Before the World Trade Organization

Panel Proceedings

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

(DS602)

AUSTRALIA'S FIRST WRITTEN SUBMISSION

Business Confidential Information REDACTED

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US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521

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US – Stainless Steel (Korea), para. 6.77.	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
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US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US — Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US–Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Additional Final Disclosure	MOFCOM's release of 34 pages of supplementary Final Disclosure material to the Australian Government on 17 March 2021
AGW	Australian Grape and Wine Inc
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Duty Announcement	MOFCOM, "Announcement No. 6 of 2021 of the Ministry of Commerce on the Final Ruling of the Anti-dumping Investigation into Relevant Imported Wines Originating in Australia", 26 March 2021
Anti-Dumping Questionnaire	Unless otherwise specified means the Exporter Questionnaire issued by MOFCOM to Australian exporters on 10 October 2020
AUD	Australian Dollars
Australian Food and Beverage	Australian Food and Beverage Group Pty Ltd
BCI	Business Confidential Information
CADA	China Alcoholic Drinks Association
CADA Anti-Dumping 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
Casella Wines	Casella Wines Pty Ltd
ChAFTA	China-Australia Free Trade Agreement
Changyu Wine	Yantai Changyu Pioneer Wine Co Ltd
China's Countervailing Regulation	Countervailing Regulation of the People's Republic of China
CIF	Cost, insurance and freight
COFCO Greatwall	COFCO Great Wall Wine Co Ltd
Domestic Producer Questionnaire	Unless otherwise specified, means the Domestic Producer Questionnaire issued by MOFCOM on 10 October 2020
Dorrien Estate	Dorrien Estate Winery Pty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ERP	Enterprise resource planning
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
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Growers Wine Industry	Growers Wine Group Pty Ltd
IFRS	International Financial Reporting Standards
Injury POI	The injury investigation period adopted by MOFCOM, being 1 January 2015 to 31 December 2019.
Liquorland	Liquorland (Australia) Pty Ltd
MOFCOM	Ministry of Commerce of the People's Republic of China
Other named Australian exporters	The 21 Australian exporters listed in Annex 1 of the Final Determination in the category, "Other Cooperative in the Investigation"
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.
Portia Valley Wines	Portia Valley Wines Pty Ltd
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 Wines, Casella Wines and Swan Vintage, 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
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Supplementary Questionnaire	Unless otherwise specified, means the Supplementary Questionnaire on Relevant Wines Anti-Dumping Investigation issued by MOFCOM to sampled companies on 1 February 2021
Swan Vintage	Australian Swan Vintage Pty Ltd
The "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"
Treasury Wines	Treasury Wine Estates Vintners Limited
USD	United States Dollars
WTO	World Trade Organization

Yalumba Wines	S. Smith and Son Pty Ltd trading as The Yalumba Wine Company

LIST OF EXHIBITS

Exhibit No.	Exhibit Name	Short Title
AUS-1	MOFCOM, "Announcement No. 6 of 2021 of the Ministry of Commerce on the Final Ruling on the Anti-dumping Investigation into Relevant Imported Wines Originating in Australia", 26 March 2021 (English Translation) (pages renumbered)	Anti-Dumping Final Determination Announcement
AUS-2	MOFCOM, "Final Ruling of the Ministry of Commerce of the Peoples Republic of China on Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia", 26 March 2021 (English Translation)	Anti-Dumping Final Determination
AUS-3	MOFCOM, "Anti-Dumping Foreign Exporter and Producer Questionnaire", 10 October 2020 (English Translation)	Anti-Dumping Questionnaire
AUS-4 (BCI)	[redacted]	[redacted]
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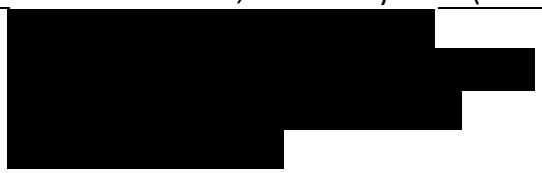
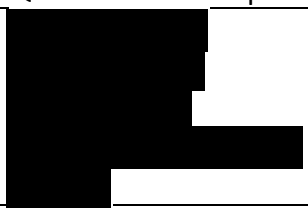
AUS-15 (BCI)		
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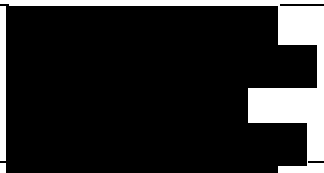
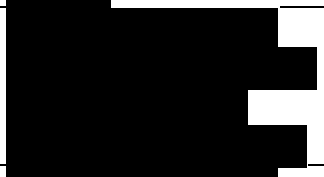
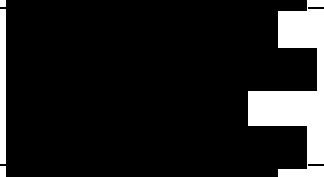
AUS-17 (BCI)		
AUS-18 (BCI)		
AUS-19 (BCI)		
AUS-20 (BCI)		
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AUS-28 (BCI)	[redacted]	[redacted]
AUS-29 (BCI)	[redacted]	[redacted]
AUS-30	Casella Wines, "Supplementary Questionnaire Response", 5 February 2021 (English translation)	Casella Wines Supplementary Questionnaire Response
AUS-31 (BCI)	[redacted]	[redacted]
AUS-32 (BCI)	[redacted]	[redacted]

AUS-33 (BCI)	[redacted]	[redacted]
AUS-34 (BCI)	[redacted]	[redacted]
AUS-35	MOFCOM, "Preliminary Ruling of the Ministry of Commerce of the Peoples Republic of China on Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia", 30 August 2020 (English Translation)	Anti-Dumping Preliminary Determination
AUS-36 (BCI)	[redacted]	[redacted]
AUS-37 (BCI)	[redacted]	[redacted]
AUS-38	Swan Vintage, "Comments on Preliminary Determination," 7 December 2020 (English translation)	Swan Vintage Comments on the Preliminary Determination
AUS-39	Swan Vintage "Response to Final Disclosure," 21 March 2021(English translation)	Swan Vintage Comments on the Final Disclosure
AUS-40	Swan Vintage, "Exporter Questionnaire Response" 16 November 2020 (English Translation)	Swan Vintage Anti-Dumping Questionnaire Response
AUS-41	Swan Vintage, "Response to the Supplementary Questionnaire," 3 February 2021 (English Translation)	Swan Vintage Supplementary Questionnaire Response
AUS-42	MOFCOM, "Notice No. 36 on Issuing Questionnaires on Wine Anti-Dumping Case RVU", 10 October 2020 (English Translation)	Issuance of Anti-Dumping Questionnaire Notice
AUS-43	Tonghua Winery, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Tonghua Winery Anti-Dumping Questionnaire Response
AUS-44	COFCO, "Anti-Dumping Case of Relevant Wines Questionnaire for Domestic Producers", 13 October 2020 (English Translation)	COFCO Anti-Dumping Questionnaire Response
AUS-45	Xinjiang West Region Pearl Winery, "Domestic Producer Questionnaire", 16 November 2020 (English translation)	Xinjiang West Region Pearl Winery Anti-Dumping Questionnaire Response
AUS-46	Yunan Gaoyuan Wine, "Domestic Producer Questionnaire", 16 November 2020 (English translation)	Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response

AUS-47	CITIC Guoan Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	CITIC Guoan Wine Anti-Dumping Questionnaire Response
AUS-48	Chateau Junding, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Chateau Junding Anti-Dumping Questionnaire Response
AUS-49	Xinjiang Sunyard Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response
AUS-50	Tonghua Tontine Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Tonghua Tontine Wine Anti-Dumping Questionnaire Response
AUS-51	Grand Dragon Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Grand Dragon Wine Anti-Dumping Questionnaire Response
AUS-52	Yanti Landsun Manor Wine Co, Anti-Dumping Case of Relevant Wines Questionnaire for Domestic Producers, 13 October 2020 (English Translation)	Yantai Landsun Anti-Dumping Questionnaire Response
AUS-53	Changyu Wines, "Anti-Dumping Case of Relevant Wines Questionnaire for Domestic Producers", 13 October 2020 (English Translation)	Changyu Wines Anti-Dumping Questionnaire Response
AUS-54	Turpan LouLan Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Turpan LouLan Wine Anti-Dumping Questionnaire Response
AUS-55	Dynasty Fine Wine Group, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Dynasty Fine Wine Anti-Dumping Questionnaire Response
AUS-56	Boheng Beijing Fengshou Wine, "Domestic Producer Response," 16 November 2020 (English translation)	Beijing Fengshou Wine Anti-Dumping Questionnaire Response
AUS-57	Ningxia Hengsheng Xixiaking Wine Co, Anti-Dumping Case of Relevant Wines – Questionnaire for Domestic Producers, Nil date (English Translation)	Ningxia Anti-Dumping Questionnaire Response
AUS-58	Gansu Mogao Industrial Development, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response
AUS-59	Gansu Zixuan Wine, "Domestic Producer Questionnaire Response," 16 November 2020 (English translation)	Gansu Zixuan Wine Anti-Dumping Questionnaire Response
AUS-60	Kweichow Moutai Distillery Group, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Kweichow Moutai Distillery Anti-Dumping Questionnaire Response

AUS-61	Qingdao Huadong Winery, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Qingdao Huadong Winery Anti-Dumping Questionnaire Response
AUS-62	Shangri-La Wine, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Shangri-La Wine Anti-Dumping Questionnaire Response
AUS-63	Shanxi Rongzi Winery, "Domestic Producer Questionnaire Response", 16 November 2020 (English translation)	Shanxi Rongzi Winery Anti-Dumping Questionnaire Response
AUS-64	CADA, "Application of the Wine Industry of the Peoples Republic of China for Anti-Dumping Investigation", 6 July 2020 (English Translation)	CADA Application for Anti-Dumping Investigation
AUS-65 (BCI)	[redacted]	[redacted]
AUS-66	CADA, "Application of the Wine Industry of the Peoples Republic of China for Anti-Dumping Investigation, Annexures 11-12 (Part 2)", 6 July 2020 (English Translation)	CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2)
AUS-67	CADA, "Application of the Wine Industry of the Peoples Republic of China for Anti-Dumping Investigation, Annexes 13-14", 6 July 2020 (English Translation)	CADA Application for Anti-Dumping Investigation, Annexes 13-14
AUS-68	Longcheng Wine, "Domestic Importer Questionnaire Response", 16 November 2020 (English translation)	Longcheng Wine Anti-Dumping Questionnaire Response
AUS-69	AGW, "Re: Dumping investigation into exports of certain Australian wines to China – Preliminary Determination – Submission", 7 December 2020 (English Translation) (pages renumbered)	AGW Comments on Preliminary Determination
AUS-70	CADA, "Applicant Comments on Stakeholder's Comments to Preliminary Ruling", 3 March 2021 (English Translation)	CADA Comments on Stakeholder's Comments on Preliminary Ruling
AUS-71	AGW, "Letter to MOFCOM Re: Dumping Investigation into exports of certain Australian wines to China – Submission", 7 September 2020 (pages renumbered)	AGW Submission on Initiation of the Investigation
AUS-72	Casella Wines, "Exporter Questionnaire Response", 13 November 2020 (public version) (English Translation)	Casella Wines Anti-Dumping Questionnaire Response
AUS-73	Treasury Wines, "Public Exporter Questionnaire Response" 13 November 2020 (public version) (English Translation)	Treasury Wines Anti-Dumping Questionnaire Response

AUS-74	Treasury Wines, "Sampling Questionnaire Response", 25 September 2020 (public version) (English Translation)	Treasury Wines Sampling Questionnaire Response
AUS-75	Casella Wines, "Sampling Questionnaire Response", 25 September 2020 (public version) (English Translation)	Casella Wines Sampling Questionnaire Response
AUS-76 (BCI)	[redacted]	[redacted]
AUS-77	Reserve Bank of Australia, "2019 Average Exchange Rates", 2019	Reserve Bank of Australia 2019 Average Exchange Rates
AUS-78	Swan Vintage, "Exporter Questionnaire Response, Annex 1 (Part 1 of 2)" (English translation)	Swan Vintage Anti-Dumping Questionnaire Response, Annex 1 (Part 1 of 2)
AUS-79	Treasury Wines, "Comments after Stakeholder Meeting", 9 October 2020 (English Translation)	Treasury Wines Comments after Stakeholder Meeting
AUS-80	Treasury Wines, "Minutes of Stakeholder Meeting with MOFCOM", 12 October 2020 (public version) (English Translation)	Treasury Wines Minutes of Stakeholder Meeting
AUS-81 (BCI)	[redacted]	[redacted]
AUS-82 (BCI)	[redacted]	[redacted]
AUS-83	International Chamber of Commerce, "Incoterms 2010", 2010	International Chamber of Commerce Incoterms 2010
AUS-84 (BCI)	[redacted]	[redacted]
AUS-85 (BCI)	[redacted]	[redacted]
AUS-86	Australian Government, "Anti-Dumping Questionnaire Response, Section 7", 16 November 2020	Australian Government Anti-Dumping Questionnaire Response, Section 7
AUS-87	Australian Government, "Initiation of Anti-Dumping Investigation into Imports of Wine from Australian – Submission from Australia" 7 September 2020 (pages renumbered)	Australian Government Submission on Initiation

AUS-88	E. Vermulst, The WTO Anti-Dumping Agreement: A Commentary (Oxford University Press, 2005)(Excerpt)	Vermulst, E, The WTO Anti-Dumping Agreement (Excerpt)
AUS-89	MOFCOM, "Announcement No. 34 of 2020 on initiating anti-dumping investigation into relevant imported wines originating in Australia", 18 August 2020 (English translation) (pages renumbered)	Anti-Dumping Initiation of Investigation Announcement
AUS-90	CADA, "Annexes to the Application of the Wine Industry of the Peoples Republic of China for Anti-Dumping Investigation", 6 July 2020 (English translation)	CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1)
AUS-91	Yantai Changyu Pioneer Wine Co, Anti-Dumping and Countervailing Duty Cases against Relevant Wines – Supporting Documents for the Response to the Questionnaire, 9 February 2021 (English translation)	Changyu Wines Anti-Dumping Questionnaire Response Supporting Documents
AUS-92	MOFCOM, "Notice of Sampling in Anti-Dumping Case of Relevant Wines, 28 September 2020 (English translation)	Anti-Dumping Sampling Notice
AUS-93	Pernod Ricard, Comments on the Sample Survey Results Regarding the Wine Anti-Dumping Case, 9 October 2020 (English translation)	Pernod Ricard Comments on Sampling
AUS-94	Treasury Wines, "Application for Postponement of Submission of Questionnaire Responses of Foreign Exporters or Producers in Relevant Wine Anti-Dumping Case" 7 July 2020 (English translation) (pages renumbered)	Treasury Wines Anti-Dumping Questionnaire Extension Request
AUS-95	Casella Wines, Application for Postponement of Submission of Questionnaire Responses of Foreign Exporters or Producers in Relevant Wine Anti-Dumping Case, 9 July 2020 (English translation) (pages renumbered)	Casella Wines Anti-Dumping Questionnaire Extension Request
AUS-96	Australian Government, "Submission on Disclosure of Basic Facts Relied on by Final Determination in the Anti-Dumping Investigation into imports of Wines from Australia", 23 March 2021 (English translation) (pages renumbered)	Australian Government Comments on Final Disclosure
AUS-97	AGW, "Re: Dumping and subsidy investigations into exports of certain Australian wines to China – Submission on Disclosure of Basic Facts", 22 March 2021	AGW Comments on Final Disclosure

AUS-98	Casella Wines, Comments on the Preliminary Ruling in the Wine Anti-Dumping Case, 4 December 2020 (public version) (English Translation)	Casella Wines Comments on the Preliminary Determination
AUS-99	Treasury Wines, "Comments on the Disclosure of Essential Facts" 22 March 2021	Treasury Wines Comments on the Final Disclosure
AUS-100	MOFCOM, "Disclosure of Basic Facts on which The Final Determination of Antidumping Case against Australian Wines is Based" (English translation), 12 March 2021	Anti-Dumping Final Disclosure Notice
AUS-101	MOFCOM, "Additional Disclosure of Basic Facts Relied on by Final Ruling of Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia", 19 March 2021, (English translation)	Anti-Dumping Additional Final Disclosure
AUS-102	Yantai Changyu Pioneer Wine Co, Anti-Dumping and Countervailing Duty Cases against Relevant Wines – Supporting Documents for the Response to the Questionnaire, 9 February 2021 (English translation)	COFCO Wines Anti-Dumping Questionnaire Response Supporting Documents
AUS-103	COFCO W&W, "Domestic Importer Questionnaire Response", 16 November 2020 (English translation)	COFCO W&W International Anti-Dumping Questionnaire Response
AUS-104 (BCI)	[redacted]	[redacted]
AUS-105 (BCI)	[redacted]	
AUS-106 (BCI)	[redacted]	
AUS-107 (BCI)	[redacted]	
AUS-108 (BCI)	[redacted]	

	[redacted]	[redacted]
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AUS-110 (BCI)	[redacted]	[redacted]
AUS-111 (BCI)	[redacted]	[redacted]

I. INTRODUCTION

A. INTRODUCTION

1. This dispute concerns anti-dumping duties applied by China to bottled wines from Australia.[1] Bottled wines (referred to in this submission simply as "wines") are traded around the globe, with Australia being a recognised producer and exporter of high-quality wines. Australia's wine industry is well-developed, efficient, and profitable. The export prices for Australian wines are largely determined by international supply and demand conditions, in particular competition with producers of similar high-quality wines.

2. At the core of this dispute is China's decision to impose anti-dumping duties on imported Australian wine, ranging from 116.2% to 218.4%. This was an absurd decision that was reached on the basis of findings that lacked any logical relationship to the facts on the record, following a deeply flawed investigation that did not comply with China's obligations under the Anti-Dumping Agreement or the GATT 1994.

1. Australian bottled wine markets and trade

3. Wines are highly differentiated consumer products. They vary by, *inter alia*, grape type and blends, viticulture (cultivation or winegrowing), the terroir, geography and the climate of the region the grapes were grown in, year of harvest and production, vinification (winemaking) and consumer perceptions such as taste and status symbolism, marketing and brand reputation. Price is closely linked to these characteristics.

4. Price is often used by consumers as an indicator of the quality of the product, with prices between low and high-quality wines varying greatly because of the substantial value placed on premium wines by consumers. Importantly, and as Australia will demonstrate, there is little or no competitive relationship between the high-price and low-price segments of the market.

5. In the Chinese market, the quality of Australian wines and the focus of Australian exporters on the higher end of the market is reflected in the average prices of those wines.

[1] In this Submission, Australia refers to "wines" as "wines in containers holding 2 litres or less originating in Australia" as defined by MOFCOM in Anti-Dumping Final Determination Announcement (Exhibit AUS-1) and Anti-Dumping Final Determination (Exhibit AUS-2).

During the injury investigation period (1 January 2015 to 31 December 2019), the average price exceeded both the average price of Chinese wines and the average price of all other imported wines.

6. The Chinese wine industry is still developing, and its wines tend to be sold at the lower end of the market. China does not produce meaningful quantities of high-quality wines that compete with Australian wines and high quality-wines from other countries. Reflecting this reality, during the injury investigation period, the majority of wines sold in China were imported. Based on MOFCOM's own estimate, sales of Chinese domestically produced wines represented between 24% to 32% of annual apparent consumption when measured by volume. At all times during that period, Australian wines accounted for a relatively small amount of the total volume of imported wine, and the total volume of Australian wine was significantly less than the total volume of sales by Chinese domestic producers.

7. The market for Chinese imports of Australian wines went through a period of significant change during the injury investigation period. For example, one factor was the entry into force of the China-Australia Free Trade Agreement on 20 December 2015 (ChAFTA). ChAFTA provided for the progressive elimination of Chinese tariffs on Australian wine beginning at its entry into force, until their complete elimination on 1 January 2019. This led to a significant change in the competitiveness of Australian wine within the Chinese market vis-à-vis other comparable wines. China's tariffs on Australian wines fell from 14% in December 2015 to 0% in January 2019. This coincided with an increase in the volume of Australian wines imported into China.

2. MOFCOM's dumping determination

8. In section II, relating to MOFCOM's determination of dumping, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 2.1, 2.2, 2.2.1, 2.2.1.1, 2.4, 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement in the following respects:

- *First,* MOFCOM failed to rely on the domestic sales reported by the sampled companies relevant to the calculation of each company's normal value. MOFCOM did not provide adequate justification for its rejection of this data, including, *inter alia*, by failing to consider whether the rejected sales

occurred in the ordinary course of trade pursuant to Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

- *Second*, MOFCOM had no proper basis to use facts available. It had the "necessary information" on the record to determine normal value for the sampled companies in accordance with Article 2 of the Anti-Dumping Agreement, but rejected it without adequate cause. Further, MOFCOM: failed to take into account information which was verifiable, appropriately submitted, and timely; failed to provide reasons as to why submitted information was rejected; failed to inform the sampled Australian companies forthwith that their information was not accepted; failed to provide these interested parties an opportunity for further explanation; and ultimately determined dumping margins that had no logical relationship with the facts on the record.
- *Third*, even if MOFCOM had f been entitled to resort to facts available, MOFCOM failed to select the "best information available" as a reasonable replacement for the allegedly deficient information, and failed to exercise special circumspection in its selection of the facts available.
- *Fourth*, both as a result of MOFCOM's improper use and selection of facts available and errors in its calculation of normal value, China failed to determine normal value in accordance with Article 2 of the Anti-Dumping Agreement. MOFCOM: failed to base its calculation of normal value on all relevant domestic sales reported by the sampled companies; misapplied the below-cost test in Article 2.2; failed to apply appropriate adjustments to account for level of trade and product mix (i.e. physical characteristics, quality, consumer preferences, price) differences; improperly had recourse to constructed normal value; and then misapplied the constructed normal value methodology.
- *Fifth*, MOFCOM determined export prices in a manner that ignored level of trade and product mix differences, while not alone violating the Anti-Dumping Agreement, it required MOFCOM to make appropriate

adjustments to ensure a fair comparison could be conducted with normal value.

- *Sixth*, MOFCOM failed to make a fair comparison between the normal value and the export price, including because it failed to make due allowance for all factors affecting price comparability and failed to indicate to interested parties the information necessary to ensure a fair comparison.

3. MOFCOM's determination of the domestic industry

9. In section III, in relation to MOFCOM's determination of the domestic industry, Australia will demonstrate that China acted inconsistently with its WTO obligations under Article 4.1 of the Anti-Dumping Agreement the following respects:

- MOFCOM failed to establish that the "domestic industry" it defined covered "a major proportion of the total domestic production" of the like product. This failure vitiated MOFCOM's subsequent injury and causation analyses.

4. MOFCOM's determinations of causation and injury

10. In section IV, in relation to MOFCOM's determination that the allegedly dumped products caused injury to the Chinese domestic industry, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement the following respects:

- *First*, in relation to MOFCOM's findings that the allegedly dumped imports of Australian bottled wine caused significant price suppression in China's domestic market for like products, MOFCOM: (i) did not conduct an objective examination based on positive evidence because it failed to adequately disclose its methodology for calculating the import price of Australian products, failed to conduct a counterfactual analysis in the context of making a price suppression finding, failed to consider evidence relating to price undercutting or depression; (ii) failed to ensure price comparability between Australian imports and domestic like products because it failed to account for differences in product mix, level of trade and conditions of sale, between subject imports and domestic like products; and

(iii) failed to adequately examine whether subject imports had explanatory force for the alleged suppression of the prices of domestic like products.

- *Second*, MOFCOM failed to evaluate all the economic factors bearing on the state of the Chinese bottled wine industry. MOFCOM: conducted its evaluation as no more than a mechanical exercise that did not properly examine the alleged explanatory force that Australian imports had on domestic industry; failed to examine "factors affecting domestic prices"; and made errors in its evaluation of that data.

- *Third*, MOFCOM's causation analysis was vitiated by the errors outlined above. Further, MOFCOM failed to conduct a proper analysis to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between subject imports of Australian bottled wine and injury to the Chinese bottled wine industry and failed to conduct non-attribution analyses in relation to other "known" factors.

5. MOFCOM's imposition of anti-dumping duties

11. In section V, in relation to MOFCOM's imposition of duties, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, and Articles VI:2 of the GATT 1994 in the following respects:

- China improperly imposed anti-dumping duties where all requirements for their imposition had not been fulfilled; did not impose anti-dumping duties in appropriate amounts and imposed anti-dumping duties in excess of the margin of dumping that could have been established under Article 2 of the Anti-Dumping Agreement (if any).

6. MOFCOM's initiation of the investigation

12. In section VI, in relation to MOFCOM's initiation of the investigation, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement in the following respects:

- *First*, MOFCOM improperly initiated the investigation following receipt of the application by CADA which failed to provide a list of known producers

and did not properly "identify the industry on behalf of which the applications were made". MOFCOM also failed to examine the degree of support, or opposition to the application.

- *Second*, MOFCOM improperly initiated the investigation on the basis of information provided by CADA that was not of the "quantity" and "quality" to meet the threshold of "sufficient evidence to justify the initiation of an investigation".

7. MOFCOM's conduct of the investigation

13. In section VII, in relation to MOFCOM's conduct of the investigation, Australia will demonstrate that China acted inconsistently with its WTO obligations under Articles 6.1, 6.2, 6.4, 6.5, 6.6, 6.9, 6.10, 12.1 and 12.2 of the Anti-Dumping Agreement, in the following respects:

- MOFCOM failed to observe the framework of procedural and due process obligations set out in the Anti-Dumping Agreement. In particular, MOFCOM: failed to grant extensions where cause was shown and it was practicable to do so; failed to give interested parties ample opportunities to present relevant evidence; failed to disclose information it collected and relied upon; failed to undertake an objective assessment of claims of confidentiality before upholding them; failed to satisfy itself as to the accuracy of extensive evidence submitted by interested parties; based its findings on an investigation of a sample of three companies that was neither statistically valid nor the largest percentage of the volume of exports from Australia that could reasonably be investigated; failed to respond to submissions by interested parties; and failed to make adequate disclosures of the essential facts or provide adequate reasons for its determinations with the consequence that interested parties were unable to discern why MOFCOM acted in the way it did.

B. PROCEDURAL OVERVIEW

14. On 22 June 2021, Australia requested consultations with China pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994, Articles 17.2 and 17.3 of the Anti-Dumping

Agreement, and Article 30 of the SCM Agreement, with respect to China's anti-dumping and countervailing duty measures on bottled wine in containers of 2 litres or less imported from Australia. Pursuant to this request, Australia and China held consultations on 9 August 2021. Unfortunately, those consultations failed to resolve the dispute.

15. On 16 September 2021, Australia requested the establishment of a panel pursuant to Articles 4.7 and 6 DSU, Article 17.4 of the Anti-Dumping Agreement and Article XXIII of the GATT 1994. At its meeting on 27 September 2021, the DSB deferred the establishment of the Panel.

16. Australia renewed its request for the establishment of a panel at the 26 October 2021 meeting of the DSB. At that meeting, a panel was established with the following terms of reference:

17. To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Australia in document WT/DS602/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

C. STANDARD OF REVIEW

18. Article 11 of the DSU sets out the generally applicable standard for a Panel's assessment of a matter before it. Appendix 2 of the DSU lists Articles 17.5 and 17.6 of the Anti-Dumping Agreement as special or additional rules and procedures.[2]

19. The standard established under Article 11 imposes an obligation on panels to make an "objective assessment of the matter", which encompasses both the panel's factual and legal assessments. A panel's role is not to conduct a *de novo* review or substitute its conclusions for that of the investigating authority. However, as the Appellate Body in *US - Lamb* emphasised,

> [T]his does *not* mean that panels must simply *accept* the conclusions of the competent authorities. … Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the

[2] Appendix 2, DSU. They are applied pursuant to Article 1(2) of the DSU.

> facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[3]

20. The Panel in the current matter is required to examine whether MOFCOM's conclusions are "reasoned and adequate" with regard to the evidence in its "totality".[4] The Appellate Body has described the requirements of this examination as "critical and searching", and noted that while it will inevitably require a case-by-case assessment:

> The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence.[5]

21. The Appellate Body has recognised that the nature of anti-dumping investigations is that investigating authorities will gather, and then " inevitably be called upon to reconcile … divergent information and data". However, as the Appellate Body went on to say:

> [T]he evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report. … In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation".[6]

22. Turning to the special procedures under Articles 17.5 and 17.6 of the Anti-Dumping Agreement, Article 17.5(ii) provides that the panel is to examine the matter based upon the facts that were made available to the investigating authority of the importing Member when it made its determination. Article 17.6 of the Anti-Dumping Agreement provides the standard of review that panels must apply in respect of those facts.

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[3] Appellate Body Report, *US – Lamb*, para. 106. See also *US – Cotton Yarn, para. 69 n. 42; US – Softwood Lumber VI (Article 21.5 – Canada), paras. 52 and 99;* and *US – Countervailing Duty Investigations on DRAMS*, para. 187.
[4] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 52 and 93-94. See also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.
[5] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[6] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97 (citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

23. In sum, the fundamental question before the panel, is whether an objective and impartial investigating authority, in light of the evidence that was before it and the explanations provided, could have reached the conclusions that MOFCOM did in this matter. As Australia will demonstrate in the course of this submission, the answer to this question must be "no, it could not".

II. AUSTRALIA'S CLAIMS CONCERNING THE DUMPING DETERMINATION

24. This section of the submissions addresses MOFCOM's determination of dumping. Australia will first provide an overview of MOFCOM's determination of dumping (Part A), and then summarise the key legal principles (Part B). It then addresses two important points of context relevant to all three sampled companies: the extensive cooperation the sampled companies provided (Part C), and the influence that product mix and level of trade characteristics had on domestic and export sales of Australian bottled wine (Part D).

25. Australia will then make submissions with respect to MOFCOM's specific findings on each of the sampled companies (Parts E, F and G), before turning to the findings made about the non-sampled companies (Parts H and I). The final section addresses MOFCOM's failure to make a fair comparison between normal value and export price (Part J).

A. CHINA ACTED INCONSISTENTLY WITH ARTICLES 2 AND 6.8 AND PARAGRAPHS 1, 3, 5, 6, AND 7 OF ANNEX II OF THE ANTI-DUMPING AGREEMENT

26. MOFCOM's determination of dumping is based upon findings it made in respect of all three sampled companies: Treasury Wines, Casella Wines and Swan Vintage. For each sampled company, MOFCOM impermissibly rejected key parts of the evidence they had submitted, deemed the companies non-cooperative and resorted to the use of "facts available" under Article 6.8 for the determination of normal values.

27. In the case of Treasury Wines, the company's high margin of dumping largely reflects MOFCOM's use of the costs of a single unrepresentative premium Product Control Number (PCN)[7] to assess the profitability of the entirety of the company's domestic sales and for constructing normal values, without making any adjustments to ensure comparability. In the

[7] For completeness, Australia understands MOFCOM used "Product Control Number" interchangeably with "Product Control Code" and "Product Model Number".

case of Casella Wines and Swan Vintage, the high margins of dumping largely reflect the impermissible rejection of the companies' actual data and the use of the heavily filtered domestic sales of Treasury Wines as the "best information available".

28. MOFCOM derived a margin of dumping for "other named Australian exporters"[8] from a weighted average of the margins determined from the sampled companies. It also imposed a margin on "all other"[9] companies derived in an unexplained way from data received from the sampled companies. In this way, errors made in respect of the sampled companies were carried forward to other named Australian exporters and all other companies.

1. Anti-Dumping Questionnaire

29. MOFCOM's primary mechanism for seeking data from the sampled companies was the Anti-Dumping Questionnaire issued on 10 October 2020 to the three sampled companies. It comprised approximately 308 questions and sub-questions,[10] seeking an enormous volume of granular technical data. MOFCOM provided only 37 days for the companies to respond – the minimum period allowed under the Anti-Dumping Agreement.[11] MOFCOM refused all requests for extensions of time with no consideration or explanation that an extension was not practicable, even though the Anti-Dumping Final Disclosure on 12 March 2022 was almost four months after the due date for the Anti-Dumping Questionnaire responses. The denial of such an extension and MOFCOM's failure to enter into a dialogue with the companies denied interested parties the full opportunity for the defence of their interests.

2. Anti-Dumping Preliminary Determination

30. The Anti-Dumping Preliminary Determination was issued on 27 November 2020, only 11 days after the Anti-Dumping Questionnaire responses were due. This manifestly did not provide MOFCOM with sufficient time to take into account the extensive information in the Anti-Dumping Questionnaire responses in making the preliminary determination, *prima facie* undermining its reliability. The Final Determination largely adopted the approaches taken in the Preliminary Determination, carrying forward its deficiencies.

[8] MOFCOM titled this category "Other Cooperative in the Investigation" in Annex 1.II of the Anti-Dumping Final Determination (Exhibit AUS-2).
[9] MOFCOM titled this category "All Others" in Annex 1.III of the Anti-Dumping Final Determination (Exhibit AUS-2).
[10] See Anti-Dumping Questionnaire (Exhibit AUS-3).
[11] Anti-Dumping Agreement, Article 6.1.1 and footnote 15.

3. Comments on the Anti-Dumping Preliminary Determination

31. MOFCOM provided interested parties 10 days to submit written comments on the Preliminary Determination. Detailed comments were submitted by the sampled companies, the Government of Australia and other interested parties. Among other things, the sampled companies responded to the alleged deficiencies in their Anti-Dumping Questionnaire responses including by submitting additional information in response to the allegations

4. Supplementary Questionnaire

32. A Supplementary Questionnaire was issued to sampled companies on 1 February 2021. MOFCOM allowed the sampled companies only four days to respond, with a deadline of 5 February 2021. While Swan Vintage was granted a four-day extension to 9 February 2021, the imposition of such short time periods to submit responses once again denied interested parties the full opportunity for the defence of their interests.

33. Each sampled company provided extensive and detailed responses to the Anti-Dumping Questionnaire and Supplementary Questionnaire. This included a significant volume of granular transaction level data that included all necessary information to enable MOFCOM to ascertain the normal value of the product under investigation.

5. Anti-Dumping Final Disclosure

34. An incomplete Anti-Dumping Final Disclosure was issued on 12 March 2021. Only upon request by the Australian Government did MOFCOM release further elements of the Final Disclosure on 17 March 2022. MOFCOM's disclosure of the methodology it had employed was entirely inadequate, leaving the parties to speculate on the "facts available" MOFCOM had in fact chosen to rely upon in lieu of the actual data submitted. Even to the extent MOFCOM did set out its approach in the Final Disclosure, it allowed the interested parties only 10 business days to respond. The provision of further elements in the Final Disclosure on 17 March 2022 further reduced this period, which was insufficient for the interested parties to defend their interests given the need to reverse engineer much of MOFCOM's reasoning in order to try to understand the basis for the decision.[12]

[12] See below, section VII.

6. Anti-Dumping Final Determination

35. The Final Determination was issued on 26 March 2021, only four days after the deadline for the interested parties to respond to the Final Disclosure. As in the case of the Preliminary Determination, this manifestly did not provide MOFCOM with sufficient time to take into account the comments of the interested parties on the Final Disclosure. Combined with the adoption of the unreliable conclusions from the Preliminary Determination, this failure further undermined the reliability of the Final Determination.

36. For each of the sampled companies, MOFCOM purported to find deficiencies in the responses provided, apparently of such significance that it concluded it was necessary to disregard much of the extensive primary evidence submitted, and instead rely upon the purported "best information available".

37. No recognition was given, nor allowance made, by MOFCOM for the fact that it had sought, and received, an extraordinary amount of relevant information from the sampled companies within a short period of time. When MOFCOM identified purported deficiencies in the information received, the sampled companies responded with cogent explanations as to where the requested information had in fact been provided, why the identified information was not provided, why it was not "necessary information" and how it could be replaced by other information on the record. Notwithstanding the passage of 119 days since the Preliminary Determination during which MOFCOM could have considered the information and explanations of the interested parties, MOFCOM ignored these responses.

38. Throughout the investigation, the foregoing demonstrates that MOFCOM did not conduct itself in the unbiased and objective manner expected of investigating authorities.[13]

7. MOFCOM's approach to determining dumping

39. As far as Australia can discern from MOFCOM's Final Disclosure and Final Determination, the high margins of dumping primarily reflect improperly inflated normal values and a failure to make a fair comparison between those normal values and export prices.

[13] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.

40. For Treasury Wines, MOFCOM's inflated normal value determination was grounded principally on the following errors:

- (i) MOFCOM rejected related party sales without giving due consideration to whether these transactions occurred in the ordinary course of trade;
- (ii) MOFCOM incorrectly used [[redacted];[15]
- (iii) MOFCOM failed to consider whether the [[redacted]] that were rejected due to occurring "below cost" allowed for the recovery of costs within a reasonable period of time; and
- (iv) MOFCOM incorrectly calculated constructed normal value by selecting [[redacted]].

41. For Casella Wines, MOFCOM's inflated normal value determination was principally grounded in the following errors:

- (i) MOFCOM incorrectly rejected Casella Wines' domestic sales prices; and
- (ii) MOFCOM erroneously replaced Casella Wines' reported domestic sales data with that of "other respondents". While MOFCOM did not identify these "other respondents", given Swan Vintage's domestic sales data was rejected, this could only mean Treasury Wines' data.

42. For Swan Vintage, MOFCOM's inflated normal value determination was incorrectly grounded in its rejections of Swan Vintage's domestic prices, production costs and expenses

[14] [redacted] (AUS-4 (BCI)),]]
[15] [redacted] (AUS-4 (BCI)), [redacted]]]

and replacement of this information with "the weighted average price of domestic sales of the product under investigation given by other respondents". Given that Casella Wines' domestic sales data was rejected, this could only mean Treasury Wines' data.

43. These errors led to inflated margins of dumping which were further inflated by MOFCOM not making a fair comparison between these normal values and export prices at the same level of trade and by failing to make due allowance for differences affecting comparability, including differences related to product mix and levels of trade.

44. MOFCOM then relied upon the findings it had made in respect of each of the sampled companies to:

- impose a dumping margin on other named Australian exporters based on a "weighted average" of the margin calculated for each of the sampled companies;[16]
- impose a dumping margin on all other Australian producers based on facts available, which, as far as Australia can discern, involved making unspecified use of the data submitted by the sampled companies to determine a dumping margin significantly higher than that imposed on any of the individual producers.

45. Given that each successive dumping determination is based in part on a preceding determination, if the Panel finds one determination by MOFCOM in this chain to be inconsistent with China's obligations, the other successive determinations will be, *ipso facto*, inconsistent.

B. LEGAL FRAMEWORK

46. This section sets out the applicable law. This law is subsequently applied to MOFCOM's determinations for each of the three sampled wine companies, for "other Australian producers cooperating in the investigation" and for "all others".

[16] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 99-100.

1. Article 6.8 and Annex II

47. The first sentence of Article 6.8 identifies the circumstances where an investigating authority may overcome a lack of information in the responses of interested parties by using facts which are otherwise available to the investigating authority.[17] It provides that:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

48. If none of these circumstances are satisfied, an investigating authority cannot use facts available, and must use the information submitted by the interested parties.[18]

49. The second sentence of Article 6.8 provides that the provisions of Annex II are mandatory in the application of the Article.[19] Annex II sets out parameters which address both when facts available can be used, and what information can be used as facts available.[20] It specifies that information provided by interested parties, even if not ideal in all respects, should, to the extent possible, be used by investigating authorities.[21] This is because the Anti-Dumping Agreement expresses a "clear preference" for investigating authorities to use "first-hand information".[22] Provisions regulating the selection of facts available when "first-hand information" is not available ensure the "reliability" of information used by the investigating authority, and that information from "unreliable sources" is avoided.[23]

50. Even in circumstances where the criteria set out in Article 6.8 to resort to facts available are met, an investigating authority does not have an unlimited discretion when selecting facts to replace missing information.[24] The Anti-Dumping Agreement permits recourse to facts available solely for the purpose of replacing necessary information that is

[17] See Appellate Body Report, *US – Hot Rolled Steel*, para. 77.
[18] Appellate Body Report, *US – Hot Rolled Steel*, para. 77.
[19] Panel Report, *US – Steel Plate*, para. 7.56.
[20] Panel Report, *Egypt – Steel Rebar*, para. 7.152.
[21] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.
[22] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.
[23] Panel Report, *Egypt – Steel Rebar*, para. 7.154.
[24] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

missing from the record.[25] The Appellate Body explained that the selection of facts is a process that an investigating authority must undertake:[26]

> Ascertaining which "facts available" reasonably replace the missing "necessary information" calls for a process of reasoning and evaluation of all substantiated facts on the record. In such a process, no substantiated facts on the record can be a priori excluded from consideration. […] Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination.

51. The use of facts available must be a genuine attempt by the investigating authority to identify appropriate and reliable alternative facts to make its determination. The selection of facts available by an investigating authority cannot be used by investigating authorities as a form of punishment.[27] Investigating authorities must base their determinations on facts available that "reasonably replace" the missing "necessary" information, in that "'there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination … is based".[28]

(a) "Necessary Information"

52. There is no explicit guidance in the text of the Anti-Dumping Agreement as to what constitutes "necessary information". The ordinary meaning of "information" is "[k]nowledge communicated concerning some particular fact, subject, or event".[29] "Necessary" is defined as "[i]ndispensable, vital, essential; requisite".[30] On this basis, Article 6.8 pertains only to facts which are indispensable, vital or essential.

53. This interpretation is consistent with the approach of the Panel in *US – Steel Plate*, where it explained that it is only when "essential knowledge or facts, which cannot be done without" are missing that an investigating authority may make determinations on the basis of facts available.[31] Similarly, other panels have considered that "necessary information" is that which is "required to complete a determination".[32]

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[25] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28.
[26] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172. (footnotes omitted).
[27] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea),* para. 7.28.
[28] Ibid. citing Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.
[29] Oxford English Dictionary online, definition of "information", https://www.oed.com/view/Entry/95568 (accessed 28 April 2022).
[30] Oxford English Dictionary online, definition of "necessary", https://www.oed.com/view/Entry/125629 (accessed 28 April 2022).
[31] Panel Report, *US – Steel Plate*, para. 7.53.
[32] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28; citing Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

54. Necessary information has been distinguished from information that is merely "required" or "requested".[33] The characterisation of information as "indispensable" or "essential" is clearly intended to hold it to a high standard. That standard plainly does not encompass all information that may be requested by an investigating authority. While investigating authorities enjoy a level of discretion as to what constitutes "necessary information", the fact that information has been requested from an interested party does not, without more, render it necessary within the meaning of Article 6.8.[34] The investigating authority must assess whether certain information constitutes "necessary information" on a case-by-case basis "in light of the specific circumstances of each investigation, not in the abstract".[35] In making that assessment, the investigating authority may take into account whether the absence of some requested information casts doubt over the reliability or usability of the provided information.

55. The Appellate Body has explained that an investigating authority is not "unconstrained" in its identification of "necessary information".[36] An investigating authority is required to make a "reasonable assessment based on evidence and cannot simply infer, without further clarification, that any missing information is "necessary"".[37] An assessment of what constitutes "necessary information" must be conducted with reference to the information that is necessary to determine dumping pursuant to Article 2 of the Anti-Dumping Agreement. Specifically, in the current context, this includes information that is necessary to ascertain the normal value under Articles 2.1 and 2.2.

(b) Annex II obligations

i. Paragraph 1

56. Paragraph 1 of Annex II provides that:

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied

[33] Panel Report, *Egypt – Steel Rebar*, para. 7.151.
[34] The Panel in *Egypt – Steel Rebar* drew a distinction between "necessary information" and information that is "required" or "requested". (Panel Report, *Egypt – Steel Rebar,* para. 7.151).
[35] Panel Report, *Korea – Certain Paper*, para. 7.43.
[36] Appellate Body Report, *US – Supercalendered Paper*, para. 5.81. The Appellate Body made this observation in light of the comparable provision of the SCM Agreement, Article 12.7.
[37] Appellate Body Report, *US – Supercalendered Paper*, para. 5.81. (Footnotes omitted.)

> within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

57. Paragraph 1 sets out two obligations on investigating authorities before determinations may be made on the basis of facts available. First, an investigating authority must inform any interested party of the information that must be supplied and the manner in which it should be structured. Second, an investigating authority must ensure a party is aware of the consequences of not submitting the requested information, in particular, the possibility that "facts available", including those presented in a domestic industry's application, could be applied.[38] There is a connection between the awareness of an interested party, and the ability of an investigating authority to resort to facts available.[39]

58. It is beyond doubt that the obligations contained in paragraph 1 are borne by the investigating authority. The Anti-Dumping Agreement is silent as to how an investigating authority is to fulfil the notice requirements in paragraph 1 of Annex II, and there is no clear established threshold in WTO jurisprudence for making interested parties aware of the consequences of not supplying necessary information.[40] However, this does not detract from the obligations contained in that provision, which have been clarified by WTO jurisprudence. In terms of content, the scope of the information requested in the notice of initiation must correspond to that of the information used in the determination. That is, an interested party cannot be deemed to have failed to provide the necessary information (justifying recourse to the use of "facts available") if it has not been made aware that it is required.[41]

59. In respect of the timing of the notice, paragraph 1 of Annex II requires "[a]s soon as possible after the initiation of the investigation" that the investigating authorities specify in detail the information required from interested parties. In general, the first sentence of paragraph 1 of Annex II has been interpreted to mean that any request for specific information should be communicated to interested parties "as soon as possible" and does not require that

[38] Panel Report, *EC – Salmon (Norway)*, para. 7.453, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.
[39] See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.426.
[40] In *China – GOES*, the Panel stated that posting a notice on the internet or in a public place might not suffice. However, the Panel was not required to resolve this issue in the case as the notice of initiation relied on by China as providing requisite notification did not specify in detail the information required of the interested parties for the purposes of the anti-dumping investigation. Panel Report, *China – GOES*, para. 7.386.
[41] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.54. Cf Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU),* paras. 7.218-7.219.

the only time information may be requested is immediately after initiation provided the request is made as soon as possible".[42]

ii. Paragraphs 3 and 5

60. Paragraph 3 of Annex II provides that:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

61. Paragraph 3 of Annex II sets out certain criteria concerning information which, when satisfied, oblige an investigating authority to take that information into account when determinations are made. Conversely, paragraph 3 also governs when an investigating authority may reject information submitted to it.[43]

62. Paragraph 5 of Annex II is a "complement" to paragraph 3,[44] and provides that:

> Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

63. Therefore, information that satisfies the criteria of paragraph 3 but which "may not be ideal in all respects" nevertheless should be taken into account by an investigating authority provided the interested party has "acted to the best of its ability".

64. According to paragraph 3, information which is "verifiable", "appropriately submitted so that it can be used … without undue difficulties", "supplied in a timely fashion" and where applicable, "supplied in a medium or computer language requested by the authorities" should be taken into account. Australia will briefly consider the ordinary meaning, and jurisprudential interpretation, of each of these criteria.

65. The ordinary meaning of "verifiable", in the context of paragraph 3 of Annex II, is information that "can be verified or proved to be true, authentic, accurate, or real; [is]

[42] Panel Report, *Guatemala – Cement II*, para. 8.177.
[43] Appellate Body Report, *US – Hot Rolled Steel*, para. 80.
[44] Panel Report, *Egypt – Steel Rebar*, para. 7.161.

capable, admitting, or susceptible of verification".[45] Notably, paragraph 3 does not mandate that an investigating authority undertake on the spot verification, but only that the information is susceptible of verification.[46]

66. In *US – Steel Plate*, the Panel concluded that information is "verifiable" when "the accuracy and reliability of the information can be assessed by an objective process of examination" and that this process does not necessarily require an on-the-spot verification.[47] The Panel in *EC –Salmon (Norway)* agreed and considered that whether information is "verifiable" "must be a conclusion reached on the basis of a case-by-case assessment of the particular facts at issue, including not only the nature of the information submitted but also the steps, if any, taken by the investigating authority to assess the accuracy and reliability of the information".[48] The fact that information submitted to an investigating authority contains "minor flaws" cannot be considered unverifiable solely on this basis, "so long as the submitter has acted to the best of its ability".[49]

67. For example, the Panel in *Mexico – Steel Pipes and Tubes* considered whether, based on the evidence, an "unbiased and objective investigating authority could have reached the conclusion that the nature and number of problems encountered at verification were so significant that none of Tubac's data [the only identified exporter]… could be used".[50] Further, in *Egypt – Steel Rebar*, the Panel considered that, pursuant to paragraphs 3 and 5 of Annex II, if read together:[51]

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

[45] Oxford English Dictionary online, definition of "verifiable", https://www.oed.com/view/Entry/222501 (accessed 28 April 2022).
[46] Panel Report, *US – Steel Plate*, para. 7.71 and footnote 67; see also Panel Report, *Guatemala – Cement II*, para. 8.252. The Panel found that the fact that information submitted by the exporter, Cruz Azul, was not actually verified by the investigating authority did not change the Panel's assessment that it was verifiable.
[47] Panel Report, *US – Steel Plate*, para. 7.71 and footnote 67.
[48] Panel Report, *EC – Salmon (Norway),* para. 7.360.
[49] Panel Report, *Egypt – Steel Rebar*, para. 7.161; see also Panel Report, *US – Steel Plate*, para. 7.65.
[50] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.111. Note that ultimately, the Panel was not convinced that Mexico's investigating authority had complied with its substantive obligations under Article 6.8 and Annex II.
[51] Panel Report, *Egypt – Steel Rebar*, 7.161.

68. As for information which is "appropriately submitted", the ordinary meaning of "appropriately", in the context of paragraph 3, is "[i]n a manner properly suited; fittingly".[52] Therefore, in order for information to meet this criteria in paragraph 3, it must be properly suited or fitting for use in the investigation such that it can be used without "undue difficulties". Whether using appropriately submitted information would give rise to "undue difficulties" has been held to be a highly fact specific issue, thus requiring the investigating authority to explain the basis of a conclusion that information that is verifiable and timely submitted cannot be used in the investigation without undue difficulties.[53] The ordinary meaning of "undue" is "[g]oing beyond what is appropriate, warranted, or natural; excessive".[54] It is clear that paragraph 3 is not concerned with just any difficulties, but rather those that are excessive.

69. Next, paragraph 3 is concerned with information submitted in a "timely fashion". The ordinary meaning of "timely" is "[o]ccurring, done, or made at a fitting, suitable, or favourable time".[55] The Appellate Body in *US – Hot-Rolled Steel* interpreted timeliness "as a reference to a 'reasonable period' or a 'reasonable time'".[56] When determining whether information was submitted within a "reasonable period", an investigating authority must take into account the particular circumstances of each case, including factors such as the number of days by which the submission missed the applicable time limit, and the verifiability of the information and the ease by which it can be used by the investigating authority.[57] An investigating authority is not entitled to reject information for the sole reason that it was submitted after a deadline, without considering whether the information was submitted in a "timely fashion".[58]

70. Finally, paragraph 3 of Annex II provides that information which is supplied in a medium or computer language requested by the authorities should be taken into account.

[52] Oxford English Dictionary online, definition of "appropriately", https://www.oed.com/view/Entry/9873 (accessed 28 April 2022); see also Panel Report, *US – Steel Plate*, para. 7.72 where the Panel concluded the meaning of "appropriately" in similar terms as "suitable for, proper and fitting".
[53] Panel Report, *US – Steel Plate*, paras. 7.72 and 7.74. See also Panel Report, *China – Broiler Products (Article 21.5 – US),* paras. 7.342.
[54] Oxford English Dictionary online, definition of "undue", https://www.oed.com/view/Entry/212679 (accessed 28 April 2022); see also Panel Report, *US – Steel Plate*, para. 7.72 where the Panel concluded the meaning of "undue" in similar terms as "going beyond what is warranted or natural, excessive, disproportionate".
[55] Oxford English Dictionary online, definition of "timely", https://www.oed.com/view/Entry/202120 (accessed 28 April 2022).
[56] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 81-83. See also Panel Report, *US – Steel Plate*, para. 7.76.
[57] Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.
[58] See Appellate Body Report, *US – Hot-Rolled Steel*, para. 89 noting the panel deals with relevant factors when an investigating authority is considering whether information is submitted within a reasonable period of time.

The operation of this requirement is straightforward and provides that information submitted in the requested format should be taken into account.

71. To the extent that an investigating authority is dissatisfied with information submitted to it, it must examine the information provided in light of the criteria set out in paragraph 3 of Annex II,[59] and the determination to be made.[60] However, examination in the absence of explanation is not sufficient. An investigating authority must also explain how the information which is being rejected does not meet the criteria in paragraph 3.[61] The Panel in *China – Broiler Products* explained that:

> Because *every element* of information that satisfies the criteria of paragraph 3 must be taken into account, an investigating authority is not entitled to reject all information submitted and apply facts available, when only individual elements of that information fail to satisfy the criteria of paragraph 3. An investigating authority must, at a minimum, explain in what way the information that it is rejecting does not meet the requirements of paragraph 3.[62]

72. Further, there is no "unlimited right" for investigating authorities to reject all information on the basis that some information was not provided by an interested party.[63] Before rejecting information submitted on the basis that other requested information was not provided, an investigating authority must first assess whether the absence of that information casts doubt over the reliability or usability of the information submitted. The investigating authority must then explain how the information not provided was necessary for the verification of, or use (without undue delay) of, the information submitted.

73. Paragraph 5 of Annex II highlights that information that satisfies the requirements of paragraph 3, but which is not perfect, must not be disregarded.[64] However, this is contingent on an interested party acting to the "best of its abilities". The ordinary meaning of "best", in the context of paragraph 5, is "[d]esignating an effort, action, etc., which surpasses all others in commitment or dedication; that involves the most work, or one's highest level of application".[65] Whether an action "involves the most work" or the "highest level of

[59] Panel Report, *US – Steel Plate*, para. 7.58. The Panel explained that this does not mean that an investigating authority must scrutinise each piece of information submitted to establish whether it satisfied the criteria of paragraph 3.
[60] Australia recalls that what constitutes "necessary information" must be considered with reference to the substantive provisions of the Anti-Dumping Agreement to which the determination at issue relates. See above, section II.B(b)(i).
[61] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[62] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343 (emphasis original, footnotes omitted).
[63] Panel Report, *US – Steel Plate*, para. 7.57.
[64] Panel Report, *US – Steel Plate*, para. 7.65.
[65] Oxford English Dictionary online, definition of "best", https://www.oed.com/view/Entry/18180 (accessed 28 April 2022).

application" is necessarily dependent upon the particular action. An action that is burdensome will require greater work than one that is not. Therefore, whether an interested party has acted to the "best of its abilities" is dependent on the circumstances in which the interested party is acting.

74. This interpretation is consistent with the findings of the Appellate Body, when it explained in *US – Hot-Rolled Steel* that investigating authorities are entitled to expect a "very significant degree of effort … from investigated exporters", but they are "not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters".[66] The threshold in paragraph 5, whether an interested party has acted "to the best of its ability", is a measure of the "nature and quality" of the interested party's participation.[67] Whether an interested party has acted to the best of its ability cannot be judged against an absolute standard.

75. Ultimately, investigating authorities must cooperate with interested parties, and "actively make efforts to use information submitted if the interested party has acted to the best of its ability".[68] In this respect, it is clear that there is a preference under the Anti-Dumping Agreement for "first-hand" information. It is only in limited circumstances where an investigating authority may "base its determination on facts, albeit perhaps 'second-best' facts".[69] This interpretation is consistent with the object and purpose of Article 6.8 (which incorporates Annex II) and the Anti-Dumping Agreement as a whole, which seeks to "ensure objective decision-making based on facts".[70]

iii. *Paragraph* 6

76. Paragraph 6 of Annex II provides that:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination.

[66] Appellate Body Report, *US – Hot Rolled Steel*, para. 102 (emphasis original)
[67] Panel Report, *Egypt – Steel Rebar*, para. 7.159.
[68] Panel Report, *US – Steel Plate*, para. 7.65.
[69] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391. See also, Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.
[70] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.391.

77. The scope of the obligations in paragraph 6 are well settled.[71] Paragraph 6 of Annex II is one of many important protections of due process obligations owed to interested parties participating in an investigation.[72] Investigating authorities have an obligation to inform an interested party "forthwith" if information submitted by them is not accepted. The ordinary meaning of "forthwith", in the context of paragraph 6, is "[i]mmediately, at once, without delay or interval".[73] The ordinary meaning of "reason" is "an account or explanation of, or answer to, something".[74] Therefore paragraph 6 requires an investigating authority to give an account or explanation of why information was not accepted immediately after the decision to reject it was made.

78. An investigating authority must then afford interested parties an opportunity to provide further explanations as to why the information should be taken into account.[75] An investigating authority must provide reasons if it rejects the information notwithstanding the explanations. It is not sufficient for an investigating authority to simply provide a "general statement" of the possibility that a determination may be made on the basis of facts available.[76] In order to satisfy paragraph 6, an investigating authority must provide an "affirmative and direct notification" to the interested party concerned that submitted information has been rejected, and the reasons for the rejection.[77]

79. The Panel in *Egypt – Steel Rebar* clarified that there is no temporal limitation on the requirements set out in paragraph 6, and they apply to information requests made throughout the course of an investigation.[78] However, that Panel also clarified that the requirements only pertain to "necessary" information in the sense of Article 6.8 and not any information submitted.[79]

[71] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.186.
[72] For example, Article 6 of the Anti-Dumping Agreement safeguards other important due process obligations. In particular, Article 6 mandates particular disclosure obligations. Article 6.5.1 sets out that parties must have access to a summary of confidential information. See Panel Report, *China – GOES*, para. 7.205.
[73] Oxford English Dictionary online, definition of "forthwith", https://www.oed.com/view/Entry/73702 (accessed 28 April 2022). See also, Panel Report, *Korea – Certain Paper*, para. 7.75.
[74] Oxford English Dictionary online, definition of "reason", https://www.oed.com/view/Entry/159068 (accessed 28 April 2022).
See also, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225. In differentiating "facts" and "reasons", the Panel found that a "reason" is a "motive, cause or justification".
[75] Panel Report, *Korea – Certain Paper*, para. 7.85.
[76] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.
[77] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.188.
[78] Panel Report, *Egypt – Steel Rebar*, para. 7.262.
[79] Panel Report, *Egypt – Steel Rebar*, para. 7.262, see footnote 230.

iv. *Paragraph* 7

80. Paragraph 7 of Annex II provides that:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

81. Paragraph 7 of Annex II requires that when an investigating authority bases its findings on "information from a secondary source", it must exercise "special circumspection" and "check the information from other independent sources".

82. "Secondary source" and "independent source" are not defined terms in the Anti-Dumping Agreement. The ordinary meaning of "source", in the context of paragraph 7 of Annex II, is defined as "[a] work, etc., supplying information or evidence (esp. of an original or primary character) as to some fact, event, or series of these. Also, a person supplying information, an informant, a spokesman".[80] As such, "source" includes a work or individual supplying information or evidence.

83. "Secondary", in the context of paragraph 7, is defined as "[b]elonging to the second order in a series related by successive derivation, causation, or dependence; derived from, based on, or dependent on something else which is primary".[81] "Independent", in the context of paragraph 7, is defined as "[n]ot depending upon the authority of another" or "[n]ot depending on something else for its existence, validity, efficiency, operation, or some other attribute".[82]

[80] Oxford English Dictionary online, definition of "source", https://www.oed.com/view/Entry/185182 (accessed 28 April 2022).
[81] Oxford English Dictionary online, definition of "secondary", https://www.oed.com/view/Entry/174507 (accessed 28 April 2022).
[82] Oxford English Dictionary online, definition of "independent", https://www.oed.com/view/Entry/94325 (accessed 28 April 2022).

84. The broader context of Article 6.8 and Annex II makes clear that there is a "clear preference for *first-hand information*" to be used by investigating authorities.[83] It is only when this information is missing that an investigating authority may have recourse to secondary/ other sources of necessary/ missing information and the disciplines in paragraph 7 of Annex II are relevant.[84]

85. An investigating authority must use information from a secondary source with "special circumspection". The ordinary meaning of "circumspection" is "vigilant and cautious observation of circumstances or events; […] circumspect action or conduct; attention to circumstances that may affect an action or decision; caution, care, heedfulness, circumspectness".[85] "Special", in the context of paragraph 7, is defined as "[e]xceptional in quality or degree; unusual; out of the ordinary; […] Additional to the usual or ordinary".[86] As such, "special circumspection" can be defined as caution that is exceptional in quality; additional to the ordinary. It is clear from the ordinary meaning of "special circumspection" that when using information from a secondary source, an investigating authority must act with exceptional caution.[87]

86. Paragraph 7 of Annex II provides that an investigating authority must also "check the information from other independent sources". In this context, the obligation to "check" is triggered only when information from a secondary source is used. The ordinary meaning of "check", in the context of paragraph 7, is "[t]o agree upon comparison".[88] To find "agreement" in the comparison of two data sources is to reconcile them, corroborate, or verify the contents of one source against the other. Paragraph 7 sets out an illustrative list of sources that can be

[83] The Panel in *Mexico – Anti-Dumping Measures on Rice* explained that the Anti-Dumping Agreement "expresses a clear preference for *first-hand information* but does not allow any party to hold the authority hostage by not providing the necessary information, and thus provides that second-best information from secondary sources may be used in certain well-defined circumstances". Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238. (emphasis original)
[84] See e.g. Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172 where it explained that an investigating authority must "use those facts available that reasonably replace the necessary information that an interested party failed to provide with a view to arriving at an accurate determination".
[85] Oxford English Dictionary online, definition of "circumspection", https://www.oed.com/view/Entry/33369 (accessed 28 April 2022).
[86] Oxford English Dictionary online, definition of "special", https://www.oed.com/view/Entry/185972 (accessed 28 April 2022).
[87] This is consistent with the interpretation by the Panel in *Korea – Certain Paper (Article 21.5 - Indonesia)* where it explained that, "[w]e note that paragraph 7 generally requires the investigating authorities to exercise caution in their selection of facts available". Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.26.
[88] Oxford English Dictionary online, definition of "check", https://www.oed.com/view/Entry/31082 (accessed 28 April 2022).

used in this process. The Appellate Body has explained that this process requires investigating authorities to:[89]

> [A]scertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".

87. Ultimately, Paragraph 7 of Annex II requires investigating authorities to undertake a comparative evaluation and assessment of all the available evidence when selecting facts available, which "necessarily involves consideration and comparison of 'all substantiated facts on the record,' and must be sufficiently reflected in the investigation's published reports".[90] In this process, "no substantiated facts on the record can be *a priori* excluded from consideration".[91] There must be a "logical relationship" between the replacement facts and the facts on the record.[92]

88. The final sentence of paragraph 7 of Annex II provides that if an interested party does not cooperate, it could lead to a result which is less favourable than if the party were to cooperate. However, investigating authorities are not entitled to arrive at a less favourable result simply because an interested party failed to furnish information if the interested party otherwise cooperated.[93]

2. Articles 2.1 and 2.2

89. Where MOFCOM improperly resorted to facts available and for those elements of its dumping determinations that did not involve facts available, MOFCOM's determinations are governed by Article 2 of the Anti-Dumping Agreement.

90. Article 2 of the Anti-Dumping Agreement covers the determination of dumping. It imposes multiple obligations over the relevant components that are considered by an investigating authority when determining the existence of dumping and the calculation of the dumping margins.[94]

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[89] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[90] Panel Report, *Canada – Welded Pipe*, para. 7.133, referencing the principles set out in Appellate Body Reports, *US – Carbon Steel (India),* paras. 4.421 and 4.424; and *US – Countervailing Measures (China),* para. 4.179.
[91] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.
[92] See Panel Report, *China – Broiler Products*, para. 7.312.
[93] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.
[94] Panel Report, *Thailand – H-Beams*, para. 7.35.

(a) Article 2.1 Definition of Dumping

91. Article 2.1 is a definitional provision that is central to the interpretation of the other provisions in the Anti-Dumping Agreement relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping.[95] It provides that:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

92. This provision defines dumping in relation to the export price being introduced into the commerce of another country at less than its normal value. It specifies that the normal value of a product is the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". That is, it is defined in terms of the domestic sales transactions in the exporting country.[96] Article 2.2 elaborates upon the meaning and determination of normal value.

