors into consideration in making its findings on whether there had been a significant increase.

#### **4. Conclusion**

409. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the first sentence of Article 15.2 of the SCM Agreement.

### **C. CHINA ACTED INCONSISTENTLY WITH THE SECOND SENTENCES OF ARTICLE 3.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.2 OF THE SCM AGREEMENT**

#### **1. Introduction**

410. Australia maintains that MOFCOM's findings that allegedly dumped and subsidised imports of Australian barley caused significant price depression in China's domestic market for like products during the Injury POI are inconsistent with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement.

411. MOFCOM merely asserted that the subject imports "caused a significant reduction in the price of [like] domestic product".<sup>464</sup> It failed to consider or provide an explanation of whether the subject imports had "explanatory force" for this alleged effect on domestic prices. Further, MOFCOM failed to consider evidence on the investigation record that called into question the "explanatory force" of subject imports, including the prices of like imports from third countries.<sup>465</sup>

412. Moreover, MOFCOM's analysis was not based on an objective examination of the evidence on the record, including because it did not account for the different segments in the Chinese domestic barley market, which require different types (e.g. grades, varieties, and quality) of barley at considerably different prices for different end uses. Consequently, MOFCOM failed to ensure price comparability between the product mix in the basket of subject imports and that in the basket of like domestic products.

413. Overall, for the reasons set out in Australia's first written submission and responses to the Panel's questions, MOFCOM: (i) failed to consider or explain how subject imports had "explanatory force" for the alleged price effect; (ii) failed to ensure price comparability between subject imports and domestic like products; (iii) failed to address relevant data on the investigation records before it; (iv) failed to explain how it took into account evidence that conflicted with its conclusions; and (v) applied a methodology that made a final determination of injury more likely.

## **2. Australia is unable to accept China's proposed translation**

414. In attempting to contest Australia's claim that MOFCOM failed to conduct a proper price depression analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement,<sup>466</sup> China seeks to distract the Panel by challenging Australia's translation of key wording in MOFCOM's Final Determinations. China claims that MOFCOM conducted a "price undercutting" analysis rather than a "price depression" analysis, and that Australia's

<sup>464</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 17; Countervailing Duties Final Determination (Exhibit AUS-11), p. 17. For the correct translation of MOFCOM's reasoning, refer to Expert assessment of selected translations (Exhibit AUS-99), Annex A, Line 15. Note that, similarly, MOFCOM simply stated that "[u]nder the influence of the increase in quantity and decrease in the price of dumped imported product, the selling price of similar domestic product dropped", but provided no explanation of how the subject imports were having this "influence" — that is, whether the subject imports had "explanatory force" for the alleged price effect on the domestic like products.

<sup>465</sup> Australia's response to Panel question No. 50, paras. 154-157.

<sup>466</sup> Australia's first written submission, paras. 594-626.

claims and arguments are therefore based on an incorrect translation of the Final Determinations.<sup>467</sup> On this basis alone, China alleges that Australia has failed to establish a *prima facie* case with respect to its claims and arguments regarding MOFCOM's price effects analysis under Articles 3.2 and 3.1 of the Anti-Dumping Agreement and Articles 15.2 and 15.1 of the SCM Agreement.<sup>468</sup>

415. Australia does not accept China's proposed translation or *ex post facto* interpretation of MOFCOM's price effects analysis. The relevant text in Australia's translation of the Anti-Dumping Final Determination follows:

Therefore, the Investigating Authority determined that dumped imported product caused a *significant reduction* in the price of similar domestic product.<sup>469</sup>

China contends that the following text is the proper translation:

Therefore, the Investigating Authority determined that dumped imported product caused *significant undercutting* on the price of like product of the domestic industry.<sup>470</sup>

416. Australia sought the expert opinion of an independent professional translation services provider (Speak Your Language) to assess the accurate translation into English of the original Mandarin text in respect of this issue and others.<sup>471</sup>

417. Having reviewed the relevant documents, Speak Your Language concluded that:

The translation 'undercutting' in CHN-3, and CHN-6 is incorrect as the meaning of 削减 is simply "decrease" in the context.

The translation 'reduction' in AUS-2 and AUS-11 is correct, however "认为" should not be translated as "determined".<sup>472</sup>

It provided the following correct translation of the text:

Therefore, the Investigating Authority believes that the *dumped/subsidized* imports have caused a significant reduction in the price of similar products in the domestic industry.

<sup>467</sup> China's first written submission, para. 480.

<sup>468</sup> China's first written submission, para. 484.

<sup>469</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 17. (emphasis added). See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

<sup>470</sup> China's first written submission, para. 480. (emphasis added, footnote omitted). See Anti-Dumping Final Determination English Translation (Exhibit CHN-1), p. 16; Countervailing Duties Final Determination English Translation (Exhibit CHN-4), p. 17.

<sup>471</sup> Expert assessment of selected translations (Exhibit AUS-99).

<sup>472</sup> Expert assessment of selected translations (Exhibit AUS-99), Annex A, row 15.

418. This translation is also consistent with the substantive content of MOFCOM's own analysis of price effects. MOFCOM's reasoning, including its description of the alleged price effects, in the texts of the Final Determinations clearly indicates an assessment of "price reduction", and not "price undercutting".

419. The Appellate Body explained in *China – GOES* that "price depression refers to a situation in which prices are pushed down, or reduced, *by something*".<sup>473</sup> MOFCOM's examination falls squarely within this description. For example, it includes the following findings:

- "[u]nder the influence of the increase in quantity and decrease in the price of dumped imported product, the selling price of similar domestic product dropped from 2.14 RMB/kg to 1.90 RMB/kg";<sup>474</sup>
- "[a]ffected by this [*referring to subject imports*], the price of similar domestic product dropped substantially";<sup>475</sup> and
- "[t]he evidence shows that during the Period of the Injury Investigation, the price change trends of dumped imported product and similar domestic product were the same, both falling first and then rising, with the overall trend decreasing."<sup>476</sup>

420. Having made these findings, MOFCOM's examination leads to the following conclusion in Australia's translation of the Final Determinations, "[t]herefore, the Investigating Authority determined that dumped imported product *caused* a significant reduction in the price of similar domestic product".<sup>477</sup> This conclusion is expressed in China's translation as, "[t]herefore, the Investigating Authority determined that dumped imported product *caused* significant undercutting on the price of the like product of the domestic industry".<sup>478</sup> The

<sup>473</sup> Appellate Body Report, *China – GOES*, para. 141. (emphasis original)

<sup>474</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 16. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 16.

<sup>475</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 16. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

<sup>476</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 16-17. See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

<sup>477</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 17. (emphasis added). See also Countervailing Duties Final Determination (Exhibit AUS-11), p. 17.

<sup>478</sup> Anti-Dumping Final Determination English Translation (Exhibit CHN-1), p. 17. (emphasis added)

Speak Your Language translation also contains "caused". The use of "caused" accords with an inquiry to determine whether subject imports have "explanatory force" for significant price depression.<sup>479</sup> As the Appellate Body observed in *China – GOES*:

By asking the question '*whether the effect of the subject imports is significant price depression or suppression*', the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports.<sup>480</sup>

On the other hand, the use of "caused" does not accord with an inquiry to determine the existence of significant price undercutting, which involves a "comparison" between the prices of subject imports and like domestic products.<sup>481</sup> As such, Australia submits that the use of "caused" also points to MOFCOM having undertaken an inquiry into price depression, not price undercutting.

421. In its response to Panel question No. 46, China attempts, through *ex post facto* rationalisation, to interpret MOFCOM's statements, as outlined above, as elements of a price undercutting analysis. China argues that MOFCOM followed the guidance of the WTO jurisprudence in its price undercutting analysis,<sup>482</sup> and provides the following explanation:

MOFCOM compared the price levels of subject imports and the like product of the domestic industry, but did not stop there. In addition, MOFCOM made dynamic assessment of the relationship and development of the prices of subject imports and the like product of the domestic industry, including the interactions of the prices of subject imports and the like product of the domestic industry over the entire POI, and whether they were moving in the same or contrary direction.<sup>483</sup>

China's *ex post facto* explanation does not accurately reflect the price effects examination set out in the texts of the Final Determinations and should be disregarded by the Panel.

<sup>479</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>480</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>481</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>482</sup> China's response to Panel question No. 46, para. 161.

<sup>483</sup> China's response to Panel question No. 46, para. 161.



**3. China has failed to rebut Australia's arguments regarding price comparability and the segmentation of the Chinese barley market under the second sentences of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement**

**(a) Introduction**

422. Solely on the basis of its assertion that MOFCOM conducted a "price undercutting" analysis rather than a "price depression" analysis, China takes the position that Australia has "not discharged its initial burden of demonstrating the inconsistency of MOFCOM's price effect determination" with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>484</sup> China appears to treat this as an end to the matter, providing no further response to Australia's claims or supporting arguments and failing to engage with them on the merits.

423. However, Australia's claim and supporting arguments under Articles 3.2 and 15.2 do not depend on whether MOFCOM's price effects analysis is ultimately characterised as a "price depression" analysis, a "price undercutting" analysis, or both. Australia's case addresses MOFCOM's failure to conduct an objective examination based on positive evidence and to ensure price comparability. This includes MOFCOM's failure to consider the information supplied by interested parties concerning differences between the product mix in the basket of subject imports and the basket of like domestic products in a market composed of distinct segments requiring different types of barley distinguished by considerable price differences. Such a failure results in a breach of Articles 3.2 and 15.2 regardless of whether the analysis focused on "price depression" or "price undercutting" or both. China offers no further evidence or arguments in response to these points.

**(b) Price comparability**

424. In conducting its price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, MOFCOM had to ensure that the prices of imported Australian barley and domestic barley in China were comparable.<sup>485</sup> One of the

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<sup>484</sup> China's first written submission, para. 484.

<sup>485</sup> Australia's first written submission, para. 592; Appellate Body Report, *China – GOES*, para. 200; and Expert assessment of selected translations (Exhibit AUS-99), Annex A, row 15.

keys to establishing price comparability is that the subject imports and domestic like products are in a competitive relationship.<sup>486</sup> To the extent that imported Australian barley competed with "like" domestic Chinese barley, there was competition within each of the different market segments between "like" products of the same category required by those market segments.

