

**Before the World Trade Organization
Panel Proceedings**

**CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY
MEASURES ON WINE FROM AUSTRALIA
(DS602)**

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

Business Confidential Information Redacted

6 September 2022

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Short Title	Full Case Title and Citation
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
<i>EC – Fasteners (China) (Article 21.5 China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>US – Anti-Dumping and Countervailing Duties (Korea)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Products and the Use of Facts Available</i> , WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed by the United States 19 March 2021
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
"All others" category of Australian companies	All other Australian companies that were not named in Annex 1 of the Final Determination, which MOFCOM collectively referred to as "all others"

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Questionnaire	Exporter Questionnaire issued by MOFCOM to Australian exporters on 10 October 2020
Application	CADA, "Application of the Wine Industry of the People's Republic of China for Anti-dumping Investigation on Imported Wines Originating in Australia", 6 July 2020
BCI	Business Confidential Information
CADA	China Alcoholic Drinks Association
Casella	Casella Wines Pty Ltd
ChAFTA	China-Australia Free Trade Agreement
CIF	Cost, insurance, freight
Domestic Producer Questionnaire	Unless otherwise specified, means the Domestic Producer Questionnaire issued by MOFCOM on 10 October 2020
Final Determination	MOFCOM, "Final Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Imported Wine Originating in Australia", 26 March 2021
Final Disclosure	MOFCOM, "Disclosure of Basic Facts Relied on by Final Ruling of Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia", 12 March 2021
Injury POI	The injury investigation period adopted by MOFCOM, being 1 January 2015 to 31 December 2019.
MOFCOM	Ministry of Commerce of the People's Republic of China
PCN	Product Control Number
Pernod Ricard	Pernod Ricard Winemakers Pty Ltd
POI	The dumping investigation period adopted by MOFCOM, being 1 January to 31 December 2019.
Preliminary Determination	MOFCOM, "Preliminary Ruling of the Ministry of Commerce of the People's Republic of China on Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia", 30 August 2021
RMB	Chinese Renminbi
Sampled companies	Treasury, Casella and Swan, the three Australian companies selected by MOFCOM as sampled companies and named in Annex 1 of the Final Determination in the category, "Sampled Companies"
Swan	Swan Vintage
Treasury	Treasury Wine Estate Vintners Limited

I. INTRODUCTION

1. Chair, members of the Panel, thank you for your time today.
2. Before I continue, I wish to advise the Panel that Australia's opening statement will include business confidential information.
3. First to say that Australia greatly values its bilateral and trade relationship with China. It does not bring this dispute lightly. Australia and China have long worked closely together on a range of bilateral and multilateral trade issues, including in the WTO, and we will continue to do so.
4. We are here today to address MOFCOM's decision to impose absurdly inflated anti-dumping duties on imports of Australian bottled wine. Australia's ultimate submission is that an unbiased and objective investigating authority could not have found the existence of dumping, let alone this extraordinary margin.
5. China's anti-dumping duties have significantly curtailed what was once a strong Australian wine export trade. This was a trade that thrived after progressive liberalisation following the entry into force of the China-Australia Free Trade Agreement. Chinese tariffs on Australian wine went from 14% in December 2015 to 0% in January 2019. This benefitted Australian industry and Chinese consumers alike. Despite this liberalisation, trade is now unjustifiably disrupted.
6. Australia takes its obligations at the WTO seriously, and expects other WTO Members to do the same. The WTO dispute settlement system plays a critically important role, holding Members to account in fulfilling their obligations. Moreover, WTO dispute settlement provides the certainty and stability that underpin the global trading system. In this statement, Australia will demonstrate how China's conduct of the underlying dumping investigation, from initiation through to Final Determination, failed to comply with the requirements of the WTO Anti-Dumping Agreement. Ultimately, it showed disregard for the rules-based trading system. Ensuring unbiased and objective decision-making based on facts is a key tenet of that system. MOFCOM's actions were neither objective, nor based on facts.
7. Australia has set out its claims in detail in our first written submission, and will not repeat all of them here today, Chair. Nor will I present an issue-by-issue rebuttal of China's

lengthy first written submission in this oral statement. Rather, we will use this opportunity to explain the key issues in the dispute.

8. I will begin by making some brief observations about the nature of the Australian wine industry. These observations provide essential context for the Panel's consideration of the matters in dispute. They were before MOFCOM and they should have informed its investigation. Wine is of course a highly differentiated consumer product that varies by, among other things, grape type and blend, viticulture, terroir, method of winemaking, and consumer perceptions and preferences. Price is linked to these characteristics, and accordingly price can be used as an indicator of product quality. In the Chinese market, Australian exporters focused on the higher end of the market. This was reflected in the fact that the average price of Australian wine in the Chinese market exceeded both the average price of like Chinese domestically produced wines *and* the average price of all other imported wines over the injury analysis period.

9. By contrast, the Chinese wine industry is generally focused on the lower end of the market. Chinese producers do not produce meaningful quantities of high-quality wines that compete with the high-quality wines imported from Australia or other countries.