93. With respect to the export price, an investigating authority is required to use actual export prices in the determination of dumping under Article 2 of the Anti-Dumping Agreement. This has been confirmed by the Appellate Body, observing that "the "export prices" and "normal value" to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met".[97]

94. Reading the term "export price" in Article 2.1 in its broader context, including the requirement in Article 6.10 to determine individual dumping margins,[98] "export price" means the export price for a particular exporter.

[95] Appellate Body Report, *US –Zeroing (Japan)*, para. 140. Article 2.1 describes the circumstances in which a product is to be considered as being dumped for the purposes of the entire Anti-Dumping Agreement (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 109 and 126). If an investigating authority does not conduct its dumping determination in a manner consistent with that definition, all elements of the dumping determination will be flawed, including the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties.
[96] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272.
[97] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada),* para. 88 and footnote 143. Article 2.2 allows investigating authorities, under certain conditions, to use constructed normal value. Article 2.3 permits the use of constructed export prices under certain conditions.
[98] Article 6.10 of the Anti-Dumping Agreement provides, in relevant part, "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter concerned of the produce under investigation".

95. Australia's interpretation of "export price" – i.e. the actual export price for a particular exporter – is supported by an examination of the context of the term "export price" within the Anti-Dumping Agreement, and the object and purpose of the Anti-Dumping Agreement. In particular, the Appellate Body has identified of a number of "fundamental disciplines that apply under the Anti-Dumping Agreement and the GATT 1994 to all anti-dumping proceedings".[99] These fundamental disciplines include that:[100]

> [T]he Anti-Dumping Agreement prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.

96. This interpretation of export price is supported by other provisions of the Anti-Dumping Agreement which make it clear that "dumping" and "margins of dumping" relate to the exporter or foreign producer. Article 6.10 requires, "as a rule", that investigating authorities determine "an individual margin of dumping for each known exporter or producer".[101]

(b) Article 2.2 obligations

97. Article 2.2 provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (footnote omitted)

98. Thus, Article 2.2 sets out three specific circumstances in which it is permissible for an investigating authority to determine the normal value on a basis other than domestic sales.

[99] Appellate Body Report, *US — Zeroing (Japan)*, para. 107.
[100] Appellate Body Report, *US — Zeroing (Japan)*, para. 111.
[101] Appellate Body Report, *US — Zeroing (Japan)*, paras. 112.

99. Read together, Articles 2.1 and 2.2 have been understood to mean that normal value must be determined on the basis of domestic sales, except where one of the circumstances provided for in Article 2.2 exist. Specifically, (i) where there are no sales in the exporting country of the like product in the ordinary course of trade; (ii) where sales in the exporting country do not "permit a proper comparison" because of a "particular market situation"; or (iii) where sales in the exporting country do not "permit a proper comparison" because of their low volume. As the Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* explained:[102]

> As Article 2.1 makes clear, the starting point for normal value is "the comparable price, in the ordinary course of trade" for the like product when destined for consumption in the exporting country. Thus, the concept of dumping is, in the first instance, a comparison of home market and export prices. Only in the circumstances set forth in Article 2.2 may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value.

100. Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade" from the calculation of normal value to ensure that normal value is, indeed, the "normal" price of the like product in the home market of the exporter. While the Appellate Body has noted that the Anti-Dumping Agreement does not define the term "in the ordinary course of trade",[103] it has also indicated it could "envisage many reasons for which transactions might not be "in the ordinary course of trade"."[104]

101. Implicit in the Appellate Body's reasoning in *US – Hot Rolled Steel* is that sales between economically independent parties, transacted at market prices, would usually be considered as sales made in the ordinary course of trade. However, the Appellate Body also recognised that there could be situations where a sales transaction between independent parties might not be "in the ordinary course of trade", such as "a liquidation sale by an enterprise to an independent buyer, which may not reflect "normal" commercial principles".[105] The Appellate Body also provided support for the exclusion of like products where the sales are made to affiliated parties and are not at "arm's length".[106] This enables

[102] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* para. 7.76. See also Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.83.
[103] Appellate Body Report, *US – Hot-Rolled Steel*, para. 139.
[104] Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.
[105] Appellate Body Report, *US – Hot-Rolled Steel*, para. 143 and footnote 106.
[106] Appellate Body Report, *US – Hot Rolled Steel*, paras. 165-168.

normal value to be calculated on the basis of other relevant sales, including downstream sales prices with the first independent customer under Article 2.1 of the Anti-Dumping Agreement. However, the Appellate Body's reasoning was directed at Article 2.1 and, therefore, it did not consider constructed normal value under Article 2.2.[107]

102. In determining whether sales do not permit a proper comparison on the basis of "low volume", Footnote 2 to Article 2.2 provides that sales of a like product "will normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5% or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such a lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison".

103. Article 2.2.1 provides that sales of the like product will not be "in the ordinary course of trade" by reason of price and may be disregarded in determining normal value only if such sales are made within an extended period of time, in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time. Below-cost sales will have been made in "substantial quantities" where the volume of sales is 20% or greater of the volume sold in transactions under consideration for the determination of normal value.[108] When determining whether the sales price is above or below the "ordinary course" price, regard should be had to the terms and conditions of the transaction and any other factors which may influence that price, such as the volume of the sales transaction and additional liabilities on the seller, including transport or insurance.[109]

104. The Appellate Body in *US Hot-Rolled Steel* further elaborated:[110]

> We note that Article 2.2.1 of the Anti-Dumping Agreement itself provides for a method for determining whether sales below cost are "in the ordinary course of trade". However, that provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible methods for determining whether low-priced sales are "in the ordinary course of trade". Article 2.2.1 sets forth a method for determining whether sales between any two parties are "in the ordinary course of trade"; it does not address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that sales above cost, but below the usual market price, might not be in the ordinary course of trade. Such

[107] Appellate Body Report, *US – Hot Rolled Steel*, paras. 166.
[108] Footnote 5 of the Anti-Dumping Agreement.
[109] Appellate Body Report, *US – Hot Rolled Steel*, para. 142.
[110] Appellate Body Report, *US – Hot Rolled Steel*, para. 147. (emphasis removed)

transactions may, therefore, be the subject of special scrutiny by the investigating authorities.

105. The established two-step methodology to Article 2.2.1 is discussed by the Panel in *EC - Salmon (Norway)*:[111]

> On its face, the methodology set out in the first sentence of Article 2.2.1 involves two steps: First, the below-cost sales that may potentially be treated as not being made in the ordinary course of trade by reason of price must be ascertained. This initial step requires investigating authorities to identify sales made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs". Article 2.2.1 does not prescribe any particular time period for the purpose of measuring the per unit costs that must be used in this assessment, suggesting that investigating authorities have a degree of discretion to calculate such costs over different periods of time, which might be, for example, the day of sale or the period of investigation. We understand that this is also the view of the parties.
>
> Secondly, the investigating authority must "determine" whether "such" below-cost sales display three specific characteristics, i.e., whether the below-cost sales identified under the first step are made: (i) "within an extended period of time"; (ii) "in substantial quantities"; and (iii) "at prices which do not provide for the recovery of all costs within a reasonable period of time". It is only below-cost sales that are found to exhibit all three of these characteristics that may be treated as not being made in the ordinary course of trade by reason of price.

106. Where one of the circumstances in Article 2.2 is established, the Investigating Authority is permitted to have recourse to an alternate basis for determining normal value, namely third-country sales[112] or constructed normal value. Constructed normal value is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Costs must normally be based on the exporters' records relating to the cost of production, subject to certain requirements in Article 2.2.1.1 being met, and on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation, in accordance with Article 2.2.2.

107. Article 2.2.1.1 specifies that:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

[111] Panel Report, *EC – Salmon (Norway)*, paras. 7.232-7.233. (footnote removed)
[112] Article 2.2 of the Anti-Dumping Agreement provides this is the "comparable price of the like product when exported to an appropriate third country, provided the price is representative". See also Panel Report, *A4 Copy Paper*, para. 7.68.

C. THE SAMPLED COMPANIES FULLY COOPERATED IN THE INVESTIGATION

108. Australia submits that information submitted by the sampled companies was verifiable, appropriately submitted, could be used without undue difficulties, and was supplied in a timely fashion. Regardless of whether the information submitted was ideal in all respects from MOFCOM's perspective, it reflected the best efforts of the sampled companies.

109. MOFCOM was entitled to expect a "very significant degree of effort – to the "best of their abilities" – from investigated exporters," and equally, the sampled companies were entitled to expect that MOFCOM would not impose "*unreasonable* burdens".[113] The nature and quality of the effort from the sampled companies must be assessed in light of the burdensome requests made by MOFCOM, the information that was provided by the sampled companies within the specified deadlines, and the supplementary information and explanations subsequently provided where MOFCOM raised concerns about the original submissions.

110. Australia submits that the following points of context should inform the Panel's assessment of MOFCOM's assessment of the adequacy of the responses from the sampled companies:

- The Anti-Dumping Questionnaire issued by MOFCOM was extensive, comprising more than 300 questions and sub-questions requesting detailed data and information, to be answered within 37 days.[114]
- The sampled companies provided detailed responses to the Anti-Dumping Questionnaire and the Supplementary Questionnaire (including a significant volume of granular transaction level data) and expressly indicated their willingness to engage further with MOFCOM if required.

[113] Appellate Body Report, *US – Hot Rolled Steel*, para. 102 (emphasis original). In addition, the sampled companies were entitled to expect that MOFCOM would "conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts" Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602), including by "actively seek[ing] out pertinent information" (Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130, quoting Appellate Body Report, *US – Washing Machines*, para. 5.268, in turn quoting Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55; referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China – Broiler Products*, para. 7.261.
[114] See Anti-Dumping Questionnaire (Exhibit AUS-3).

- The Anti-Dumping Questionnaire responses the sampled companies provided to MOFCOM had to be translated from Chinese into English, the working language of the Australian based companies, and then the English language responses translated to Chinese. This had the practical effect of substantially decreasing the time available for the sampled companies to prepare their substantive responses because of the need to allow time for translations.
- The sampled companies sought, but were refused, short extensions of time, despite having demonstrated good cause for the extension.
- MOFCOM insisted on the provision of certain information by the sampled companies *even after* the companies had explained that the requested information did not exist.
- In many instances, the sampled companies only became aware that MOFCOM required certain data that it had not requested in the Anti-Dumping Questionnaire, and that MOFCOM would make adverse findings against the sampled companies because of the absence of that unrequested data, when MOFCOM published its Preliminary Determination on 27 November 2020, 11 days *following* the deadline for Anti-Dumping Questionnaire responses. The companies voluntarily submitted additional responses addressing these concerns, which MOFCOM disregarded.

111. MOFCOM's decision to resort to the use of facts available was based primarily on its findings of alleged deficiencies in information contained in Forms 6-1-2, 6-1-2, 6-3 and 6-4 submitted by each of the sampled companies. Australia submits that, for the reasons explained in detail below, these findings were inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

D. CHARACTERISTICS AFFECTING DOMESTIC AND EXPORT SALES OF AUSTRALIAN BOTTLED WINE

1. Overview

112. As Australia foreshadowed above,[115] Australian bottled wine is a highly differentiated consumer product that cannot be considered a commodity. Australian wine producers and exporters sell wine across multiple quality grades and at different levels of trade in Australian and overseas markets. It is important Australia sets out these characteristics in detail as it provides essential context to the fundamental flaws in MOFCOM's dumping determination.

113. Australia will establish that there was sufficient evidence before MOFCOM as to the significant influence of two primary characteristics on domestic and export wine sales – a highly varied product mix and sales made at different levels of trade. These characteristics affected all three sampled companies, and it was incumbent on MOFCOM to make the requisite adjustments to ensure the conduct of a fair comparison between normal value and export price under Article 2.4. Australia notes the references to "price comparability" between domestic prices, normal values, and export prices in Articles 2.1, 2.2, 2.4 and 2.5 highlight the importance of this concept in the determination of dumping.

2. Domestic sales of Australian bottled wine

114. Australia submits the domestic sales selected by MOFCOM for the three sampled companies had significant differences affecting price comparability. Specifically, the sales were affected by differences in physical characteristics, consumer preferences and level of trade issues. While the selection of such domestic sales was not, *ipso facto*, a violation of the Anti-Dumping Agreement, Australia will demonstrate in the section on fair comparison,[116] these factors were not accounted for through adjustments to normal value to ensure its comparability with export price sales.

[115] See above, section I.A.1.
[116] See below, section II.J.

(a) Product mix (physical characteristics, quality, quantity, consumer preferences, price)

115. [[ ]]

116. [[ ]]

117. [[ ]]

118. [[ ]]

[117] [(AUS-5 (BCI)), .]]
[118] [(AUS-5 (BCI)), .]]
[119] [(AUS-5 (BCI)), .]]

[redacted]

119. [[redacted]]

120. The examples above demonstrate the domestic sales of bottled wine were affected by product mix factors. This was most pronounced in the quality grade assigned to domestic products and had a significant correlation to the invoice prices of these products. It required MOFCOM to make adjustments to ensure any normal value calculated with these sales would enable a proper comparison.

(b) Level of Trade

121. [[redacted]]] In the ordinary course of trade, prices for direct sales to clients are generally higher than those to wholesalers, distributors and retailers because they are at different levels of trade and represent different segments in the market. Wholesalers and distributors pay producers lower prices for identical products because they must be able to make a margin to cover their costs and a profit on resale to their clients. For a distributor or wholesaler to break even – let alone realise a profit – from the sale, it would be necessary to purchase the product at a lower price. By contrast, if a producer sells

[120] [[redacted] AUS-5 (BCI)), [redacted].]]
[121] [[redacted] (AUS-7 (BCI)).]]
[122] [[redacted] (AUS-5 (BCI)), [redacted].]]

directly to consumers, it will commonly constitute the highest possible sales price given the additional price components, including costs, involved in such sale.

122. [[ ]]

123. [[ ]]

124. The above analysis makes clear that the domestic sales prices reported by sampled companies were affected by significant level of trade differences. This meant MOFCOM was

[123] [(AUS-9 (BCI)).]]
[124] [(AUS-5 (BCI)) .]]
[125] [(AUS-5 (BCI)), .]]
[126] [(AUS-5 (BCI)), .]]

obligated to adjust for these differences to ensure comparability of the resulting normal value with export price.

3. Export sales of Australian bottled wine

125. Australia submits that export sales of Australian bottled wine were also affected by characteristics affecting price comparability. Consistent with Australia's submissions on domestic sales above, the main characteristics were product mix and level of trade. These factors had a significant influence on the price of export sales and required MOFCOM to make the necessary adjustments to ensure a fair comparison was conducted with normal value. A failure to do so, as established in the section on fair comparison below, resulted in MOFCOM relying upon export transactions that were not comparable to domestic sales in Australia.

(a) Product mix (physical characteristics, quality, quantity, consumer preferences, price)

126. Australia submits there was sufficient evidence before MOFCOM that Australian bottled wine exported during the period of investigation had differing physical characteristics. These differences resulted in exported products being assigned into different quality grades with a significant influence on export sales prices. In other words, these export sales were constituted by a highly varied product mix that required MOFCOM to make adjustments to these sales to ensure a proper comparison.

127. [[ ]]

128. [[ ]

[127] [(AUS-10 (BCI)).]]
[128] [(AUS-5 (BCI)), .]]

[redacted]

129. [[redacted]]

130. [[redacted]]

(b) Level of Trade

131. Australia submits the export sales of Australian bottled wine were also affected by level of trade issues. As Australia set out above in domestic sales, prices will fluctuate at different levels of trade due to the differing costs that arise. In the ordinary course of trade, the higher the level, the greater the price that will be charged.

132. [[redacted]]

[129] [redacted] (AUS-5 (BCI)), [redacted].]]
[130] [redacted] (AUS-5 (BCI)) [redacted].]]

[[ ]]

133. [[ ]]

134. For these reasons, the export sales of Australian bottled wine were clearly affected by level of trade issues and require adjustments. As Australia demonstrates below,[132] MOFCOM failed to make these adjustments.

E. TREASURY WINE ESTATES VINTNERS LIMITED

1. Overview

135. MOFCOM's dumping determination for Treasury Wines is inconsistent with the Anti-Dumping Agreement in respect of its determination of normal value and export price and the comparison between the two.

[131] [(AUS-5 (BCI)) .]]
[132] See below, section II.J.3.

136. With respect to normal value, MOFCOM's explanation of its methodology for Treasury Wines in the Preliminary and Final Determinations was cast in vague and general language that provided insufficient disclosure of the non-confidential calculation process. This opacity meant that Australia and the interested parties in the investigation were forced to engage in a process of reverse engineering MOFCOM's findings in order to understand the determination that was made. For example, it required, *inter alia*, the engagement in "back-calculations and inferential reasoning" to ascertain the essential facts,[133] being the specific domestic sales MOFCOM relied upon to calculate its normal value. The lack of transparency undermined Australia's ability to challenge MOFCOM's findings.

137. MOFCOM resorted to facts available in respect of Treasury Wines' costs associated with the production and sale of wines in a manner that was inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement. This resulted in erroneous costs being determined by MOFCOM which, in turn, were used in the application of the below-cost test in Article 2.2.1 and in the construction of normal values under Article 2.2, creating further inconsistencies with those provisions. The errors were compounded by MOFCOM's failure to ensure that the domestic selling prices used to determine normal value and the constructed normal value were comparable to export prices to China, a fundamental requirement under Articles 2.1 and 2.2.

138. The foregoing errors contributed to an inflated dumping margin for Treasury Wines of 175.6%, the highest of the sampled companies.

2. MOFCOM improperly resorted to facts available

139. Given that MOFCOM's improper resort to facts available led to errors in the determination of normal value using both domestic prices and constructed normal value, it is the logical starting point for demonstrating the errors in MOFCOM's determination of dumping for Treasury Wines.

140. MOFCOM's resort to facts available is limited to the determination of Treasury Wines' production costs and expenses.[134] It found that Treasury Wines "did not try its best and failed to be fully cooperative in the investigation" and that the information submitted by the

[133] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.
[134] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 56-69.

company in its responses to Forms 6-1-1, 6-1-2, 6-3, 6-4, 6-5, 6-6, 6-7 and 6-8 was "necessary information," that was not provided "within a reasonable time", that "could not be verified" and the company "did not give reasonable explanations" for the alleged omissions and deficiencies in the information.[135] On this basis, MOFCOM determined these costs and expenses using facts available which was "the data of some product types reported by the Company".[136]

141. MOFCOM improperly resorted to facts available to calculate aspects of Treasury Wines' normal value. Contrary to MOFCOM's assertions, Treasury Wines was fully cooperative in the investigation and participated to the best of its abilities.[137] Moreover, for the identified Forms, all necessary information was provided within a reasonable period of time, was verifiable and, to the extent information was not provided, it was not necessary, and its absence was fully explained.

142. Furthermore, the replacement information relied upon by MOFCOM was not the best information available. That information was [[ ]]

143. To demonstrate MOFCOM's errors, it is necessary to examine each of the five data Forms that MOFCOM rejected and to address MOFCOM's assertion that several of the Forms could not be reconciled.

[135] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 59-66, 69.
[136] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 60, 65.
[137] See above, section II.C.

(a) MOFCOM's Determination

i. Form 6-1-1 Procurement Cost Sheet for Raw Materials

144. With respect to Form 6-1-1 (Procurement Cost Sheet for Raw Materials), MOFCOM stated in the Final Determination that Treasury Wines:

- "did not fill in the beginning and ending inventories, the consumption and the unit price for each kind of raw material as required by the questionnaire";[138]
- "explained that since purchase information in Form 6-1-1 was not directly related to the calculation of dumping margin, and the time was very limited, so it did not submit relevant information as required by the questionnaire";[139]
- "resubmitted Form 6-1-1 in its comments but just listed each kind of raw material into individual worksheets and still failed to fill in the beginning and ending inventories, the consumption and the unit price for each kind of raw material";[140] and
- "explained that since the quantities were listed in different units and each kind of raw material had so many detailed specifications, so it was impossible to get meaningful beginning and ending inventories and consumption in such a short time".[141]

145. The information requested in Form 6-1-1 relates to the procurement (i.e. purchase) costs of raw materials (i.e. inputs). Treasury Wines provided sufficient information to confirm its actual production costs using its financial reporting system, rendering any missing information sought in this form unnecessary for determining the cost of production under Article 2 of the Anti-Dumping Agreement.

[138] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[139] Anti-Dumping Final Determination (Exhibit AUS-2), p. 62.
[140] Anti-Dumping Final Determination (Exhibit AUS-2), p. 62.
[141] Anti-Dumping Final Determination (Exhibit AUS-2), p. 62.

146. This is confirmed in the evidence submitted by Treasury Wines during the investigation. [[ ]] Such costs, therefore, are not "necessary" within the meaning of Article 6.8 for Treasury Wines' normal value calculations. [[ ]]

147. In addition to the information not being "necessary", [[ ]]

[142] [(Exhibit AUS-11 (BCI)), .]]
[143] [(Exhibit AUS-11 (BCI)), .]]
[144] [(Exhibit AUS-11 (BCI)), .]]

[[ ]]

148. Notwithstanding that the information in Form 6-1-1 was not "necessary" and was not recorded in the normal course of business, [[ ]] demonstrating Treasury Wines' willingness to cooperate in the investigation and respond to MOFCOM's requests.

149. [[ ]] MOFCOM rejected the information provided.[148] MOFCOM also rejected Treasury Wines' claims that it had a limited time to provide the requested material in its initial Anti-Dumping Questionnaire Response.[149] MOFCOM provided no explanation in the Final Determination as to why it considered alleged deficiencies to remain after receipt of valid explanations by Treasury Wines in respect of Form 6-1-1, and made no mention of rejecting the provision of a revised Form 6-1-1 containing information and data supplied to the best of Treasury Wines' ability.

150. MOFCOM did not seek any further explanations or information, following the provision of Treasury Wines' Supplementary Questionnaire response.

151. Assuming, *arguendo*, that the information contained in Form 6-1-1 was "necessary information" within the meaning of Article 6.8, to the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II,[150] and at a minimum, explain in what way the information it rejected did not meet the requirements.[151] Moreover, MOFCOM was required to "actively make efforts" to use the information submitted.[152] Had it done so, MOFCOM would have

[145] [(Exhibit AUS-12 (BCI)).]]
[146] [(Exhibit AUS-11 (BCI)), .]]
[147] See above, paras. 146 and 147.
[148] Anti-Dumping Final Determination (Exhibit AUS-2), p. 65.
[149] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 63-64.
[150] Panel Report, *US – Steel Plate*, para. 7.58.
[151] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[152] See Panel Report, *US – Steel Plate*, para. 7.65.

concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. An unbiased and objective investigating authority could not have found otherwise.[153]

152. Further, there is no "unlimited right" for an investigating authority to reject all information and ascertain the normal value entirely on the basis of facts available if *some* information was not provided, or if *some* information did not meet the criteria in paragraph 3 of Annex II.[154] Before rejecting all of the information submitted by Treasury Wines in the revised Form 6-1-1 on the basis that the form did not include certain information (beginning inventories, consumption and unit prices), MOFCOM was required to assess whether the absence of that particular information meant that the information submitted in the revised Form was not verifiable, or could not be used without undue difficulty.

153. MOFCOM was also obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Treasury Wines had acted to the best of its ability. Treasury Wines acted to the best of its ability in providing all the necessary information to enable MOFCOM to construct normal value, with full (and repeated) explanations of why it was presented in the way chosen. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

154. MOFCOM did not inform Treasury Wines of the reasons for not accepting the additional information submitted in Treasury Wines' response to the Preliminary Determination or the Supplementary Questionnaire, did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM stated in the Final Disclosure published on 12 March 2021 (published 14 calendar days prior to the Final Determination), that it "decided in the Preliminary Ruling to conduct a review and evaluation on the basis of the facts already obtained and the best information available" for the purposes of determining normal value.[155]

155. In *US – Anti-Dumping and Countervailing Duties (Korea),* the Panel held that paragraph 6 of Annex II requires an investigating authority to inform an interested party why

[153] See above, section I.C above which outlines the standard of review required of an investigating authority to evaluate information submitted by interested parties in an "unbiased and objective manner"; see Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[154] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7. 343.
[155] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 29-30.

its submitted information, including supplementary information, had not been accepted, thereby providing an interested party with an opportunity to provide further explanations within a reasonable period.[156] This is analogous to the current situation before this Panel. It is clear that information that was alleged as being missing by MOFCOM in the Preliminary Determination, and subsequently updated by Treasury Wines, was ultimately not accepted by MOFCOM in its Final Determination. Given the length of time between receipt of Treasury Wines' Anti-Dumping Questionnaire Response, its written comments to the Preliminary Determination, its response to the Supplementary Questionnaire and publication of the Final Determination, it is clear that MOFCOM failed to notify Treasury Wines *immediately* and *without delay*. Further, paragraph 6 of Annex II required MOFCOM to provide an opportunity for Treasury Wines to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation, which remained unclear and not advised. However, MOFCOM never provided Treasury Wines with such an opportunity.

156. For the foregoing reasons, MOFCOM erred when it relied upon Treasury Wines' response to Form 6-1-1 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

ii. Form 6-1-2 Production Cost Sheet for Raw Materials

157. With respect to Form 6-1-2 (Production Cost Sheet for Raw Materials), MOFCOM stated in the Final Determination that Treasury Wines:

- "did not fill in the production cost of its own bulk wine; "[157] and
- "just filled in the amount column [of bulk wines] but did not report the quantity, beginning and ending inventories etc., as required. "[158]

158. The information requested by MOFCOM in Form 6-1-2 relates to the production costs of raw materials used in the product under investigation. [[redacted]]

[156] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea),* paras. 7.471-7.472.
[157] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[158] Anti-Dumping Final Determination (Exhibit AUS-2), p. 62.

[redacted]]][159]

159. Consistent with Australia's submissions in respect of Form 6-1-1 above, [[redacted]]

160. This is confirmed in the evidence submitted by Treasury Wines during the investigation. [[redacted]

161. [redacted]]] Such costs, therefore, are not "necessary" for Treasury Wines' normal value calculations. [[redacted]]

[159] [redacted] (Exhibit AUS-11 (BCI)), [redacted].]]
[160] [redacted] (Exhibit AUS-11 (BCI)), [redacted].]]

162. [[ ]][163]

163. MOFCOM rejected Treasury Wines' claims that it had a limited time to provide the requested material in its initial Anti-Dumping Questionnaire Response.[164] MOFCOM provided no explanation in the Final Determination as to why it considered alleged deficiencies to remain after receipt of valid explanations by Treasury Wines in respect of Form 6-1-2, and made no mention of rejecting the provision of a revised Form 6-1-2. MOFCOM did request an explanation from Treasury Wines in its Supplementary Questionnaire where it asked "[i]f the raw materials are self-produced, please explain why your company has not completed "Table 6-1-2 Production Costs of Raw Materials".[165] [[ ]]

164. MOFCOM did not seek any further explanations or information, following the provision of Treasury Wines' Supplementary Questionnaire response.

165. Assuming, *arguendo*, that the information contained in Form 6-1-2 was "necessary information" within the meaning of Article 6.8, to the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the

[161] [(Exhibit AUS-13 (BCI)).]]
[162] [(Exhibit AUS-11 (BCI)), .]]
[163] [(Exhibit AUS-11 (BCI)), .]]
[164] Anti-Dumping Final Determination (Exhibit AUS-2), p. 63-64.
[165] Treasury Wines Supplementary Questionnaire Response (Exhibit AUS-14), pp. 3-4 (see question 2).
[166] [(Exhibit AUS-15 (BCI)), .]]
[167] [(Exhibit AUS-15 (BCI)), .]]

criteria in paragraph 3 of Annex II.[168] As set out above,[169] this paragraph at a minimum required MOFCOM to explain in what way the information it rejected did not meet the requirements.[170] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. There is no "unlimited right" for MOFCOM to reject all information and ascertain the normal value entirely on the basis of facts available if *some* information was not provided, or if *some* information did not meet the criteria in paragraph 3 of Annex II.[171] Treasury Wines acted to the best of its ability to provide the information to MOFCOM and, even if the information was not ideal in all respects, MOFCOM was not justified in rejecting it as per paragraph 5 of Annex II.

166. MOFCOM otherwise failed to specify in detail the information it required for the purposes of the investigation, as required under paragraph 1 of Annex II. Paragraph 1 of Annex II clearly places the onus on MOFCOM to explain in detail the type of information that it is seeking. It is not incumbent upon interested parties to guess what MOFCOM is looking for in its investigation. [[ ]] it should have specified what it required in the relevant forms attached to the Anti-Dumping Questionnaire, or failing that, in the Supplementary Questionnaire.

167. MOFCOM, once again, did not inform Treasury Wines of the reasons for not accepting the information submitted in Treasury Wines' response to the Preliminary Determination or the Supplementary Questionnaire, did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM stated in the Final Disclosure (published on 12 March 2021, 14 calendar days prior to the Final Determination), that it "decided in the Preliminary Ruling to conduct a review and evaluation on the basis of the facts already obtained and the best information available" for the purposes of determining normal value.[172]

[168] Panel Report, *US – Steel Plate*, para. 7.58.
[169] See above, section II.B.1(b)(ii).
[170] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[171] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7. 343.
[172] Anti-Dumping Final Disclosure (Exhibit AUS-16) pp. 29-30.

168. Given the length of time between receipt of Treasury Wines' Anti-Dumping Questionnaire Response, Treasury Wines' response to the Preliminary Determination and the Supplementary Questionnaire, and MOFCOM's publication of the Final Determination, it is clear that MOFCOM failed to notify Treasury Wines why its submitted information had not been accepted *immediately* and *without delay*. Further, paragraph 6 of Annex II required MOFCOM to provide an opportunity for Treasury Wines to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, the time limits of the investigation remained unclear, and MOFCOM never provided an opportunity for Treasury Wines to provide further explanations within a reasonable period.

169. For these reasons, MOFCOM erred when it relied upon Treasury Wines' response to Form 6-1-2 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

iii. Form 6-3 Product Costs and Related Expenses

170. With respect to Form 6-3 (Product Costs and Related Expenses), MOFCOM stated in the Final Determination that:

- Treasury Wines "did not fill in the costs and related expenses of all product types;" and [173]
- "[f]or the product type it filled in… did not fill in the production cost for some months, did not explain the calculation method, the cost apportionment method and the relevant calculation formula of each item, and did not provide the daily cost calculation sheet".[174]

171. The information requested in Form 6-3 relates to the cost of production and expenses associated with producing the product under investigation. Given this information reflects the actual cost of producing the product under investigation and domestic like products, Australia acknowledges that it is necessary for the purposes of constructing normal value under Article 2 of the Anti-Dumping Agreement and would constitute "necessary information" within the meaning of Article 6.8 of the Anti-Dumping Agreement.

[173] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[174] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.

(A) All necessary information was provided

[[ ]]

172. [[ ]]

173. [[ ]] MOFCOM asserted that Treasury Wines: (i) did not provide production costs for some months; (ii) did not explain the calculation method, the cost apportionment method and the relevant calculation formula of each item; and (iii) did not provide the daily cost calculation sheet.[177]

174. [[ ]]

[175] [(Exhibit AUS-17 (BCI)).]]
[176] [(Exhibit AUS-11 (BCI))]]
[177] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[178] [(Exhibit AUS-11 (BCI)), .]]
[179] [(Exhibit AUS-11 (BCI)),

[[Thus, the missing information did not exist and, therefore, could not have been "necessary" information.

175. [[.]][181]

176. [[ ]] MOFCOM rejected these arguments.[184] MOFCOM also rejected Treasury Wines' claims that it had a limited time to provide the requested material in its initial Anti-Dumping Questionnaire Response.[185]

177. [[ ]]

178. [[

[180] [(Exhibit AUS-11 (BCI)), .]]
[181] [(Exhibit AUS-11 (BCI)), (Exhibit AUS-19 (BCI)); (Exhibit AUS-20 (BCI)); (Exhibit AUS-21 (BCI)); (Exhibit AUS-22 (BCI)).]]
[182] [(Exhibit AUS-11 (BCI)), .]]
[183] [[(Exhibit AUS-11 (BCI)), .]] See also Anti-Dumping Final Determination (Exhibit AUS-2), p. 63-64.
[184] Anti-Dumping Final Determination (Exhibit AUS-2), p. 63-64.
[185] Anti-Dumping Final Determination (Exhibit AUS-2), p. 63-64.
[186] [(Exhibit AUS-11 (BCI)), .]]

[[ ]]

179. [[ ]]

180. [[ ]]

181. [[ ]]

182. Thus, the necessary information was provided to apply the below-cost test and to calculate normal values.

[187] [(Exhibit AUS-11 (BCI)), .]]
[188] [(Exhibit AUS-11 (BCI)), .]]
[189] [(Exhibit AUS-23 (BCI)).]]

183. MOFCOM provided no explanation as to why it considered alleged deficiencies to remain after receipt of valid explanations as outlined above by Treasury Wines in respect of Form 6-3.

184. To the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II,[190] and at a minimum, explain in what way the information it rejected did not meet the requirements.[191] Moreover, MOFCOM was required to "actively make efforts" to use the information submitted.[192] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. An unbiased and objective investigating authority could not have found otherwise.[193] There is no "unlimited right" for MOFCOM to reject all information and ascertain the normal value entirely on the basis of facts available if some information was not provided, or if some information did not meet the criteria in paragraph 3 of Annex II.[194]

185. MOFCOM was also obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Treasury Wines had acted to the best of its ability. Treasury Wines acted to the best of its ability in providing all the necessary information to enable MOFCOM to construct normal value, with full (and repeated) explanations of why it was presented in the way chosen. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

186. MOFCOM otherwise failed to specify in detail the information it required in order to verify certain information, as required under paragraph 1 of Annex II. MOFCOM alleged that Form 6-3 submitted by Treasury Wines as part of its Anti-Dumping Questionnaire Response did not include a daily cost calculation sheet.[195] This omission purportedly made it "impossible" for MOFCOM to verify the data.[196] If MOFCOM needed certain data verified it could have done so in relation to Treasury 'Wines' accounting system, but it did not seek to

[190] Panel Report, *US – Steel Plate*, para. 7.58.
[191] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[192] See Panel Report, *US – Steel Plate*, para. 7.65.
[193] See above, section I.C, which outlined the standard of review required of an investigating authority to evaluate information submitted by interested parties in an 'unbiased and objective manner'; see Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[194] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7. 343.
[195] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[196] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.

do so. Even if the forms were necessary (they are not), MOFCOM should have specified what it required in the relevant forms attached to the Anti-Dumping Questionnaire for verification purposes, rather than attempting to compare the data provided in different datasets submitted by the sampled companies for different purposes.

187. MOFCOM did not inform Treasury Wines of the reasons for not accepting the information submitted in Treasury Wines' response to the Preliminary Determination and Supplementary Questionnaire, did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM stated in the Final Disclosure (published on 12 March 2021, 14 calendar days prior to the Final Determination), that it "decided in the Preliminary Ruling to conduct a review and evaluation on the basis of the facts already obtained and the best information available" for the purposes of determining normal value.[197]

188. In *US – Anti-Dumping and Countervailing Duties (Korea),* the Panel held that paragraph 6 of Annex II requires an investigating authority to inform an interested party why its submitted information, including supplementary information, had not been accepted, thereby providing an interested party with an opportunity to provide further explanations within a reasonable period.[198] This is analogous to the current situation before this panel. It is clear that information that was alleged as being deficient by MOFCOM in the Preliminary Determination in relation to Form 6-3, and subsequently provided by Treasury Wines in response to the Preliminary Determination and Supplementary Questionnaire, was ultimately not accepted by MOFCOM in its Final Determination. Given the length of time between receipt of Treasury Wines' original Anti-Dumping Questionnaire Response, its written submission and comments on the Preliminary Determination, response to the Supplementary Questionnaire and publication of the Final Determination, it is clear that MOFCOM failed to notify Treasury Wines why its submitted information had not been accepted *immediately* and *without delay*. Further, paragraph 6 of Annex II required MOFCOM to provide an opportunity for Treasury Wines to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, MOFCOM never provided Treasury Wines such an opportunity.

[197] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 29-30.
[198] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea),* paras. 7.471-7.472.

189. For the foregoing reasons, MOFCOM erred when it relied upon Treasury Wines' response to Form 6-3 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

iv. Form 6-4 Production Cost Details of the Product Under Investigation and the Like Product

190. With respect to Form 6-4 (Production Cost Details of the Product Under Investigation and its Like Product), MOFCOM stated in the Final Determination that Treasury Wines:

- "did not fill in the production cost details of all product types… and did not fill in the categories and names of the direct materials for producing the product under investigation and like products, and only four accounting codes were filled in;"[199]
- "the unit price of the direct materials of the same accounting code is inconsistent in the cost of different product types;"[200]
- "did not provide purchase or self-production information for some direct documents listed in Form 6-4".[201]

191. The information requested in Form 6-4 relates to the production cost of the product under investigation and domestic like products, and includes data on input costs, direct labour, fuel and energy, and other expenses such as freight and sundry expenses, among others. Given this information reflects the actual cost of producing the product under investigation and domestic like products, it is necessary for the purposes of constructing normal value under Article 2 of the Anti-Dumping Agreement and would constitute "necessary information" within the meaning of Article 6.8 of the Anti-Dumping Agreement.

192. [[

[199] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59-60.
[200] Anti-Dumping Final Determination (Exhibit AUS-2), p. 60.
[201] Anti-Dumping Final Determination (Exhibit AUS-2), p. 64-65.
[202] [(Exhibit AUS-25 (BCI)).]]
[203] See above, para. 172.

[[ ]]

193. [[ ]]

194. [[ ]]

195. [[ ]]

[204] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59-60.
[205] [(Exhibit AUS-11 (BCI)), .]]
[206] See below, section II.E.2(a)(v).
[207] [(Exhibit AUS-11 (BCI)), .]]
[208] [(Exhibit AUS-11 (BCI)), .]]

[[ ]]

196. [[ ]]

197. [[ ]]

198. [[ ]]

199. In the first instance, paragraph 1 of Annex II clearly places the onus on MOFCOM to explain in detail the type of information that it is seeking. Australia re-states its above

[209] [(Exhibit AUS-15 (BCI)), .]]
[210] [(Exhibit AUS-15 (BCI)), .]]
[211] [(Exhibit AUS-15 (BCI)), .]]
[212] Anti-Dumping Final Determination (Exhibit AUS-2), p. 65.
[213] [(Exhibit AUS-15 (BCI)), .]]
[214] [(Exhibit AUS-15 (BCI)), .]]
[215] (Exhibit AUS-15 (BCI)), .]]
[216] [(Exhibit AUS-15 (BCI)), .]]
[217] Anti-Dumping Final Determination (Exhibit AUS-2), p. 60.

argument that it is not incumbent upon interested parties to guess what MOFCOM is looking for in its investigation.[218]

200. Further, despite providing a fulsome explanation to accompany the provision of Re-Submitted Form 6-4, which would have been sufficient to allow MOFCOM to verify the accuracy and reliability of the data, MOFCOM instead re-stated its original allegations from the Preliminary Determination in the Final Determination and concluded that Treasury Wines "failed to provide necessary information within the reasonable period of time and failed to offer convincing explanations".[219]

201. The Appellate Body has clearly explained that an investigating authority is not entitled to reject information as being untimely if the information is submitted within a reasonable period of time.[220] At no point during the investigation did MOFCOM indicate that taking supplementary submissions into account, including submissions after the Preliminary Determination, would compromise its ability to conduct the investigation expeditiously, particularly in circumstances when it openly states that it decided to conduct a further "review" of "the products by type" following publication of the Preliminary Determination.[221]

202. Given the nature of the supplementary data and information from Treasury Wines and the fact that MOFCOM issued its Final Determination some 7 weeks after the deadline for Supplementary Questionnaire responses, there was sufficient time for MOFCOM to take the data and information into account.

203. By rejecting the information submitted in Form 6-4, MOFCOM failed to observe the provisions of Annex II of the Anti-Dumping Agreement. Specifically, Australia submits that MOFCOM failed to take into account information which is verifiable, appropriately submitted in a timely fashion and through a medium as requested by MOFCOM, thus acting inconsistently with paragraph 3 of Annex II. Australia submits that there was no reasonable basis for MOFCOM to determine that the information contained in Form 6-4 was not "verifiable" – that is, not capable of being "verified or proved to be true" - and demonstrates that MOFCOM did not conduct an "objective process of examination" to verify the data and

[218] See above, para. 166.
[219] Anti-Dumping Final Determination (Exhibit AUS-2), p. 65.
[220] Appellate Body Report, *US – Hot-Rolled Steel*, para. 83.
[221] Anti-Dumping Final Determination (Exhibit AUS-2), p. 57.

information submitted by Treasury Wines.[222] [[ ]] The information was appropriately submitted so that it could be used without undue difficulties. There is no evidence on the record to indicate to the contrary. If MOFCOM was not able to use the information submitted without experiencing "undue difficulties", it was incumbent on MOFCOM to provide an explanation of the problem.[223] MOFCOM did not do so.

204. Treasury Wines also acted to the best of its ability to provide the information to MOFCOM and, even if the information was not ideal in all respects, MOFCOM was not justified in rejecting it as per paragraph 5 of Annex II.

205. MOFCOM otherwise sought no further explanations or information from Treasury Wines relating to the alleged deficiencies in Form 6-4 after receiving Treasury Wines' response to its Preliminary Determination, including as part of its further "review" of Treasury Wines' "products by type".[224] MOFCOM did request clarifications in respect of Form 6-4 in its Supplementary Questionnaire. [[ ]]

[222] Panel Report, *US – Steel Plate*, para. 7.71.
[223] See Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74 and *China – Broiler Products (Article 21.5 – US),* para. 7.348.
[224] Anti-Dumping Final Determination (Exhibit AUS-2), p. 57.
[225] See [(Exhibit AUS-15 (BCI)),]]
[226] See [(Exhibit AUS-15 (BCI)),]]
[227] See [(Exhibit AUS-15 (BCI)),]]
[228] See [(Exhibit AUS-15 (BCI)).]]

[redacted]

206. After the provision of Treasury Wines' Supplementary Questionnaire response, and prior to publication of the Final Determination, Treasury Wines MOFCOM failed to make any meaningful effort to inform Treasury Wines that its information was not accepted. Given the length of time between receipt of the Anti-Dumping Questionnaire, Preliminary Determination and Supplementary Questionnaire responses, and publication of the Final Determination, it is clear that MOFCOM failed to notify Treasury Wines why its submitted information had not been accepted *immediately* and *without delay*.

207. MOFCOM also did not inform Treasury Wines of one of the alleged deficiencies contained in Form 6-4, until publication of the Final Determination. In respect of the allegation that Treasury Wines "did not provide purchase or self-production information for some direct documents listed in Form 6-4",[230] MOFCOM did not raise this as a deficiency in either the Preliminary Determination or the Supplementary Questionnaire. Therefore, there was no basis upon which Treasury Wines could have known that this information was required by MOFCOM for the purposes of its investigation.

208. In *US – Anti-Dumping and Countervailing Duties (Korea),* the Panel held that paragraph 6 of Annex II requires an investigating authority to inform an interested party why its submitted information, including supplementary information, had not been accepted, thereby providing an interested party with an opportunity to provide further explanations within a reasonable period.[231] It is clear that information that was requested by MOFCOM in its Anti-Dumping Questionnaire, and provided by Treasury Wines, namely Re-submitted Form 6-4, was ultimately not accepted by MOFCOM in its Final Determination. In such circumstances, paragraph 6 of Annex II required MOFCOM to provide an opportunity to the sampled companies to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, MOFCOM never provided such an opportunity to the sampled companies.

[229] See [redacted] (Exhibit AUS-15 (BCI)), [redacted]
[230] Anti-Dumping Final Determination (Exhibit AUS-2), p. 64.
[231] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea),* paras. 7.471-7.472.

209. Because MOFCOM failed to provide the requisite notice to Treasury Wines, it follows that MOFCOM also failed to provide Treasury Wines with an opportunity to provide explanations as to why the information ought to be considered.

210. The only notice provided to Treasury Wines in the investigation was in the Preliminary Determination, Supplementary Questionnaire and Final Determination. As mentioned above, Treasury Wines made submissions in response to the Preliminary Determination concerning MOFCOM's rejection of its submitted information, and was not made aware that the information it submitted in response to the Supplementary Questionnaire was in any way deficient, or rejected. Pursuant to paragraph 6 of Annex II, MOFCOM was obliged to consider the explanations provided by Treasury Wines and, if they were not considered satisfactory, MOFCOM was obliged to provide the reasons for the rejection of the evidence and information in its published determinations and provide an opportunity for interested parties to give an explanation. It did not do so.

211. In response to submissions from Treasury Wines in response to the Preliminary Determination and Supplementary Questionnaire, MOFCOM provided only cursory responses in the Final Determination, claiming for example that:[232]

> It could be known from the above descriptions that the Company did not submit relevant information within the stipulated time in accordance with the questionnaire requirements and that there was also lots of problems with the information already submitted. Secondly, after the Investigating Authority pointed out the above problems, the Company still did not give reasonable explanations. All of the above factors led to the consequence that the production costs and expenses of the product under investigation and like products could not be verified. Thus, the basis of using known facts and the best information available is secured.

212. This statement from MOFCOM does not address, in any meaningful way, the issues raised in Treasury Wines' submissions. It is not a "reason" for why MOFCOM did not accept supplementary information. Providing reasons entails giving an account for why something has occurred. It is concerned with setting out the evaluation of facts, rather than the establishment of those facts.[233] A recitation of what has occurred, or what MOFCOM took into

[232] Anti-Dumping Final Determination (Exhibit AUS-2), p. 66. In fact, MOFCOM gave no account of how it verified any information obtained during the investigation.
[233] See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.227 where the Panel explained, with reference to Articles 6.9 and 17.6(i), that "a reason is part of the evaluation of a fact, and not the fact itself. … we agree … that an

account, is not an evaluation of facts. As such, MOFCOM failed to provide reasons as to why information was rejected.

213. For the foregoing reasons, MOFCOM erred when it relied upon Treasury Wines' response to Form 6-4 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

v. Reconciliation with Forms 6-1-1, 6-1-2, 6-3, 6-5, 6-6, 6-7, 6-8

214. MOFCOM made a number of allegations in the Final Determination that Treasury Wines submitted certain responses to the Anti-Dumping Questionnaire, which were inconsistent or irreconcilable with other responses it provided. MOFCOM used these alleged inconsistencies as a basis to have recourse to facts available.

215. In respect of Form 6-2 (Inventory Delivery and Receipt Details), MOFCOM stated in the Final Determination that Treasury Wines "failed to report the delivery and receipt of inventories for major raw materials in "Form 6-2 Inventory Delivery and Receipt Details… so relevant data in Form 6-1-1 and Form 6-1-2 could not be comparatively checked with those in Form 6-2".[234]

216. In respect of Form 6-3 (Product Costs and Related Expenses), MOFCOM stated in the Final Determination that "the expenses cannot be aligned with the data in Forms 6-5 to 6-8".[235]

217. In respect of Form 6-4 (Production Cost Details of the Product Under Investigation and the Like Product), MOFCOM stated in the Final Determination that:

- "The unit price of the direct materials of the same accounting code… cannot be aligned with "Form 6-1-1 Procurement Cost Sheet for Raw Materials" and "Form 6-1-2 Production Cost Sheet for Raw Materials;""[236]

investigating authority must inform interested parties why certain information is disregarded. However … that obligation is found in Article 6.8 (through Annex II, para. 6), and not in Article 6.9". (footnotes omitted)
[234] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 62-63.
[235] Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.
[236] Anti-Dumping Final Determination (Exhibit AUS-2), p. 60.

- Treasury Wines "also offered inconsistent filling methods in Form 6-2 and Form 6-4, so these data could not be mutually verified;"[237] and
- "The cost of each product type is also inconsistent with the data in "Form 6-3 Product Costs and Related Expenses".[238]

218. In the first instance, Australia submits that given a number of the identified inconsistencies were between forms which did not contain "necessary" information, it is therefore unnecessary for those forms to be reconciled for calculation purposes. Specifically, as outlined in above,[239] Form 6-1-1 and Form 6-1-2 are not "necessary" for Treasury 'Wines' normal value calculations. [[ ]] On this basis, Australia submits that it is unnecessary for Form 6-4 and Form 6-2 to be reconciled with Form 6-1-1 and Form 6-1-2 for calculation purposes.

219. Assuming, *arguendo*, that Form 6-1-1 and Form 6-1-2 contained "necessary information" within the meaning of Article 6.8, Australia submits that the Anti-Dumping Questionnaire did not specify that the information required must be reconciled for verification purposes. Paragraph 1 of Annex II clearly places the onus on MOFCOM to explain in detail the type of information that it is seeking, and the information it requires, in order to verify certain information. It is not incumbent upon interested parties to guess what MOFCOM is looking for in its investigation. If MOFCOM needed certain data verified it should have specified what it required in the relevant forms attached to the Anti-Dumping Questionnaire for verification purposes, rather than attempting to compare the data provided in different datasets submitted by Treasury Wines and the other sampled companies. MOFCOM failed to take all reasonable steps that might be expected from an unbiased and objective authority to specify in detail the information requested, as soon as possible after initiation of the investigation, and acted inconsistently with paragraph 1 of Annex II.

[237] Anti-Dumping Final Determination (Exhibit AUS-2), p. 64.
[238] Anti-Dumping Final Determination (Exhibit AUS-2), p. 60.
[239] See above, section II.E.2(a)(i) for form 6-1-1; section II.E.2(a)(ii) for form 6-1-2.
[240] See above, section II.E.2(a)(iii) for form 6-3; section II.E.2(a)(iv) for form 6-4.

220. Australia submits that Form 6-2, Form 6-3 and Form 6-4 were otherwise appropriately submitted so that they could be used without undue difficulties, in accordance with paragraph 3 of Annex II. There is no evidence on the record to indicate to the contrary. [[ ]] If MOFCOM was not able to use the information submitted in these Forms without experiencing "undue difficulties", it was incumbent on MOFCOM to provide an explanation of the problem.[241] MOFCOM did not do so.

221. Prior to the publication of the Final Determination, MOFCOM provided insufficient reasons for its decision to reject the information contained in Form 6-2, Form 6-3 and Form 6-4, and failed to afford Treasury Wines due process, including by providing an opportunity to give further explanations. At no point in the four-month period between the publication of the Preliminary Determination and the Final Determination did MOFCOM expressly request further information in respect of the alleged inconsistencies identified above.

222. As MOFCOM failed to provide the requisite notice to Treasury Wines, it follows that MOFCOM also failed to provide Treasury Wines with an opportunity to provide explanations as to why the information ought to be considered.

223. Treasury Wines otherwise submitted supplementary information to MOFCOM for clarification purposes, and to explain any perceived inconsistencies. [[ ]]

[redacted]

[redacted]

[241] See Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74 and *China – Broiler Products (Article 21.5 – US),* para. 7.348.

[242] [(Exhibit AUS-11 (BCI)), (Exhibit AUS-13 (BCI)).]]

[243] [(Exhibit AUS-11 (BCI)), (Exhibit AUS-26 (BCI)).]]

- [[ ]]

224. [[ ]]

225. [[.]]

226. [[ ]

[244] [(Exhibit AUS-24 (BCI)).]]
[245] [(Exhibit AUS-11 (BCI)), .]]
[246] [(Exhibit AUS-11 (BCI)), .]]
[247] [(Exhibit AUS-11 (BCI)), .]]
[248] See above, para. 160.
[249] [(Exhibit AUS-11 (BCI)), .]]
[250] [(Exhibit AUS-11 (BCI)), .]]

[[ ]]

227. [[ ]]

228. In reaching its conclusions that Treasury Wines did not provide necessary information in order to construct normal value, MOFCOM failed to address the quality and quantity of the information that *was* provided, [[ ]] in the manner required by paragraph 3 of Annex II. In all cases, MOFCOM merely re-iterated its findings and determinations from the Preliminary Determination as a basis for rejecting the data and information provided and having recourse to facts available, without mention of the supplementary data contained in the Exhibits to Treasury Wines' response to the Preliminary Determination. This does not demonstrate any "meaningful consideration by MOFCOM of the criteria in paragraph 3".[252] In fact, it does not address the quality of the "existing evidence" at all.

229. The information submitted in [[ ]] met the criteria of paragraph 3 of Annex II and MOFCOM had an obligation to take it into account in its calculation of normal value. Further, even if information submitted by Treasury Wines was "not ideal in all respects" (despite no such express finding

[251] [(Exhibit AUS-11 (BCI)), .]]
[252] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.348. In that dispute, the Panel considered an analogous situation.

in the Final Determination) MOFCOM was still precluded from rejecting that information pursuant to paragraph 5 of Annex II, provided Treasury Wines acted to the best of its abilities.

230. Further, pursuant to paragraph 6 of Annex II, MOFCOM was obliged to consider the explanations and data provided by Treasury Wines in response to the Preliminary Determination and, if they were not considered satisfactory, MOFCOM was obliged to provide reasons for the rejection of the evidence and information in its published determinations and provide an opportunity for interested parties to give an explanation. It did not do so.

231. For the foregoing reasons, MOFCOM erred when claiming certain datasets and information could not be reconciled and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

(b) Information used was not the "Best Available"

232. Assuming *arguendo* that MOFCOM was entitled to resort to facts available, MOFCOM failed to select the "best information available" as a reasonable replacement for the allegedly missing information.[253] [[ ]] The resulting dumping margin for Treasury Wines was 175.6%, the highest of the sampled companies, the calculation of which was flawed.

233. In respect of Treasury Wines, MOFCOM determined that it would "use the data of some product types reported by the company to determine the production costs and expenses of the product under investigation and like products".[254] For information to be considered "best available" it must not only be available and usable, but must also be the most appropriate information available, i.e. the best information available by comparison. This means that even if *arguendo* MOFCOM is entitled to use the available facts, it is not open to it to use just any information; it must use the *best information available*.[255]

[253] In the first instance, Australia submits that no necessary information was missing from the record. China acted inconsistently with Article 6.8, and paragraphs 1, 3, 5 and 6 of Annex II in making its determinations on the basis of facts available.
[254] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 60-61.
[255] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

234. [[ ]]

235. In order to determine the selection of "best information available", an investigating authority is also obliged to undertake a "comparative and systematic evaluation and assessment of that data".[257] Merely "checking for anomalies, aberrations, or the need for adjustments" does not equate to a comparative evaluation and assessment.[258] For example, in selecting the best information available MOFCOM should have accounted for Treasury Wine's production situation and product structure, the cost differences between different types of wine products, and other factors affecting comparability between the company's wine products. [[ ]] demonstrates that MOFCOM did not conduct the required comparative systematic evaluation and assessment of the data submitted, as required by Article 6.8 and paragraph 7 of Annex II.

236. [[ ]]

[256] See above, section II.E.2(a)(iii).
[257] Panel Report, *Canada – Welded Pipe*, para. 7.134
[258] Panel Report, *Canada – Welded Pipe*, para. 7.134.
[259] [(Exhibit AUS-11 (BCI)), .]]

[redacted]

237. [[redacted]]

238. [[redacted]]

239. For the reasons outlined above, Australia submits that the PCN selected by MOFCOM as the basis for calculating normal value, [[redacted]], could not constitute the "best information available" within the meaning of Article 6.8 and Annex II of the Anti-Dumping Agreement.

3. MOFCOM improperly calculated normal value

240. Australia understands MOFCOM adopted three different means of calculating normal value for each PCN based on Treasury Wines' sales. All three methods relied exclusively on sales made to non-related parties. The methods were:

- [[redacted]

[260] [redacted] (Exhibit AUS-11 (BCI)), [redacted].]]
[261] [redacted] (Exhibit AUS-11 (BCI)), [redacted].]]

- [redacted]
- [redacted]]]

241. Australia submits MOFCOM made significant errors in all three methods. As Australia will demonstrate below, these errors resulted in an inflated and incomparable normal value and a correspondingly high dumping margin. Collectively, these errors amounted to inconsistencies with and violations of Articles 2.1, 2.2, 2.2.1, 2.4, 6.8 and Annex II of the Anti-Dumping Agreement.

242. This section addresses the first two methods. The third method, constructed normal value, is addressed in the next section.[263]

(a) MOFCOM failed to have regard to all relevant domestic sales

243. At the heart of MOFCOM's flawed normal value methodology was its improper application of the "ordinary course of trade" test under Article 2.2.1 of the Anti-Dumping Agreement that excluded relevant domestic sales reported by Treasury Wines based on related party transactions and on improperly calculated below cost sales. Insofar as normal values for certain PCNs were determined using domestic prices, this resulted in MOFCOM disregarding relevant domestic wine sales and relying on unrepresentative high-cost domestic sales that artificially inflated the dumping margins for those PCNs.

[262] [redacted.]]
[263] See section II.E.4.

i. MOFCOM failed to consider whether relevant domestic sales were in the 'Ordinary Course of Trade'

244. Articles 2.1 and 2.2 of the Anti-Dumping Agreement make clear that the relevant sales to be included in the calculation of normal value are those occurring in the ordinary course of trade. Australia has set out in detail the obligations arising from these provisions in section B(2).

245. MOFCOM's application of this two-step ordinary course of trade test suffered from three fundamental defects. These were:

- MOFCOM rejected Treasury Wines' related party sales without giving due consideration to whether these were in the ordinary course of trade;
- MOFCOM incorrectly used [[ ]]; and
- MOFCOM failed to consider whether the sales it found to be "below cost" provided for the recovery of costs within a reasonable period of time.

(A) <u>MOFCOM failed to *consider whether related party sales were in the ordinary course of trade*</u>

246. Australia submits MOFCOM erroneously rejected related party sales without giving due consideration to whether these sales occurred in the ordinary course of trade. This is a threshold issue as MOFCOM only applied the Article 2.2.1 ordinary course of trade test to non-related sales.

247. MOFCOM stated in the Final Determination that some of Treasury Wines' like products were sold to non-related clients through related traders, and some were sold directly to non-related clients:

> [D]uring the anti-dumping investigation period, some of the Company's like products were sold to non-related clients through related traders, and some were sold directly to non-related clients. The Investigating Authority decided to use the price of the Company's like

> products of relevant types *sold to domestic non-related clients* as the basis for further determination of normal value.[264] (emphasis original)

248. Australia interprets MOFCOM's use of the phrases "related clients" and "non-related clients" as meaning "related customers" and "non-related customers". Australia understands that MOFCOM's use of "related clients/producers" is a reference to sales made between Treasury Wines and its affiliate Treasury Wines Australia (TWEA). Aside from the above, MOFCOM did not elaborate or provide any further explanation to interested parties of its decision to entirely reject related party sales and exclusively rely on non-related sales.

249. Australia recalls the findings of the Appellate Body in *US – Hot-Rolled Steel* concerning the application of the ordinary course of trade test in Article 2.2.1 to related-party sales:[265]

> Article 2.2.1 sets forth a method for determining whether sales between any two parties are "in the ordinary course of trade"; it does not address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that sales above cost, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities.

250. The Appellate Body identified a number of non-exhaustive factors that may be relevant for authorities in determining whether the terms and conditions are incompatible with normal commercial practice.[266] While price is one factor, authorities should also consider the volume sold at that price and whether additional liabilities or responsibilities were undertaken in the transaction. Such factors should influence an authority's assessment of whether the price at which a sale was made to related parties is either higher or lower than normal commercial practice.

251. Australia submits MOFCOM's decision to reject Treasury Wines' related-party sales without engaging in any "special scrutiny" constituted a significant error in its normal value methodology. The mere fact that transactions are between related parties does not render them *ipso facto* not in the ordinary course of trade so long as these sales occurred at "arm's length". MOFCOM was only entitled to reject sales in the limited circumstances provided for in Article 2.1.[267] This includes, *inter alia*, where such sales are not in the ordinary course of trade because they are "concluded on terms and conditions that are incompatible with

[264] Anti-Dumping Final Determination (Exhibit AUS-2), p. 58.
[265] Appellate Body Report, *US – Hot Rolled Steel*, para. 147.
[266] Appellate Body Report, *US – Hot Rolled Steel*, para. 142.
[267] Appellate Body Report, *US – Hot Rolled Steel*, paras. 140-142.

"normal" commercial practice for sales of the like product in the exporting market".[268] Related party sales, for example, might have a sales price higher than the "ordinary course" price, or because it is lower than that price.[269] In such circumstances, an investigating authority would be entitled to conclude the sales were not made at "arm's length" length transactions and therefore not in the ordinary course of trade.

252. The Final Determination demonstrates MOFCOM did not consider, in an unbiased and objective manner (or at all), whether Treasury Wines' related party sales were made in the ordinary course of trade. To the contrary, MOFCOM's outright rejection of all related party sales indicates it did not turn its mind to the possibility these sales might have occurred with terms and conditions compatible with normal commercial practice in Australia. Australia accepts that MOFCOM was not obligated to scrutinise "*each and every* category of sale that is potentially 'not in the ordinary course of trade'".[270] However, MOFCOM failed to provide any justification for rejecting this sales data, offering no explanation and tendering no evidence for its decision, either in the Preliminary or Final Determinations, or elsewhere.

253. It follows that MOFCOM made a substantial error in its methodology on normal value by failing to consider whether the related party sales were in the ordinary course of trade prior to rejecting these in their totality. In doing so, MOFCOM acted inconsistently with Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

(B) MOFCOM incorrectly used [[redacted]]

254. Australia submits MOFCOM erred in conducting the first step of the two-step Article 2.2.1 test articulated by the Panel in *EC – Salmon (Norway)*. That is, MOFCOM failed to correctly identify the sales made at prices below per unit costs of production, plus administrative, selling, and general costs. [[redacted]]

[268] Appellate Body Report, *US – Hot Rolled Steel*, para. 140.
[269] Appellate Body Report, *US – Hot Rolled Steel*, para. 142.
[270] Appellate Body Report, *US – Hot Rolled Steel*, para. 142.

[[redacted]]

255. Article 2.2.1.1 of the Anti-Dumping Agreement sets out clear obligations for investigating authorities when calculating the costs to be used in the "below cost" assessment. As Australia has set out above in the legal framework,[273] these "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". This obligation is operative so long as the records are in accordance with the generally accepted accounting principles in the exporting country, and reasonably reflect the costs associated with the production and sale of the product under consideration.[274]

256. MOFCOM was obligated to use the costs reported by Treasury Wines for each PCN unless it established one of the exceptional circumstances above on the record. As Australia will established in facts available section above,[275] MOFCOM failed to do so. [[redacted]]

257. [[redacted]]

[271] [redacted] (Exhibit AUS-4 (BCI)).]]
[272] [redacted] (Exhibit AUS-4(BCI)).]]
[273] See section II.B.2(b).
[274] This is discussed further in Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*; Appellate Body Report, *EU – Biodiesel (Argentina)*; Panel Report, *Australia – A4 Copy Paper*.
[275] See section II.E.2(a).
[276] [redacted] (Exhibit AUS-11 (BCI)), [redacted].]]

[redacted]]]

258. [[redacted]]]

259. [[redacted]]]

260. [[redacted]

[277] [redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[278] [redacted] (Exhibit AUS-8 (BCI)).]]
[279] [redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[280] [redacted] (Exhibit AUS-4 (BCI)).]]

[redacted]]]

261. [[redacted]]]

262. [[redacted]

[281] [redacted (AUS-5 (BCI)), redacted.]]
[282] [redacted (Exhibit AUS-11 (BCI)), redacted.]]
[283] [redacted (Exhibit AUS-19 (BCI)).]]
[284] [redacted (Exhibit AUS-4 (BCI)).]]

[redacted]]]

263. [[redacted]]] Accordingly, it was incumbent on MOFCOM to ensure the costs it applied to each PCN were reflective of the actual costs of that PCN to ensure a proper comparison with sales prices. Anything short of this would result in an improper comparison of costs and prices, as has occurred here.

264. [[redacted].]]