*i. MOFCOM failed to recognise the Chinese segmented barley market*

425. Australia has demonstrated that MOFCOM made a fundamental error in rejecting evidence on the record that the domestic barley market consists primarily of two distinct sectors: barley for malting purposes (malting barley) and barley used as animal feed in livestock production (feed barley).<sup>487</sup> These sectors have separate grade, variety, and consistency and quality requirements, and the different categories of barley they purchase for their different end uses are distinguished by considerable price differences.<sup>488</sup> Contrary to MOFCOM's assumptions, the evidence on the investigation records confirmed that imported Australian malting barley was not competing with Chinese feed barley (and, in many cases, with other Chinese barley) in sales to Chinese malting companies. Neither Australian feed barley nor Chinese feed barley could meet the companies' technical requirements.

*ii. Prices of feed barley and malting barley were not comparable*

426. The evidence on the record confirmed that the prices of feed barley and malting barley were not comparable. Despite this being the case, MOFCOM based its injury and causation analysis on AUV (per kilogram) for imported and domestic barley which made no distinction between the malting and feed barley categories. The prices did not take into account the different grades and varieties of malting barley and feed barley that were sold into the different market segments at different price points.<sup>489</sup>

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<sup>486</sup> Australia's first written submission, para. 593; Panel Report, *China – X-Ray Equipment*, para. 7.50.

<sup>487</sup> Australia addressed the evidence on the record in its first written submission. See paras. 606-614 and footnotes thereto, and paras. 686-691 and footnotes thereto.

<sup>488</sup> Australia's first written submission, paras. 606-614 and 686-691.

<sup>489</sup> Australia's first written submission, paras. 606-614 and 686-691.

427. Australia has also identified other flaws in the construction of these AUVs. In particular, the data that MOFCOM relied upon consisted of averages of prices at different levels of trade that cannot be meaningfully averaged without making appropriate adjustments to ensure price comparability.<sup>490</sup> MOFCOM failed to make any of the necessary adjustments to ensure the prices of imported Australian barley and domestic barley were comparable.<sup>491</sup>

428. Although China did not offer any rebuttal in its first written submission on Australia's claim and supporting arguments regarding price comparability, it did address an element of that claim in answering Panel question No. 53. The Panel asked China to respond to Australia's argument that MOFCOM did not adjust the CIF import prices for Australian barley to account for a range of costs, including "vessel unloading costs, transportation and logistics costs for shipment from the vessel to a warehouse or silo, storage costs (at the warehouse or silo), and costs related to the operations of the importer".<sup>492</sup> China relied on the panel's findings in *China – Broiler Products* that MOFCOM was not required, in that case, to adjust CIF prices of the subject imports to account for "transportation costs to the importer's warehouse and an amount to cover the importer's eventual profit",<sup>493</sup> which China describes as "elements very similar to those argued by Australia that need to be adjusted from the CIF price in the current dispute".<sup>494</sup>

429. The panel in *China – Broiler Products* explained the basis for its finding in the following terms:

All else being equal, the Panel is of the view that a c.i.f. price *to which appropriate adjustments are made to reflect the price paid by the first purchaser in the country of import* (i.e. the importer) is comparable to an ex works price to the first purchaser in the importing country. Both prices are situated at the first point at which a purchaser may take delivery of the product in the country of importation and both contain pricing elements that reflect the first point in the distribution chain where imported and like domestic products enter into competition.<sup>495</sup>

<sup>490</sup> Australia's first written submission, paras. 599-602.

<sup>491</sup> Australia's first written submission, paras. 603-605.

<sup>492</sup> Panel question No. 53. See also Australia's first written submission, para. 603.

<sup>493</sup> Panel Report, *China – Broiler Products*, para. 7.487.

<sup>494</sup> China's response to Panel question No. 53, para. 188.

<sup>495</sup> Panel Report, *China – Broiler Products*, para. 7.486. (emphasis added)

In relying on the panel's reasoning, China does not address how the "ex works" price was derived in the present case, if at all. There is nothing in the Final Determinations to indicate that MOFCOM addressed this question. MOFCOM refers to "the barley sales prices of domestic growers" in the following statement:

[T]he CIF prices of dumped imported product calculated by China Customs were basically at the same trade level as the barley sales prices of domestic growers after taking into account factors such as exchange rates, customs duties, value-added import tax and customs clearance costs.<sup>496</sup>

However, it did not relate these prices to an "ex works" price of Chinese domestic like barley (i.e. barley that has undergone post-harvest processes such as cleaning, drying, and sorting into grades).

430. Australia also observed in response to Panel question No. 47 that the average unit prices of domestic like products appear to have been derived by dividing total revenues from domestic production by the total volume of domestic production.<sup>497</sup> This derivation is set out in Table 1 in Australia's response to Panel question No. 47. If Australia is correct about the derivation of the average unit prices, it is difficult to see how these values could be related to "ex works" prices.

431. Further, Australia recalls that MOFCOM relied on the domestic sales prices provided by CICC in its Applications. The prices were provided to CICC in a third-party confidential report on the Chinese barley industry and market, which was not made available to other interested parties.<sup>498</sup> The data on prices were ostensibly provided in the non-confidential summary of the report given at Annex VII to CICC's Applications. As Australia observed in response to Panel question No. 47, "[t]here is nothing on the record or in the Final Determinations that explains where these data came from or how they were collected, estimated, or otherwise obtained".<sup>499</sup> There is no evidence to suggest that MOFCOM verified the third-party report to

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<sup>496</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 15; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 15-16.

<sup>497</sup> Australia's response to Panel question No. 47, para. 150.

<sup>498</sup> Australia's response to Panel question No. 47, para. 149.

<sup>499</sup> Australia's response to Panel question No. 47, para. 150.

confirm its accuracy.<sup>500</sup> As such, MOFCOM appears to have been in no position to treat the domestic sales prices obtained from the third-party report as "ex works" prices.

432. In sum, China's response to Panel question No. 50 offered no rebuttal to Australia's claim that MOFCOM failed to ensure price comparability with respect to sales at different levels of trade.<sup>501</sup>

433. MOFCOM's errors in relation to the prices of domestic barley during the Injury POI were carried forward in its use of the flawed AUVs for domestic barley in its analysis of economic factors under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement.<sup>502</sup> Australia will address this point in its submissions on these provisions below.

*iii. China's response to Panel question No. 49 demonstrates MOFCOM's complete disregard of the relevant evidence*

434. Following China's complete failure to address Australia's arguments concerning the segmentation of the Chinese barley market in its first written submission, the Panel requested that China show where, in the Final Determinations, MOFCOM addressed the comments of interested parties on this question.<sup>503</sup> China's response merely demonstrated that MOFCOM completely disregarded the evidence provided by interested parties and highlighted its failure to conduct an objective examination in breach of Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.

435. For example, China refers to the following statements in MOFCOM's Final Determinations:

- "[t]here is no material difference between domestically cultivated barley and the Investigated Product in terms of customer groups, which mainly

<sup>500</sup> Australia's response to Panel question No. 47, para. 149.

<sup>501</sup> Australia's first written submission, paras. 599-602. See also Australia's response to Panel question No. 18, paras. 56-67.

<sup>502</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 18; Countervailing Duties Final Determination (Exhibit AUS-11), p. 18.

<sup>503</sup> China's response to Panel question No. 49.

include malt enterprises, feed processing enterprises, food processing enterprises and end consumers";<sup>504</sup>

- "there is no evidence to prove that there is a clear boundary for barley products used for different purposes;"<sup>505</sup> and
- there is no "clear and unified international classification standard for barley products" and the lack of such a standard "makes it difficult [...] to classify barley from different sources for the purpose of comparison".<sup>506</sup>

436. In its first written submission, Australia comprehensively addressed these assertions and MOFCOM's related findings of substitutability and competition between all imported Australian barley and all domestic barley.<sup>507</sup> The evidence on the record clearly established that there was a "material difference" in the types of barley required by the customer groups for malting barley and feed barley and that, consequently, there is a "clear boundary" between malting barley required for beer production and feed barley that can be used in livestock production. As the responses of the malting companies to the anti-dumping questionnaires show, malting barley must meet the technical specifications for grade, variety, quality, and consistency required for malt production in the brewing industry, while feed barley does not. As such, malting barley was used by malting companies to the exclusion of feed barley during the Injury POI.<sup>508</sup> The differences between feed barley and malting barley are recognised by Chinese importation documentation,<sup>509</sup> including by different tariff classifications.<sup>510</sup> The evidence also clearly established that imported malting barley, including subject imports from Australia, met the technical requirements of the malting industry in ways that the barley produced by the domestic industry in China simply could not.<sup>511</sup>

<sup>504</sup> China's response to Panel question No. 49, para. 168.

<sup>505</sup> China's response to Panel question No. 49, para. 170.

<sup>506</sup> China's response to Panel question No. 49, para. 171.

<sup>507</sup> See Australia's first written submission, paras. 606-614 and 686-691.

<sup>508</sup> Guangzhou Malting Anti-Dumping Questionnaire Response (Exhibit AUS-75), pp. 43-48; Ningbo Malting Anti-Dumping Questionnaire Response (Exhibit AUS-76), pp. 42-48; Baoying Malting Anti-Dumping Questionnaire Response (Exhibit AUS-77), pp. 41-48; Qinhuangdao Malting Anti-Dumping Questionnaire Response (Exhibit AUS-78), pp. 43-48; Changle Malting Anti-Dumping Questionnaire Response (Exhibit AUS-79), pp. 40-46.

<sup>509</sup> Australia's first written submission, para. 338.

<sup>510</sup> Australia's first written submission, para. 338 (citing Global Trade Atlas Data – Australia's POI Barley Exports (Exhibit AUS-40) (see Columns L and M)).

<sup>511</sup> Australia's first written submission, para. 607 and footnotes thereto and paras. 687-698 and footnotes thereto.

#### 4. MOFCOM failed to take account of third country imports in its price depression analysis

437. Apart from MOFCOM's failure to ensure price comparability between imported Australian barley and domestic barley in its price effects analysis, it also breached Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement by (i) failing to consider whether subject imports had "explanatory force" for the alleged reduction in the price of like domestic barley — that is, by considering how and why the subject imports were having the *consequence* of the alleged price depression — and (ii) failing to take into account the impact of like imports from third countries on the price of domestic like products in arriving at the conclusion that subject imports were the cause of the alleged reduction.