10. These differences in product mix ought to have been taken into account by MOFCOM.

11. Now, the balance of this meeting will be on some of the key issues in dispute between the Parties. However, Australia, as always, remains open to reaching a mutually agreed solution.

12. Chair, Members of the Panel – can I thank you for your attention. I wish now to pass to Jonathan Kenna, Chief Trade Law Officer, who will take you through some detailed observations on Australia's claims.

13. Thank you, Ambassador Mina and good morning Chair and Panelists. I will start by making some observations about the approach taken by China in its first written submission.

14. First, China makes many objections asserting jurisdictional limits on the Panel's Terms of Reference. Each of these objections is entirely without merit. They appear to have been

raised in an attempt by China to avoid responding to the substance of Australia's case. Similar attempts to avoid engaging with the merits of Australia's claims can be seen in:

- China's repeated and baseless assertions that Australia has not made out a *prima facie* case on its individual claims;
- its requests that the Panel examine MOFCOM's decisions "holistically" rather than through scrutiny of the individual findings; and
- its baseless and premature assertions that Australia has "abandoned" claims.

15. Second, there is a deep disconnect between the reasoning set out in MOFCOM's Final Determination and the *ex post facto* justifications that China now offers to the Panel. China's first written submission is replete with explanations for MOFCOM's decision that have no basis in the record, and in many instances are at odds with it. Indeed, in some instances, China seeks to disavow express findings that MOFCOM made, asserting that those findings were "moot" or "given little to no weight".

16. Third, China's submission repeatedly misrepresents Australia's submissions: either selectively quoting Australia's submissions in a misleading fashion, or attributing to Australia arguments that Australia never made and then vigorously rebutting those "straw" arguments. As a consequence, China has offered little or no response to rebut many of the arguments that Australia has made.

17. Australia encourages the Panel to have close regard, as it considers China's submission, to the evidence on the record and the arguments actually advanced by Australia in its first written submission.

18. Fourth, there is the issue of the competing translations. China has submitted alternative translations of certain documents exhibited by Australia. In doing so, China has identified only a handful of differences which it asserts are material to the matter before the Panel. Australia does not agree with China's assessment of the materiality of its alternative translations. To the extent that there are other differences between the translations of the same documents submitted by the parties that may be material, but that have not been identified by China, Australia will address them in its second written submission. Unless

specifically indicated otherwise, Australia relies upon its own translations for the purposes of this meeting.

19. I will now take you through some detailed observations regarding Australia's claims.

II. INITIATION OF INVESTIGATION

20. MOFCOM initiated its investigation without conducting an adequate examination of the information submitted by the Applicant. This constitutes a fatal error that could not be remedied later in the investigation.

21. Among other issues, MOFCOM failed to make an adequate assessment of whether the Applicant had standing to initiate the investigation. In particular, MOFCOM failed to examine the degree of support for and opposition to the Application expressed by domestic producers. The China Alcoholic Drinks Association — which I will refer to by its acronym, CADA — purportedly submitted the Application on behalf of the domestic wine industry. MOFCOM appears to have accepted it without scrutiny. It did not properly examine the level of support for or opposition to the Application amongst CADA's 122 members. Nor did it take any steps to gauge the level of support or opposition amongst non-CADA producers, despite being told there were "hundreds" of such producers.

22. China's *ex post facto* justification for MOFCOM's failure to examine the degree of support for the Application is without merit. It argues that the obligation in Article 5.5 requiring an investigating authority to avoid publicising an application prior to the initiation of an investigation prevented MOFCOM from approaching other producers to determine whether they supported the Application, were neutral or opposed it. There is no basis for this interpretation. The Article 5.4 requirement to examine the degree of support for the application is a mandatory obligation.

23. Further, the data provided by CADA in the Application included non-subject products, such as bulk wine and liqueur wine. MOFCOM failed to recognise that this meant that the data was incapable of accurately establishing either the amount of the like product produced by the domestic industry or the level of production represented by those domestic producers supporting the Application.

III. DEFINITION OF DOMESTIC INDUSTRY

24. For the purposes of its Final Determination, MOFCOM defined the "domestic industry" as those domestic producers whose collective output of the products constituted a major proportion of the total domestic production. The Appellate Body has explained that there are quantitative and qualitative elements of the requirement for a "major proportion of total domestic production".¹ MOFCOM's approach failed to satisfy either of these elements.

25. In respect of the quantitative element, MOFCOM's finding that the collective output of 21 questionnaire respondents constituted a major proportion of the total domestic production was undermined by its failure to properly establish the volume of total domestic production. Lacking any direct evidence, MOFCOM purported to estimate domestic production. It provided only a vague explanation of its method, stating that it "surveyed the actual domestic output through different means" and "relied on data provided by" one or more "authoritative domestic organization(s)" to calculate an estimate that it "believed ... was reasonable".² No further explanation was provided. There is no evidence on the record concerning the calculation methodology, the underlying data used in the calculation, or the calculation itself.