[285] See Section II.E.3(a)(ii).

(C) MOFCOM failed to consider whether the "below cost" sales provided for the recovery of costs within a reasonable period of time

265. Australia submits MOFCOM erred in conducting the second step of the Article 2.2.1 process by failing to consider whether the "below cost" sales provided for recoverability within a reasonable period of time.

266. In accordance with Article 2.2.1, it was not sufficient for MOFCOM to merely identify the "below cost" sales. MOFCOM was required to take a second necessary step and determine whether the below-cost sales provided for the "recovery of costs within a reasonable period of time" before disregarding these sales. This required a consideration of whether the per unit costs at the time of sale were above the weighted average per unit costs for the period of investigation.

267. On the basis of the available information, MOFCOM made no finding on the recoverability of costs for below cost sales within a reasonable period. There is nothing on the public record, including the Preliminary and Final Determinations, [[ ]], that indicates MOFCOM even turned its mind to this issue.

268. [[.]]

269. Australia submits that, on the basis of the above errors, MOFCOM failed to establish that the conditions set out in Article 2.2 for resorting to a constructed normal value as an

286 [[ ]]

alternative method to calculate normal value were met. Accordingly, it was required to calculate normal value in accordance with the definitional requirements in Article 2.1. MOFCOM failed to do so and thereby acted inconsistently with Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

ii. Characteristics affecting price comparability in the selected domestic sales

270. Consistent with Australia's analysis in the 'Characteristics affecting domestic and export sales of Australian bottled wine' section above,[287] MOFCOM's selected domestic sales for Treasury Wines had significant differences affecting price comparability. These differences rendered the average of the ex-factory domestic selling prices unsuitable for comparison with export sales unless appropriate adjustments were made.

(A) Product mix (physical characteristics, quality, consumer preferences, price)

271. The sales selected by MOFCOM to calculate Treasury Wines' normal value included products with significantly different physical characteristics which would have affected the domestic selling prices for those products. These characteristics resulted in MOFCOM relying on a product mix reflecting significant variations in products. It obligated MOFCOM to make subsequent adjustments to the domestic sales prices for normal value to ensure a fair comparison with export price.

272. [[.]]

[287] Section II.D.

273. [[ ]]

274. The above analysis makes clear that MOFCOM's use of domestic sales prices where sales for a PCN passed the low volume test was affected by significant product mix differences in the form of physical characteristics, quality, and consumer preferences, which all impact price and affect price comparability. This meant MOFCOM was obligated to adjust for these differences to ensure comparability with export price. As Australia will demonstrate below,[290] MOFCOM failed to make the requisite adjustments to ensure a fair comparison in accordance with Article 2.4 of the Anti-Dumping Agreement.

(B) Level of Trade

275. [[ ]]

276. [[ ]

[288] [(Exhibit AUS-10 (BCI)).]]
[289] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[290] See Section II.J.

[redacted].]]

277. The above analysis makes clear that Treasury Wines' "above cost" sales were affected by level of trade differences. MOFCOM was obligated to adjust for these differences to ensure comparability of the resulting normal value with export price. As Australia will demonstrate below,[292] MOFCOM failed to make the requisite adjustments to ensure a fair comparison in accordance with Article 2.4 of the Anti-Dumping Agreement.

4. MOFCOM improperly resorted to and calculated constructed normal value

278. MOFCOM's use of constructed normal value was affected by multiple errors. As discussed above, MOFCOM made the following errors:

- [[redacted]]
- identified deficiencies in Treasury Wines' production costs and expenses forms that were either incorrect, or which were not necessary for the purposes of constructing normal value, and which resulted in MOFCOM having incorrect recourse to facts available; and
- did not use the best available information when selecting alternative facts.

279. Australia submits that, on the basis of the above errors, MOFCOM failed to establish that the conditions set out in Article 2.2 for resorting to a constructed normal value as an alternative method to calculate normal value were met. Accordingly, it was required to

[291] [redacted] (Exhibit AUS-10 (BCI)).]]
[292] See Section II.J.
[293] Australia set out the erroneous application of the below-cost test in section II.E.3(a)(i).

calculate normal value in accordance with the definitional requirements in Article 2.1. MOFCOM failed to do so and has thereby acted inconsistently with Articles 2.1 and 2.2.

5. MOFCOM selected export sales with characteristics affecting price comparability

280. Consistent with Australia's explanation on domestic sales for normal value, MOFCOM selected export sales with specific characteristics that affected price comparability. These were the product mix and level of trade characteristics set out in detail by Australia in the Characteristics affecting domestic and export sales of Australian bottled wine section above.[294] These differences, while not alone a violation of the Anti-Dumping Agreement, required MOFCOM to make appropriate adjustments to ensure a fair comparison could be conducted to normal value. As Australia will demonstrate in the Fair Comparison section below,[295] MOFCOM failed to do so.

281. [[ ]]

282. On level of trade, MOFCOM stated in the Final Determination that it used non-related clients and "traders" as the basis for determining export price:[297]

> During the anti-dumping investigation period, the Company exported the product under investigation to China in two ways: first, selling directly to Chinese non-related clients; second, selling to Chinese non-related clients through non-related traders. […] for the first sales mode, the Investigating Authority decided to temporarily use the sales price between the Company and Chinese non-related clients as the basis for determining the export price; for the second sales mode, the Investigating Authority decided to temporarily use the sales price between the Company and non-related traders as the basis for determining the export price.

283. Australia submits MOFCOM's selected export price sales gives rise to two level of trade issues. [[ ]]

[294] See section II.D.
[295] See section II.J.
[296] [(AUS-5 (BCI)), .]]
[297] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 69-70.

[redacted].]]

284. [[redacted].]] MOFCOM should have assessed whether a level of trade adjustment was required when determining the export price, or alternatively, for further consideration of the underlying data, to assess whether it supports a claim for adjustments being made for fair comparison based on these price differences.

285. For these reasons, the export sales reported by Treasury Wines and relied upon by MOFCOM were affected by level of trade issues that required adjustments. As Australia will set out below,[300] MOFCOM failed to make such adjustments.

6. Conclusion

286. For the reasons set out above, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement in its application of facts available, and Articles 2.1, 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement in its calculation of normal value.

F. CASELLA WINES PTY LIMITED

1. Overview

287. MOFCOM rejected Casella Wines' domestic sales data and production cost data.[301] It determined the company's normal value using facts available which was "the weighted

[298] [redacted] (Exhibit AUS-10 (BCI)).]]
[299] [redacted] (AUS-5 (BCI)), [redacted].]]
[300] Section II.J.
[301] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 73-85.

average price of domestic sales of other respondents".[302] MOFCOM did not explain which "other respondents" whose domestic sales prices it was referring to and for each respondent, nor which domestic prices. Since Treasury Wines and Swan Vintage were the only other respondents and MOFCOM rejected Swan Vintage's domestic sales because they accounted for less than 5% of exports to China,[303] the reference to "other exporters" might refer only to Treasury Wines. MOFCOM determined Casella Wines' export price using the "sales price between the company and Chinese non-related clients".[304] Based on this approach to normal value and export price, MOFCOM determined a grossly excessive margin of dumping for Casella Wines of 170.9%.

288. MOFCOM's determination of dumping for Casella Wines is inconsistent with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement because:

- MOFCOM improperly rejected Casella Wine's domestic prices and production costs, improperly resorted to facts available, and has therefore acted inconsistently with Articles 2.1 and 2.2 of the Anti-Dumping Agreement;
- Even if it did not improperly resort to facts available, it erred in its selection of facts available; and
- Even if it did not err in its selection of facts available, it failed to undertake a fair comparison between normal value and export price as required by Article 2.4.

2. MOFCOM improperly calculated normal value

(a) MOFCOM failed to have regard to all relevant domestic sales

289. MOFCOM failed to have regard to all relevant domestic sales when calculating normal value for Casella Wines. In accordance with its obligations in the investigation, Casella Wines reported all domestic sales transactions in Form 4-2. MOFCOM made a number of adverse

[302] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.
[303] Anti-Dumping Final Determination (Exhibit AUS-2), p. 88.
[304] Anti-Dumping Final Determination (Exhibit AUS-2), p. 86.

findings concerning the domestic sales data reported by Casella Wines. MOFCOM also identified a number of issues in the forms submitted by Casella Wines in relation to its related sales and special price arrangements, specifically Forms 4-1 and 4-2. On the basis of these alleged deficiencies, MOFCOM concluded it was unable to verify the accuracy, authenticity, and completeness of these affiliated transactions.[305]

290. Australia will demonstrate MOFCOM's findings were based upon three fundamental errors. These errors, which Australia will address below in turn, concerned:

- the agency role of [[ ]] in Casella Wines domestic sales process;
- the sufficiency of Casella Wines' explanation of its special price arrangements with related parties; and
- the incomplete WPS sales spreadsheet data.

291. Due to these errors, MOFCOM was not entitled to reject the domestic sales data supplied by Casella Wines. Having done so, MOFCOM calculated Casella Wines' normal value in a manner that was inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

292. For completeness, Australia submits that MOFCOM's recourse to facts available in its use of the sales prices of "other respondents" to calculate Casella Wines' normal value was entirely nonsensical. Only three respondents provided sales data, being the three sampled companies: Treasury Wines, Casella Wines and Swan Vintage. However, MOFCOM rejected the data of both Casella Wines and Swan Vintage. Accordingly, MOFCOM either used the domestic sales data of Swan Vintage to calculate Casella Wines' normal value despite MOFCOM finding Swan Vintages' domestic sales failed the volume test, or MOFCOM only relied on Treasury Wines' data and its reference to "other respondents" (plural) was incorrect.

[305] Anti-Dumping Final Determination (Exhibit AUS-2), pp.75, 77.

i. MOFCOM fundamentally misunderstood the agency relationship between Casella Wines and [[ ]]

293. Australia submits MOFCOM fundamentally misunderstood the agency relationship that existed between Casella Wines and its affiliated company, [[ ]]. MOFCOM made the following findings:

- no transaction data for the related company was provided in the domestic sales form (Form 4-2);[306]
- despite a sales invoice being issued to the customer in [[ ]] name, this company did not fill in a separate response;[307]
- the sales links and expenses of the related company were not reflected or reported in the domestic sales data;[308] and
- did not explain the fees generated from sales to this related company.[309]

294. The above findings suggest MOFCOM held an incorrect understanding of Casella Wines' relationship with [[ ]]. MOFCOM explanation of its approach to [[ ]] suggests it characterised the relationship as a related intermediary in the sales process.

295. [[

[306] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 74-75.
[307] Anti-Dumping Final Determination (Exhibit AUS-2), p. 75.
[308] Anti-Dumping Final Determination (Exhibit AUS-2), p. 75.
[309] Anti-Dumping Final Determination (Exhibit AUS-2), p. 76.
[310] [(Exhibit AUS-27 (BCI)), .]]
[311] [(Exhibit AUS-27 (BCI)), .]]

[redacted]]]

296. Casella Wines' explanation is consistent with other evidence on the record. [[redacted]]

297. When Casella Wines' relationship with its affiliate is characterised in this manner, it is evident MOFCOM's findings in the Final Determination are incorrect. [[redacted]]] If Casella Wines had reported these as affiliated sales, as MOFCOM seems to suggest they should have done in the Final Determination, MOFCOM would have then objected to the inclusion of these sales on the basis that they are unverifiable and misrepresent Casella Wines' relationship to its affiliate.

298. [[redacted]

[312] [redacted] (Exhibit AUS-28 (BCI)).]]
[313] [redacted] (Exhibit AUS-29 (BCI)), [redacted].]]
[314] [redacted] (Exhibit AUS-29 (BCI)), [redacted].]]
[315] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 4.

[[redacted]]

299. Despite there being no evidence on the public file that suggests [[redacted]] was anything other than an agent of Casella Wines, MOFCOM nonetheless rejected Casella Wines' explanation and made an adverse finding. This is particularly egregious given Casella Wines' explanation was consistent throughout the company's evidence on the record. To the extent that any additional concerns existed, it was open to MOFCOM to request verification from Casella Wines, including through provision of further evidence to demonstrate the nature of this relationship. MOFCOM did not avail itself of this option.

300. For these reasons, MOFCOM failed to consider the available evidence in the requisite "unbiased and objective manner".[317] MOFCOM erred in its adverse findings on [[redacted]], with the public record supporting Casella Wines' characterisation of the company as being its agent with a limited marketing role in its sales to one single customer. [[redacted]] Accordingly, MOFCOM's conclusion that this relationship provided a justification to reject all domestic sales is incorrect.

ii. MOFCOM incorrectly rejected domestic sales due to special price arrangements

301. MOFCOM made a further error in rejecting Casella Wines' reported domestic sales on the basis that the company did not sufficiently explain its special price arrangement and related transactions.

302. In its Final Determination, MOFCOM found in relation to special price arrangements that Casella Wines:

- did not explain the clients and the sales situation;[318]

[316] [[redacted] (Exhibit AUS-29 (BCI))[redacted]]; Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 4.
[317] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[318] Anti-Dumping Final Determination (Exhibit AUS-2), p. 74.

- did not provide the sales process;[319]
- did not explain what special price arrangement meant;[320] and
- failed to provide a reason why the sales prices under some special price arrangements were negative.[321]

303. Australia submits the above information was available on the record and MOFCOM's findings are therefore incorrect. [[special price arrangements were provided in Form 4-1]] These specially priced sales concerned free samples or sales made to internal staff, with the negative amounts being due to taxation.[323] [[ ]]

304. Australia submits Casella Wines provided all information requested by MOFCOM concerning "special price arrangements" in Form 4-1. [[ ]]

[319] Anti-Dumping Final Determination (Exhibit AUS-2), p. 74.
[320] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 75-76.
[321] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 75-76.
[322] [(Exhibit AUS-29 (BCI)), .]]
[323] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 2; Anti-Dumping Final Determination (Exhibit AUS-2), p. 76.
[324] [(Exhibit AUS-29 (BCI)), .]]
[325] See also Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 1; Anti-Dumping Final Determination (Exhibit AUS-2), p. 76.

305. [[ ]]

306. Australia submits that MOFCOM was in a position to identify all the necessary information for sales made under special price arrangements from [[ ]]. Together, these documents sufficiently explain what special price arrangements meant, the clients and the sales situation, and the sales process. Even if MOFCOM considered these related party sales as not being in the ordinary course of trade, it was not entitled to also reject all the sales made to non-affiliated customers. The quantity of sales reported as related party sales or under special price arrangements constituted a very small number of total sales. [[8,333.93 kl or 0.015%.]]

307. On the basis of the above, Australia submits that Casella Wines provided all information concerning special price arrangements and related party sales that MOFCOM requested. [[ ]] As Casella Wines noted in its Supplementary Questionnaire, the affiliated sales were of such low volume that any issue with these sales could not be used to justify the rejection of the non-affiliated sales.[327]

308. On these grounds, MOFCOM was not entitled to reject the reported domestic sales data on the basis of the sales made through special price arrangements.

[326] [(Exhibit AUS-6 (BCI)).]]
[327] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 4.

iii. MOFCOM incorrectly found the WPS domestic sales spreadsheet was incomplete

309. In its Final Determination, MOFCOM found the spreadsheet data of domestic sales in Australia (Form 4-2) was incomplete.[328] Specifically, it made the following findings:

- the electronic spreadsheets were neither complete nor consistent with printed spreadsheets;[329]
- the WPS could supported Casella Wines' submission of all transaction data and its technical problem "could serve as a good excuse for its inability to provide complete spreadsheet submitted [sic]";[330]
- Casella Wines did not inform MOFCOM of its difficulty with the WPS software within the stipulated 15-day period following distribution of the Questionnaire;[331] and
- Casella Wines did not submit the WPS sheets in accordance with MOFCOM requirements after the Preliminary Determination, including either by verifying the response was complete or making every endeavour to submit the sheets.[332]

310. Australia submits MOFCOM's findings concerning Casella Wines' incomplete spreadsheets significantly mischaracterises the evidence on the record, the reasons provided by Casella Wines that justified the incomplete spreadsheets the company initially provided, and the efforts made by Casella Wines to remedy the incomplete information and fully cooperate with the investigation.

311. As Casella Wines explained in its response to the Supplementary Questionnaire, the company was not aware the WPS format did not support a large amount of data until it submitted the Anti-Dumping Questionnaire.[333] In particular, neither MOFCOM nor the program informed Casella Wines the spreadsheets had exceeded the maximum number of

[328] Anti-Dumping Final Determination (Exhibit AUS-2), p. 77.
[329] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 78-79.
[330] Anti-Dumping Final Determination (Exhibit AUS-2), p. 79.
[331] Anti-Dumping Final Determination (Exhibit AUS-2), p. 79.
[332] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 79-80.
[333] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 5-6.

lines and columns, nor that these excess sections would be automatically discarded.[334] Nonetheless, Casella Wines did provide printed versions of these spreadsheets with its physical copy of the Anti-Dumping Questionnaire. MOFCOM was in a position to rely upon the printed versions of these spreadsheets until Casella Wines was made aware of the issue and had an opportunity to provide complete electronic versions, which it did at the first opportunity by attaching Excel versions to its Comments on the Preliminary Questionnaire. The provision of these latter spreadsheets in Excel format was supported by MOFCOM's decades-long practice of using Excel to collect data in investigations, with WPS only being adopted in recent years. WPS is not a commonly used software and is not used by Casella in its daily operations.[335] Once these electronic versions were provided, MOFCOM was in a position to verify the accuracy and completeness of the data in the printed domestic sales spreadsheet.

312. Australia strongly refutes MOFCOM's false characterisation that Casella Wines was uncooperative and did not make every endeavour to provide this information. Such a characterisation is not founded on any evidence on the public record and is contradicted by the conduct and explanations provided by Casella Wines. The fact that Casella Wines provided MOFCOM with printed versions of these spreadsheets demonstrates the company had already prepared the relevant information and the omission of electronic data was unintentional. It proves false MOFCOM's allegation that Casella Wines was using WPS issues as merely "a good excuse". Casella Wines could not have been expected to raise a software issue it did not know existed. On this basis, MOFCOM's finding that Casella Wines failed to inform MOFCOM within the stipulated 15 days of distribution of the Questionnaire is unreasonable. Furthermore, Casella Wines subsequent provision of these forms in an Excel format at the first opportunity and its consistent explanations of the initial deficiency demonstrate a continued effort on its behalf to comply with its obligations as a sampled company in the investigation.

313. MOFCOM's findings reflect an approach in relation to this issue that fell below the requisite "unbiased and objective" standard expected of an investigating authority.[336]

[334] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 6.
[335] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 6.
[336] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.

MOFCOM had access to the relevant data in either printed or electronic form at all relevant times. The evidence on the public file demonstrates Casella Wines gave its best efforts to comply with the information requirements of the investigation. When the deficiency was identified, Casella Wines responded in a prompt manner to remedy the deficiency. It follows that the provided domestic sales data provided by Casella Wines could be verified and authenticated for the purpose of calculating the company's normal value. MOFCOM was not entitled to reject the domestic sales reported in Form 4-2 on the basis of "incompleteness".

314. For the reasons set out above in relation to Casella Wines' agency relationship with [[ ]], special price arrangements, and the incomplete WPS domestic sales spreadsheet, MOFCOM was not entitled to reject the reported domestic sales of Casella Wines, and should have used these sales to calculate the company's normal value.

(b) Characteristics affecting price comparability

315. As Australia set out in detail above,[337] domestic sales of Australian bottled wine possessed characteristics that affected the price comparability of these sales. [[ ]]

316. [[ ]]

[337] See above, section II.D.2(a).
[338] Australia identified these findings in section II.D.2(a).
[339] [[(AUS-6 (BCI)). (Exhibit AUS-5 (BCI)), .]]
[340] [(Exhibit AUS-5 (BCI)), .]]

[[redacted]]

317. For completeness, Australia notes MOFCOM did not select the reported domestic sales for Casella Wines, but instead had recourse to the sales of "other respondents". [[redacted]]

318. It is Australia's firm view that MOFCOM was not permitted to calculate Casella Wines' normal value through [[redacted]], or Swan Vintage's sales which otherwise failed the low volume test in Article 2.2 and were rejected for Swan Vintage's normal value calculation. However, assuming *arguendo* the Panel found otherwise, MOFCOM was obligated to account for the characteristics affecting these high-priced sales that created a distortive effect through artificially inflating the normal value. Australia set these characteristics out above in respect of Treasury Wines.[344] Nothing on the record indicates MOFCOM accounted for these characteristics.

[341] [redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[342] See above, section II.A.7.
[343] See above, section II.E.3.
[344] See above, section II.D.2.

3. MOFCOM improperly resorted to facts available

319. MOFCOM improperly resorted to facts available to calculate aspects of Casella Wines' normal value. As Australia will demonstrate below, MOFCOM made the following errors:

- it identified deficiencies in the production costs and expenses forms that either did not exist, or the allegedly deficient information was not necessary for the purposes of constructing normal value, and which resulted in MOFCOM having incorrect recourse to facts available; and
- it did not use the best available information when selecting facts available.

(a) MOFCOM's Determination

i. Form 6-1-2 Production Cost Sheet for Raw Materials

320. In the Final Determination MOFCOM upheld its findings in the Preliminary Determination relating to Form 6-1-2 ("Production Cost Sheet for Raw Materials")[345] submitted by Casella Wines. These findings were to the effect that:

- "[t]he Company regarded bulk wine as the raw material (or direct raw material) of the product under investigation and like products in its response, and provided "Form 6-1-2 Production Cost Sheet for Raw Materials". Meanwhile, some types not reported as bulk wine were filled in as direct materials in the name of "Clean Skin", but the data for "Clean Skin" were not given in "Form 6-1-2 Production Cost Sheet for Raw Materials";[346]
- "the origin and costs for "Clean Skin" were also not provided";[347] and
- "the Company also did not fill in relevant data or give explanations in the Production Cost Sheet for Raw Materials or Purchase Details".[348]

321. As foreshadowed above,[349] the information requested by MOFCOM in Form 6-1-2 relates to the production costs of raw materials used in the product under investigation.

[345] [[redacted] (Exhibit AUS-31 (BCI)).]]
[346] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 82-83.
[347] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 82-83.
[348] Anti-Dumping Final Determination (Exhibit AUS-2), p. 83.
[349] See above, section II.E.2(a).

[[redacted]]

322. [redacted]

323. [redacted].]]

324. Thus, production costs for raw materials cannot be used to determine the cost of production and domestic like products within the meaning of Article 2 of the Anti-Dumping Agreement. Such costs, therefore, are not "necessary" for Casella Wines' normal value calculations. [[redacted]]]

[350] See above, section II.E.2(a)(ii).
[351] [(Exhibit AUS-29 (BCI)), .]]
[352] See [(Exhibit AUS-32 (BCI)),]]
[353] [(Exhibit AUS-29 (BCI)), .]]
[354] See above, section II.E.2(a).

325. Issues relating to the characterisation of clean skin were not raised by MOFCOM in the Preliminary Determination. MOFCOM did request an explanation from Casella Wines in its Supplementary Questionnaire where it asked:[355]

> [t]he Company said in the Response that "Casella Wines produce bulk wine, which is the raw material (or direct raw material) of the product under investigation and like products. Therefore, we provide "Form 6-1-2 Production Cost Sheet for Raw Materials". Please explain why some models were reported as the direct material Clean Skin but not bulk wine, and why the source and cost of Clean Skin were not provided; besides, you also failed to fill out the Production Cost Sheet for Raw Materials or Procurement Cost Sheet for Raw Materials in accordance with the requirements of the Response or give relevant explanations.

326. This was the first, and last, request for information from MOFCOM relating to clean skin and Form 6-1-2. MOFCOM made no mention of any deficiencies contained in Casella Wines' response to question 4 of the Supplementary Questionnaire. MOFCOM otherwise provided no explanation in the Final Determination as to why it considered alleged deficiencies to remain after receipt of Casella Wines' Supplementary Questionnaire response, and provided no notice of its rejection of Casella Wines' Supplementary Questionnaire response.

327. Assuming, *arguendo*, that the information contained in Form 6-1-2 was "necessary information" within the meaning of Article 6.8, to the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II.[356] In particular, at a minimum, MOFCOM is obliged to explain in what way the information it rejected did not meet the requirements.[357] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. There is no "unlimited right" for MOFCOM to reject all information and ascertain the normal value entirely on the basis of facts available if some information was not provided, or if some information did not meet the criteria in paragraph 3 of Annex II.[358]

328. MOFCOM was further obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Casella Wines had acted to the best of its ability. Casella Wines had provided complete data, with full explanations of why it was

[355] See Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 8-9 (question 4).
[356] Panel Report, *US – Steel Plate*, para. 7.58.
[357] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[358] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7.343

presented in the way chosen. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

329. MOFCOM otherwise did not inform Casella Wines of the reasons for not accepting the information submitted in Casella Wines' response to the Preliminary Determination or the Supplementary Questionnaire, did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM stated in the Final Disclosure published on 12 March 2021, which was 14 calendar days prior to the Final Determination, that it "decided in the Preliminary Ruling to conduct a review and evaluation on the basis of the facts already obtained and the best information available" for the purposes of determining normal value.[359]

330. Given the length of time between receipt of Casella Wines' Anti-Dumping Questionnaire Response, its response to the Preliminary Determination, and publication of the Final Determination, it is clear that MOFCOM failed to notify Casella Wines why its submitted information had not been accepted *immediately* and *without delay*. Further, paragraph 6 of Annex II required MOFCOM to provide an opportunity for Casella Wines to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, MOFCOM never provided Casella Wines with such an opportunity.

331. For these reasons, MOFCOM erred when it relied upon Casella Wines' response to Form 6-1-2 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

ii. Form 6-3 Product Costs and Related Expenses

332. In the Final Determination, MOFCOM upheld its findings in the Preliminary Determination relating to Form 6-3 ("Product Costs and Related Expenses")[360] submitted by Casella Wines. These findings were to the effect that:

- "[T]he Company provided incomplete spreadsheet data and only filled in the data for some product types";[361] and

[359] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 29-30.
[360] [(Exhibit AUS-33 (BCI)).]]
[361] Anti-Dumping Final Determination (Exhibit AUS-2), p. 80.

- "[A]mong the data filled in, the Company did not provide cost sheets saved in daily operations as required by the questionnaire, making it impossible for the Investigating Authority to verify the correctness of the data based on the response".[362]

333. Each of these findings was in error. They are discussed separately below.

(A) MOFCOM's refusal to accept replacement spreadsheet data

334. MOFCOM's concern about the incompleteness of this spreadsheet data had first been raised in the Preliminary Determination.[363] [[ ]]

335. MOFCOM did not raise any concerns about this approach with Casella Wines, or issue any follow-up questionnaire or notice requesting the provision of this data in any alternate format. The Supplementary Questionnaire issued by MOFCOM to Casella Wines only asked why the electronic data in the original response was incomplete and asked why Casella Wines had not submitted an application to provide its original response in a different format within 15 days of receipt of the Anti-Dumping Questionnaire.[365] Casella Wines reiterated its explanation provided in its earlier submission (in response to the Preliminary Determination) and added that it had been impossible for it to submit an application within 15 days of the Anti-Dumping Questionnaire being issued given the problem had not been identified until much later.[366]

[362] Anti-Dumping Final Determination (Exhibit AUS-2), p. 80.
[363] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 28
[364] [(Exhibit AUS-29 (BCI)),]]
[365] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 4-5.
[366] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 5-6.

336. MOFCOM then reiterated the same findings in the Final Determination,[367] with no reference to the complete data submitted by Casella Wines in Excel and PDF, both of which are commonly used formats. MOFCOM acknowledged that a printed copy of the complete data had been submitted but refused to consider it on the basis that the data in it was inconsistent with the original WPS submission, which Casella Wines had conceded was deficient.[368]

337. MOFCOM did not at any time contend that the Excel, PDF or hard copy versions of Casella Wines' responses were in any way deficient, save for the nonsensical critique that the printed copy was different from the erroneous version.[369] Nor did MOFCOM allege that it was unable to use the alternate formats or that it faced any material difficulty in doing so. No request was made by MOFCOM for the data to be submitted in any additional, preferred, format.

338. MOFCOM's own Anti-Dumping Questionnaire had specified that PDF was an acceptable format to provide data in – mandating that all data be provided in both WPS and PDF format.[370] No explanation was given for its refusal to use the data provided in one of its own specified preferred formats.

339. The two reasons given by MOFCOM for its refusal to use the data were not credible and did not identify any genuine obstacle to using the data provided.

340. First, MOFCOM complained that Casella Wines had not submitted an application to it to submit the data in a different format within 15 days of receipt of the Anti-Dumping Questionnaire.[371] Given Casella Wines' uncontested submission that it was not aware of the limitations of the format until MOFCOM flagged its concerns in the Preliminary Determination, it is unreasonable for MOFCOM to insist upon compliance with this procedural requirement. Moreover, this response highlights that MOFCOM was open to data being provided in other formats, indicating that it was capable of making use of such submissions without undue difficulty.

[367] Anti-Dumping Final Determination (Exhibit AUS-2), p. 84.
[368] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 78-79.
[369] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 78-79.
[370] See Anti-Dumping Questionnaire (Exhibit AUS-3), Instruction 15 under heading "Specific Instructions and Requirements", p. 12.
[371] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), p. 4.

341. Second, MOFCOM complained that Casella Wines had not attempted to split the transaction data into multiple WPS documents if one document could not accommodate the transaction data.[372] This is an unreasonable proposition. It is not apparent why any investigating authority would prefer to receive data separated into multiple different documents, rather than receiving them in an integrated format. Such data would have to be reconsolidated into a different format to be useful – a process that if MOFCOM was prepared to undertake, it could readily have used for the data provided in PDF or Excel. Further, despite the months that had passed since Casella Wines first raised the issue with the WPS format with MOFCOM, MOFCOM never made a request to Casella Wines that multiple files be provided instead of the alternative formats that were submitted.

342. Even to the extent that MOFCOM was genuinely dissatisfied with the format in which the information was submitted, it was nonetheless required to examine that information in light of the criteria in paragraph 3 of Annex II.[373] It was required to "actively make efforts" to use the information submitted.[374] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium having regard to the explanation provided by MOFCOM. An unbiased and objective investigating authority could not have found otherwise.[375]

343. MOFCOM was obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Casella Wines had acted to the best of its ability. Given the comprehensive explanations, and resubmissions of the data in different formats provided by Casella Wines, MOFCOM should have found that Casella Wines had acted to the best of its ability. MOFCOM was not entitled to insist the information be provided in a particular format in circumstances where Casella Wines had clearly articulated the unreasonableness of that requirement in light of the volume of data sought, and had provided the same data in multiple alternative formats.

[372] Anti-Dumping Final Determination (Exhibit AUS-2), p. 79.
[373] Panel Report, *US – Steel Plate*, para. 7.58.
[374] See Panel Report, *US – Steel Plate*, para. 7.65.
[375] See above, section I.C, which outlined the standard of review required of an investigating authority to evaluate information submitted by interested parties in an 'unbiased and objective manner'; see Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.

(B) MOFCOM's complaint about the absence of cost sheets saved in daily operations

344. MOFCOM also alleged that the data in Form 6-3 submitted by Casella Wines in the original WPS version of the form did not include "cost sheets saved in daily operation".[376] MOFCOM complained that this made it "impossible" for MOFCOM to verify the data.[377]

345. Casella Wines responded in its response to the Preliminary Determination that [[ ]]

346. There is no evidence on the record that MOFCOM took any steps to verify the reported data from Casella Wines production and stock system, either before or after receipt of this submission. Casella Wines offered to MOFCOM a reasonable and conventional method of verifying data drawn from an accounting system, and MOFCOM elected to make no further enquiries. There is nothing on the record to suggest that MOFCOM was unable to verify the data in the way proposed by Casella Wines, or would have faced undue difficulties in adopting that method.

347. There was no basis for MOFCOM to conclude that it was "impossible" for it to verify the data. The data was "verifiable", within the meaning of paragraph 3 of Annex II. Inaction by an investigating authority that is presented with a reasonable mechanism for verifying data cannot be the basis for that authority to then reject the otherwise properly submitted data and then have resort to facts available.

348. For the foregoing reasons, MOFCOM erred when it relied upon Casella Wines' response to Form 6-3 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.

[376] Anti-Dumping Final Determination (Exhibit AUS-2), p. 80.
[377] Anti-Dumping Final Determination (Exhibit AUS-2), p. 80.
[378] [(Exhibit AUS-29 (BCI)), (Exhibit AUS-33 (BCI)).]]

iii. Form 6-4 Production Cost Details of the Product Under Investigation and the Like Product

349. In the Final Determination MOFCOM upheld its findings in the Preliminary Determination relating to Form 6-4 ("Product Costs and Related Expenses")[379] submitted by Casella Wines. These findings were to the effect that:

- "the Investigating Authority found that the Company failed to fill in the costs for bulk wine, one of the major raw materials, in the cost details for multiple types";[380] and
- "some product control codes were not reported in the sheet (shown as #N/A), making it impossible for the Investigating Authority to compare these data".[381]

350. Each of these findings was in error. They are discussed separately below.

(A) <u>The purported failure to fill in the costs for bulk wine</u>

351. MOFCOM's allegation that costs data for bulk wine were not filled in for certain product types was underpinned by an assumption made by MOFCOM, without a factual or evidentiary basis, that every product had to have a cost component that was labelled as "bulk wine". It insisted on this assumption in the face of persuasive explanation as to why that assumption was unsustainable.

352. MOFCOM first complained about the lack of costs data for "bulk wine" in Form 6-4 in the Preliminary Determination.[382] Casella Wines provided a submission in response where it explained that:[383]

[[

[379] [(Exhibit AUS-34 (BCI)).]]
[380] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.
[381] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.
[382] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p.28.
[383] [(Exhibit AUS-29 (BCI)), .]]

353. [redacted]

354. [redacted]

[redacted]]]

355. Despite the clear and cogent explanation given by Casella Wines, MOFCOM maintained its criticism that Casella Wines had "failed to fill in the costs for bulk wine" in Form 6-4 in the Final Determination.[385] MOFCOM summarised Casella Wines' explanations in the Final Determination but did not engage with them at all – aside from an observation that "bulk wine was an important raw material".[386] No reasons were provided by MOFCOM as to why it did not accept Casella's explanation. Instead, MOFCOM maintained its earlier finding and relied upon it as part of its conclusion that it was unable to determine normal value from Casella Wines' data, and would instead resort to facts available.[387]

356. MOFCOM was required to examine that information in light of the criteria in paragraph 3 of Annex II.[388] It was required to "actively make efforts" to use the information submitted.[389] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. MOFCOM was not entitled to reject the data solely on the basis that it, without any evidentiary

[384] [[redacted] (Exhibit AUS-32 (BCI)), [redacted]]]
[385] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.
[386] Anti-Dumping Final Determination (Exhibit AUS-2), p. 83.
[387] Anti-Dumping Final Determination (Exhibit AUS-2), p. 84.
[388] Panel Report, *US – Steel Plate*, para. 7.58.
[389] See Panel Report, *US – Steel Plate*, para. 7.65.

basis, had formed the view that Casella Wines' cost data should be organised in some different way.

357. MOFCOM was obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Casella Wines had acted to the best of its ability. Casella Wines had provided complete data, with full (and repeated) explanations of why it was presented in the way chosen. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

(B) The use of product control code marker "#N/A"

358. In the Final Determination MOFCOM recalled its finding from the Preliminary Determination that some product control codes in Form 6-4 submitted by Casella Wines "were not reported in the sheet (shown as #N/A), making it impossible for the Investigating Authority to compare these data".[390] Although MOFCOM did not say so expressly, it appears it affirmed and relied upon this finding in the Final Determination as part of its decision to disregard the data submitted in Form 6-4 and resort to facts available.[391]

359. MOFCOM persisted with this finding, despite expressly recording in the Final Determination that Casella Wines had explained that for "those product control codes shown as #N/A, it meant that these products were not sold during the investigation period; since they were irrelevant to the calculation of dumping margin, no product control codes were attributed to them".[392] MOFCOM did not offer any reasons as to why it had not accepted this explanation.

360. It was unreasonable for MOFCOM to insist upon the provision of costs data for products that had not been sold in the investigation period, given how it had chosen to define the scope of its investigation. The Anti-Dumping Questionnaire issued by MOFCOM expressly confined the requirement to provide information to the "products, production and sales of the product under investigation…during the investigation period".[393]

[390] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.
[391] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 83-84.
[392] Anti-Dumping Final Determination (Exhibit AUS-2), p. 82.
[393] See Anti-Dumping Questionnaire (Exhibit AUS-3), p. 5.

361. It was unreasonable for MOFCOM to use the absence of such data as a reason to reject the costs data provided for products that were sold during the investigation period, and instead resort to facts available. There is no basis on which MOFCOM could have concluded that costs data for products that were never sold within the investigation period could have been "necessary" information for the purpose of that investigation. Even if could have been "necessary" (which it clearly was not), no request for product costs outside the period of investigation been made, as required by paragraph 1 of Annex II.

362. For the foregoing reasons, MOFCOM erred when it relied upon Casella Wines' response to Form 6-4 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3 and 5 of Annex II of the Anti-Dumping Agreement.

iv. Reconciliation of Forms 6-1-2, 6-3, and 6-4

363. MOFCOM made a number of allegations in the Final Determination that Casella Wines submitted certain responses to the Anti-Dumping Questionnaire, which were inconsistent or irreconcilable with other responses it provided. MOFCOM used these alleged inconsistencies as a basis to have recourse to facts available.

364. MOFCOM made two findings with respect to the consistency of the data in Form 6-4:

- "[T]he unit prices of bulk wine for some types were not consistent with those in "Form 6-1-2 Production Cost Sheet for Raw Materials";[394] and
- "[T]he Company also did not elaborate the alignment between Form 6-3 and Form 6-4".[395]

365. Each of these findings was in error. They are discussed separately below.

[394] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.
[395] Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.

(A) Inconsistencies between Forms 6-4 and 6-1-2 regarding the unit prices of bulk wine

366. In relation to the allegation that the unit prices of bulk wine "for some types" in Form 6-4 were inconsistent with Form 6-1-2, it must be noted at the outset that MOFCOM did not specifically identify which specific aspects of the data submitted were allegedly inconsistent.

367. In the first instance, Australia submits that given a number of the identified inconsistencies were between forms which did not contain "necessary" information, it is therefore unnecessary for those forms to be reconciled for calculation purposes. Specifically, as outlined above,[396] Form 6-1-2 was not "necessary" for Casella Wines' normal value calculations. [[ ]] On this basis, Australia submits that it is unnecessary for Form 6-4 to be reconciled with Form 6-1-2 for calculation purposes.

368. Assuming, *arguendo*, that Form 6-1-2 contained "necessary information" within the meaning of Article 6.8, Australia submits that the Anti-Dumping Questionnaire did not specify that the information required must be reconciled for verification purposes. Paragraph 1 of Annex II clearly places the onus on MOFCOM to explain in detail the type of information that it is seeking, and the information it requires, in order to verify certain information. If MOFCOM needed certain data verified it should have specified what it required in the relevant forms attached to the Anti-Dumping Questionnaire for verification purposes, rather than attempting to compare the data provided in different datasets submitted by Casella Wines. MOFCOM failed to take all reasonable steps that might be expected from an unbiased and objective authority to specify in detail the information requested, as soon as possible after initiation of the investigation, and acted inconsistently with paragraph 1 of Annex II.

369. Australia submits that Form 6-4 was otherwise appropriately submitted so that it could be used without undue difficulties, in accordance with paragraph 3 of Annex II. There is no evidence on the record to indicate to the contrary. If MOFCOM was not able to use the

[396] See above, section II.E.2(a)(ii).
[397] See above, section II.E.2(a)(iv).

information submitted in Form 6-4 without experiencing "undue difficulties," it was incumbent on MOFCOM to provide an explanation of the problem.[398] MOFCOM did not do so.

370. Casella Wines provided reasonable explanations that the data and information in Form 6-4 was reconcilable, and which would have allowed MOFCOM to verify the information. [[ ]]

371. Despite providing a fulsome explanation that was sufficient to allow MOFCOM to verify the accuracy and reliability of this aspect of the information submitted in Form 6-4, MOFCOM instead concluded that Casella Wines "did not give a convincing explanation for the inconsistency in the unit prices of bulk wine".[401] This is despite Casella Wines having to guess at exactly what the alleged "inconsistencies" MOFCOM identified in its Preliminary Determination, and then provide an explanation in the abstract. MOFCOM also sought no further explanations or information from Casella Wines relating to the alleged inconsistencies between Form 6-4 and Form 6-1-2 after receiving Casella Wines' response to its Preliminary Determination, as part of its "review" of the data and information. MOFCOM did not engage with Casella Wines' explanation in the Final Determination, and no reasons were provided by MOFCOM as to why it did not accept Casella Wines' explanation.

372. MOFCOM was required to examine that information in light of the criteria in paragraph 3 of Annex II.[402] It was required to "actively make efforts" to use the information submitted.[403] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. MOFCOM was not entitled to reject the data solely on the basis that it, without any evidentiary

[398] See Panel Reports, *US – Steel Plate*, paras. 7.72 and 7.74 and *China – Broiler Products (Article 21.5 – US),* para. 7.348.
[399] [(Exhibit AUS-29 (BCI)), .]]
[400] [(Exhibit AUS-29 (BCI)),]]
[401] Anti-Dumping Final Determination (Exhibit AUS-2), p. 83.
[402] Panel Report, *US – Steel Plate*, para. 7.58; see also section II.B.1(b).
[403] See Panel Report, *US – Steel Plate*, para. 7.65.

basis, had formed the view that Casella Wines' consumption data could not be reconciled, when the evidentiary record demonstrates that it could be.

373. MOFCOM was obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Casella Wines had acted to the best of its ability. Casella Wines had provided complete data, with full explanations regarding how it could be reconciled with different datasets. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

374. Further, pursuant to paragraph 6 of Annex II, MOFCOM was obliged to consider the explanations and data provided by Casella Wines in response to the Preliminary Determination and, if they were not considered satisfactory, MOFCOM was obliged to provide reasons for the rejection of the evidence and information in its published determinations and provide an opportunity for interested parties to give an explanation. It did not do so.

375. For the foregoing reasons, MOFCOM erred when claiming Forms 6-4 and 6-1-2 could not be reconciled and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

(B) 'Alignment' of Forms 6-3 and 6-4

376. In the Final Determination MOFCOM reiterated its finding from the Preliminary Determination that Casella Wines "did not elaborate [on] the alignment between Form 6-3 and Form 6-4".[404] Similar to other allegations above,[405] although MOFCOM did not say so expressly, it appears it affirmed and relied upon this finding in the Final Determination as part of its decision to disregard the data submitted in Form 6-4 and resort to the use of facts available.[406]

377. [[[redacted]

[404] Anti-Dumping Final Determination (Exhibit AUS-2), p.81.
[405] Specifically, MOFCOM's allegation that some product control codes in Form 6-4 submitted by Casella Wines "were not reported in the sheet (shown as #N/A), making it impossible for the Investigating Authority to compare these data."
[406] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 83-84.
[407] [[redacted] (Exhibit AUS-33 (BCI)).]]

[[redacted]] Both Forms 6-3 and 6-4 contained 'necessary information' within the meaning of Article 6.8 of the Anti-Dumping Agreement.

378. [[redacted]] It is therefore difficult to ascertain what data specifically in both Forms could not be "aligned" and exactly why Casella Wines needed to "elaborate on the alignment" between Forms 6-3 and 6-4.

379. [[redacted]]

380. In circumstances where the data is clearly reconcilable between Forms 6-3 and 6-4, it was unreasonable for MOFCOM to insist that both datasets be "aligned". It was unfounded for MOFCOM to continue to allege an inconsistency which did not exist, or without proper specification, as a reason to reject the data provided, and instead resort to facts available.

381. For the foregoing reasons, MOFCOM erred when it relied upon Casella Wines' response to Form 6-4 as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

(b) The Information Used was not the "Best Available"

382. In the alternative, if MOFCOM was entitled to resort to facts available, MOFCOM failed to select the "best information available" as a reasonable replacement for the allegedly missing information.[410] MOFCOM used "the weighted average price of domestic sales of other respondents" purportedly adjusted to the ex-factory level,[411] to calculate normal value

[408] [redacted] (Exhibit AUS-34 (BCI)).]]
[409] [redacted] (Exhibit AUS-36 (BCI)).]]
[410] In the first instance, Australia submits that no necessary information was missing from the record. China acted inconsistently with Article 6.8, and paragraphs 1, 3, 5 and 6 of Annex II in making its determinations on the basis of facts available.
[411] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.

without exercising special circumspection or undertaking a process of reasoning and evaluation of the record evidence, as required under Article 6.8 and paragraph 7 of Annex II. The resulting dumping margin for Casella Wines was 170.9%, the calculation of which was grossly flawed.

i. MOFCOM'S Stated Methodology for Determining Normal Value Through Facts Available for Casella Wines and Swan Vintage Was Irrational

383. In respect of both Casella Wines and Swan Vintage, MOFCOM had erroneous recourse to facts available to calculate normal values and chose to use the "weighted average price of domestic sales of other respondents".[412]

384. Taken on its face, this approach suggests that MOFCOM rejected the actual data reported by both of those companies, and instead calculated averages from the data provided by "other respondents".

385. The obvious difficulty with this assertion is that only the three respondents included in the sample provided price data on domestic sales to MOFCOM as part of the investigation. Given that two of those companies were Casella Wines and Swan Vintage themselves, it is impossible to discern a rational methodology from MOFCOM's stated approach.

386. MOFCOM provided no further explanation of what it meant by this concept of "weighted average" in the Final Determination. No explanation was given as to how, even at a conceptual level, MOFCOM purported to calculate a weighted average when only partial data from one company (i.e. Treasury Wines) was accepted. It is impossible to understand what a "weighted average" of sales from "other respondents" (in plural) could constitute when this average was, itself, the basis for the determination of the price of domestic sales of all except one of the respondents.

387. Australia submits that this statement of MOFCOM's approach must be given one of three potential interpretations, each of which involved error.

388. One interpretation is that, in the case of Casella Wines, MOFCOM used the prices it determined for domestic sales from Swan Vintage and Treasury Wines to calculate a weighted

[412] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 85, 92.

average, and in the case of Swan Vintage, MOFCOM used the prices it determined for Casella Wines and Treasury Wines to calculate a weighted average. This would be logically and mathematically nonsensical because:

- In the case of Casella Wines, it would mean that the price was determined by an average where one of the data points used to create the average (Swan Vintage's price) was itself an average purportedly calculated using, as an input, the *very average* that was to be determined by the equation being performed (because Swan Vintage's price was based on Casella Wines' price).
- In the case of Swan Vintage, it would mean that the price was determined by an average where one of the data points used to create the average (Casella Wines' price) was itself an average purportedly calculated using, as an input, the *very average* that was to be determined by the equation being performed (because Casella Wines' price was based on Swan Vintage's price).

389. Such an approach would involve a recursion that would be incapable of leading to the calculation of any mathematically valid figure.

390. The second interpretation is that, in the case of Casella Wines, MOFCOM decided to calculate a weighted average using the actual price data submitted by Swan Vintage and Treasury Wines, and in the case of Swan Vintage, use the actual price data submitted by Casella Wines and Treasury Wines. The effect of this approach would be that:

- MOFCOM decided that the data from Swan Vintage that it rejected for the purpose of calculating Swan Vintage's *own* normal value (due to the low volume of domestic sales)[413] was sufficiently reliable and probative to use to calculate Casella Wines' normal value; and
- MOFCOM decided that the data from Casella Wines that it rejected for the purpose of calculating Casella Wines' *own* normal value (due to an alleged inability to verify the completeness and accuracy of domestic sales

[413] Anti-Dumping Final Determination (Exhibit AUS-2), p. 88.

transactions and cost data)[414] was sufficiently reliable and probative to use to calculate Swan Vintage's normal value.

391. Such an approach would be patently irrational as it would involve treating the same price data as both unreliable and reliable for a relevantly identical purpose.

392. The third interpretation is that despite claiming to use a "weighted average" of other respondents (in plural), MOFCOM in fact simply used the price data it relied upon for Treasury Wines and applied it to Casella Wines and Swan Vintage. This interpretation would involve treating MOFCOM's explanations of its methodology in the Final Determination as false, and inevitably would result in MOFCOM having violated its obligations of transparency and due process.

393. Nonetheless, Australia submits that in the absence of a compelling and evidence-based alternative explanation from China, the inference that this is what occurred should be drawn given that it is impossible to give MOFCOM's stated methodology a rational interpretation if it is read literally. This interpretation would also explain how MOFCOM arrived at the absurdly high margins it calculated for each of the sampled companies, since it would carry across the highly selective use of unrepresentative data from Treasury Wines and apply it to each of the other sampled companies. If this is in fact what has occurred, then it necessarily follows that the errors made by MOFCOM in its treatment of Treasury Wines' price data invalidate its determinations for both Casella Wines and Swan Vintage. The use of this methodology for two of the three sampled companies also had a highly detrimental effect on the calculation of the rates for other named Australian exporters and all others.

ii. MOFCOM did not check the information from "other respondents" against information obtained from the sampled companies, nor from other independent sources

394. As stated above, MOFCOM decided to adjust the "expenses" to the ex-factory level, based on the "weighted average price of domestic sales of the product under investigation given by other respondents" to determine normal value.[415] MOFCOM did not identify the

[414] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 78, 84.
[415] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 85, 92.

"other respondents" nor the domestic sales data it relied on for calculation purposes. However, since Treasury Wines and Swan Vintage were the only "other respondents" and MOFCOM rejected Swan Vintage's domestic sales,[416] the reference to "other exporters" might refer only to Treasury Wines.

395. MOFCOM claimed in the Final Determination that it "[took] into account the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors" before deciding to resort to use data submitted by "other respondents" as the best information available.[417]

396. There is no evidence on the record to support the assertion that MOFCOM checked the data it used for the normal value against other independent sources, in the manner required by paragraph 7 of Annex II. As for "taking into account" the physical properties of the product under investigation, cost differences and trade links, MOFCOM provides no further elaboration. It is also unclear what "other influencing factors" were relevant to MOFCOM's assessment. The mere listing of these factors is not indicative of its analysis. As the Panel explained in *Canada – Welded Pipe*: [418]

> Collecting data is not the same as undertaking a comparative and systematic evaluation and assessment of that data for the purpose of applying facts available. Nor does checking for anomalies, aberrations, or the need for adjustments equate to a comparative evaluation and assessment.

397. MOFCOM does not explain what, if any, comparisons were made in respect of the data collected, and whether it evaluated prices, volumes, product specification, or differences in sales terms, shipping costs, and market structure in order to reconcile the information from that submitted by the "other respondents" with that submitted by Casella Wines. It is not sufficient for MOFCOM to merely assert it "[took] into account" specific factors in the absence of any further explanation or analysis. Explanations provided by an investigating authority must be sufficiently detailed to allow a panel to assess whether the facts available were a reasonable replacement for the missing necessary information.[419]

[416] Anti-Dumping Final Determination (Exhibit AUS-2), p. 88.
[417] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.
[418] Panel Report, *Canada – Welded Pipe*, para. 7.140.
[419] See Appellate Body, *US - Carbon Steel (India)*, para. 4.421. In this dispute, the Appellate Body was considering the equivalent provision in the SCM Agreement, Article 12.7.

398. Australia submits that MOFCOM's explanation was lacking in requisite detail because it is clear from the evidence on the record that MOFCOM did not check the information submitted by the "other respondents," with other independent sources as required by paragraph 7 of Annex II.

399. MOFCOM could also have checked the data from "other respondents" against "information obtained from other interested parties during the investigation". The data submitted by Casella Wines on cost of production and expenses, which Australia submits MOFCOM unjustifiably disregarded,[420] suggests that the information that should have been applied was before MOFCOM and could have been used to construct normal value.

400. As outlined above,[421] [[ ]] In both its Preliminary and Final Determinations, MOFCOM failed to disclose the basis upon which the weighted average of the "other respondents" data was chosen as the "best information available" in circumstances where Casella Wines provided extensive transaction level data throughout the investigation.

iii. MOFCOM did not undertake a process of evaluation or reasoning of the facts on the record regarding normal value

401. As foreshadowed above,[423] in order to determine the selection of "best information available", an investigating authority must undertake a "comparative and systematic evaluation and assessment of that data".[424] MOFCOM's collection of data from Casella Wines is not the same conducting an evaluation and assessment of said data. Further, as outlined by the Panel in *Canada – Welded Pipe* "[n]or does checking for anomalies, aberrations, or the need for adjustments equate to a comparative evaluation and assessment".[425]

[420] See above, section II.F.2.
[421] See above, section II.F.3(a)(ii).
[422] [(Exhibit AUS-33 (BCI)).]]
[423] See above, section II.E.2(b).
[424] Panel Report, *Canada – Welded Pipe*, para. 7.140
[425] Panel Report, *Canada – Welded Pipe*, para. 7.140.

402. For example, in selecting the best information available MOFCOM should have accounted for Casella Wine's production situation and product structure, the cost differences between different types of wine products, and other factors affecting comparability between the company's wine products. MOFCOM's application of uniform cost and related expenses data based on a weighted average of "other respondents'" data to all products demonstrates that MOFCOM did not conduct the required comparative systematic evaluation and assessment of the data submitted, as required by Article 6.8 and paragraph 7 of Annex II.

403. By failing to consider the other information in its selection of facts to replace the allegedly missing information, MOFCOM failed to undertake "a process of reasoning and evaluation" to select facts which reasonably replaced facts on the record in order to arrive at an accurate determination.[426]

404. Further, the final sentence of paragraph 7 of Annex II provides that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate". MOFCOM made a groundless finding concerning a lack of cooperation on the part of both Casella Wines and Swan Vintage to effectively justify a "less favourable" result. Investigating authorities are not entitled to arrive at a less favourable result simply because an interested party failed to furnish information if they otherwise cooperated.[427] According to the Appellate Body:[428]

> Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination, and thus cannot be made on the basis of procedural circumstances alone.

405. For the reasons outlined above, Australia submits that the weighted average price of domestic sales provided by "other respondents", selected by MOFCOM as the basis for calculating normal value, could not constitute the "best information available" within the meaning of Article 6.8 and Annex II of the Anti-Dumping Agreement.

[426] See Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.
[427] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99. See also, Panel Report, *US – Coated Paper (Indonesia)*, para. 7.115. See also Section II.C above where Australia demonstrates that the sampled companies fully cooperated in the investigation.
[428] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172. (footnotes omitted)

(c) MOFCOM had all necessary information to construct normal value

406. For the foregoing reasons, Australia has demonstrated the weighted average ex-factory prices of "other respondents" domestic sales was not the best available information. Furthermore, MOFCOM had all necessary information to calculate constructed normal value. On this basis, Australia submits that even if MOFCOM had correctly determined it was unable to rely on the reported domestic sales to calculate normal value pursuant to Article 2.1, the necessary information was available to use constructed normal value as the alternative methodology under Article 2.2.

4. MOFCOM selected export sales with characteristics affecting price comparability

407. As in the case of Treasury Wines, while MOFCOM's approach to determining export prices did not alone violate the Anti-Dumping Agreement, it required MOFCOM to make appropriate adjustments to ensure a fair comparison could be conducted with normal value.

408. Australia has demonstrated the influence of product mix on the sales prices of Casella Wines' export sales.[429] [[ ]]

409. Australia also submits MOFCOM was required to make adjustments to account for level of trade differences to ensure a proper comparison with normal value. MOFCOM relied upon the export sales prices reported by Casella Wines to "Chinese non-related clients" to determine export price.[431] [[

[429] See above, section II.D.3.
[430] [(AUS-5 (BCI)), .]]
[431] Anti-Dumping Final Determination (Exhibit AUS-2), p. 86.
[432] [(Exhibit AUS-37 (BCI)).]]

[redacted]]]

For completeness, an export price exclusively calculated on distributor level sales (the lowest level of trade) would not permit a proper comparison with a normal value calculated on high priced direct to consumer sales (the highest level of trade), especially where the domestic sales relied upon were made by a different company in materially different operating circumstances. MOFCOM was under a duty to account for differences affecting price which arise at different levels of trade. The public record and MOFCOM's own explanation of its methodology indicates it failed to do so.

5. Conclusion

410. For the reasons set out above, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement in its application of facts available, and Articles 2.1 and 2.2 of the Anti-Dumping Agreement in its calculation of normal value.

G. AUSTRALIA SWAN VINTAGE PTY LTD

1. Overview

411. MOFCOM erred in its determination of normal value and the comparison of normal value to export price in relation to Swan Vintage. These errors led to an inflated dumping margin of 116.2%.

412. With respect to normal value, MOFCOM improperly resorted to facts available under Article 6.8 because all necessary information was available to construct normal value. As such, MOFCOM was required to determine normal value in accordance with Articles 2.1 and 2.2 and failed to do so.

413. In the alternative, if MOFCOM did properly resort to facts available, it did not replace missing necessary information with the best available information and thereby acted

inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II. These errors reflect, in part, MOFCOM's failure to inform Swan Vintage forthwith of the reasons for not accepting evidence or information and provide Swan Vintage with an opportunity to provide further explanations with a reasonable period. This failure denied Swan Vintage a full opportunity to defend its interests in relation to the determination of normal value.

2. MOFCOM failed to comply with its disclosure obligations

414. MOFCOM's failures to comply with the procedural and disclosure obligations in Articles 6.4 and 6.9 and paragraph 6 of Annex II of the Anti-Dumping Agreement underpin and compound the errors MOFCOM made in determining Swan Vintage's normal value and export price. In its comments on MOFCOM's disclosures for the Preliminary and Final Determinations, Swan Vintage made the following statements:

- On the calculation of normal value, MOFCOM's Preliminary Determination only discloses that it "temporarily decided to use the costs and expenses of some of the product under investigation reported by the Company, as well as the profit margin reported by the Company to calculate the constructed normal value and determine the normal value of the Company accordingly".[433] From the above disclosure, Swan Vintage informed MOFCOM that it was unable to know exactly what costs and expenses of the product under investigation were used by MOFCOM to determine the normal value of Swan Vintage as well as which method was used to calculate costs and expenses.[434]
- On the price adjustment of normal value, MOFCOM's Preliminary Determination only states "In the part of price adjustment, the Investigating Authority adjusted the relevant sales expenses on the basis of the constructed normal value, so as to adjust the normal value to the factory price level".[435] MOFCOM did not disclose the specific amount or ratio of

[433] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 31.
[434] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p.2.
[435] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 32.

price adjustment, so Swan Vintage informed MOFCOM that it was unable to know the calculation method and basis for price adjustment.[436]

- Due to the limited information disclosed in the Preliminary Determination, Swan Vintage was "unable to reckon the dumping margin of Swan Vintage based on the available disclosures," and therefore was unable to make more specific and valid comments, which seriously affected the right of Swan Vintage to present a defence.[437]
- The Preliminary Determination of MOFCOM is oversimplified, which made it impossible for Swan Vintage to understand the method and basis for calculating normal value and export price on the basis of which MOFCOM calculated the dumping margin, limiting the right of Swan Vintage to make an effective defence.[438]
- On the calculation of normal value, the Anti-Dumping Final Disclosure by MOFCOM only states, "due to the use of data from other companies and the need for maintaining confidentiality, the weighted average normal value range which was adjusted according to the export prices adopted by the Investigating Authority in this disclosure is [ ]1 Australian dollar/[kilolitre]".[439] From this, it is unclear what costs and expenses of the product under investigation were used by MOFCOM to determine the normal value of Swan Vintage.[440]

415. Thus, MOFCOM's failures denied Swan Vintage the information it needed to identify and address MOFCOM's concerns regarding the information necessary to determine normal value and export price. The deficiencies alleged by MOFCOM must be viewed in this light.

[436] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 2.
[437] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 2.
[438] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 1.
[439] Swan Vintage Comments on the Final Disclosure (Exhibit AUS-39), p.2.
[440] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p.2.

3. MOFCOM improperly calculated normal value

(a) MOFCOM erred in its use of "other respondents" domestic sales data

416. MOFCOM rejected Swan Vintage's domestic selling prices on the basis that these sales accounted for less than 5% of the exports of the product under investigation to China.[441] In such circumstances, Article 2.2 of the Anti-Dumping Agreement provides two alternative bases to determine normal value: constructed normal value and the comparable price of the like product when exported to an appropriate third country. MOFCOM did not use either of these alternative bases, and it did not even consider basing normal value on export prices to a third country.

417. Although MOFCOM did consider constructed normal value, it held that it could not rely on this basis because Swan Vintage did not provide accurate costs and expenses of the product under investigation.[442] Specifically, MOFCOM held that Swan Vintage: (i) did not provide accurate information about the costs and expenses of the product under investigation and like product as required by the questionnaire;[443] (ii) reported the costs neither in accordance with product control codes given in the questionnaire nor in line with JDE codes commonly used in its daily operations without providing a reasonable explanation;[444] (iii) provided production costs based on the level of the product under investigation, which could not reasonably reflect the production and sales costs of the product under investigation and like products, without providing a reasonable explanation;[445] (iv) did not provide completed questionnaires from suppliers who provided press services, filling services and bulk wine;[446] and (v) did not answer a question related to cost sheets.[447]

418. Ultimately, MOFCOM resorted to facts available, determining that the best information available to determine Swan Vintage's normal value was "the weighted average price of domestic sales of the product under investigation given by other respondents".[448]

[441] Anti-Dumping Final Determination (Exhibit AUS-2), p. 88.
[442] Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.
[443] Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.
[444] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 89-90.
[445] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 89-90.
[446] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.
[447] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.
[448] Anti-Dumping Final Determination (Exhibit AUS-2), p. 92.

MOFCOM did not identify the "other respondents" nor the domestic sales prices of the other respondents that were used in the weighted average.

419. MOFCOM's reference to the domestic sales prices of "other respondents" is vague and difficult to understand given its approach to the other sampled companies.[449] The only other respondents that provided domestic sales prices were Treasury Wines and Casella Wines. However, in both instances, domestic selling prices were rejected by MOFCOM either in part (Treasury Wines)[450] or as a whole (Casella Wines).[451]

420. Moreover, in the case of Casella Wines, MOFCOM resorted to facts available for normal value and similarly used "expenses properly adjusted based on the weighted average price of domestic sales of other respondents… adjust[ing] other respondents' weighted average prices of domestic sale of the product under investigation to the ex-factory price level".[452] Since the only "other respondents" were Treasury Wines and Swan Vintage, there is a circularity and arbitrariness in MOFCOM's determinations whereby Swan Vintage's normal value was determined using Casella Wines' prices and Casella Wines' normal value was determined using Swan Vintage's prices. Such a conclusion would mean that Casella Wines and Swan Vintage's domestic selling prices were acceptable for use for the other company, but not for itself.

421. Australia submits that no unbiased and objective investigating authority would have calculated normal value for Swan Vintage in this manner. This approach also gave rise to issues as the selected sales had characteristics affecting price comparability, which Australia will now address.

(b) Characteristics affecting price comparability

422. MOFCOM's reliance on Treasury Wines' data, which it appears to have used under any plausible interpretation of "other respondents", means that MOFCOM used the "above cost" Treasury Wines' domestic sales that were [[ ]]. Consistent with other parts of Australia's submissions, MOFCOM was required to account for characteristics in this data that affected price comparability.

[449] See above, section II.F.2, where this is outlined in further detail.
[450] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 61, 65.
[451] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 83-84.
[452] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.

423. Australia has addressed these characteristics above.[453] While Australia will not repeat these submissions in full, the selected "above cost" sales of Treasury Wines were affected by product mix and level of trade differences that would not enable a proper comparison without adjustments being made. Furthermore, if Casella Wines' sales had been used in the calculation, Australia submits there was sufficient evidence that Casella Wines' reported sales were similarly affected by product mix and level of trade differences.[454] It follows that any possible configuration of the reported domestic sales data of "other respondents" required MOFCOM to consider these characteristics and make appropriate adjustments.