438. In *China – GOES*, the Appellate Body explained that an investigating authority's inquiry under Articles 3.2 and 15.2 into whether the effect of subject imports is to depress prices to a significant degree "must provide it with a meaningful understanding of whether subject imports have explanatory force for the significant depression [...] of domestic prices that may be occurring in the domestic market".<sup>512</sup> In this respect, the Appellate Body considered that an investigating authority is not permitted to disregard evidence that calls into question the "explanatory force" of subject imports for significant depression of domestic prices, explaining as follows:

[W]here an authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices. [...] Moreover, by taking into account evidence pertaining to such elements, an authority also ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1.<sup>513</sup>

439. This inquiry into whether dumped imports have "explanatory force" for significant depression of domestic prices under Articles 3.2 and 15.2 is distinct from the causation and non-attribution analysis required under Articles 3.5 and 15.5.<sup>514</sup>

<sup>512</sup> Appellate Body Report, *China – GOES*, paras. 144 and 151.

<sup>513</sup> Appellate Body Report, *China – GOES*, para. 152.

<sup>514</sup> Appellate Body Report, *China – GOES*, para. 147.

440. There was sufficient evidence on the investigation records before MOFCOM to indicate that prices of like imports from third countries may explain the alleged depression of domestic prices, calling into question any "explanatory force" attributed to subject imports of Australian barley. According to the data submitted by CICC, the average "landed price" of these 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.<sup>515</sup>

**Table 1 Domestic Like Barley and Imported Like Barley from Third Countries<sup>516</sup>**

	2014	2015	2016	2017	2018
<b>Average Domestic Sales Price in China (RMB/kg)<sup>517</sup></b>	2.14	2.01	1.96	1.90	1.97
<b>Average "Landed Price" of Like Imports from Third Countries (RMB/kg)<sup>518</sup></b>	2.16	1.88	1.96	1.75	1.91

441. MOFCOM was obligated to consider this evidence and to explain how it had taken this evidence into account in arriving at its conclusion that the subject imports from Australia were the cause of a significant reduction in the price of domestic like barley. MOFCOM not only failed to consider whether the subject imports had "explanatory force" for the alleged domestic price reduction, but it also failed to consider whether or to what extent the impact of like imports from third countries could explain the alleged domestic price reduction. As such, MOFCOM's examination of price effects was inconsistent with Articles 3.2 and 15.2 as well as with Articles 3.1 and 15.1.

442. Further, MOFCOM noted elsewhere in the final determinations that there had been substantial growth of 18% in the consumption of barley in China's domestic market during the

<sup>515</sup> CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 46-47.

<sup>516</sup> Australia summarised the evidence on the prices of third country imports in its response to Panel question No. 50, drawing on the data submitted by CICC. See Australia's response to Panel question No. 50, para. 155.

<sup>517</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 16, 18, and 23; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 16, 18, and 23.

<sup>518</sup> CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 46-47. The average prices of the like imports from third countries were converted from USD/ton to RMB/kg using exactly the same annual conversion rates that MOFCOM applied to convert the average prices of subject imports of Australian barley from USD/ton to RMB/kg. See Anti-Dumping Final Determination (Exhibit AUS-2), p. 23; Countervailing Duties Final Determination (Exhibit AUS-11), p. 23.



Injury POI (as measured by MOFCOM's data on apparent consumption).<sup>519</sup> The evidence before MOFCOM indicated that the market shares of both imported Australian barley and domestic barley declined in the growing domestic market during the Injury POI, in contrast to the increased market share captured by third country imports during that period.<sup>520</sup> As Australia observed in its first written submission, it is striking, given this evidence, that MOFCOM did not address the prices of third country imports in relation to domestic prices and Australian import prices.<sup>521</sup>

## 5. Price undercutting

443. Even if, *arguendo*, the Panel accepts China's assertion that MOFCOM conducted a "price undercutting" analysis that finding alone is insufficient to rebut Australia's claims. MOFCOM's analysis did not satisfy the requirements for a "price undercutting" finding under Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement.

444. As Australia has emphasised above,<sup>522</sup> price comparability needs to be considered in all price effects analyses, regardless of whether an examination is characterised as a price depression analysis or a price undercutting analysis or both. In either case, MOFCOM was obligated to conduct an objective examination based on positive evidence, including by ensuring price comparability, as required by Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.<sup>523</sup> In *China – GOES*, the Appellate Body explained as follows:

[W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, inter alia, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.<sup>524</sup>

<sup>519</sup> Australia dealt with the evidence on market share in Table 11 in its first written submission at p. 268.

<sup>520</sup> Australia's first written submission, para. 693.

<sup>521</sup> Australia's first written submission, para. 694.

<sup>522</sup> See above section VII.C.3.

<sup>523</sup> Australia's first written submission, para. 592. See also Panel Report, *China – X-Ray Equipment*, para. 7.68.

<sup>524</sup> Appellate Body Report, *China – GOES*, para. 200. (footnote omitted)

445. Australia demonstrated in its first written submission that MOFCOM failed to establish price comparability in the context of its claim on "price depression".<sup>525</sup> MOFCOM's failure would apply equally, even if, *arguendo*, the Panel were to accept China's assertion that MOFCOM conducted a "price undercutting" analysis. As set out above,<sup>526</sup> China has not rebutted Australia's arguments on price comparability, regardless of the characterisation of MOFCOM's price effects analysis.

## 6. Conclusion

446. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement and Article 15.1 and the second sentence of Article 15.2 of the SCM Agreement.

### D. CHINA ACTED INCONSISTENTLY WITH ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.4 OF THE SCM AGREEMENT

#### 1. Introduction

447. Australia maintains that MOFCOM's evaluations of economic factors bearing on the state of the Chinese barley industry in the context of its examination of injury are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement, because MOFCOM failed to:

- identify properly the "domestic industry" as required by Articles 4.1 of the Anti-Dumping Agreement and 16.1 of the SCM Agreement, leading to a risk of material distortion of its injury analysis under Articles 3.4 and 15.4;
- assess "the role, relevance and relative weight" of the relevant factors, adopting instead a "checklist approach";
- explain its conclusions as to lack of relevance or significance with respect to identified factors;

<sup>525</sup> Australia's first written submission, paras. 596-614.

<sup>526</sup> See above section VII.C.3.

- evaluate all of the listed factors in Articles 3.4 and 15.4; and
- conduct objective examinations and consider all of the positive evidence on the record.

## **2. Australia's consequential argument relating to MOFCOM's definition of "domestic industry"**

448. In its first written submission, Australia contended that MOFCOM's failure to properly define the "domestic industry" gave rise to "a material risk of distortion"<sup>527</sup> in respect of its purported analyses under Articles 3.4 and 15.4.<sup>528</sup> In response, China asserted that MOFCOM's definition of the "domestic industry" was consistent with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement and that, accordingly, Australia's claim should be rejected by the Panel.<sup>529</sup> As discussed above, China has failed to rebut Australia's *prima facie* case in relation to the purported definition of "domestic industry" by MOFCOM.<sup>530</sup>

## **3. MOFCOM failed to objectively examine economic factors**

449. China asserts in its first written submission that Australia's arguments under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement are based on an "incomplete presentation" of MOFCOM's analysis of the economic factors having a bearing on the state of the Chinese barley industry.<sup>531</sup> China goes on to describe<sup>532</sup> how MOFCOM purportedly undertook an "objective and comprehensive examination of all the factors" and their impact on the domestic barley industry, which fully met the requirements of Article 3.4 and Article 15.4.<sup>533</sup> In doing so, China attempts to remedy MOFCOM's incomplete and deficient analysis by applying an *ex post facto* gloss of interpretations and explanations to it. The Panel should reject this improper attempt to remedy the deficiencies in MOFCOM's analyses in the Final Determinations.

<sup>527</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 414.

<sup>528</sup> Australia's first written submission, para. 636.

<sup>529</sup> China's first written submission, para. 487.

<sup>530</sup> See above section II.C.

<sup>531</sup> China's first written submission, para. 488.

<sup>532</sup> China's first written submission, paras. 489-494.

<sup>533</sup> China's first written submission, paras. 489-494.

450. China states that "[i]n the Final Determinations, based on the volume effect and price effect findings in previous steps of injury analysis, MOFCOM found domestic industry were forced to lower their price due to the impact of the dumped and subsidized imports".<sup>534</sup> Australia has demonstrated that MOFCOM's "volume effect and price effect findings" were inconsistent with Articles 3.2 and 3.1 of the Anti-Dumping Agreement and Articles 15.2 and 15.1 of the SCM Agreement.<sup>535</sup> Given that MOFCOM incorporated those findings into its analysis of the impact of subject imports on domestic prices under Articles 3.4 and 15.4, the WTO-inconsistencies flowed through to this examination and vitiated it.

451. China claims that MOFCOM "fully examined the interaction among all the economic factors".<sup>536</sup> However, MOFCOM did not assess "the role, relevance and relative weight"<sup>537</sup> of any of the listed and non-listed factors it identified. Rather, MOFCOM concluded that "[a]fter review, the Investigating Authority found that barley sales prices and income are important factors that affect China's barley cultivation and industrial development".<sup>538</sup>

452. MOFCOM accorded significant weight to the prices for domestic barley.<sup>539</sup> However, it used the AUVs for domestic barley which were drawn from a confidential report provided by a third-party to CICC.<sup>540</sup> Australia has demonstrated above that these AUVs did not take into account the different grades and varieties of malting barley and feed barley which were sold into the different market segments at different price points.<sup>541</sup> Accordingly, as the use of the AUVs did not reflect prices in the different segments of the market, they could not constitute "positive evidence" for MOFCOM's evaluation of the state of the domestic industry. As such, MOFCOM's evaluation of sales prices was not an "objective examination". Consequently, MOFCOM breached Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

<sup>534</sup> China's first written submission, para. 492.

<sup>535</sup> See above sections VII.B and VII.C.

<sup>536</sup> China's first written submission, para. 497.

<sup>537</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.314.

