

**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 SECOND SUBSTANTIVE  
MEETING OF THE PANEL AND THE PARTIES**

**Business Confidential Information Redacted**

28 February 2023

**TABLE OF CONTENTS**

<b>TABLE OF CASES .....</b>	<b>4</b>
<b>LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS .....</b>	<b>5</b>
<b>I. INTRODUCTION .....</b>	<b>7</b>
<b>II. ISSUES CONCERNING THE CONDUCT OF THIS DISPUTE .....</b>	<b>7</b>
<b>A. ABANDONED CLAIMS .....</b>	<b>7</b>
<b>B. MISCHARACTERISATION OF ARTICLE 6.2 OF THE DSU .....</b>	<b>8</b>
<b>C. CHINA'S RELIANCE ON DOMESTIC LAW CONFIDENTIALITY CLAIMS .....</b>	<b>9</b>
<b>III. DUMPING CLAIMS .....</b>	<b>10</b>
<b>A. THE SO-CALLED HOLISTIC ANALYSIS.....</b>	<b>10</b>
<b>B. TREASURY .....</b>	<b>10</b>
<b>C. CASELLA .....</b>	<b>12</b>
<b>D. SWAN.....</b>	<b>14</b>
<b>E. ALL OTHERS.....</b>	<b>15</b>
<b>F. FAIR COMPARISON .....</b>	<b>15</b>
<b>IV. CONDUCT AND TRANSPARENCY CLAIMS RELATING TO DUMPING .....</b>	<b>16</b>
<b>A. MOFCOM'S ERRORS WITH RESPECT TO EXTENSION REQUESTS.....</b>	<b>16</b>
<b>B. MOFCOM'S TREATMENT OF CASELLA .....</b>	<b>17</b>
<b>C. MOFCOM'S SELECTION OF SAMPLED COMPANIES .....</b>	<b>18</b>
<b>V. DOMESTIC INDUSTRY CLAIMS .....</b>	<b>19</b>
<b>VI. INJURY AND CAUSATION CLAIMS.....</b>	<b>20</b>
<b>A. MOFCOM'S CONSIDERATION OF PRICE EFFECTS WAS FUNDAMENTALLY FLAWED .....</b>	<b>21</b>
<b>1. MOFCOM compared prices without ensuring comparability .....</b>	<b>21</b>
<b>2. MOFCOM did not objectively examine whether Australian imports had explanatory force for the alleged price suppression .....</b>	<b>22</b>
<b>B. MOFCOM'S CONSIDERATION OF CAUSATION AND NON-ATTRIBUTION FACTORS WAS FUNDAMENTALLY FLAWED .....</b>	<b>24</b>
<b>1. Volume and market share.....</b>	<b>24</b>
<b>2. Third country imports .....</b>	<b>25</b>
<b>3. China Australia Free Trade Agreement (ChAFTA).....</b>	<b>26</b>
<b>VII. CLAIMS CONCERNING CONFIDENTIALITY AND ACCURACY .....</b>	<b>27</b>

<b>A.</b>	<b>MOFCOM FAILED TO ASSESS "GOOD CAUSE" FOR CLAIMS OF CONFIDENTIALITY AND FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES .....</b>	<b>28</b>
<b>B.</b>	<b>MOFCOM FAILED TO SATISFY ITSELF AS TO THE ACCURACY OF THE INFORMATION IT RELIED UPON FOR ITS FINDINGS .....</b>	<b>29</b>
<b>VIII.</b>	<b>INITIATION CLAIMS.....</b>	<b>30</b>
<b>IX.</b>	<b>CROSS-CUTTING CONDUCT AND TRANSPARENCY CLAIMS .....</b>	<b>31</b>
<b>A.</b>	<b>MOFCOM FAILED TO PROVIDE OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION.....</b>	<b>32</b>
<b>B.</b>	<b>DISCLOSURE OF ESSENTIAL FACTS.....</b>	<b>33</b>
<b>C.</b>	<b>FINAL DETERMINATION .....</b>	<b>34</b>
<b>X.</b>	<b>CONCLUSION .....</b>	<b>35</b>

## TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Canada – Welded Pipe</i>	Panel Report, <i>Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu</i> , <a href="#">WT/DS482/R</a> and Add.1, adopted 25 January 2017, DSR 2017:I, p. 7
<i>China – Broiler Products (Article 21.5 - US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS427/RW</a> and Add.1, adopted 28 February 2018, DSR 2018:II, p. 839
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Panel 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> , <a href="#">WT/DS397/RW</a> and Add.1, adopted 12 February 2016, as modified by Appellate Body Report <a href="#">WT/DS397/AB/RW</a> , DSR 2016:I, p. 195
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/R</a> and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report <a href="#">WT/DS397/AB/R</a> , DSR 2011:VIII, p. 4289
<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>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 – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , <a href="#">WT/DS206/R</a> and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
<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

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

<b>Abbreviation</b>	<b>Full Form or Description</b>
"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"
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

<b>Abbreviation</b>	<b>Full Form or Description</b>
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"
Sampling Questionnaire	MOFCOM, "Anti-dumping Investigation of Certain Wines Sampling Investigation Questionnaire for Dumping", 15 September 2020
Supplementary Questionnaire	Supplementary Questionnaire on Relevant Wines Anti-Dumping Investigation issued by MOFCOM to sampled companies on 1 February 2021
Swan	Swan Vintage
Treasury	Treasury Wine Estate Vintners Limited
USD	United States Dollar

## I. INTRODUCTION

1. Chair, members of the Panel – good morning.
2. Before I begin, I advise that Australia's opening statement will include business confidential information.
3. Australia has set out its claims in detail in its first written submission and its rebuttal arguments in its second written submission. A clear *prima facie* case that China has violated the relevant provisions of the Anti-Dumping Agreement and the GATT 1994 has been established. In short, no objective and unbiased investigating authority *could* have made the determinations regarding initiation, dumping, injury or causation that MOFCOM made on the basis of the investigation record that was before it. China has failed to rebut Australia's case.
4. Indeed, the submissions and evidence presented by China in this dispute have exacerbated, rather than addressed, Australia's concerns. The fact that China has had to resort to rationalisations that do not appear anywhere in MOFCOM's investigation record highlights the lack of due process and transparency in its investigation.
5. In its written submissions, China has engaged in lengthy rebuttals of points never made by Australia. The Panel should not be distracted by this tactic. Not only are such arguments irrelevant to the issues actually in dispute, they expose China's failure to provide any response to significant elements of Australia's case.
6. Rather than repeat all of Australia's claims and arguments today, I will take this opportunity to set out key issues that highlight the egregious failings in MOFCOM's investigation and determinations, and China's failed attempts to justify them.

## II. ISSUES CONCERNING THE CONDUCT OF THIS DISPUTE

### A. ABANDONED CLAIMS

7. China's first written submission contained multiple allegations that Australia had "abandoned" certain claims. The majority of these allegations were spurious, since the

arguments of fact and law in support of those claims were set out in Australia's first written submission.<sup>1</sup> The balance were premature at the time they were made.

8. In China's second written submission, China goes further and submits that if Australia did not specifically mention an *argument* in its *opening statement* at the first substantive meeting, then Australia should be understood to have abandoned the claim, notwithstanding the detailed arguments contained in Australia's first written submission.<sup>2</sup> There is no principle of procedure, law or logic to support China's submission. If China's proposed approach were adopted, it would not only render the first written submission redundant, but the entirety of a two-day meeting would be required for the presentation of Australia's oral statement.