4. MOFCOM improperly resorted to facts available

424. MOFCOM improperly resorted to facts available to calculate aspects of Swan Vintage's normal value. As Australia will demonstrate below, MOFCOM made the following errors:

- it identified deficiencies in the production costs and expenses forms that either did not exist, or the allegedly deficient information was not necessary for the purposes of constructing normal value, and which resulted in MOFCOM having incorrect recourse to facts available; and
- it did not use the best available information when selecting facts available.

(a) Production costs and expenses

425. MOFCOM's use of facts available for Swan Vintage was limited to the determination of the company's production costs and expenses.[455] MOFCOM found that Swan Vintage "did not provide accurate costs and expenses of the product under investigation" and that the company "did not give reasonable explanations" for the purported omissions and deficiencies in the information submitted.[456] On this basis, MOFCOM determined these costs and expenses using facts available, which was said to be the "weighted average price of domestic sales of the product under investigation given by other respondents".[457]

[453] See above, section II.D.2.
[454] This has been set out in detail in section II.D.2 above.
[455] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 89-91.
[456] Anti-Dumping Final Determination (Exhibit AUS-2), p. 90.
[457] Anti-Dumping Final Determination (Exhibit AUS-2), p. 92.

426. MOFCOM alleged two purported deficiencies in the costs data submitted by Swan Vintage. First, MOFCOM alleged that Swan Vintage had not reported costs according to valid product control codes.[458] Second, MOFCOM alleged that Swan Vintage had not coordinated with its bottling and pressing service providers to submit costs data that would corroborate Swan Vintage's records.[459] In relation to the second purported concern raised, MOFCOM further alleged in the Final Determination that Swan Vintage "did not answer the question related to cost sheets", which Australia can only assume relates to bottling and pressing services.[460] MOFCOM ultimately decided that, following receipt of comments from the company on the Preliminary Determination and conducting a "further review" of the company's costs data,[461] MOFCOM still "could not secure accurate costs based on the information provided by [Swan Vintage]".[462]

427. MOFCOM otherwise made no findings in the Final Determination as to the level of Swan Vintage's cooperation in the investigation, nor directly, the verifiability of the data and information submitted by Swan Vintage.

428. MOFCOM improperly resorted to facts available. Swan Vintage was fully cooperative in the investigation and participated to the best of its abilities.[463] Moreover, Swan Vintage provided the necessary information within a reasonable period of time, and which was verifiable by reference to the company's accounting system. To the extent information was not provided, it was not necessary, and its absence was fully explained.

429. Moreover, the information relied upon by MOFCOM was not the best information available. MOFCOM used "the weighted average price of domestic sales of other respondents" purportedly adjusted to the ex-factory level,[464] to calculate the normal value. The weighted average price of domestic sales of "other respondents," who were not identified by MOFCOM, resulted in the absurd 116.2% margin of dumping for Swan Vintage.

[458] Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.
[459] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.
[460] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.
[461] Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.
[462] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.
[463] See above, section II.C.
[464] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.

i. Product control codes

430. With respect to the reporting of costs and expenses information, MOFCOM stated in the Final Determination that Swan Vintage:

- "[R]eported the costs neither in accordance with product control codes given in the questionnaire nor in line with JDE codes commonly used in its daily operations";[465] and
- "[Reported costs] based on product level only [that] could not reasonably reflect the production and sales costs of the product under investigation and like products".[466]

431. MOFCOM did not specify which forms submitted by Swan Vintage as part of the investigation contained the above purported deficiencies.

432. Australia submits that Swan Vintage provided extensive cost and expenses data which were verifiable by reference to its financial systems,[467] and which followed the Australian industry standard of wine classification. As Swan Vintage stated in its response to the Final Disclosure, the "18-digit product control number required by [MOFCOM] conflicts with industry norms in many ways", and thus producers were "unlikely to manage their daily accounts in accordance with the product control numbers established by [MOFCOM]".[468] Swan Vintage relied upon the "Clarification Letter on Product Control Numbers in the Questionnaire for Relevant Foreign Exporters or Producers in the Anti-Dumping Case" submitted by Treasury Wines in October 2020 as part of the investigation.[469]

433. Swan Vintage also fully cooperated in the investigation and, where concerns were raised by MOFCOM, Swan Vintage used its best efforts to respond to MOFCOM's concerns and provide it with supplementary information. In particular, Swan Vintage submitted Annexes 1 to 3 as part of its response to the Preliminary Determination,[470] sought to match its costs to the product control numbers identified in MOFCOM's original questionnaire,[471]

[465] Anti-Dumping Final Determination (Exhibit AUS-2), p. 89.
[466] Anti-Dumping Final Determination (Exhibit AUS-2), p. 90.
[467] Swan Vintage Anti-Dumping Questionnaire Response (Exhibit AUS-40), p. 54.
[468] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 5.
[469] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 5.
[470] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), pp. 3-4.
[471] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 4.

and provided a "Comparison of JDE and Product Control Numbers".[472] This was despite the challenges identified by Swan Vintage in the preceding paragraph.

434. It is also unclear how MOFCOM concluded that Swan Vintage "did not give a reasonable explanation" for its approach to product classification, when Swan Vintage provided fulsome responses to all of MOFCOM's requests for information.[473] Swan Vintage stated in its response to the Preliminary Determination that its production costs and expenses were reported according to the general accepted accounting principles (GAAP) of Australia.[474] There is nothing on the record to show that MOFCOM disputed this characterisation. Rather, MOFCOM asserted that Swan Vintage's use of product control codes meant that the company's reported costs "could not reasonably reflect" the true costs of production.[475] MOFCOM did not elaborate further on why it took the view that the data was rendered unusable by Swan Vintage's approach to product control codes. Nothing on the record establishes any connection between Swan Vintage's classification of product types and MOFCOM's asserted concerns about the accuracy of the information the company provided. Strikingly, no explanation was given for why MOFCOM considered that the use of these product control codes would render the data unusable in relation to costs, but not in relation to the company's reported export prices and CIF prices, which MOFCOM was prepared to accept.

435. It was not open to MOFCOM to disregard the production costs and expenses reported by Swan Vintage merely because the company used a different system to classify product types. As discussed above, the cost of production shall normally be calculated using the records of the exporter or producer under investigation provided that they are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation.[476]

436. Given the information was drawn from Swan Vintage's respective accounting system, which is compliant with the International Financial Reporting Standards (IFRS),[477] the information submitted by Swan Vintage, and which was rejected by MOFCOM, was *per se*

[472] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 4.
[473] Anti-Dumping Final Determination (Exhibit AUS-2), p. 90.
[474] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 7.
[475] Anti-Dumping Final Determination (Exhibit AUS-2), p. 90
[476] Article 2.2.1.1 of the Anti-Dumping Agreement.
[477] The IFRS is the Australian equivalent of the American Generally Accepted Accounting Principles (GAAP).

verifiable within the meaning of paragraph 3 of Annex II. There is no evidence to suggest that MOFCOM made any meaningful effort to verify the substantial amount of information and data submitted by Swan Vintage. MOFCOM's decision not to take steps to verify the information, while seemingly harbouring concerns, cannot reasonably have the consequence of meaning the "necessary" information was missing or withheld.

437. The Panel in *US – Steel Plate* found that information is "verifiable" if "the accuracy and reliability of the information can be assessed by an objective process of examination".[478] That is, the information must be *susceptible* of verification. Minor flaws do not mean that information is unverifiable, "so long as the submitter has acted to the best of its ability".[479]

438. Swan Vintage's system of classifying product types according to its usual accounting practices could not have rendered the entirety of the costs data unverifiable and unusable. According to Article 2.2.1.1, costs are normally "calculated on the basis of the records kept by the exporter or producer under investigation". To uphold an argument that the exporter's records are not susceptible of verification simply because they do not match MOFCOM's preferred system of classification would entirely undermine the effect of this Article. If MOFCOM considered the information to be potentially unreliable, Australia is not aware that MOFCOM took any steps to examine and test the data, for example, by conducting on-the-spot or virtual verification pursuant to Article 6.7. It is significant that MOFCOM was satisfied with the verifiability of Swan Vintage's export and CIF prices, notwithstanding that those prices were seemingly structured according to the same system of product classification. Even if MOFCOM considered that Swan Vintage's product control codes posed some challenges, the difficulties were not "undue" or excessive. Swan Vintage had gone to considerable lengths to explain its product classification and sought to match its costs against MOFCOM's codes.

439. To the extent that MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II,[480] and at a minimum, explain in what way the information it rejected did not meet the requirements.[481] Moreover, MOFCOM was required to "actively make efforts" to use the

[478] Panel Report, *US – Steel Plate*, para. 7.71.
[479] Panel Report, *Egypt – Steel Rebar*, para. 7.161.
[480] Panel Report, *US – Steel Plate*, para. 7.58.
[481] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343; see also section II.B.1 above.

information submitted.[482] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. An unbiased and objective investigating authority could not have found otherwise.[483] As outlined above,[484] once again, there is no "unlimited right" for MOFCOM to reject all information and ascertain the normal value entirely on the basis of facts available if *some* information was not provided, or if *some* information did not meet the criteria in paragraph 3 of Annex II.[485]

440. MOFCOM was further obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Swan Vintage had acted to the best of its ability. Swan Vintage had provided complete data, with full explanations of why it was presented in the way chosen. Accordingly, MOFCOM had no proper basis to refuse to make use of it.

441. MOFCOM did not inform Swan Vintage of the reasons for not accepting the information submitted in Swan Vintage's response to the Preliminary Determination or the Supplementary Questionnaire, and did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. It is inexplicable that MOFCOM would have harboured profound concerns about the reliability of Swan Vintage's costs and expenses data without at least raising those concerns in the Supplementary Questionnaire or in other correspondence with the company, prior to publishing the Final Determination.

442. Purported inconsistencies between Swan Vintage's categorisation of PCNs and MOFCOM's preferred system would not have prevented MOFCOM from calculating the comparable price in the ordinary course of trade, or constructing normal value based on production and sales data in the company's accounting system. It is not uncommon when establishing normal values and export prices for investigating authorities to use the product classification codes utilised by a company in its normal course of business.

[482] See Panel Report, *US – Steel Plate*, para. 7.65.
[483] See section II.B.1 above which outlined the standard of review required of an investigating authority to evaluate information submitted by interested parties in an 'unbiased and objective manner'; see Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[484] See section II.B.1 above.
[485] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7. 343.

443. For the foregoing reasons, MOFCOM erred when it relied upon Swan Vintage's costs and expenses data and information as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

ii. Data from non-affiliated service providers

444. With respect to the reporting of costs and expenses information, MOFCOM stated in the Final Determination that Swan Vintage:

- "[E]ntrusted local companies to provide press service and produce bulk wine and asked other companies to offer filling services. One of the press companies filled in response but just reported overall data and did not provide detailed costs in accordance with the requirements of the questionnaire,"[486] and
- "[O]ther press and filling companies did not respond to the questionnaire".[487]

445. Swan Vintage stated in its response to the Supplementary Questionnaire that it sources grapes locally from a number of suppliers in Australia, and also commissions a number of companies to provide bottling services.[488] One of the affiliated companies engaged by Swan Vintage for bottling services was "Growers Wine", with four non-affiliated companies (original equipment manufacturers, or "OEMs") providing processing and bottling services.[489] Swan Vintage explained the relationship between itself and these companies to MOFCOM as part of the investigation.

446. In the Supplementary Questionnaire, MOFCOM asked:[490]

> You said in the original response that you purchase grapes and entrust two winemaking service providers to provide pressing services and produce crude wines. One of them serves as your affiliate. Please explain why these two companies do not submit their own responses. Besides, you also entrust another company for bottling. Please explain why the bottling company does not submit its own response.

[486] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.
[487] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.
[488] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[489] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 2 (see question 3).
[490] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.

447. Swan Vintage responded that it had submitted a separate response from its affiliated company, Growers Wine, which provided a complete Anti-Dumping Questionnaire response for MOFCOM.[491] Swan Vintage alluded to the instructions in the original Anti-Dumping Questionnaire from MOFCOM, which stated that:[492]

> If you conduct consigned processing in the course of production and operation, namely, you entrust other companies to complete some links in producing and selling the product under investigation and its like product, such links remain parts the overall production and sales of your company. For the sake of the investigation and acquisition of necessary information, you and such companies shall complete the Questionnaire together.

448. The information submitted by Growers Wine included complete data and information in respect of its production costs.[493] Swan Vintage also explained that, despite its best efforts, it unsuccessfully sought the cooperation of the four non-affiliated companies, and provided MOFCOM with evidence of its communications with the companies in question.[494] The costs and expenses associated with these companies would be recorded and reasonably reflected in Swan Vintage's GAAP-consistent accounting system. Since the companies are non-affiliated, it would not be necessary to go further for the purpose of the dumping determination. Thus, the production cost data of unaffiliated companies was not "necessary information".

449. Notwithstanding the irrelevance of the information, Swan Vintage made good faith efforts to obtain it. MOFCOM did not address Swan Vintage's explanations of its attempts to obtain information from the unaffiliated companies, and instead concluded that it "could not acquire accurate costs and expenses of the product under investigation produced and sold by the Company".[495] Further, MOFCOM did not explain the basis on which it concluded that the failure of the unaffiliated companies to submit the requested information were attributable to Swan Vintage, or why the absence of this information meant it could not rely upon the extensive costs and expenses data and information provided by Swan Vintage.

450. In the first instance, MOFCOM failed to specify in detail the information it required for the purposes of the investigation, as required under paragraph 1 of Annex II. Paragraph 1 of Annex II clearly places the onus on MOFCOM to explain in detail the type of information

[491] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[492] Anti-Dumping Questionnaire (Exhibit AUS-3), p. 7 (Instruction 9).
[493] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[494] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[495] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.

that it is seeking. It is not incumbent upon interested parties to guess what MOFCOM is looking for in its investigation.

451. In the Preliminary Determination, MOFCOM expressed its view that the affiliate company "filled out part of the response and reported only the overall data, which did not correspond to the data reported by Australia Swan Vintage Pty Ltd".[496] However, in the Supplementary Questionnaire that followed, MOFCOM merely requested that Swan Vintage "explain why the bottling company [Growers Wine] does not submit its own response".[497]

452. As Swan Vintage noted, repeatedly, the bottling and pressing service providers that did not provide responses were independent companies, not under the direction of Swan Vintage. Australia submits that the record shows that Swan Vintage nonetheless made best efforts to solicit responses from the independent OEMs, issuing them with letters of request on "several" occasions,[498] but ultimately was not able to persuade the firms to release their confidential data. Swan Vintage submitted to MOFCOM that Swan Vintage's contracts with the OEM service providers only accounted for a "very small proportion" of the turnover of those companies,[499] and thus Swan Vintage's influence over them was limited.

453. If MOFCOM required Growers Wine to submit a separate response, it should have specified what it required in the questionnaire. Conversely, if MOFCOM needed certain data submitted by the affiliated company to be verified by reference to the data submitted by Swan Vintage, MOFCOM should have specified what it required in the relevant forms attached to the questionnaire for verification purposes, rather than attempting to compare the data provided in different datasets submitted by the different companies. MOFCOM otherwise took no steps to verify the information it considered unreliable, apart from the request for Swan Vintage to "explain" the situation with the OEMs in the Supplementary Questionnaire.

454. MOFCOM was obliged by paragraphs 3 and 5 of Annex II to "actively make efforts" to use the information provided to it,[500] even if not ideal in all respects, provided Swan Vintage had acted to the best of its ability. Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an

[496] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 31.
[497] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 2 (see question 3).
[498] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[499] Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), p. 3.
[500] See Panel Report, *US – Steel Plate*, para. 7.65.

appropriate medium having regard to the explanation provided by MOFCOM. An unbiased and objective investigating authority could not have found otherwise.

455. Given the comprehensive explanations provided by Swan Vintage, MOFCOM should have found that Swan Vintage had acted to the best of its ability. MOFCOM was not entitled to insist the information be provided by the OEMs in circumstances where Swan Vintage had clearly articulated the unreasonableness of that requirement in light of the uncooperative nature of the OEMs in question, and the fact that those companies did not want to disclose confidential information as part of the investigation.

456. Further, MOFCOM failed to inform Swan Vintage of the reasons for not accepting the information submitted in Swan Vintage's response to Supplementary Questionnaire, and did not provide an opportunity for the company to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM merely argued that the company had "just reported overall data and did not provide detailed costs in accordance with the requirements of the questionnaire".[501] MOFCOM provided no indication of whether Swan Vintage's Supplementary Questionnaire had resolved the alleged inconsistency between its data and that of Growers Wine, and if it had not, provided an opportunity for Swan Vintage to provide further information.

457. In particular, Australia submits that MOFCOM failed to take into account the responses provided by Swan Vintage in its totality. MOFCOM's Final Determination repeated almost verbatim the complaints made in the Preliminary Determination and the Disclosure of Basic Facts, notwithstanding that Swan Vintage had provided detailed responses on those issues in the intervening period. For example, in relation to the fees paid to bottling and service companies, Swan Vintage explained in both its response to the Supplementary Questionnaire and Preliminary Determination that it was unable to direct independent companies to provide confidential data, although Swan Vintage had made best efforts to solicit the information.[502] MOFCOM engaged no further on this issue with the company, before restating the same allegations made in the Preliminary Determination, in the Final

[501] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.
[502] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 8; Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), pp. 3-4.

Determination. MOFCOM seemingly failed to consider much of the explanatory information supplied by the company.

458. As outlined above,[503] in *US – Anti-Dumping and Countervailing Duties (Korea),* the Panel held that paragraph 6 of Annex II requires an investigating authority to inform an interested party why its submitted information, including supplementary information, had not been accepted, thereby providing an interested party with an opportunity to provide further explanations within a reasonable period.[504] It is clear that information provided by Swan Vintage in response to the Supplementary Questionnaire was ultimately not accepted by MOFCOM in its Final Determination. Given the length of time between receipt of Treasury Wines' supplementary questionnaire response, and publication of the Final Determination, it is clear that MOFCOM failed to notify Swan Vintage *immediately* and *without delay*.

459. Further, paragraph 6 of Annex II required MOFCOM to provide an opportunity for Swan Vintage to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, MOFCOM never provided Swan Vintage with such an opportunity.

460. For the foregoing reasons, MOFCOM erred when it relied upon Swan Vintage's costs data as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

iii. Cost sheets

461. With respect to the reporting of costs and expenses information, MOFCOM stated in the Final Determination that Swan Vintage "did not answer the question related to cost sheets".[505]

462. MOFCOM did not elaborate on which "question related to cost sheets" it was referring to, or in what sense Swan Vintage's responses were either insufficient or incomplete. In the Preliminary Determination, MOFCOM offered a slightly different formulation of this alleged deficiency to the effect that Swan Vintage "did not respond to the questions on cost accounting in the questionnaire, and the Company did not submit a financial report for the

[503] See section II.B.1 above.
[504] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.471-7.472.
[505] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.

period of investigation for dumping".[506] ' Swan Vintage subsequently provided its financial reports for the period of the investigation with its comments on the Preliminary Determination.[507]

463. Australia submits that Swan Vintage responded in full to the questions put to the company in the Questionnaire and the Supplementary Questionnaire, and that to the extent that any cost sheets were not provided, such information was not "necessary" for constructing normal value. Cost sheets are redundant when verifiable cost information can be extracted from a company's accounting system. Thus, MOFCOM could have constructed normal value for Swan Vintage without the cost sheets and without sourcing processing costs data from the independent OEMs.

464. Further, MOFCOM's assertion that, due to the absence of supporting information from the OEMs, it "could not acquire accurate costs" was not adequate reasoning to support a claim that MOFCOM lacked the "necessary" information to determine normal value. MOFCOM was not entitled to "infer, without further clarification, that the missing information [was] 'necessary'".[508] There was no proper basis for MOFCOM to conclude that the lack of secondary information from the OEMs had the effect of rendering all of Swan Vintage's costs data unverifiable or unusable.

465. If MOFCOM was dissatisfied with the information submitted, it was required to examine that information in light of the criteria in paragraph 3 of Annex II.[509] In particular, MOFCOM was obliged to explain in what way the information it rejected did not meet the requirements.[510] Had it done so, MOFCOM would have concluded that the information submitted was, in fact, verifiable, appropriately submitted, timely and in an appropriate medium. MOFCOM did not have unlimited discretion to reject *all* of Swan Vintage's data on the grounds that MOFCOM objected to a few elements of the company's submission.[511]

466. MOFCOM was obliged by paragraph 5 of Annex II to use the information provided to it, even if not ideal in all respects, provided Swan Vintage had acted to the best of its ability.

[506] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 31.
[507] Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 12.
[508] Appellate Body Report, *US – Supercalendered Paper*, para. 5.81.
[509] Panel Report, *US – Steel Plate*, para. 7.58.
[510] Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.
[511] Panel Reports, *US – Steel Plate*, para. 7.57; *China – Broiler Products (Article 21.5 - US)*, para. 7. 343.

Given the comprehensive explanations, and resubmissions of data and information in different formats by Swan Vintage, MOFCOM should have found that Swan Vintage had acted to the best of its ability.

467. MOFCOM otherwise did not inform Swan Vintage of the reasons for not accepting the information submitted in Swan Vintage's response to the Supplementary Questionnaire, did not provide an opportunity to provide further explanations and did not provide reasons for the rejection of information, as required by paragraph 6 of Annex II. MOFCOM stated in the Disclosure of Basic Facts published on 12 March 2021, which was published 14 calendar days prior to the Final Determination, that it "decided in the Preliminary Ruling to conduct a review and evaluation on the basis of the facts already obtained and the best information available" for the purposes of determining normal value.[512]

468. MOFCOM's ambiguity in articulating the purported deficiencies in Swan Vintage's costs data not only calls into question MOFCOM's justification for resorting to facts available, but it also impeded Swan Vintage's engagement with MOFCOM throughout the process, such that the company faced undue difficulty in resolving deficiencies, if they indeed existed, at an early stage. For example, in its response to the Final Disclosure, Swan Vintage noted it "cannot understand exactly what information is being referred to in the Bureau's statement: '…without providing detailed cost information as required by the questionnaire'".[513] Similarly, in its comments on the Final Disclosure, Swan Vintage explained that it was unable to discern the link between the evidence it supplied and the margins proposed by MOFCOM, "and therefore is unable to make more specific and valid comments, which seriously affects the right of Swan Vintage to present a defence".[514] It was wholly unreasonable for MOFCOM to fail to particularise its complaints over the course of the investigation, before concluding in the Final Determination that the company had not remedied perceived deficiencies.

469. Paragraph 6 of Annex II also required MOFCOM to provide an opportunity for Swan Vintage to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. However, MOFCOM never provided Swan Vintage with such an opportunity.

[512] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 29-30.
[513] Swan Vintage Comments on Final Disclosure (Exhibit AUS-39), p. 9.
[514] Swan Vintage Comments on Final Disclosure (Exhibit AUS-39), p. 2.

470. For the foregoing reasons, MOFCOM erred when it relied upon Swan Vintage's costs data as a basis to resort to facts available and, therefore, China acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

(b) The information used was not the "Best Available"

471. Assuming *arguendo* that MOFCOM was entitled to resort to facts available, MOFCOM failed to select the "best information available" as a reasonable replacement for the allegedly missing information. MOFCOM used "the weighted average price of domestic sales of other respondents" purportedly adjusted to the ex-factory level,[515] to calculate normal value without exercising special circumspection or undertaking a process of reasoning and evaluation of the record evidence, as required under Article 6.8 and paragraph 7 of Annex II. The resulting dumping margin for Swan Vintage was 116.2%, the calculation of which was grossly flawed.

472. MOFCOM did not identify the "other respondents" nor the domestic sales data it relied on for calculation purposes. Given that there were only two other sampled respondents, Treasury Wines and Casella Wines, and numerous "other respondents, " and that MOFCOM also relied on the "weighted average price of domestic sales of other respondents" to determine the normal value for Casella Wines, it is impossible to discern which prices MOFCOM purportedly used to calculate a "weighted average" if MOFCOM's explanation is taken at face value.

473. There is no evidence on the record that MOFCOM checked the data it used for the normal value against other independent sources, in the manner required by paragraph 7 of Annex II. It is also unclear what factors were relevant to MOFCOM's assessment. As the Panel explained in *Canada – Welded Pipe*:[516]

> Collecting data is not the same as undertaking a comparative and systematic evaluation and assessment of that data for the purpose of applying facts available. Nor does checking for anomalies, aberrations, or the need for adjustments equate to a comparative evaluation and assessment.

474. MOFCOM does not explain what, if any, comparisons were made in respect of the data collected, and whether it evaluated prices, volumes, product specification, or differences

[515] Anti-Dumping Final Determination (Exhibit AUS-2), p. 92.
[516] Panel Report, *Canada – Welded Pipe*, para. 7.140.

in sales terms, shipping costs, and market structure in order to reconcile the information from that submitted by "other respondents" with that submitted by Swan Vintage. It is not sufficient for MOFCOM to merely assert it "decided to determine the Company's normal value based on other respondents' domestic sale data" in the absence of any further explanation or analysis. Explanations provided by an investigating authority must be sufficiently detailed to allow a panel to assess whether the facts available were a reasonable replacement for the missing necessary information.[517]

475. Australia submits that, in selecting the best information available MOFCOM should have accounted for Swan Vintage's production situation and product structure, the cost differences between different types of wine products, and other factors affecting comparability between the company's wine products. MOFCOM's application of cost and related expenses data based on a weighted average of other respondents' data to all products demonstrates that MOFCOM did not conduct the required comparative systematic evaluation and assessment of the data submitted, as required by Article 6.8 and paragraph 7 of Annex II.

476. By failing to consider the other information in its selection of facts to replace the allegedly missing information, MOFCOM failed to undertake "a process of reasoning and evaluation" to select facts which reasonably replaced facts on the record in order to arrive at an accurate determination.[518]

5. MOFCOM had all necessary information to construct normal value

477. For the foregoing reasons, Australia has demonstrated the weighted average ex-factory prices of "other respondents" domestic sales was not the best available information. Furthermore, MOFCOM had all necessary information to calculate constructed normal value. On this basis, Australia submits that even if MOFCOM had correctly determined it was unable to rely on the reported domestic sales to calculate normal value pursuant to Article 2.1, the necessary information was available to use constructed normal value as the alternative methodology under Article 2.2.

[517] See Appellate Body, *US - Carbon Steel (India)*, para. 4.421. In this dispute, the Appellate Body was considering the equivalent provision in the SCM Agreement, Article 12.7.
[518] See Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172.

6. MOFCOM selected export sales with characteristics affecting price comparability

478. As in the case of Treasury Wines and Casella Wines, while MOFCOM's approach to determining export prices alone did not violate the Anti-Dumping Agreement, it required MOFCOM to make appropriate adjustments to ensure a fair comparison could be conducted with normal value.

479. MOFCOM stated in its Final Determination that Swan Vintage sold some of the products under investigation directly to Chinese non-related clients and some to Chinese non-related clients through non-related traders.[519] Accordingly, MOFCOM acknowledged that Swan Vintage's export sales occurred at two levels of trade: "end-consumer" sales and "trader" sales. MOFCOM concluded that "the sales prices for the product under investigation directly sold to non-related or related traders were used as the basis for determining export price".[520] Australia understands "end-consumer" and "trader" to mean direct to consumer and wholesaler/distributor respectively.

480. Australia submits that MOFCOM intentionally relied upon export sales to a lower level of trade to artificially deflate the calculation of export price and thus increase the resulting margin. As Australia has previously explained, in the ordinary course of trade, sales made directly to non-related wholesaler/distributors are at a lower level and therefore a lower price than sales made directly to consumers. Wholesaler/distributors pay producers lower prices for identical products because they must be able to make a margin to cover their costs and a profit on resale to their clients. However, if a producer sells directly to consumers, it can sell at the higher price prevailing in that market segment. MOFCOM did not provide an adequate explanation as to why it did so, other than to say that "the pricing mechanisms were basically the same" at both levels of trade.[521] An unbiased and objective investigating authority would not have disregarded export prices to a higher-priced level of trade on such a basis, without proper justification.

[519] Anti-Dumping Final Determination (Exhibit AUS-2), p. 92.
[520] Anti-Dumping Final Determination (Exhibit AUS-2), p. 93.
[521] Anti-Dumping Final Determination (Exhibit AUS-2), p. 93.

481. Furthermore, consistent with Australia's submissions for Casella Wines above,[522] limiting Swan Vintage's export prices to a lower-priced level of trade further exaggerated the non-comparability with a normal value calculated using [[ ]]

7. Conclusion

482. For the reasons set out above, China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement in its application of facts available, and Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in its calculation of normal value.

H. OTHER NAMED AUSTRALIAN EXPORTERS

483. MOFCOM identified a dumping margin of 167.1% for "other Australian producers cooperative with the investigation".[523] MOFCOM explained that this margin was determined "based on the weighted average margin of the selected exporters and producers".[524] No explanation was provided about the weighting or weightings used.

484. The inevitable consequence of this approach is that the deficiencies in MOFCOM's determination of the normal value and margins of dumping for the sampled companies set out above also, inevitably, undermines its determination of the margin for these producers. Inherent in the use of an average is that an error in the determination of any one of the component figures will cause error in the average.

485. For this reason, Australia submits that the errors discussed above in relation to Treasury Wines, Casella Wines and Swan Vintage carried forward to the dumping margins for these producers.

[522] See section II.F.2.
[523] Anti-Dumping Final Determination (Exhibit AUS-2), p. 1.
[524] Anti-Dumping Final Determination (Exhibit AUS-2), p. 97.

I. ALL OTHERS

486. MOFCOM identified a dumping margin of 218.4% for the category of producers described as "All Others," which were the companies that MOFCOM deemed to have not been cooperative because they did not complete the registration form issued by MOFCOM within 20 days of the initiation of the investigation and did not respond to any other questionnaires.[525] MOFCOM explained that the dumping margins for these producers were determined on the basis of "best information available" by a comparison of "the weighted average normal value with the weighted average export price to obtain the dumping margin".[526]

487. No explanation was provided about the weighting or weightings used. Nor was an explanation provided as to why the margin calculated significantly exceeded not only the weighted average margin determined for the producers classified as "other cooperative in the investigation," but also the highest margin determined for any individual company.

488. To the extent that the weighted average normal value relied upon the normal values determined for the sampled companies and to the extent that the comparison between the weighted average normal value and weighted average export price was not fair, the errors discussed above in relation to Treasury Wines, Casella Wines and Swan Vintage carried forward to the dumping margins for these producers.

489. Further, irrespective of whether the weighted average normal value relied upon the normal values determined for the sampled companies, Australia submits that MOFCOM's determination of this dumping margin was inconsistent with the obligations imposed by Article 6.8 and Annex II. Australia does not know, because MOFCOM did not divulge, the information that was relied upon to determine a margin of 218.4%. But the bare fact that this rate significantly exceeds the highest margin determined for any individual company (175.6% for Treasury Wines) and the weighted average margin (167.1%) appears irreconcilable with it purportedly being based on weighted averages drawn from the sampled companies' data.

490. Australia submits that the inference the Panel must draw is that MOFCOM either:

[525] Anti-Dumping Final Determination (Exhibit AUS-2), p. 97.
[526] Anti-Dumping Final Determination (Exhibit AUS-2), p.100.

- made material errors in the selection of data identified as "best information available" or in the calculations conducted that led to an inexplicably high margin, but despite the obvious anomalous result chose not to verify its calculations;
- deliberately, in its selection of "best information available", selected adverse facts to ensure it reached an otherwise unjustifiably high margin to punish the companies that did not respond to the registration questionnaire.

491. While Paragraph 7 of Annex II recognises that if an interested party does not cooperate such that relevant information is withheld, that "could lead to a result which is less favourable to the party", that does not give a license to authorities to select "adverse" facts or to manufacture high dumping margins unsupported by the evidence. As the Panel observed in *China – GOES:*[527]

> In our view, the use of facts available should be distinguished from the application of adverse inferences. […] While noncooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation.

492. A dumping margin determined based on best information must have a logical relationship with the facts on the record, and be a result of an evaluative, comparative assessment of those facts.[528] The rate reached appears to be logically divorced from the facts on the record, and there is no evidence of any evaluative assessment having been undertaken. The Panel should infer that the "All Others" rate was not the result of such an evaluative process, but rather based on either obvious error or the impermissible application of adverse facts. The sparse explanation given by MOFCOM on the record of the basis for the determination of these rates does not allow for any other interpretation to be reached by the Panel.

[527] Panel Report, *China – GOES*, para. 7.302; this passage was cited with approval and applied by the Panel in *China – Broiler Products*, para. 7.311.
[528] Panel Report, *China – Broiler Products*, para. 7.312.

J. MOFCOM FAILED TO MAKE A FAIR COMPARISON BETWEEN NORMAL VALUE AND EXPORT PRICE

493. Australia submits that MOFCOM determined normal value and export price for each sampled company in a manner inconsistent with Article 6.8 and Annex II, and failed to make its determinations in accordance with Article 2 of the Anti-Dumping Agreement. As a consequence, it did not correctly establish the two "component elements" of a fair comparison and could not then have made a fair comparison between these values to determine accurate margins of dumping for each sampled company.[529]

494. Assuming, *arguendo*, that the Panel finds MOFCOM's calculation of normal values and export prices for each sampled company to be WTO-consistent, Australia submits that MOFCOM failed to make a fair comparison between the normal values and export prices as required by Article 2.4 of the Anti-Dumping Agreement. That provision applies to margins of dumping determined by MOFCOM for the three sampled companies.

495. The adjustments required by MOFCOM to make a fair comparison for the three sampled companies were affected by, *inter alia*, the methodologies used to establish their normal values.[530] As explained above[531], [[ ]]. Where a PCN did not pass the "below cost" and "low volume" tests, MOFCOM used the [[ ]] costs to construct normal value. Those constructed normal values were similarly inflated because they reflected the [[ ]]. The Treasury Wines' domestic "sales" that passed the tests then formed part, or potentially the entirety of, the "other respondents" sales that MOFCOM used to calculate the normal values for Casella Wines and Swan Vintage. Given MOFCOM's methodologies, these sales were not representative of Treasury Wines' domestic

[529] The requirement to make a fair comparison, set out in the first sentence of Article 2.4, presupposes that the component elements of the comparison – i.e. the normal value and the export price - have already been established. The focus of Article 2.4 is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the fairness of that comparison. For a comparison to be fair, it must be unbiased, objective, and even-handed: Appellate Body Report, *EU — Fatty Alcohols (Indonesia)* para. 5.21 citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.

[530] The manner in which the normal value or export price is determined, including constructed normal value, could be pertinent to the question whether the authority is conducting a "fair comparison" within the meaning of Article 2.4: Panel Report, *EU Biodiesel (Argentina)*, para. 7.297.

[531] As discussed at section II.E(3).

sales in the ordinary course of trade, let alone representative of two companies in different commercial positions and did not provide the basis for a fair comparison.

496. In order to conduct a fair comparison between normal values determined in this manner and the export prices of the sampled companies, significant adjustments to ensure a fair comparison were necessary, none of which MOFCOM made. In the case of Casella Wines and Swan Vintage, MOFCOM's failure to indicate the bases for the determination of their normal values in a timely manner deprived those companies of the ability to request adjustments for differences that could have affected price comparability.

497. For these reasons, China is in breach of its obligations under Article 2.4 of the Anti-Dumping Agreement. The impact of these errors is exacerbated by MOFCOM using the subsequent erroneous dumping margins for the three sampled companies in the calculations of the "other cooperative Australian companies" (i.e. the other named Australian exporters) and the "all others" category of Australian companies.

1. Legal framework

498. Article 2.4 imposes an obligation on investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability.[532] In order to facilitate this requirement, Article 2.4 mandates investigating authorities to indicate to interested parties what information is necessary to ensure a fair comparison. These requirements apply to all anti-dumping investigations, irrespective of the methodology used to determine normal value.[533] Thus, they apply to the margins of dumping determined for all three of the sampled companies.

499. In the Final Determination, MOFCOM made various adjustments to the normal values and export prices "in order to make a fair and reasonable comparison". While MOFCOM did not disclose in the Final Determination all of the adjustments that it considered,[534] it disclosed those it considered: adjustments to convert domestic sales prices to the ex-factory price level;

[532] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.20 citing Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204.
[533] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.205 and 5.207.
[534] The Anti-Dumping Final Determination uses the qualifying language "and other adjustment items", "such as", pp. 70, 72, 86-87, 93-94.

discounts to invoice prices; rebates; tax adjustments; inland freight; international freight and insurance; load-unload charges; pre-sale warehousing costs; credit and currency exchange fees; advertising expenses and other items.[535] Under the section of the Final Determination entitled "Price Comparison", MOFCOM states:

> In accordance with Article 6 of the Anti-Dumping Regulations, on the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal value and export price at the ex-factory level in a fair and reasonable manner. In calculating the dumping margin, the Investigating Authority compared the weighted average normal value with the weighted average export price to obtain the dumping margin.[536]

500. Notwithstanding the foregoing actions, Australia submits that MOFCOM failed to make a fair comparison for each sampled company by, *inter alia*:

- failing to compare normal value and export price at the same level of trade, and for sales made at as nearly as possible the same time;
- failing to make due allowance for differences in products' physical characteristics (including quality) and quantity that affected price comparability;
- improperly rejecting requests for adjustments; and
- failing to indicate in a timely manner information that was necessary to ensure a fair comparison, in particular the bases for the determinations of normal value and export price, so that the companies could make informed decisions regarding possible requests for adjustments.

501. Each category of errors is addressed in turn.

2. Obligation to compare sales "at the same level of trade" and "at as nearly as possible the same time"

502. The second sentence of Article 2.4 requires investigating authorities to compare the export price and the normal value "at the same level of trade, normally at the ex-factory level,

[535] For Treasury Wines: Anti-Dumping Final Determination (Exhibit AUS-2), pp. 70-72; for Casella Wines: Anti-Dumping Final Determination (Exhibit AUS-2), pp. 86-87; for Swan Vintage: Anti-Dumping Final Determination (Exhibit AUS-2), pp. 93-94.
[536] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.

and in respect of sales made at as nearly as possible the same time".[537] MOFCOM's determinations do not comply with these requirements.

(a) "at the same level of trade"

503. The evidence on MOFCOM's record provided by Treasury Wines, Casella Wines and Swan Vintage demonstrates that domestic and export sales were made by each company at various levels of trade, namely wholesalers, distributors, retailers and direct-to-consumer.[538] Prices differed between these levels of trade. In the Final Determination, MOFCOM recognised the fact that sales were made at various levels of trade in the context of its injury analysis.[539] Thus, it was obvious from the record that MOFCOM was aware of the differences in levels of trade, that the differences affected a fair comparison, that MOFCOM was required to indicate what information was necessary to ensure a fair comparison in light of these differences, and that MOFCOM was required to make the necessary adjustments.

504. The Final Determination does not mention level of trade in the context of the determination of margins of dumping and there is no evidence that MOFCOM considered or made any adjustments to account for differences in levels of trade in that context.[540] In the context of injury, MOFCOM states in respect of level of trade:

> The prices of the dumped imported product and domestic like products should be compared at the same level of trade to ensure that they were comparable. *The Investigating Authority identified that the domestic customs clearance price of the dumped imported product and the factory price of domestic like products were basically at the same level of trade*, and both prices did not include VAT, inland freight, insurance cost, secondary sales channels cost, etc. Based on the CIF price of the dumped imported product provided by China Customs, the Investigating Authority further considered exchange rates, tariff rates and imported customs clearance costs during the investigation period, adjusted the import price of the product under investigation accordingly, and saw the adjusted price as the import price of such dumped imported product. Among them, the exchange rate was calculated on the basis of

[537] This sentence has been described as the "basic parameters that further the goal of achieving a fair comparison": Appellate Body Report, *EU — Fatty Alcohols (Indonesia)* para. 5.21.
[538] As discussed at section II.B.2.
[539] Anti-Dumping Final Determination (Exhibit AUS-2), p. 118.
[540] It is mentioned in the context of injury in relation to the comparison of prices of the dumped imported production and like domestic products: Anti-Dumping Final Determination (Exhibit AUS-2), pp. 112-113, 118, 139. Although the Final Determination mentions adjusting domestic prices to the ex-factory level (pp. 87, 92, 94, 100), making no explicit mentions of doing the same for export prices, adjusting prices to the ex-factory level does not address different levels of trade. For example, prices at each level of trade can be expressed in ex-factory terms or other terms (e.g. CIF).

> the arithmetic average of the monthly average exchange rate of the year published by the People's Bank of China.[541] (emphasis original)

505. It appears from this statement that MOFCOM simply assumed that normal values and export prices were at the same level of trade without assessing the record evidence.[542]

506. Given the complete absence of consideration by MOFCOM of differences in levels of trade between normal values and export prices and of any adjustments to account for these differences, China is in breach of the second sentence of Article 2.4.

(b) "*at as nearly as possible the same time*"

507. The second sentence of Article 2.4 requires investigating authorities to compare "sales made at as nearly as possible the same time". The timing of sales may have implications in respect of the comparability of export and home market transactions.[543] Where there are timing differences that affect price comparability, appropriate adjustments must be made. There is no evidence to indicate that MOFCOM considered this issue or made appropriate adjustments, thereby breaching the second sentence of Article 2.4.

3. Obligation to make "due allowance […] in each case, on its merits, for differences which affect price comparability"

508. The third sentence of Article 2.4 requires investigating authorities to make due allowance, on the merits, for all differences affecting price comparability.

(a) Physical characteristics and consumer preferences

509. The evidence before MOFCOM demonstrated significant physical differences between wines, including the quality of the wines, that affected price comparability.[544] For all three sampled companies, their domestic and export sales comprised a diverse product mix with products with different physical characteristics, including qualities and consumer preferences. In the case of Treasury Wines, these differences are described above and in Tables 1 and 3 of Exhibit AUS-5 (BCI).[545] They encompassed [[ ]]

[541] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 112-113.
[542] The factors MOFCOM refers to in this statement relate to adjustments other than level of trade.
[543] Panel Report, *US – Stainless Steel (Korea)*, para. 6.120.
[544] As discussed at section II.D.1.
[545] See Section II.E.3(a)(ii); and [(Exhibit AUS-5 (BCI)),]]

[[redacted]] In the case of Swan Vintage, MOFCOM also treated its export sales as if they pertained to a bulk commodity, making no allowance for differentiation in product grades or physical characteristics of bottled wine.

510. In the context of its injury assessment, MOFCOM acknowledged these differences.[549] However, no consideration was given nor adjustments made for these differences in the context of MOFCOM's comparison of normal values and export prices in its dumping determination.

511. This deficiency is exacerbated by the methodologies MOFCOM used to determine the normal values of the three sampled companies, in particular the reliance on [[redacted]]. The comparisons of the normal values to the export prices of all three sampled companies would have required adjustments to account for this.

512. Given the complete absence of consideration by MOFCOM of differences in the physical characteristics of the products and any adjustments to account for these differences which affect price comparability between the three sampled companies, China is in breach of the third sentence of Article 2.4.

(b) Quantities

513. The evidence before MOFCOM demonstrated significant quantity differences associated with domestic sales, normal values and export prices related to different PCNs.[550]

[546] [[redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[547] [[redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[548] [[redacted] (Exhibit AUS-5 (BCI)), [redacted].]]
[549] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 103-108.
[550] As discussed at section II.D.1.

MOFCOM's failure to consider these differences is exacerbated by the methodologies MOFCOM used to determine the normal values of the three sampled companies. With respect to normal values determined using domestic sales prices, [[redacted]]

514. [[redacted]]

515. Accordingly, quantity was a relevant factor that affected price comparability of normal value to export sales for Treasury Wines, Casella Wines and Swan Vintage. Given the complete absence of consideration by MOFCOM of differences in the quantities of sales and any adjustments to account for these differences, Australia submits that China is in breach of the third sentence of Article 2.4.

(c) Other adjustments

516. MOFCOM rejected Treasury Wines' request for relevant adjustments to normal value regarding "other discounts, rebates and advertising fees" and export price regarding "other discounts and rebates and advertising fees".[553] In its Final Determination, MOFCOM stated:

> The Company also claimed other discounts and rebates and advertising fees. In the Preliminary Ruling, the Investigating Authority held that the Company did not provide

[551] Australia addresses this in detail at section II.E.3 above.
[552] [redacted (Exhibit AUS-4 (BCI)).]]
[553] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 71-72.

sufficient evidence to support the above claims and decided not to accept them. The Company claimed in its comments on the Preliminary Ruling and the Disclosure of Basic Facts Relied on by the Final Ruling that other discounts, rebates and advertising fees were the direct expenses resulting from the daily sale, correlated with the sales market and included in the invoices issued to the clients, and the Company supplemented some information in the comments to describe relevant alignment and apportionment methods.[554]

After the review, the Investigating Authority held that, firstly, no sufficient evidence indicated that the above expenses were really realized; secondly, as for other discounts and rebates, the Company did not elaborate the discount standards and bases and the methods for determining the discounts as required by the questionnaire; thirdly, as for the advertising fees, the Company did not explain the method of determining advertising fees as required by the questionnaire and also did not indicate whether relevant fees were directly related to the sales of the product under investigation and like products.[555]

The Company also claimed other discounts and rebates and advertising fees [in respect of export price]. In the Preliminary Ruling, the Investigating Authority held that the Company did not provide sufficient evidence to support the above claims and decided not to accept them. The Company's claims after the release of the Preliminary Ruling and the Investigating Authority's review and identification were the same as those in "Normal price part" above.[556]

517. In its comments on the Preliminary Determination[557], Treasury Wines [[ ]] There is no evidence that this information was taken into account by MOFCOM when making its decision to disregard the requests for adjustments.

[554] Anti-Dumping Final Determination (Exhibit AUS-2), p. 71.
[555] Anti-Dumping Final Determination (Exhibit AUS-2), p. 71.
[556] Anti-Dumping Final Determination (Exhibit AUS-2), p. 72.
[557] [(Exhibit AUS-11 (BCI)) (Exhibit AUS-8 (BCI))]]
[558] [(Exhibit AUS-104 (BCI)); (Exhibit AUS-105 (BCI)); (Exhibit AUS-106 (BCI)); (Exhibit AUS-107 (BCI)); (Exhibit AUS-108 (BCI)).]]
[559] [[(Exhibit AUS-109 (BCI)); (Exhibit AUS-110 (BCI)); (Exhibit AUS-111 (BCI)).]]

4. Obligation to indicate in a timely manner information that was necessary to ensure a fair comparison

518. The sixth sentence of Article 2.4 requires investigating authorities to "indicate to the parties in question what information is necessary to ensure a fair comparison". Such information must be indicated early enough so that the interested parties can make requests for adjustments to ensure a fair comparison between normal value and export price before the dumping margin is determined.[560] Even if the information is confidential, the investigating authority still needs to make its best efforts to disclose the information that was necessary for the interested parties to meaningfully participate in the fair comparison process.[561] For example, the investigating authority could prepare a non-confidential summary.[562]

519. In most cases, a disclosure of essential facts under Article 6.9 will not fulfil the requirements of Article 2.4. However, as the Appellate Body explained in *EC – Fasteners (China) (Article 21.5 China)*:

> whether information shared at the end of an on-going dialogue under Article 2.4 is timely enough to ensure a fair comparison between normal value and export price must be assessed on a case-by-case basis, by assessing whether interested parties had a meaningful opportunity to request adjustments in the light of the information shared by the investigating authority towards the end of that dialogue.[563]

520. Which specific allowances should be made in any case depends very much on the facts surrounding the calculation of export price and normal value.[564] Thus, the manner in which a normal value or export price is determined could be pertinent to the question of whether the investigating authority is conducting a fair comparison within the meaning of Article 2.4. As discussed above, the facts surrounding the calculation of normal values for Casella Wines and Swan Vintage were clearly pertinent to whether adjustments were needed for, *inter alia*, level of trade, timing, and physical characteristics, including product quality.

521. MOFCOM first disclosed the methods of calculation for Casella Wines' and Swan Vintage's normal values in the Final Disclosure issued on 12 March 2021, with comments due 10 days later on 22 March 2021, just four days before the Final Determination was issued on

[560] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China),* para. 5.191.
[561] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China),* para. 5.195.
[562] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China),* para. 5.195.
[563] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China),* para. 5.191.
[564] Appellate Body, *US – Hot-Rolled Steel*, para. 179.

26 March 2021.[565] In the statement, Casella Wines' normal value was based upon "the expenses properly adjusted based on weighted average prices of domestic sales of other respondents could be used to determine the normal value that reflected market conditions in a reasonable manner" and Swan Vintage's normal value was based upon the "weighted average prices of typical domestic sales of the product under investigation given by other respondents".[566] This was effectively unchanged in the Final Determination.[567] Given the methodologies utilised by MOFCOM for determining the normal values for Casella Wines and Swan Vintage directly impacted the necessary adjustments (e.g. level of trade, timing, physical characteristics and other adjustments), this disclosure was too ambiguous (i.e. it did not disclose the nature of the calculations) and too late to enable Casella Wines and Swan Vintage to make meaningful requests for adjustments to ensure a fair comparison between their normal values and export prices before their dumping margins were determined.

522. Given the deficient and untimely disclosure to Casella Wines and Swan Vintage of the methodologies for determining their normal values, China is in breach of the sixth sentence of Article 2.4.

5. Conclusions

523. For the foregoing reasons, MOFCOM's determinations were inconsistent with the requirements of Article 2.4 and, therefore, China is in breach of that provision.

K. CONCLUSION

524. For the reasons set out above, Australia has established that China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping

[565] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 60, 66. The methods for determining normal value for the two companies were different from those utilised in the Preliminary Determination. For Casella Wines see Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 29 ("the Investigating Authority decided to temporarily use the sales price between the Company and Chinese non-related clients as the basis for determining the export price") and for Swan Vintage see p. 31 ("the Investigating Authority temporarily decided to use the costs and expenses of some of the product under investigation reported by the Company, as well as the profit margin reported by the Company to calculate the constructed normal value and determine the normal value of the Company accordingly").
[566] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 60, 66.
[567] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85 and 92. The principal difference is that, for Swan Vintage, the Anti-Dumping Final Determination refers to the "weighted average prices of typical domestic sales of the product under investigation given by other respondents", omitting the reference to "typical" domestic sales that appears in the Final Disclosure.

Agreement in respect of MOFCOM's application of facts available in its investigation and Article 2 of the Anti-Dumping Agreement in relation to the determination of dumping.

III. AUSTRALIA'S CLAIMS CONCERNING THE DEFINITION OF "DOMESTIC INDUSTRY"

525. MOFCOM's determination of the domestic industry is inconsistent with Article 4.1 of the Anti-Dumping Agreement because it fails to establish "a major proportion of total domestic production" of the like product in accordance with the definition of "domestic industry". As a consequence, MOFCOM's injury and causation analyses are fundamentally flawed and, therefore, also inconsistent with the requirements of Article 3 of the Anti-Dumping Agreement.

A. CHINA HAS BREACHED ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT

526. The definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement lays the foundation for the injury and causation analyses required under the provisions of Article 3. It is a "keystone" of an investigation.[568] Article 4.1 imposes an express obligation on Members to interpret the term "domestic industry" in a specific manner.[569] Failure to do so can be the basis of a finding of a violation.[570]

527. The Appellate Body has read the requirement that domestic producers' output constitutes a "major proportion" as having both quantitative and qualitative connotations.[571] Regarding the quantitative element, the Appellate Body has considered that "'a major proportion' should be properly understood as a relatively high proportion of the total domestic production" that "substantially reflects the total domestic production".[572] This

[568] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.397.
[569] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.
[570] Panel Reports, *EC – Salmon (Norway)*, paras. 7.117-7.119 ("If the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1, then it seems clear to us the EC analysed the wrong industry in determining the adequacy of support for the initiation of the investigation under Article 5.4 of the AD Agreement, and in considering injury and causation under Article 3, committing an error which is potentially fatal to the WTO-consistency of the investigating authority's determinations on those issues"); *Argentina – Poultry Anti-Dumping Duties*, para. 7.338; *Russia – Commercial Vehicles*, paras. 7.10-7.11.
[571] Appellate Body Report, *EC – Fasteners (China),* Recourse to Article 21.5 of the DSU by China, para. 5.302.
[572] See Appellate Body Report*, EC – Fasteners (China)*, para. 412:

ensures that the injury determination is based on wide-ranging information regarding domestic producers and is not distorted or skewed".[573] The qualitative element "is concerned with ensuring that the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production".[574] The quantitative and qualitative aspects of the domestic industry are closely connected, in that the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole.[575]

528. As discussed below, MOFCOM's determination of the domestic industry is inconsistent with Article 4.1 because (i) the process it used to identify and define the domestic industry introduced material risks of distortion; (ii) it is not based on positive evidence; and (iii) it introduced a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

529. As a consequence of those errors, MOFCOM failed to establish "a major proportion of total domestic production" with respect to both the quantitative and the qualitative elements, as it could not reasonably conclude that the "21 producers who submitted the response to the Questionnaire on Domestic Producers"[576] represent a "relatively high proportion of the total domestic production" that "substantially reflects the total domestic production"[577], nor that those producers are representative of the total domestic production.

530. As discussed,[578] this further resulted in errors fatal to MOFCOM's determinations with respect to injury and causation.

> [T]he term 'a major proportion' is immediately followed by the words 'of the total domestic production'. 'A major proportion', therefore, should be understood as a proportion defined by reference to the total production of domestic producers as a whole. 'A major proportion' of such *total* production will standardly serve as a substantial reflection of the total domestic production. Indeed, the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole. (emphasis original).

[573] Appellate Body Report, *EC – Fasteners (China)*, para. 419.
[574] Appellate Body Report, *Russia — Commercial Vehicles*, para. 5.13.
[575] Appellate Body Report, *EC – Fasteners (China),* para. 412.
[576] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[577] See Appellate Body Report*, EC – Fasteners (China)*, para. 412.
[578] See below Section IV.D.2.

1. MOFCOM's process for defining the domestic industry

531. In the Final Determination, MOFCOM defines "domestic industry" as the "21 producers who submitted the response to the Questionnaire on Domestic Producers".[579] MOFCOM determined that these domestic producers represented 66.95%, 68.27%, 60.75%, 62.76%, and 60.72% of the output of the domestic like products between 2015 and 2019 respectively.[580]

532. MOFCOM's process for identifying and defining the "domestic industry" can be summarised as follows:

- On 10 October 2020, MOFCOM posted its questionnaires on its website for stakeholders to download, including an Domestic Producer Questionnaire.[581] The Final Determination provides no detail as to (i) the names of all domestic producers identified by MOFCOM, (ii) how many domestic producers were identified by MOFCOM, other than an indication that CADA, the Applicant, purportedly represents 122 domestic producers and that there are "several hundreds" more; and (iii) whether the Domestic Producer Questionnaire was actually distributed, or whether notice was provided, to those domestic producers identified by MOFCOM. MOFCOM received 21 questionnaire responses from domestic producers. The record shows that MOFCOM sought to verify the accuracy of the responses given in only 2 of the 21 questionnaire responses it received.[582]
- When MOFCOM sought to verify the statistics of the overall output of the Chinese wine producers in CADA's written application (i.e. the output figures that MOFCOM had relied upon to initiate the investigation), it found that those statistics were unreliable as they included a range of products outside the scope of the investigation "including liqueur wines, highly carbonated wines, gasified wine, flavoured wines, distilled wines and bulk wines".[583]

[579] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[580] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[581] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 97-98; Issuance of Anti-Dumping Questionnaire Notice (Exhibit AUS-42).
[582] Anti-Dumping Final Determination (Exhibit AUS-2), p. 28.
[583] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

- Unable to rely on the statistics provided to it, MOFCOM "surveyed the real domestic output through different parties" and concluded that it was reasonable to calculate the overall output of the Chinese wine industry "by the area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines".[584] MOFCOM provided no explanation of how it made these calculations, other than the statement that it had regard to "statistics from authoritative domestic organizations".[585] The sources of the data that MOFCOM relied upon are unknown. No explanation is given as to who the "different parties" surveyed for the "real domestic output" were, or who the "authoritative domestic organizations" were. There is no information on the record as to how the data were gathered, determined, estimated, constructed, calculated, and/or adjusted, what information they include and what information they exclude, and what steps MOFCOM took to ensure that they to specifically cover like products, to the exclusion of products outside the scope of the investigation. There is no explanation as to how MOFCOM was able to segregate the relevant data relating to domestic like products - such as "area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines" from the data relating to wine products outside the scope of the investigation.

Thus, MOFCOM prepared an estimate of the "overall output" of like products produced by the Chinese wine industry on the basis of undisclosed data from undisclosed sources. As such, neither the data nor MOFCOM's estimate on the basis of that data could be checked, verified, or challenged substantively by the interested parties. The fact that MOFCOM had to undertake such an exercise indicates that neither the applicant, CADA, nor MOFCOM knew or understood the true scope, identity, or definition of the domestic industry of like wine products. This is a remarkable gap in a trade remedies

[584] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[585] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

investigation that is purportedly initiated by or on behalf of the same domestic industry.

- Finally, MOFCOM compared the sum of the production reported by those 21 companies who chose to respond to the domestic producer questionnaire with the estimate it had calculated for the overall output of the Chinese wine industry. There is no evidence that MOFCOM considered anything other than these percentages in identifying the respondent companies as the "domestic industry", including whether those 21 companies (out of hundreds of domestic producers) were representative of the domestic industry as a whole. According to the record, *all* 21 companies themselves reported that there were "several hundred wine producers in China in more than 20 provinces".[586]

2. The process MOFCOM used to identify and define the domestic industry introduced material risks of distortion

533. The Appellate Body has held that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product".[587] An investigating authority "bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".[588]

[586] COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44),p.38; Turpan Louland Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), p. 36; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), pp. 36-37; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), p. 38; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), p. 36; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), pp. 37-38; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), p. 36; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), p. 37; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), p. 37; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), p.38; Xinjiang West Region Pearl Winery Anti-dumping Questionnaire Response (Exhibit AUS-45), p. 35; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), p. 35; CITIC Guoan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 37; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 37; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), p. 36; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), p. 38; Grand Dragon Wine Anti-Dumping Questionnaire Response (Exhibit AUS-51), p. 39; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 3; Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 38; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55); p. 38; and Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), p. 41.

[587] Appellate Body Report, *EC – Fasteners (China)*, para. 414.

[588] Appellate Body Report, *EC – Fasteners (China)*, para. 416.

534. MOFCOM's process for gathering and assessing the information from the Domestic Producer Questionnaire was affected by multiple errors that materially distorted its assessment of the domestic industry.

535. MOFCOM's decision to determine the domestic industry as those 21 producers who (i) had registered, (ii) were aware of the questionnaire, and (iii) were willing to voluntarily invest company resources in preparing and submitting responses to the questionnaire, introduced a material risk of distortion because it limited to 21 the number of domestic producers that were analysed when the actual number of producers was substantially higher.[589] MOFCOM should have been aware of this risk of distortion because it was on notice that: (i) 40 domestic producers had sufficient commercial incentive to register for the investigation;[590] (ii) the Applicant's application was made purportedly on behalf of 122 producers;[591] and (iii) there were hundreds of other producers in China.[592] MOFCOM did nothing to mitigate this risk. MOFCOM was obliged to actively seek out pertinent information and could not remain passive in the face of clear shortcomings in the evidence submitted to it.593 Yet the record shows that MOFCOM did nothing to mitigate the risk of distortion.

536. The risk of distortion was compounded by MOFCOM's failure to verify the data provided by 19 of the 21 Questionnaire respondents. The details of the information supplied by the 21 producers' regarding their production outputs were not disclosed to interested parties due to confidentiality, making it impossible for any party to identify and make submissions to MOFCOM about any potential deficiencies in the claims made by those producers, or to make any independent assessment of their suitability to represent the "domestic industry".

[589] This risk of distortion is similar to that identified by the Appellate Body in its Report in *EC – Fasteners (China)*, para. 427: by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion. […] we fail to see the reason why a producer's willingness to be included in the sample should affect its eligibility to be included in the domestic industry, which is a universe of producers that is by definition wider than the sample.
[590] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 8-9.
[591] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 9.
[592] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 10, 60.
[593] Panel Report, *China – Broiler Products*, para. 7.421.

3. MOFCOM's determination of "domestic industry" is not objective and not based on positive evidence

537. The domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers. This determination must be based on positive evidence.[594] Such positive evidence includes relevant economic factors and indices collected from the domestic industry, which have a bearing on the state of the industry, and requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered.[595] Accordingly, a major proportion of the total domestic production should be determined so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.[596]

538. The Applicant, CADA, failed to provide accurate production data on behalf of the industry it purported to represent – or even to provide a list of names of all of the producers of which it was aware.[597] MOFCOM did not require the Applicant to correct these deficiencies. Rather, it took it upon itself to determine the "domestic industry" by estimating the total output of the Chinese wine industry "by the area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines".[598] This process was opaque, involved considerable speculation, did not address conflicting record evidence, was not based on positive evidence, and was not objective.

539. The technique employed by MOFCOM did not identify the *actual* total input based on positive evidence, but rather estimated output using a formula based on limited assumptions. There is nothing on the record to show that this estimate made allowance for year-to-year variables such as weather, nor that there was any attempt to verify this estimate against actual production data, despite the annual production figures being very significantly lower than the production figures claimed by CADA in its application. For example, in 2015,

[594] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[595] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[596] Appellate Body Report, *EC – Fasteners (China),* para. 413.
[597] See below, section VI.
[598] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

CADA claimed a total domestic production of 1,161,110 KL, whereas MOFCOM calculated a total production of 377, 600KL for the same year. As noted above, MOFCOM failed to provide the data that it relied upon or details of its calculations to the interested parties.

540. Also, as noted above, the sources of the data used in the formula are also unclear. MOFCOM states that it "surveyed the real domestic output through different parties" without specifying who those parties are.[599] MOFCOM also describes the sources of the data used for the calculation as "authoritative domestic organizations" and states that "[a]ll the industry data used in the ruling were from domestic companies unless otherwise specified".[600] The only potentially relevant sources of data (e.g. domestic organisations or domestic companies) that were disclosed in the Final Disclosure or Final Determination include CADA's application and the responses to the Domestic Producer Questionnaire. This implies that the statistics that MOFCOM relied upon for the purpose of its estimate of the output of the domestic industry were either sourced:

- from CADA, whose own calculations of domestic production MOFCOM rejected as unreliable;
- from the 21 producers who responded to the Questionnaire, in which case the material risk of distortion described above was also introduced into the calculation of the total domestic production by treating the statistical production data derived solely from those who voluntarily responded as if it were necessarily representative of the domestic industry as a whole, without having undertaken any enquiries to confirm the accuracy of that assumption; or
- from other undisclosed sources.

541. MOFCOM's determination that the 21 producers were representative of China's domestic industry appears to be based on the proportion of MOFCOM's flawed estimate of total domestic production that the sum of their purported outputs accounted for. For the foregoing reasons, MOFCOM:

[599] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[600] Anti-Dumping Final Determination (Exhibit AUS-2), p. 110.

- Failed to establish the quantitative element of the definition of "domestic industry" because its estimate of total domestic production was flawed and because it failed to verify the production of 19 of the 21 responding domestic producers; and

- Failed to establish the qualitative element of the definition of "domestic industry" because it did not determine whether the 21 responding domestic producers were representative of the total domestic production, even though there was a material risk of distortion. There is no evidence on the record that MOFCOM undertook any sort of qualitative assessment of the suitability of the 21 producers, including whether they were suitably representative in terms of geographic spread, product mix (for example, high or low quality, red or white wine), scale of operations, or any other factor, to ensure they were reflective of the domestic industry as a whole.

542. MOFCOM's failure in respect of the proper identification of the "domestic industry" has significant implications for its injury and causation analysis. The Appellate Body has warned that, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry".[601] Similarly, the panel in *China – Autos (US)* explained that "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent [with the Anti-Dumping Agreement]".[602]

543. As a consequence of MOFCOM's errors in defining the "domestic industry", a "keystone" of the investigation is fundamentally flawed. It follows that MOFCOM's subsequent injury and causation analyses are also inconsistent with the provisions of Article 3 of the Anti-Dumping Agreement.

