



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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY AUSTRALIA

The following communication, dated 15 March 2021, from the delegation of Australia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. On 16 December 2020, Australia requested consultations with the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") with respect to measures imposing anti-dumping duties and countervailing duties on barley imported from Australia.¹ Australia and China held such consultations on 28 January 2021. Unfortunately, these consultations were unsuccessful in resolving this dispute. As a consequence, Australia is requesting the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, Article 30 of the SCM Agreement and Article XXIII of the GATT 1994.

2. Australia considers that China's measures imposing anti-dumping and countervailing duties on barley from Australia, as set forth in Ministry of Commerce of the People's Republic of China ("MOFCOM") Notice No. 14 of 2020 (18 May 2020), including any and all annexes and any amendments, modifications or replacements thereof, and Notice No. 15 of 2020 (18 May 2020), including any and all annexes and any amendments, modifications or replacements thereof, are inconsistent with China's commitments and obligations including under the following provisions of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement.

Interpretation and application of "like product", "product under consideration" and "domestic industry"

- i. Articles 2.1, 2.6, 3.1, 3.6 and 5.2 (i) and (iv) of the Anti-Dumping Agreement and Articles 11.2(i) and (iv), 15.1, footnote 46 and 15.6 of the SCM Agreement because, *inter alia*, in conducting its investigation China incorrectly defined and applied the "product under consideration" and the "like product" including, *inter alia*, by failing to account for the difference between: seed barley and other barley; malting barley and feed barley; and different qualities of malting barley.
- ii. Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement because, *inter alia*, in conducting its investigation China incorrectly defined and applied the "domestic industry" in part because of its incorrect definition and application of "product under consideration" and "like product".

¹ WT/DS598/1.

Initiation of the investigations

- iii. Articles 5.1, 5.2 and 5.4 of the Anti-Dumping Agreement and Articles 11.1, 11.2 and 11.4 of the SCM Agreement because, *inter alia*, China improperly initiated investigations on the basis of applications that were not made "by or on behalf of the domestic industry" and because, *inter alia*, China failed to determine, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made "by or on behalf of the domestic industry".
- iv. Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement and Articles 11.2, 11.3 and 11.9 of the SCM Agreement because, *inter alia*, China initiated investigations without sufficient evidence, China failed to examine or review the accuracy and adequacy of the evidence provided in the application, and China failed to reject the application or terminate promptly the investigation given the lack of sufficient evidence.

Conduct of the investigations

- v. Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement because, *inter alia*, China did not provide all interested parties and interested Members with sufficient notice of and opportunity to present all relevant information and evidence, including, *inter alia*, by failing to take into account relevant factors in determining deadlines for response to questionnaires and comments on the Final Disclosures, and failing to make interested parties aware of alleged deficiencies in the information provided and to give opportunities to rectify such alleged deficiencies.
- vi. Article 6.2 of the Anti-Dumping Agreement because, *inter alia*, throughout the investigation China did not provide all interested parties a full opportunity for the defence of their interests.
- vii. Articles 6.4 of the Anti-Dumping Agreement and Article 12.3 of the SCM Agreement because, *inter alia*, China failed to provide timely opportunities for all interested parties to see all non-confidential information used by authorities that was relevant to the presentation of their cases, and to prepare presentations on the basis of this information, including, *inter alia*, with respect to: alleged deficiencies in the information provided by the interested parties and the basis for disregarding such information; the composition of the domestic industry; the determination of normal value and export prices, including data sourced from Global Trade Atlas; the adjustments for differences in price comparability; the calculations of the dumping margins; the financial contributions and specificity of the alleged subsidy programs; the calculation of the subsidy rates; and the determination of injury and causation.
- viii. Articles 6.4 and 6.5.1 of the Anti-Dumping Agreement, and Articles 12.3 and 12.4.1 of the SCM Agreement because, *inter alia*, China appears to have relied on confidential information from interested parties and has failed to provide, or require the interested parties to provide, adequate non-confidential summaries of allegedly confidential information or because China wrongly treated information as being confidential.
- ix. Article 6.6 of the Anti-Dumping Agreement and Articles 12.5 of the SCM Agreement because China failed during the course of the investigation to satisfy itself as to the accuracy of the information supplied by interested parties, including, *inter alia*: the composition of the domestic industry; the production of barley in Australia and the operation of the Australian barley market; the operation of the alleged subsidies; the domestic prices of barley in China; and the accuracy of the statistics of various economic indicators related to the state of China's barley industry.
- x. Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement because, *inter alia*, China failed to disclose to the interested parties the essential facts under consideration which form the basis for the determinations in sufficient time for the parties to defend their interests, including by failing to make available all relevant information on the matters of fact, law and reasons which led to the imposition of the