9. To be clear, where Australia has exercised its prerogative not to press a particular claim, it has said so expressly.<sup>3</sup>

## **B. MISCHARACTERISATION OF ARTICLE 6.2 OF THE DSU**

10. Australia's panel request satisfied all requirements in Article 6.2 of the DSU pertaining to its *claims*. It unambiguously identified the provisions of the Anti-Dumping Agreement that Australia alleged to be infringed. It plainly connected those obligations to the anti-dumping measure at issue in a manner sufficient to present the problem clearly. China's objections to the contrary amount to an insistence that Australia's panel request should have included not only *claims* but also *arguments*.

11. China has had a full opportunity to respond to Australia's claims and supporting arguments, including in its submissions, the Panel's meeting with the Parties, and in its responses to the Panel's questions. China's repeated assertions that it has not had such an opportunity or that its due process rights "have been hampered"<sup>4</sup> are entirely without merit.

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<sup>1</sup> Australia's second written submission, para. 51.

<sup>2</sup> China's second written submission, paras. 1191 and 1263.

<sup>3</sup> Australia's second written submission, para. 52.

<sup>4</sup> China's second written submission, paras. 11, 17, 24, and 28.



### C. CHINA'S RELIANCE ON DOMESTIC LAW CONFIDENTIALITY CLAIMS

12. While much of China's lengthy response in its second written submission addressing its failure to provide requested information<sup>5</sup> is directed at a "straw" version of Australia's case, it nonetheless raises important points of principle that I will briefly address.

13. China repeatedly, and falsely, asserts that Australia submitted that the "Panel must draw adverse inferences against China" because of China's failure to provide requested information or that Australia has "posited" that the drawing of adverse inferences is an "automatic exercise".<sup>6</sup> China then expresses indignant disagreement with these submissions of its own invention. The position expressly set out by Australia is that a failure to provide requested information becomes a material fact on the record that is relevant to the Panel when drawing inferences from the totality of the information before it.<sup>7</sup> There seems to be no disagreement about this principle – in China's rebuttal of its "straw" arguments, China cites exactly this standard, referencing the same paragraph from the same Appellate Body decision that Australia does.<sup>8</sup>

14. China takes the view that information cannot be disclosed to a panel where an investigating authority has granted confidential treatment in purported consistency with Article 6.5 of the Anti-Dumping Agreement unless the submitting entity consents to the disclosure. China considers that no inference can be drawn from a party's refusal to provide information in such a situation. Australia disagrees. Far from promoting a "harmonious interpretation",<sup>9</sup> China's approach is at odds with the requirements set out at Articles 17.5 and 17.6 of the Anti-Dumping Agreement to examine the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". It is also at odds with the panel's "right" to seek information "which it deems appropriate" under Article 13 of the DSU.

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<sup>5</sup> China's second written submission, paras. 31-125.

<sup>6</sup> See for example China's second written submission, paras. 33, 40 and 70.

<sup>7</sup> See Australia's response to Panel questions, paras. 259-266 and second written submission, paras. 57-66.

<sup>8</sup> China's second written submission, para. 70; Australia's response to Panel questions, para. 265; second written submission, para. 66, all of which cite Appellate Body Report, *US – Wheat Gluten*, para. 174.

<sup>9</sup> China's second written submission, paras. 51 and 55.

15. I also wish to address China's allegation that Australia holds confidential information that it has "failed to submit in support of some of its claims".<sup>10</sup> Australia has not withheld any information in its possession that the Panel has requested, or that is relevant to the issues in dispute and was part of the investigation record.

### III. DUMPING CLAIMS

16. I turn now to some of the issues relating to Australia's dumping claims.

#### A. THE SO-CALLED HOLISTIC ANALYSIS

17. China attempts to defend MOFCOM's recourse to facts available on the basis that it undertook a "holistic analysis". There is no evidence that MOFCOM undertook such an analysis. Even if it had, MOFCOM's approach would still be inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.<sup>11</sup>

#### B. TREASURY

18. Turning to MOFCOM's recourse to facts available in respect of Treasury, I will address two arguments put forward by China. First, it argues that Forms 6-3<sup>12</sup> and 6-4<sup>13</sup> omit certain information. Second, it argues that the data provided in the two Forms was not verifiable.

19. Neither argument has merit.

20. First, China's entirely *ex post facto* argument that the Forms [REDACTED] is contradicted by the text of the Anti-Dumping Questionnaire and the record of the investigation.

21. Contrary to China's arguments, the explicit language of the questionnaire *clearly* sought cost of production data *only* for domestic PCNs that matched the exported PCNs.<sup>14</sup>

22. As is clear from [REDACTED] Treasury provided the requested cost of production information. MOFCOM did not raise this

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<sup>10</sup> China's second written submission, para. 43.

<sup>11</sup> Australia's second written submission, paras. 74-80.

<sup>12</sup> "Product Costs and Related Expenses".

<sup>13</sup> "Production Cost Details of the Product Under Investigation and its Like Product".

<sup>14</sup> Australia's second written submission, paras. 126-129.

now-alleged deficiency in either the Preliminary Determination or the Final Determination. Nor did it ask for this information in the Supplementary Questionnaire, which was the natural opportunity for it to do so. The record demonstrates that MOFCOM held the same interpretation of the Anti-Dumping Questionnaire as Treasury.

23. Given these facts, even if the Panel accepted the purportedly [REDACTED] [REDACTED] was sought by MOFCOM, then it would follow that MOFCOM acted inconsistently with paragraphs 1 and 6 of Annex II.<sup>15</sup>

24. Second, China argues that the cost of production data in Treasury's responses to Forms 6-3 and 6-4 was not verifiable, and therefore MOFCOM was justified in resorting to facts available. Australia disagrees.

25. Article 6.8 and paragraph 3 of Annex II allow information to be rejected where it is not "verifiable".<sup>16</sup> This requires an investigating authority to consider objectively whether particular information is verifiable, not merely whether it is convenient to verify it. Whether information is verifiable must be determined through a "case-by-case assessment of the particular facts at issue".<sup>17</sup> Information is "verifiable" where its accuracy and reliability can be assessed by an objective process of examination.

26. The record shows that there was no consideration by MOFCOM, let alone "meaningful consideration",<sup>18</sup> of whether the accuracy of Treasury's data could be assessed through an objective process of examination. This failure is significant given Treasury identified an objective process using its accounting system.<sup>19</sup> That accounting system was both GAAP-compliant and subject to scrutiny as part of group financial audits. There is no evidence on the record that MOFCOM even considered using that method of verification, let alone that MOFCOM made a finding that utilising that method would give rise to "undue difficulties".

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<sup>15</sup> Australia's second written submission, paras. 131-133, 150-152, and 173-184.

<sup>16</sup> Panel Report, *US – Steel Plate*, para. 7.61.

<sup>17</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.360.

<sup>18</sup> Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.348.

<sup>19</sup> Australia's first written submission, paras. 145-146; second written submission, para. 148. See also [REDACTED]

27. Even if MOFCOM's recourse to facts available had been proper, its subsequent selection of replacement facts was inconsistent with Article 6.8 and paragraph 7 of Annex II.