[601] Appellate Body Report, *EC – Fasteners (China)*, para. 414. The Appellate Body was referring to the obligation imposed by Article 3.1 of the Anti-Dumping Agreement to conduct an "objective examination".
[602] Panel Report, *China – Autos (US)*, para. 7.210. See also Panel Report, *EC – Salmon (Norway)*, paras. 7.117-7.118.

IV. AUSTRALIA'S CLAIMS CONCERNING THE DETERMINATION OF INJURY AND CAUSATION

A. CHINA HAS BREACHED ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

544. MOFCOM's determination that allegedly dumped subject imports were causing material injury to the domestic industry in China was inconsistent with China's obligations under the provisions of Article 3 of the Anti-Dumping Agreement. This is because:

- MOFCOM's examination of the effect that subject imports had on prices in the Chinese domestic market was inconsistent with China's obligations under Article 3.1 and 3.2 because MOFCOM: did not conduct an objective examination of positive evidence; failed to ensure price comparability between subject imports and domestic like products; and failed to adequately consider whether subject imports had explanatory force for the alleged suppression of the price of domestic like products.
- MOFCOM's evaluation of the economic factors bearing on the state of the Chinese wine industry was inconsistent with China's obligations under Articles 3.1 and 3.4 because the evaluation: is fatally undermined by MOFCOM's errors in defining the domestic industry under Article 4.1; and does not provide a satisfactory basis for MOFCOM's injury determination.
- MOFCOM's causation analysis is inconsistent with China's obligations under Articles 3.1 and 3.5 because it: is fatally undermined by MOFCOM's errors in its examination of price effects under Article 3.2 and its evaluation of relevant economic factors under Article 3.4; fails to establish a causal link between the alleged dumping of the subject imports and the alleged injury suffered by the domestic industry; is not based on an objective assessment of all relevant evidence on the record; fails to establish that subject imports and domestic like products were substitutable with each other; and fails to properly examine or assess the effects of the other "known" factors on the domestic wine industry based on the relevant evidence and to identify,

separate, and distinguish their injurious effects from that allegedly caused by subject imports through price suppression.

B. LEGAL FRAMEWORK

545. Article 3.1 of the Anti-Dumping Agreement establishes a Member's overarching obligations with respect to the determination of injury in antidumping investigations. Article 3.1 provides that:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

546. The Appellate Body addressed the relationship between Article 3.1 and the other provisions in Article 3 in *Thailand – H-Beams*, stating that "Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs".[603]

547. Article 3.1 of the Anti-Dumping Agreement establishes an overarching obligation that a determination under Article 3 "shall be based on positive evidence and involve an objective examination". The Appellate Body confirmed in *US – Hot-Rolled Steel*, when addressing Article 3.1, that the term "positive evidence" relates to "the quality of the evidence that authorities may rely upon in making a determination", with "positive" requiring that it "must be of an affirmative, objective and verifiable character, and … [be] credible".[604]

548. As to the term "objective examination", the Appellate Body explained that the use of "objective" requires the examination to "conform to the dictates of the basic principles of good faith and fundamental fairness".[605] This means that "the identification, investigation and evaluation of the relevant factors must be even-handed".[606] To perform an objective examination, the authority "must also take into account the evidence that appears to conflict with its own hypotheses, and explain how it has reconciled conflicting evidence in reaching its

[603] Appellate Body Report, *Thailand – H-Beams*, para. 106; see also Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[604] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[605] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. (footnote omitted)
[606] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

conclusions".[607] According to the Appellate Body, this means that "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[608]

C. MOFCOM'S CONSIDERATION OF THE EFFECT OF SUBJECT IMPORTS[609] ON PRICES OF LIKE DOMESTIC PRODUCTS WAS INCONSISTENT WITH ARTICLE 3.1 AND THE SECOND SENTENCE OF ARTICLE 3.2 OF ANTI-DUMPING AGREEMENT

1. Introduction

549. As noted above, Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury shall be based on positive evidence and shall involve an objective examination of, *inter alia*, "the effect of the dumped imports on prices in the domestic market for like products". The second sentence of Article 3.2 elaborates on these obligations, requiring that "the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".

550. In the section of the Final Determination entitled "impact of dumped imported product on the price of domestic like products", MOFCOM found "that the dumped imported product suppressed the price of domestic like products during the injury investigation period".[610] MOFCOM's support for this finding was limited to mere assertions that, during the five-year Injury POI, the increased volume and decreased average unit price of the subject imports "sufficed to cause a material adverse impact on the price of domestic like products" by "directly suppressing the price increase of domestic like products" such that "the price of

[607] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.258. (footnote omitted). The panel cited Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93-94 and 97.
[608] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196; see also Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.272.
[609] In section IV of this submission, Australia uses the term "subject imports" to refer to Australian bottled wine products in containers of less than two litres that were exported to China during the Injury POI and were subject to MOFCOM's injury investigation and injury determination.
[610] Anti-Dumping Final Determination (Exhibit AUS-2), p. 123.

domestic like products was unable to increase accordingly with the rising cost".[611] In this regard, MOFCOM considered that the average unit price of domestic like products had increased by 20.54% during the Injury POI, while the average unit cost of those products had increased by 25.19%.[612]

551. MOFCOM did not consider or explain how the allegedly dumped subject imports had the *effect* of "prevent[ing] price increases, which otherwise would have occurred, to a significant degree" within the meaning of Article 3.2. There was no consideration given at all to the question of whether the average unit price of domestic like products would have increased at a higher rate — for example, by an additional 658 RMB/kl over the course of the Injury POI to fully cover the increasing costs[613] — in the absence of the allegedly dumped imports from Australia. Moreover, MOFCOM failed to explain how the subject imports could have prevented "the price of domestic like products … to increase accordingly with the rising cost" when the data on the investigation record clearly demonstrated that: (i) the average prices of the allegedly dumped Australian products were *much higher* throughout the Injury POI, by margins of 16.28% to 72.99%, than the average prices of the domestic like products; and (ii) the average prices of like imports from third countries were *lower* during the Injury POI than the average prices of the domestic like products.[614]

552. Thus, MOFCOM failed: (i) to consider whether the subject imports had "explanatory force" for the alleged suppression of the price of the domestic like products, and (ii) to conduct an objective examination based on positive evidence. For these reasons alone, MOFCOM's finding of price suppression was inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. However, MOFCOM's price effects examination involved other critical errors and omissions, as outlined below, that were also inconsistent Articles 3.1 and 3.2. The resolution of each of these claims is important to the effective and efficient resolution of the dispute.

[611] Anti-Dumping Final Determination (Exhibit AUS-2), p. 122.
[612] Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.
[613] This figure reflects the difference between the total unit cost increase over the Injury POI less the total domestic like product price increase over the Injury POI. Australia has calculated this figure using the following formula: (2019 unit cost – 2015 unit cost) – (2019 domestic like product price – 2015 domestic like product price). For MOFCOM's unit cost figures see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120. For MOFCOM's domestic like product price see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 120, 125, 149.
[614] For a comparison of average unit prices of the Injury POI and description of Australia's calculations underpinning these percentages see: [(Exhibit AUS-65 (BCI)),]] See also below, Figure 4 at para. 701.

553. These critical errors and omissions were:

- MOFCOM's examination of price effects was based on undisclosed data sets that were subject to undisclosed methodologies,[615] exclusions, constructions, adjustments and/or calculations. As the pricing data used in MOFCOM's examination could not be reviewed, checked, or verified, they were insufficient to constitute "positive evidence" within the meaning of Article 3.1.
- Moreover, MOFCOM failed to ensure price comparability because it compared broad annual average unit prices for subject imports and domestic like products that failed to account for: (i) materially different conditions of sale; (ii) different levels of trade; and (iii) the different types of wine products in the basket of subject imports *vis-à-vis* the basket of like domestic products, which were sold at considerably different prices to different market segments. In this regard, MOFCOM failed to conduct an objective and adequate examination of the competitive relationships between different types or categories of wine products, both within and between the baskets of subject imports and domestic like products.
- MOFCOM also failed to conduct an objective examination based on positive evidence because it: (i) did not conduct a counterfactual examination to establish that the subject imports had prevented price increases that would have otherwise occurred to a significant degree; (ii) did not consider relevant evidence relating to price undercutting or price depression ; and (iii) did not adequately examine year-to-year price fluctuations occurring during the Injury POI or explain how it took them into account in arriving at its findings.
- Finally, MOFCOM also failed to make any finding that the alleged price suppression was "significant" within the meaning of Article 3.2.

[615] MOFCOM failed to adequately explain the methodologies that it used and failed to disclose the sets of underlying data that it relied upon for calculating the average unit prices for subject imports and for domestic like products.

2. The examination of price suppression required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement

554. The Appellate Body has explained that, with regard to price suppression, Article 3.2 of the Anti-Dumping Agreement requires "the investigating authority to consider 'whether the effect of' subject imports is '[to] prevent price increases, *which would otherwise have occurred*, to a significant degree'".[616] Based on the terms of this provision, The Appellate Body has considered that "price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices 'otherwise would have' increased".[617] In this regard, the Appellate Body has explained that "[w]ere an investigating authority to rely on a methodology that concerned price increases that would *not* have occurred in the absence of dumped imports, it would not be able to consider objectively, pursuant to Article 3.2, whether the effect of dumped imports was to suppress significantly domestic prices".[618]

555. In addition, the Appellate Body has observed that "[b]y asking the question 'whether the effect of' the dumped imports is significant price suppression, the second sentence of Article 3.2 of the Anti-Dumping Agreement specifically instructs an investigating authority to consider whether certain price effects are the consequences of dumped imports".[619] Thus, an investigating authority is "required to consider whether dumped imports have 'explanatory force' for the occurrence of significant suppression of domestic prices".[620] In this respect, the Appellate Body has emphasised that:

> … an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority's record concerning elements other than

[616] Appellate Body Report, *China – GOES*, para. 141 (emphasis original); see also Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.95. In *China GOES*, the Appellate Body considered that the meaning of the word "consider" includes to "look at attentively", "think over", and "take into account", and found that "[t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision" (emphasis original) Appellate Body Report, *China – GOES*, para. 130 and footnote 216. In addition, the panel in *Pakistan – BOPP Film (UAE)* considered that "the ordinary meaning of 'consider' includes '[t]o view or contemplate attentively, to survey, examine' and '[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of'". Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.262. (footnote omitted)
[617] Appellate Body Report, *China – GOES*, para. 141.
[618] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.95 (emphasis original).
[619] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.53 and 5.96.
[620] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.53 and 5.96, citing Appellate Body Report, *China – GOES*, para. 136 ("The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable — that is, subject imports — has explanatory force for the occurrence of significant depression or suppression of a second variable — that is, domestic prices").

> dumped imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices.[621]

556. This inquiry into whether dumped imports have "explanatory force" for significant suppression of domestic prices under Article 3.2 is distinct from the causation and non-attribution analysis under Article 3.5.[622] In this respect, the Appellate Body has clarified that:

> While the assessments under both Article 3.2 and 3.5 are interlinked elements of the single, overall injury analysis, the inquiry under each provision has a distinct focus. The analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*. In contrast, the analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. …. Therefore, while an investigating authority is not required under Article 3.2 to conduct an "analysis of all known factors that may cause *injury* to the domestic industry", as required by Article 3.5, the authority must consider under Article 3.2 whether dumped imports have "explanatory force" for the occurrence of significant suppression of *domestic prices*.[623] [emphasis original]

557. The Appellate Body has also explained that, while an investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its price suppression analysis, the exercise of that discretion must nonetheless comply with the requirements of Articles 3.1 and 3.2.[624] Therefore, "when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified".[625] The Appellate Body has confirmed that "[a]n investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence".[626]

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[621] Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.96, citing Appellate Body Report, *China – GOES*, para. 152.
[622] Appellate Body Reports, *Russia – Commercial Vehicles*, para. 5.54, *China – GOES*, para. 147.
[623] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.54 (footnotes omitted). See also Appellate Body Report, *China – GOES*, paras. 147, 151, and 136. See also Panel Report, *China – Cellulose Pulp* para. 7.65. (emphasis original). ("The need for a contextual analysis in respect of prices derives from the requirement to consider the *effects* of dumped imports on prices in the second sentence of Article 3.2. Simply to observe the trends in prices does not suffice, as those trends may be the effect of different factors other than dumped imports, as well as of the dumped imports".)
[624] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.51-5.52. See also Appellate Body Reports, *Thailand – H-Beams*, para. 106; *Mexico – Anti-Dumping Measures on Rice*, para. 204.
[625] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.52, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; Panel Report, *Morocco – Hot Rolled Steel (Turkey)*, para. 7.155.
[626] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.52 ("An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis"), citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 205.

3. MOFCOM did not conduct an objective examination of price effects based on positive evidence

(a) The broad annual averages upon which MOFCOM's examination is based do not constitute positive evidence

558. MOFCOM did not adequately disclose the methodologies that it used or the sets of underlying data that it relied upon for calculating the average unit prices for subject imports and for domestic like products. As the pricing data used to determine these broad averages could not be reviewed, checked, or verified, it cannot be said that MOFCOM's examination was based on "positive evidence" within the meaning of Article 3.1.[627]

559. In the Final Determination, MOFCOM stated that it "decided to conduct [the] price impact analysis based on the weighted average prices of the dumped imported product and domestic like products".[628]

560. To calculate the annual average price covering all products within the basket of subject imports, MOFCOM states that "[b]ased on the CIF price of the dumped imported product provided by China Customs, the Investigating Authority further considered exchange rates, tariff rates and imported customs clearance costs during the investigation period, adjusted the import price of the product under investigation accordingly, and saw the adjusted price as the import price of such dumped imported product".[629] MOFCOM did not provide: the underlying CIF pricing data "provided by China Customs" that it relied upon as the basis for its calculation of import prices, or any description of the methodology that China Customs used to determine this data set;[630] the average yearly exchange rates that it calculated;[631] the tariff rates that it applied as an adjustment; or the "customs clearance costs"

[627] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.52, citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204; Panel Report, *Morocco – Hot Rolled Steel (Turkey)*, para. 7.155.
[628] Anti-Dumping Final Determination (Exhibit AUS-2), p. 116-117.
[629] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113. See also ibid., p. 139 ("the price of the dumped imported product was determined on the basis of CIF prices provided by China Customs after considering the exchange rate, tariff rate and customs clearance fee during the investigation period").
[630] Although MOFCOM states that "the CIF price of the dumped imported product" was "provided by China Customs", Australia notes that USD/kl CIF data for bottled wine imports for 2015, 2016, 2017, and 2019 are included at CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45-48. It is unclear whether or to what extent MOFCOM may have relied upon this data as a basis for its price calculation.
[631] Australia notes that average yearly exchange rates (USD to RMB) published by the People's Bank of China were included at CADA Application for Anti-Dumping Investigation, Annexes 13-14 (Exhibit AUS-67), Annex 14, pp. 59. It is not clear whether or to what extent MOFCOM relied on this data.

that it applied as an adjustment.[632] Moreover, MOFCOM provided no explanations concerning what the "customs clearance costs" included (or excluded), how they were calculated, constructed, estimated, or otherwise determined, or how they were applied as an adjustment to the CIF pricing data. Further, MOFCOM provided no explanation as to how the underlying CIF pricing data "provided by China Customs" had been collected or adjusted, including whether and how it had ensured the data was limited in scope to products subject to the investigation, e.g. by excluding prices related to non-subject imports like "liqueur wines, highly carbonated wines, gasified wine, flavoured wines, distilled wines and bulk wines".[633]

561. To calculate the annual average price covering all products within the basket of domestic like products, MOFCOM states that "[b]y summarizing the responses to the [Anti-Dumping] Questionnaire for Domestic Producers, the Investigating Authority took the weighted average price of the factory prices of domestic like products as the price of these products".[634] However, MOFCOM did not provide: any explanation of the "summarizing" process that it used to derive "the weighted average price of the factory prices of domestic like products"; an explanation of which data in the questionnaire responses that it relied upon and which data it did not rely upon; an explanation of how weighting was applied to the domestic pricing data and on what basis it was applied; or any identification or explanation of adjustments that were applied to the pricing data (if any).

562. For the foregoing reasons, the pricing data used in MOFCOM's examination cannot be reviewed, checked, or verified. As a consequence, the Panel cannot be satisfied from the evidence on the record that MOFCOM relied on credible or verifiable evidence. This is insufficient to constitute an objective examination based on positive evidence within the meaning of Article 3.1. Therefore, MOFCOM's price effects analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

[632] Australia understands that "customs clearance costs" may refer to information obtained from the two responses from importers MOFCOM received to the Questionnaire for Domestic Importers. Ultimately, the source of this information, the costs that were included as "customs clearance costs" and the value of these costs is not clear. See COFCO W&W International Anti-Dumping Questionnaire Response (Exhibit AUS-103); Longcheng Wine Anti-Dumping Questionnaire Response (Exhibit AUS-68).
[633] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[634] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.

(b) MOFCOM failed to ensure price comparability between the product under consideration and the domestic like products

563. It is well-established that price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence.[635] The concept of price comparability requires an investigating authority to ensure that it is comparing "like with like" for the purposes of its price effects analysis.[636] This requires an investigating authority to take account of technical differences and differences in price and volume between baskets of products captured by the subject imports and domestic like products definition.[637] The Appellate Body has confirmed that price comparability needs to be ensured to the extent that an investigating authority relies on price comparisons in its consideration of price effects of subject imports.[638]

564. In *China – GOES*, the Appellate Body explained as follows:

> [W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices.[639]

565. In this dispute, MOFCOM failed to ensure price comparability between the annual average unit prices that MOCOM compared for the purposes of examining the impact of

[635] Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323, C*hina – GOES*, para. 200; Panel Reports, *Korea – Pneumatic Valves (Japan)*, para. 7.266*China – X-Ray Equipment*, para. 7.68; *Pakistan – BOPP Film (UAE)*, para. 7.309; *China - Autos (US),* para. 7.277.

[636] Panel Report, *China - Autos (US),* para. 7.277. See also Appellate Body Report, *China – GOES*, para. 200; Panel Report, *China – X-Ray Equipment*, 7.65; *China – Broiler Products*, para. 7.483.

[637] Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.326; *China – GOES*, para. 200; Panel Reports, *China – X-Ray Equipment*, 7.65; *China – Broiler Products*, para. 7.483; *China - Autos (US),* para. 7.277.

[638] Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323; *China – GOES*, para. 200. See also Panel Report, *China – X-Ray Equipment*, para. 7.68; Panel Report, *China – Autos (US)*, paras. 7.256 and 7.277.

[639] Appellate Body Report, *China – GOES*, para. 200. See also Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.234("… 'a failure to ensure price comparability' cannot be considered to be consistent with the requirement under Article 3.1 that 'a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products'. Accordingly, to the extent an investigating authority relies on price comparisons in its consideration of price effects of subject imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons"); Panel Report, *China – X-Ray Equipment*, paras. 7.50 and 7.68, "[i]f two products being analysed in an undercutting analysis are not comparable, for example in the sense that they *do not compete* with each other, it is difficult to conceive how the outcome of such an analysis could be relevant to the causation question … (emphasis original).

subject imports on the prices of domestic like products. First, MOFCOM failed to account for the price differences between the basket of subject imports and the basket of like domestic products arising from differences in the mix of product categories in each basket and the different market segments served by those product categories at considerably different prices. Second, MOFCOM relied on average prices that encompassed pricing at different levels of trade and failed to make any adjustments to account for these differences. Third, MOFCOM relied on average prices with materially different conditions of sale and failed to make any adjustments to account for these differences. As a consequence, MOFCOM's price effects analysis was inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

i. MOFCOM failed to account for the clear differences in product mix between the basket of subject imports and the basket of domestic like products

566. To properly ensure price comparability between the prices of subject imports and the prices of domestic like products, MOFCOM was required to account for the differences in product mix between the basket of subject imports and the basket of like domestic products. MOFCOM was presented with comprehensive evidence demonstrating that there were significant differences between the basket of subject imports and the basket of like domestic products, including the mix of product types and categories within each basket. This evidence is discussed in detail below. Rather than engaging with this evidence and explaining how it was taken into account, MOFCOM summarily stated, without reference to any supporting evidence, that:

> Since the product under investigation and domestic like products are sold in the Chinese market, the changes in the prices of high-end foreign wines will exert a direct influence on the consumers' selection of domestic high-end or middle-and-low end wines. …. Therefore, the Investigating Authority identified that imported wines from Australia fell under the same category despite different specifications and types and competed with domestic like products in the Chinese market, so imported wines from Australia would be seen as the same category of products and compared with domestic like products for identification of material injury and causal link.[640]

[640] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 105-106.

567. On this basis, MOFCOM conducted its Article 3.2 price effects analysis on the basis of average unit values for the entire basket of subject imports and average unit values for the entire basket of like domestic products, ignoring the known distinctions between the product mix in each basket with respect to quality, price, and market segments (i.e. "customer groups").[641]

568. MOFCOM's conclusion that premium and luxury "high-end" wines compete directly with inexpensive wines on the basis of price is contrary to the reality of a consumer market in which different product categories compete in different market segments at considerably different price points. MOFCOM previously adopted a similar methodology to support a conclusion that luxury automobiles compete directly with entry-level cars on the basis of price. That approach was found to be inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.[642]

569. Similarly, in the current dispute, MOFCOM's methodology was flawed because it ignored detailed evidence on the record that established clear differences in terms of quality

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[641] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 101, 103-108, 118, 119, 135.

[642] Panel Report, *China – Autos (US)*, paras. 7.278-7.283. The panel provided the following explanation, emphasizing the importance of ensuring price comparability between a basket of subject imports and a basket of like domestic products for the purposes of considering price effects pursuant to Articles 3.2 and 3.1 of the Anti-Dumping Agreement:

> [7.278] In our view, merely finding that Chinese automobiles are "like" the subject imported automobiles for purposes of Article 2.6 of the Anti-Dumping Agreement and footnote 46 to the SCM Agreement, does not necessarily mean that the AUVs [*average unit values*] of the Chinese automobiles can be appropriately compared with the AUVs of the imported automobiles. ...
>
> [7.279] In this case, the record suggests that MOFCOM's like product determination was an inadequate basis on which to conclude that the AUVs for the imported and domestic products were comparable for two reasons. First, there was evidence before MOFCOM suggesting that the mix of products differed between the subject imports and the domestic like product. …
>
> [7.280] Second, MOFCOM's like product determination itself acknowledges some lack of competitive overlap between subject imports and the domestic like product. In its preliminary determination, MOFCOM evaluated similarities between both baskets of goods on the basis of "physical and chemical characteristics", "use", "sales channels", and "prices, consumers, competitiveness or substitution". …
>
> > [a]ll in all, the investigating authority considers that, although the product under investigation and the domestic products are different to some extent, but their physical and chemical characteristics, use and sales channels are generally the same or similar, and their prices and end users overlap partially, while perception of consumers is usually reflected in prices. So the product under investigation and the domestic products may substitute for each other and they are competing with each other.
>
> …
>
> [7.281] In our view, the arguments by US respondents, coupled with MOFCOM's own analysis, demonstrate that MOFCOM was or should have been aware that all subject automobiles imported from the United States were not identical to all Chinese automobiles constituting the domestic like product. In our view, the differences between the two baskets of goods should have prompted an objective decision-maker to make further inquiries into those differences to determine whether they affected prices, before proceeding to undertake a price effects analysis on the basis of AUVs for the two baskets of goods …

and price between different types of Australian wine products falling within the definition of subject imports and different types of Chinese wine products falling within the scope of the like products. MOFCOM was aware that all subject imports from Australia are not identical to all Chinese wines constituting the domestic like products.[643] The differences between the two baskets of products should have prompted an objective decision-maker to make further inquiries into those differences to determine whether they affected prices, before proceeding to undertake a price effects analysis on the basis of the annual average unit prices for each of the two baskets of goods. MOFCOM failed to do so. As a result, MOFCOM's analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

570. There was detailed evidence on the record before MOFCOM that clearly established that MOFCOM was aware that there were significant differences between the basket of subject imports and the basket of domestic like products. This evidence falls into three categories: (a) evidence establishing differences between the mix of products ("product mix" or "product differentiation") in the basket of subject imports and the basket of like domestic products; (b) product control code and quality grading information establishing different types and categories of products within the basket of subject imports; and (c) quality grading information establishing different types and categories of products within the basket of domestic like products. The evidence relating to each category is discussed below.

(A) Differences between the mix of products in the basket of subject imports and the basket of like domestic products

571. Based on the evidence on the investigation record, MOFCOM was or should have been aware that there were significant differences in the product mix between the basket of subject imports and the basket of domestic like products. The evidence of the differences between the two baskets was more than sufficient to prompt an objective decision-maker to make further inquiries into the differences to determine whether they affected prices, before

[643] In this respect, MOFCOM's own analysis describes the effect of "changes in the prices of high-end foreign wines" on consumer selection of "domestic high-end or middle-and-low end wines", indicating an awareness of the different product mix in the basket of subject imports *vis-à-vis* the basket of domestic wine products. Similarly, MOFCOM found that subject imports consisted of "different specifications and types" of wine in comparison to domestic products. Anti-Dumping Final Determination (Exhibit AUS-2), pp. 105-106.

proceeding to undertake a price effects analysis on the basis of average unit prices for each of the two baskets. This evidence included:

- Submissions filed on behalf of the Australian industry that identified that "Australian wines cannot be compared with Chinese wines as the same bulk commodities".[644]
- The Applicant's admission that "differences in grape varieties, blending, grape regions, grape harvesting years, quality, brands … reflect the different specifications or types of the investigated products, or the distinction in quality".[645]
- The substantial difference between MOFCOM's average unit price for subject imports and average unit price for domestic like products. Specifically, the average unit price for subject imports was substantially higher than the average unit price of domestic like products for every year in the Injury POI. Table 1 in Exhibit AUS-65 (BCI) provides a comparison of MOFCOM's average unit prices throughout the Injury POI.[646]

572. Further, at various points in the Final Determination, MOFCOM appears to have accepted that differences in the product mix between the baskets of subject imports and domestic like products was a relevant issue. For example:

- MOFCOM confirmed that "imported wines from Australia could be divided into different specifications and types of wines based on factors like grape variety, grape pickup year, quality and brand", and that there are "sales channels and customer groups of different specifications and types of wines".[647]
- MOFCOM considered that "the wines imported from Australia fall under the same category [as domestic wine products] although they differ in

[644] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 103-104; AGW Comments on the Preliminary Determination (AUS-69), p. 4.
[645] Anti-Dumping Final Determination (Exhibit AUS-2), p. 104. See also CADA Comments on Stakeholder's Comments on Preliminary Determination (Exhibit AUS-70), p. 11.
[646] [(Exhibit AUS-65 (BCI)),]]
[647] Anti-Dumping Final Determination (Exhibit AUS-2), p. 104.

> specifications and types", and that "the product under investigation included wines of different price levels and different quality".[648]

573. This demonstrates that MOFCOM knew that the subject imports from Australia consisted of a basket of products, including different product categories serving different market segments (i.e. "sales channels and customer groups"), at different price points. MOFCOM also understood that the like domestic wine products also consisted of a basket of products, observing that "domestic like products in China were also divided into high-end wines and middle-and-low wines".[649]

(B) <u>The product mix of subject imports</u>

574. MOFCOM was clearly aware of the pronounced level of product differentiation within the basket of subject imports, which consisted of a range of different product types that were distinguished by, *inter alia*, considerable price differences. This is demonstrated by MOFCOM seeking product segmentation information from Australian companies using three separate mechanisms: a product control code (**Dumping PCN**) that MOFOM had designed;[650] "control codes for products under injury investigation" (**Injury PCN**) that MOFCOM had designed;[651] and internal product quality grading mechanisms used by Australian exporters.[652] There was also extensive submissions from interested parties about the degree and importance of product differentiation in the wine market in China and amongst subject imports of Australian wine.[653] The clear inference to be drawn from MOFCOM's request for this information is that MOFCOM considered this type of granular detail important for its assessment.

575. Despite this, MOFCOM ignored the detailed evidence supplied by interested parties that demonstrated the existence of significant differences in terms of quality and price within the range of products in the basket of subject imports. Specifically, Treasury Wines and Casella Wines provided detailed information to MOFCOM regarding significant differences between

[648] Anti-Dumping Final Determination (Exhibit AUS-2), p. 105.
[649] Anti-Dumping Final Determination (Exhibit AUS-2), p. 105.
[650] Anti-Dumping Questionnaire (Exhibit AUS-3), Section 2, Question 10, pp. 10-42.
[651] Anti-Dumping Questionnaire (Exhibit AUS-3), Section 5, pp. 79 - 80.
[652] Anti-Dumping Questionnaire (Exhibit AUS-3), Section 3, Question 15, item 6-10, p. 50.
[653] AGW Submission on Initiation of the Investigation (Exhibit AUS-71), pp. 3 – 4; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Question 4, pp. 12-15; Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Question 4, pp. 16-19.

the products they exported to China during the POI.[654] The evidence showed that differences in grape variety, region and terroir, cultivation and wine making techniques impacted the physical and chemical properties of wine products.[655] These differences resulted in different qualities of end product, which affected consumer perceptions of product value, and were ultimately reflected in considerable differences in price.

576. Evidence regarding quality and price differences between subject import products was provided to MOFCOM by the sampled Australian companies, in accordance with MOFCOM's Dumping PCN classifications.[656] As MOFCOM sought Dumping PCN evidence only in relation to the POI, this data relates to export sales occurring in the final year (2019) of the five-year Injury POI. The Dumping PCN evidence coupled with product quality categories provided by the sampled Australian companies demonstrated that there was clear differentiation in the mix of products falling with the scope of the subject import definition. For example, the Dumping and Injury PCN information demonstrated that during the Dumping POI:

- [redacted]

[654] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74), Section 2, Question 3, pp. 14-19; Casella Wines Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16-19.

[655] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74), Section 2, Question 3, pp. 14 - 19; Casella Wines Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16-19.

[656] [redacted] (Exhibit AUS-76 (BCI)), (Exhibit AUS-10 (BCI)), (Exhibit AUS-37 (BCI)),]]

[657] [redacted] (Exhibit AUS-10 (BCI)), P. (Exhibit AUS-65 (BCI)), .]]

[658] [redacted] (Exhibit AUS-10 (BCI)), F (Exhibit AUS-65 (BCI)), .]]

[659] [redacted] (Exhibit AUS-10 (BCI)),

[redacted]]]

- [[redacted]

[redacted]

660 [redacted (Exhibit AUS-10 (BCI)), (Exhibit AUS-65 (BCI)), .]]

661 Australia has calculated the RMB/kl price for each quality category using the average yearly exchange rate for AUD to RMB, published by the Reserve bank of Australia: see Reserve Bank of Australia 2019 Average Exchange Rates (Exhibit AUS-77). [redacted (Exhibit AUS-65 (BCI)), .]]

662 [redacted (Exhibit AUS-37 (BCI)), (Exhibit AUS-65 (BCI)), .]]

663 [redacted (Exhibit AUS-37 (BCI)), (Exhibit AUS-65 (BCI)), .]]

664 [redacted (Exhibit AUS-37 (BCI)), (Exhibit AUS-7 (BCI)), .]]

665 [redacted (Exhibit AUS-7 (BCI)), (Exhibit AUS-65 (BCI)), .]]

[redacted]]]

- Australia does not have access to evidence provided by Swan Vintage in relation to its internal product quality grading system, as this information is subject to confidentiality claims. However, the public materials suggest that Swan Vintage did provide this information to MOFCOM.[667] The publicly available evidence shows that Swan Vintage sold products falling into between 10 and 17 different product quality categories throughout the Injury POI.[668] The publicly available indexed price information suggests that there were significant price differences between each of these categories. By way of example, this evidence shows that Swan Vintage exported products in 17 different quality categories in 2019, with average export prices ranging between 116.96 index points to 1,058.20 index points.[669]

[666] [redacted].]] The point, however, is that this evidence clearly establishes that there was a range of different product categories distinguished by considerably different prices. [redacted] (Exhibit AUS-65 (BCI)), [redacted].]]

[667] Swan Vintage Anti-Dumping Questionnaire Response, Annex 1 (Part 1 of 2) (Exhibit AUS-78), Form 3-4, items 6-1, 6-9, 6-10, 17, 56, columns I, Q, R, AD, BT.

[668] Swan Vintage Anti-Dumping Questionnaire Response, Annex 1 (Part 1 of 2) (Exhibit AUS-78), Form 5-2, columns B and C, cells 39 to 104. For a detailed explanation of Australia's product mix calculations for Swan Vintage, see [redacted] (Exhibit AUS-65 (BCI)), [redacted].]]

[669] Swan Vintage Anti-Dumping Questionnaire Response, Annex 1 (Part 1 of 2) (Exhibit AUS-78), Form 5-2, columns B and C, cells 88 to 104. While it is not explained, Australia understands that the public versions of Swan Vintage's responses to the Anti-Dumping Questionnaire are expressed as indexed values. That is, the first entry in every column is typically adjusted to 100, then every other value in that column is expressed relative to the index value of 100. The result is that the difference represents the change between an unknown starting value and the other figures. [redacted] Exhibit AUS-65 (BCI)), [redacted].]]

Table 4 in Exhibit AUS-65 (BCI) provides a summary of the available evidence.[670]

577. The foregoing examples of data supplied by the sampled exporters demonstrates that there was clear evidence on the record establishing that the basket of subject imports consisted of a range of different product categories that were distinguished by considerable price differences. Before proceeding to undertake a price effects analysis on the basis of annual average unit prices, an objective decision-maker would have made further inquiries into these differences to determine whether they affected the price comparability between the basket of subject imports and the basket of domestic like products.

(C) The product mix of domestic like products

578. The evidence before MOFCOM demonstrated that the basket of domestic like products also consisted of a range of different product types and categories that supplied different market segments, although the mix of types and categories clearly differed from that in the basket of subject imports. In its Application, CADA provided information to MOFCOM which split the data on domestic like products into two groups consisting of two quality categories: "high end" and "medium and low end".[671] CADA provided the following information regarding price differences between the groups of categories:

[670] [(Exhibit AUS-65 (BCI)), .]] [671] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 56.

Price comparison between products subject to the investigation request and domestic like products

Period	Products subject to the investigation request		Domestic like products			
	Import prices in USD (USD/kl)	Variation	High-end price (RMB/bottle)	Medium and low-end price (RMB/bottle)	Arithmetic average price	Variation
2015	7,759	-	548	63	305	-
2016	6,834	-11.92%	549	70	310	1.41%
2017	6,447	-5.67%	454	73	264	-14.81%
2018	6,090	-5.54%	349	69	209	-20.74%
2019	6,723	10.39%	357	72	215	2.64%

Notes: (1) The import price of products subject to the investigation request comes from "Annex VIII: Customs statistics on wine import and export."

(2) The high-end prices and medium and low-end prices of domestic like products are from the statistics of "750 ml of high-end dry red wine at 12% alcohol" and "750 ml of medium and low-end dry red wine at 12% alcohol" in the Average Price List of Industrial Consumer Goods in 36 Large and Medium-sized Cities disclosed by the Price Monitoring Centre of the National Development and Reform Commission of the People's Republic of China. For details, please refer to the "Annex XII: The National Development and Reform Commission's price monitoring data for dry red wine."

(3) Arithmetic average price = (high-end price + medium and low-end price) / 2.

Figure 1 Price comparison between products subject to the investigation request and domestic like products[672]

579. This evidence clearly demonstrates that the basket of domestic like products consisted of different product types and/or categories — e.g. high-end and medium-to-low end products — distinguished by considerable differences in price. Additionally, this information demonstrates different price trends over the Injury POI between the two groups of quality categories. While high-end prices decreased by 34.85% over the period, medium-to-low end prices increased by 14.29%. This shows, for example, that differences in the product mix composition between just these two broad groups of quality categories, let alone between the basket of subject imports and the basket of domestic like products, could have a material impact, separate from other market factors, on the price trends examined for the purposes of its price effects analysis. MOFCOM did not consider this evidence or explain how it was taken into account in its determination that all subject wine products from Australia compete with all domestic like wine products.

[672] Figure 1 Source: CADA, Application for Initiation of Anti-Dumping Investigation, p. 56. See also CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 12, pp. 64 – 128, which Australia understands provides the data underlying these average price figures.

580. MOFCOM was required to ensure the price comparability of the prices of subject imports and the prices of domestic like products before undertaking its price effects analysis on the basis of average unit prices. It did not, in Australia's submission, need to break the market down to the granular specificity required in MOFCOM's own Dumping PCN system. However, it did need to structure and conduct its analysis in a manner that took into account the realities of the Chinese wine market, where different product categories supply different market segments at considerably different price points, and adjust for the differences in the baskets of subject imports and domestic like products affecting the comparison of prices and the examination of price effects. MOFCOM's failure to do so means that its price effects analysis compares average unit prices for subject imports that are not comparable to the average unit prices for domestic like products. As a consequence, MOFCOM's price effects analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

(D) MOFCOM was not entitled to disregard evidence relating to differences in product mix between the baskets of subject imports and domestic like products

581. In the Final Determination MOFCOM, explained that it decided not to have regard to the Injury PCN evidence on the basis of its conclusion that, of the sampled Australian companies, only Swan Vintage provided the Injury PCN evidence in accordance with MOFCOM's classification standards.[673] On this basis, MOFCOM disregarded and failed to consider the extensive evidence that was before it, and incorrectly determined that it was "impossible to get the import prices of relevant wines imported from Australia based on control codes and grades of injury investigation products from the Responses of these producers".[674] This approach is flawed for three reasons.

582. First, Australia's examination of the responses provided by Treasury Wines, Casella Wines and Swan Vintage demonstrates that it was not "impossible" to calculate prices of

[673] Anti-Dumping Final Determination (Exhibit AUS-2), p. 115.
[674] Anti-Dumping Final Determination (Exhibit AUS-2), p. 116.

different types or categories of subject imports based on product quality grading information. That evidence was available to MOFCOM for at least one year of the Injury POI — i.e. 2019.[675]

583. Second, that some information may not have been provided in accordance with MOFCOM's requirements is not a legitimate reason to disregard all relevant information on the record. There was significant and detailed evidence before MOFCOM, in the form of Dumping PCNs and company-specific product quality category information, that clearly established the existence of different types and categories of wine products that were distinguished on the bases of, *inter alia*, quality and considerable price differences.

584. By way of example, as set out in Table 3 in Exhibit AUS-65 (BCI),[676] in 2019 [[redacted]]. MOFCOM was not entitled to disregard the substantial evidence that was before it on the basis that some other aspect of the evidence sought was not provided. An investigating authority is not entitled to disregard relevant evidence before it on the basis of its perception that such evidence is not ideal in all respects.

585. Third, MOFCOM's Injury PCN system was significantly less detailed than the Dumping PCN system. The Injury PCN system only allowed product differentiation to be captured in terms of general category, colour, sugar level and container size.[677] The Injury PCN system did not enable product differences relating to grape variety, vintage year, or growing region or sub-region to be captured. These omitted features are fundamental to establishing product differentiation in terms of quality and price.[678] For example, [[redacted]]

[675] See product mix analysis at section IV.C.3(b)i(B) above.

[676] [redacted] (Exhibit AUS-65(BCI)), [redacted].]]

[677] Australia understands that the Injury PCN code for a product, is the same of the first four digits of the PCN code for that product: see Anti-Dumping Questionnaire (Exhibit AUS-3), pp. 28-29, 78-79. The information sought by the first four digits of the PCN code (pp. 28-29) is the same as the information sought by the four digits making up the Injury PCN code (pp. 78-79).

[678] AGW Submission on Initiation of the Investigation (Exhibit AUS-71), pp. 3-4; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Question 4, pp. 12-15; Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Question 4, pp. 16-19.

[[redacted]] Injury PCN code A111 refers to regular wine, red in colour, dry, in a 750ml container. [[redacted]].

586. There was sufficient evidence on the record to make MOFCOM aware that there were significant differences between the basket of subject imports and the basket of like domestic products. MOFCOM was obligated to further examine these differences to determine whether and to what extent they affected prices before it proceeded to undertake a price effects analysis on the basis of average unit prices, which covered each entire basket of products. MOFCOM's failure to examine whether the differences affected price comparability, and to make the necessary adjustments in its analysis, means that it compared broad average unit prices that were not comparable. As a consequence, MOFCOM's analysis and findings are inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

ii. MOFCOM failed to account for different levels of trade in the price data

587. To properly ensure price comparability between prices of domestic like products and subject imports, MOFCOM was required to ensure that it compared prices that reflected transactions occurring at the same level of trade or make appropriate adjustments to account for prices reflecting transactions occurring at different trade levels.[680] In the Final Determination, MOFCOM asserted that "the domestic customs clearance price of the dumped imported product and the factory price of domestic like products were basically at the same level of trade".[681] This assertion ignored significant evidence on the record that established that sales of subject imports and domestic like products occurred at different trade levels, such as wholesalers, distributors and retail consumers. This evidence is summarised below.

588. During the investigation, Treasury Wines informed MOFCOM that there were "diverse channels for exporting wines to China", including "direct sales" and "via trading

[679] [redacted] (Exhibit AUS-10 (BCI)), [redacted] (Exhibit AUS-65 (BCI)), [redacted].]]
[680] Panel Report, *China – Broiler Products (US)*, paras. 7.481-7.483.
[681] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 112-113.

companies".[682] [redacted]] Taking this evidence into account, MOFCOM was on notice that sales frequently occurred at a range of different levels of trade, and that the CIF price data it relied upon reflected or was likely to reflect different prices occurring at different levels of trade.

589. Additionally, evidence available to MOFCOM demonstrated that sales by Chinese domestic producers occurred through various different sales channels, "including direct sales, distribution, online sales etc".[686] For example, CITIC Guoan Wine's 2017 Annual Report shows

[682] Treasury Wines Comments after Stakeholder Meeting (Exhibit AUS-79), p. 17. See also Treasury Wines Minutes of Stakeholder Meeting (Exhibit AUS-80), p. 10.

[683] [redacted] (Exhibit AUS-81 (BCI)) (Exhibit AUS-10 (BCI)), (Exhibit AUS-82 (BCI)), (Exhibit AUS-37 (BCI)),]]. [684] [(Exhibit AUS-10 (BCI)), (Exhibit AUS-18 (BCI)), (Exhibit AUS-82 (BCI)), .]] [685] [(Exhibit AUS-18 (BCI))]]; COFCO W&W International Anti-Dumping Questionnaire Response) (Exhibit AUS-103), Section 3, Question 15.

[686] Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), Section 2, Question 10(6), p. 18; CITIC Guoan Anti-Dumping Questionnaire Response (Exhibit AUS-47), Section 2, Question 10(6), p. 19; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), Section 2, Question 10(6), pp. 18-19; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), Section 2, Question 10(6), pp. 19 – 20; Grand Dragon Wine Anti-Dumping Questionnaire Response (Exhibit AUS-51), Section 2, Question 10(6), pp. 21; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), Section 2, Question 10(6), p.20; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), Section 2, Question 10(6), pp. 18-19; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), Section 2, Question 10(6), p. 18; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), Section 2, Question 10(6), p. 19; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), Section 2, Question 10(6), pp. 19-20; Turpan LouLan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), Section 2, Question 10(6), pp. 18-19 (Turpan's response also refers to "consignment" as a sales channel); Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), Section 2, Question 10(6), pp. 17-18; Ningxia

that sales to "wholesale agent – distributors" accounted for 83.03% of its total operating income, and "direct sales" accounted for 16.97%.[687] Similarly, Tonghua Wine's 2018 Annual Report shows that it generated sales revenue from "direct sales (including group buying)" and "wholesale agent" sales.[688] Taking this evidence into account, MOFCOM was on notice that the price data it relied on to calculate the average unit price of domestic like products reflected, or was likely to reflect, prices occurring at different levels of trade.

590. An objective and unbiased investigating authority would have considered whether the different levels of trade affected the comparability of the prices and/or whether adjustments to reflect the differences needed to be applied. MOFCOM failed to do so. MOFCOM's failure to consider this evidence and account for transactions occurring at different levels of trade in the price data means that the import price of subject imports and the factory price of domestic like products calculated by MOFCOM were not comparable for the purposes of the consideration of price effects under Article 3.2. As a result, MOFCOM's price effects analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

iii. MOFCOM failed to account for prices with materially different conditions of sale

591. In the circumstances of this dispute, the impact of different conditions and terms of sale on price comparability was an important consideration for the purposes of the examination of price effects under Article 3.2 of the Anti-Dumping Agreement. Australia uses the term "conditions of sale" to encompass the conditions and terms related to a transaction that could be expected to be reflected in the sales prices of the product.[689] Where the conditions and terms of sale for subject imports and for domestic like products are materially

Anti-Dumping Questionnaire Response (Exhibit AUS-57), Section 2, Question 10(6), pp. 18-19; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), Section 2, Question 10(6), p. 18-19; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), Section 2, Question 10(6), p. 19; Changyu Wine Anti-Dumping Questionnaire Response (Exhibit AUS-53), Section 2, Question 10(6), pp. 19-20.

[687] CADA Application for Anti-Dumping Investigation, Annexes 13-14 (Exhibit AUS-67), Appendix 13, p. 39. Australia has calculated these percentages using the "sales channels" information. To calculate the percentage Australia has divided the operating income recorded for "direct sales (including group buying)" (43,859,592.53) and "Wholesale agent – distributor" (214,543,574.78) by the "Subtotal" (258,403,167.31).

[688] CADA Application for Anti-Dumping Investigation, Annexes 13-14 (Exhibit AUS-67), Appendix 13, p. 28.

[689] Support for this interpretation can be found in the Anti-Dumping Agreement. In the context of determining margins of dumping, Article 2.4 of the Anti-Dumping Agreement recognises that differences in "conditions and terms of sale" can affect price comparability. These factors reflect "differences in a transaction that an exporter could be expected to have reflected in his pricing": Panel Reports*, US – Stainless Steel*, para. 6.77; *EU - Biodiesel*, para. 7.295; *EC – Tube and Pipe Fittings*, para. 7.183.

different, such that the prices are not comparable, they cannot be used in a price effects analysis without appropriate adjustments being applied.

592. To properly ensure price comparability between prices of domestic like products and subject imports, MOFCOM was required to either ensure that it compared prices that reflected transactions with similar conditions of sale or make appropriate adjustments to account for any impact on prices resulting from different conditions of sale.[690] This is because prices reflecting different conditions of sale will include different pricing components and sale terms, such as transportation costs, warehousing and logistics costs, fees, levies, and markups. Differences of this nature can reasonably be expected to be reflected in the sale price of products.[691] Without appropriate adjustments, prices reflecting different conditions of sale are not comparable because they do not reflect "like for like" prices.[692]

593. The methodology MOFCOM adopted to calculate annual average unit prices for all subject imports and all sales of domestic like products resulted in a comparison of averages derived from prices with materially different conditions of sale. The adjustments MOFCOM applied to the "CIF prices" for subject imports do not address the impact of different conditions of sale.

(A) MOFCOM compared prices with different conditions of sale

594. MOFCOM compared "CIF prices" of subject imports provided by China Customs (which were ostensibly adjusted to account for exchange rate, tariff rate, and customs clearance fee) with the ex-factory prices of domestic like products.[693] A transaction occurring under CIF conditions of sale reflects the costs, insurance and freight to ship products to the buyer's named port of destination.[694] In a transaction under CIF conditions of sale, the buyer assumes responsibility for any fees or charges for unloading the goods from the ship and

[690] Differences in "conditions and terms of sale" are not the same as differences in "levels of trade". This is evidenced in Article 2.4 of the Anti-Dumping Agreement, which deals with addresses differences in price comparability caused by "levels of trade" and "conditions of sale" separately.
[691] There was evidence before MOFCOM which suggested different conditions of sale could impact prices. See Longcheng Wine, Anti-Dumping Questionnaire Response (Exhibit AUS-68), Section 3, Question 26; COFCO W&W International Anti-Dumping Questionnaire Response (Exhibit AUS-103), Section 3, Question 26.
[692] Panel Report, *China - Autos (US),* para. 7.277. See also Appellate Body Report, *China – GOES*, para. 200; Panel Reports, *China – X-Ray Equipment*, 7.65; China – *Broiler Products*, para. 7.483.
[693] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 113, 139.
[694] International Chamber of Commerce Incoterms 2010 (Exhibit AUS-83), CIF Terms, p. 60.

warehousing costs incurred prior to the goods being available for inland transport to the buyer.[695] In contrast, ex-factory conditions of sale are only recommended for domestic trade and reflect the price of goods available for domestic shipment to a purchaser.[696] Practically, this means that, prior to adjustments being applied, the CIF price for subject imports reflected the price of Australian wine situated on a vessel at a port of entry to China, whereas the ex-factory price of domestic like products reflected the price of Chinese wine available for inland shipment to a buyer in China.

595. The CIF price for subject imports is not comparable to the ex-factory price for domestic like products. This is because the CIF price does not reflect the actual cost of making goods available for inland transport to a buyer in China. It excludes relevant costs such as logistics and/or stevedoring costs and warehousing costs. These costs are incurred during and immediately after goods are unloaded at the port of entry. It also excludes markups for selling expenses and a profit associated with ex-warehouse sales. In contrast, the ex-factory price of domestic like products reflected the price of goods available for inland transport.

596. The additional costs associated with making subject imports available for inland transport would have been reflected in different conditions of sale. That is, subject imports sold on CIF conditions of sale would have a different price to subject imports sold on ex-warehouse conditions and to domestic like products sold on ex-factory conditions. As a result, an objective and unbiased investigating authority would have considered whether the different conditions of sale affected the comparability of the prices and/or whether additional adjustments to reflect the differences needed to be applied. MOFCOM failed to do so. As a result, MOFCOM proceeded to conduct its price comparison on the basis of prices that were not comparable. Consequently, MOFCOM's price effects analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

[695] International Chamber of Commerce Incoterms 2010 (Exhibit AUS-83), CIF Terms, Section B6, p. 65.
[696] International Chamber of Commerce Incoterms 2010 (Exhibit AUS-83), Ex-Works Terms, pp. 1-5. Australia has assumed that the "ex-factory" price of domestic products reflects the sale price on Ex-Works terms.

(B) The adjustments applied by MOFCOM to the CIF prices provided by China Customs do not account for the different conditions of sale

597. Based on MOFCOM's description of the adjustments that it applied, Australia understands that the CIF price was converted to yuan; one or more adjustments to account for the addition of customs/import tariffs was applied; and one or more adjustments to account for the addition of "customs clearance fees" was applied.[697] There is nothing to indicate that these adjustments accounted for the different conditions of sale between the CIF price for subject imports and the ex-factory price for domestic like products. This is because the adjustments MOFCOM applied to the CIF price do not account for the additional costs associated with making subject imports available for inland transport to a buyer in China.

598. In particular, MOFCOM did not apply adjustments to reflect costs associated with:

- stevedoring and logistics costs associated with unloading subject imports from the ship;
- transportation costs associated with moving subject imports from the dock to a warehousing facility; and
- warehousing and storage costs.

599. MOFCOM's failures to: (i) account for different conditions of sale between the CIF price for subject imports and the ex-factory price for domestic like products, and (ii) apply appropriate adjustments to account for these differences, means that the adjusted CIF price of subject imports and the factory price of domestic like products calculated by MOFCOM were not comparable for the purposes of the consideration of price effects under Article 3.2. As a result, MOFCOM's price effects analysis is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

[697] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.

4. MOFCOM failed to consider whether the subject imports had "explanatory force" for the alleged suppression of domestic prices

600. MOFCOM's price suppression determination was based on mere assertions that the subject imports were "directly suppressing the price increase of domestic like products" and, "[a]s a result", preventing the price of domestic like products from increasing at a higher rate "accordingly with the rising cost" of those products.[698] In this regard, MOFCOM considered that the average unit price of domestic like products was suppressed because it had increased by 20.54% (or +6,576 RMB/kl) during the Injury POI, while the average unit cost had increased by 25.19% (or +7,234 RMB/kl) during the same period – a difference of just 658 RMB/kl over the Injury POI.[699]

601. For the reasons set out in sections **3(a)** and **3(b)**, above, Australia's position is that the annual average prices and costs that MOFCOM relied upon for its price effects analysis did not constitute positive evidence and were therefore inconsistent with the obligations set forth in Articles 3.1 and 3.2 of the Anti-Dumping Agreement. However, even if, *arguendo*, such average unit values could be accepted, MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 because MOFCOM failed to consider whether the subject imports of Australian wine had "explanatory force" for the alleged suppression of the domestic prices.

602. In this regard, MOFCOM's price effects analysis omits any consideration or explanation of:

- how the allegedly dumped imports of Australian wine *caused* the alleged price suppression — that is, how subject imports had the *effect* of "prevent[ing] price increases, which otherwise would have occurred, to a significant degree" within the meaning of Article 3.2;
- whether the average unit price of domestic like products would have increased at a higher rate — for example, by an additional 658 RMB/kl over the course of the Injury POI to fully cover the increasing costs of China's domestic industry — in the absence of the allegedly dumped imports from Australia;

[698] Anti-Dumping Final Determination (Exhibit AUS-2), p. 122.
[699] Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.

- evidence on the investigation record concerning factors other than the subject imports of Australian wine that could potentially explain the significant suppression of domestic prices — in particular, the substantial volumes of like imports from third countries whose average unit prices were similar to or less than the average unit prices of the domestic like products during the Injury POI;[700] and

- any other factors calling into question the "explanatory force" of the subject imports for the alleged price suppression, including the fact that, throughout the Injury POI, the average unit prices of the allegedly dumped subject imports were *much higher* than the average unit prices of the domestic like products — i.e. by annual margins of 16.28% to 72.99% (which reflected annual differences of 5,848 RMB/kl to 23,371 RMB/kl).

For these reasons, MOFCOM's price effects analysis and its finding that subject imports of Australian wine were causing suppression of the prices of domestic like products that prevented those prices from rising at a rate that would fully cover their increasing costs are inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Additionally, MOFCOM failed to properly consider whether subject imports had "explanatory force" for the alleged suppression of prices of domestic like products because MOFCOM: (i) did not conduct a counter factual examination; (ii) failed to consider evidence which demonstrated that subject imports were not undercutting or depressing domestic prices; and (iii) did not adequality consider year-to-year price fluctuations occurring during the Injury POI. Each of these arguments are examined below.

(a) MOFCOM's price suppression analysis did not include a counterfactual analysis

603. MOFCOM failed to undertake a counterfactual analysis as part of its consideration of price suppression. The Appellate Body has concluded that the phrase "otherwise would have occurred" in the second sentence of Article 3.2 means that "price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports,

[700] For a full discussion of this evidence, see Section IV.E.8(b) below. See also below, Figure 4 at para. 701.

prices 'otherwise would have' increased".[701] In other words, a price suppression analysis for the purposes of Article 3.2 requires an analysis that is counterfactual in nature.[702]

604. The Final Determination does not contain any discussion or evidence to suggest that MOFCOM conducted a counterfactual analysis in the course of arriving at its price suppression finding. While the evidence discloses that the average unit price of domestic like products rose steadily in China during the Injury POI, increasing a total of 20.5% between 2015 and 2019,[703] there is no evidence indicating that domestic producers in China sought to raise their prices to higher levels or that they were precluded from doing so due to the (much higher) average unit price of subject imports. Rather, the evidence established that, on average, domestic like products were cheaper than subject imports, by a significant margin, for every year in the Injury POI. This indicates that there was ample opportunity for the price of domestic like products to be further increased before competition with subject imports based on price would become an issue.

(b) MOFCOM failed to consider all of the relevant evidence on the record relating to price undercutting and price depression

605. MOFCOM's price effects analysis focuses solely on price suppression. There is no evidence on the record to show that MOFCOM considered price undercutting or depression. To the contrary, the evidence relating to the average unit prices of subject imports and domestic like products clearly indicates that there was no significant price undercutting or price depression occurring in the prices of domestic like products during the Injury POI.

606. Australia acknowledges that an investigating authority may consider whether there has been significant price undercutting, price depression, or price suppression independently of one another and that a finding is not required in relation to all three price effects.[704] However, as the panel in *China – Cellulose Pulp* observed:

> reliance on only one of these price effects in the context of a determination that dumped imports are causing injury will only be consistent with Article 3.1 to the extent that the

[701] Appellate Body Report, *China – GOES*, para. 141.
[702] Panel Report, *Russia - Commercial Vehicles*, para. 7.61.
[703] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 149.
[704] Appellate Body Report, *China – GOES*, para. 137; Panel Reports, *China - HP-SSST (Japan)*, para. 7.129; *China - Cellulose Pulp*, para. 7.63.

investigating authority does not ignore evidence and arguments on the record before it suggesting that one or both of the other price effects suggests a different result.[705]

607. MOFCOM's failure to undertake an analysis of price undercutting or price depression means that it did not consider evidence that undermined its findings on the effect of subject imports on domestic prices. This omission is particularly significant in light of MOFCOM's failure to undertake a counterfactual examination of the evidence on the record in the context of its price suppression analysis, as outlined above. As a result, MOFCOM's price effects analysis and price suppression finding are not based on an objective examination of positive evidence.

608. MOFCOM's own price analysis figures show that:

- The average unit price of subject imports was consistently more expensive than the average unit price of domestic like products, by a considerable margin, in each year of the Injury POI. For example, when the price gap between subject imports and domestic like products was at its widest, subject imports were 72.99% more expensive than domestic like products. When the price gap was at its narrowest, the average unit price of subject imports remained 16.28% more expensive than the average unit price of domestic like products.[706] On average, subject imports were 38.61% more expensive than domestic like products throughout the Injury POI.[707] This demonstrates there was no price undercutting occurring.
- The average unit price of domestic like products was not depressed by the average unit price of subject imports in any year of the Injury POI. Rather, domestic prices continued to increase by a considerable margin in each year during the Injury POI. Domestic prices increased by 20.54%, when 2015 prices are compared to 2019.[708] This demonstrates that no significant price depression was occurring.

[705] Panel Report, *China - Cellulose Pulp*, para. 7.63.

[706] [(Exhibit AUS-65 (BCI)), .]] [707] Australia has calculated the simple average of the price difference percentages using the following formula: (sum of price different percentages for 2015, 2016, 2017, 2018, 2019) / 5.

[708] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120, 136.

609. As discussed below, the evidence on the record before MOFCOM demonstrated that, in contrast to the average unit prices of the subject imports of Australian wine, the average unit prices of imports of like products from third countries were generally *below* the average unit prices of the domestic like products. This evidence indicated that, to the extent that any price suppression or other price effects might be occurring in China's market, it was not the subject imports of Australian wine that had the "explanatory force" for those effects. This alone was sufficient to call into question any explanatory force that might otherwise be attributed to the subject imports.

(c) MOFCOM did not adequately examine year-to-year price fluctuations occurring during the Injury POI

610. MOFCOM's price suppression analysis was based on trends that it purportedly observed during the Injury POI concerning: (i) rising import volumes and declining prices of subject imports; (ii) declining sales volumes of domestic like products; and (iii) rising unit costs of like domestic products, which increased at a faster rate than domestic sales prices were increasing.[709] These trends were based on a comparison of volumes, prices and costs in China in 2015 and 2019, with no detailed analysis of what occurred year-to-year during that period. MOFCOM's focus on the overall 2015-2019 growth and decline trends ignored significant year-to-year fluctuations in the price of subject imports and domestic like products. As a result, MOFCOM ignored evidence on the record that called into question the existence of any alleged relationship between prices of subject imports and domestic prices of like products in China's market.

611. In particular, MOFCOM's omission of any analysis of volume and price fluctuations occurring between 2018 and 2019 is striking given that:

- 2019 is the only year in the Injury POI during which MOFCOM identified subject imports as allegedly being dumped;[710]

[709] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 119-121.
[710] The Anti-Dumping Investigation Period was 1 January to 31 December 2019: see Anti-Dumping Final Determination (Exhibit AUS-2), p. 4.

- the average unit price of subject imports actually increased by 11.48% (4,797 RMB/kl) from 2018 to 2019, while import volumes rose just 2.55% (3,000 kl); and
- the average unit price of domestic like products experienced its most significant increase of 7.41% (2,663 RMB/kl) from 2018-2019, while sales volumes experienced their most significant decline of -15.98% (-34,700 kl).

612. Table 5 in Exhibit AUS-65 (BCI) provides a year-to-year comparison of volume and price change rates.[711]

5. Conclusion

613. For the foregoing reasons, MOFCOM's examination of the price effects of subject imports is inconsistent with China's obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

D. MOFCOM'S EVALUATION OF THE ECONOMIC FACTORS BEARING ON THE STATE OF THE CHINESE WINE INDUSTRY IS INCONSISTENT WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

1. Introduction

614. As set out in section III above, MOFCOM's errors in defining the domestic industry under Article 4.1 of the Anti-Dumping Agreement are fatal to its analysis of the economic factors bearing on the state of the Chinese wine industry under Article 3.4.

615. Further, even if the data relied upon by MOFCOM was reliable, MOFCOM's analysis of the economic factors having a bearing on the domestic industry is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because (i) MOFCOM's evaluation was a mechanical exercise that did not properly examine the explanatory force that Australian imports allegedly had on the domestic industry; (ii) MOFCOM failed to adequately consider factors affecting domestic prices; and (iii) there were errors in MOFCOM's evaluation of the domestic industry data.

[711] [(Exhibit AUS-65 (BCI)), .]]

2. MOFCOM's errors in defining the domestic industry under Article 4.1 are fatal to MOFCOM's Article 3.4 analysis

616. The definition of the domestic industry "forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers".[712] The panel in *China – Autos (US)* explained that "a wrongly-defined domestic industry necessarily leads to an injury determination that is inconsistent" with the Anti-Dumping Agreement.[713]

617. As set out in section III, MOFCOM's identification of the domestic industry contained significant errors and was inconsistent with Article 4.1 of the Anti-Dumping Agreement because: (i) the process MOFCOM used to identify and define the domestic industry introduced material risks of distortion; (ii) it is not based on positive evidence; and (iii) it introduced a material risk of skewing the economic data. The consequence of this is that the data gathered by MOFCOM for the purposes of its evaluation of the domestic industry under Article 3.4 suffers from the same errors, meaning that the data relied on by MOFCOM was flawed and unreliable.

618. As a result, MOFCOM's evaluation of the economic factors that have a bearing on the domestic industry cannot be said to be an objective examination based on positive evidence and is therefore inconsistent with China's obligations under Articles 3.4 and 3.1 of the Anti-Dumping Agreement.

3. The evaluation of economic factors required under Article 3.4 of the Anti-Dumping Agreement

619. Article 3.4 of the Anti-Dumping Agreement sets forth a Member's substantive obligations with respect to the evaluation of economic factors that bear on the state of the domestic industry in the context of an examination of injury. Article 3.4 provides as follows:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative

[712] Appellate Body Report, *EC – Fasteners (China),* para. 413, Footnote to Article 3 of the Anti-Dumping Agreement.
[713] Panel Report, *China – Autos (US)*, para. 7. 210.

> effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

620. As with the analysis under the second sentence of Article 3.2, Article 3.4 requires an examination of the relationship between the domestic industry and the subject imports. The Appellate Body addressed this point in *China – GOES*, explaining as follows:

> Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry.[714]

621. As to the factors to be addressed under Article 3.4, the panel in *Guatemala – Cement II* considered that:

> Article 3.4 establishes a rebuttable presumption that those factors listed are relevant in giving guidance on whether the dumped imports have had an effect on the domestic industry. It is only after consideration of the listed factors that the investigating authority may dismiss some of them as not being relevant for the particular industry, thus in effect rebutting the presumption established in Article 3.4.[715]

622. The list of factors is not exhaustive. The panel in *Mexico – Corn Syrup* observed that "[t]here may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required".[716]

4. MOFCOM's evaluation of the factors having a bearing on the domestic industry does not provide a satisfactory basis for the injury determination

623. In the Final Determination, MOFCOM summarised data relating to 16 economic factors. It then performed a high-level assessment of overall trends relating to some of these factors in order to arrive at its overall conclusion that "the production and operation of

[714] Appellate Body Report, *China – GOES*, para. 149. (original emphasis)
[715] Panel Report, *Guatemala – Cement II*, para. 8.283.
[716] Panel Report, *Mexico – Corn Syrup*, para. 7.128.

domestic like products deteriorated, and the domestic relevant wine industry suffered material injury".[717]

624. Even if the data relied upon by MOFCOM was reliable, MOFCOM's analysis of the economic factors having a bearing on the domestic industry does not provide a satisfactory basis for its determination that there was material injury to that industry because:

- MOFCOM's evaluation was a mechanical exercise that did not properly examine the "explanatory force" that Australian imports allegedly had on the state of the domestic industry;
- MOFCOM failed to adequately consider factors affecting domestic prices; and
- there were errors and omissions in MOFCOM's evaluation of the relevant economic factors and indices having a bearing on the state of the domestic industry.