<sup>538</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

<sup>539</sup> See, for example, Anti-Dumping Final Determination (Exhibit AUS-2), pp. 16, 19; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 16, 19.

<sup>540</sup> See above para. 431.

<sup>541</sup> See above section VII.C.3.

453. Turning to MOFCOM's flawed analysis of planting costs as a factor, as Australia argued in its first written submission, MOFCOM failed to place proper weight on these costs as a determinative factor in its evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry.<sup>542</sup> MOFCOM failed to explain why this factor did not undermine its material injury determination. China responds to Australia's argument by stating that "MOFCOM did not neglect this factor".<sup>543</sup> China's response appears to misconstrue Australia's argument. Australia did not contend that MOFCOM "neglected" planting costs. Rather it observed that "MOFCOM appeared to acknowledge that the decrease in revenue *and* the increase in planting costs are both causes of the lack of profitability in the domestic barley industry".<sup>544</sup> Having done so, MOFCOM then, without proper consideration of the relative weight of the increase in planting costs, accorded primacy to the decrease in revenue in determining that the Chinese barley industry had suffered material injury.

454. Further, China not only fails to engage properly with Australia's arguments, but it also fails to engage with Table 9 in Australia's first written submission, which highlights the significance of planting costs in relation to the economic position of China's barley industry. Table 9 shows that, in each year of the Injury POI, China's barley industry operated at a loss, including in 2014, when the price of domestic barley was at its highest point during the Injury POI (RMB 2.14 per kg).

455. In its first written submission, Australia contended that MOFCOM engaged in an endpoint-to-endpoint analysis of the economic factors and did not consider "intervening trends".<sup>545</sup> In so doing, MOFCOM engaged in a "mechanical exercise"<sup>546</sup> which did not satisfy the obligations imposed under Articles 3.4 and 15.4 to examine "the explanatory force of subject imports on the state of the domestic industry through an evaluation of *all* the relevant factors *collectively*".<sup>547</sup>

<sup>542</sup> Australia's first written submission, para. 643.

<sup>543</sup> China's first written submission, para. 500.

<sup>544</sup> Australia's first written submission, para. 641.

<sup>545</sup> Australia's first written submission, para. 640.

<sup>546</sup> Panel Report, *Thailand – H-Beams*, para. 7.236.

<sup>547</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para.5.172. (emphasis original)

456. Australia observes that MOFCOM used the same endpoint-to-endpoint approach for its analysis of the factors under Articles 3.4 and 15.4 as it used for its analysis of the volume of subject imports under the first sentences of Articles 3.2 and 15.2.<sup>548</sup>

**4. MOFCOM did not evaluate all the factors listed under Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement**

457. As Australia demonstrated in its first written submission, MOFCOM did not properly evaluate the following mandatory factors listed in Articles 3.4 and 15.4: cash flow; inventories; employment; wages; growth; and financing or investment.<sup>549</sup> In response, China states that "due to the unique features of the primary agriculture products, there was no statistics of these economic indicators".<sup>550</sup>

458. China's explanation is merely a repetition of MOFCOM's assertion in the Final Determinations that it conducted an "investigation" and found that the domestic industry did not have statistics on these factors.<sup>551</sup> MOFCOM provides no detail on the extent of this "investigation". Absent that detail, there is no basis for China to assert that MOFCOM satisfied Articles 3.4 and 15.4.

459. The purported absence of readily available statistical data does not, without more, excuse an investigating authority's decision to omit the evaluation of these factors from its analysis. Rather, where the evaluation of a mandatory factor has been omitted from the analysis of injury and causation, an investigating authority is required to explain why it is not relevant, not significant, or not necessary to the overall analysis and determination. This must be done to ensure that the examination is objective, based on positive evidence, and not conducted in a manner that would make a determination of injury more likely. If the evaluation of a mandatory factor that is actually relevant, significant, and necessary to reach an accurate determination of injury and causation is omitted, the outcomes of the analysis of injury and causation cannot be said to be consistent with Articles 3.4 and 3.1 or Articles 15.4

<sup>548</sup> See, for example, Anti-Dumping Final Determination (Exhibit AUS-2), p. 14; Countervailing Duties Final Determination (Exhibit AUS-11), p. 15; compared with Anti-Dumping Final Determination (Exhibit AUS-2), pp. 17-18; Countervailing Duties Final Determination (Exhibit AUS-11), p. 18.

<sup>549</sup> Australia's first written submission, paras. 648-649.

<sup>550</sup> China's first written submission, para. 503.

<sup>551</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Countervailing Duties Final Determination (Exhibit AUS-11), p. 19.

and 15.1. In this respect, an investigating authority's failure to collect the data needed to evaluate a factor does not mean that the factor can be dismissed as not relevant, not significant, or unnecessary to the analysis. Such a factor may indeed be highly relevant, significant, and/or vital to reaching the outcomes of the investigation.

460. Contrary to China's submissions, and to MOFCOM's explanation, Australia has identified data that were in fact available in relation to the mandatory "wages" factor.<sup>552</sup> The data on "labour costs" were provided by CICC as part of a breakdown of "planting costs" in its responses to the questionnaire for domestic producers or growers in the anti-dumping investigation and the questionnaire for domestic producers or growers in the countervailing duties investigation.<sup>553</sup>

461. China's response in this regard is incomplete. China contends that barley is grown by farmers who receive income from its sale but not "wages".<sup>554</sup> It distinguishes "wages", which it claims are "wages" paid by employers to workers in companies,<sup>555</sup> with "labour costs" which "reflect the payment made by farmers to [...] temporarily hired [laborers]"<sup>556</sup> and which are a cost of production in "parallel to other cost items, such as pesticides, fertilizers and seeds".<sup>557</sup>

462. China's arguments on this point rely on the proposition that its barley industry is largely comprised of farmers operating on a small scale, without employees.<sup>558</sup> Assuming, *arguendo*, that China's argument concerning payments made by farmers to temporary laborers is correct, [[REDACTED]  
[REDACTED]  
[REDACTED] ]. China's response, even if accepted, does not explain how it addressed this relevant economic factor with respect to [[REDACTED]].

<sup>552</sup> Australia's first written submission, paras. 650-651.

<sup>553</sup> CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 53; CICC Countervailing Duties Questionnaire Response (Exhibit AUS-66), p. 46. See Australia's first written submission, Table 10.

<sup>554</sup> China's first written submission, para. 507.

<sup>555</sup> China's response to Panel question No. 54, paras. 191-192.

<sup>556</sup> China's response to Panel question No. 54, para. 191.

<sup>557</sup> China's first written submission, para. 508.

<sup>558</sup> China's response to Panel question No. 54, para. 191.

<sup>559</sup> [[REDACTED]]

## 5. Conclusion

463. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement and Articles 15.1 and 15.4 of the SCM Agreement.

### E. CHINA ACTED INCONSISTENTLY WITH ARTICLE 3.5 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 15.5 OF THE SCM AGREEMENT

#### 1. Introduction

464. Australia maintains that MOFCOM's causation analyses in the Anti-Dumping Final Determination and the Countervailing Duties Final Determination are inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because MOFCOM:

- used the outcomes of the flawed inquiries and evaluations under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and under Articles 15.2 and 15.4 of the SCM Agreement in its causation analyses, vitiating the analyses;
- failed to conduct proper causation analyses to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between subject imports of Australian barley and injury to the Chinese barley industry;
- failed to conduct non-attribution analyses in relation to other "known" factors; and
- failed to undertake an objective examination of causation or to make determinations based on positive evidence.

#### 2. MOFCOM failed to establish that Chinese feed barley was "substitutable" for imported Australian malting barley

465. In *China - HP-SSST (Japan)* and *China - HP-SSST (EU)*, the Appellate Body considered that, in order to make a finding of present material injury under Article 3.5 of the Anti-Dumping Agreement, an analysis of "substitutability" or "price correlation" may well be required in cases involving a dumped product and a like domestic product consisting of a range



of different product types that are distinguished by considerable price differences.<sup>560</sup> In this regard, it considered that an affirmative finding of causation under Article 3.5 could not be made to the extent that the relevant imports "are not substitutable for the domestic like products".<sup>561</sup> With regard to the "substitutability of different product types", it considered that "whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses".<sup>562</sup>

466. Australia considers that this requirement goes hand-in-hand with ensuring price comparability in the examination of price effects under the second sentences of Articles 3.2 and 15.2. Australia has established that, in conducting its price effects analysis, MOFCOM failed to ensure that the average unit price of all imported Australian barley was comparable with the average unit price of all domestic barley in China.<sup>563</sup> In this respect, MOFCOM failed, *inter alia*, to account for (i) the different segments in China's domestic barley market, which require different types (e.g. grades, varieties, and quality) of barley at considerably different prices for different end uses, and (ii) the differences between the product mix in the basket of subject imports and that in the basket of like domestic products.<sup>564</sup>

467. Australia has demonstrated that, to the extent that imported Australian barley competed with "like" domestic Chinese barley, it was competition within each of the different market segments between "like" products of the same category required by those market segments.<sup>565</sup> The evidence on the investigation records confirmed that Chinese feed barley was not at all substitutable, and was therefore not competing at all, with imported malting barley — including subject imports of Australian malting barley — in sales to Chinese malting and brewing companies.<sup>566</sup> In fact, neither Australian feed barley, nor Chinese feed barley, nor

<sup>560</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, paras. 5.262-5.263.

<sup>561</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.263.

<sup>562</sup> Appellate Body Reports, *China - HP-SSST (Japan) / China - HP-SSST (EU)*, para. 5.263.

<sup>563</sup> See above section VII.C.3(b)ii.

<sup>564</sup> See above section VII.C.3.

<sup>565</sup> See above section VII.C.3.

<sup>566</sup> Australia's first written submission, paras. 607-614 (citing, *inter alia*, Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), pp. 25-26 and 30-31; Dalian Xingze Malt Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 36).

the majority of other types of domestic Chinese barley could meet these companies' technical requirements.