26. The qualitative component requires that it be established that the producers forming the domestic industry are representative of total domestic production. MOFCOM's definition of domestic industry included only the 21 domestic producers, all members of CADA, that chose to respond to the domestic questionnaire. MOFCOM undertook no steps to ensure the representativeness of this group.

27. This definition of the domestic industry excluded not only the majority of CADA members, but also the hundreds of domestic producers that were not CADA members.

28. MOFCOM's failure to properly determine both the quantitative and qualitative components in its definition of "domestic industry" introduced a material risk of distortion, undermining the foundation of the injury and causation analysis.

¹ Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China)*, paras. 5.302-5.303.

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

IV. DUMPING DETERMINATION

A. THE ANTI-DUMPING DUTIES ARE ABSURD ON THEIR FACE

29. MOFCOM imposed anti-dumping duties ranging from 116.2% to 218.4%. Duties at this level are absurd in the light of the three sampled companies' profitability, the actual domestic and export prices of Australian wine, and the highly developed nature of the Australian wine industry.

30. Turning first to Treasury. The dumping margin of 175.6% was the result of MOFCOM rejecting [REDACTED]

[REDACTED] This finding stands at odds with Treasury's reputation as a highly successful company listed on the Australian Stock Exchange, and the clear evidence before MOFCOM that Treasury made a net profit of [REDACTED] during the period of investigation. It is absurd to suggest that Treasury could have recorded profits if [REDACTED]

[REDACTED] The implausibility of the 175.6% dumping margin is confirmed by China's Exhibit CHN-11 (BCI). In this exhibit China identifies [REDACTED]

32. For Casella, MOFCOM calculated a dumping margin of 170.9%. It did so by arbitrarily discarding Casella's data, and instead used [REDACTED]

Moreover, MOFCOM made it impossible for Casella to make any requests for necessary

adjustments by failing to disclose the relevant data or its methodology, which was only disclosed for the first time in China's first written submission.

33. In respect of the final sampled company, Swan, MOFCOM calculated a dumping margin of 116.2%. [REDACTED]

34. The 167.1% duty rate for "other named Australian exporters" was based on an average of the sampled companies' duties and was infected by the errors in those calculations. For the "all others" rate, MOFCOM appears to have deliberately selected adverse facts to produce an even higher duty of 218.4%.

35. MOFCOM's methodology and calculations in its determination of dumping margins fall far short of an unbiased and objective investigating authority.

**B. MOFCOM DENIED INTERESTED PARTIES A FULL OPPORTUNITY FOR DEFENCE
OF INTERESTS**

36. I will address aspects of the procedural deficiencies in MOFCOM's investigative process later in this oral statement. At this point, I will just underscore two ways in which MOFCOM's deficient procedures undermined the sampled companies' capacity to properly defend their interests in the investigation.

37. First, MOFCOM's refusal to grant extensions to parties to respond to questionnaires, even where good cause was shown and time permitted, forced responses to be provided without adequate time to prepare. MOFCOM then entrenched this unfairness by refusing to take into account any supplementary data provided, even when received many months before the Final Determination.

38. Second, MOFCOM failed to give interested parties timely notice of material decisions affecting their interests. Critically, it did not give the parties adequate notice of the basis on which it had calculated their dumping margins or the data used in those calculations. This deprived the companies of any meaningful opportunity to comment on these proposed calculations or to request relevant adjustments to these calculations.

C. SAMPLED COMPANY COOPERATION

39. In the context of Australia's claims concerning MOFCOM's improper recourse to facts available, Australia highlights that this is not an investigation where the sampled companies failed to cooperate with the investigating authority.

40. The record shows that the sampled companies provided an enormous level of granular technical data. Where they were unable to provide all requested data within the timeframes set by MOFCOM or concerns were raised, they provided supplementary data or cogent explanations for why it was not possible to meet the request.

41. MOFCOM's criticisms of a lack of cooperation from the sampled companies are based, not on a lack of effort from the companies, but MOFCOM's refusal to accept any evidence submitted after its initial deadline, its unwillingness to accept cogent explanations, and its insistence that information had to be provided in its preferred format irrespective of whether that was practically achievable.

D. VERIFICATION OF INFORMATION

42. A repeated justification for MOFCOM's rejection of the sampled companies' data was a purported inability to verify the data. MOFCOM made various findings to the effect that certain information contained alleged deficiencies and could not be verified.

43. MOFCOM's purported inability to verify information arose not from any deficiencies in the data submitted, but rather from two choices made by MOFCOM to disregard the information available to it.

44. The first was MOFCOM's refusal to consider any new information provided by the sampled companies after submission of the questionnaire responses but months before the issuance of the Final Determination. MOFCOM essentially "closed its eyes" to directly relevant information that it had sufficient time to consider.

45. The second was MOFCOM's choice not to verify data and information submitted by the sampled companies directly from their respective financial accounting systems. It was open to MOFCOM to conduct a remote or in-person verification of the data directly from the

companies' systems, as the companies invited it to do. MOFCOM chose not to take up this invitation.