28. MOFCOM failed to conduct any meaningful "comparative evaluation or assessment"<sup>20</sup> of the facts available to it *at all*, let alone an assessment that could justify a conclusion that the single [REDACTED] was in fact the "best information available". The purported lack of cooperation that China relies upon is not the equivalent of, or an alternative to, a comparative evaluation or assessment of the facts on record.<sup>21</sup>

29. Further, the [REDACTED] selected by MOFCOM was not a reasonable replacement for Treasury's cost of production data. The [REDACTED]

### C. CASELLA

30. MOFCOM's errors in relation to Casella included its unjustified rejection of Casella's Form 4-2,<sup>22</sup> Form 6-3,<sup>23</sup> and its improper recourse to facts available.

31. In its second written submission, China explained that the "main" reason for MOFCOM's rejection of Casella's Forms 4-2 and 6-3 was that the WPS formatted spreadsheets contained incomplete datasets.<sup>24</sup> The rejection was unjustified. This is because complete versions were filed contemporaneously in PDF and hardcopy formats and later, in the widely used Excel format.<sup>25</sup>

32. China offers three excuses for MOFCOM's refusal to have regard to the PDF, hardcopy or Excel formats submitted by Casella.

33. First, China argues that Casella did not apply for approval to submit the data in a different format within 15 days of receipt of the Anti-Dumping Questionnaire. Given Casella

<sup>20</sup> Panel Report, *Canada – Welded Pipe*, para. 7.143.

<sup>21</sup> See China's first written submission, paras. 453-457; second written submission, paras. 317-318 and 326-328.

<sup>22</sup> "Domestic Sales".

<sup>23</sup> "Product Costs and Related Expenses".

<sup>24</sup> China's second written submission, paras. 261-262 and 304.

<sup>25</sup> Australia's second written submission, paras. 244-248. These submissions apply equally to MOFCOM's treatment of Casella's Forms 4-2 and 6-3.

was unaware of the missing data until after filing its questionnaire response, this would have been impossible. Casella provided replacement data as soon as it was aware of the omission.<sup>26</sup>

34. Second, China argues that the other two unrelated Australian exporters did not experience difficulties in submitting WPS forms.<sup>27</sup> But this does not negate the fact that Casella did.

35. Third, China argues that MOFCOM stated in its Additional Final Disclosure that Casella "never tried to split the transaction data into two WPS documents".<sup>28</sup> However, MOFCOM's apparent preference for split transaction data (rather than complete Excel data) was not communicated to Casella until the Additional Final Disclosure. By then, it was too late to refile the data, which it had already provided in hardcopy, PDF and Excel formats.

36. MOFCOM was required to "actively make efforts" to use the information submitted.<sup>29</sup> Had it done so, MOFCOM would have concluded that the information was verifiable, appropriately submitted, timely and in an appropriate medium having regard to the explanation provided by Casella. An unbiased and objective investigating authority could not have found otherwise.

37. Even if there had been a proper basis for MOFCOM's recourse to facts available in respect of Casella, two fundamental flaws remain in MOFCOM's selection of replacement facts.

38. First, MOFCOM failed to disclose to Casella the basis for MOFCOM's determination of its normal value.<sup>30</sup> Indeed, this was only disclosed by China in the course of these proceedings.<sup>31</sup>

39. Second, MOFCOM failed to provide any adequate justification, or conduct any meaningful comparative evaluation or assessment for its choice.

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<sup>26</sup> Australia's first written submission, para. 340.

<sup>27</sup> China's second written submission, paras. 165 and 271.

<sup>28</sup> China's second written submission, para. 268; Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 55.

<sup>29</sup> See Panel Report, *US – Steel Plate*, para. 7.65.

<sup>30</sup> Australia's second written submission, paras. 287-289.

<sup>31</sup> China's first written submission, para. 573. China also noted at fn. 689 of its first written submission that "an additional downward adjustment was made to that weighted average ex-factory domestic price to include other discounts" that it said were "not relevant" but did not provide further explanation.

**D. SWAN**

40. MOFCOM improperly rejected the detailed cost of production data that Swan provided in Forms 6-3 and 6-4 and resorted to facts available. It did so primarily on the basis that Swan provided the data in a format reflecting the company's internal records that was different from the PCN format requested. MOFCOM did not find that the data was incomplete or otherwise unusable and gave no consideration as to whether it was able to use the data in the format provided. It ignored Swan's cogent explanations and supporting information that showed:

- why Swan was unable to utilise the PCN format;
- how the information could be used to determine Swan's dumping margin;
- that the information was complete, in accordance with its accounting system, and consistent with Australian industry standard of wine classification;<sup>32</sup> and
- the relationship between Swan's production cost data and the PCNs identified in MOFCOM's Anti-Dumping Questionnaire.<sup>33</sup>

41. In the course of these proceedings, China has offered a number of rationalisations which are *ex post facto*.<sup>34</sup> These cannot assist the Panel.

42. In any event, it was not open to MOFCOM to disregard the production costs and expenses reported by Swan merely because the company was unable to use MOFCOM's preferred classification system.

43. China also argues that MOFCOM relied on two other alleged deficiencies to justify resorting to facts available. First, contracted companies that provided filling or pressing services provided incomplete responses to the questionnaire; and second, Swan did not reply to the question relating to cost allocations and did not provide financial reports. These

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<sup>32</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), pp. 3-4 and Annexes 1, 2 and 3.

<sup>33</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 4 and Annex 3.

<sup>34</sup> For examples in relation to China's dumping arguments, see China's first written submission, paras. 304, 335, 372, 384, 412, 425, 433, 437, 546-548, 630, 633-636, 648, 651-652, 760, 765, 768, 770-773, 836-843 and 852, and fn. 689; response to Panel questions No. 2, paras. 1, 2, 7, 9, 19-20, and 22; No. 6; and No. 75, para. 390.

arguments are also misplaced. Swan fully responded to these issues in its Comments on the Preliminary Determination.<sup>35</sup> MOFCOM ignored those explanations.

#### **E. ALL OTHERS**

44. China's attempts to justify MOFCOM's punitive calculation of the margin for "All Others", arguing that MOFCOM was permitted to select replacement facts in order to punish exporters that did not cooperate with its investigation.<sup>36</sup> This justification is contrary to MOFCOM's obligations to select the best information available and to provide cogent reasons for its selection of replacement facts.<sup>37</sup> The deliberate selection of adverse facts, which China admits was the case for the "All Others" rate, is not permitted by the Anti-Dumping Agreement.

#### **F. FAIR COMPARISON**

45. MOFCOM failed to make a fair comparison between the normal values and export prices of the three sampled companies.

46. Having chosen to use facts available, MOFCOM needed to find ways to disclose as much information as the companies would need in order to meaningfully participate in the fair comparison process. This was particularly crucial for Casella and Swan, as their normal values were not established on the basis of their own domestic sales, leaving them "in the dark" as to normal value.<sup>38</sup>

47. Instead, MOFCOM failed to adequately disclose its methodology or data or to engage in dialogue. This deprived the companies of any "meaningful opportunity" to request adjustments.<sup>39</sup> It then failed to make adjustments based on confidential information to which it alone had access.

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<sup>35</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), pp. 9-12 and Annex 9; Swan Vintage Comments on the Final Disclosure (Exhibit AUS-39), pp. 3-8 and Annexes 1-3 and 5.

<sup>36</sup> Australia's second written submission, paras. 379-382.