468. Thus, the evidence of distinct market segments requiring distinct types of barley at different price points indicated that not all product types were "substitutable" or capable of exercising competitive restraint upon one other within their segments in China's market. Specifically, there was very limited substitutability and competitive overlap between imported malting barley, including subject imports of Australian malting barley, and Chinese barley in the market segment occupied by Chinese malting and brewing companies. Within this segment, there was no overlap between Chinese feed barley and imported malting barley, and the degree to which Chinese malting barley was substitutable for imported malting barley was limited. For example, evidence supplied by Tsingtao Brewery explained that, "[a]s far as brewing performance is concerned, currently the quality of domestic malting barley is quite behind that of imported barley, and domestic malting barley can *only be used for brewing ordinary low-grade beer*".<sup>567</sup> Similarly, Dalian Xingze Malt (a Chinese malting company) stated that, "[d]ue to its high quality and large quantity, Australian barley has long been regarded as the primary source of raw materials for malting barley in the Chinese beer industry".<sup>568</sup>

469. As noted above, an assessment of whether "different product types that are distinguished by considerable price differences" are "substitutable" or "exercise competitive restraint on each other" in the same market cannot be determined "simply by assessing whether they share particular physical characteristics or have the same general uses".<sup>569</sup> Consideration should also be given to customer preferences.<sup>570</sup> MOFCOM ignored the evidence demonstrating the absences and the limitations of substitutability between subject imports of malting barley and domestic barley in the malting and brewing market segment. This evidence called into question whether or to what degree subject imports of malting barley could be causing material injury to the domestic industry.

<sup>567</sup> Tsingtao Brewery Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 25. (emphasis added)

<sup>568</sup> Dalian Xingze Malt Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 36.

<sup>569</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.263.

<sup>570</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.263.

470. Similar to the errors which led to MOFCOM's failure to establish price comparability in its price effects analysis, MOFCOM's failure to conduct a proper assessment of substitutability renders its causation analysis inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement and Articles 15.5 and 15.1 of the SCM Agreement.

### **3. MOFCOM failed to establish a "genuine" causal relationship between Australian barley imports and injury to the Chinese barley industry**

471. Australia argued in its first written submission that MOFCOM relied on its flawed inquiries under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement as the foundation for its causation analyses and, by doing so, it vitiated those analyses.<sup>571</sup> Australia also argued that MOFCOM erred in relying on the outcomes of those inquiries, without further analysis, to assert that a causal relationship existed between the allegedly dumped and subsidised imports of Australian barley and the alleged injury to the Chinese barley industry.<sup>572</sup> In arriving at this determination, MOFCOM was required to go beyond the outcomes of its analyses under Articles 3.2 and 15.2 and Articles 3.4 and 15.4.<sup>573</sup> MOFCOM was obligated to establish, rather than to merely allege, the existence of a causal relationship between the allegedly dumped and subsidised imports and the domestic industry's injury.<sup>574</sup> It failed to do so.

472. In its first written submission, China contends that Australia's arguments are "very generic" and "not based on specific record evidence" but does not explain exactly what it means by these statements.<sup>575</sup>

473. Australia pointed out in its first written submission that the following statement in MOFCOM's causation analysis was key to the determination of causation: "the low-price competition for dumped [subsidised] imported product has caused a substantial reduction in the prices of similar products in the domestic industry".<sup>576</sup> Australia explained that, beyond

<sup>571</sup> Australia's first written submission, paras. 667-668.

<sup>572</sup> Australia's first written submission, para. 669.

<sup>573</sup> Australia's first written submission, para. 670.

<sup>574</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175; Appellate Body Report, *China – GOES*, para. 150.

<sup>575</sup> China's first written submission, para. 512.

<sup>576</sup> Australia's first written submission, para. 671 (citing Anti-Dumping Final Determination (Exhibit AUS-2), p. 20; Countervailing Duties Final Determination (Exhibit AUS-11), p. 21).

this assertion, MOFCOM failed to undertake any further analysis for the purposes of establishing a causal relationship.<sup>577</sup>

474. In response, China argues that this statement was prefaced with the phrase "'[a]s mentioned earlier' in the Final Determinations", which "shows the basis of this statement has been discussed and examined in previous sections and paragraphs in the same Final Determinations", namely the price effects analysis under Articles 3.2 and 15.2.<sup>578</sup> China argues that "Australia misconstrues the basis of MOFCOM's causation analysis and fails to substantiate its claim on causality", and that MOFCOM's determination was "reasoned and adequate", demonstrating "a relationship of cause and effect".<sup>579</sup> For the following reasons, China's arguments are without merit.

475. The paragraph quoted below constitutes the entirety of MOFCOM's purported analysis of the causal relationship between subject imports of Australian barley and the injury allegedly suffered by the domestic industry.<sup>580</sup> The short phrase "[a]ffected by this" at the beginning of the second sentence is the *only* indication of a causal relationship between the subject imports and MOFCOM's assertion in the final sentence that "[t]he domestic industry has suffered a substantial injury". This short phrase suggests that the many circumstances affecting the domestic industry that are listed in the paragraph can be traced directly back to the alleged price effect described in the first sentence. However, MOFCOM provides no actual analysis or explanation to establish this key causal link between the alleged price effect and the circumstances it asserts have caused "substantial injury".

As mentioned earlier, the low price competition for dumped imported product has caused a substantial reduction in the prices of similar products in the domestic industry. Affected by this, during the Period of the Injury Investigation, domestic growers began to reduce the planting area of similar products, and the overall national output declined with a cumulative decrease of 5.63%. The market share of similar products in the domestic industry also declined with a cumulative decrease of 5.02%. The decline in the prices of similar products

<sup>577</sup> Australia's first written submission, para. 671.

<sup>578</sup> China's first written submission, paras. 515-517.

<sup>579</sup> China's first written submission, para. 515.

<sup>580</sup> In the Final Determinations, there are four paragraphs in the sections headed "(I) The dumped imported product caused material injury to the domestic industry". The content of the first and second paragraphs is drawn from the analyses conducted by MOFCOM under the first and second sentences of Articles 3.2 and 15.2. The content of the third paragraph is drawn from the analysis conducted by MOFCOM under Articles 3.4 and 15.4. The fourth paragraph concludes in one sentence that MOFCOM "determined that there is a causal relationship between the dumping of imported product and the substantial injury suffered by the domestic industry". Anti-Dumping Final Determination (Exhibit AUS-2), pp. 20-21; Countervailing Duties Final Determination (Exhibit AUS-11), pp. 21-22.

in the domestic industry led to a significant decrease in the sales revenue of such products with a cumulative decrease of 13.13%, and the average income per *mu* also declined with a cumulative decrease of 0.59%. At the same time, domestic industrial planting costs continue to increase with a cumulative increase of 13.86%. The decrease in sales revenue and increase in planting costs led to the constant deterioration of the profitability of similar products in the domestic industry, which not only sustained the stage of loss during the Period of the Injury Investigation but also gradually expanded the average loss per acre every year. The average loss per *mu* at the end of the Period of the Injury Investigation increased by 58.08% from the beginning of the period. The domestic industry has suffered a substantial injury.<sup>581</sup>

476. In the subsequent paragraph, MOFCOM simply concludes, without more, that "[i]n summary, the Investigating Authority determined that there is a causal relationship between the dumping of imported product and the substantial injury suffered by the domestic industry".<sup>582</sup> Australia submits that the words "affected by this" are insufficient to establish a genuine relationship of cause and effect between the subject imports, through their alleged effect on the price of domestic like products, and the list of circumstances allegedly resulting in injury to the domestic industry.

477. China suggests that the alleged price effect described in the first sentence of the above-referenced paragraph required no further analysis or explanation in MOFCOM's causality analysis because the words "[a]s mentioned earlier" referred back to MOFCOM's analysis on the "[e]ffect of the dumped [subsidised] imported product on the price of domestic like product".<sup>583</sup> However, this argument conflates the examination of the relationship between the subject imports and domestic prices under Articles 3.2 and 15.2 with the analysis of whether the subject imports have caused material injury to the domestic industry under Articles 3.5 and 15.5. The former cannot simply stand in for the latter in the causation analysis without further analysis and explanation.<sup>584</sup> As the Appellate Body has explained, the examination under Articles 3.2 and 15.2 and under Articles 3.4 and 15.4 "*contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5".<sup>585</sup>

<sup>581</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 20-21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 21.

<sup>582</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

<sup>583</sup> China's first written submission, para. 515.

<sup>584</sup> See Appellate Body Reports, *China – GOES*, para. 147; *Russia – Commercial Vehicles*, para. 5.54 (citing Appellate Body Report, *China – GOES*, para. 147).)

<sup>585</sup> Appellate Body Report, *China – GOES*, para. 149. (emphasis original)

478. To the extent that MOFCOM's determination of causation was based on a mere correlation between the alleged price effect(s) caused by subject imports and the list of circumstances allegedly resulting in injury, this was not — without more — sufficient to establish a causal relationship under Articles 3.5 and 15.5. Correlation and causation are "two distinct concepts".<sup>586</sup> While a correlation may be indicative of a causal relationship, it is "not dispositive of the causation question".<sup>587</sup> An analysis grounded in coincidence is not sufficient for the purposes of Articles 3.5 and 15.5. A more detailed analysis is required.<sup>588</sup> In contrast, MOFCOM's causation analyses are merely restatements of the outcomes of the inquiries it conducted under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

479. Thus, contrary to China's assertions, Australia's argument is grounded very clearly in the "specific record evidence", namely MOFCOM's Final Determinations. MOFCOM did not engage in the further analysis required to *demonstrate* the existence of a causal relationship — that is, a genuine relationship of cause and effect — between the subject imports of Australian barley and the alleged injury suffered by the domestic barley industry. Moreover, China's assertions have failed to rebut the *prima facie* case that Australia has established.

#### 4. MOFCOM failed to conduct a proper non-attribution analysis

480. As Australia emphasised in its first written submission, an investigating authority must "ensure that the injurious effects of [...] other known factors are not 'attributed' to dumped [subsidised] imports".<sup>589</sup> The Appellate Body has explained that this requires the investigating authority to identify, separate, and distinguish the injurious effects of the other factors from the injurious effects of the dumped imports because, in the absence of such separation and distinction of the different injurious effects, the authority will have no rational basis to conclude that the dumped or subsidised imports are indeed causing the injury.<sup>590</sup>

481. The Appellate Body has also explained that an investigating authority must determine whether, in light of the injurious effects of other known factors, the dumped or subsidised

<sup>586</sup> Panel Report, *China - X-Ray Equipment*, para. 7.247.