46. An unbiased and objective investigating authority that had concerns about the veracity of the data submitted would have verified it by reference to its primary source, being the sampled companies' respective financial accounting systems. MOFCOM did not need to verify the data submitted by comparing it to data contained in other forms submitted by the sampled companies in response to the questionnaire.

E. BEST INFORMATION AVAILABLE

47. There appears to be a fundamental disagreement between the parties as to the analytical approach the Panel should adopt in assessing whether MOFCOM's findings on the use of facts available were consistent with the requirements of the Anti-Dumping Agreement.

48. China asserts that the Panel should not examine the correctness of the deficiencies identified by MOFCOM in its Final Determination to justify its use of facts available on an individual level. Rather, China argues that the Panel should only assess what China describes as the "holistic" assessment undertaken by MOFCOM.³

49. Contrary to China's assertion, there is no evidence on the record that MOFCOM undertook a "holistic" assessment of the purported defects it had identified in the forms submitted by the sampled companies. The concept of a "holistic" assessment appears for the first time in China's first written submission. To the contrary, the Final Determination contains a form-by-form analysis and discussion of specific issues with those forms identified by MOFCOM.

50. China relies on the Panel's decision in *US – Steel Plate* as support for its assertion that the Panel should consider MOFCOM's rejection of sampled companies' data holistically, rather than on an individual basis. Australia accepts, as the Panel in *US – Steel Plate* articulated, that conceptually "a failure to provide certain information may have ramifications beyond the category into which it falls" and that the absence of certain information "may affect the relative ease or difficulty of using the information that has been submitted".⁴ But this

³ See China's first written submission, paras. 272, 527 and 726.

⁴ Panel Report, *US – Steel Plate*, para. 7.60.

proposition does not support either an investigating authority or a panel undertaking a "holistic assessment" or assessing purported defects on a holistic level.

51. Even acknowledging that defects in one piece of data may affect the use that can be made of another piece of data, this is subject to at least three qualifications:

- First, it must be demonstrated, and not simply asserted, that the purported defect in the first piece of information in fact exists. This necessarily involves an individual assessment of each piece of information. An investigating authority is not permitted to simply make an impressionistic assessment of the completeness of the evidence.
- Second, it must be demonstrated, and not simply asserted, that a deficiency in a piece of information in fact has a relevant impact on the use that can be made of another piece of information.
- Third, the absence of information can only be relevant to whether a determination can be made on the basis of facts available to the extent that the missing information is "necessary".

F. TREASURY PROVIDED ALL NECESSARY INFORMATION

52. Treasury provided all necessary information to enable MOFCOM to calculate normal value under Article 2 of the Anti-Dumping Agreement.

While data were missing from [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

54. In contrast, Australia and China agree that Forms 6-3 and 6-4 contain "necessary information" within the meaning of Article 6.8. Following the submission of Treasury's response to the Preliminary Determination, MOFCOM had complete cost of production data in these forms [REDACTED]

55. MOFCOM complained that it had not been provided with production cost data for all wines sold by Treasury in Australia, only those also exported to China. In the circumstances, this was not necessary information. The purpose of the investigation is to determine margins of dumping for actual exports, requiring that such exports are compared with normal values established in relation to their sale in Australia. [REDACTED] that were exported.

G. MOFCOM'S SELECTION OF REPLACEMENT DATA FOR TREASURY

56. There must be a connection between the "necessary information" that is missing and the particular "facts available" on which a determination is based.⁵

57. [REDACTED] This was the best information available to MOFCOM. Even if MOFCOM had any basis to disregard the data submitted after the Preliminary Determination, at the time of that Determination it had complete data on its record for [REDACTED]

58. Instead of relying on the data before it, MOFCOM based its determination of normal value [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

59. It is unsurprising that this approach gave rise to highly distorted results. [REDACTED]
[REDACTED]
[REDACTED]

60. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] No unbiased and objective investigating authority would have adopted such an approach.

⁵ See Australia's first written submission, para. 51 citing Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28 in turn referencing Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

H. CASELLA PROVIDED ALL NECESSARY INFORMATION

61. MOFCOM's rejection of both Casella's domestic sales data and cost of production data and resort to facts available was based on its findings of deficiencies in certain forms submitted by Casella. These findings were inconsistent with the requirements of the Anti-Dumping Agreement. They can be summarised into five categories.

62. First, a common factor in MOFCOM's rejection of Form 4-2 and Form 6-3 was its refusal to accept data that was not provided in WPS format. Casella had attempted to provide the data in this format, but inadvertently submitted incomplete data because the WPS forms could not hold the complete dataset for each Form. When notified of this, Casella resubmitted the complete datasets in Excel format. MOFCOM refused to have regard to this information, notwithstanding it was provided many months in advance of the Final Determination, in a conventional format routinely used by investigating authorities. Moreover, MOFCOM did not notify Casella of its refusal to use this data until the Final Disclosure.