<sup>37</sup> China's first written submission, paras. 796-802; second written submission, paras. 371-374. While China asserts that it did not "cross the fine line between incentivizing cooperation and [...], punishing non-cooperating exporters" (Panel Report, *Canada – Welded Pipe*, para. 7.143), its argument is *ex post facto* justification. As Australia has established, the evidence on the record indicates that MOFCOM did indeed assess the "All Others" margin punitively (Australia's second written submission, paras. 379-382).

<sup>38</sup> Panel Report, *EC – Fasteners (Article 21.5 - China)*, para. 7.149.

<sup>39</sup> Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.191; Australia's second written submission, para. 115.

48. This entirely frustrated the purpose of Article 2.4, which is to ensure fair comparison between the normal value and the export price.<sup>40</sup>

49. China claims MOFCOM was not required to make any adjustments without a request from the sampled companies.<sup>41</sup> This position is legally unsound. The obligation to ensure a fair comparison "lies on the investigating authorities, and not the exporters".<sup>42</sup> This obligation includes making best efforts to disclose information to allow the sampled companies to make informed decisions regarding possible adjustments.<sup>43</sup>

50. MOFCOM failed to disclose relevant information or engage in a dialogue to identify necessary adjustments, or to enable the sampled companies to request them.<sup>44</sup> As a result, MOFCOM failed to ensure a fair comparison.

#### **IV. CONDUCT AND TRANSPARENCY CLAIMS RELATING TO DUMPING**

##### **A. MOFCOM'S ERRORS WITH RESPECT TO EXTENSION REQUESTS**

51. MOFCOM rejected the extensions requested by Treasury and Casella without engaging with the grounds set out in the requests or considering whether it was practicable to grant the extensions.

52. One layer of China's response is the repeated allegation that Australia seeks a standard of "automaticity" where extension requests are granted in a "rubber-stamp fashion".<sup>45</sup> This is a straw argument entirely disconnected from, and therefore irrelevant to, the case actually advanced by Australia.

53. A second layer of China's response is its allegation that MOFCOM did in fact consider the grounds for extension, despite the absence of any evidence of such examination on the investigation record. Even if China could show that such consideration occurred, the analysis that China asserts MOFCOM engaged in was obviously flawed. For example, China argues that MOFCOM rejected Treasury's application for an extension because it considered that

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<sup>40</sup> Panel Report, *EC – Fasteners (Article 21.5 – China)*, para. 7.149

<sup>41</sup> China's first written submission, paras. 261 and 860; second written submission, paras. 382 and 384.

<sup>42</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

<sup>43</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China)*, para. 5.195.

<sup>44</sup> Panel Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.191.

<sup>45</sup> China's second written submission, para. 1329.



significant restrictions on Treasury imposed by COVID-19 lockdowns could not have been so onerous, as Swan was "obviously subject to the same restrictions".<sup>46</sup> If MOFCOM ever made such a finding, then it was made by assuming, without any basis, that Swan was subject to the same restrictions as Treasury, notwithstanding that these companies operated in different Australian states. That assumption was factually incorrect.<sup>47</sup>

54. The final layer of China's response is a convoluted attempt to defend the sole reason given by MOFCOM for rejecting the extensions, which was that there was *some* overlap between the Sampling Questionnaire and the Anti-Dumping Questionnaire. The record shows that the overlap was minimal – whether measured by the number of questions or the information requested. An unbiased and objective investigating authority could not have found that the overlap meaningfully affected the amount of work required to respond to the questionnaire so as to warrant rejecting the extension requests on that basis.

## **B. MOFCOM'S TREATMENT OF CASELLA**

55. MOFCOM's refusal to consider the detailed data on domestic sales and costs that Casella submitted, by reason of the format in which Casella presented the data, without any prior communications of its intention to reject the evidence for this reason, denied Casella a full opportunity for the defence of its interests.

56. At the level of legal principle, China defends MOFCOM's conduct by arguing that Article 6.2 does not embody an obligation to disclose information to interested parties.<sup>48</sup> China's view appears to be that, categorically, Article 6.2 can never give rise to an obligation to communicate or disclose information to an interested party. This is legally untenable given the breadth of the language used in the first sentence of Article 6.2. While Australia agrees that there is no *specific* obligation of disclosure set out in Article 6.2, a contravention can occur where, as in this case, the particular circumstances of the interactions between an investigating authority and an interested party would deny the party the opportunity for a full defence of its interests.

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<sup>46</sup> See Australia's second written submission, para. 785; and China's response to Panel question No. 57, para. 336.

<sup>47</sup> Australia's second written submission, paras. 786-787.

<sup>48</sup> China's second written submission, para. 1353.

57. On the facts, China's case is that MOFCOM "did in fact communicate the relevant deficiencies to Casella" in its resubmitted data through the Supplementary Questionnaire.<sup>49</sup> This is inconsistent with the record. The Supplementary Questionnaire only identified the errors in the *original* WPS format spreadsheet and asked for an explanation. No comment was made, or question asked, about the *resubmitted* data in Excel format.

58. MOFCOM and China both appear to suggest that MOFCOM would have accepted the resubmitted data from Casella if it had been provided in the form of data split across multiple WPS sheets.<sup>50</sup> If so, MOFCOM should have asked Casella to provide the data in that format. It did not do so. Given that Casella had demonstrated a good faith willingness to provide the data in multiple different formats, there was no reason for MOFCOM to assume that Casella would not have promptly complied.

### C. MOFCOM'S SELECTION OF SAMPLED COMPANIES

59. China's second written submission contains no response to Australia's arguments in relation to Article 6.10, save for two complaints that Australia has failed to put forward evidence showing that Pernod Ricard's Sampling Questionnaire response demonstrated that it was one of the three largest exporters.<sup>51</sup> This replicates, rather than excuses, the error that was made by MOFCOM.

60. Australia's case has never relied on establishing that the sampling data before MOFCOM showed that Pernod Ricard was one of the three largest exporters. Rather, the point made by Australia is that MOFCOM was positively put on notice of an apparent error in the sampling data it had received, but impermissibly failed to take any action to seek clarification.<sup>52</sup> MOFCOM should have, but failed to, properly consider Pernod Ricard's submission and check the accuracy of the data provided to it.<sup>53</sup>

61. China has offered no response to this argument.

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<sup>49</sup> China's second written submission, para. 1355.

<sup>50</sup> China's first written submission, para. 2406.

<sup>51</sup> China second written submission, paras. 77 and 1242.

<sup>52</sup> Australia's first written submission, paras. 893-898.

<sup>53</sup> Australia's first written submission, paras. 893-897; second written submission, paras. 742-753.

## **V. DOMESTIC INDUSTRY CLAIMS**

62. Turning to domestic industry claims.

63. MOFCOM's definition of domestic industry failed to meet both the "quantitative" and the "qualitative" components of a "major proportion" of total domestic production.

64. Much of China's response in its submissions is directed at irrelevant issues, such as the lengthy passages dedicated to the proposition that domestic industry under Article 4.1 did not need to be defined "at the outset" of the investigation.<sup>54</sup> This is an uncontroversial proposition that has not been raised in any part of Australia's submissions. Similarly, a significant proportion of China's response to Australia's Article 4 claims is directed at unrelated obligations under Article 5.<sup>55</sup>

65. With respect to the quantitative component, the [REDACTED] [REDACTED] rough calculation of total domestic production of the like product was only disclosed following the first meeting of the Panel.<sup>56</sup> It is apparent that it was no more than a simplistic estimate, without any evidence that the inputs were based on real world data. As such, it was incapable of constituting positive evidence.