final duties, including, *inter alia*: alleged deficiencies in the information provided by the interested parties and the basis for disregarding such information; the composition of the domestic industry; the determination of normal value and export prices, including data sourced from Global Trade Atlas; the decisions regarding adjustments for differences in price comparability; the calculations of the dumping margins; the financial contributions and specificity of the alleged subsidy programs; the calculation of the subsidy rates; and the determination of injury and causation.

The use of facts available

- xi. Article 6.8, and Annex II.1, 3, 5, 6 and 7 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement because China improperly based its determinations on the facts available. In particular, China was not entitled to reject necessary information submitted by Australian interested parties as such information was submitted in a reasonable period of time and Australian interested parties did not significantly impede the investigation. China also, *inter alia*:
 - a. failed to take into account information that was verifiable, appropriately submitted so that it could be used in the investigation without undue difficulties, which was supplied in a timely fashion, and, where applicable, which was supplied in a medium or computer language requested by China;
 - b. improperly and without justification disregarded information provided by interested parties acting to the best of their abilities;
 - c. failed to inform supplying parties forthwith of the reasons for not accepting evidence or information or to give an opportunity to provide further explanations within a reasonable period;
 - d. failed to give reasons for the rejection of such information in its published determination; and
 - e. failed to exercise special circumspection in regard to information from secondary sources in making its findings.

Dumping determination

- xii. Article 2.2 of the Anti-Dumping Agreement because, *inter alia*, China improperly determined normal value by reference to third country sales without proper justification, without establishing that the third country was "appropriate", and without establishing that the price of the like product when exported to that third country was "comparable" and "representative".
- xiii. Article 2.3 of the Anti-Dumping Agreement, because, *inter alia*, China did not determine export price on a reasonable basis when it improperly discarded the information provided by exporters on their export sales of barley to China, and determined the export price by reference to third party information.
- xiv. Article 2.4 of the Anti-Dumping Agreement because China failed to make a fair comparison between the export price and normal value by, *inter alia*, failing to ensure: that normal value and export price were compared at the same or equivalent levels of trade; that the comparison was made in respect of sales made at as nearly as possible the same time; that due allowances were made for all factors affecting price comparability; and that allowances were made for costs and profits accruing. Moreover, China failed to indicate what information was necessary to ensure a fair comparison, in part because of its failure to disclose its methodologies for determining both export price and normal value.
- xv. Article 2.4.2 of the Anti-Dumping Agreement, because, *inter alia*, China did not establish the margin of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.

- xvi. Article 6.10 of the Anti-Dumping Agreement because, *inter alia*, China did not determine individual margins of dumping for each known exporter or producer concerned of barley.

Countervailing determination

- xvii. Articles 1.1, 1.2, 2.1, 2.2 and 2.4 of the SCM Agreement because, *inter alia*, China improperly established the existence of a subsidy, as defined in paragraph 1 of Article 1 of the SCM Agreement, including by improperly determining that a subsidy existed, that a "benefit" was conferred on Australian producers or exporters of barley, and that the alleged subsidy was specific to certain enterprises within Australia.