63. Second, in relation to Casella's Forms 4-2, 6-3 and 6-4, MOFCOM refused to accept cogent explanations for the purported irregularities MOFCOM had identified in the forms. For example, in relation to special price arrangements in Form 4-2, MOFCOM rejected Casella's explanation that the negligibly small number of transactions marked as "Samples" were free samples of product given by the company. In respect of Form 6-4, MOFCOM found error because certain PCNs were labelled "#N/A" and therefore couldn't be verified, notwithstanding that Casella explained that this label referred to wines that were not sold in the Period of Investigation.

64. Third, MOFCOM found error in Form 6-1-2, relating to raw materials. Casella had provided complete explanations for the purported missing information. But in any event, none of the information in this form was "necessary information".

65. Fourth, MOFCOM found the data in Form 6-3 could not be verified. But this was only because MOFCOM chose not to take up Casella's invitation to verify the costs data directly from Casella's production and stock system.

66. Finally, MOFCOM refused to accept Casella's explanations of the nature of its agency relationship with Austral Wines Pty Ltd. In any event, Casella explained in its Supplementary

Questionnaire that the only customer that Austral Wines engaged with represented a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I. SWAN PROVIDED ALL NECESSARY INFORMATION

67. MOFCOM's decision to resort to facts available to determine normal value for Swan was based on its findings of deficiencies in data submitted by Swan. MOFCOM's findings were inconsistent with the Anti-Dumping Agreement. I will highlight two of MOFCOM's errors.

68. First, MOFCOM refused to accept verifiable production costs and expenses data submitted by Swan purportedly due to the data not being reported according to valid PCNs.⁶ MOFCOM failed to consider Swan's cogent explanations for why it could not comply with MOFCOM's request given the way its accounts were managed. Swan provided supplementary information that matched its costs to the PCNs identified by MOFCOM and submitted a document comparing its Enterprise Resource Planning system to the PCNs.⁷ MOFCOM refused to accept this information without providing any explanation as to why this rendered Swan's data unusable.

69. Second, MOFCOM alleged that Swan had not coordinated with its five bottling and pressing service providers to submit costs data to corroborate Swan's records.⁸ As Swan explained, four of the providers were non-affiliated companies that Swan had no capacity to control. The sole affiliated company, Growers Wines, provided a complete questionnaire response in respect of its production costs.⁹

J. MOFCOM'S SELECTION OF REPLACEMENT DATA FOR CASELLA AND SWAN

70. Even if, *arguendo*, necessary information was missing such that MOFCOM's resort to facts available was warranted, it did not select the best information available as replacement

⁶ Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.

⁷ Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 4.

⁸ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.

⁹ Swan Vintage Supplementary Response (Exhibit AUS-41), p. 3.

data. Nor did it engage in a process of evaluation or reasoning to support the selection of appropriate replacement data.

71. The replacement data used by MOFCOM – apparently [REDACTED] [REDACTED] – was never disclosed in a non-confidential summary to Casella and Swan. It was only disclosed to Australia for the first time in China's first written submission.

72. Strikingly, [REDACTED]
[REDACTED]
[REDACTED]

73. China appears to accept in its first written submission that MOFCOM did not engage in any process of comparative evaluation in selecting the replacement information for Casella and Swan.¹⁰ There was no assessment of whether this data would enable the most accurate determination of normal value for Casella and Swan on the available information.

74. The consequence of MOFCOM's failures was the enormous dumping margin ultimately imposed on both companies in a manner inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

K. FAIR COMPARISON FOR THE SAMPLED COMPANIES

75. MOFCOM compounded its errors by failing to make a fair comparison between the normal values and export prices of the three sampled companies. This flawed comparison formed the basis for MOFCOM's dumping margins with respect to both the sampled and non-sampled companies.

76. In relation to Treasury, MOFCOM calculated normal value based on [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁰ China's first written submission, paras. 686 and 687.

[REDACTED]

[REDACTED]

[REDACTED]¹¹

77. In determining the dumping margin for Casella and Swan, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

78. China's explanation for these failures to make appropriate adjustments appears to be that the sampled companies were obliged to request adjustments and that MOFCOM could not make adjustments without such a request.

79. The Appellate Body has made it clear that the obligation to ensure a fair comparison under Article 2.4 "lies on the investigating authorities, and not the exporters".¹² To facilitate this, the final sentence of Article 2.4 places a procedural onus on the investigating authority to "tell the parties what information the authority will need in order to ensure a fair comparison". This is usually achieved through a dialogue.¹³ MOFCOM failed to engage in such dialogue with the sampled companies.

80. Indeed, MOFCOM failed to disclose the necessary information – including its methodology, data or quantum of adjustments (even as non-confidential summaries) – with respect to Casella and Swan. This wholly deprived them of the "meaningful opportunity to request adjustments" to facilitate a fair comparison.¹⁴

L. THE "ALL OTHERS" RATE

81. China imposed an anti-dumping duty for "all others" that was significantly higher than the duty imposed on any sampled company, or on the "other named exporters". MOFCOM provided no explanation for why this extraordinary rate was applied. However, in its first

¹¹ Panel Report, *EC – Tube or Pipe Fittings*, para 7.157

¹² Appellate Body Report, *US-Hot-Rolled Steel*, para. 178.