66. In addition, MOFCOM's approach to defining the domestic industry introduced a material risk of distortion.<sup>57</sup> This is because it failed to undertake any qualitative assessment of the representativeness of the 21 domestic producers that submitted questionnaire responses, in terms of geographic spread, product mix, scale of operations, economic indicators or any other relevant factor.<sup>58</sup>

67. China does not dispute that MOFCOM failed to make a qualitative assessment. Rather, its primary response is that there was no "active exclusion" of any domestic producers – a contention never made by Australia, nor one determinative of the issues.<sup>59</sup> China appears to mistakenly assume that a risk of distortion may only be introduced through "active exclusion". This is not the case. A failure to ensure the representativeness of a group

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<sup>54</sup> China's first written submission, paras. 905-906; second written submission, paras. 396, and 423-427.

<sup>55</sup> China's second written submission, paras. 429, 430, 433, 450-452.

<sup>56</sup> [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).

<sup>57</sup> Australia's first written submission, paras. 533-536; second written submission, paras. 412-417.

<sup>58</sup> Australia's first written submission, para. 541; second written submission, para. 418.

<sup>59</sup> China's second written submission, paras. 442, 453-454, 467-468, 473, and 481.

of domestic producers will introduce a "material risk of distortion", whether as a consequence of "active exclusion", passive omission, or otherwise.

## VI. INJURY AND CAUSATION CLAIMS

68. MOFCOM's examination and determination of injury and causation was also beset with errors, resulting in violations of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. China's submissions obfuscate and confuse what are clear violations of Article 3. I will highlight three pertinent examples.

69. First, China adopts an interpretative approach that is inconsistent with the text and context of Article 3. Under this approach, each of the analyses required by the paragraphs of Article 3, and indeed by sentences within each paragraph, are artificially severed from one another.

70. China's submissions relating to tariff reductions provide a clear example of the error in this approach.<sup>60</sup> China posits that price changes attributable to tariff reductions are not a matter to be considered during the price effects analysis under Article 3.2.<sup>61</sup> China then argues that tariff reductions do not qualify "as another factor within the meaning of Article 3.5".<sup>62</sup> The net result is that in China's view, a factor that clearly had a relevant and material impact on the price of Australian imports during the Injury POI cannot be considered at any time during the Article 3 analysis, whether under Article 3.2 or Article 3.5.

71. Second, China's submissions in response to Australia's Article 3 claims consist in large part of *ex post facto* reasoning, which should be disregarded by the Panel.<sup>63</sup> For example, China has dedicated over 30 pages of its first written submission to describing MOFCOM's price calculation.<sup>64</sup> This level of detail does not appear anywhere on the investigation record.

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<sup>60</sup> China's second written submission, paras. 745-752.

<sup>61</sup> China's second written submission, para. 748.

<sup>62</sup> China's second written submission, paras. 752. See also second written submission, para. 1109; and first written submission, paras. 1925-1926.

<sup>63</sup> See Australia's second written submission, paras. 427, 442, 452, 456-458, 483-484, 492-493, 499, 526-528, 539, 566, 573, 591-594, and 605.

<sup>64</sup> China's first written submission, paras. 944-1078.

72. Third, China invokes what it describes as MOFCOM's "holistic" analysis in response to Australia's claims under Articles 3.2, 3.4 and 3.5.<sup>65</sup> China does not explain what it means by the term "holistic analysis", but appears to suggest that because Australia has not challenged each and every aspect of MOFCOM's purportedly "holistic" decision-making process, all of Australia's claims must fail.<sup>66</sup> This notion has no legal basis.

**A. MOFCOM'S CONSIDERATION OF PRICE EFFECTS WAS FUNDAMENTALLY FLAWED**

73. MOFCOM's injury determination was grounded in its finding of price suppression amounting to just 658 Renminbi per kilolitre over the course of the five-year Injury POI. This amounts to just 2% of the domestic sale price in the base year of 2015.<sup>67</sup>

74. There were fundamental errors in MOFCOM's examination of price effects. The most critical were:

- MOFCOM's failure to ensure price comparability between the average unit values of Australian imports and domestic like products; and
- MOFCOM's failure to objectively examine the explanatory force that Australian imports were said to have for the alleged suppression of domestic prices.

75. China makes two key arguments in response. Australia will address each in turn.

**1. MOFCOM compared prices without ensuring comparability**

76. China's assertion that MOFCOM did not consider or compare prices during its evaluation of *price effects* is both inconsistent with the text of the Final Determination and illogical. The Final Determination makes clear that MOFCOM did compare the price of Australian wine and domestic like products.<sup>68</sup> In any event, MOFCOM found that Australian

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<sup>65</sup> China's second written submission, paras. 582-583, 585, 656 on price comparability, paras. 694, 701, 713, 805, 806, 809, 813 on explanatory force for price suppression, paras. 834, 860, 942, 958 on examination of the state of the domestic industry, paras. 1031, 1032, 1045, 1060 on causation of injury, and paras. 1124 and, 1132 on non-attribution factors.

<sup>66</sup> China's second written submission, paras. 583 and 805.

<sup>67</sup> See Australia's second written submission, para. 424.

<sup>68</sup> Australia's second written submission, paras. 434-437, 485 and fn. 703.

wine and Chinese domestic products were "basically identical",<sup>69</sup> such that "consequently price has become the primary factor for consideration when downstream customers choose between the products."<sup>70</sup> China does not explain how the market that MOFCOM defined, in which price was the primary factor for competition, can be rationalised with China's assertion that the prices within that market were not relevant or compared during MOFCOM's examination of price effects.

77. The obligation to ensure price comparability when a price comparison is made during a price effects analysis is of critical importance to the operation of Article 3.2. MOFCOM failed to ensure price comparability because it did not account for material differences in levels of trade, conditions of sale, and product mix between Australian wine and domestic like products.

78. The illogical nature of China's position is underscored by its attempt to characterise MOFCOM's consideration of differences in the product mix of subject imports and that of domestic like products as requiring recourse to facts available. MOFCOM either considered that price comparability and product mix were irrelevant to its price effects analysis, and was therefore *not* missing any necessary information, *or* it had recourse to facts available because product mix *was* a relevant consideration and therefore necessary information.<sup>71</sup> China cannot have it both ways.

## **2. MOFCOM did not objectively examine whether Australian imports had explanatory force for the alleged price suppression**

79. I turn now to MOFCOM's so-called "holistic" consideration of price suppression. The term "holistic" is not used in MOFCOM's injury analysis. China's *ex post facto* account of MOFCOM's analysis as "holistic" cannot correct MOFCOM's failure to consider whether Australian imports had explanatory force for the alleged price suppression. MOFCOM committed at least three fundamental errors in the analysis.

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<sup>69</sup> Final Determination (Exhibit CHN-1), p. 66; See also pp. 49 and 52; Anti-Dumping Final Determination, (Exhibit AUS-2), p. 135.

<sup>70</sup> Final Determination (Exhibit CHN-1), p. 66; Anti-Dumping Final Determination, (Exhibit AUS-2), p. 135.

<sup>71</sup> Australia's second written submission, paras. 450-453.

80. First, MOFCOM did not consider whether the impact of Australian imports was to prevent price increases that "otherwise would have occurred". There is no evidence anywhere on the investigation record showing that MOFCOM considered what the state of domestic prices would have been in the absence of subject imports.