625. The effect of each of these errors (individually or cumulatively) was that MOFCOM's evaluation of the domestic industry was inconsistent with Article 3.4, because it failed to provide a satisfactory basis for the injury determination. These errors further result in a violation of Article 3.1 because MOFCOM's analysis does not constitute an objective examination of positive evidence.

(a) MOFCOM's evaluation was a mechanical exercise that did not adequately examine the explanatory force Australian imports were alleged to have on the domestic industry

626. Article 3.4 requires more than a mere "check-list approach" consisting of a mechanical exercise of referring to each of the listed relevant factors.[718] Rather, it requires an investigating authority to examine the impact of subject imports on the domestic industry in order to provide a meaningful basis for the analysis of whether the dumped imports are, through the effects of dumping, as set forth in Articles 3.2 and 3.4, causing injury to the

[717] Anti-Dumping Final Determination (Exhibit AUS-2), p. 134.
[718] Panel Report, *Thailand – H-Beams*, para. 7.236; see also Panel Reports, *Korea – Certain Paper*, para. 7.272; *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; *Egypt – Steel Rebar*, paras. 7.44, 7.46; and *US – Hot-Rolled Steel*, para. 7.232

domestic industry.[719] To do so, an investigating authority should evaluate trends relating to injury factors and ensure it adequately explains the basis for its conclusions.[720]

627. In the Final Determination, MOFCOM's evaluation of the domestic industry was divided into two distinct parts:

- In the first part, MOFCOM provides a high-level summary of data relating to 16 economic factors (**Part 1**).[721] Generally, MOFCOM's evaluation of the 16 factors consists of: a sentence providing MOFCOM's assessment of the overall trend relating to the factor; a recitation of yearly figures relating to the factor; and a recitation of yearly change rates without further consideration or analysis.
- In the second part, MOFCOM provides a narrative description of some of the 16 domestic industry factors and issues raised by various interested parties (**Part 2**).[722] MOFCOM then concluded that, during the Injury POI, "the production and operation of domestic like products deteriorated, and the domestic relevant wine industry suffered material injury".[723]

628. MOFCOM's evaluation of the domestic industry is inconsistent with Article 3.4 because it amounts to a mere "checklist" or "mechanical exercise",[724] and fails to provide an adequate examination of the impact of the subject imports on the domestic industry.

629. First, Part 1 simply consists of a recitation of figures relating to each economic factor. It contains no evaluation or assessment of those figures, let alone any examination of the "explanatory force" of subject imports in relation to those figures. Article 3.4 requires an investigating authority to do more than simply gather data. An investigating authority must analyse and interpret that data.[725]

[719] Appellate Body Reports, *China–GOES*, paras. 145, 149, 154; *China – HP-SSST (Japan)*, paras. 5.205, 5.211.
[720] Panel Report, *China – X-Ray Equipment*, para. 7.215.
[721] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123 – 129.
[722] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 129 – 134.
[723] Anti-Dumping Final Determination (Exhibit AUS-2), p. 134.
[724] Panel Report, *Thailand – H-Beams*, para. 7.236.
[725] Panel Reports, *Egypt – Steel Rebar*, para. 7.44; *Pakistan - BOPP Film (UAE)*, para. 7.351; *Korea – Certain Paper*, para. 7.268.

630. The Panel in *Thailand – H-Beams* explained that "all of the listed factors in Article 3.4 must be considered in all cases"[726] and that "a mere 'checklist approach'", consisting of a "mechanical exercise" which referred to each of the factors in some way, would not satisfy the requirements of Article 3.1 to conduct an objective examination.[727]

631. The panel in *Korea – Certain Paper*, with the benefit of the Panel's findings in *Thailand – H-Beams*, considered that:

> Article 3.4 requires the [investigating authority] to carry out a reasoned analysis of the state of the industry. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 lead to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury.[728]

632. MOFCOM's analysis fails to do so and, as such, was inconsistent with Article 3.4 of the Anti-Dumping Agreement.

633. Second, Part 2 of MOFCOM's analysis only provides further comments on certain factors, without providing the reasons for not considering the relevance of the other economic factors.[729]

634. While an investigating authority is entitled to determine that some economic factors are not relevant or significant in the particular circumstances of a case, it is required to provide an explanation of the basis for this conclusion,[730] and this should be apparent in the final determination.[731] As the Panel in *EC – Bed Linen* explained:

> [W]e are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination.[732]

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[726] Panel Report, *Thailand – H-Beams*, para. 7.229. This view was endorsed by the Appellate Body, see Appellate Body Report, *Thailand – H-Beams*, para. 125.
[727] Panel Report, *Thailand – H-Beams*, para. 7.236.
[728] Panel Report, *Korea – Certain Paper*, para. 7.272. (footnote omitted)
[729] In Part 2, MOFCOM makes reference to apparent consumption, production capacity, output, domestic sale value, market share, sale price, sales revenue, profit before tax, return on investment, operating rate, employment, closing stock, cashflow and Investment and financing capacity. MOFCOM did not reference labour productivity, salary per capita or dumping margins.
[730] Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.314; Panel Report, *Mexico – Corn Syrup*, para. 7.128; Panel Report, *Korea - Pneumatic Valves,* para. 7.179; see also Appellate Body Report, *Korea - Pneumatic Valves*, para. 5.168.
[731] Panel Reports, *EC – Bed Linen* para. 6.162; *EC – Tube or Pipe Fittings*, para. 7.314
[732] Panel Report, *EC – Bed Linen*, para. 6.162.

635. MOFCOM does not explain why it chose to not provide any further comment on the relevance of certain factors.

636. Third, MOFCOM's evaluation of the factors that it considered relevant is insufficient to reach a determination of material injury. Article 3.4 requires a "well-reasoned and meaningful analysis" of the state of the domestic industry that must "contain persuasive explanations as to how the evaluation of relevant factors led to the determination of injury".[733]

637. MOFCOM's analysis provides no explanation as to how the volumes and prices of the subject imports had any impact on the relevant economic factors relating to the performance of the domestic industry. Rather, MOFCOM's conclusions consist of bare assertions that "[a]fter a comprehensive analysis of relevant data, the Investigating Authority concluded in the Preliminary Ruling that during the injury investigation period, the production and operation of domestic like products deteriorated, and the domestic wine industry suffered material injury",[734] and "[u]pon further investigation, the Investigating Authority decided to uphold the conclusions of the Preliminary Ruling".[735]

638. As such, MOFCOM's methodology does not involve a "well-reasoned and meaningful analysis" of the impact of subject imports on the domestic industry, including through an evaluation of the relevant economic factors or a persuasive explanation as to how such an evaluation led to the determination of material injury. As a result, MOFCOM's examination of the impact of the subject imports on the domestic industry is inconsistent with China's obligations under Articles 3.4 and 3.1 of the Anti-Dumping Agreement.

(b) MOFCOM failed to adequately consider factors affecting domestic prices

639. Article 3.4 lists "factors affecting domestic prices" as one of the relevant factors having a bearing on the state of the domestic industry. Investigating authorities have discretion to determine what specific factors affecting domestic prices are to be considered

[733] Panel Report, *Thailand – H-Beams*, para. 7.236.
[734] Anti-Dumping Final Determination (Exhibit AUS-2), p. 131.
[735] Anti-Dumping Final Determination (Exhibit AUS-2), p. 134.

in any given case.[736] However, once interested parties have demonstrated that a factor may be relevant to the state of the domestic industry, an investigating authority "is tasked with objectively examining such evidence".[737]

640. During the investigation, MOFCOM sought information from Chinese domestic producers regarding the "factors that your company believes affect price changes of your company's like product".[738] All 21 Chinese producers informed MOFCOM that three main factors affected domestic prices: (i) market supply and demand; (ii) changes in the cost of raw materials; and (iii) import quantities and prices of subject imports.[739] In its evaluation of the domestic industry, MOFCOM failed to adequately examine the impact of market supply and demand on domestic prices and did not consider the cost of raw materials at all. Rather, MOFCOM simply asserted that the price of domestic like products was affected solely by the "continuous significant increase in the absolute volume and market share of the dumped imported products, and the cumulative decline in the price of the dumped imported products".[740]

i. Market supply and demand

641. Despite the responses supplied by the Chinese domestic producers, which indicated that market supply and demand constituted a main factor affecting domestic prices, MOFCOM

[736] Panel Reports, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.260; *Egypt – Steel Rebar (Turkey)*, para. 7.65; *EU – Footwear (China)*, para. 7.445.
[737] Appellate Body Report, *Russia - Commercial Vehicles*, para. 5.158.
[738] Anti-Dumping Questionnaire for Domestic Producers, Part 4, Question 39(5). See footnote [739] below.
[739] Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), Section 4, Question 39(5), p. 35-36; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), Section 4, Question 39(5), pp. 36-37; CITIC Guoan Anti-Dumping Questionnaire Response (Exhibit AUS-47), Section 4, Question 39(5), p. 36; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), Section 4, Question 39(5), p. 37; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), Section 4, Question 39(5), pp. 37 – 38; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), Section 4, Question 39(5), p. 35; Grand Dragon Wine Anti-Dumping Questionnaire Response (Exhibit AUS-51), Section 4, Question 39(5), p. 39; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), Section 4, Question 39(5), p. 37; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), Section 4, Question 39(5), p. 36; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), Section 4, Question 39(5), p. 36; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), Section 4, Question 39(5), p. 36; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), Section 4, Question 39(5), p. 38; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), Section 4, Question 39(5), p. 37; Turpan LouLan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), Section 4, Question 39(5), pp. 35-36; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), Section 4, Question 39(5), pp. 35-36; Xinjiang West Region Pearl Winery Anti-Dumping Questionnaire Response (Exhibit AUS-45), Section 4, Question 39(5), pp. 34-35; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), Section 4, Question 39(5), pp. 34-35; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), Section 4, Question 39(5), p. 37; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), Section 4, Question 39(5), p. 37; COFCO Wine Anti-Dumping Questionnaire Response (Exhibit AUS-44), Section 4, Question 39(5), p. 38; and Changyu Wine Anti-Dumping Questionnaire Response (Exhibit AUS-53), Section 4, Question 39(5), p. 37.
[740] Anti-Dumping Final Determination (Exhibit AUS-2), p. 130.

did not evaluate or consider the impact that supply and demand trends had on the price of domestic like products. Rather, in Part 1 of its evaluation of the domestic industry, MOFCOM provided yearly volumes and change rates relating to apparent consumption volumes, production capacity and output volumes.[741] In Part 2, MOFCOM merely reiterated the apparent consumption, production capacity and output trends identified in Part 1. [742] In particular, MOFCOM's figures show that during the Injury POI:

- apparent consumption increased by 19.85% (765,900 kl to 918,000 kl) between 2015 and 2017 and then declined by 19.25% (918,000 kl to 741,200 kl) between 2017 and 2019.[743]
- the domestic output reported by the 21 respondents did not exceed 33% of apparent consumption during any year of the Injury POI;[744] and
- the 21 respondents reported that they never utilised more than 40% of total production capacity.[745]

642. Such significant fluctuations in consumption volumes are highly unusual for a consumer product such as wine. Further, the significant gap between output volumes and overall production capacity is unusual. These supply and demand issues required careful consideration in order to establish the impact that they may have had on the price of domestic like products. However, at no point in its analysis did MOFCOM evaluate or consider the impact that these issues had on the prices of domestic like products or the state of the domestic industry.

[741] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-124.
[742] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 129-130.
[743] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123, 148.
[744] Output volumes as a percentage of apparent consumption for the 21 domestic respondents for each year in the Injury POI were: 33.01% in 2015, 28.95% in 2016, 24.80% in 2017, 25.81% in 2018 and 23.61% in 2019. Australia has calculated output as a percentage of apparent consumption using the following formula: (Domestic Output / Apparent consumption)*100. For output and apparent consumption volumes see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 111, 123-124, 148-149.
[745] Output volumes as a percentage of production capacity for the 21 domestic respondents for each year in the Injury POI were: 39.43% in 2015, 37.01% in 2016, 36.11% in 2017, 34.52% in 2018 and 26.98% in 2019. Australia has calculated output as a percentage of production capacity using the following formula: (Domestic Output / Domestic capacity)*100. For output and capacity volumes see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-124, 148-149.

ii. Cost of raw materials

643. Despite being informed by domestic producers that the cost of raw materials was a key factor affecting domestic prices, MOFCOM did not consider the effect that the cost of raw materials had on domestic prices.[746]

iii. Conclusion

644. Once informed that supply and demand in China's market and changes in raw material costs were factors affecting prices of domestic like products, MOFCOM was required to evaluate the impact that these factors had on the price of domestic like products.

645. MOFCOM's failure to do so means that it has failed to adequately examine a mandatory Article 3.4 factor and that its evaluation of the state of the domestic industry was not an objective examination of positive evidence. Consequently, MOFCOM's evaluation of the economic factors having a bearing on the state of the domestic industry is inconsistent with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

(c) There were errors and omissions in MOFCOM's evaluation of the data relating to relevant economic factors and indices

646. MOFCOM made a number of errors and omissions in its evaluation of the data related to the relevant economic factors and indices having a bearing on the state of the domestic

[746] MOFCOM sought information regarding the costs of raw materials from the domestic producers. The domestic producers' responses to these questions are subject to confidentiality claims: see Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), Questions 12, 13 and 40, pp. 18-19, 36; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), Questions 12, 13 and 40, pp. 20, 37; CITIC Guoan Anti-Dumping Questionnaire Response (Exhibit AUS-47), Questions 12, 13, 40, pp. 19, 37; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), Questions 12, 13, 40, pp. 19, 37-38; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), Questions 12, 13, 40, pp. 20, 38; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), Questions 12, 13, 40, pp. 18, 35; Grand Dragon Wine Anti-Dumping Questionnaire Response (Exhibit AUS-51), Questions 12, 13, 40, pp. 21, 39-40; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), Questions 12, 13, 40, pp. 20, 37; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), Questions 12, 13, 40, pp. 19, 36; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), Questions 12, 13, 40, pp. 19, 36-37; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), Questions 12, 13, 40, pp. 19, 36; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), Questions 12, 13, 40, pp. 19, 38; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), Questions 12, 13, 40, pp. 20, 37-38; Turpan LouLan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), Questions 12, 13, 40, pp. 19, 36; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), Questions 12, 13, 40, pp. 19, 36; Xinjiang West Region Pearl Winery Anti-Dumping Questionnaire Response (Exhibit AUS-45), Questions 12, 13, 40, pp. 18, 35; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), Questions 12, 13, 40, pp. 18, 35; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), Questions 12, 13, 40, pp. 19, 37; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), Questions 12, 13, 40, pp. 19, 37-38; COFCO Wine Anti-Dumping Questionnaire Response (Exhibit AUS-44), Questions 12, 13, 40, pp. 19, 39; and Changyu Wine Anti-Dumping Questionnaire Response (Exhibit AUS-53), Questions 12, 13, 40, pp. 20, 37-38.

industry. In this respect, MOFCOM's analyses and reasoning were inconsistent with its own data and factual findings.

647. First, as noted above, MOFCOM's apparent consumption figures show that there was significant growth (19.85%) between 2015 and 2017 and a significant contraction (-19.26%) between 2017 and 2019.[747] MOFCOM did not consider what factors were driving the significant growth in apparent consumption experienced between 2015 and 2017, nor did it evaluate the factors which caused the contraction between 2017 and 2019. Instead, MOFCOM simply stated that during the Injury POI "the apparent consumption in the Chinese relevant wine market first increased and then decreased, the overall market demand was steady".[748] MOFCOM's characterisation of market demand as "steady" appears to be based on an end-to-end comparison of consumption volumes in 2015 and 2019, which fails to take into account the substantial growth and contraction trends that occurred during the injury POI or their impact on the relevant economic factors and indices having a bearing on the state of the domestic industry.

648. Substantial changes in consumption volumes were likely to have an impact on the domestic industry in terms of sales volume and revenue, profits, return on investments, cash flow, employment, wages, growth and ability to raise capital or attract investment. As noted above, the domestic producers indicated in their questionnaire responses that supply and demand constituted a main factor affecting the price of domestic like products. Article 3.4 required MOFCOM to properly evaluate the impact of significant changes in apparent consumption to the extent that it affected the relevant economic factors and indices having a bearing on the state of the domestic industry. MOFCOM's failure to engage with the significant changes in apparent consumption volumes experienced during the Injury POI means that its evaluation of the domestic industry does not provide a meaningful basis for the injury determination.

649. Second, MOFCOM stated that "evidence shows … the domestic industry capacity expansion plan was suspended with the volume increase and price decrease of the product under investigation".[749] MOFCOM does not explain what the "domestic industry capacity

[747] Anti-Dumping Final Determination (Exhibit AUS-2), p. 148 (Table entitled "Form: Data Table of Anti-Dumping Case against Relevant Australian Wines", row entitled "Apparent consumption (10,000 kl)".
[748] Anti-Dumping Final Determination (Exhibit AUS-2), p. 129.
[749] Anti-Dumping Final Determination (Exhibit AUS-2), p. 129.

expansion plan" was and does not provide any evidence in support of the assertion that it was "suspended" because of price and volume fluctuations in subject imports.

650. In its Domestic Producer Questionnaire, MOFCOM requested information regarding the "impact of domestic production capacity expansion".[750] It is unclear whether this question is related to the "the domestic industry capacity expansion plan" referred to in the Final Determination. However, MOFCOM ignored evidence before it that weighed against the existence of a causal relationship between subject imports and the suspension of the domestic industry capacity expansion plan. Specifically, there was evidence before MOFCOM which demonstrated that:

- there was significant idle capacity already existing in the domestic industry during the Injury POI;[751] and
- between 2017 and 2019, the volume of apparent consumption (i.e. demand in the domestic market) contracted by- 176,800 kl (a decrease of 19.26%). This contraction was far greater than the increase in import volume of subject imports in the same period (15,000 kl).[752]

651. Third, MOFCOM stated that "the operating rate of domestic like products was decreasing and seriously inadequate, which was only 35%, with lots of idle production equipment and the capacity could not be released effectively".[753] Beyond asserting that the "operating rate" of the domestic industry was "seriously inadequate", MOFCOM failed to provide any explanation as to why the unutilised "capacity could not be released effectively" or any evidence to support this statement. Moreover, there is no consideration or explanation provided as to whether the subject imports have any "explanatory force" for the domestic industry's low rate of capacity utilization or the purported inability to release capacity effectively.

652. Fourth, MOFCOM sought to contrast the price increases experienced by the domestic industry with decline in the average unit price of the basket of subject imports as follows:

[750] See e.g., Changyu Wines Anti-Dumping Questionnaire Response, p. 46.
[751] See difference between yearly 'capacity', 'output and 'total national output' figures: Anti-Dumping Final Determination (Exhibit AUS-2), p. 129.
[752] See 'apparent consumption' and 'Import volume of the product under investigation' figures: Anti-Dumping Final Determination, p. 148.
[753] Anti-Dumping Final Determination (Exhibit AUS-2), p. 130.

> With the continuous significant increase in the absolute volume and market share of the dumped imported products, and the cumulative decline in the price of the dumped imported products by 15.91%, the domestic like products saw some growth in the sales price, yet such growth was lower than the cost rise at the same time, indicating that the rise of the sales price failed to reach the level where it should be able to offset the cost rise.[754]

653. In making this statement, MOFCOM ignored evidence on the record which demonstrated that:

- The growth in domestic prices was in fact a cumulative price increase of 20.54% (6,576 RMB/kl) between 2015 and 2019.[755]
- While the increase in the average unit price was lower than the increase in the average unit cost for each year in the Injury POI, the difference was minimal. Specifically, the change rates for domestic unit price and cost increases were within one percentage point for every year, except 2015 to 2016, where the difference was 2.79 percentage points.[756] Moreover, in each year, the difference between the average unit price of subject imports and that of domestic like products vastly exceeded the difference between the average unit price and average unit cost of domestic like products. In this way, the evidence on the record before MOFCOM clearly demonstrated that the average unit price of subject imports was not preventing the average unit price of domestic like products from further increasing to fully cover the rise in average unit cost.

[754] Anti-Dumping Final Determination (Exhibit AUS-2), p. 130.

[755] For end-to-end domestic price increase percentage see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120, 136. Australia has been able to replicate this percentage using the formula: (2019 domestic price – 2015 domestic price)/2015 domestic price. Australia has calculated the RMB/kl end-to-end price difference using the formula: 2019 domestic price – 2015 domestic price. For domestic price figures see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 120, 125, 149.

[756] Australia has relied on the yearly domestic price change rates calculated by MOFCOM, see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 125, 149. Australia has been able to replicate these percentages using the formula: (domestic price – domestic price of previous year) / domestic price of previous year. Australia has calculated the year to year change rate for unit costs using the formula: (unit cost – unit cost for previous year)/ unit cost for previous year. For unit costs see Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.

- Despite the average unit cost increases, the sale price of domestic like product was always higher than the unit cost during the Injury POI, suggesting that the sale price was "able to offset the cost rise".[757]

654. MOFCOM did not explain why it chose to place significant weight on the increase in the average unit costs and disregard evidence placing that increase in context. MOFCOM did not identify any evidence to support the proposition that the domestic industry was unable to increase its prices in line with its increased costs because of (that is, as a result of) subject imports. Rather, MOFCOM describes the trends related to the subject imports on one hand, and the trends related to the domestic industry on the other hand, but provides no evidence or explanation indicating any relationship of cause and effect. There is nothing to suggest that the presence of the subject imports in China's market prevented the domestic industry from further increasing prices of domestic like products. As noted above, this is evidenced by the substantial gap between the average unit price of the basket of subject imports and the average unit price of the basket of like domestic products.

655. Fifth, MOFCOM stated in the Final Determination that:

> During the injury investigation period, the sales revenue and the PBT of domestic like products continued to decline, resulting in the continuous deterioration of the production and operation of such products and in the forced reduction of the employment in the domestic industry, which saw a continuous decline in employees engaged in such products.

656. In making this statement, MOFCOM ignored evidence on the record that called into question MOFCOM's assertion that the "deterioration of the production and operation" resulted from declining revenue and PBT, including:

- sales revenue during the Injury POI did not "continue to decline". Rather, sales revenue (RMB) fluctuated year to year, reaching its highest point in 2018. It then experienced significant decline between 2018 and 2019 (- 9.76%);[758]

[757] Anti-Dumping Final Determination (Exhibit AUS-2), p. 130. For domestic sale price figures see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 120, 125, 149; For unit cost figures see Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.
[758] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 125-126, 149.

- there was significant idle production capacity and "lots of idle production equipment" available to the domestic industry throughout the Injury POI;[759] and
- despite declines, the domestic industry remained profitable on a PBT basis throughout the Injury POI.[760]

657. Individually and cumulatively, these errors undermine the veracity and credibility of MOFCOM's evaluation of the relevant economic factors and indices having a bearing on the state of the domestic industry under Article 3.4, such that it cannot be said to be an objective examination of positive evidence or to provide a satisfactory basis for the injury determination. As a consequence, MOFCOM's examination of the impact of subject imports on the domestic industry is inconsistent with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5. Conclusion

658. For the foregoing reasons, MOFCOM's examination of the domestic industry was inconsistent with China's obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

E. MOFCOM'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

1. Introduction

659. MOFCOM's causation analysis in the Anti-Dumping Final Determination is inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM:

- relied on the outcomes of its flawed evaluations under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, vitiating its causation analysis under Article 3.5;

[759] Anti-Dumping Final Determination (Exhibit AUS-2), p. 130.
[760] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 126, 149.

- failed to conduct a proper causation analysis to demonstrate the existence of a "genuine and substantial relationship of cause and effect" between subject imports and the alleged injury to the Chinese domestic industry;
- failed to conduct non-attribution analyses in relation to other "known" factors; and
- failed to undertake an objective examination of causation based on all relevant evidence before MOFCOM or to make determinations based on positive evidence.

2. The examinations of causation and non-attribution required under Articles 3.5 and 3.1 of the Anti-Dumping Agreement

660. Article 3.5 of the Anti-Dumping Agreement establishes the framework for an investigating authority to determine whether a "causal relationship" exists between the allegedly dumped imports and injury to the domestic industry.[761]

661. The first sentence of Article 3.5 requires an investigating authority to demonstrate that the allegedly dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4 — that is, "through their volume, price effects, and impact on the domestic industry"[762] — causing material injury to the domestic industry.[763] However, the second sentence also requires that the establishment of this "causal link" be "based on an examination of *all relevant evidence* before the authorities".[764] In the context of Article 15.5

[761] Article 3.5 of the Anti-Dumping Agreement provides as follows: "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry".

[762] Panel Report, *Korea – Pneumatic Valves*, para. 7.248. See also Appellate Body Reports, *China – GOES*, para. 143 ("by virtue of the phrase "*through* the effects of" dumping or subsidies "[a]s set forth in paragraphs 2 and 4", Articles 3.5 and 15.5 make clear that the inquiries set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5") (emphasis in original) (footnotes omitted); *Korea – Pneumatic Valves*, para. 5.191.

[763] Panel Reports, *EU – Footwear (China)*, para. 7.482; Appellate Body, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 117.

[764] Appellate Body Reports*, China – HP-SSST (Japan)*, para. 5.225 ("The first two sentences of Article 3.5 identify the ***causal link*** that must be shown in reaching an injury determination. These sentences expressly require investigating authorities to

of the SCM Agreement, which is nearly identical to Article 3.5 of the Anti-Dumping Agreement, the Appellate Body has held that a showing of a "causal relationship" between the subject imports and the injury requires the existence of a "genuine and substantial relationship of cause and effect".[765] Australia submits that the same "causation standard" is applicable under Article 3.5.

662. In the course of identifying this causal relationship, investigating authorities are not permitted to attribute to dumped imports injuries caused by other factors.[766] In this respect, the third sentence of Article 3.5 requires an investigating authority to "ensure that the injurious effects of other known factors are not 'attributed' to dumped imports".[767] The Appellate Body has explained that this requires the investigating authority to identify, separate, and distinguish the injurious effects of the other factors from the injurious effects of the dumped imports because, in the absence of such separation and distinction of the different injurious effects, the authority will have no rational basis to conclude that the dumped imports are indeed causing the injury.[768] The list of factors in the fourth sentence of Article 3.5 is "illustrative", and each of these factors may or may not be relevant in a given case.[769]

663. Article 3.5 does not prescribe any particular methodology for how the examinations of causation and non-attribution are to be undertaken.[770] However, "[t]he investigating

demonstrate that the dumped imports are causing injury, and stipulate that such 'demonstration of a causal relationship between the dumped imports and the injury to the domestic injury shall be based on an examination of ***all relevant evidence*** before the authorities'"[emphasis original]); *Korea – Pneumatic Valves*, para. 5.291 ("evidence that does not fall squarely within the parameters of Articles 3.2 and 3.4 may nevertheless be relevant and persuasive with respect to whether a causal relationship can be demonstrated under Article 3.5"). See also Panel Report, *China – Cellulose Pulp*, para. 7.141; Appellate Body Report, *EU – Biodiesel*, para. 6.125.

[765] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.168 citing Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132; *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 179 (addressing the causation standard under Article 4.2(b) of the Agreement on Safeguards); *US – Upland Cotton*, para. 438; *US – Large Civil Aircraft (2nd complaint)*, para. 913 (addressing the causation standard under Articles 5 and 6 of the SCM Agreement).

[766] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

[767] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[768] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223 ("If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors"); see also Appellate Body Report, *EU – Biodiesel*, para. 6.125 ("The non-attribution language in Article 3.5 calls for an assessment that involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports" and requires "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports"). See also Appellate Body Reports, *China – GOES*, para. 151; *China – HP-SSST (Japan)*, para. 5.283; and Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.434. (footnote omitted).

[769] Panel Report, *Thailand – H-Beams*, para. 7.274.

[770] Panel Report, *China – Cellulose Pulp*, para. 7.24 and 7.142; Appellate Body Report, *US – Hot Rolled Steel*, para. 224.

authority's demonstration of causation and non-attribution is subject to the overarching obligation under Article 3.1 that the determination of injury must involve an objective examination based on positive evidence".[771] Further, the investigating authority's "reasoning and explanations" regarding its causation determination "must be reflected in relevant documentation, such as a public notice or other separate report of its final determination whether or not to impose an anti-dumping measure".[772] The Appellate Body has explained that "the entire rationale for the investigating authority's decision must be set out in its report on the determination", and "in all instances, it is the explanation provided in the written report of the investigating authorities (and supporting documents) that is to be assessed in order to determine whether the determination was sufficiently explained and reasoned".[773]

3. The inconsistencies of MOFCOM's analyses under Articles 3.2 and 3.4 of the Anti-Dumping Agreement vitiate its causation analysis under Article 3.5

664. The Appellate Body has explained that the examinations required under Articles 3.2 and 3.4 of the Anti-Dumping Agreement "are necessary in order to answer the ultimate question" in Article 3.5 "as to whether subject imports are causing injury to the domestic industry", and that "[t]he outcomes of these inquiries form the basis for the overall causation analysis contemplated" in Article 3.5.[774] In turn, the Appellate Body has considered that "to the extent that a panel finds that an investigating authority's … analyses are inconsistent with its obligations under Articles 3.2 and 3.4, such inconsistencies would likely undermine an investigating authority's overall causation determination and *consequentially* lead to an inconsistency with Article 3.5".[775]

[771] Panel Report, *Korea – Pneumatic Valves*, para. 7.249.
[772] Panel Report, *China - Cellulose Pulp*, para. 7.30 citing Appellate Body Report*, China – GOES*, para. 131..
[773] Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.255.
[774] Appellate Body Report, *China – GOES*, para. 149.
[775] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.196 (emphasis original). A number of panels have taken this view, see e.g. Panel Report, *China – GOES*, para. 7.620 ("Our evaluation of MOFCOM's findings on price depression and price suppression has revealed a number of shortcomings in MOFCOM's analysis of the price effects of subject imports. Since MOFCOM relied on the price effects of subject imports in support of its finding that subject imports caused material injury to the domestic industry, the abovementioned shortcomings also undermine MOFCOM's conclusion on the causal link between subject imports and the material injury suffered by the domestic industry"); and Panel Report, *China – Autos (US)*, para. 7.327 ("it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of the Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements"). See also Panel Report, *China - X-Ray Equipment*, para. 7.250.

665. Australia has demonstrated that MOFCOM acted inconsistently with:

- Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement by failing to conduct an objective examination based on positive evidence of the price effects of the allegedly dumped imports of Australian wine on prices for domestic like products; and
- Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to conduct an objective evaluation based on positive evidence of the economic factors bearing on the state of China's wine industry in the context of its examination of injury.

666. MOFCOM relied on the outcomes of these WTO-inconsistent examinations in support of its finding that subject imports caused material injury to the domestic industry.[776] As such, these shortcomings also undermine MOFCOM's conclusion on the causal link between subject imports of Australian wine and the injury allegedly suffered by the domestic industry. Therefore, as a consequence of the inconsistencies with Articles 3.2 and 3.4 of the Anti-Dumping Agreement, MOFCOM's determination that subject imports of Australian wine caused material injury to the domestic wine industry in China is inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

4. MOFCOM's analysis failed to establish a genuine causal link between Australian imports and injury to the domestic industry

667. Under Article 3.5, MOFCOM was required to demonstrate, based on an examination of all relevant evidence on the investigation record, that subject imports of Australian wine were, through the effects of dumping, *causing* material injury to the domestic wine industry in China. MOFCOM failed to do so. Rather, MOFCOM's causation analysis simply reiterated the outcomes of its examinations under Articles 3.2 and 3.4 and concluded, without further analysis, that "the market share of domestic like products was obviously squeezed by the

[776] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 134-137.

dumped imported product"[777] and "[b]ecause of the suppressed price, … the dumped imported product caused severe injury to domestic industrial production and operation".[778]

668. Like MOFCOM's examinations under Articles 3.2 and 3.4, in which it failed to consider or explain the "explanatory force" of subject imports for the alleged price suppression or other factors affecting the state of the domestic industry, MOFCOM's analysis under Article 3.5 merely asserted that there was a "causal relationship" without actually establishing the existence of a genuine and substantial relationship of cause and effect between the allegedly dumped imports of Australian wine and the material injury. Absent from the Final Determination is any evaluation, explanation, or reasoning to demonstrate how the volumes and prices of the subject imports are causally linked to the price suppression allegedly affecting China's domestic market and injuring the domestic industry. In order to properly establish whether such a causal relationship existed, MOFCOM was required, at a minimum, to examine how the volumes and prices of the subject imports interacted with the prices of domestic like products in order to cause price suppression.[779] It failed to do so.

669. To the extent that MOFCOM's determination of causation was based on a mere correlation drawn between the increasing volume and declining average unit price of the basket of subject imports on the one hand, and the decreasing production volume and rate at which the average unit price of the like domestic products was increasing on the other hand, this was not — without more — sufficient to establish a causal relationship. Correlation and causation are two distinct concepts.[780] While a correlation may be indicative of a causal relationship, it is "not dispositive of the causation question".[781] An analysis grounded in coincidence is not sufficient for the purposes of Article 3.5; a more detailed analysis is required.[782] This is manifestly demonstrated in the circumstances of this investigation, in which the evidence on the record before MOFCOM clearly established that certain other factors, including the prices of like imports from third countries and the preferential treatment

[777] Anti-Dumping Final Determination (Exhibit AUS-2), p. 135.
[778] Anti-Dumping Final Determination (Exhibit AUS-2), p. 136 ("Because of the suppressed price, the pre-tax profit of domestic like products dropped, their output, sales volume, PBT, return on investment (ROI), operating rate and employment volume declined year by year, and their market share, sales revenue, labour productivity and net cash flow from operating activities were in a downtrend. To sum up the dumped imported product caused severe injury to domestic industrial production and operation").
[779] Panel Report, *China – X-Ray Equipment*, para. 7.251.
[780] Panel Report, *China - X-Ray Equipment*, para. 7.247.
[781] Panel Report, *China - X-Ray Equipment*, para. 7.247.
[782] Panel Report, *China - X-Ray Equipment*, para. 7.247.

phased in under the China-Australia Free Trade Agreement, were causing the alleged injurious effects that MOFCOM attributed to the alleged dumping of Australian wine.

5. MOFCOM failed to conduct an examination of all relevant evidence that was before it on the investigation record

670. MOFCOM failed to conduct an examination of all relevant evidence before it in accordance with the second sentence of Article 3.5 of the Anti-Dumping Agreement. In its causation analysis, it failed to engage with relevant evidence on the investigation record that weighed against the existence of a "causal relationship" between the subject imports and the injury allegedly caused by the suppression of the prices of domestic like products. This evidence clearly established, *inter alia*, that:

- In each year of the Injury POI, the average unit price of subject imports of Australian wine was consistently higher, by a substantial margin, than (i) the average unit price of domestic like products, and (ii) the level to which the average unit price of domestic like products would need to rise to fully cover the average unit cost increase;[783]
- Imports of like products from third countries were substantially greater in volume than subject imports from Australia, but at average unit prices that were much closer to or lower than the average unit prices of domestic like products;[784]
- Despite increasing due to the preferential treatment accorded under ChAFTA,[785] the volumes of subject imports were consistently lower than the sales volumes of domestic like products reported by the 21 domestic producers that submitted questionnaire responses (representing only a portion of the sales volume of domestic like products).[786] As such, they were

[783] For example, the average unit price of subject imports was 72.99% higher than the average unit price of domestic like products in 2015, which was the largest difference during the Injury POI, and 16.28% higher in 2018, which was the smallest difference during the Injury POI. For a price comparison of subject imports and domestic like product during Injury POI, see [(Exhibit AUS-65 (BCI)), .]]

[784] For a discussion of the evidence relating to non-subject imports, see section IV.E.8(b) below.

[785] For a discussion of evidence relating to ChAFTA, see section IV.E.8(a) below.

[786] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 113, 148-149. For a comparison of import volumes and change rates, see [(Exhibit AUS-65 (BCI)),]]

also lower than the total production output of the 21 domestic producers and MOFCOM's estimate of the "total national output" of domestic like products;[787]

- In each year of the Injury POI, the volume of subject imports relative to apparent domestic consumption in China (referred to by MOFCOM as "market share") was significantly lower than the market share of sales of domestic like products by the 21 domestic producers;[788]
- Despite experiencing declines, the domestic industry remained profitable, in terms of profit before tax (PBT), throughout the Injury POI.[789]

671. Table 7 in Exhibit AUS-65 (BCI) provides examples of relevant evidence on the investigation record, including data that MOFCOM used in its own analyses, that weighed against the existence of a "causal relationship" and should have been addressed in MOFCOM's examination under Article 3.5.[790] At a minimum, MOFCOM was required to explain how it took such evidence into account and reconciled it in reaching its conclusion that there was a causal relationship between subject imports and price suppression allegedly injuring the domestic wine industry. By failing to do so, MOFCOM failed to conduct the examination of all relevant evidence required under the second sentence of Article 3.5.

672. For example, MOCOM's written reasons in the final determination are insufficient to address the following issues that arise from a cursory review of the above-referenced evidence:

- How subject imports of Australian wine could cause significant suppression of the increasing prices of the like domestic products in circumstances where: (i) the average unit price of the basket of like domestic products steadily increased throughout the Injury POI, rising 20.5% over the 5-year period; (ii) there is no evidence of how much more those prices were expected to rise (or could reasonably be expected to rise) "but for" the alleged impact of the subject imports; (iii) the average unit price of the basket of imported products was considerably higher than the average unit price of the basket

[787] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 148-149.
[788] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 111, 125, 148-149. See [(Exhibit AUS-65 (BCI)), .]]
[789] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 126, 149.
[790] [(Exhibit AUS-65 (BCI)), .]]

of like domestic products, indicating that, on average, there was significant room for the price of domestic like products to be further increased before competition with subject imports on the basis of price became an issue; and (iv) although import volumes of subject imports increased during the Injury POI, these volumes were consistently smaller than both output and sales volumes of the domestic like products in China's market in each year of the Injury POI.

- If, as MOFCOM determined, all subject imports and all domestic like products were "basically the same'"[791] and "mutually-substitutable",[792] why the domestic industry did not simply raise their domestic sales prices to a level more closely approaching the average unit price of the basket of subject imports.

- If Australian imports were responsible for causing material injury to the domestic industry in the form of declining production output, why Chinese producers did not simply increase their output of domestic like products, in circumstances where: (i) domestic industry sales remained profitable throughout the Injury POI; (ii) production capacity remained significantly higher than production output volumes;[793] and (iii) the correlation between output and sales volumes suggested that domestic producers were able to sell what they produced.

673. For the foregoing reasons, MOFCOM's examination and determination of causation were inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

6. MOFCOM failed to establish that Australian wine and domestic like products were substitutable with each other

674. In *China - HP-SSST (Japan)*, the Appellate Body considered that, in order to make a finding of material injury under Article 3.5 of the Anti-Dumping Agreement, an analysis of "substitutability" or "price correlation" may well be required in cases involving a dumped product and a like domestic product consisting of a range of different product types that are

[791] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 105, 119, 135.
[792] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 103, 105, 108.
[793] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-124.

distinguished by considerable price differences.[794] In this regard, it considered that an affirmative finding of causation under Article 3.5 could not be made to the extent that the relevant imports "are not substitutable for the domestic like products".[795] In the circumstances of that dispute, the Appellate Body determined that the investigating authority (MOFCOM) "should, at the very least, have assessed the existence and the extent of substitutability of lower- and higher-end [subject and like products] in order to show that 'alleged substitutability demonstrates price correlation' between each product type".[796] With regard to the "substitutability of different product types", it considered that "whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses".[797]

675. Australia considers that this obligation goes hand-in-hand with the obligation to ensure price comparability in the examination of price effects under the second sentence of Article 3.2. Australia has established that MOFCOM failed to ensure price comparability in its examination of price effects under this provision.[798] For the same reasons, MOFCOM failed in its causation analysis under Article 3.5 to assess "the existence and the extent of substitutability of lower- and higher-end" wine products "in order to show that 'alleged substitutability demonstrates price correlation' between each product type". As a result, MOFCOM's determination that subject imports caused injury to the domestic industry is inconsistent with China's obligations under Articles 3.1 and 3.5.

676. In its causation analysis, MOFCOM's examination of the competitive relationship between subject imports and domestic like products was limited to the following statements:

> As the dumped imported product is basically the same as domestic like products in terms of physical properties, raw materials and production techniques, product usages, sales channels and customer groups, they can be replaced by each other and actually compete with each

[794] Appellate Body Report, *China - HP-SSST (Japan)*, paras. 5.262-5.263. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.
[795] Appellate Body Report, *China - HP-SSST (Japan)*, para. 5.262.
[796] Appellate Body Report, *China - HP-SSST (Japan)*, para. 5.263. The Appellate Body also considered that: "As noted by the Panel, there was no 'consideration by MOFCOM of how [the] unspecified degree of substitutability, and the resultant price correlation, might enable Grade B and C subject imports [i.e. higher-end products] to cause injury of the domestic industry's Grade A [i.e. low-end products] operations'" (see para. 5.263). The Appellate Body explained that " we do not see how MOFCOM, under the specific facts of this case, could provide a 'meaningful basis' for an analysis of whether the dumped imports are causing injury, without considering the degree of impact that movements of prices of imported Grades B and C might have on the price of domestic Grade A" (see para. 5.262).
[797] Appellate Body Report, *China - HP-SSST (Japan)*, para. 5.263 citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[798] See section IV.C.3(b)i(C) above.

other, and consequently price has become the primary factor for consideration when downstream customers choose products.[799]

677. MOFCOM's assessment ignores the evidence on the investigation record before MOFCOM regarding substantial, commercially important differences between the mix of product types in the basket of Australian wine imports and that in the basket of domestic like products.[800] These differences impact the overall quality and consumer perceptions of the wine products in each basket.[801] Australia's detailed submissions regarding product mix differences in the baskets of subject imports and like domestic products are set out at section C.3(b)(i) above.

678. Further, an assessment of whether "different product types that are distinguished by considerable price differences" are "substitutable" or "exercise competitive restraint on each other" in the same market cannot be determined "simply by assessing whether they share particular physical characteristics or have the same general uses".[802] Consideration should also be given to customer preferences.[803] MOFCOM ignored the significant evidence which demonstrated that domestic like products suffered from relatively lower quality and less favourable consumer perceptions than subject imports from Australia. This evidence included, *inter alia*, the following:

- MOFCOM and CADA's acknowledgment that Australian imports occupied a strong position in the Chinese domestic market.[804] CADA submitted to MOFCOM that "Australian wine manufacturers have a definite competitive

[799] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 135-136. See also MOFCOM's examination of the competitive relationship between subject imports and domestic like products for the purposes of its examination of price effects under Article 3.2, ibid., pp. 119-120.
[800] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74), Section 2, Question 3, pp. 14-20; Casella Wines Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16-28, AGW Submission on Initiation of the Investigation (Exhibit AUS-71), pp. 3-4.
[801] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response, Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74) Section 2, Question 3, pp. 14-20; Casella Wines Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16-28, AGW Submission on Initiation of the Investigation (Exhibit AUS-71), pp. 3-4.
[802] Appellate Body Report, *China - HP-SSST (Japa*n), para. 5.263 citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[803] Appellate Body Report, *China - HP-SSST (Japa*n), para. 5.263 citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[804] Anti-Dumping Final Determination (Exhibit AUS-2), p. 120; CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 55.

advantage by virtue of their existing public praise and brands, as well as consumption habits formed in consumer groups".[805]

- Evidence which demonstrated that the Chinese domestic wine market was highly segmented on the basis of perceived quality and price and that there was limited overlap in the quality and price categories between subject imports and domestic like products.[806]

- Evidence establishing the differences in wine products created by grape variety, region and terroir, vintage cultivation and wine making techniques.[807] CADA explained that "[d]ue to the influence of the climate, soil and planting technology, the quality of grapes produced in different regions varies, which further affects the quality of the wines …".[808] Differences of this nature impact customer preferences and perceived value of a given wine product.

- Evidence of a Global Brand Tracking survey conducted by Wine Intelligence that showed that Chinese consumers ranked Chinese wine 6th in terms of quality, when compared to wines from other nations. Australian wine ranked 3rd, behind French and Italian wine. Notably, only 35% of Chinese respondents to the survey ranked Chinese wine in the top quality categories (9 and 10). In contrast, 52% of Chinese respondents ranked Australian wine in the top quality categories.[809]

- Evidence from Treasury Wines which demonstrated that their products were preferred by customers for "high-end commercial consumption sites, such as hotels and upscale restaurants", whereas domestic like products were preferred for "public consumption occasions at affordable prices".[810]

[805] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 55.
[806] See section IV.C.3(b) above.
[807] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74), Section 2, Question 3, pp. 14-20; Casella Wines Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16 – 28; AGW Submission on Initiation of the Investigation (Exhibit AUS-71), pp. 3-4.
[808] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 18. See also ibid, pp. 10, 17.
[809] AGW Submission on initiation of Investigation (Exhibit AUS-71) pp. 9-10.
[810] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4(5), p. 17.

- MOFCOM's consumption and sales volume data, which demonstrated that despite consuming more wine between 2015 and 2017, Chinese consumers chose not to purchase more domestic like product.[811]

679. MOFCOM was required to examine this evidence in assessing the existence and the extent of substitutability between different types of wine products (e.g. low, medium, and high-end wine products) in China's domestic market in order to establish whether this alleged "substitutability" demonstrated price correlation between each product type. Its failure to undertake such an assessment means that it failed to adequately demonstrate that different types of Australian imports were mutually substitutable with different types of domestic like products. As a consequence, MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5.

7. MOFCOM's comparison of the "market share" of subject imports and domestic like products was flawed

680. Throughout the Final Determination, MOFCOM considered Australian import volumes and domestic like product sales volumes relative to apparent consumption volumes.[812] In each case, MOFCOM expressed the volume as a percentage of apparent domestic consumption and termed the percentage "market share". During its causation analysis, MOFCOM conducted a direct comparison between the so-called "market share" of subject imports and that of sales of domestic like products, and determined that:

> During the injury investigation period, the market share of domestic like products experienced a cumulative decrease of 7.01%. In contrast, the market share of the dumped imported product experienced a cumulative increase of 8.90%, which was inversely related to the decreased market share of domestic like products. In other words, the market share of domestic like products was obviously squeezed by the dumped imported product.[813]

681. The problem with this comparison is that MOFCOM adopted inconsistent methodologies for calculating the so-called "market share" percentages of subject imports of Australian wine and domestic like products. These inconsistent methodologies resulted in MOFCOM calculating a percentage that understated the "market share" of domestic like products *vis-à-vis* that of subject imports, resulting in an unfair comparison. In each case, the

[811] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123, 148.
[812] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 111-112, 119, 125, 130, 135-136, 142, 145.
[813] Anti-Dumping Final Determination (Exhibit AUS-2), p. 135.

denominator was the apparent consumption volume in each year of the Injury POI. While MOFCOM used the total volume of subject imports as the numerator to determine the "market share" of subject Australian wine,[814] it used the sum of the domestic sales volumes reported by the 21 Chinese companies who submitted responses to the domestic producer questionnaire as the numerator to determine the "market share" of domestic like products.[815] As a consequence, the domestic sales volume relied on by MOFCOM for the purposes of calculating "market share" only represents a portion of the domestic wine industry in China.[816] The effect of this is that MOFCOM's "market share" percentages unfairly compare only a portion of domestic sales to the total volume of subject imports relative to total apparent consumption. For ease of reference, these market share values are set out in Table 8 in Exhibit AUS-65 (BCI).[817]

682. Further, MOFCOM used import volumes, rather than sales volumes, to calculate the market share of subject imports. This methodology assumes that all subject imports are sold for consumption in the same year that they are imported. In the context of a product with an extensive shelf life, such as bottled wine, this is not a sound assumption in the absence of positive evidence to demonstrate it reflects actual market behaviours. Further, in making this assumption, MOFCOM ignored evidence on the record showing that [[ ]] had "inventory held in mainland China (excluding products purchased by related parties or importers)", at various points during the Injury POI.[818] As a result, the "market share" percentage calculated by MOFCOM likely overstates the true market share of subject imports in terms of "consumption".

683. In addition, MOFCOM does not explain how "consumption" is defined with respect to the "apparent consumption volumes" (i.e. which sales volumes are included/excluded for the purposes of determining "consumption"), the method by which these volumes are

[814] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 110-111.

[815] Anti-Dumping Final Determination (Exhibit AUS-2), p. 126.

[816] In the Final Determination, MOFCOM explained that between 2015 and 2019, these companies accounted for 66.95%, 68.27%, 60.75%, 62.76% and 60.72% of the total output of the domestic wine industry". MOFCOM explained that, unless otherwise specified, all industry data relied on in the ruling was obtained from the domestic companies that submitted responses to the domestic producer questionnaire: see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 109-110. [817] [[(AUS-65 (BCI)),]]

[818] [(Exhibit AUS-84 (BCI)),]]; Swan Vintage Anti-Dumping Questionnaire Response, Annex 1 (Part 1 of 2) (Exhibit AUS-78), Row 16. [[(Exhibit AUS-85 (BCI))]].

calculated, or the underlying data and its source(s). It is unclear whether MOFCOM relied on the "total national output" figures calculated using "statistics from authoritative domestic organizations" for the purposes of calculating apparent consumption volumes.[819]

684. For the foregoing reasons, MOFCOM's comparison of market share between subject imports and domestic like products is not based on an objective examination of positive evidence and does not represent a fair comparison of like volumes. Accordingly, MOFCOM's ostensible comparison of "market share" is incapable of supporting an affirmative determination of causation and is inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

8. MOFCOM failed to conduct non-attribution analyses in relation to "known" factors in accordance with Articles 3.1 and 3.5 of the Anti-Dumping Agreement

685. Australia submits that MOFCOM failed to conduct a proper non-attribution analysis in relation to the following known factors in its Final Determination: (i) the progressive elimination of China's import tariffs on subject imports pursuant to the *China-Australia Free Trade Agreement* (ChAFTA); (ii) low-priced imports of like products from third countries; (iii) exchange rate fluctuations; and (iv) non-price factors impacting purchasing decisions of Chinese consumers.

686. An investigating authority must consider the effects of other factors "known" to it which may be causing injury to the domestic industry.[820] This requires the investigating authority to "appropriately assess the injurious effects of those other factors", and "[l]ogically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".[821] The Anti-Dumping Agreement does not expressly state how such factors should become "known" to the investigating authority or if and in what manner they must be raised by interested parties in

[819] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 109, 148. As set out in section III above, MOFCOM's methodology for calculating total national output was flawed and unreliable. To the extent that MOFCOM relied on total national output figures for the purposes of calculating apparent consumption, the apparent consumption volumes are also flawed and unreliable, particularly for the purposes of determining whether subject imports have caused injury to the domestic wine industry in China.
[820] Panel Report, *EU – Footwear (China)*, para. 7.484 citing Panel Report, *Thailand – H-Beams,* para. 7.484.
[821] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

order to qualify as "known".[822] However, a factor is either "known" or it is not "known" to an investigating authority.[823] It is well-established that such factors, "at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the anti-dumping investigation".[824]

687. Although Article 3.5 does not set out a specific methodology for undertaking a non-attribution analysis, the methods that an investigating authority applies must comport with the overarching obligations in Article 3.1 to undertake an objective examination based on positive evidence.[825] In determining whether and to what extent a "known" factor is in fact causing injury to the domestic industry at the same time as the dumped imports, "[t]he task of the investigating authority is to weigh the evidence and make a reasoned judgement" in accordance with these overarching obligations.[826]

688. In its Final Determination, MOFCOM failed to properly examine or assess the effects of the other "known" factors on the domestic wine industry based on the relevant evidence before it and failed to identify, separate, and distinguish their injurious effects from those allegedly caused by subject imports through price suppression. The explanations that MOFCOM provides in the Final Determination reveal that MOFCOM failed to conduct an objective examination based on positive evidence. Due to these deficiencies, its explanations and reasoning are not sufficient to support its conclusions that the other "known" factors either "cannot be established", "cannot deny the causal link ", or "cannot negate the causal link between the dumped imported product and the material injury to the domestic industry".[827]

689. Further, Australia submits that MOFCOM was not entitled to dismiss other "known" factors on the basis that their impact "cannot deny" or "cannot negate the causal link" *before* it had identified, examined, and assessed their distinct injurious effects on the domestic industry. Nothing in the text of Article 3.5 or any of the other provisions of the Anti-Dumping Agreement supports the notion that only factors that are sufficient to "negate the casual link"

[822] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 176.
[823] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.
[824] Panel Report, *EU – Footwear (China)*, para. 7.484; See also Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.359; *Thailand – H-Beams*, para. 7.273.
[825] Panel Report, *US – Ripe Olives from Spain*, para. 7.306. See also Panel Report, *China - Cellulose Pulp*, paras. 7.24, 7.27, 7.141; Panel Report, *Korea – Pneumatic Valves*, para. 7.249; Appellate Body Report, *Thailand – H-Beams,* para. 106.
[826] Panel Report, *EU – Footwear (China)*, para. 7.484
[827] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 139-146.

between dumped imports and material injury to the domestic industry need to be considered in a non-attribution analysis. Rather, investigating authorities are required to identify, separate, and distinguish any injury caused by other factors in order to ensure that such injury is not attributed to the dumped imports.[828] As a result, MOFCOM's examination of the other known factors was inconsistent with China's obligations under Article 3.5 of the Anti-Dumping Agreement.

(a) Changes to import tariffs under ChAFTA

690. On 20 December 2015, Australia and China entered into the *China-Australia Free Trade Agreement* (ChAFTA). Under the terms of ChAFTA, China agreed to reduce the import tariff on Australian wine in less than two litre containers,[829] from 14% to zero. These tariff reductions occurred gradually between 20 December 2015 and 1 January 2019, coinciding with the Injury POI. This preferential tariff treatment, as well as the other negotiated outcomes facilitating cross-border trade in goods, could reasonably be expected to result in two intended and foreseeable trade outcomes: (i) the net unit price of imports of Australian wine in China's market would decrease by at least 14 percent between 2016 and 2019; and (ii) the volume of imports of Australian wine into China's market would increase, which in turn could generate further reductions in unit prices (i.e. due to economic benefits of increased volumes).

691. During MOFCOM's investigation, the Australian Government raised the progressive elimination of customs tariffs under the ChAFTA as a relevant factor.[830] In the Final Determination, MOFCOM summarily dismissed this factor without properly examining its effect on the domestic industry. Its explanation, which is difficult to follow, appears to consist of the following reasoning: "the price of the dumped imported product was in a downtrend with a cumulative decline of 15.91% in 2015-2019, suppressing the price of domestic like products", and "[t]herefore, the DFAT's [i.e. the Department of Foreign Affairs and Trade of the Australian Government] claim that the injury suffered by the domestic industry during the injury investigation period was related to changes in import tariffs … was inconsistent with the

[828] See Panel Report, *Thailand – H-Beams*, para. 7.275; Panel Report, *China - Cellulose Pulp*, para. 7.25 citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 226; Appellate Body Reports, *US – Steel Safeguards*, para. 491; *EC – Tube or Pipe Fittings*, para. 175.
[829] Import code HS 2204.2100
[830] Australian Government Submission on Initiation (Exhibit AUS-87), pp. 3-4, 8; Australian Government Anti-Dumping Questionnaire Response, Section 7 (Exhibit AUS-86), pp. 70, 74.

facts".[831] MOFCOM's explanation describes a decrease in the average price of the subject imports of 15.91% over the course of the course of the Injury POI,[832] but fails to consider the role of the 14% decrease in applicable customs duties over exactly the same period. As a consequence, MOFCOM failed to identify, separate, and distinguish the injurious effects of the elimination of customs duties under the ChAFTA from those of the alleged dumping of the subject imports.

692. MOFCOM's explanation suggests that it may have considered price comparability related to the "level of trade" of subject imports to be relevant to its assessment of the impact of this factor (notwithstanding that "CIF" describes delivery terms rather than the "level of trade").[833] MOFCOM's reasoning is neither coherent nor cogent. MOFCOM was required to examine whether the 14% decrease in the customs tariff applied to imports of Australian wine could have caused or contributed to the injury to the domestic industry that MOFCOM alleges was caused by the price suppression resulting from the "cumulative decline of 15.91%" in the price of subject imports. If so, MOFCOM was required to identify, separate, and distinguish this injury from that allegedly caused by the effects of dumping.

693. Table 9 in Exhibit AUS-65 (BCI) compares the progressive elimination of the tariffs applied to imports of Australian wine under the ChAFTA with the year-to-year changes in the average price of subject imports in MOFCOM's evidence.[834] Australia also provided evidence to MOFCOM charting the increase in export volumes of Australian wine products to China that coincided with the progressive elimination of tariffs during the Injury POI.[835] Australia summarised this evidence in the figure below.

[831] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 139-140.
[832] Australia notes that a determination that subject imports have caused injury through price suppression must be based on an examination of the effects of "prices that are related to the domestic market conditions of the importing Member" — that is, that landed prices at which the subject goods are alleged to compete with domestic like products within that market. This price must necessarily include any applicable customs tariffs and other charges incurred in bringing the imported products to market. See Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.208.
[833] Anti-Dumping Final Determination (Exhibit AUS-2), p. 139.
[834] [(AUS-65 (BCI)), .]]
[835] Australian Government Submission on Initiation (Exhibit AUS-87), p. 4.

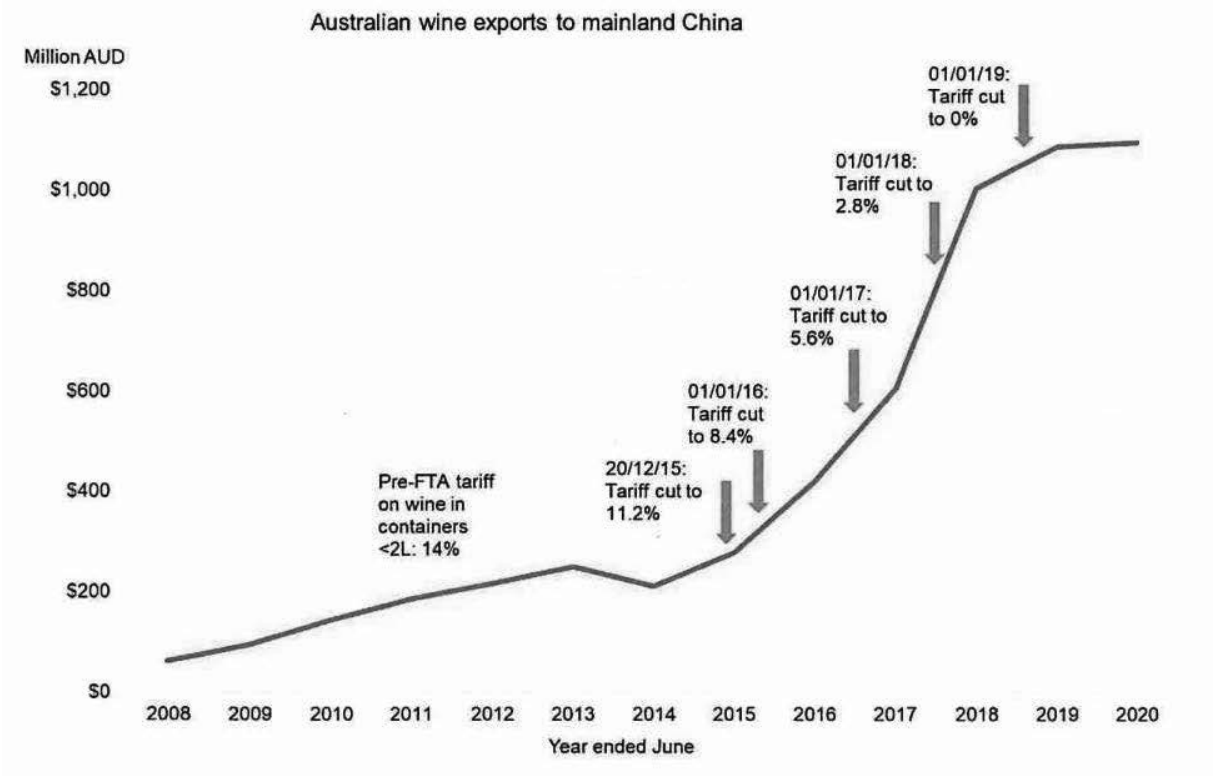

Figure 2 - Comparison of tariff reductions to Australian prices during Injury POI

694. MOFCOM appears to have entirely ignored the apparent cause-and-effect relationship between the progressive elimination of tariffs under the ChAFTA, which are specifically designed to liberalise, facilitate, and benefit cross-border trade in wine products,[836] and the evidence upon which MOFCOM's injury and causation determinations are founded, namely: (i) the decrease in the average unit price of the subject imports; and (ii) the increase in the volume of subject imports. In this way, MOFCOM improperly treated the price decrease and the volume increase associated with the negotiated outcomes of the ChAFTA as evidence that the subject imports were, through the effects of dumping, causing injury to the domestic industry.

695. As a result, MOFCOM's examination of this "known" factor was inconsistent with China's obligations Articles 3.5 and 3.1 of the Anti-Dumping Agreement.

[836] In addition, other negotiated outcomes to facilitate cross-border trade in goods between Australia and China may have further reduced unit costs of subject imports, resulting in further reductions to their unit prices when they arrive in the Chinese market.

(b) Imports from other countries or regions

696. In the Final Determination, MOFCOM states that "the impact of imported products from other countries (regions)" was one of the "other known factors that may have caused injury to the domestic industry other than dumped imported product".[837] In addition, MOFCOM acknowledged that the Australian Government and AGW raised imports of like products from other countries as one of the factors that may be causing injury to the domestic industry.[838]

697. As discussed below, the evidence on the record before MOFCOM established not only that imports of like products from third countries were substantially greater in volume and lower in price than the subject imports of Australian wine, but also that the average unit prices of imports from third countries were lower — and, in some cases, much lower — than the average unit prices of domestic like products. In the light of the much higher average unit prices of the subject imports of Australian wine, this evidence indicated that a causal relationship was much more likely to exist between imports of like products from third countries and the price suppression that was alleged to be injuring the domestic industry.

698. However, MOFCOM's examination of the evidence avoided any mention of these relevant facts, and instead focused on comparing certain isolated trends in the data for third-country imports with those for subject imports.[839] MOFCOM also considered that "there was no evidence showing the existence of dumping products imported from other countries".[840] On the basis of these considerations alone, MOFCOM concluded that "the impact of imports from other countries and regions on the domestic industry cannot deny the causal link between the import of the dumped imported product and the material injury suffered by the domestic industry".[841] MOFCOM failed to undertake any assessment of the impact of the prices or volumes of imports of like products from third countries on the domestic industry.

[837] Anti-Dumping Final Determination (Exhibit AUS-2), p. 137.
[838] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 137-138.
[839] In its brief explanation in the Final Determination, MOFCOM considered that: (i) "during the injury investigation period, the import volume of products from other countries and regions was in a downtrend"; (ii) although the "import prices of products from other countries and regions were also in a downtrend", the "price reduction of products from other countries and regions is lower than that of the dumped imported product"; and (iii) "[c]ompared with products imported from other countries, the dumped imported product not only had a continuously increasing volume but also had a more significant price reduction": see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 140-141.
[840] Anti-Dumping Final Determination (Exhibit AUS-2), p. 141.
[841] Anti-Dumping Final Determination (Exhibit AUS-2), p. 141.