¹³ Panel Report, *EC – Fasteners (Article 21.5 – China)*, para 5.191.

¹⁴ Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para 5.191.

written submission, China says that the high rate was imposed to "incentivise cooperation" from exporters in future anti-dumping investigations undertaken by MOFCOM.

82. Accordingly, even on China's own submissions, there was no attempt by MOFCOM to identify the most accurate and appropriate rate of duty to impose on the "all others" category. Rather, it reflected a punitive approach of deliberately selecting adverse facts to artificially produce a higher rate of duty. Such an approach is impermissible under the Anti-Dumping Agreement.

V. INJURY AND CAUSATION DETERMINATION

83. Ultimately, MOFCOM's injury and causation analysis can be summed up in the following single sentence:

- According to MOFCOM, the decreasing price and increasing volume of Australian wine imports over the Injury Period of Investigation – or "Injury POI" – suppressed the prices of like Chinese domestic products, preventing them from increasing enough to cover rising domestic production costs.

A. THE MAGNITUDE OF THE SUPPRESSION

84. MOFCOM's injury determination is grounded in an affirmative finding of price suppression over the 2015 to 2019 period. According to MOFCOM, prices did not increase sufficiently to cover the cost increase over the same period. However, the facts on which MOFCOM relied indicate that, over the relevant period, the amount by which the increasing prices did not fully cover the increased costs was only 658 Renminbi per kilolitre. This means that prices only needed to increase by another 2% to completely cover the increased costs.

85. In short, the foundation for MOFCOM's affirmative injury determination is effectively a finding that the 2015 sale price was suppressed by a mere 2% over the course of the Injury POI.

86. This negligible level of suppression further demonstrates the absurdity of the dumping margins calculated by MOFCOM. The extraordinary implication is that, apparently, Australian exports assigned dumping margins of over 100% – and in some cases over 200% – resulted in price suppression of a mere 2% over the course of the five-year Injury POI.

87. In any event, there is no factual basis for MOFCOM's determination that the declining price and increasing volume of Australian imports prevented the price of domestic like products from increasing by 2% over the Injury POI.

88. On one hand, MOFCOM failed to properly establish that imports of Australian wine had any explanatory force for the alleged price suppression, let alone any causal relationship with the alleged injury said to result from this price suppression. On the other hand, there was also a plethora of evidence on the record that called into question MOFCOM's mere assertions that Australian imports were having a suppressive effect on the prices of domestic like products and causing material injury to the domestic industry.

89. MOFCOM failed to explain how it took this evidence into account in arriving at its findings of price suppression and causation. As a consequence of these and other deficiencies, MOFCOM's injury determination was inconsistent with China's obligations under Article 3.

B. THE PRICE ELEMENT OF MOFCOM'S PRICE SUPPRESSION DETERMINATION

90. According to MOFCOM, Australian imports had a suppressive effect on the price of domestic like products because the price that MOFCOM calculated for Australian imports declined by 15.91% between 2015 and 2019.

91. There are two fundamental issues with MOFCOM's observations of this price decline and its alleged explanatory force for the suppression of domestic prices. First, MOFCOM failed to properly consider the impact of the elimination of customs tariffs on imports of Australian wine pursuant to the China Australia Free Trade Agreement (which I will call "ChAFTA"). Second, MOFCOM failed to properly consider the impact of third-country imports.

1. Relevance of the China Australia Free Trade Agreement

92. The price decline observed by MOFCOM is attributable to a factor entirely separate from the effects of the alleged dumping of Australian imports – that is, the progressive elimination of customs tariffs on imports of Australian bottled wines that occurred under ChAFTA.

93. Specifically, between 2015 and 2019, the tariffs on subject imports were progressively phased out, decreasing from 14% to zero. Over the exact same period, the

import price calculated by MOFCOM, which included an adjustment to reflect the applicable customs duties, declined by 15.91%.

94. This simple fact provides a persuasive and cogent explanation for the price decline observed by MOFCOM. Although Australia identified this progressive elimination of the import tariff during MOFCOM's investigation, MOFCOM summarily dismissed this factor without assessing and distinguishing its impact.

95. Given the clear correlation between price declines and tariff reductions, MOFCOM's casual dismissal of the impact of this factor was not the action of an unbiased and objective investigating authority.

2. Relevance of imports from third countries

96. In addition, MOFCOM failed to adequately examine the effect that imports from countries other than Australia were having on the prices of domestic like products in the Chinese market.

97. There was detailed evidence on the record before MOFCOM of the volumes and average prices of imports of like wine products from third countries during the Injury POI.¹⁵ This evidence, which was available on a per-country basis, demonstrated clear price trends that should have been assessed by MOFCOM, given their obvious potential to cause the price suppression MOFCOM attributed to Australian imports.