<sup>587</sup> Panel Report, *China - X-Ray Equipment*, para. 7.247.

<sup>588</sup> Panel Report, *China - X-Ray Equipment*, para. 7.247.

<sup>589</sup> Appellate Body Report, *US - Hot-Rolled Steel*, para. 223; Australia's first written submission, para. 657.

<sup>590</sup> Appellate Body Report, *US - Hot-Rolled Steel*, para. 223. See also Appellate Body Reports, *China - GOES*, para. 151; *China - HP-SSST (Japan) / HP-SSST (EU)*, para. 5.283; and Panel Report, *Pakistan - BOPP Film (UAE)*, para. 7.434.

imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.<sup>591</sup> The analysis required to make this determination is not directed towards negating the link between the imported product and injury to the domestic industry. Rather, as the Appellate Body has clarified, an investigating authority has to assess the "comparative significance" of the link between the subject imports and injury to the affected domestic industry in relation to the contributions made by other known factors to that injury.<sup>592</sup>

482. Australia maintains that MOFCOM failed to conduct a proper non-attribution analysis in relation to the "known" factors identified below, as required by Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. MOFCOM also acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement by failing to take into account positive evidence on the record concerning these "known" factors and failing to conduct an objective examination.

(a) Wheat and corn policies

483. In its first written submission, Australia identified the Chinese Government's support policies for wheat and corn as a "known" factor which MOFCOM failed to address in a non-attribution analysis.<sup>593</sup> China acknowledged that MOFCOM recognised the policies were a "known" factor.<sup>594</sup> However, China restated MOFCOM's reasoning that the policies were but one of a number of factors which farmers took into account in deciding whether to grow barley.<sup>595</sup> China repeated MOFCOM's conclusion that, while the corn and wheat policies constituted one factor that contributed to the state of the domestic barley industry, that factor did not deny the causality between imports of Australian barley and the injury to the domestic industry.<sup>596</sup>

484. Australia submits that China's defence of MOFCOM's reasoning demonstrates that China also misunderstands the obligations governing non-attribution analyses under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement. The analysis of a "known" factor is not directed at negating the causal relationship between

<sup>591</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.

<sup>592</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.

<sup>593</sup> Australia's first written submission, paras. 676-680.

<sup>594</sup> China's first written submission, para. 523.

<sup>595</sup> China's first written submission, para. 528.

<sup>596</sup> China's first written submission, para. 529.

subject imports and injury to domestic industry. It is directed at testing the "comparative significance" of that causal relationship against the contribution of the "known" factor to the injury.

485. Although MOFCOM did not conduct a non-attribution analysis in relation to the Chinese Government's support policies for wheat and corn production, China claimed in its opening statement at the first meeting of the Panel that MOFCOM "did not attribute the impact of the [wheat and corn] policies" to imports of Australian barley.<sup>597</sup> However, in the absence of any non-attribution analysis of this factor in MOFCOM's Final Determinations, there is no basis upon which China can make this *ex post facto* rationalisation. Unless an investigating authority identifies, separates, and distinguishes the injurious effects of the other factors from the injurious effects of the subject imports, it will have no rational basis to conclude that the subject imports are indeed causing the injury.<sup>598</sup>

486. In its first written submission, China sought to highlight that "*the most important reason* for the decrease of planting of barley was the reduced price of barley, which was caused by increased imports from Australia".<sup>599</sup> However, in answering Panel question No. 48 in relation to this assertion, China appears to have nuanced its position, stating instead that "[t]he information collected showed that the reduced barley price was *an important factor* leading to the reduction of the planting of barley in China".<sup>600</sup>

487. China has failed to rebut Australia's *prima facie* case that MOFCOM's failure to conduct a proper non-attribution analysis of the "known" factor of the Chinese Government's support policies for wheat and corn was inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement and Articles 15.5 and 15.1 of the SCM Agreement.

#### (b) Production costs

488. In its first written submission, China attempts to dismiss Australia's argument that MOFCOM failed to conduct a non-attribution analysis in relation to the impact of production

<sup>597</sup> China's opening statement at the first meeting of the Panel, para. 56.

<sup>598</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 223. See also Appellate Body Reports, *China – GOES*, para. 151; *China – HP-SSST (Japan) / HP-SSST (EU)*, para. 5.283; and Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.434.

<sup>599</sup> China's first written submission, para. 528. (emphasis added)

<sup>600</sup> China's response to Panel question No. 48, para. 164. (emphasis added)



costs on barley production as "baseless".<sup>601</sup> China contends that MOFCOM "considered the costs of domestic industry in the context of its relationship with and interaction with prices",<sup>602</sup> and that production costs "did not deny the causal relationship between the subject imports and injury of the domestic industry".<sup>603</sup>

489. Australia recalls that the non-attribution analysis of a "known" factor is not directed at negating the causal relationship between subject imports and injury to domestic industry, but is directed at testing the "comparative significance" of that causal relationship against the contribution of the "known" factor to the injury.

490. China asserted that costs "would not lead to losses or reduction of profit, if the products could be sold at a reasonable price level".<sup>604</sup> In making this assertion, China ignores Table 9 in Australia's first written submission,<sup>605</sup> which highlights the significance of planting costs in relation to the economic position of the Chinese barley industry. Table 9 shows that, in each year of the Injury POI, the Chinese barley industry operated at a loss, including in 2014, when the price of domestic barley was RMB 2.14 per kg: its highest point during the Injury POI.

491. China has failed to rebut Australia's *prima facie* case that MOFCOM's failure to conduct a proper non-attribution analysis of the "known" factor of production costs was inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement and Articles 15.5 and 15.1 of the SCM Agreement.

(c) Quality differences

492. In its first written submission, Australia argued that another "known" factor which MOFCOM dismissed was the purchase of imported Australian barley rather than domestic barley for reasons other than price, including the superior quality of Australian barley.<sup>606</sup> The record evidence clearly established that there are critical technical requirements for malting

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<sup>601</sup> China's first written submission, para. 530.

<sup>602</sup> China's first written submission, para. 532.

<sup>603</sup> China's first written submission, para. 533.

<sup>604</sup> China's first written submission, para. 532.

<sup>605</sup> Australia's first written submission, p. 248.

<sup>606</sup> Australia's first written submission, para. 686.

barley, which cannot be satisfied by the Chinese barley industry and must therefore be met by imported barley, including from Australia.<sup>607</sup>

493. China argued in its first written submission that the information gathered on its visit to the barley producing areas in Jiangsu province in December 2018 showed that the reduction in the purchase of domestic malting barley was not solely attributable to the superior quality of Australian malting barley, but could be attributed to "lower prices and fewer impurities of imported raw materials, decreasing barley growing area and low barley output".<sup>608</sup> Australia observes that this information must be considered in light of the evidence provided, *inter alia*, in the anti-dumping questionnaire responses of various Chinese malting companies, which imported more than 90% of the barley they consumed, mainly from Australia, Canada, France, Denmark and Argentina.<sup>609</sup> The strong preference of the malting companies for imported barley, particularly Australian barley, was based on the significant difference in quality between imported and domestic malting barley.<sup>610</sup>

494. It was these malting companies that China was apparently referring to when it stated that:

[D]ownstream users purchased both domestic barley and barley imported from Australia for its use. So quality difference was not the single factor that would determine the purchase options of the downstream users.<sup>611</sup>

The evidence on the record shows that these companies purchased hundreds of thousands of tonnes of Australian malting barley during the Injury POI and a few thousand tonnes of domestic malting barley.<sup>612</sup> The evidence supplied by these companies during the investigations established that this disparity is explained by the differences in the quality and consistency of the imported barley, and not merely the price.

495. China also argued that the quality of Australian barley was "part of the embedded nature" of imported Australian barley, which was not a factor that could separately contribute

<sup>607</sup> Australia's first written submission, paras. 687-689.

<sup>608</sup> China's first written submission, para. 537.

<sup>609</sup> Australia's first written submission, para. 688.

<sup>610</sup> Australia's first written submission, para. 689.

<sup>611</sup> China's first written submission, para. 537.

<sup>612</sup> Australia's first written submission, para. 688.

to the injury of the domestic industry at the same time as imported Australian barley.<sup>613</sup> Australia contends in response that the quality of Australian barley could be assessed separately as a "known" factor because it was not linked to MOFCOM's finding that imported Australian barley was dumped and subsidised. The evidence on the investigation records clearly demonstrated that the quality of imported Australian barley operated as a separate factor in the competitive relationship between imported Australian barley and domestic barley.

496. Again, despite there being sufficient evidence to support a non-attribution analysis of this "known" factor, MOFCOM failed to conduct that analysis.

497. China has failed to rebut Australia's *prima facie* case that MOFCOM's failure to conduct a proper non-attribution analysis of this "known" factor was inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement and Articles 15.5 and 15.1 of the SCM Agreement.

(d) Third country imports

498. Australia has addressed the issue of third country imports above in the context of MOFCOM's price effects analyses under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement.<sup>614</sup> Australia referred above to Table 11 in its first written submission, which demonstrated that the market share of both imported Australian barley and domestic barley declined in a growing domestic market during the Injury POI, in contrast to the increased market share captured by third country imports during that period.<sup>615</sup> It can be seen from this evidence that third country imports played an important role in the Chinese domestic barley market during the Injury POI.

499. Australia recalls that MOFCOM asserted in respect of both its Anti-Dumping and Countervailing Duties Final Determinations that there was "no evidence to show that factors such as the impact of imported products from other countries (regions) [...] caused substantial injury to the domestic industry".<sup>616</sup> These statements were incorrect. In its response to

<sup>613</sup> China's first written submission, para. 539.

<sup>614</sup> See above section VII.C.4.

<sup>615</sup> Australia's first written submission, para. 693.

<sup>616</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 21; Countervailing Duties Final Determination (Exhibit AUS-11), p. 22.