81. Second, in making its finding of price suppression, MOFCOM did not consider whether the effect of subject imports was to prevent price increases, "to a *significant degree*".<sup>72</sup>

82. China submits that MOFCOM did not identify the degree of suppression at all and argues that, accordingly, the Panel cannot consider that issue.<sup>73</sup> Incongruously, China also attributes an analysis of changes in unit profitability to MOFCOM, supposedly to establish that MOFCOM *did* consider the significance of the alleged price suppression.<sup>74</sup> This analysis does not appear in the Final Determination or elsewhere on the investigation record. Moreover, China argues *ex post facto* that the price suppression must have been significant because of the state of the domestic industry. Even on China's version of the analysis undertaken, there was no consideration of whether the effect of the subject imports was to prevent price increases "to a *significant degree*".

83. Third, MOFCOM never examined whether the Australian imports had explanatory force for the price suppression that it observed. MOFCOM's findings regarding the price and volume trends of Australian imports did not provide an objective basis for concluding that Australian imports had explanatory force for the alleged suppression of domestic prices. MOFCOM was not entitled to simply assume that rising volumes and declining prices would have a suppressing effect on domestic prices. Rather, MOFCOM needed to objectively consider whether the evidence on the record supported this conclusion. It did not do so. In particular, MOFCOM did not consider how Australian imports prevented the average unit price of domestic products from increasing by 658 Renminbi per kilolitre, in circumstances where the average unit price of Australian wine was always more expensive than that of domestic like products, by a margin of at least 5,848 Renminbi per kilolitre.

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<sup>72</sup> Article 3.2 of the Anti-Dumping Agreement. (emphasis added).

<sup>73</sup> China's second written submission, paras. 730-731.

<sup>74</sup> China's second written submission, para. 732.

**B. MOFCOM'S CONSIDERATION OF CAUSATION AND NON-ATTRIBUTION  
FACTORS WAS FUNDAMENTALLY FLAWED**

84. The record shows that MOFCOM merely *assumed* that a causal relationship existed between Australian imports and the alleged injury – rather than demonstrating that such a relationship existed based on an examination of all relevant evidence. In doing so, MOFCOM failed to objectively examine the evidence relating to other known factors. MOFCOM was required to identify, separate and distinguish the injury the other factors caused, so as to ensure that it was not improperly attributed to the subject imports.

**1. Volume and market share**

85. MOFCOM assumed, rather than demonstrated, that Australian imports caused the volume and market share declines experienced by the domestic industry. China argues that this assumption was justified on the basis of a correlation between the percentage point changes in the market share of Australian imports and the domestic industry.<sup>75</sup> The evidence on the record demonstrated that the Chinese wine market was far more complicated than MOFCOM recognised. There were imports of like products from third countries in larger volumes and lower prices than subject imports. There were domestic producers beyond those included in MOFCOM's definition of the "domestic industry", and there were substantial fluctuations in market demand. MOFCOM's analysis of volume and market share omitted any consideration of these complexities. It was wholly inadequate to ignore major influences in the market given that MOFCOM considered the market comprised of "basically identical" products that competed on price.

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<sup>75</sup> China's first written submission, para. 1741. See also China's second written submission, para. 1086.



## 2. Third country imports

86. The evidence before MOFCOM established that third country imports played a significant role in the Chinese market over the course of the Injury POI. However, MOFCOM's consideration of the impact of third country imports consisted of only two observations:

- that the aggregated import volume from third countries declined by 1.27% when 2019 is compared to 2015;<sup>76</sup> and
- the average unadjusted CIF price in USD per kilolitre, for all third country imports declined by 2.88% when 2019 is compared to 2015.<sup>77</sup>

87. China argues that MOFCOM's dismissal of third country imports is justified on the basis of the "disparate trends" in price and volume exhibited by all third country imports, considered as a homogenous block, and Australian imports.<sup>78</sup> This limited analysis of isolated trends was not an objective basis on which to dismiss the impact of third country imports. The evidence before MOFCOM showed that, at all times during the Injury POI, third country imports accounted for significantly greater import volumes and market share and were significantly cheaper than Australian imports.

88. MOFCOM's analysis failed entirely to separate and distinguish any injury caused by third-country imports in order to ensure that such injury would not be attributed to the subject imports.

89. China's response to Australia's observations regarding the volume and prices of third country imports is to suggest that the evidence that was on the record before MOFCOM should be disregarded because it reflects unadjusted CIF prices.<sup>79</sup>

90. This is unpersuasive. MOFCOM's own analysis of third-country import prices was based on unadjusted CIF prices in USD per kilolitre.<sup>80</sup> In any event, converting the CIF prices of third country imports to Renminbi per kilolitre and adding the tariff and customs clearance

<sup>76</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 144 ("[I]mport volume from other countries and regions showed a downward trend during the injury investigation period, from 339,500 kl in 2015 to 335,200 kl in 2019").

<sup>77</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 144 ("The import prices of products from other countries and regions were also in a downtrend, decreasing from USD 4,238/kl in 2015 to USD 4,116/kl in 2019").

<sup>78</sup> China's second written submission, para. 1120.

<sup>79</sup> China's second written submission, para. 640.

<sup>80</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 144.

adjustments does not alter the fundamental facts that were before MOFCOM. That is, even after the customs tariff and clearance fees are applied,<sup>81</sup> third country imports remained significantly cheaper than Australian products. On the whole, they were cheaper than domestic like products and, in some cases, significantly cheaper.

91. The result is that there is no rational or objective basis, either on the investigation record or as argued by China in this dispute, that could justify MOFCOM's cursory finding that third country imports did not "break the causal link" between subject imports and material injury to the domestic industry.

### 3. China Australia Free Trade Agreement (ChAFTA)

92. MOFCOM's identification of price suppression and resulting injury was grounded in its finding that the average unit value of Australian imports declined by 15.91% when the 2019 price is compared to 2015. The evidence on the record indicated that this price decline was attributable to an entirely separate factor: the progressive elimination of customs tariffs on imports of Australian bottled wines under ChAFTA.

93. 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 tariff, declined by 15.91%.

94. Australia has shown that these tariff reductions provide a cogent explanation for the price decline observed by MOFCOM. In response, China raises three arguments.

95. First, China argues that MOFCOM was not required to consider tariff reductions under Article 3.5 because tariffs are not an "other known factor" within the meaning of Article 3.5. This is both surprising and incorrect. It is surprising because MOFCOM itself considered the tariff reductions as an "other known factor" and treated them as such during the investigation.<sup>82</sup>

96. It is incorrect because Article 3.5 requires the investigating authority to demonstrate that the subject imports are causing injury *through the effects of dumping*, and that such a

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<sup>81</sup> Australia understands that Chilean wine imports were not subject to the 14% import tariff during the Injury POI.

<sup>82</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 137-140.

determination must be based on *all relevant evidence* including factors other than the subject imports. Tariff reductions that apply to the subject imports during the Injury POI fall within the scope of the third sentence of Article 3.5. This is because tariff reductions have the capacity to bring about price reductions that are entirely separate from dumping or the effects thereof.

97. Second, China contends that Australia's argument lacks a factual basis because there is no correlation between the year-to-year price changes of Australian imports and the tariff reduction, and the unadjusted CIF price for Australian imports also declined. This does not respond to Australia's argument, which is directed to the price decline that MOFCOM actually calculated and based its determination on. MOFCOM adopted a price calculation methodology that incorporated tariff adjustments. The tariff declined by 14% over the Injury POI. MOFCOM then relied on the 15.91% price decline it observed as a result of an end-to-end comparison of the prices it calculated for its injury determination. There is a clear correlation between the end-to-end tariff reduction and the end-to-end price reduction. The fact that it is not a perfect correlation is unremarkable. There are numerous factors that could result in differences between the yearly price and tariff changes. These included the very factors that MOFCOM failed to consider in its price calculation, such as difference in product mix, level of trade and conditions of sale.