98. I will highlight three pertinent examples that arise from this evidence.

99. First, the data demonstrates that between 2015 and 2019, French imports occupied an average market share of 21.8%. In comparison, Australia, on average, occupied 11%. During this period, French wines were sold at prices that were: (i) cheaper than Australian imports per kilolitre; and (ii) much closer to the prices of domestic like products. In fact, during the latter half of the Injury POI, French imports were sold at lower prices than domestic like products.

100. Second, the evidence shows that, between 2015 and 2017, wine imports from France exhibited similar price and volume trends to Australian imports. That is, import volumes of

¹⁵ CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45 – 48.

wines increased year-to-year and prices declined. Under these circumstances, it is difficult to reconcile MOFCOM's finding that price suppression was solely attributable to Australian imports with its failure to consider the extent to which third-country imports were causing the alleged effects and to distinguish those effects.

101. Third, the evidence demonstrated that imports from Chile, Spain and Italy, the next three largest exporting countries, were sold at lower prices (and, in some cases, significantly lower prices) than domestic like products. For example, Chilean wines were on average 31% cheaper than domestic like products throughout the period. Similarly, Spanish wines were on average 58% cheaper.

102. Even if we were to assume for the sake of argument that all wine products are mutually substitutable and compete directly in China, the evidence on the record concerning imports from third countries called into question the explanatory force of Australian imports on the price suppression that MOFCOM observed in domestic like products.

103. An unbiased and objective investigating authority would have examined this data to ascertain whether, and to what extent, imports from other countries were having an effect on domestic prices and an impact on the domestic industry. MOFCOM failed to do so. Rather, MOFCOM chose to dismiss the effects of third-country imports on the basis of certain isolated trends that were observed in the data when third-country imports were considered as a homogenous block.

104. Australia submits that these errors in MOFCOM's injury examination are further compounded by MOFCOM's failure to:

- conduct any examination of what domestic prices would have done but for, or in the absence of, the alleged effect of Australian imports on domestic prices; and
- take any steps to ensure price comparability in the average unit prices it calculated for domestic like products and Australian imports.

C. THE VOLUME ELEMENT OF MOFCOM'S PRICE SUPPRESSION DETERMINATION

105. In its first written submission, China seeks to maximise the importance of end-to-end growth trends in the volume and market share of Australian imports. In response, I will recall three overarching points in relation to volume.

106. First, Australian imports played a relatively small role in the overall wine market in China throughout the entire Injury POI. In 2019, when Australian wine imports were at their largest, Australian volumes were 120,800 kilolitres. By way of comparison, in the same year:

- sales volumes for the 21 Chinese producers that MOFCOM defined as the domestic industry were 182,400 kilolitres; and
- import volumes from third countries were 335,200 kilolitres.

107. Second, the increases in volume and associated market share observed by MOFCOM were attributable to a factor entirely separate from the effects of the alleged dumping of Australian exports – that is the progressive elimination of tariffs on imports of Australian bottled wines under ChAFTA. The clearly predictable effect of the liberalisation of trade in bottled wine from Australia is that prices would decline and volumes would increase.

108. Third, MOFCOM's apparent consumption figures show a market that went through a period of change. Between 2015 and 2017, apparent consumption volumes increased by 20%. This trend was reversed between 2017 and 2019, when consumption volumes declined by 19%.

109. MOFCOM's evaluation of volume was overly simplistic and did not grapple with the complexities of China's market. Rather, MOFCOM's volume analysis simply compared yearly Australian import volumes to yearly sales volumes of domestic like products.

110. The reality is that the wine market in China was far more complex than MOFCOM's examination revealed. Take market volume changes occurring between 2018 and 2019 as an example:

- apparent consumption experienced its most significant decline of 112,700 kilolitres;
- sales volumes for domestic like products experienced their most significant decline of 34,700 kilolitres; and
- conversely, Australian import volumes increased by just 3,000 kilolitres.

111. Assuming, as MOFCOM does, that Australian volumes were responsible for the declines in domestic sales volumes, MOFCOM's analysis does not include any consideration of what caused the additional 31,700 kilolitre decline in sales volumes experienced by domestic like products in 2019.

VI. PROCEDURAL CLAIMS

112. Australia has set out in detail in its first written submission multiple procedural deficiencies in MOFCOM's investigative process. Today, I will focus on five issues.

A. MOFCOM'S SELECTION OF SAMPLED COMPANIES

113. MOFCOM chose to conduct its investigation through sampling, selecting three companies that it purportedly identified as the top three exporters by volume.

114. After the sample was announced, Pernod Ricard – a non-sampled exporter – advised MOFCOM that it considered that, since it was among the three largest exporters by volume, it should have been included in the sample. MOFCOM took no steps to examine Pernod Ricard's claim. MOFCOM instead relied on unverified assertions as to the level of exports from the other exporters. An unbiased and objective unbiased investigating authority would have made further enquiries in the face of the information submitted by Pernod Ricard and rectified any errors at this foundational stage of the investigative process.¹⁶

¹⁶ See Panel Report, *EC – Salmon (Norway)*, para. 7.203.