Panel question No. 50, Australia has identified information and comments provided by interested parties on third country imports that contradict China's assertion in its first written submission that MOFCOM "received no substantiated comments from interested parties" that third country imports were causing injury to the domestic industry.<sup>617</sup>

500. In addition, as explained above,<sup>618</sup> the data submitted by CICC demonstrated that the average "landed price" of like imports from third countries 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.<sup>619</sup> Although CICC also argued that the level of third country imports was "no reason to deny the injuries to the domestic industry caused by the imported product under investigation",<sup>620</sup> Australia contends 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.<sup>621</sup>

501. As with the other "known" factors, despite there being sufficient evidence to support a non-attribution analysis in relation to third country imports, MOFCOM failed to conduct that analysis.

502. China has failed to rebut Australia's *prima facie* case that MOFCOM's failure to conduct a proper non-attribution analysis of like imports from third countries was inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement and Articles 15.5 and 15.1 of the SCM Agreement.

## 5. Conclusion

503. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement.

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<sup>617</sup> Australia's response to Panel question No. 50, paras. 155-158.

<sup>618</sup> See above para. 440.

<sup>619</sup> Australia's response to Panel question No. 50, para. 155, citing CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), pp. 46-47.

<sup>620</sup> CICC Anti-Dumping Questionnaire Response (Exhibit AUS-65), p. 47.

<sup>621</sup> See Australia's response to Panel question No. 50, para. 157.

**F. CHINA ACTED INCONSISTENTLY WITH THE DUE PROCESS FRAMEWORK  
CONCERNING THE INJURY AND CAUSATION DETERMINATIONS**

**1. Introduction**

504. In this section, Australia addresses China's "due process" errors pertaining to MOFCOM's injury and causation determinations in the anti-dumping and countervailing duties investigations, including MOFCOM's errors relating to the confidential treatment of information concerning domestic industry and information provided by a third-party organisation concerning injury and causation.

**2. MOFCOM failed to give interested parties ample opportunities to  
present all evidence and full opportunity to defend their interests**

505. Australia has established that China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement regarding MOFCOM's failure to provide notice about the information requested at the visit to the "barley producing areas in Jiangsu".<sup>622</sup> China argues that no specific information was requested from parties at the visit, and even if it were, MOFCOM disclosed that information.<sup>623</sup>

506. *First*, in relation to China's argument that no information was requested and therefore the obligations in Articles 6.1 and 6.2 and Article 12.1 do not arise, Australia has addressed China's erroneous interpretation of the scope of these provisions in section IV, above.

507. *Second*, it is implausible that MOFCOM did not request any information throughout the duration of the visit.<sup>624</sup> MOFCOM itself said in the Final Determinations that it "collect[ed] relevant information and evidence *by inquiry*".<sup>625</sup> This indicates that MOFCOM did, in fact, request information from the parties at the visit.

<sup>622</sup> Australia's first written submission, paras. 864-867.

<sup>623</sup> China's first written submission, paras. 614-615.

<sup>624</sup> If this were to be true, it is further proof of MOFCOM's passive approach to undertaking the investigations.

<sup>625</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 4. (emphasis added)

508. *Finally*, and contrary to China's assertions, the lists of public documents in the anti-dumping<sup>626</sup> and countervailing duties<sup>627</sup> investigations do *not* establish that the report<sup>628</sup> was published on 20 February 2019, nor that interested parties were notified that same day. China's exhibits simply confirm that the report itself is dated 20 February 2019.<sup>629</sup> The Panel will observe that the dates contained in the lists exhibited by China are not chronological, and as such the date, 20 February 2019, cannot be the date of disclosure.<sup>630</sup>

509. China has failed to rebut Australia's claims that MOFCOM failed to give interested parties ample opportunity to present all evidence and have full opportunity to defend their interests. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 6.1 and 6.2 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement.

### **3. MOFCOM failed to require CICC to furnish non-confidential summaries**

510. Australia has established that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement with respect to MOFCOM's failure to require CICC to furnish non-confidential summaries.

511. *First*, China asserts that there is no confidential information in CICC's Applications, despite CICC's clear reference to information *in the Applications* in its request for confidential treatment.<sup>631</sup> China argues that the request from CICC is "just a general reference" and "does not mean there is confidential information in the body of the Applications."<sup>632</sup> An interested party making a request for confidential treatment of information must specify the information subject to that request. Failure to make precise requests for confidential treatment would frustrate the operation of the provision and the balance between the public interest in

<sup>626</sup> List of public documents in Barley Anti-Dumping Case (Exhibit CHN-20).

<sup>627</sup> List of public documents in Barley Countervailing Case (Exhibit CHN-21).

<sup>628</sup> The relevant report is MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71).

<sup>629</sup> See MOFCOM Records on the Survey Results of Barley in Yancheng, Jiangsu (Exhibit AUS-71), pp. 4 and 7.

<sup>630</sup> List of public documents in Barley Anti-Dumping Case (Exhibit CHN-20); List of public documents in Barley Countervailing Case (Exhibit CHN-21). The Panel will observe that document numbers 42-44 in the anti-dumping list all predate 20 February 2019. Likewise, document numbers 34-35 in the countervailing duties list both predate 20 February 2019. All other dates listed correspond to the date of the document. If the dates corresponded to the date of disclosure, China does not explain why the documents identified are not organised by date. Moreover, there is nothing in China's exhibits to show that interested parties were *notified* on 20 February 2019.

<sup>631</sup> China's first written submission, para. 646. See also Australia's first written submission, para. 894.

<sup>632</sup> China's response to Panel question No. 65, para. 221.

disclosure and protecting information which is genuinely confidential. CICC's reference to information in the Applications does not precisely identify what information was to be treated confidentially. In any event, it would be reasonable to assume that the Applications contained some reference to the confidential [REDACTED] from [REDACTED] – the "relevant organizations" who China allege authorised the Applications. It is implausible that there is no reference to these organisations in CICC's Applications.

512. *Second*, in relation to other confidential information provided by CICC, both in the Annex to the Applications and in CICC's questionnaire response, China asserts that "[n]one of the industry data was treated as confidential information in the annexes."<sup>633</sup> However, in response to Panel question No. 55, China asserts that "[n]one of the individual domestic barley growers responded to MOFCOM's questionnaires."<sup>634</sup> As such, it is not clear to what "industry data" China refers. An adequate proper non-confidential summary would have assisted in this regard. China also asserts that "[w]hile other information contained in the Annexes that were sensitive to the provider of the information, the data of the domestic industry which is most relevant to the investigation contained in the Annexes were disclosed as public information."<sup>635</sup> The summary of information provided was inadequate and did not permit a reasonable understanding of the substance of the information.<sup>636</sup> For example, as Australia observed in response to Panel question No. 47, "[t]here is nothing on the record or in the Final Determinations that explains where these data came from or how they were collected, estimated, or otherwise obtained".<sup>637</sup>

513. China has failed to rebut Australia's claims that MOFCOM failed to require CICC to furnish non-confidential summaries of sufficient detail to permit a reasonable understanding of the substance of the information. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.

<sup>633</sup> China's first written submission, para. 649.

<sup>634</sup> China's response to Panel question No. 55, para. 201. (footnotes omitted) Australia assumes this statement from China, together with China's disclosure that the Applications were "authorised" by [REDACTED] and CICC's failure to include a list of known domestic producers or associations of domestic producers, means that there was no domestic industry involvement in CICC's Applications.

<sup>635</sup> China's first written submission, para. 649.

<sup>636</sup> See above, paras.33, 47, 431 and 452. See also Australia's first written submission, paras. 888-899.

<sup>637</sup> Australia's response to Panel question No. 47, para. 150.

#### **4. MOFCOM failed to satisfy itself as to the accuracy of the information provided**

514. Australia has explained, above, that the obligation in Article 6.6 of the Anti-Dumping Agreement and Article 12.5 of the SCM Agreement is not dependant on demonstrations that evidence is "inaccurate". China attempts to misdirect the Panel's attention by asserting that the information to which Australia refers is "so broad" and that Australia has not demonstrated that the information was inaccurate.<sup>638</sup> For the benefit of the Panel, Australia provided a non-exhaustive list of information to which it refers.<sup>639</sup> However, Australia does not concede that such a list is necessary in light of the poor quality of MOFCOM's Final Determinations and no indications whatsoever that MOFCOM undertook any activity to satisfy itself of the accuracy of information on which its determinations were based. Had MOFCOM provided adequate reasons and explanations in its Final Disclosures, Final Determinations, or elsewhere on the record, and had there been record evidence showing the verification or other similar activities undertaken by MOFCOM, Australia could have articulated its claim in greater detail. In the absence of reasons and evidence, Australia has set out its claim and arguments in sufficient detail.

515. In any event, China's attempts to rely on passing references MOFCOM made to "examination" and "review" of information in the Final Determinations must fail.<sup>640</sup> These references are clearly not evidence that MOFCOM satisfied itself as to the accuracy of information on which its determinations were based.

516. China has failed to rebut Australia's claim that MOFCOM failed to satisfy itself as to the accuracy of information on which its injury and causation determinations were based. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.6 of the Anti-Dumping Agreement, and Article 12.5 of the SCM Agreement.

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<sup>638</sup> China's first written submission, para. 661.

<sup>639</sup> Australia's response to Panel question No. 67, paras. 202-204.

<sup>640</sup> China's first written submission, para. 665.



## **5. MOFCOM failed to disclose essential facts**

517. Australia has established that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement with respect to MOFCOM's failure to disclose essential facts.

518. *First*, given MOFCOM published the Final Determinations on the same day that it received comments on the Final Disclosures, there was no meaningful opportunity for parties to defend their interests. The documents MOFCOM published purporting to be disclosure documents could not meet the standard required by Articles 6.9 and 12.8.

519. *Second*, contrary to China's assertions, MOFCOM did not fully disclose the essential facts.<sup>641</sup> In its first written submission, China merely points to assertions MOFCOM made in the Final Disclosures. These assertions do *not* constitute the factual basis underlying MOFCOM's determinations. In Australia's submission, MOFCOM did not fully disclose the essential facts under consideration, and China cannot point to anything to the contrary, because these "facts" did not exist.

520. China has failed to rebut Australia's claims that MOFCOM failed to disclose the essential facts under consideration in sufficient time to allow parties to defend their interests. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.

## **6. MOFCOM failed to give public notices containing sufficient detail of the findings and conclusions reached on all issues of fact and law**

521. Australia has established that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement with respect to MOFCOM's failure to explain the considerations relevant to the injury determinations, and the reasons for rejecting all arguments made by the Australian Government and Australian interested parties.