98. Third, China argues "that tariff reductions do not necessarily result in a decrease in import prices". Australia's argument is not grounded in a general assumption regarding the impact of tariff reductions in markets. Rather, it is grounded in the particular price calculation that MOFCOM adopted during the investigation, which incorporated the 14% reduction attributable to tariff elimination.

## **VII. CLAIMS CONCERNING CONFIDENTIALITY AND ACCURACY**

99. Turning now to Australia's claims concerning Articles 6.5 and 6.6.

**A. MOFCOM FAILED TO ASSESS "GOOD CAUSE" FOR CLAIMS OF CONFIDENTIALITY AND FAILED TO REQUIRE ADEQUATE NON-CONFIDENTIAL SUMMARIES**

100. China appears to accept that there is no evidence of how MOFCOM undertook its assessment of "good cause" in MOFCOM's published reports or any related documentation.<sup>83</sup> China has chosen not to submit the confidential versions of the domestic industry questionnaire responses. Accordingly, the Panel's examination of those grants of confidential treatment is confined to the confidentiality requests and what little can be inferred from the questions posed in the questionnaire.

101. Australia has set out a number of examples in which the nature of the information that MOFCOM treated as confidential did not support a finding of good cause, such as the response to questions that asked for the "main raw materials" of wine to be identified.<sup>84</sup> In relation to these examples, China now appears to accept that some elements of the responses were non-confidential, but argues that confidential treatment was granted over the entirety of the answer because some *other* distinct element of the response *was* confidential.<sup>85</sup> Even if China's argument is accepted at face value, it confirms that confidential treatment was applied to non-confidential information.

102. MOFCOM's failure to require good cause in its treatment of confidential information is also evident in relation to Exhibit CHN-32 (BCI).<sup>86</sup> The disclosure of this material by China following the first meeting of the Panel demonstrates that MOFCOM failed to require or assess good cause for the underlying data and calculation methodology used to determine total domestic production. Nothing in Exhibit CHN-32 (BCI) contains any identifying information about the "authoritative domestic organisation" or any other organisation. This document contains no more than unsourced assumptions and aggregated or averaged data. There is no evidence on the record to suggest that this information is business sensitive. MOFCOM

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<sup>83</sup> China's first written submission, paras. 2249, 2275-2279, and fn. 2098.

<sup>84</sup> Australia's first written submission, paras. 860-864; second written submission, paras. 702-710.

<sup>85</sup> China's first written submission, paras. 2296-2302.

<sup>86</sup> [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).

appears to have accepted the request for confidential treatment without assessing whether there was good cause shown, contrary to the requirements of Article 6.5.

103. Turning to the non-confidential summaries submitted by the domestic producers. These are deficient on their face.<sup>87</sup>

104. China attempts to justify the inadequacy of the summaries by arguing that certain information is "so business sensitive" that only a "general or high level (that is, non-specific) non-confidential summary can be provided".<sup>88</sup> This argument finds no basis in the facts of this case or the text of the article. Article 6.5.1 mandates that non-confidential summaries must contain "sufficient detail". It also provides that in "exceptional circumstances", an interested party providing confidential information may "indicate that the information is not susceptible of summary". In such a situation, the party requesting confidential treatment must provide "a statement of the reasons why summarisation is not possible". In this case, there were no indications that summarisation was impossible, let alone statements of the reasons why.

**B. MOFCOM FAILED TO SATISFY ITSELF AS TO THE ACCURACY OF THE INFORMATION IT RELIED UPON FOR ITS FINDINGS**

105. Contrary to the obligations under Article 6.6, the record shows that MOFCOM:

- did nothing to satisfy itself as to the accuracy of the information supplied by the [REDACTED] concerning the estimate of total domestic production of like products, despite obvious shortcomings;<sup>89</sup>
- did nothing to satisfy itself of the accuracy of at least 16 of the 21 questionnaire responses submitted by domestic producers;<sup>90</sup>
- did nothing to satisfy itself of the accuracy of the sampling data despite the accuracy of that data being directly challenged by Pernod Ricard.<sup>91</sup>

106. China's second written submission fails to engage with or rebut these arguments.

<sup>87</sup> Australia's first written submission, paras. 865-869.

<sup>88</sup> China's second written submission, paras. 1299-1300.

<sup>89</sup> Australia's first written submission, paras. 941-943; second written submission, paras. 812-816.

<sup>90</sup> Australia's first written submission, paras. 944-948; second written submission, paras. 817-827.

<sup>91</sup> Australia's first written submission, paras. 949-952; second written submission, paras. 828-835.

107. The only point raised by China in its second written submission concerns a legal question about the intersection of Articles 6.6 and 6.8.<sup>92</sup> It is based on a misunderstanding of Australia's submission. It is not Australia's case that the obligation in Article 6.6 applies to replacement data selected as "facts available" under Article 6.8. Nor is it Australia's case that Article 6.6 could be relied upon to mandate the use of some other information.

108. Rather, Australia's case is that Article 6.8 is only engaged once an investigating authority has found, as a fact, that an interested party refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation. Until such a factual finding is made, Article 6.8 does not apply. Thus, a finding that information supplied by the sampled companies is deficient must be made before Article 6.8 can be engaged. That finding must necessarily be based on information which the investigating authority has satisfied itself is accurate under Article 6.6.<sup>93</sup> Australia's submission is that MOFCOM did not satisfy itself as to the accuracy of the information that it relied upon to make the findings that engaged Article 6.8. This is because the process used to make that assessment was not rationally capable of determining the reliability and probity of the information being assessed.<sup>94</sup>

## **VIII. INITIATION CLAIMS**

109. Australia has established a multitude of errors in the initiation process.<sup>95</sup> For the purpose of this statement, I will highlight two.

110. First, CADA's production data included products outside the scope it had specified in its own application. MOFCOM itself confirmed this.<sup>96</sup> This data was incapable of reflecting the relevant production levels of the domestic industry on whose behalf the application was purportedly made. As such, it could not provide a basis for a determination of standing under Article 5.4. MOFCOM's uncritical reliance on this information for the purpose of initiation, despite its obvious unsuitability, contravened the obligations in Article 5.4.

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<sup>92</sup> China's second written submission, paras. 1370-1376.

<sup>93</sup> Australia's response to Panel question No. 59, para. 151.

<sup>94</sup> Australia's first written submission, para. 955.

<sup>95</sup> Australia's first written submission, paras. 742-826; second written submission, paras. 607-651.

<sup>96</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

111. Second, MOFCOM failed to conduct any examination of the degree of support for, or opposition to, the application among the hundreds of domestic wine producers that were not CADA members.<sup>97</sup>

112. China has conceded that this examination did not take place but attempts to justify this omission by arguing that Article 5.5 prevented MOFCOM from doing so.<sup>98</sup> There is no legal basis for this view. Article 5.5 does not prevent an investigating authority from undertaking the assessment of support for the application mandated by Article 5.4. MOFCOM could have conducted the required examination without "publicizing" the application to the general public. Instead, MOFCOM simply assumed industry support. The fact MOFCOM found no opposition to the written application is unremarkable when no opportunity was allowed for opposition to be expressed.