Determination of injury and causation

- xviii. Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement because China failed to base its determination of injury on positive evidence and an objective examination of both (a) the volume of the allegedly dumped and subsidized imports of Australian barley and the effect of these imports on prices in the domestic market for like products, and (b) the consequent impact of the allegedly dumped and subsidized imports of Australian barley on domestic producers of like products. China's failure to meet the obligations under Article 3.1 is linked to its failure to comply with Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement and China's failure to meet the obligations under Article 15.1 is linked to its failure to comply with Articles 15.2, 15.4 and 15.5 of the SCM Agreement.
- xix. Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, because: (a) with regard to the volume of the allegedly dumped and subsidized imports of Australian barley, China failed to consider, *inter alia*, all the positive evidence available on the record, including year-to-year fluctuations in the volume of these imports, and failed to conduct an objective analysis of whether there had been a significant increase in these imports, either in absolute terms or relative to production or consumption in China; (b) with regard to the effect of the allegedly dumped and subsidized imports of Australia barley on prices, China did not consider, *inter alia*, all the positive evidence available on the record, including year-to-year fluctuations in the volume of these imports, and failed to conduct an objective analysis of whether there had been a significant price undercutting by these imports as compared with the price of a like product in the domestic market, or whether the effect of the imports was otherwise to depress prices to a significant degree; and (c) China failed to consider whether the allegedly dumped and subsidized imports of Australian barley prevented price increases, which otherwise would have occurred, to a significant degree.
- xx. Article 3.4 of the Anti-Dumping Agreement and Article 15.4 of the SCM Agreement, because China failed to (a) conduct an objective examination of the impact of the allegedly dumped and subsidized imports of Australian barley on the domestic industry by, *inter alia*, conducting the examination in relation to a wrongly defined domestic industry under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement; (b) evaluate the role, relevance and weight of all the relevant economic factors and indices having a bearing on the state of the domestic industry, limiting its analysis to a mechanical checklist approach that, *inter alia*, did not take into account all the positive evidence available; and (c) give full weight to factors such as planting costs in making its finding that the domestic industry had suffered a substantial injury.
- xxi. Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement, because China failed to (a) demonstrate that the allegedly dumped and subsidized imports of Australian barley, through the effects of the alleged dumping and subsidies, caused injury to the domestic industry; (b) base its purported demonstration of the causal relationship on an objective examination of all relevant evidence; (c) objectively examine other known factors that injured the domestic industry, including, *inter alia*, non-subject imports and support provided by the Chinese government for corn and wheat production; and (d) not attribute the injuries caused by those other factors to the imports of Australia barley. Moreover, China improperly based its assessment of

causation on flawed considerations, examinations, and evaluations under Articles 3.2 and 3.4 of the Anti-Dumping Agreement and Articles 15.2 and 15.4 of the SCM Agreement.

Imposition of duties

- xxii. Article VI:2 of the GATT 1994 and Article 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement because, *inter alia*, China: has imposed anti-dumping duties where all requirements for their imposition have not been fulfilled; has not imposed anti-dumping duties in appropriate amounts; has not imposed anti-dumping duties on an individual basis; has not named the suppliers of the product concerned; and has imposed anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement.
- xxiii. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement because, *inter alia*, China used an inadequate methodology to determine an amount of subsidization, and therefore improperly levied countervailing duties on imported Australian barley products in excess of the amount of the subsidy that would have been found to exist had the investigation been conducted in compliance with the SCM Agreement.

Transparency

- xxiv. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement because, *inter alia*, China failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material, and the reasons for acceptance or rejection of relevant arguments and claims including, *inter alia*: its decision to use facts available; the composition of the domestic industry; the determination of normal value, including the decision to use export sales to Egypt; the determination of export price; its decision to source data from Global Trade Atlas; adjustments made, if any, to undertake a fair comparison; calculation of the dumping margin; imposition of dumping duties; acceptance of the applicant's legal and factual assertions and rejection of the same from the Australian government and other Australian interested parties with respect to the alleged financial contribution, specificity and injury caused by the alleged subsidy programs; calculation of the subsidy rates; imposition of countervailing duties; and the determination of injury and causation in respect of both investigations.

Consequential claims

- xxv. Article VI of the GATT 1994 as a consequence of the breaches of the Anti-Dumping Agreement and the SCM Agreement described above.
- xxvi. Article 1 of the Anti-Dumping Agreement as a consequence of the breaches of the Anti-Dumping Agreement described above.
- xxvii. Articles 10 and 32.1 of the SCM Agreement as a consequence of the breaches of the SCM Agreement and the GATT 1994 described above.

3. China's measures also appear to nullify or impair the benefits accruing to Australia directly or indirectly under the cited agreements.

4. Therefore, Australia respectfully requests, pursuant to Articles 4.7 and 6 of the DSU, Article 17.4 of the Anti-Dumping Agreement, Article 30 of the SCM Agreement, and Article XXIII of the GATT 1994, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

5. Australia asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 26 March 2021.