699. In failing to undertake a proper assessment of this factor, MOFCOM ignored evidence on the record providing volume and price data for non-subject imports on a per country basis for four of the five years in the Injury POI (2015, 2016, 2017, and 2019).[842] These data, which are summarised below, demonstrated that there was substantially more direct price competition between non-subject imports and domestic like products than there was between subject imports and domestic like products.

700. The import volume data showed that France, Australia, Chile, Spain and Italy were the top five exporting countries by volume of bottled wine to China in 2015, 2016, 2017 and 2019.[843] Collectively, these five countries accounted for 89% of all bottled wine imports to China during the period.[844] France was the largest exporter by a significant margin, accounting for 37.69% of import volumes during the period, followed by Australia (19.23%), Chile (13.52%), Spain (13.03%) and Italy (5.70%).[845] Import volumes for the top five exporting countries are illustrated in Figure 3 below.

[842] CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45 (2015), 46 (2016), 47 (2017), 48 (2019).

[843] CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45-48. For 2015 import volumes see p. 45, column F: France – row 46; Australia – row 8; Chile – row 14; Spain – row 40; Italy – row 45. For 2016 import volumes see p. 46, column F: France – row 44; Australia – row 8; Chile – row 13; Spain – row 35, Italy - 43. For 2017 import volumes see p. 47, column F: France – row 45; Australia – row 9; Chile – row 14; Spain – row 39, Italy – 44. For 2019 import volumes see p. 48, column E: France – row 53; Australia – row 93; Chile – row 87; Spain – row 59, Italy – 55.

[844] CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45-48. Australia has calculated the proportion of imports by: (i) calculating the total import volume for each country, by summing the import volumes shown for 2015, 2016, 2017 and 2019 for each country (see pp. 45-47 (column F), p. 48 (column E); (ii) calculating the total import volume for the whole period (2015, 2016, 2017 and 2019), by summing the total import volumes for each country calculated in step (i); and (iii) dividing the total import figure for each country by the total import volume for the whole period. For consistency with MOFCOM's units of measure, Australia has converted the volume data from litres to kilolitres, by dividing the litre figures by 1,000.

[845] These percentages result from Australia's calculations described in the footnote above. Notably, Australia's calculations show that no other individual importing country accounted for more than 2% of imports during the period.

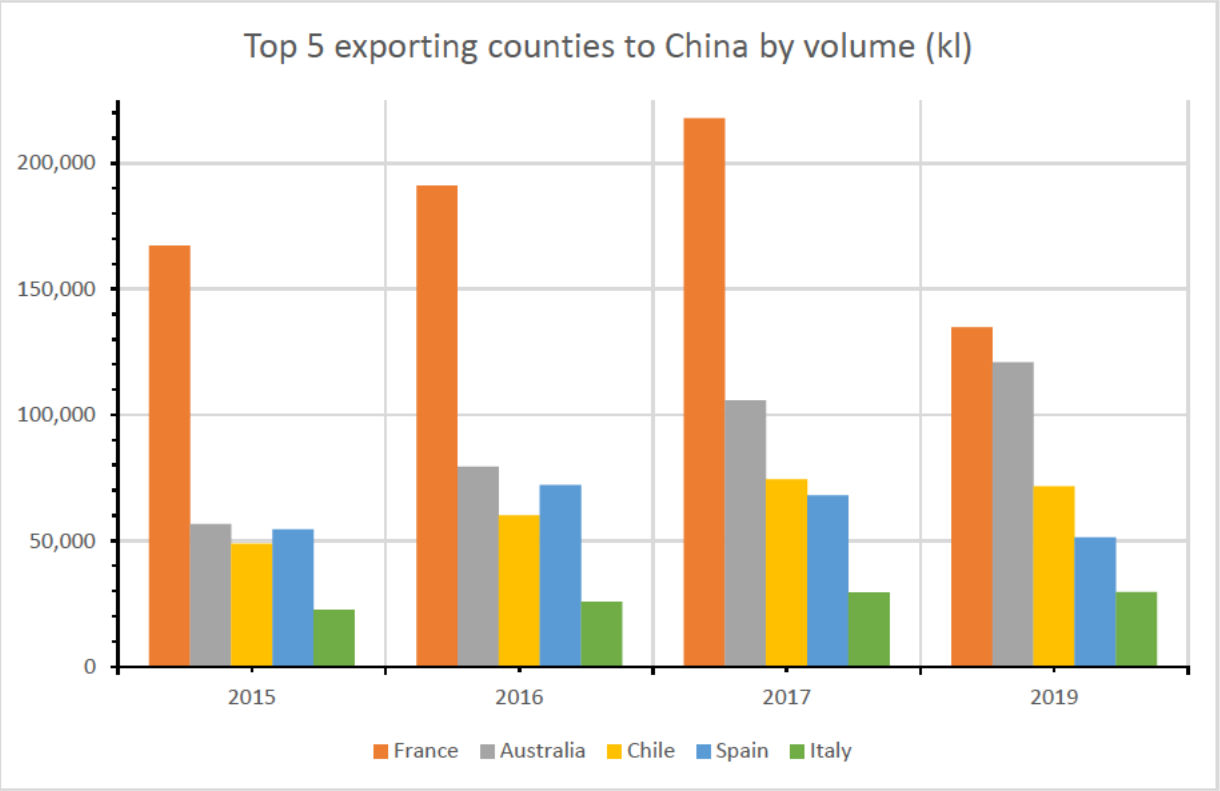

Figure 3 - Comparison of export volumes from top 5 exporting countries to China during Injury POI[846]

701. Importantly, the price data showed that the average unit price for bottled wine (USD/kl) from the top four importing counties (excluding Australia) was not only significantly lower than the average unit price for Australian wine (USD/kl) but also lower than the average unit price of the domestic like products. Figure 4 below shows that, the average prices of French wine imports were very similar to the average prices of domestic like products in 2015 and 2016 (USD/kl), but lower than the average prices of domestic like products in 2017 and 2019. The average prices of Italian wine imports were consistently lower than the prices of domestic like products. The average prices of imports from Chile and Spain were consistently *significantly* lower than the average prices of the domestic like products. This data suggests

[846] This Figure is generated using the following data: CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45 – 48. For 2015 import volumes see p. 45, column F: France – row 46; Australia – row 8; Chile – row 14; Spain – row 40; Italy – row 45. For 2016 import volumes see p. 46, column F: France – row 44; Australia – row 8; Chile – row 13; Spain – row 35, Italy - 43. For 2017 import volumes see p. 47, column F: France – row 45; Australia – row 9; Chile – row 14; Spain – row 39, Italy – 44. For 2019 import volumes see p. 48, column E: France – row 53; Australia – row 93; Chile – row 87; Spain – row 59, Italy – 55.

that imports of like products from third countries were much more likely to impose pricing pressure on the domestic like products than the subject imports of Australian wine.

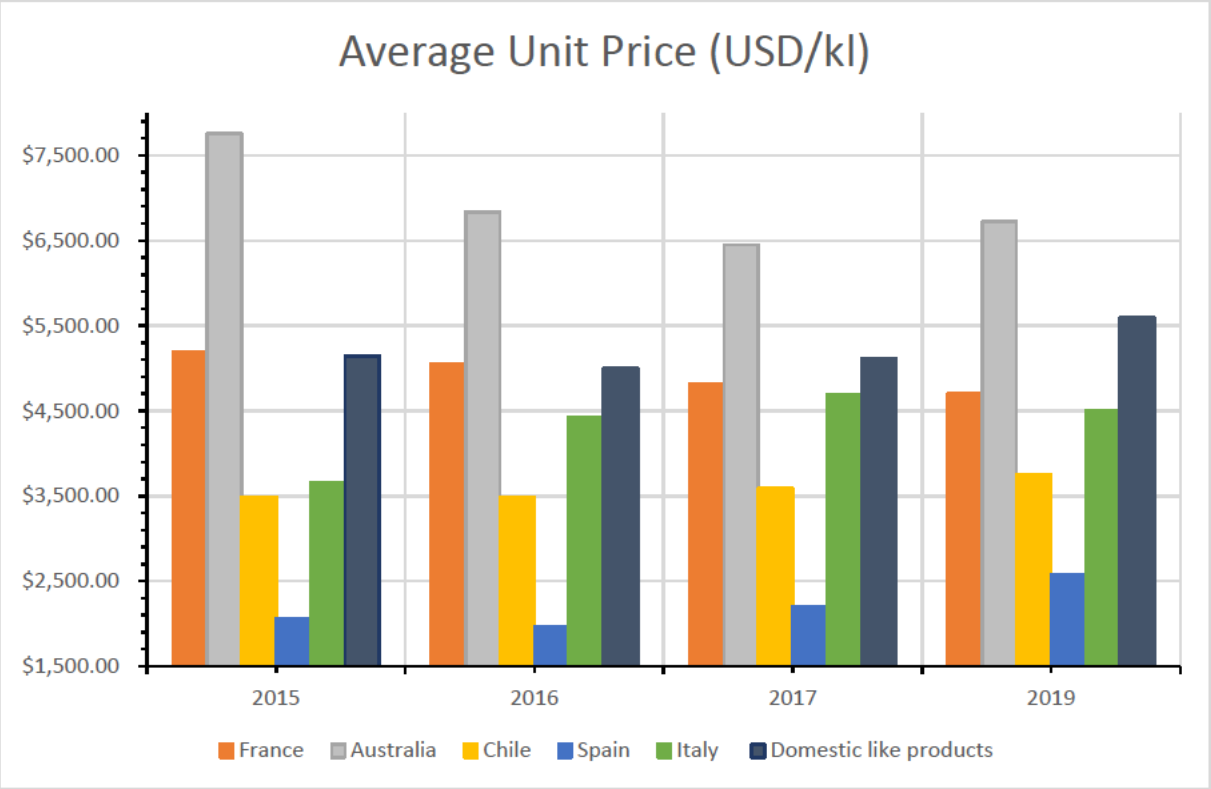

Figure 4 Comparison of average unit prices during Injury POI (USD/kl)[847]

702. Australia submits that this evidence, present on the record before MOFCOM, clearly raises imports from other countries and regions as a "known factor" having an impact on the domestic industry. That being the case, MOFCOM was not entitled to simply dismiss this evidence. Rather, it was required to conduct a proper non-attribution analysis in order to determine the extent to which imports from third countries caused injury to the domestic

[847] This Figure is generated using the following data:

For France, Australia, Chile, Spain and Italy - CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66), Annex 8, pp. 45-48. For 2015 import volumes and value (USD) see p. 45, columns F and G: France – row 46; Australia – row 8; Chile – row 14; Spain – row 40; Italy – row 45. For 2016 import volumes and value see p. 46, columns F and G: France – row 44; Australia – row 8; Chile – row 13; Spain – row 35, Italy - 43. For 2017 import volumes and value see p. 47, columns F and G: France – row 45; Australia – row 9; Chile – row 14; Spain – row 39, Italy – 44. For 2019 import volumes and value see p. 48, columns E and I: France – row 53; Australia – row 93; Chile – row 87; Spain – row 59, Italy – 55. Australia has calculated the average unit price (USD/kl) for each country, in each year by (i) dividing the 'value in USD' figures (column G, or I) by the import volume (L) (column F or E); and (ii) converting the average price to USD/kl by multiplying the average USD/L figure by 1,000.

For Domestic like products – Anti-Dumping Final Determination (Exhibit AUS-2), pp. 114, 120, 125, 149. MOFCOM provided the average unit price of domestic like products in RMB/kl. For the purposes of this comparison, Australia has converted the domestic sale price from RMB/kl to USD/kl using the average yearly conversion rates published by the People's Bank of China and included at CADA Application for Anti-Dumping Investigation, Annexes 13-14 (Exhibit AUS-67), Annex 14, p. 59.

industry. MOFCOM's failure to do so means that its analysis was inconsistent with the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

703. In the light of this evidence, it is difficult to understand how the average prices of subject imports that were considered by MOFCOM could have supported any finding of a causal link. In contrast to the average unit prices of like imports from third countries, which were generally *lower* than the average unit prices of like domestic products, the average unit prices of subject imports from Australia were consistently *higher*, by substantial margins, than the average unit prices of like domestic products. As Australia has previously explained, the average price of like domestic products (which consistently increased during the Injury POI) could have increased by an additional 72.99% in 2015, an additional 48.98% in 2016, an additional 34.12% in 2017, an additional 16.28% in 2018, and an additional 20.68% in 2019 before reaching the average price of Australian imports.[848] The fact that they did not indicates that some other factor(s) were preventing such further increases from happening. Based on the evidence on the investigation record before MOFCOM, the significant import volumes from third countries at lower prices provides an apparent explanation.

704. Further, MOFCOM's dismissal of this factor on the basis that there was "no evidence showing the existence of dumping products imported from other countries" is inconsistent with Article 3.5.[849] Nothing in the text of Article 3.5 limits the non-attribution analysis to imports for which there is "evidence showing the existence of dumping". To the contrary, Article 3.5 expressly provides that "factors which may be relevant include, *inter alia*, the volume and prices of imports not sold at dumping prices". As such, MOFCOM had an obligation to consider the impact of imports from third countries on the domestic industry, regardless of any question as to whether those imports might have been dumped.

(c) Exchange rates

705. In the Final Determination, MOFCOM dismissed exchange rate fluctuations as a factor causing injury to the domestic industry on the same basis as tariff reductions.[850] As a result,

[848] [[(Exhibit AUS-65 (BCI)) .]] [849] Anti-Dumping Final Determination (Exhibit AUS-2), p. 141.
[850] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 139-140.

MOFCOM's analysis of exchange rates is subject to similar errors to those discussed above in relation to the ChAFTA tariff reductions.

706. MOFCOM was clearly aware of the potential impact of exchange rate fluctuations on the domestic industry because it raised and then dismissed the issue in the Final Determination. However, in dismissing the issue, MOFCOM appears to have considered the impact of exchange rate fluctuations as a price comparability / level of trade issue. For the purposes of a non-attribution analysis, the correct question is whether exchange rate fluctuations could have caused the injury to the domestic industry, for example by lowering the effective price of Australian wine for Chinese consumers and making it more affordable. MOFCOM did not consider this possibility prior to dismissing exchange rates as a cause of injury to the domestic industry.

707. Exchange rate fluctuations had the potential to impact the price of Australian imports. Decreases in the price of Australian imports caused by exchange rate fluctuations are not attributable to the effects of dumping. MOFCOM was required to conduct a proper non-attribution analysis in order to determine the extent to which exchange rate fluctuations caused injury to the domestic industry. MOFCOM failed to do so. As a result, MOFCOM's analysis was inconsistent with the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

(d) Purchase of imported Australian wine rather than Chinese domestic wine because of factors other than price

708. There was significant evidence on the record establishing that purchasing decisions for wine products were impacted by various non-price factors such as grape variety, harvesting region, vintage, age, product quality, branding and, importantly, consumer perceptions regarding the quality of the product.[851]

[851] See Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4, 5, 6, pp. 16-21; Casella Wines Anti-Dumping Questionnaire Response (Exhibit AUS-72), Section 2, Questions 4, 5, 6, pp. 12-21; Treasury Wines Sampling Questionnaire Response (Exhibit AUS-74), Section 2, Question 3, pp. 14-19; Casella Wines, Sampling Questionnaire Response (Exhibit AUS-75), Section 2, Question 3, pp. 16-19; AGW Submission on Initiation of the Investigation, (Exhibit AUS-71), pp. 3-4, 9-10; AGW Comments on the Preliminary Determination (AUS-69), p. 4; CADA Comments on Stakeholder's Comments on the Preliminary Determination (Exhibit AUS-70), p. 11; CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 10, 17, 18.

709. In relation to consumer perceptions, the evidence on the record established that consumers in the Chinese market perceived domestic like products as being of a poorer quality that subject imports. This evidence included:

- Evidence of a Global Brand Tracking survey conducted by Wine Intelligence that showed that Chinese consumers ranked Chinese wine 6th in terms of quality, when compared to wines from other nations. Australian wine ranked 3rd, behind French and Italian wine. Notably, only 35% of Chinese respondents to the survey ranked Chinese wine in the top quality categories (9 and 10). In contrast, 52% of Chinese respondents ranked Australian wine in the top quality categories.[852]
- Evidence from Treasury Wines which demonstrated that their products were preferred by customers for "high-end commercial consumption sites, such as hotels and upscale restaurants", whereas domestic like products were preferred for "public consumption occasions at affordable prices".[853]
- Evidence provided by COFCO W&W International Co that Australian wine imports were not an alternative to domestic like products due to various factors including "production area, grape variety, winery and brand". Additionally, COFCO noted that as "Australian wine has its own targeted consumer groups, and many Australian wine brands are well recognised by the Chinese people, they are difficult to be replaced in a short time".[854]
- MOFCOM found that imported products typically enjoyed a "traditionally strong" position in the Chinese market.[855] Similarly, in its application for initiation of the anti-dumping investigation, CADA acknowledged that "[i]n the Chinese market, Australian wine manufacturers have a definite competitive advantage by virtue of their existing public praise and brands, as well as the consumption habits developed in consumer groups".[856]

[852] AGW Submission on Initiation of Investigation (Exhibit AUS-71), pp. 9-10.
[853] Treasury Wines Anti-Dumping Questionnaire Response (Exhibit AUS-73), Section 2, Questions 4(5), p. 17.
[854] COFCO W&W International Anti-Dumping Questionnaire Response (Exhibit AUS-103), Section 2, Question 19, pp. 28. See also COFCO W&W International Anti-Dumping Questionnaire Response (Exhibit AUS-103), Section 2, Questions 20 -24, pp. 28-30; Longcheng Wine Anti-Dumping Questionnaire Response (Exhibit AUS-68), Section 2, Question 22, p. 24.
[855] Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.
[856] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 55.

- MOFCOM's apparent consumption and sales volume data, which demonstrated that despite consuming more wine between 2015 and 2017, consumers in China chose not to purchase more domestic like products.[857]

710. This evidence shows that, in the Chinese market, imported wine products from Australia enjoyed a "strong competitive advantage" based on well-established consumer preferences, while domestic like products suffered from less favourable consumer perceptions. This issue was clearly raised on the record and, as such, was "known" to MOFCOM. Despite this, there is nothing in the Final Determination to suggest that MOFCOM considered the impact that consumer perceptions and preferences had on the domestic industry or attempted to identify, separate, and distinguish any injury being caused by this factor from the injury allegedly being caused by subject imports. As a result, MOFCOM's analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

9. Conclusion

711. For the foregoing reasons, MOFCOM's examination of the domestic industry was inconsistent with China's obligations under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

F. CONCLUSION

712. For the reasons set out above, Australia has established that MOFCOM acted inconsistently with China's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

[857] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-124, 148-149.

V. AUSTRALIA'S CLAIMS CONCERNING THE IMPOSITION OF DUTIES

A. CHINA'S IMPOSITION OF ANTI-DUMPING DUTIES WAS CONTRARY TO ARTICLES 1, 9.1, 9.2 AND 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

713. MOFCOM's imposition of anti-dumping duties was inconsistent with China's obligations under Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, because it: improperly imposed anti-dumping duties where all requirements for their imposition had not been fulfilled; did not impose anti-dumping duties in appropriate amounts and imposed anti-dumping duties in excess of the margins of dumping that could have been established under Article 2 of the Anti-Dumping Agreement (if any). As Australia has demonstrated, MOFCOM erred in its application of Article 2, as a result of which MOFCOM erroneously identified the existence of dumping and erroneously inflated dumping margins.

1. MOFCOM failed to impose anti-dumping duties in accordance with the Anti-Dumping Agreement

714. In the Final Determination, MOFCOM imposed the following three categories of anti-dumping duties: (I) "Sampled Companies", in which MOFCOM imposed individual rates of anti-dumping duty on each of the three sampled exporters;[858] (II) "Other Cooperative in the Investigation" (other named Australian exporters), in which MOFCOM imposed a single rate of anti-dumping duty on the 21 non-sampled exporters that it deemed to be "cooperative" with the investigation (on the basis that they both registered and submitted responses to the sampling questionnaires);[859] and (III) "All Others", a residual category under which MOFCOM imposed an even higher rate of anti-dumping duty to every exporter that was not identified in categories I and II.[860] These outcomes are summarised in the table below.

[858] Anti-Dumping Final Determination (Exhibit AUS-2), Annex 1. MOFCOM imposed anti-dumping duty at rates of 175.6% for subject imports from Treasury Wine Estates Vintners Limited, 170.9% for subject imports from Casella Wines Pty. Limited; and 116.2% for subject imports from Australia Swan Vintage Pty. Ltd.
[859] Anti-Dumping Final Determination (Exhibit AUS-2), Annex 1. MOFCOM imposed anti-dumping duty at the rate of 167.1% on subject imports from all other exporters deemed to be "cooperative" with the investigation.
[860] Anti-Dumping Final Determination (Exhibit AUS-2), Annex 1. MOFCOM imposed anti-dumping duty at the rate of 218.4% on subject imports from "all other" exporters.

Name of Company	Dumping Margin/Anti-Dumping Duty Rates
I. "Sampled Companies"	
• Treasury Wines	175.6%
• Casella Wines	170.9%
• Swan Vintage	116.2%
II. "Other Cooperative in the Investigation" (MOFCOM's classification for other registered Australian exporters) • 21 other registered exporters who were not included in the examination of sampled exporters	167.1%
III. "All Others"	218.4%

Table 1 Summary of Anti-Dumping Duties Imposed by MOFCOM

715. Australia has demonstrated that MOFCOM's determinations of the existence of dumping and the margins of dumping were inconsistent with China's obligations under Article 2 of the Anti-Dumping Agreement.[861] In addition, Australia has demonstrated that MOFCOM's definition of the domestic industry and determinations of injury and causation were inconsistent with obligations under Articles 3 and 4 of the Anti-Dumping Agreement[862]. As a consequence, MOFCOM's imposition of anti-dumping duties breached the requirements of the Anti-Dumping Agreement.

2. Breach of Article 9.1

716. MOFCOM's decisions to impose anti-dumping duties caused China to breach Article 9.1 of the Anti-Dumping Agreement because MOFCOM failed to fulfil key substantive and procedural requirements for their imposition, both in the investigation and the dumping determinations, as outlined above.

717. The first sentence of Article 9.1 of the Anti-Dumping Agreement provides as follows:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

[861] See above, section II.
[862] See above, sections III and IV.

718. The Appellate Body has observed that "Article 9.1 confers on Members the discretion to decide whether to impose an anti-dumping duty in cases where all the requirements for such imposition '*have been fulfilled*'".[863] In cases where the requirements for the imposition of an anti-dumping duty have not been fulfilled, the authorities of the importing Member do not have any right to decide to impose such a duty on imported products.

719. The fundamental requirements for the imposition of an anti-dumping duty include those summarised under Article 1 of the Anti-Dumping Agreement, which provides that an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to an investigation initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement.

720. Australia has established, based on the Final Determination and the record of evidence, that MOFCOM's investigation and subsequent determinations were inconsistent with substantive and procedural obligations under Articles 2, 3, 4, 5, and 6 of the Anti-Dumping Agreement.[864] As such, MOFCOM failed to initiate or conduct its investigation in accordance with these provisions. Therefore, it could not be said that all requirements for the imposition of anti-dumping duties were fulfilled within the meaning of Article 9.1. For example, MOFCOM's improper recourse to facts available in breach of Article 6.8 and Annex II, and its failure to determine the existence of dumping under Article 2.1 in a WTO-consistent manner means that a fundamental requirement for the imposition of anti-dumping duties — i.e. that the price of wine imported into China was less than its normal value — was not fulfilled.

721. As a consequence, all rates of anti-dumping duty applied under the three categories discussed above[865] were inconsistent with Article 9.1 of the Anti-Dumping Agreement. The inconsistencies vitiating the determination of the rates for the sampled Australian producers consequently affected the determination of the maximum rate for the non-sampled Australian exporters and the residual "All Others" rate. In each case, MOFCOM failed to fulfil all requirements under the Anti-Dumping Agreement to impose these anti-dumping duties.

[863] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 122.(emphasis original). See also Panel Report, *EC – Salmon (Norway)*, para. 7.705.

[864] See above, section II.

[865] See above, section V.A.1.

3. Breach of Article 9.2

722. Similarly, MOFCOM caused China to breach Article 9.2 of the Anti-Dumping Agreement because it failed to impose duties in "appropriate amounts" — that is, amounts meeting the requirement in Article 9.3 that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping *as [correctly] established under Article 2*".[866] MOFCOM also breached the second sentence of Article 9.2 by failing to name the six registered "traders" of Australian wine in Annex I of the Final Determination, considering that the traders constituted "suppliers" within the meaning of Article 9.2 and it was not "impracticable" for MOFCOM to name them.

723. First, MOFCOM breached Article 9.2 because it failed to impose duties in appropriate amounts. Article 9.2 of the Anti-Dumping Agreement provides, in relevant part, that "[w]hen an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury".[867]

724. An "appropriate" amount of anti-dumping duty is the amount of duty that is "proper" or "fitting" in the context of an anti-dumping investigation,[868] and "must be an amount that results in offsetting or preventing dumping".[869] The panel in *Argentina – Poultry Anti-Dumping Duties* found that "an anti-dumping duty meeting the requirements of Article 9.3 (i.e. not exceeding the margin of dumping) would be 'appropriate' within the meaning of Article 9.2".[870]

725. Conversely, if the anti-dumping duty imposed exceeds the margin of dumping that should have been established under Article 2, it is not "specially suitable", "fitting" or "proper" for the objective of off-setting dumping,[871] as it would be in excess of the level of dumping that is actually occurring, if any.[872] Therefore, where errors under Article 2 have led to an

[866] Article 9.3 of the Anti-Dumping Agreement (emphasis original).
[867] Article 9.2 of the Anti-Dumping Agreement.
[868] Panel Report, *EC – Salmon (Norway)*, para. 7.704.
[869] Panel Report, *EC – Salmon (Norway)*, para. 7.705.
[870] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.
[871] Panel Report, *EC – Salmon (Norway),* para. 7.704.
[872] Panel Report, *EC – Salmon (Norway),* paras. 7.705-7.706.

incorrectly high margin of dumping, this amounts to a breach not only of Article 9.3, but also of the obligation in Article 9.2 to impose anti-dumping duties in "appropriate amounts".[873]

726. As a consequence of the errors in MOFCOM's determinations of the existence of dumping and the margins of dumping, as established (above)[874], MOFCOM breached Article 9.2 by failing to impose anti-dumping duties in "appropriate amounts".

727. MOFCOM failed to make its dumping determinations in accordance with the requirements of Article 2 because, *inter alia*, it improperly rejected relevant information supplied by the sampled companies, resorted to facts available inconsistently with its obligations under Article 6.8 and Annex II, erred in determining the normal values and export prices, and failed to make a fair comparison between the normal value and export price for each sampled company.[875] MOFCOM also erroneously deemed non-sampled companies to be non-cooperative.

728. The amount of anti-dumping duties imposed were not "suitable", "fitting" or "proper"[876] to offset the alleged dumping because MOFCOM's breaches of Articles 2, 6.8, and Annex II resulted in the determination of levels of dumping that were (i) much higher than they would have been if MOFCOM had complied with Article 2, and (ii) much higher than the levels of dumping, if any, that were actually occurring (which Australia submits were none). These errors likewise resulted in a breach of Article 9.3, which will be examined below.

729. In addition, MOFCOM breached the second sentence of Article 9.2 by failing to name all "suppliers of the product concerned" in the dumping margin categories set out in Annex I of the Final Determination. Specifically, MOFCOM failed to name six "Australian traders"[877] of Australian bottled wine that had validly registered for the investigation. The term "suppliers" in Article 9.2 is broader than the narrower concept of "producers", encompassing "Australian

[873] The corollary of the finding in Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365.
[874] See above, section II.
[875] [[[redacted]]] In the case of Casella Wines and Swan Vintage, the high margins of dumping largely reflected the impermissible rejection of the companies' actual data and the utilisation of the erroneous Treasury Wines' normal values. MOFCOM then derived a margin of dumping for the other named Australian exporters from the weighted average of the margins determined from the sampled companies and imposed a margin on the "All Others" category derived in an unexplained way from data received from the sampled companies. In this way, the errors and WTO inconsistencies made in respect of the sampled companies were carried forward to cooperating and non-cooperating companies.
[876] Panel Report, *EC – Salmon (Norway),* para. 7.704.
[877] Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.

traders" who exported subject wine products to China. Given that MOFCOM referred to each of these suppliers in the body of Annex II,[878] albeit without assigning them an anti-dumping margin, it was not "impracticable to name all these suppliers". MOFCOM's failure to name the six Australian traders in Annex I thus constituted a further breach of Article 9.2.

4. Breach of Article 9.3

730. MOFCOM's failure to properly determine the existence of dumping or the margins of dumping in a manner consistent with Article 2 of the Anti-Dumping Agreement resulted in the determination of dumping margins that were far higher than those that would have been determined in accordance with Article 2. This resulted in China breaching Article 9.3 of the Anti-Dumping Agreement.

731. Article 9.3 requires that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article V1:2 of GATT 1994 similarly requires that anti-dumping duties are not "greater" than the "margin of dumping … determined in accordance with the provisions of paragraph 1". The term "in accordance with" in Article VI:2 of GATT 1994 "prohibits the levying of anti-dumping duties in excess of the dumping margin *determined consistently* with Article VI:1 of the GATT 1994 in the same way as the phrase 'as established under Article 2' does in Article 9.3".[879]

732. As discussed above, Australia has established MOFCOM's dumping determinations were inconsistent with Articles 2, 6.8, and Annex II of the Anti-Dumping Agreement.[880] These breaches resulted in the improper determination of dumping margins that were (i) much higher than they would have been if MOFCOM had made its dumping determinations in accordance with Article 2, and (ii) much higher than the levels of dumping, if any, that were actually occurring (which Australia submits were none).

733. MOFCOM imposed anti-dumping duties at the same rate as the dumping margins that it improperly determined, ranging from 167.1% to 218.4%,[881] to be "levied ad valorem based on the tax-paid price as verified by the customs".[882] MOFCOM set out the following

[878] Anti-Dumping Final Determination (Exhibit AUS-2), p. 7.
[879] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.98. (emphasis original).
[880] See above, section V.A.3.
[881] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100, Annex 1.
[882] Anti-Dumping Final Determination Announcement of 2021 (Exhibit AUS-1).

calculation formula: "Anti-dumping Duty = Tax-paid price as verified by the customs × Anti-dumping duty rate".[883] This duty is additional to any import consumption tax and import value added tax.

734. If, instead of improperly and unjustifiably rejecting the relevant information provided by Australian companies, MOFCOM had used that information to determine normal values in accordance with Article 2, it would have determined far lower normal values and, as a result, far lower (or negative) dumping margins for those companies.[884]

735. Even if MOFCOM's recourse to facts available had been justifiable (which Australia submits it was not in the circumstances of this case), a proper selection of facts that were reasonable replacements for the allegedly missing information would have resulted in a significantly lower normal value and, in turn, a lower (or negative) dumping margin.[885] As Australia has demonstrated[886], the alternative facts that MOFCOM relied upon were not the "best information available" and resulted in unrepresentative normal values that did not permit a proper comparison.

736. In addition to incorrectly determining normal values and export prices, MOFCOM failed to make a fair comparison between export price and normal value in accordance with Article 2.4 because, *inter alia*, it failed to adjust for factors affecting price comparability, in particular, level of trade and product mix differences.

737. The evidence clearly demonstrates that, had MOFCOM acted consistently with Article 2, it would have (i) determined that dumping was not occurring, or (ii) determined far lower dumping margins. This alone is sufficient to establish a breach of Article 9.3.[887]

5. Consequential breach of Article 1

738. Article 1 of the Anti-Dumping Agreement provides that "[a]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this

[883] Anti-Dumping Final Determination Announcement of 2021 (Exhibit AUS-1).
[884] See above, section II.
[885] See above, section II.
[886] See above, section II.G.4(b).
[887] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.104.

Agreement". Article 1 thereby establishes that the ensuing provisions of the Anti-Dumping Agreement govern the application of Article VI of GATT 1994 as to anti-dumping action.[888]

739. As a consequence of the violations of the Anti-Dumping Agreement, China also breached Article 1 of the Anti-Dumping Agreement.

6. Consequential breach of Article VI:2 of GATT 1994

740. Applying the same considerations as to its claim under Article 9.3,[889] Australia further submits that China consequentially breached Article VI:2 of GATT 1994 by imposing anti-dumping duties in excess of the dumping margin that would have been determined consistently with Article VI:1.

B. CONCLUSION

741. For the reasons set out above, Australia has established that China acted inconsistently with Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

VI. AUSTRALIA'S CLAIMS CONCERNING THE INITIATION OF THE INVESTIGATION

742. China's initiation of the investigation was inconsistent with the procedural rules and evidentiary requirements under Article 5 of the Anti-Dumping Agreement because CADA's Anti-Dumping Application (i) was not made "by or on behalf of the domestic industry"; (ii) did not contain a list of all known domestic producers; (iii) did not contain sufficient evidence of dumping; and (iii) did not contain sufficient evidence of injury and causation. As a result, MOFCOM should have rejected the application pursuant to Articles 5.4 and 5.8 of the Anti-Dumping Agreement.

[888] Panel Report, *Thailand – H-Beams*, para. 7.210.
[889] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.112.

A. THE APPLICATION WAS NOT MADE "BY OR ON BEHALF OF THE DOMESTIC INDUSTRY"

743. China's initiation of the investigation was contrary to Article 5.4 of the Anti-Dumping Agreement because an unbiased and objective investigating authority could not have determined that the applicant had the requisite standing.

1. Legal framework

744. Pursuant to Article 5.1 of the Anti-Dumping Agreement, an investigation may only be initiated if the application has been made "by or on behalf of the domestic industry", and has the support of the domestic industry, otherwise known as "standing".[890] The standing requirement is set out in Article 5.4 of the Anti-Dumping Agreement, which contains two numerical benchmarks for determining whether an application has been made by or on behalf of the domestic industry:

> An application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

745. In order to establish whether the obligations in Article 5.4 have been complied with, a panel must examine an investigating authority's determination, in light of the evidence before the authority at the time the determination was made.[891]

746. A failure to properly determine standing prior to initiation constitutes a fatal error that cannot be repaired later in the proceeding.[892] In *EC – Salmon (Norway)*, the panel concluded that an incorrect definition of domestic industry resulted in *inter alia,* the wrong

[890] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 282; Panel Reports, *EC – Bed Linen*, para. 6.213; and *Argentina – Poultry Anti-Dumping Duties*, fn. 221.
[891] Panel Report, *EC – Bed Linen*, para. 6.213.
[892] Vermulst, E, The WTO Anti-Dumping Agreement (Excerpt) (Exhibit AUS-88), p. 109. See e.g., GATT Panel Report, *United States – Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden*, unadopted, paras. 5.21 – 5.24; GATT Panel Report, *United States – Imposition of anti-dumping duties on gray Portland cement and cement clinker from Mexico*, unadopted, paras. 5.37-5.38.

industry being analysed in determining the required level of support for the purposes of initiation under Article 5.4, which can be fatal to the investigation.[893]

2. An unbiased and objective investigating authority could not have determined that the applicant had standing

747. In the notice announcing the initiation of the investigation, MOFCOM states that:

> According to the evidence provided by the Applicant and MofCom's preliminary examination, the Applicant's total output of relevant wines in 2015, 2016, 2017, 2018, and 2019 constitutes a major proportion of the total domestic production of like products in China during the same period, which meets relevant requirements.[894]

748. There is no further explanation as to how MOFCOM made this assessment in either the notice announcing the initiation of the investigation or the Final Determination.

749. Based on the information in the Application, an unbiased and objective investigating authority could not have been satisfied that the criteria in Article 5.4 were met. The material before MOFCOM was inadequate to allow it to be satisfied that the Application had the level of support necessary to meet the numerical thresholds in Article 5.4 because (a) while CADA claimed it had been authorised to submit the application, it provided no evidence of the number of domestic producers (and the level of their production) that supported, opposed or were neutral about the application; and (b) the evidence relied upon by CADA to establish the total output of its members and the total domestic production value of like products was unreliable.

(a) Required support of the domestic industry

750. CADA states in its application that "it has a wine branch which is responsible for the macro management of the wine industry" with a "total of 122 wine-producing member units".[895] CADA claimed that these member units account for the "vast majority of total domestic output and are representative and influential in the industry".[896] CADA also

[893] Panel Report, *EC – Salmon (Norway),* para. 7.118.
[894] Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-89), p.1.
[895] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 6.
[896] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 6-7.

acknowledged that they were aware of "hundreds" of other domestic producers of like goods.[897]

751. In order to conclude that CADA's application was made on behalf of the domestic industry, MOFCOM had to be satisfied that (i) CADA's application had the support of those domestic producers whose collective output constitutes more than 50% of the total production of the "like-product" produced by that portion of the domestic industry expressing either support or opposition to the application; and (ii) the application was *also* supported by those domestic producers whose collective output constitutes more than 25% of total production of the "like product" produced by the "domestic industry".

752. The application omits any reference to the key information required to make the numerical assessment required by Article 5.4. While it refers to resolutions having been adopted by "participating entities",[898] it does not provide any information about:

- who the "participating entities" were, including whether representatives of *all* of CADA's member organisations in the domestic wine industry attended the "special discussion meeting" at which "it was agreed that the China Alcoholic Drinks Association shall be the applicant on behalf of the domestic wine industry to file an anti-dumping investigation application",[899] and if it was less than complete attendance, which members attended and what proportion of domestic production they represented;
- the basis on which the resolutions were adopted – whether by simple majority, special majority, consensus, or some other voting technique; or
- how many, and which, members voted for, against, or abstained from the relevant resolutions and what proportion of domestic production they represented.

753. The application also omits whether CADA had any information about the views of the "hundreds" of domestic producers that are not members of CADA, including whether they supported or opposed the application, and the proportion of domestic production that they

[897] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 60.
[898] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 7.
[899] CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 3.

represented. CADA was obliged to provide a list of all known CADA and non-CADA domestic producers of the like domestic products (and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers) to allow the investigating authority to assess whether the application was made on behalf of the domestic industry. There is no evidence on the record that MOFCOM sought to obtain the necessary information through any other mechanism so as to be able to make a proper assessment as required by Article 5.4. As the Appellate Body has noted, Article 5.4 does "not permit investigating authorities to 'presume' that industry support for an application exists".[900]

754. Without this information, an unbiased and objective investigating authority could not have determined that CADA's application had the support of domestic producers whose collective output constitutes more than 50% of the total production of the like product.

755. MOFCOM was placed on notice of this specific deficiency in CADA's application by the Australian Government's submission on the proposed initiation of the investigation. The Australian Government submitted that the application did not "indicate the level of support for the application or the percentage of wine production represented by those that support the application".[901] There is nothing on the record to suggest that MOFCOM took any steps in response.

756. MOFCOM did not explain the reasoning that led it to the conclusion that CADA's application had the requisite level of support, but it appears it was done by simply drawing an unsubstantiated inference that CADA's application had the unanimous support of every domestic producer it had listed in the application. Such an approach relies upon simple assertions that are unsubstantiated by relevant evidence and is inconsistent with the examination of the specific level of support for the application that is mandated by Article 5.4.

[900] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 289.
[901] Australian Government Submission on Initiation (Exhibit AUS-87), pp. 6-7.

(b) Unreliability of evidence relied upon by CADA to establish the total output of its members and the total domestic production value of like products

757. Notwithstanding the deficiencies outlined above, an unbiased and objective investigating authority could not have determined that CADA's application was made on behalf of the domestic industry because the domestic production value of like products submitted by CADA was unreliable.

758. In its application, CADA alleged that the total output of like products represented by its member organisations accounted for 53.40%, 60.57%, 70.68%, 88.81% and 84.16% of total domestic production of the like products for the period between 2015 and 2019.[902] CADA's written application indicated that the overall output of domestic wines was 1.1611 million kl, 1.0566 million kl, 679,100 kl, 506,700 kl and 451,500 kl for the same period.[903] CADA claimed to have gathered the data on the total output of domestic like products from the National Bureau of Statistics.[904]

759. These assertions were unsubstantiated by relevant evidence. In Annexes 3 and 5 to its application, which set out the details of these figures, CADA explained that both sets of figures are based on *total* wine production by domestic producers, rather than the production of the product under investigation. This meant that these metrics drew in a range of other products outside the scope of the investigation.[905]

760. Further, CADA's calculation of the total domestic production that it used as the denominator for this calculation was not actually the production data for all domestic wine producers in China. Rather, as CADA explained, only those domestic producers that had an annual main business income of more than RMB 20 million were included in the calculation. CADA asserted – without explanation or evidence – that these producers represented 90% of total domestic production.[906] Even if CADA was able to substantiate its estimate that the production output in Annex 5 represented 90% of total domestic production, it made no

[902] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 9.
[903] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 9.
[904] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 2.
[905] Such as "liqueur wines, highly carbonated wines, gasified wine, flavoured wines, distilled wines and bulk wines" as determined in the Anti-Dumping Final Determination (Exhibit AUS-2) p. 109.
[906] CADA Application for Anti-Dumping investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 5.

allowance for the missing 10% in its calculation of the proportion of total output represented by its members, which had the consequence of overstating the proportion of total domestic production represented by its members.

761. MOFCOM acknowledged these errors in the Preliminary Determination and accepted that they made the data unreliable for the purposes of the investigation.[907] While these errors would have been readily apparent to an unbiased and objective investigating authority scrutinising the application, it is unclear whether MOFCOM identified these errors at the time it chose to initiate the investigation. In the Final Determination, MOFCOM confirmed that the statistics in CADA's application were unreliable and could not be used for the purpose of identifying the domestic industry because they included "other wines beyond the products subject to the investigation request, including liqueur wines, highly carbonated wines, gasified wine, flavoured wines, distilled wines and bulk wines".[908]

762. Concerns about the possibility of overstatement of the production data were raised with MOFCOM at the initiation stage of the investigation. Australian Grape and Wine, the trade association for the Australian wine industry, expressed concern about the reliability of the data in CADA's written application and whether it had overstated production, suggesting that the statistics may have been "counted twice".[909] There is nothing on the record to show that MOFCOM undertook any examination of the reliability of the data either in response to this submission, or otherwise. It appears to have simply been accepted the data for the purposes of initiation without scrutiny.

763. The distortion of the calculation of the "domestic industry" caused by this error was material in the assessment of the level of support. When MOFCOM undertook its own assessment of total output of domestic like product in the Final Determination, it identified a total level of domestic output less than half of that identified by CADA. The Final Determination contains two conflicting sets of figures for total domestic output of like product but both are significantly lower than CADA's figure. The differences between the three sets of figures are shown in Table 2 below.

[907] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 36.
[908] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[909] AGW Submission on Initiation of the Investigation (Exhibit AUS-71), para. 8.

Year	CADA's "total output of domestic like-products" (kl) [910]	CADA's "total output of domestic like-products represented by the applicant" (kl) [911]	MOFCOM's "Overall output of domestic relevant wines" (kl)[912] – page 109 of Final Determination	MOFCOM's "Output of domestic like products" (kl)[913] – page 124 of Final Determination
Number of producers allegedly included in calculations	Unknown	122	Unknown	21
2015	1,161,000	620,000	377,600	252,800
2016	1,056,600	640,000	347,600	237,300
2017	679,100	480,000	374,800	227,700
2018	506,700	450,000	351,200	220,400
2019	451,500	380,000	288,200	175,000

Table 2 Conflicting Total Domestic Production Figures

764. As a result of those errors, an unbiased and objective investigating authority could not have determined that the applicant had standing pursuant to Article 5.4, which resulted in the initiation of the investigation contrary to that provision.

B. THE APPLICATION DID NOT CONTAIN A LIST OF ALL KNOWN DOMESTIC PRODUCERS OF THE LIKE PRODUCTS

765. Pursuant to Article 5.2(i) of the Anti-Dumping Agreement, where an application is made on behalf of the domestic industry, it must contain "a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers".

766. CADA purports to have made its application "on behalf of the domestic wine industry".[914] However, the application did not include a list of all known domestic producers of the like product, contrary to the requirements of Article 5.2(i).

[910] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 9; and CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 5.
[911] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 9; and CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex II.
[912] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[913] Anti-Dumping Final Determination (Exhibit AUS-2), p. 124.
[914] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 9.

767. Instead, CADA's application only included a list of its 122 member companies.[915] CADA acknowledged that "there are hundreds of domestic wine producers in more than 20 provinces, autonomous regions, and directly-controlled cities, mainly in Shandong, Hebei, Ningxia, Xinjiang, and Gansu".[916] Although it was aware of the existence of hundreds of other wine producers, no other producers are identified in the application. Further, CADA'S failure to identify all known producers, meant that there was also no attempt to provide a description of the volume and value of domestic production of the like product accounted for by such producers, as required by Article 5.2(i).

768. An unbiased and objective investigating authority could not have found CADA's list of producers sufficient for the purposes of Article 5.2(i).

C. MOFCOM INITIATED THE INVESTIGATION WITHOUT "SUFFICIENT EVIDENCE"

769. MOFCOM acted inconsistently with China's obligations under Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement by (i) concluding that there was sufficient evidence of dumping, injury, and causation to initiate an anti-dumping investigation, and (ii) failing to reject the application on the basis of insufficient evidence.

1. Legal framework

770. Article 5.2 of the Anti-Dumping Agreement provides that an application must include "evidence of (a) dumping, (b) injury … and (c) a causal link between the dumping imports and the alleged injury". Sufficient evidence of all three elements must be present in order to justify the initiation of an investigation.[917]

771. Pursuant to Article 5.3 of the Anti-Dumping Agreement, an investigating authority must determine whether the application contains information that might be used to establish

[915] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), Annex II.
[916] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 10 and p. 60.
[917] Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.21 and *Guatemala – Cement II*, para. 8.35**:** evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury, and causation… Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury, and causation. We further observe that the only clarification of the term "dumping" in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2.

dumping, injury, and a causal link, of a quantity and scope to justify the *initiation* of an investigation.[918]

772. The object and purpose of making a determination of "sufficient evidence" under Articles 5.2 and 5.3 is to "balanc[e] two competing interests, namely the interest of the domestic industry 'in securing the initiation of an investigation' and the interest of respondents in ensuring that 'investigations are not initiated on the basis of frivolous or unfounded suits'"[919]

773. The chapeau of Article 5.2 states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph".[920] It is well settled that "sufficient evidence" constitutes a standard *higher* than "simple assertion" but is something *less* than that required to make a final determination.[921] The evidence must be more than a "mere indication". Rather, the evidence, considered as a whole, must constitute a "reasonable indication".[922]

774. Therefore, the task of the Panel in this dispute is to assess whether an unbiased and objective investigating authority could have found that the evidence before MOFCOM – before initiation – was sufficient to justify the initiation of the investigation.[923]

[918] The panel in *US – Softwood Lumber V* explained that "the *quantity and the quality* of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination". Panel Report, *US – Softwood Lumber V*, para. 7.84. (emphasis original). See also Panel Reports, *Pakistan – BOPP Film (UAE)*, paras. 7.19-7.24, *Guatemala–Cement II*, paras. 8.35-8.39 and 8.45; *Argentina–Poultry Anti-Dumping Duties*, paras. 7.61 and 7.80; *Mexico–Steel Pipes and Tubes*, para.7.21; *China – GOES*, para. 7.54; and *US – Supercalendered Paper*, para. 7.146.

[919] Panel Report, *China – GOES*, para. 7.54, quoting Panel Reports, *US – Offset Act (Byrd Amendment)*, para. 7.61; and *Guatemala – Cement I*, para. 7.52.

[920] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60.

[921] Panel Report, *Mexico – Corn Syrup*, paras. 7.94-7.95, quoting Panel Report, *Guatemala – Cement I*, para. 7.55 which in turn quotes *United States – Measures Affecting Imports of Softwood Lumber from Canada (SCM/162)*, para. 332. See also Panel Reports, *Guatemala – Cement I*, para. 7.64; *Guatemala – Cement II*, para. 8.35; *Argentina – Poultry Anti-Dumping Duties*, para. 7.67; *US – Softwood Lumber V*, paras. 7.83-7.84; and *China – GOES*, paras. 7.55-7.56.

[922] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.22-7.24.

[923]Panel Reports, *US – Softwood Lumber V*, para. 7.87; *Mexico – Corn Syrup*, para. 7.95; and *Argentina – Poultry Anti-Dumping Duties*, paras. 7.60-7.62; Panel Report, *Guatemala – Cement II,* para. 8.31.

2. The application did not contain sufficient evidence of dumping

775. An application must contain sufficient evidence of the constituent elements of dumping, as defined under Article 2 of the Anti-Dumping Agreement, namely normal value, export price, and adjustments for differences affecting price comparability.[924]

776. In order to initiate an investigation, an investigating authority needs to satisfy itself that there has been dumping of the product as a whole.[925]

(a) Normal value

777. CADA did not provide sufficient evidence of normal value in the written application because it (i) improperly relied on unsubstantiated claims of a particular market situation in Australia, and (ii) used prices of wines imported into Australia from China as a proxy to determine normal value of Australian wine.

i. CADA's Unsubstantiated Claim of a Particular Market Situation

778. CADA's application did not include any information on the prices at which the products in question were sold when destined for consumption in Australia's domestic market, the prices at which those products were sold for export to a third country from Australia, nor a constructed normal value, contrary to Article 5.2(iii) of the Anti-Dumping Agreement. Instead, CADA provided the prices of wines imported into Australia from China and a bare assertion of the existence of a "particular market situation" in Australia. CADA submitted, as a result, that the prices of Chinese exports should be used instead as a basis for the calculation of a normal value because they were not "distorted".

779. For MOFCOM to have treated this data as consistent with the obligations in Article 5.2(iii), it had to be satisfied that (1) CADA had provided sufficient evidence of a "particular market situation" in Australia to justify its failure to provide any information about the price

[924] Panel Report, *Guatemala – Cement II*, paras. 8.35-8.36. The panel explained that "the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation". The "only clarification of the term 'dumping' in the Anti-Dumping Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2". See also Panel Report, *Argentina– Poultry Anti-Dumping Duties,* para. 7.80.
[925] Panel Report, *Argentina – Poultry Anti-Dumping Duties,* para. 7.80.

of the product in question when sold in Australia, and (2) the alternative data that CADA had submitted was an adequate basis on which to provide a normal value.[926]

780. An unbiased and objective investigating authority could not be satisfied of either proposition in the circumstances of this case. CADA's claims were based on unsubstantiated allegations and unreliable alternative data that was incapable of meeting the minimum requirements of Article 5.2(iii).

781. The evidence contained in CADA's application could not support the existence "particular market situation" in Australia to justify CADA's failure to provide the prices at which the product in question was sold when destined for consumption in the domestic markets of the country of origin. It is a series of bare allegations of "non-market conditions", supported by summary information about a range of different programs and policies within Australia that purportedly had some connection to providing support to the Australian wine industry. The evidence provided is, on its face, entirely inadequate to demonstrate that the Australian wine market was distorted by government intervention to a degree that could establish the existence of a "particular market situation".

ii. Prices of Wines Imported from China to Australia are not an Appropriate Basis to Determine Normal Value

782. Even if MOFCOM, acting as an unbiased and objective investigating authority, was prepared to accept that there was a sufficiently plausible allegation of a particular market situation to warrant reliance on an alternative basis for determining normal value, prices of wines imported into Australia from China were not an appropriate alternative basis for determining normal value.

783. Where the evidence on normal value before the investigating authority at the time of initiation does not pertain to a producer or exporter, pertains to a different level of trade, and may not reflect the products produced in the relevant exporting country, the investigating authority must make its best endeavours to verify that the evidence reflects the prevailing home market pricing at the level of producers and/or exporters.[927] MOFCOM failed to do so.

[926] Article 5.2(iii) and Article 2.2 of the Anti-Dumping Agreement.
[927] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.35, 7.37-7.39.

784. First, the price of Chinese wine imported for sale an Australia is not an accurate or appropriate basis for an alternative determination of normal value. Such an approach is not contemplated in Articles 2.2 or 5.2(iii).[928] As in Article 2.2, Article 5.2(iii) provides for three different sources of information that can be used at the initiation stage to evidence dumping: (i) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export, (ii) information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or (iii) the constructed value of the product. None of these permit reference onto the price of *Chinese* wine imported into Australia to evidence dumping of Australian wine imported into China.

785. The price of imported Chinese wine into Australia shows nothing about the price of Australian wine exported to a third country, nor does it provide a basis to construct normal value for Australian wine. The concept of "constructed value" in Article 5.2(iii) mirrors the reference to the process of constructing normal value for the purpose of a dumping determination as set out in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. This sets out a process for constructing normal value, taking as a starting point costs associated with production and sale of the product recorded by exporters, or the nearest possible reasonable alternative method of determining those costs. CADA did not provide any information that would allow for such a calculation. CADA did not even attempt to explain why it considered there was to be a logical relationship between the imports of Chinese wine into Australia and production costs of wine produced in Australia, given that they are two different environments for the production of wine.

786. The panel in *Mexico – Steel Pipes and Tubes* found that where it is obvious on its face that the evidence of normal value before the authority at the time of initiation does not pertain to a producer or exporter and may not even reflect the products produced in the exporting country, the investigating authority must make its best endeavours to determine whether the evidence reflects the prevailing home market pricing at the level of producers and/or exporters.[929] MOFCOM failed to do this.

[928] This alternative determination is not contemplated in either Article 5.2(iii), in the context of determining whether there is sufficient evidence to initiate a dumping investigation, or in Article 2.2, in the context of a dumping determination in the course of the investigation.
[929] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.35.

787. Second, the volumes of imported Chinese wine into Australia were very low, as indicated in the data relied upon by CADA:[930]

Period	Import amount (l)	Import value (USD)	Import price (USD/kl)[931]
2019	3,844	77,000	20,031

788. As the data indicates, only 3,844 litres of Chinese wine were imported into Australia in 2019. The additional detail provided in Annex 11 to CADA's application shows that there were no imports at all in 6 out of the 12 months of that year, and around two thirds of the total imports were made in the month of March. Based on figures contained elsewhere in CADA's application, this was equivalent to approximately 0.003% of total imports of Australian wine into China in 2019.[932] The trade data showed that sales of Chinese wine to Australia were erratic, and at low volumes, so may be characterised by speciality or novelty items that are not representative of the sales in an established trade relationship.[933]

789. Third, even if the price of imported Chinese wine into Australia was a permitted basis for determining the normal value of Australian exported wine, CADA simply took the value of Chinese exports to Australia and made no attempt to apply adjustments to its identified value so as to accurately reflect the situation of Australian wines sold in the Australian market. The application identifies a range of matters in which adjustments would be appropriate, including "domestic freight, domestic insurance premium, packing charge, discount, commission, credit cost, storage charge and other charges" as well as "import tariffs", but said that on the basis of the "conservativism principle" no adjustments would be made. Although the application purported to identify the "normal value after adjustment", in fact no adjustments were made.[934] In fact, CADA specifically stated that "the import volume of like products imported

[930] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 29-30; and CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 11.
[931] Import price = import value / import volume x 1,000
[932] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64); and CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 8.
[933] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64); and CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 11.
[934] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 29-30.

from China to Australia is representative and comparable," which is clearly not the case, as discussed above.[935]

(b) Export price

790. CADA claimed that it was unable to obtain specific transaction prices of products subject to the investigation request originating in Australia from 1 January 2019 to 31 December 2019, due to limited information.[936] CADA instead used the weighted average price calculated according to the statistical data of China Customs as the basis on which to calculate the export price.[937] CADA then calculated an "average price" by dividing the total import amount (in USD) by the total import volume (in kilolitres) for 2019.

791. Article 2.4 requires that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. This requires making due allowance for differences that affect price comparability to neutralise differences in a transaction that an exporter could be expected to have reflected in its pricing.[938]

792. CADA claimed that it was unable to obtain specific transaction prices of products subject to the anti-dumping investigation application originating in Australia from 1 January 2019 to 31 December 2019, due to limited information.[939] CADA instead used the weighted average price calculated according to the statistical data of China Customs as the basis on which to calculate the export price.[940] CADA then calculated an "average price" by dividing the total import amount (in USD) by the total import volume (in kilolitres) for 2019.

793. CADA provided that the weighted export price was $6,723 UDS/kl in 2019. In terms of adjustments, CADA claimed to have used import volume and statistics from China Customs, they argued that it was the weighted cost, insurance, and freight (CIF) price, and did not include import tariff or VAT, etc. Therefore, CADA did not apply this adjustment.

[935] See above, section VI.C.2(a).
[936] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 26.
[937] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 26.
[938] Panel Report, *US – Stainless Steel (Korea)*, para. 6.77.
[939] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 26.
[940] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 26; and CADA Application for Anti-Dumping investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 8.

794. CADA claimed that they were temporarily unable to obtain the actual shipping charges and insurance costs for wine products from Australia to China during the suggested period of investigation contained in the application.[941] No explanation was provided as to why CADA was unable to simply call a shipping container company to get a quote. Relying on other sources of data, CADA then proceeded to remove the alleged costs from Australia to China to be deducted from the export price,[942] and it claimed that these costs could be divided into costs for "overseas links" and "domestic links".[943] Regarding the overseas links, CADA temporarily adjusted the export price on the basis of ocean freight from Australian ports to Chinese ports, and the insurance premium from China to Oceania. In circumstances where the applicant fails to put forward readily available data, an unbiased and objective investigating authority would have made further enquiries to satisfy itself that no more authoritative data was available. MOFCOM failed to do this.

795. Finally, CADA claimed that they were "unable to obtain the costs for the domestic links actually incurred in Australia for products subject to the investigation request".[944] Instead, CADA claimed to use data from the World Bank Group to account for domestic links.[945] CADA did not make any adjustments for the sales volume and physical characteristics. CADA claimed that "this adjustment should not be considered for the time being as the quantity of wines originating in Australia and exported to China are representative and comparable, and they are basically the same in terms of physical and chemical properties".[946]

796. MOFCOM accepted the information as provided by the applicant without any inquiry or corroboration. MOFCOM made no attempts to verify the quantum of the adjustments. After a downward adjustment of USD 319 per kl, the export price was USD 6404 per kl. The individual amounts constituting the adjustment were inadequate and speculative. MOFCOM made no attempt to even verify the adjustments against the information already available to it.[947] CADA failed to provide original sources in several annexes, and in fact only provided

[941] CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 9.
[942] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 27.
[943] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 27.
[944] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 28.
[945] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 28.
[946] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 28.
[947] Information available to MOFCOM at this initiation stage included but was not limited to Annex 8: Customs Statistics on Wine Imports and Exports, Annex 9: Sea Freight and Insurance Quotes, Annex 10: World Bank Group Report on Trade Link Costs in Australia, Annex 11: Statistics on Wine Imports from China, and Annex 13: Annual Reports of Four Listed Wine Companies, from CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1), (Exhibit AUS-90).

screenshots of information, which would have placed an unbiased and objective investigating authority on notice that it needed to assess the information available to it to corroborate the estimates provided by the applicant. MOFCOM failed to do this.

797. The downward adjustment of USD 173 per kl for "domestic links in Australia" was purely speculative. The adjustment was based on a report concerning the "ease of doing business in Australia" from the World Bank Group, and was not connected, in any way, to costs incurred in the export of wine from Australia to China. For example, the inland freight cost of USD 525 appears to be based on the domestic transport cost associated with the export of "HS 02: Meat and edible meat offal" to Japan from a Sydney port.[948] No unbiased and objective investigating authority could have assumed, without inquiry or corroboration, that this was representative of the domestic transport costs associated with the export of wine from Australia to China.

(c) Fair comparison

798. CADA did not provide a fair comparison of the purported normal value and export price in the written application because it failed to (i) make any adjustments to normal value, and (ii) account for the differences in volumes of trade affecting normal values and export prices, which skewed the price comparability of these two values. An unbiased and objective investigating authority would have found that CADA's comparison of normal value and export price did not provide for a fair comparison. Instead, MOFCOM appeared to have wholly adopted CADA's flawed analysis.

799. CADA acknowledges that it failed to make any adjustment to normal value, despite recognising the appropriateness of doing so as discussed above,[949] thereby making a fair comparison impossible.

800. Furthermore, due allowance was not made for the enormous differences in the quantities, as required by Article 2.4. In this instance, the export price was based on an average of a high volume of sales, whereas the normal value was based on very low levels of imports of Chinese wine in Australia.

[948] This appears to be inconsistent with the information used to establish the ocean freight, which was based on shipping from Fremantle in Western Australia to China, from CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 10: World Bank Group Report on the Costs (of Exported Products) within Australia.
[949] See above, Section VI.C.3.

(d) Conclusion

801. CADA failed to submit any actual evidence that dumping was occurring, as is required by Article 5.2 of the Anti-Dumping Agreement. The "simple assertions" provided by CADA did not provide a sufficient factual basis of the normal value, export price or fair comparison to initiate an investigation. Despite this, MOFCOM accepted the information of alleged dumping contained in the application without any inquiry or corroboration. No unbiased and objective investigating authority could have determined that there was sufficient evidence of dumping to justify the initiation of an investigation. On that basis, MOFCOM acted inconsistently with China's obligations under Articles 5.2 and 5.3 of the Anti-Dumping Agreement.

3. The application did not contain sufficient evidence of injury and causation

802. CADA's application did not provide sufficient evidence of injury to the domestic industry, and that that injury was caused by dumping.

803. The chapeau of Article 5.2 provides that the application must contain sufficient evidence of injury and causation. Article 5.2(iv) of the Anti-Dumping Agreement specifies that an application must contain:

> (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

804. This requires panels to have before them, at the time of initiation, the same type of evidence of injury and causation as defined in Article 3, including as to the volume of allegedly dumped imports, sufficient to justify the initiation of an investigation.[950] There was no such evidence before MOFCOM.

[950] Panel Reports, *Guatemala – Cement II*, paras. 8.35-8.36 and para. 8.45, *Mexico – Steel Pipes and Tubes*, paras. 7.21, 7.56, 7.59-7.60.

(a) Injury

805. CADA's application contained no actual evidence of injury suffered by the Chinese domestic industry.[951] MOFCOM did not make any inquiries or seek to corroborate the information provided by the applicant. MOFCOM's decision to initiate was based solely on it acceptance of the accuracy and adequacy of the evidence put forward by CADA.[952]

806. CADA's allegations of injury were characterised by three factors that fundamentally undermined their reliability:

- the data was selectively presented, with arbitrary adjustments made to it, or comparisons were made between non-comparable data sets;
- even accepting the data on face value, they generally did not demonstrate the claims made by CADA; and
- even if CADA's claims had been established on the basis of the data, there was no attempt to show that the injury was caused by the import of Australian wine [as discussed below].[953]

807. These errors were made with respect to each allegation of injury presented by CADA, including:

- The allegation that the "price reduction and dumping" of the product under investigation had a "negative impact on the sales price of the domestic like products".[954]
- CADA's claim that the sales prices of domestic like products showed an overall downward trend during the investigation period, using available annual report data of four listed domestic wine companies.[955]
- The allegation that the importation of the products subject to the investigation request caused "apparent price depression and suppression

[951] Panel Report, *Mexico - Steel Pipes and Tubes*, para. 7.24, where the panel stated that "[F]or the purpose of Article 5.2, the applicant must submit a degree of actual evidence of alleged dumping allegedly causing injury, and for the purpose of Article 5.3, that evidence must constitute an objectively *sufficient* factual basis to initiate an investigation". (original emphasis)
[952] Anti-Dumping Initiation of Investigation Announcement (Exhibit AUS-89), pp. 1-2.
[953] See below, Section VI.C.3(c).
[954] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 55.
[955] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 57.

for the domestic like products".[956] This was said to be supported by data showing an "overall sharp decline in the import prices of products subject to the investigation request", a "narrowing trend" in the price gap between those products and domestic products, and falling profit margins from Chinese domestic companies said to have been caused by these price decreases.