## **IX. CROSS-CUTTING CONDUCT AND TRANSPARENCY CLAIMS**

113. Finally, I will address certain cross-cutting conduct and transparency claims.

114. MOFCOM failed to provide timely opportunities for interested parties to see all information used in the investigation that was relevant to the presentation of their cases and to properly inform interested parties of the essential facts forming the bases for MOFCOM's determinations. This was deeply unfair to the interested parties and denied MOFCOM the opportunity to benefit from their informed engagement when making determinations under Articles 2, 3 and 4. It is one illustration of the interaction between MOFCOM's procedural and substantive failures.

115. Much of China's response to Australia's submissions in relation to these obligations is misdirected. Rather than engage with the substance of the claims, China cherry-picks phrases from Australia's submissions — such as section headings — and then criticises those phrases in isolation from their context. China's criticisms are wholly unpersuasive. They do not address the substance of the submissions that Australia actually makes.

116. Similarly, China has repeatedly complained about what it asserts are analogous claims by Australia under Articles 6.4, 6.9, and 12.2 of the Anti-Dumping Agreement. China

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<sup>97</sup> Australia's second written submission, paras. 615-619.

<sup>98</sup> China's first written submission, para. 2057.

considers that Australia has conflated the obligations under these provisions. But, on any fair reading of Australia's submissions, Australia has dealt in detail with the distinct legal standards under each obligation. The factual overlap in some of the claims is simply a consequence of MOFCOM's failure to make available certain information at *any* point in the investigation, despite being required to do so at multiple stages.

**A. MOFCOM FAILED TO PROVIDE OPPORTUNITIES TO SEE ALL RELEVANT INFORMATION**

117. China has placed heavy emphasis on the notion that Article 6.4 is not a "disclosure" obligation. While Australia agrees that the word "disclosure" does not appear in Article 6.4, the point is semantic. In order for the interested parties to "see" information, that information must necessarily be "disclosed".

118. In its first written submission, and then faintly in its second written submission, China submits that Article 6.4 only applies where an interested party has made a specific request to see the information, relying on *Korea – Certain Paper (Article 21.5 – Indonesia)*.<sup>99</sup> That interpretation of Article 6.4 is inconsistent with subsequent panel decisions and cannot be reconciled with the text of the Article.<sup>100</sup>

119. In its second written submission, China shifts its emphasis to a contention that Article 6.4 only requires "regular and routine access" to the investigation case file, and does not require any other proactive steps from an investigating authority.<sup>101</sup> Providing meaningful "regular and routine access" to the investigation case file, *if* it contained all required information, would be sufficient to meet the requirements of Article 6.4. The difficulty for China is that none of the information at issue was made available through the investigation case file.

120. Of all the items of information in issue, China only contends one was made available in accordance with Article 6.4. China asserts that MOFCOM did mak [REDACTED]

<sup>99</sup> China's first written submission, paras. 2446 and 2467; and second written submission, paras. 1406 and 1410.

<sup>100</sup> Australia's second written submission, paras. 852-855.

<sup>101</sup> China's second written submission, para. 1405.

<sup>102</sup> China's second written submission, paras. 1422-1423.



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This submission is irreconcilably inconsistent with China's submissions in other sections that "other respondent(s)" was a deliberately vague term used to purposely conceal [REDACTED] [REDACTED] to meet MOFCOM's understanding of its confidentiality obligations.

## **B. DISCLOSURE OF ESSENTIAL FACTS**

121. Detailed submissions have been made about the correct interpretation of Article 6.9. I will focus on just two points.

122. First, there appears to be little disagreement between the parties that methodologies for determining dumping margins, including formulae, are "essential facts" within the scope of Article 6.9, while the calculations themselves generally are not. Where there remains a difference between the parties is in the scope of the term "methodology". For China, a "methodology" entails a "brief description of the steps undertaken by the investigating authority",<sup>104</sup> but would not include an explanation of how or why the information and data were used or not used by the investigating authority.<sup>105</sup> China's proposed interpretation is too narrow. To properly "inform all interested parties", the disclosure of a "methodology" may need to include sufficiently detailed explanations concerning: what information or data was selected and why it was selected; what information or data was disregarded and why it was not used; and how the information or data was used, including any adjustments or assumptions that were made.

123. Second, Australia considers that there is a significant gap between the information that has been disclosed by China in the course of these proceedings and the paucity of disclosure of essential facts during the investigation. This is most apparent in respect of China's submissions on injury and causation. Even if the Panel were to accept the detailed rationalisations now presented, there is no doubt that this information was never disclosed to the interested parties, in contravention of Article 6.9. For example, if the Panel were to accept China's assertion that MOFCOM had recourse to facts available to determine the average unit

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<sup>103</sup> China's second written submission, para. 1424.

<sup>104</sup> China's second written submission, para. 1441.

<sup>105</sup> China's second written submission, para. 1436.

values of subject imports for the purpose of its price effects examination, then the Panel should also find a clear breach of Article 6.9, given this was never disclosed to the interested parties.

### C. FINAL DETERMINATION

124. Finally, we turn to Australia's Article 12 claims. China's submissions on these reflect the approach seen elsewhere of an unduly narrow view of the transparency obligations in the Anti-Dumping Agreement.

125. Australia and China disagree on key aspects of the applicable legal standard under Articles 12.2 and 12.2.2, including whether methodologies applied by the investigating authority need to be disclosed in the public notice or report of a final determination.

126. China's view appears to be that "methodological questions are not covered by the scope of Articles 12.2 [and] 12.2.2" and that the "methodology adopted by an investigating authority as well as decisions made by the authority are [...] not subject to these provisions".<sup>106</sup> This is legally unsustainable for at least the following reasons:

- first, Article 12.2.2 explicitly requires the public notice or report to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". It is entirely inconsistent with the text and purpose of this provision to interpret "matters of fact and law and reasons" in a manner that would exclude "methodologies";
- second, the incorporation by reference of information required under Article 12.2.1(iii) means that an investigating authority is *specifically* mandated to include "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value";
- finally, the reports China cites in support of its position do not stand for the proposition that methodologies are not subject to Article 12.2.2. The panel's decision in *EU – Footwear (China)* was limited to the specific

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<sup>106</sup> China's second written submission, paras. 1555-1559.

"methodological questions" raised in that case.<sup>107</sup> And in *EC – Bed Linen*, the panel found that in circumstances where an investigating authority applied its "customary methodology", it was not required to explain its *choice* to use that methodology.<sup>108</sup>

## X. CONCLUSION

127. Chair, members of the Panel, it is critical that WTO Members adhere to the rules when imposing anti-dumping duties. Where a Member fails to do so, it undermines the functioning of the rules-based trading system and it disrupts and damages trade. China's egregious measure does precisely this.

128. Prompt resolution of this matter would benefit both Chinese importers and Australian exporters who have cultivated strong commercial ties over many years.

129. For the reasons set out in Australia's submissions, Australia respectfully requests that the Panel find China's measure is inconsistent with its obligations under the Anti-Dumping Agreement and the GATT 1994.

130. Australia thanks the Panel for its careful consideration and looks forward to responding to the Panel's questions.

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<sup>107</sup> Panel Report, *EU – Footwear (China)*, para. 7.882.

<sup>108</sup> Panel Report, *EC – Bed Linen*, para. 6.252.