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<sup>641</sup> China's first written submission, paras. 675-679.

522. MOFCOM was required to publish a public notice setting out the "matrix of facts, law, and reasons that logically fit together to render the decision to impose final measures."<sup>642</sup> It failed to do so. This is evident from the preceding sections detailing MOFCOM's failings in the injury and causation analyses. China has failed to rebut Australia's claim in this regard. Moreover, China has failed to rebut Australia's claims that MOFCOM did not give reasons as to why it rejected all arguments and claims made by the Australian Government and interested parties. China merely points to places where MOFCOM noted a submission had been received. As set above, this is insufficient to meet the standards in Articles 12.2.2 and 22.5.<sup>643</sup>

523. As such, China has failed to rebut Australia's claims in this regard that MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.

## **7. Conclusion**

524. MOFCOM's injury and causation determinations were flawed from the start when MOFCOM failed to determine whether CICC had standing, failed to properly set out the legal and factual basis for its definition of domestic industry, and failed to require CICC to furnish non-confidential summaries. These errors continued into MOFCOM's injury and causation analyses, and were exacerbated by MOFCOM's numerous and significant due process failings as set out above.

525. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 6.1, 6.2, 6.5.1, 6.6, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 12.1, 12.4.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement.

## **G. CONCLUSION**

526. For the reasons set out above and in Australia's first written submission, China has failed to rebut Australia's claims that it acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement and Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement in respect of MOFCOM's injury and causation determinations, and with Articles 6.1, 6.2, 6.5.1,

<sup>642</sup> Panel Report, *US – OCTG (Korea)*, para. 7.299. See also, Appellate Body Report, *China – GOES*, para. 258.

<sup>643</sup> See above, section IV.D.

6.6, 6.9, 12.2 and 12.2.2 of the Anti-Dumping Agreement, and Articles 12.1, 12.4.1, 12.5, 12.8, 22.3 and 22.5 of the SCM Agreement in respect of MOFCOM's conduct of the investigations regarding injury and causation.

## VIII. AUSTRALIA'S CLAIMS CONCERNING THE IMPOSITION OF DUTIES

### A. ANTI-DUMPING AGREEMENT

527. Australia has set out in its first written submission<sup>644</sup> a *prima facie* case that China has breached its obligations under the Anti-Dumping Agreement and the GATT 1994 as follows:

- Article 9.2 of the Anti-Dumping Agreement by failing to name the suppliers of the product concerned in its Anti-Dumping Duty Announcement;
- Article 9.2 of the Anti-Dumping Agreement by failing to impose anti-dumping duties in appropriate amounts;
- Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties greater than the margin that would have been established in compliance with Article 2;
- Article VI:2 of GATT 1994 by imposing anti-dumping duties in excess of the dumping margin that would have been determined in compliance with Article VI:1;
- Article 9.1 of the Anti-Dumping Agreement by imposing anti-dumping duties despite having not fulfilled the requirements for their imposition; and
- Article 1 of the Anti-Dumping Agreement as a consequence of the violations of the Anti-Dumping Agreement Australia has outlined before the Panel.

528. Australia takes this opportunity to clarify the basis of its claim under Article 9.2 of the Anti-Dumping Agreement regarding MOFCOM's failure to name the suppliers of the product concerned. In particular, Australia makes a standalone claim under Article 9.2, which is not consequential on the Panel's findings with respect to Australia's claim under Article 6.10 of

<sup>644</sup> Australia's first written submission, paras. 700-725.

the Anti-Dumping Agreement. As Australia set out in its first written submission,<sup>645</sup> the Appellate Body has made clear that there is "parallelism"<sup>646</sup> between the relevant obligations. However, these are not the same obligation. Australia's claim is that China breached the obligation in Article 6.10 to determine individual dumping margins, and separately and additionally, breached the obligation in Article 9.2 to name the suppliers of the product concerned.

529. With respect to China's arguments at paragraphs 719-722 of its first written submission, Australia maintains that MOFCOM failed to name the 15 Australian traders in its Anti-Dumping Duty Announcement, leaving some ambiguity as to the dumping duties that applied to each of those traders. It appears MOFCOM considered it sufficient to indicate the dumping margin for these 15 traders in the Final Determination, and then rely on the reader to make the inference when reading the Anti-Dumping Duty Announcement that the dumping duties for those 15 traders were automatically applied at the same rate. This is not consistent with the clear, mandatory<sup>647</sup> requirement in Article 9.2 of the Anti-Dumping Agreement to name the suppliers of the product concerned.

530. China has failed to rebut Australia's claims that it acted inconsistently with Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of GATT 1994 in its imposition of anti-dumping duties.

## **B. SCM AGREEMENT**

531. Australia has set out in its first written submission<sup>648</sup> a *prima facie* case that China has breached its obligations under the SCM Agreement and GATT 1994 as follows:

- Article 10 of the SCM Agreement by imposing countervailing duties other than pursuant to investigations initiated and conducted in compliance with Article VI of the GATT 1994;

<sup>645</sup> Australia's first written submission, para. 708.

<sup>646</sup> Appellate Body Report, *EC — Fasteners (China)*, para. 344.

<sup>647</sup> See Australia's first written submission, para. 708; Appellate Body Report, *EC — Fasteners (China)*, para. 336.

<sup>648</sup> Australia's first written submission, paras. 726-730

- Article VI:3 of GATT 1994 by conducting its countervailing duties investigation contrary to the terms of that provision as interpreted by the SCM Agreement;
- Article 19.4 of the SCM Agreement by levying countervailing duties in an amount greater than the subsidy that would have been found to exist, in terms of per unit subsidisation of the imported product, had MOFCOM conducted its investigation consistent with the SCM Agreement and Article VI of the GATT 1994; and
- Article 32.1 of the SCM Agreement by taking specific action, namely imposing countervailing duties, against a subsidy of another Member, being Australia, other than in accordance with the provisions of GATT 1994, as interpreted by SCM Agreement.

532. China has failed to rebut these claims.

## IX. CONCLUSION

### A. JUDICIAL ECONOMY

533. It is well recognised that a panel has discretion to exercise judicial economy, meaning it "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>649</sup> However, the Appellate Body has also cautioned against the exercise of "false judicial economy", stating that:

To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."<sup>650</sup>

534. In this regard, Australia recognises that a number of claims which it has raised are entirely consequential to the Panel's findings with respect to other claims, namely Articles 1, 5.8, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, Articles 10, 11.9, 19.4 and 32.1 of the

<sup>649</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, para. 54.

<sup>650</sup> Appellate Body, *Australia – Salmon*, para. 223 (citing Article 21.1 of the DSU).

SCM Agreement and Articles VI:2 and VI:3 of GATT 1994. Therefore, Australia considers that should the Panel consider it appropriate to exercise judicial economy in this matter, such exercise should be limited to those consequential claims identified above.

535. However, Australia respectfully requests the Panel to make findings with respect to all other claims. In Australia's view, such findings are necessary to ensure the effective and complete resolution of this dispute. In this regard, Australia observes the extraordinary breadth of the legal errors and inconsistencies with WTO obligations that it has identified in this dispute. These errors began at the point of initiation of the investigations at issue, continued throughout the conduct of those investigations, and were perpetuated by the flawed determinations and the unjustified imposition of duties. In Australia's view, it is necessary for the Panel to make findings with respect to each error in MOFCOM's fundamentally flawed investigation and at each stage of its determinations, including with respect to dumping, subsidisation, and injury and causation. The full range of findings are, in Australia's view, necessary to ensure that the DSB is able to make "sufficiently precise recommendations and rulings", such as would ensure full compliance and effective resolution of the dispute.<sup>651</sup> Anything less would risk only partial resolution of the matter at issue.

## **B. SUMMARY OF REQUESTED FINDINGS**

536. For the reasons set out above, and in Australia's first written submission and responses to questions from the Panel, Australia respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994, as set out below:

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

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<sup>651</sup> Australia and China have jointly notified to the DSB their intention to enter into arbitration under Article 25 of the DSU to resolve any appeal in this dispute in the event that the Appellate Body is not able to hear any such appeal (see WT/DS598/5).

- Articles VI:2 and VI:3 of the GATT 1994.

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

**ANNEX A SRWUI Program – Actual Expenditure**

<i>Irrigation Project</i>	<i>Actual Expenditure</i>
(i) Private Irrigation Infrastructure Operators Program for New South Wales	2015/16 – AUD 59 million 2016/17 – AUD 136 million <sup>652</sup>
(ii) Private Irrigation Infrastructure Program for South Australia	2015/16 – AUD 0.4 million 2016/17 – AUD 0.1 million <sup>653</sup>
(iii) Queensland Healthy Headwater Water Use and Efficiency Program	2015/16 – AUD 18.1 million 2016/17 – AUD 15.4 million <sup>654</sup>
(iv) Goulburn Murray Water Connection Project Stage 2	2015/16 – AUD 0 2016/17 – AUD 151.9 million <sup>655</sup>
(v) Victorian Farm Modernisation Project	2015/16 – AUD 10.6 million 2016/17 – AUD 32.9 million <sup>656</sup>
(vi) New South Wales State Basin Pipe – Stock and Domestic	2015/16 – AUD 0 2016/17 – AUD 0 <sup>657</sup>
(vii) New South Wales State Water Metering Scheme (Including Pilot)	2015/16 – AUD 15 million 2016/17 – AUD 2.5 million <sup>658</sup>
(viii) New South Wales State Irrigated Farm Modernisation Project (And Pilot)	2015/16 – AUD 13.4 million 2016/17 – AUD 31.7 million <sup>659</sup>
(ix) On-Farm Irrigation Efficiency Project (Including Pilot Projects)	2015/16 – AUD 62.2 million 2016/17 – AUD 78 million <sup>660</sup>
<b>Totals</b>	2015/16 – AUD 178.7 million 2016/17 – AUD 448.5 million

<sup>652</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 54.<sup>653</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 55.<sup>654</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 56.<sup>655</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 57.<sup>656</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 57.<sup>657</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 58.<sup>658</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 59.<sup>659</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 60.<sup>660</sup> CICC Application for Countervailing Duties Investigation, Annexes (Exhibit AUS-64), p. 61.