B. MOFCOM'S UNJUSTIFIED RIGID APPLICATION OF DEADLINES

115. During the investigation, MOFCOM failed to provide interested parties with ample opportunities to provide evidence they considered relevant and deprived them of the opportunity for a full defence of their interests. In particular, MOFCOM refused to grant extensions of time for questionnaire responses, even though the requesting parties – Treasury and Casella – showed good cause.

116. Before the deadline for the questionnaire response, Treasury submitted a request for a 10-day extension. It showed good cause for the extension request, outlining the substantial challenges caused by public health measures related to the COVID-19 pandemic, including lockdowns and work-from-home policies. When this request was flatly rejected by MOFCOM, Treasury endeavoured to submit a complete response by the original deadline.

117. Treasury was first made aware that MOFCOM was not satisfied with the cost and expense data it had provided in its questionnaire response when the Preliminary Determination was published. Treasury promptly resubmitted several forms with its comments on the Preliminary Determination. Yet MOFCOM rejected the replacement data, stating in the Final Disclosure that the reasons given by Treasury for the discrepancies in the information "did not exempt" it from the requirement to submit information in the stipulated time.

118. This example demonstrates MOFCOM's unreasonable conduct in rigidly adhering to pre-determined timeframes irrespective of the circumstances faced by the sampled companies. These due process violations led MOFCOM to incorrectly resort to facts available even while it had before it the full and complete data sets it had requested. MOFCOM's conduct was inconsistent with its obligations under Articles 6.1, 6.1.1 and 6.2 of the Anti-Dumping Agreement.

C. MOFCOM IMPROPERLY GRANTED CONFIDENTIAL TREATMENT AND FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES

119. Further, MOFCOM improperly granted broad confidential treatment to information submitted by Chinese domestic producers, imposing further constraints on the interested parties' ability to see relevant information and fully defend their interests. Broad and generic

requests for confidential treatment from the domestic producers were upheld without adequate assessment of whether "good cause" was shown, and without requiring the provision of sufficiently detailed non-confidential summaries. The effect was to deny interested parties anything more than a vague impression of the information that underpinned MOFCOM's findings in respect of the definition of domestic industry, injury and causation.

120. By way of example, the non-confidential "summaries" provided in the Domestic Producer Questionnaire responses, which were nearly identical in every response from the 21 domestic producers, simply stated that the "relevant information" sought in each question was a "trade secret". These "summaries" provided no information to interested parties about the import, character, or substance of the purportedly confidential information. Australia notes that "summaries" in relevantly similar terms have previously been found by the panel in *China – GOES* to be inadequate to meet the standard in Article 6.5.1.¹⁷

D. MOFCOM FAILED TO SATISFY ITSELF AS TO THE ACCURACY OF INFORMATION

121. Contrary to the requirements of Article 6.6, MOFCOM failed to take sufficient steps to confirm the accuracy of certain information on which its findings were based.

122. To give one example, MOFCOM ambiguously states in the Final Determination that it "relied on data provided by" one or more "authoritative domestic organization(s)" to calculate the estimated total domestic production of like products "based on the statistics from authoritative domestic organizations".¹⁸

123. There is no evidence of this calculation or the underlying data anywhere on the investigation record. The organisation that provided the data is neither identified nor described as confidential, and MOFCOM provides only a vague description of the kinds of data that were considered. There is no evidence that MOFCOM took any steps to satisfy itself as to the accuracy of these data or of its estimate of total production volumes. MOFCOM had good reason to take extra care in confirming the accuracy of this information given its fundamental importance to the investigation.

¹⁷ Australia's first written submission, para. 868 citing Panel Report, *China – GOES*, paras. 7.198-199.

¹⁸ Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

E. MOFCOM'S FAILURE TO DISCLOSE ESSENTIAL FACTS

124. MOFCOM failed to provide the interested parties with timely opportunities to see the information that it used to make its findings. This materially impaired both the interested parties' ability to properly defend their interests and Australia's ability to pursue this proceeding in other ways. MOFCOM also failed to disclose the essential facts under consideration and to provide sufficient detail of the findings and conclusions reached on all issues of fact and law that it considered material.

125. Australia's complaints are set out in detail in its first written submission.

VII. CONCLUSION

126. Australia recognises that the Panel is faced with a substantial dispute of wide scope, involving multiple claims. Australia did not bring this dispute lightly. The breadth of its claims reflects a genuine concern that this investigation was flawed and unfair from the point of initiation through to the issuing of the Final Determination.

127. Australia brought this dispute to relieve the damage that is being done to its wine producers from China's unjustified duties and the resulting harm to a once thriving trade between Australia and China.

128. Australia has also initiated this dispute because its claims are systemically important. It is critical that Members adhere to the rules when imposing anti-dumping duties. Where an investigating authority fails to adhere to these rules, it disrupts and damages trade. Preserving the rights of WTO Members and ensuring each Member observes its obligations is integral to safeguarding the rules-based trading system.

129. Australia is confident that the Panel will carefully consider its claims in this light. It looks forward to responding to the questions from the Panel.