- CADA's assertion that "due to the impact of the large-volume low-price import of products subject to the investigation request, the output of domestic like products showed a continuous downward trend".[957]

808. In addition, CADA made several other unsubstantiated claims, without providing any sources of supporting information when discussing the alleged influence of subject imports of Australian wine on the prices of domestic like products. These were no more than "simple assertions" unsubstantiated by evidence. These claims included:

- "[T]here is no substantial difference in the basic physical and chemical properties of products subject to the investigation request and the domestic like products. They are like products that are competitive and mutually substitutable. Therefore, they compete with each other in the Chinese market";[958]
- the product under investigation and the domestic like product are "sold in the Chinese market at the same time through basically the same sales channels. They are sold to the national market through direct sales, brokerage, or online sales. There is no substantial difference in their customer groups";[959]
- "[C]onsumers consume products subject to the investigation and the domestic like product at the same time";[960] and

[956] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 59.
[957] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 62.
[958] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 55.
[959] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 55.
[960] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 55.

- China's wine market potential has "great appeal to Australian winemakers, making them eager to seize and expand their market share in China by means of dumping".[961]

809. The defects in CADA's submissions with respect to the alleged injury to the domestic industry should all have been readily apparent to MOFCOM in its assessment for sufficiency of evidence of the written application. The consequence of these defects was that CADA's application was incapable of showing sufficient evidence of the alleged injury. An unbiased and objective investigating authority relying solely on CADA's application could not have found that there was sufficient evidence of injury to justify the initiation of an investigation.

(b) Relevant economic factors

810. CADA appears to have attempted to provide information on the "relevant economic indicators or factors of the domestic industry" as required by Article 5.2(iv), on the basis of the factors listed in Article 3.4 of the Anti-Dumping Agreement.[962] This section involved repeating largely the same claims as those discussed above, including in relation to changes in output, sales prices, and sales prices of four identified companies, all of which suffered from defects. For example:

- The analyses of trends in "apparent consumption" and total domestic output were based upon the overinclusive domestic output data and were therefore incapable of showing the apparent consumption of the products in question.[963]
- The analysis of the changes in market share of the like domestic products was based on both of the above "apparent consumption" and "total domestic output figures" and was incapable of showing the market share of like products. [964]
- The analysis of the changes in sales prices of domestic like products was again based on the calculation of an "arithmetic average price" between high-end wine products and medium- and low-end wine products, which

[961] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 68.
[962] CADA Application for Anti-Dumping investigation (Exhibit AUS-64), p. 59.
[963] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 21 and pp. 60-62; and see above Section VI.A.
[964] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 62-63.

purportedly identified a downward trend overall, while masking the clear upward trend in the medium and low-end market.[965]

- The analysis of the changes in sales prices based on four companies was the same as the analysis discussed above, in the earlier injury section, and suffered from identical defects. [966]

811. While an investigating authority is not required to have before it evidence of the quantity and quality that would be necessary to support a final determination of injury, the authority must have the same *type* of evidence of injury as defined in Article 3.[967] An unbiased and objective investigating authority would have considered this obligation in its assessment for sufficiency of evidence of the written application. MOFCOM failed to do this. In fact, the analysis provided by CADA failed to address the majority of these criteria, or to provide data to support its allegations.

812. CADA's failure to provide data regarding the majority of the factors listed in Article 3.4, namely return on investments, utilization of capacity, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments prevented an unbiased and objective investigating authority from determining if the initiation requirements were met.

813. There is no evidence on the record of any active examination of the evidence, or consideration of additional data sources. This is despite CADA's admissions in its application that there were material limitations on the accuracy of the data it relied upon.

(c) Causal link

814. CADA also failed to provide sufficient evidence of a causal link between the allegedly dumped imports and the purported injury to the domestic industry. The evidence relied upon in CADA's section relating to the purported causal link was largely the same as that relied upon to demonstrate injury and suffered from the same defects outlined above.[968]

[965] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 63-64.
[966] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 64-65; and see above Section VI.C.3(a).
[967] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.56.
[968] See above, Section VI.C.3(a).

815. At most, the data presented by CADA, even if accepted on its face, showed that from 2015 to 2019:

- the level of imports of the products subject to the investigation increased, while domestic production fell;
- the average prices of the imports fell in some years compared to the previous year, and rose in others, *while the trend in the level of imports of the products subject to the investigation remained consistent*;
- the identified average prices of the domestic products fell in some years compared to the previous year, and rose in others, *while the trend in the level of imports remained consistent*; and
- sales revenue and profits of domestic producers fell consistently, in a trend with *no apparent relationship to the prices of imported or domestic products.*

816. There is no basis on which an unbiased and objective investigating authority could have found that there was sufficient evidence of causation to justify the initiation of the investigation.

(d) Non-attributable factors

817. CADA addressed a number of non-attributable factors and, for each, concluded that those factors were not appropriate factors to consider by MOFCOM as they could not have caused injury to the domestic industry. The factors CADA addressed include (i) the influence of imported products from non-subject countries;[969] (ii) changes in market demand and consumption patterns;[970] and (iii) the effect of healthy competition and the influence of commercial distribution channels. [971] However, CADA's analysis of those factors was inadequate, misleading, and the assertions made were inconsistent with the data provided. As a result, CADA's application only contained simple assertions, contrary to the requirements of Article 5.2.

818. With respect to the impact of non-subject imports on the domestic industry, CADA's analysis was deficient as it was based on a comparison between Australia's import volumes

[969] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 76-77.
[970] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 77-78.
[971] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 77-78.

and prices with every other country as a combined total. There was no consideration of the trends in prices in imports from other countries at an individual level, including major sources of imports. In addition, the conclusions drawn by CADA were inconsistent with the data it relied upon, which showed the year-on-year changes in other countries' import prices were at least as volatile as the changes in import prices from Australia.[972]

819. Regarding changes in market demand and consumption patterns, CADA simply asserted that it "believed" that this factor could not have caused injury, even though it acknowledged that there was a "generational shift" underway.[973] No evidence was submitted in support of this view.

820. Finally, CADA limited its analysis of the effect of healthy competition and the influence of commercial distribution channels to a series of assertions extolling the virtues of China's domestic enterprises, such as devotion to the "comprehensive utilization of resources", and full adoption of the "market-orientated price mechanism". [974] No evidence was offered in support of these propositions aside from bare assertion.

821. Although CADA was also aware of other non-attributable factors, it failed to address those as a cause of injury to the domestic industry. CADA stated elsewhere in the application that "Australian wine manufacturers have a definite competitive advantage by virtue of their existing public praise and brands, as well as the consumption habits formed in consumer groups".[975] Despite this acknowledgement, there was no consideration in CADA's subsequent submissions of the likelihood that the strong performance of Australian wine imports was attributable to the quality and market position of those products rather than the alleged dumping.

(e) Conclusion

822. CADA failed to provide sufficient evidence of injury and causation by failing to provide (i) the effect of subject imports on prices of the like product in the domestic industry, and (ii) the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry. CADA made several

[972] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 77.
[973] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 77-78.
[974] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 77-78.
[975] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 55.

unsubstantiated claims regarding injury and relied on inaccurate data for its arguments. An unbiased and objective investigating authority would have detected the significant deficiencies in the proposed application and either made further verifications or rejected the application. MOFCOM failed to do this at the initiation stage, and therefore initiated an investigation solely on the basis of an application that lacked sufficient evidence of dumping, injury, and causation.

823. The defects in CADA's submissions on causation were readily apparent to MOFCOM in its assessment of sufficiency of evidence in the written application. The consequence was that CADA's application was incapable of showing a causal nexus between Australian imports and the purported injury beyond "simple assertion". As a result, an unbiased and objective investigating authority could not have found that there was sufficient evidence of injury and causation to justify the initiation of the investigation.

4. The application should have been rejected

824. Pursuant to Article 5.8 of the Anti-Dumping Agreement, as soon as an investigating authority is "satisfied that there is not sufficient evidence"[976] of either dumping, injury or causation, it must reject the application and terminate an investigation.[977]

825. MOFCOM stated in its final determination that CADA's written application contained the information and related evidence required to initiate an anti-dumping investigation as provided by Articles 14 and 15 of the *Anti-Dumping Regulations of the People's Republic of China*.[978]

826. However, as detailed above, the application did not contain "sufficient evidence" of dumping, injury, or causation, within the meaning of Articles 5.2 and 5.3 of the Anti-Dumping Agreement. As such, MOFCOM was required to reject the application in accordance with China's obligations under Article 5.8 of the Anti-Dumping Agreement.

[976] Panel Report, *Morocco – Definitive AD Measures on Exercise Books* (Tunisia), paras. 7.359-7.360.
[977] Panel Report, *US – Softwood Lumber V*, para. 7.134 ("From the wording of Article 5.8, it is clear that it addresses two situations. The first one addressing the situation where the application is to be rejected before the initiation of the investigation, and the second dealing with the termination of the investigation after it has been initiated…".).
[978] Anti-Dumping Final Determination (Exhibit AUS-2), p. 4.

D. CONCLUSION

CADA's application was insufficient and no unbiased and objective investigating authority could have determined that there was sufficient evidence to justify initiating an investigation. As a result, China acted inconsistently with Articles 5.2, 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement.

VII. AUSTRALIA'S CLAIMS CONCERNING MOFCOM'S CONDUCT AND TRANSPARENCY OF THE INVESTIGATIONS

A. INTRODUCTION

827. MOFCOM's investigation was characterised by fundamental procedural deficiencies from beginning to end. MOFCOM conducted the investigation in a fashion that denied interested parties procedural fairness and due process, contrary to the obligations provided for in the Anti-Dumping Agreement.

828. Amongst other deficiencies in MOFCOM's approach, confidential information was misused, reasonable requests for extensions of time were rejected, an invalid sample was constructed and relied upon, and key information was either never disclosed to interested parties, or only disclosed with insufficient time to comment. Parties were repeatedly deprived of opportunities to present their case to MOFCOM and ensure that their interests were properly and fairly accounted for in the investigation.

829. Australia considers that the obligations in the Anti-Dumping Agreement concerning the conduct of investigations are not only integral to the fair operation of the trade remedies system but are also intrinsically related to the credibility of an investigating authority's substantive determinations. Thus, a panel cannot address errors in the substantive determinations without also addressing the procedural errors that underpin and compound them. In this case, MOFCOM's failure to properly conduct its investigation caused and exacerbated errors in its determinations. For instance:

- MOFCOM's erroneous findings, as addressed in sections II to VI, above, were compounded by MOFCOM's unwillingness to engage with the reasonable

arguments and verifiable information supplied by interested parties during the investigation.

- Without giving interested parties ample opportunity to present in writing all evidence which they considered relevant to the investigation or ensuring that they had a full opportunity for the defence of their interests, MOFCOM could not have arrived at balanced, well-founded conclusions, which was evident from the unreasonably high dumping margins that MOFCOM ultimately determined.

830. For the reasons set out in the sections below, MOFCOM acted inconsistently with Articles 6.5, 6.5.1, 6.10, 6.1, 6.1.1, 6.1.2, 6.2, 6.4, 6.6, 6.9, 12.1.1(iv), 12.2 and 12.2.2 of the Anti-Dumping Agreement.

B. CHINA FAILED TO OBJECTIVELY ASSESS "GOOD CAUSE" FOR CLAIMS OF CONFIDENTIALITY AND FAILED TO REQUIRE INTERESTED PARTIES TO FURNISH ADEQUATE NON-CONFIDENTIAL SUMMARIES IN BREACH OF ARTICLES 6.5 AND 6.5.1 OF THE ANTI-DUMPING AGREEMENT

831. MOFCOM acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by: (i) failing to ensure that "good cause" for confidential treatment was shown in relation to information submitted by the applicant, CADA, and by the respondents to the Domestic Producer Questionnaire; and (ii) failing to objectively examine the justification for the need for confidential treatment of the information.

832. In addition, MOFCOM acted inconsistently with Article 6.5.1 by failing to require CADA and the domestic Chinese producers to furnish non-confidential summaries of the information treated as confidential, either at all or "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

1. Legal framework

833. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement provide as follows:

> 6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a

> person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.
>
> 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

834. The protection of confidential information is integral to the effective functioning of the anti-dumping investigatory system. However, it must be balanced against the fundamental due process rights of interested parties "to see the evidence submitted or gathered in an investigation", and to "have an adequate opportunity for the defence of their interests", which "opportunity must be meaningful in terms of a party's ability to defend itself".[979] It is fundamentally unfair for adverse findings to be made against a party without that party having the opportunity to understand and contest the basis of those findings.

835. The conditions set out in Article 6.5 are of "critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation".[980] It is important for panels, in their review of an investigating authority's treatment of confidential information, to strictly enforce these conditions in order to maintain this balance.[981]

836. An investigating authority is obligated to treat any information supplied by an interested party as confidential "upon good cause shown", and must require such "good cause" to be shown before providing confidential treatment. The Appellate Body has explained that the "good cause" alleged by an interested party must constitute a reason sufficient to justify withholding the information from both the public and the other interested parties.[982] It must demonstrate the risk of a potential adverse consequence that would follow

[979] Appellate Body Report, *EC – Fasteners from China*, para. 541 (citing Appellate Body Report, *US – Gambling*, para. 270).
[980] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.
[981] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.
[982] Appellate Body Report, *EC – Fasteners (China)*, paras. 537.

from the disclosure of the information, the avoidance of which is important enough to warrant the non-disclosure of the information.[983]

837. The Appellate Body has also explained that:

> The treatment of information as confidential is, therefore, the legal consequence that flows from the establishment of good cause, as determined pursuant to an objective assessment by the authority reviewing a party's request for the confidential treatment of its information. Hence, in the absence of good cause being shown by the party submitting information, as determined pursuant to an objective assessment by the authority, there is no legal basis for the authority to accord confidential treatment to that information.[984]

838. An investigating authority must objectively assess and determine whether a request for confidential treatment has shown "good cause". It cannot be established merely based on the subjective concerns of the submitting party.[985] Further, the Appellate Body has explained that:

> In practice, a party seeking confidential treatment for information must make its "good cause" showing to the investigating authority upon submission of the information. The authority must objectively assess the "good cause" alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular "good cause" alleged.[986]

839. In reviewing whether an investigating authority has objectively assessed "good cause", a panel must examine the issue on the basis of the published reports and supporting documents (if any), and in light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment.[987]

[983] Appellate Body Report, *EC – Fasteners (China)*, paras. 537.
[984] Appellate Body Report, *EC – Fasteners (China) (Article 21.5)*, para. 5.101.
[985] Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.95 (citing Appellate Body Report, *EC – Fasteners (China)*, para. 537).
[986] Appellate Body Report, *EC – Fasteners (China),* para. 539. (footnotes omitted); cited with approval in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95.
[987] Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.97.

840. It is necessary to show "good cause" for both categories of information covered by Article 6.5, i.e. information that is by its nature confidential, and information that is provided on a confidential basis.[988]

841. Article 6.5.1 further requires that an investigating authority must require the interested parties to provide a non-confidential summary.[989] These summaries must be of sufficient detail to permit a reasonable understanding of the substance of the information. The non-confidential summaries provide an alternative method for communicating the content of the confidential information "so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests".[990]

842. Without such summaries, other interested parties could not meaningfully engage in the investigative process and have adequate opportunity for the defence of their interests.[991] The purpose of Articles 6.5 and 6.5.1 is to "balance the goal of ensuring that availability of confidential treatment does not undermine the transparency of the investigative process".[992] The interest of the submitting party in maintaining confidentiality during the investigation must be balanced against the rights of all other interested parties to be reasonably informed about the substance of the information in order to be able to defend their interests.[993]

843. A non-confidential summary must be provided by the interested party submitting the information. Subsequent analysis or summation by the investigating authority cannot remedy the absence of, or shortcomings in, a non-confidential summary.[994] It is insufficient for there to merely be a possibility that an interested party could derive or infer from context the possible nature of the confidential information by having regard to what is absent or redacted.[995] A summary must contain sufficient detail to understand the "substance" of the

[988] Appellate Body Reports, *China – HP-SSST (Japan)*, para. 5.95; and *EC – Fasteners (China),* paras. 536-537.
[989] The obligatory nature of this requirement is clear notwithstanding that the Anti-Dumping Agreement does not set out specific sanctions to penalise parties that fail to comply: Appellate Body Report, *EC – Fasteners (China)*, paras. 549.
[990] Appellate Body Report, *EC – Fasteners (China),* para. 542. (footnotes omitted); cited with approval in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.95.
[991] Appellate Body Report, *EC – Fasteners (China)*, para. 542. See also Panel Reports, *China – Broiler Products*, para. 7.50; *China – GOES*, para. 7.188; *Mexico – Steel Pipes and Tubes*, paras. 7.379-7.380; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.133.
[992] Appellate Body Report, *EC – Fasteners (China)*, para. 542 (citing Panel Report, *EC – Fasteners (China)*, para. 7.515).
[993] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.380.
[994] Panel Report, *China – Broiler Products*, para. 7.53.
[995] Panel Report, *China – GOES*, paras. 7.224.

information. It is insufficient for the non-confidential summary to provide only a description of the "nature" of the information.[996]

844. Where, in "exceptional circumstances", a party considers that the confidential information is not susceptible of summary, there is an obligation on the investigating authority to require the party to provide a statement of reasons why summarisation is not possible.[997] It is not sufficient for a party to simply assert that a summary would be burdensome. They must demonstrate that no other alternative method of presenting the information can be developed that would not either necessarily disclose the confidential information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the information submitted in confidence.[998] The investigating body must then scrutinise that claim to ensure the reasons given appropriately explain why no summary that permits a reasonable understanding of the information's substance is possible.[999]

2. CADA's request for confidential treatment of certain information

(a) The body of CADA's application

845. The public version of CADA's application included a one-page section entitled "Section B Confidential Application".[1000] It included a request that "the materials and attachments in this application be treated as confidential".[1001] It also indicated that CADA "hereby prepares a public version of the application and attachments which provide descriptions or non-confidential summary for the confidential materials and information".[1002] CADA gave no further indication in this document or elsewhere in the application of the subject matter, nature, or scope of the information claimed to be confidential. Moreover, CADA provided no explanation of the basis on which it claimed that the information (which was not identified) was confidential or that confidential treatment was otherwise justified.

[996] Panel Report, *China – GOES*, paras. 7.198-7.200.
[997] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.379-7.380. See also Panel Report, *Guatemala – Cement II*, para. 8.213.
[998] Appellate Body Report, *EC – Fasteners (China)*, paras. 543.
[999] Appellate Body Report, *EC – Fasteners (China)*, para. 544.
[1000] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 82.
[1001] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 82.
[1002] CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 82.

Thus, there was nothing in CADA's application that showed the "good cause" for confidential treatment that MOFCOM was obligated to examine under Article 6.5.[1003]

846. Australia understands from CADA's "Section B Confidential Application" that a confidential version of the application was submitted and that it included purportedly confidential information, including within the body of the application and/or in one or more of the annexes. However, there is nothing in the body of the public version of the application to indicate (i) where information was omitted on the basis of confidential treatment, (ii) the subject matter, nature, or amount of such information, or (iii) the reason(s) why such information warranted confidential treatment. CADA did not employ redactions – or any other method – in order to indicate where it was asserting that certain information was confidential. There are no non-confidential summaries or descriptions of the omitted information.

847. MOFCOM was required to ensure that: (i) the confidential treatment of any information withheld from the other interested parties was based on a showing of "good cause"; (ii) non-confidential summaries of such information were provided "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence"; and (iii) in exceptional circumstances where such information was not susceptible of summary, a statement was provided of the reasons why summarization was not possible. MOFCOM failed to ensure that any of these requirements was met. The only reference in the Final Determination to confidential information in CADA's application was MOFCOM's statement that "stakeholders" and the public had been given access to "the public version of the application and non-confidential summary of the confidential version of the application".[1004]

848. Without "good cause shown", there is no legal basis for an investigating authority to accord confidential treatment to information. A showing of "good cause" must constitute a reason "sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation".[1005] An investigating authority is required to objectively assess the "good cause" alleged for confidential treatment, and "scrutinize the

[1003] Appellate Body Report, *EC – Fasteners (China)*, para. 539 ("The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'").
[1004] Anti-Dumping Final Determination (Exhibit AUS-2), p. 6.
[1005] Appellate Body Report, *EC – Fasteners (China)*, para. 537.

party's showing in order to determine whether the submitting party has sufficiently substantiated its request".[1006] If an investigating authority treats information as confidential without such a "good cause" showing having been made, the authority would be acting inconsistently with its obligation under Article 6.5 to grant such treatment only 'upon good cause shown'".[1007] Thus, by failing to require CADA to show "good cause", MOFCOM precluded itself from conducting the objective examination of the justification for confidential treatment that it was obligated to undertake, and therefore acted inconsistently with the requirements of Article 6.5.[1008]

849. Further, as noted above, MOFCOM acted inconsistently with Article 6.5.1 because it failed to require CADA to furnish non-confidential summaries of the purportedly confidential information. The body of the application does not contain anything identifiable as a non-confidential summary of confidential information. Aside from a reference to "Section B", there was nothing in the body of the application to indicate what information was treated as confidential or where such information was redacted or otherwise omitted from the public version of the application. Similarly, CADA made no claim that it was unable to provide non-confidential summaries.

(b) The annexes to the CADA Anti-Dumping Application

850. With respect to the annexes attached to the CADA Anti-Dumping Application, CADA appears to have provided a written explanation of the information for which it requested confidential treatment and a non-confidential summary of that information only in relation to Annex 3.[1009]

851. With respect to this Annex, CADA asserted the following explanation for the confidential treatment it requested:

[1006] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[1007] Appellate Body Report, *EC – Fasteners (China)*, para. 539.
[1008] Panel Report, *Korea – Certain Paper*, para. 7.335 ("some showing of good cause is necessary for the confidential treatment of information that is by nature confidential. The degree of that requirement may, however, depend on the type of information concerned. In the investigation at issue, there is no indication that the KTC requested that any good cause be shown in order to treat as confidential information submitted in the application, which was by nature confidential. We therefore conclude that the KTC acted inconsistently with Article 6.5 in the investigation at issue by not requiring that good cause be shown with respect to the information submitted in the application which was by nature confidential").
[1009] Australia notes that the "Section B Confidential Application" section of CADA's Application for Anti-Dumping Investigation appears to refer to the preparation of public versions of "attachments" in the plural. If any other attachments or annexes contained information that was treated as confidential, then the violations of Article 6.5 and 6.5.1 described above also apply to such confidential treatment.

> This appendix is the minutes of the special meeting on the applicant's internal anti-dumping investigation application for Australian wine products. In view of the fact that the meeting minutes involve the applicant's internal voting procedures, work plans, law firm engagement, payment of attorney fees, and internal and external confidential work, it is classified as internal confidential information and is only printed out and circulated within the association and its members. Disclosure to the public may cause inconvenience or other adverse effects to the daily management and operation of the applicant and the production and operation of the members' businesses, therefore, we ask that the minutes be kept confidential, and the full text is not disclosed to the public. [1010]

852. MOFCOM failed to assess CADA's reasons and determine whether CADA had shown "good cause" for treating the *entirety* of Annex 3, including all of the information therein, as confidential. The Appellate Body has explained that where a panel is tasked with reviewing whether an investigating authority has objectively assessed "good cause", it is to do so on the basis of the investigating authority's published report and any related supporting documents, and in light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment request.[1011] Nowhere in the Final Determination or related supporting documents is there any evidence that MOFCOM made the type of assessment or determination required under Article 6.5.

853. CADA alleged that disclosure of the information in Annex 3 "may cause inconvenience or other adverse effects". This unspecified, ambiguous harm is insufficient to meet the standard of "good cause" under Article 6.5. The examples provided in Article 6.5 of information that is "by nature confidential" describe information which, if disclosed, "would have a *significantly* adverse effect" (emphasis original) or "would be of *significant* competitive advantage to a competitor" (emphasis original). The Appellate Body has found that these examples "are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved".[1012] CADA's explanation did not identify any significant adverse effects that would reasonably be expected to result from disclosure of the information described in Annex 3. Australia submits that "inconvenience" does not indicate the type of harm, or the protectable interests involved, that would outweigh the transparency and due process

[1010] CADA Application for Anti-Dumping Investigation Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 3.
[1011] See Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.
[1012] Appellate Body Report, *EC – Fasteners (China)*, para. 538.

concerns, including the rights of interested parties to see the evidence submitted or gathered in an investigation and to have a meaningful opportunity for the defence of their interests.[1013]

854. There is no evidence on the record that MOFCOM conducted any assessment of whether the potential, unspecified risk described by CADA outweighed the detrimental impact that withholding the entirety of Annex 3 would have on the rights of interested parties. Australia submits that an "unbiased and objective" investigating authority could not have found that CADA had shown "good cause" to treat the entirety of Annex 3 as confidential.[1014] On this basis, MOFCOM acted inconsistently with Article 6.5.

855. MOFCOM also acted inconsistently with Article 6.5 by failing to require CADA to furnish an adequate non-confidential summary of the information treated as confidential throughout the entirety of Annex 3. CADA's non-confidential summary was as follows:

> According to the relevant terms of the Articles of Association of China Alcoholic Drinks Association and its annual work arrangements, the applicant held a special discussion meeting to exchange information and summarize the changes in the import of foreign wine products in recent years and the impact of imports on the domestic industry. After the joint discussions and adoption of resolutions of the participating entities, it was agreed that the China Alcoholic Drinks Association shall be the applicant on behalf of the domestic wine industry to file an anti-dumping investigation application for imported wine products originating in Australia to the Ministry of Commerce to protect the legitimate rights and interests of the domestic industry.[1015]

856. While this description indicated that Annex 3 contained information that was key to the initiation of the investigation, it provided no summary of that information, let alone "in sufficient detail to permit a reasonable understanding of the substance of the information". Disclosure of that information, in some meaningful degree, to the interested parties was essential to their ability to defend their interests.

857. For example, Annex 3 appeared to contain key information concerning CADA's standing to bring an application on behalf of the domestic industry in accordance with Article 5.4 of the Anti-Dumping Agreement. While CADA's summary referred to resolutions adopted by "participating entities", it did not provide any information about:

[1013] See below, sections VII.F, VII.G and VII.I.
[1014] See Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.5.
[1015] CADA Application for Anti-Dumping Investigation Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 3.

- whether representatives of *all* of CADA's member organisations attended the "special discussion meeting", or if there was less than complete attendance, which members attended;
- the basis (or bases) on which the resolutions were adopted, whether by simple majority, special majority, consensus, or some other voting technique; and
- how many, and which, members voted against or abstained from the relevant resolutions.

858. These points were the key pieces of information that MOFCOM was required to be satisfied that CADA's application met the requirements of Article 5.4 of the Anti-Dumping Agreement. If they were not included in Annex 3 of CADA's application, MOFCOM could not have been satisfied that the application was made on behalf of domestic industry.[1016] If they were included in Annex 3, CADA failed to show "good cause", and MOFCOM failed to require "good cause" to be shown, for treating this information as confidential. No summary of this key information was provided, let alone "in sufficient detail to permit a reasonable understanding of the substance of the information".

859. For the foregoing reasons, CADA's failure to provide a sufficiently detailed summary of the substance of the information contained in Annex 3,[1017] and MOFCOM's failure to require CADA to provide such a summary, deprived the interested parties of both (i) their right to see information and evidence submitted by CADA that was key to the investigation and (ii) the meaningful opportunity for a full defence of their interests.

3. Chinese domestic producers' claims to confidentiality

(a) The responses to the Domestic Producer Questionnaire

860. MOFCOM issued Domestic Producer Questionnaires on 10 October 2020. Twenty-one domestic producers of Chinese wine responded.[1018] MOFCOM treated certain information in these responses as confidential without requiring "good cause" to be shown for such

[1016] See above, section VI.A.2(a).
[1017] If this information was within the confidential version of Annex 2, then Australia submits MOFCOM acted inconsistently with Articles 6.5 and 6.5.1.
[1018] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 17-18.

treatment, without assessing whether "good cause" had been shown, and without requiring the domestic producers to furnish non-confidential summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

861. MOFCOM provided confidential treatment to information that appeared very unlikely to be genuinely confidential on its face, and for which MOFCOM should have required "good cause" to be shown for such treatment. This included:

- Confidential treatment covering the entirety of the responses supplied by certain domestic producers to question 5 of the Domestic Producer Questionnaire,[1019] which asked for information about whether domestic producers or their affiliated parties made imports or exports of the production under investigation, and the "Product Use" of the imports or exports. MOFCOM granted this broad confidential treatment even though, as is well known, bottled wine has a limited range of ordinary uses and even though in response to another question in the *same questionnaire responses*, the response was given that the like products are "mainly used as alcoholic drinks for human consumption".[1020]
- Confidential treatment covering the entirety of the responses supplied by *all* domestic producers to question 9 of the Domestic Producer Questionnaire,[1021] which asked for information concerning the classification of the wines sold by the domestic producers according to quality or brand.

[1019] Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), p. 13; Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 17; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 16; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 13; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p.13.

[1020] See for example: Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), pp. 17; and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 16.

[1021] Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 16; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), pp. 16-17; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), pp. 16-17; Grand Dragon Wine Questionnaire Response (Exhibit AUS-51); pp. 18-19; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), pp. 16-17; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49); pp. 16-17; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 17; Yunan Gaoyuan Wine Anti-dumping Questionnaire Response (Exhibit AUS-46), pp. 15-16; Xinjiang West Region Pearl Winery Anti-dumping Questionnaire Response (Exhibit AUS-45), pp. 15-16; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), pp. 17-18; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), pp. 16-17; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), pp. 16-17; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), p. 17; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), pp. 17-18; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), p.16; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), pp. 17-18; Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56); p. 16, Turpan Louland Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54); and pp. 16-17, COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), pp. 16-17.

MOFCOM granted this broad confidential treatment even though these products are publicly offered for sale to consumers.

- Confidential treatment covering the entirety of the responses supplied by *all* domestic producers to question 12 of the Domestic Producer Questionnaire,[1022] which asked for information concerning the "main raw materials" used in the production of the like products.[1023] MOFCOM granted this broad confidential treatment even though (i) the product had been defined by MOFCOM in the questionnaire as "Wine made from fresh grapes or grape juice",[1024] and (ii) in response to another question in the *same questionnaire responses*, the answer had been given that "the raw materials used in the relevant wines produced by our company […] are fresh grapes or grape juice".[1025]
- Confidential treatment covering the entirety of the responses supplied by *all* domestic producers to question 14 of the Domestic Producer Questionnaire,[1026] which asked for information concerning the production

[1022] Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 19, Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), p. 19; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), p. 19; Grand Dragon Wine Questionnaire Response (Exhibit AUS-51), p. 21; Tonghua Tontine Anti-Dumping Questionnaire Response (Exhibit AUS-50), p. 12; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), p. 19; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 20; CITIC Guoan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-47), pp. 16, 17, 19; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), p. 18; Xinjiang West Region Pearl Winery Anti-dumping Questionnaire Response (Exhibit AUS-45), p. 18; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), p.20; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), p. 19; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), p. 19; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), p.19; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), p. 20; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), p. 18; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), p. 20; Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), p. 19; Turpan Louland Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), p. 19; and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19.

[1023] See for example, Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 20 and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19.

[1024] See for example, Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 3; and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 3.

[1025] See for example: Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 18 and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 17.

[1026] Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 19; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55), p.19; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), p. 19; Grand Dragon Wine Questionnaire Response (Exhibit AUS-51), p. 21; Tonghua Tontine Anti-Dumping Questionnaire Response (Exhibit AUS-50), pp. 19-20; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), p. 19; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 20; CITIC Guoan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 19; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response, p. 18; Xinjiang West Region Pearl Winery Anti-dumping Questionnaire Response (Exhibit AUS-45), p. 18; Tonghua Winery Anti-Dumping Questionnaire Response, (Exhibit AUS-43) p. 20; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), p. 19; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), p. 19; Qingdao Huadong Winery Anti-Dumping

equipment used in the production of bottled wine.[1027] MOFCOM granted this broad confidential treatment even though in response to another question in the *same questionnaire responses,* the response had been given that the "domestic industry mainly uses modern production equipment for large-scale production, including grape sorting equipment, destemming and crushing machines, fermentation tanks, presses, centrifuges, freezers, plate and frame filters, diatomaceous-earth filters, pumps, etc".[1028]

- Confidential treatment covering the entirety of the responses supplied by *all* domestic producers to question 30 of the Domestic Producer Questionnaire,[1029] which asked for information concerning the sales structure, sales channels, and sales geographical distribution of the like products.[1030] MOFCOM granted this broad confidential treatment even though (i) wine is made available for public sales through channels readily observable to the public, and (ii)in a response to an earlier question in the *same questionnaire responses,* the answer had been given that the domestic industry's "sales channels includ[e] direct sales, distribution, online sales, etc". [1031]

Questionnaire Response (Exhibit AUS-61), p. 19; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), p. 20; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), p.18; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), p.20; Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), p. 19; Turpan Louland Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), p. 19; and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19.

[1027] See for example, Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 20; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19.

[1028] See for example, Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 19; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 18.

[1029] Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 30; Dynasty Fine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-55); p. 30; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), p. 30; Tonghua Tontine Wine Anti-Dumping Questionnaire Response (Exhibit AUS-50), pp. 30-31; Xinjiang Sunyard Wine Anti-Dumping Questionnaire Response (Exhibit AUS-49), p. 29; Chateau Junding Anti-Dumping Questionnaire Response (Exhibit AUS-48), p. 30; CITIC Guoan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-47), p. 29; Yunan Gaoyuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-46), p. 28; Xinjiang West Region Pearl Winery Anti-dumping Questionnaire Response (Exhibit AUS-45), p. 28; Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), p. 30; Shanxi Rongzi Winery Anti-Dumping Questionnaire Response (Exhibit AUS-63), p. 29; Shangri-La Wine Anti-Dumping Questionnaire Response (Exhibit AUS-62), p. 29; Qingdao Huadong Winery Anti-Dumping Questionnaire Response (Exhibit AUS-61), p. 29; Kweichow Moutai Distillery Anti-Dumping Questionnaire Response (Exhibit AUS-60), pp. 30-31; Gansu Zixuan Wine Anti-Dumping Questionnaire Response (Exhibit AUS-59), pp. 28-29; Gansu Mogao Industrial Development Anti-Dumping Questionnaire Response (Exhibit AUS-58), pp. 30-31; Beijing Fengshou Wine Anti-Dumping Questionnaire Response (Exhibit AUS-56), p. 29; Turpan Louland Wine Anti-Dumping Questionnaire Response (Exhibit AUS-54), p. 29; and COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 30.

[1030] See for example, Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 31; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 31.

[1031] See for example: Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 19; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19.

862. In every domestic producer's questionnaire response, the same requests for confidential treatment were made, in identical terms, to cover the responses to the same questions. In addition, the same non-confidential summaries of the information for which confidential treatment was requested were furnished in identical terms in every questionnaire response. A representative response is provided as an example below: [1032]

> 14. Please describe the production equipment and devices as well as the production techniques and process used to produce the like products of your company (please attach a production flow chart).
>
> Answer: [This involves relevant information about the production equipment, devices and techniques used for like products of our company, which is a trade secret. Its public disclosure will adversely affect our company. We therefore request that such information be treated as confidential and not be listed.]

863. The fact that all of these competitor companies provided verbatim identical requests for confidential treatment and non-confidential summaries in their individual questionnaire responses is striking. It indicates that there was some form of coordination or central planning involved in determining that the answers to certain questions in every questionnaire response would be treated as confidential in their entirety, rather than each company making its own requests for confidentiality on an answer-by-answer and point-by-point basis, with each taking into account its own particular circumstances and what it considered to be the confidential information contained within its answers. If this approach was based on guidance provided by MOFCOM to the domestic producers, it demonstrates that MOFCOM failed to conduct an objective assessment of whether "good cause" was shown in each of the requests. Regardless, MOFCOM's treatment of the same annexures in each questionnaire verification response as confidential *in their entirety* based upon identical, formulaic requests and identical, formulaic non-confidential summaries is *prima facie* evidence of a failure to (i) require "good cause" to be shown, (ii) objectively examine whether "good cause" has been shown, or (iii) require non-confidential summaries to be furnished "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

[1032] See the identical text in the following responses: Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), p. 20; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), p. 19; Ningxia Anti-Dumping Questionnaire Response (Exhibit AUS-57), p. 19; Yantai Landsun Anti-Dumping Questionnaire Response (Exhibit AUS-52), p. 19.

864. There is no evidence in the Final Determination or its supporting documents that MOFCOM assessed or determined that "good cause" had been shown in respect of any of the above-referenced requests. MOFCOM appears to have accepted all requests for confidential treatment without conducting the objective examination of the justification for confidential treatment that it was obligated to undertake, and therefore acted inconsistently with the requirements of Article 6.5.

865. The identical, formulaic non-confidential summaries gave the other interested parties no information about the substance of the purportedly confidential information. These summaries briefly restated the nature of the information referred to in the question, asserted that the information provided was a "trade secret", and stated that public disclosure would have an adverse effect. The answer provides no details about the actual substance of the information, which was treated as confidential. No justification was given for the confidential treatment of information in the answer even though certain processes, materials, and equipment are common to all wine production and would not constitute a "trade secret".

866. The purpose of requiring a non-confidential summary "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" is to afford procedural fairness to those parties who cannot access the confidential information, so that they have an adequate opportunity for the defence of their interests. This "opportunity must be meaningful in terms of a party's ability to defend itself"[1033]. The summaries given by the domestic companies offer no more than a vague impression of the nature of the information. They provide no detail, and do not permit a reasonable understanding of the substance of the information. This leaves the interested parties without a meaningful opportunity to defend their interests in relation to the information. Since no redacted versions of the documents were provided, these "summaries" represent the entirety of the information available to interested parties about these answers in the verification responses, upon which MOFCOM appears to have placed significant weight in making its determinations. These "summaries" do not meet the standard required by Article 6.5.1.

[1033] Appellate Body Report, *EC – Fasteners (China)*, para. 541, citing Appellate Body Report, *US – Gambling*, para. 270; Appellate Body Report, China – HP-SSST (Japan) / HP-SSST (EU), para. 5.96.

867. There is no evidence in the Final Determination or its supporting documents that MOFCOM assessed or determined that "good cause" had been shown in respect of any of the above-referenced requests.

868. The Panel in *China – GOES* found that non-confidential summaries under circumstances very similar to those in the current dispute to be inadequate. That panel explained as follows:

> 7.198 We note that Part II-2 of the application consists of short and general statements regarding the nature of the information treated as confidential. For example, the section in Part II-2 that refers to the redacted information regarding "change in price" provides:
>
> > This part involves sales price of the subject merchandise by the petitioners from 2006 to February 2009. As they are business proprietary of the petitioners, disclosure of which will seriously harm the interest of the petitioners; therefore, the petitioners applied for confidential treatment of the information.
>
> 7.199 Therefore, in the Panel's view, the "summaries" in Part II-2 provide minimal descriptions of the nature, rather than the substance, of the information treated as confidential. Indeed, China does not even attempt to argue that the summaries in Part II-2 are sufficient under Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement.

869. For the same reasons as those outlined above, the identical, formulaic summaries provided in the domestic producers' questionnaire responses in the current dispute are also inadequate. Thus, MOFCOM failed in its obligation under Article 6.5.1 to require the domestic producers to furnish adequate non-confidential summaries of the information treated as confidential in their questionnaire responses.

(b) The responses to notices of verification from domestic industry

870. MOFCOM issued "notices of verification" relating to the information provided in the questionnaire responses to two of the twenty-one Chinese producers who submitted a response to the Domestic Producer Questionnaire, COFCO Greatwall and Changyu Wines. MOFCOM treated certain information in the verification responses as confidential without (i) requiring "good cause" to be shown for such treatment, (ii) assessing whether "good cause" had been shown, or (iii) requiring the domestic producers to furnish non-confidential

summaries "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

871. In its response dated 9 February 2021, COFCO Greatwall requested confidential treatment covering 10 of 11 annexures it provided.[1034] Similarly, in its response dated 9 February 2021, Changyu Wines[1035] requested confidential treatment covering 9 of 11 annexures.[1036]

872. For the 9 annexures over which both respondents sought confidential treatment, the same requests for confidential treatment were made, in identical terms. In addition, the same non-confidential summaries of the information for which confidential treatment was requested were furnished in identical terms in both responses, as follows:

> Annex I: Brochure and Product Specification and Classification
>
> (The annex here relates to the descriptions provided by the Company about like products, including product types, and product specification and classification. As it is part of our trade secrets, the disclosure will have a severe adverse impact on the Company, so this part shall be kept confidential and will not be disclosed to the public.)

873. The fact that both of these competitor companies provided verbatim identical requests for confidential treatment and non-confidential summaries in their individual verification responses, as they did with their initial responses to the Questionnaires, is striking. It again indicates that there was some form of coordination or central planning involved in determining that the answers to the questions in the verification requests would be treated as confidential in their entirety, rather than each company making its own requests for confidentiality on an answer-by-answer and point-by-point basis, with each taking into account its own particular circumstances and what it considered to be the confidential information contained within its answers.

874. If this approach was based on guidance provided by MOFCOM to the domestic producers, it demonstrates that MOFCOM failed to conduct an objective assessment of whether "good cause" was shown in each of the requests. Regardless, MOFCOM's treatment of the same annexures in each verification response as confidential *in their entirety* based

[1034] COFCO Wines Anti-Dumping Questionnaire Response Supporting Documents (Exhibit AUS-102).
[1035] Changyu Wines Anti-Dumping Questionnaire Response Supporting Documents (Exhibit AUS-91).
[1036] Changyu Wines Anti-Dumping Questionnaire Response Supporting Documents (Exhibit AUS-91).

upon identical, formulaic requests and identical, formulaic non-confidential summaries is *prima facie* evidence of a failure to (i) require "good cause" to be shown, (ii) objectively examine whether "good cause" has been shown, or (iii) require non-confidential summaries to be furnished " in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

875. There is no evidence in the Final Determination or its supporting documents that MOFCOM had assessed or determined that "good cause" had been shown in respect of any of the above-referenced requests.

876. MOFCOM appears to have accepted all requests for confidential treatment without conducting the objective examination of the justification for confidential treatment that it was obligated to undertake, and therefore acted inconsistently with the requirements of Article 6.5.

877. The identical, formulaic non-confidential summaries gave the other interested parties no information about the substance of the purportedly confidential information. These summaries briefly restated the nature of the information referred to in the question, asserted that the information provided "involves commercial secrets", and stated that public disclosure would have a serious adverse effect. No details were provided about the actual substance of the information in the answer, which was treated as confidential in its entirety. This is despite the fact that the information over which confidential treatment was sought, such as product brochures and specifications that are used by companies to describe their products to customers, are commonly filed in anti-dumping investigations and are treated as non-confidential or public information.

878. The purpose of requiring a non-confidential summary "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" is to afford procedural fairness to those parties who cannot access the confidential information, so that they have an adequate opportunity for the defence of their interests. This "opportunity must be meaningful in terms of a party's ability to defend itself"[1037] to allow them a "full defence of their interests". The summaries given by the domestic companies offer no more

[1037] Appellate Body Reports, *EC – Fasteners (China)*, para. 541 (citing Appellate Body Report, *US – Gambling*, para. 270); *China – HP-SSST (Japan) / HP-SSST (EU),* para. 5.96.

than a vague impression of the nature of the information, provide no details, and do not permit a reasonable understanding of the substance of the information. This leaves the interested parties without a meaningful opportunity to defend their interests in relation to the information. Since no redacted versions of the documents were provided, these "summaries" represent the entirety of the information available to interested parties about these answers in the verification responses, upon which MOFCOM appears to have placed significant weight in making its determinations. These "summaries" do not meet the standard required by Article 6.5.1.

879. Each of the purportedly non-confidential summaries CADA provided was inadequate for the same reasons as the summaries that were provided under very similar circumstances in *China-GOES,* as discussed above. Thus, MOFCOM failed in its obligation under Article 6.5.1 to require the domestic producers to furnish adequate non-confidential summaries of the information treated as confidential in their questionnaire responses.

4. Conclusion

880. For the reasons set out above, MOFCOM acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

C. MOFCOM'S FAILURE TO CONSTRUCT A SAMPLE USING A PERMITTED METHOD BREACHED CHINA'S OBLIGATIONS UNDER ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT

881. China acted inconsistently with Article 6.10 of the Anti-Dumping Agreement because the sample of the top three exporters MOFCOM chose for the investigation was not the "largest percentage of the volume of the exports from [Australia] which could reasonably be investigated" and because it was not verified that the exporters in the sample were in fact the top three exporters.

1. Legal framework

882. Article 6.10 of the Anti-Dumping Agreement provides, in relevant part:

> In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using

> samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

883. The effect of Article 6.10 is to permit a departure from the ordinary rule that individual margins must be determined where doing so would be impracticable. Where such a departure occurs, the "sample" chosen for examination must be constructed in accordance with one of the two alternative methods.

884. The second method is relevant in this instance. This alternative method requires an examination of the "largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

885. Where this approach is used there is no requirement that the group selected be representative of those exporters, "including the percentage of exports of the product under consideration for which they account".[1038] Concepts of representativeness are only relevant to the first alternative method and the requirement for statistical validity. However, nothing precludes an investigating authority from taking into account additional criteria, provided that it does not result in a selection that is inconsistent with the criterion outlined in Article 6.10, i.e. the volume of the exports from the country in question.[1039]

886. An investigating authority may act inconsistently with Article 6.10 if it fails to investigate a producer that has a larger volume of exports than one of those selected in circumstances where it would be reasonable for the investigating authority to include that producer's exports in its investigation. The assessment as to whether the percentage of exports selected is the largest that can "reasonably" be investigated is fact-specific.[1040] The volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority.[1041]

[1038] Panel Report, *EU – Footwear (China)*, para. 7.216.
[1039] Panel Report, *EU – Footwear (China),* para. 7.222.
[1040] Panel Report, *EC -Salmon (Norway)*, paras. 7.187-7.188.
[1041] Panel Report, *EC -Salmon (Norway)*, para. 7. 188.

2. Construction of the sample

887. Interested parties were advised of MOFCOM's intention to employ a sampling methodology on 15 September 2020, when MOFCOM issued a sampling questionnaire to registered Australian exporters. On 27 September 2020, MOFCOM announced that it had selected three Australian wine exporters for its sample, Treasury Wines, Casella Wines and Swan Vintage, purportedly constituting the top three exporters by volume amongst those that had submitted responses to the Sampling Questionnaire.[1042] MOFCOM disregarded comments from several parties that the chosen sample was not representative of the diversity of Australian wine exports, and rebuffed Pernod Ricard's request to be included as a fourth sampled company.[1043] On 10 October 2020, MOFCOM proceeded to issue the Anti-Dumping Questionnaire to Treasury Wines, Casella Wines and Swan Vintage.

888. MOFCOM explained that "those Australian producers having submitted responses were sequenced based on their reported exports, and Top 3 producers with the most exports were selected as the samples".[1044]

889. Australia proceeds on the assumption that MOFCOM constructed the sample on the basis that it was the largest percentage of the volume of the exports from the country in question that could reasonably be investigated, rather than on the basis of it being statistically valid, notwithstanding MOFCOM's assertions about the sample being representative and the citation of submissions from interested parties about statistical validity of the sample.[1045]

890. Accordingly, for the sample to have been validly constructed, MOFCOM was obliged to construct it from the "largest percentage of the volume of the exports from the country in question which can reasonably be investigated". MOFCOM failed to construct a sample that allowed it to meet this standard.

891. The explanation repeatedly given by MOFCOM in the Final Determination for why only three companies were sampled, rather than some greater number, was that in order to

[1042] Anti-Dumping Sampling Notice (Exhibit AUS-92), p. 1.
[1043] Pernod Ricard Comments on Sampling (Exhibit AUS-93), p. 2.
[1044] Anti-Dumping Final Determination (Exhibit AUS-2), p.10; see also Anti-Dumping Sampling Notice (Exhibit AUS-92), p. 1.
[1045] If that was not the case, then Australia reserves the right to make additional arguments that the sample selected was not a statistically valid reflection of the diverse range of Australian exporters or producers of the product under consideration.

complete the anti-dumping investigation in a timely manner, selecting three samples is the most practical scheme for the Investigating Authority. [1046]

892. The evidence before MOFCOM clearly establishes that the volume of the three sampled exporters was not the largest percentage of the volume of the exports that could "reasonably be investigated". In the parallel countervailing duty investigation that was conducted with respect to the same wine products from Australia, MOFCOM chose to select four respondents, being Treasury Wines, Swan Vintage, Casella Wines and Pernod Ricard. Given the significant areas of overlap between the two investigations, the additional work that would have been required for MOFCOM to also examine Pernod Ricard in its anti-dumping investigation would have been reduced, a point expressly made to MOFCOM by Pernod Ricard when MOFCOM was constructing the sample.[1047] MOFCOM provided no explanation for its decision to reject Pernod Ricard's reasoned request to be included in the sample, aside from the general assertion that three exporters was the "most practical" number.[1048] If MOFCOM was able to reasonably examine a larger percentage of exports by considering more than three exporters, then it was obliged to do so.

893. As the panel in *EC — Salmon (Norway)* explained, where an investigating authority is on notice that it may have omitted a major exporter from its sample, Article 6.10 requires the investigating authority to take reasonable steps to seek clarification about the level of exports to "remove any doubts".[1049] It is not sufficient for the investigating authority to refuse to do so on the basis that it has chosen to rely solely on the answers to the sampling questionnaires. In *EC — Salmon (Norway)*, the Panel found a breach of Article 6.10 due to a failure to seek clarification once on notice, even though the exporter in question had not identified *any* relevant exports in its response to the sampling questionnaire.[1050]

894. In the present instance, MOFCOM was placed squarely on notice, at the time it was constructing the sample, that Pernod Ricard [[ ]]. Yet MOFCOM took no steps to clarify the position, and instead chose to rely on unverified assertions as to the level

[1046] Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.
[1047] Pernod Ricard Comments on Sampling (Exhibit AUS-93), p. 2.
[1048] Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.
[1049] Panel Report, *EC Salmon – Norway*, para. 7.203.
[1050] Panel Report, *EC Salmon – Norway*, paras. 7.196-7.203.

of exports. MOFCOM's decision not to take reasonably available steps to ensure that it had constructed a sample that comprised the largest percentage of the volume of exports that could be reasonably investigated meant that it failed to comply with Article 6.10.

895. Even if, *arguendo*, MOFCOM's decision to only select three sampled companies could be shown to be consistent with Article 6.10, MOFCOM failed to take the necessary steps to ensure that the selected companies were in fact the three largest exporters.

896. MOFCOM explained that it sequenced the exporters based on their reported exports in the Sampling Questionnaire and selected the top 3 as samples.[1051] MOFCOM failed to take any steps to verify these data even though it had expressly been put on notice by Pernod Ricard that [[ ]] Pernod Ricard submitted that for this, and other reasons, it should be selected as a mandatory respondent for the sample.[1053]

897. No response was given by MOFCOM to this submission in the Final Determination, aside from reasserting its methodology and its general assertion that three exporters was the "most practical" number.[1054] Having been alerted to these concerns, MOFCOM should have cross-checked its data against the comprehensive data on export volumes held by Wine Australia, which MOFCOM could have requested from the Australian Government. MOFCOM was evidently aware that such data existed because it had expressly requested this information in the corresponding countervailing duty investigation.

898. On the basis of the foregoing, MOFCOM acted inconsistently with Article 6.10 of the Anti-Dumping Agreement.

[1051] Anti-Dumping Final Determination (Exhibit AUS-2), p. 10. See also Anti-Dumping Sampling Notice (Exhibit AUS-92), p. 1.
[1052] [(Exhibit AUS-93),]]
[1053] Ibid.
[1054] Anti-Dumping Final Determination (Exhibit AUS-2), p. 11.

D. MOFCOM'S FAILURE TO PROVIDE INTERESTED PARTIES WITH AMPLE OPPORTUNITIES TO PRESENT EVIDENCE THEY CONSIDERED RELEVANT BREACHED CHINA'S OBLIGATIONS UNDER ARTICLES 6.1, 6.1.1, 6.1.2 AND 6.2 OF THE ANTI-DUMPING AGREEMENT

1. Legal framework

899. Articles 6.1,[1055] 6.1.1,[1056] 6.1.2,[1057] and 6.2[1058] of the Anti-Dumping Agreement enshrine fundamental due process rights.[1059] These provisions require an investigating authority to give all interested parties notice of the information the authority requires, to provide "ample opportunity" to interested parties to present in writing all evidence which they consider relevant to the investigation, to give due consideration to any requests for extension of the period given for the submission of responses to the exporter and foreign producer questionnaires, and to grant such requests, upon cause shown, whenever practicable.

900. In assessing whether "ample opportunity" had been provided under Article 6.1, the Appellate Body considered that it is necessary to take into account, *inter alia,* whether the information is readily available to the responding party, whether the data requested needs to be collected and reported in a form that is not regularly kept by the company, the consequences of the matter on which the information is sought, and the amount of the information solicited.[1060]

901. The obligation to give interested parties ample opportunity to submit evidence means that an investigating authority must take this evidence into account. The Appellate Body has explained that "[t]his due process obligation—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating

[1055] Article 6.1 of the Anti-Dumping Agreement provides: "All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."
[1056] Article 6.1.1 of the Anti-Dumping Agreement provides: "Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period, and upon due cause shown, such an extension should be granted wherever practicable."
[1057] Article 6.1.2 of the Anti-Dumping Agreement provides: "Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation."
[1058] Article 6.2 of the Anti-Dumping Agreement provides: "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."
[1059] See e.g., Appellate Body Report, *US–Oil Country Tubular Goods Sunset Reviews*, para. 241.
[1060] Appellate Body Report, *EC Fasteners (China)*, para. 615.

authority, where appropriate, to take into account the information submitted by an interested party".[1061]

902. The Appellate Body has explained that, "[a]ccording to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires 'upon *cause shown*', where granting such an extension is '*practicable*'".[1062]

903. The Appellate Body then went on to consider as follows:

> Taken together, these provisions[1063] establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, "upon cause shown", and if "practicable", these time-limits are to be extended.[1064]

904. The obligation to provide interested parties with opportunities for the full defence of their interests in Article 6.2 also entails the right to comment on how the data collected by the authorities is assessed.[1065] There should be "liberal opportunities for respondents to defend their interests" throughout an investigation.[1066]

905. MOFCOM acted inconsistently with Articles 6.1, 6.1.1, 6.1.2, and 6.2 of the Anti-Dumping Agreement. The obligations under these provisions, although distinct, operate together to ensure that interested parties can properly defend their interests during an investigation. This relies on an investigating authority providing adequate reasons for its determinations. The investigating authority's reasons must be sufficiently detailed such that they can be discerned and are understood.[1067]

906. MOFCOM failed to observe the framework of procedural and due process obligations set out in Article 6. Despite being the primary source of information in the investigations,[1068] interested parties were not given ample opportunities to present relevant evidence.

[1061] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.
[1062] Appellate Body Report, *US – Hot Rolled Steel,* para. 74. (emphasis original)
[1063] Referring to Articles 6.1.1 and 6.8, and Annex II, of the Anti-Dumping Agreement.
[1064] Appellate Body Report, *US – Hot Rolled Steel*, para. 82.
[1065] Panel Report, *Korea – Certain Paper (Article 21.5)*, para. 6.80.
[1066] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.
[1067] Panel Reports, *China – X-Ray Equipment*, para. 7.472; and *EU – Footwear (China)*, para. 7.844.
[1068] Appellate Body Report, *US – Wheat Gluten*, para. 54. *US – Wheat Gluten* considers the investigation requirements under the *Agreement on Safeguards* rather than the *Anti-Dumping Agreement*, but we consider it is relevant jurisprudence for the purposes of the *Anti-Dumping Agreement*.

MOFCOM failed to grant extension requests for which due cause was shown, even though it was clearly practicable for MOFCOM to do so. MOFCOM also failed to engage meaningfully with information provided by interested parties.

907. As a consequence, MOFCOM acted inconsistently with Articles 6.1 and 6.2 by failing to provide interested parties with (i) ample opportunity to present in writing all evidence which they considered relevant to the investigation, and (ii) a full opportunity for the defence of their interests. This manifested not only in the specific instances set out below, but also when considering the totality of MOFCOM's conduct and management of the investigation.

2. MOFCOM failed to provide interested parties with ample opportunities to provide evidence they considered relevant

(a) Extension requests for questionnaire responses

908. Pursuant to Article 6.1 of the Anti-Dumping Agreement, interested parties must be given ample opportunity to present in writing all evidence they consider relevant. Implicit in the right to present evidence is being granted the time necessary to prepare that evidence.[1069] Article 6.1.1 provides context for the interpretation of the scope of the obligation in Article 6.1 that interested parties must be provided with "ample opportunity". Article 6.1.1 of the Anti-Dumping Agreement provides that interested parties must be given at least 30 days to respond to the questionnaire from the date of its receipt, which is deemed to be seven days after the questionnaire was issued.[1070] In addition, Article 6.1.1 provides that due consideration should be given to any request for an extension and, upon cause shown, an extension should be granted whenever practicable.

909. MOFCOM issued the Anti-Dumping Questionnaire to Australian exporters and producers on 10 October 2020. MOFCOM allowed 37 days for responses, being the minimum time allowed under the Anti-Dumping Agreement.

910. Two sampled Australian companies, Treasury Wines and Casella Wines, requested an extension to respond to the Anti-Dumping Questionnaire. Treasury Wines requested an

[1069] Panel Report, *China – Broiler Products (Article 21.5)*, para. 7.218.

[1070] Footnote 15 in Article 6.1.1 provides:

> As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

extension of 10 days.[1071] Casella Wines requested an extension of three weeks.[1072] Casella Wines made their request on 9 November 2020, within 30 days of the issuance of the questionnaire on 10 October 2020, and Treasury Wines made their request on 7 November 2020, within 28 days of the issuance of the questionnaire. As the deadline for submission of extension requests was 9 November 2020 (seven days before the deadline for the questionnaire submission of 16 November 2020), both companies submitted their responses in writing within the period specified by MOFCOM.[1073]

911. These companies substantiated their requests for an extension by referring to, *inter alia*, the large volume of work involved resulting from the countervailing measures investigation being conducted concurrently,[1074] the many different product control numbers,[1075] the inexperience of staff in responding to questionnaires for anti-dumping and countervailing duty investigations,[1076] the vast amount of data requested,[1077] the time required to translate documents,[1078] and the abnormal circumstances regarding city-wide lockdowns due to the COVID-19 pandemic.[1079]

912. On the point of the COVID-19 pandemic, Treasury Wines supported their request for extension by providing detailed explanations and, where appropriate, copies of primary documents detailing the lockdown conditions they were operating under, which severely hampered their abilities to complete the Questionnaire response fully. In their extension request submitted to MOFCOM on 07 October 2021, Treasury Wines stated as follows:

> The anti-dumping investigation questionnaire involves numerous sales and financial data of the Company, which requires the Company to organise a large number of staff across multiple departments to participate in the work. In order to contain the COVID-19 outbreak, the Melbourne metropolitan area in Victoria, Australia, where TWEV is located, has implemented a strict lockdown policy since 8 July 2020. According to the policy, individuals are limited to a 5-kilimeter radius of their homes, and only essential service workers are allowed to work on-site. Other residents must in principle work from home. Although the

[1071] Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 1.
[1072] Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.
[1073] Anti-Dumping Questionnaire (Exhibit AUS-3), p. 8.
[1074] Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 3.
[1075] Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.
[1076] Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.
[1077] See Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2; Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 2.
[1078] See Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p.3; Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 2.
[1079] See Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 1.

> lockdown has been relaxed since 28 October, several restrictions still remain in place across Victoria, including a requirement to work from home when possible. Please refer to the Annex of this application for official notices and its Chinese translations of the quarantine policy in the Victoria and Melbourne Metropolitan Area. TWEV strictly complies with relevant quarantine regulations, and all work related to the anti-dumping response will have to be done remotely until 28 October. As of the date of submission of this application, most employees are still working from home. Although the Company has made every effort to collate and collect the necessary data relevant to the response, telecommuting from home has significantly increased the cost of communication and the difficulty of accessing the Company's data and records, severely impacting the responding progress of the Company. Even though some of the Company's employees have been able to resume their on-site work since the lockdown policy of Melbourne City was eased on 28 October, the prescribed time limit of 37 days is still very tight for the Company, given that full resumption of work has not yet taken place.[1080]

913. Further, in the Annexure to their extension request, Treasury Wines provided over 50 pages of supporting documentation including copies of government Stay at Home Orders, public statements from government officials, government action plans for the lockdown, and other advice detailing the circumstances, including the very strict lock down requirements in place.

914. In *EC – Fasteners (China)*, the Panel considered that where information requested would need to be collected and reported in a form that was not regularly kept by the company, this would involve a certain amount of time and effort for completion.[1081] MOFCOM required data to be presented in the questionnaire using product control numbers for wines that differed significantly from the product numbers regularly kept by the companies. As a result, this information was especially onerous for companies to collate. Casella stated in its extension request as follows:

> In this case, the wine product types were very complex and diverse, and the product control numbers required by the Ministry of Commerce are completely different from the product models in our system. That's why Casella has to spend a lot of time matching our product models with the product control numbers.[1082]

915. The consequences of the matter on which the information is sought, and the amount of the information solicited,[1083] should have both been taken into account by MOFCOM when

[1080] Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), pp. 1-2.
[1081] Appellate Body Report, *EC Fasteners (China)*, para. 615.
[1082] Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.
[1083] Appellate Body Report, *EC Fasteners (China)*, para. 615.

considering if ample opportunity was provided for companies to present all evidence in writing under Article 6.1.

916. MOFCOM refused both requests for an extension.[1084] MOFCOM provided the following reasons for the refusals:

> After a review, the Investigating Authority believed that firstly, it had conducted independent sampling before distributing the questionnaire, and the stakeholders had been granted sufficient time for preparing the responses; secondly, a number of questions in the Anti-Dumping Questionnaire for Foreign Exporters or Producers were the same with those in the sampling questionnaire, and it would take them less time to fill in the Questionnaire since they had replied to those questions in the sampling questionnaire. Therefore, the Investigating Authority held that the stakeholders had been granted sufficient time to prepare for and fill in the responses, so the extension application was rejected.[1085]

917. MOFCOM's explanation did not respond to the grounds for extension specified in the requests. Instead, MOFCOM simply rejected that the requested extensions were necessary because, in its view, "the stakeholders had been granted sufficient time". The only explanation given for this view is that "a number of the questions" in the questionnaire had purportedly also been asked in the sampling questionnaire. At most, 14 out of over 300 questions and sub-questions in the questionnaire were comparable to those in the sampling questionnaire, with nine of these questions relating to the corporate business structures of the responding parties. This overlap could not have meaningfully affected the amount of work, and therefore the amount of time required to prepare and submit completed responses to the questionnaire.

918. Even to the extent that there was some overlap between the questions in the two questionnaires, MOFCOM's decisions to reject extension requests have no logical connection to the specific grounds given by each company. These grounds were reasonable on their face, and they were based on factual claims that were readily verifiable by MOFCOM, such as the large volume of data requested and the impact that the imposition of lockdown measures in Australia in response to COVID-19 outbreaks was having on the parties' capacities to gather and prepare the responsive information. MOFCOM did not contend that these reasons for

[1084] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 17-18.
[1085] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 17-18.

requesting an extension did not constitute "cause shown" within the meaning of Article 6.1.1 of the Anti-Dumping Agreement.

919. By entirely failing to address the reasons given in the "cause shown" by the requesting parties or to explain how these reasons were taken into account in MOFCOM's decisions to reject the extension requests, MOFCOM failed to give "due consideration" to the requests in accordance with Article 6.1.1.

920. Further, there is nothing in (i) MOFCOM's decisions to deny the extension requests, (ii) its explanation of these decisions in the Final Determination, or (iii) anywhere else in the Final Determination to indicate that it was not "practicable" to grant the extensions as requested. The extension requests were submitted only two months into the investigation. It was clearly practicable for MOFCOM to grant the requested extensions at this point in the ongoing investigation, especially considering that supplementary questionnaires were not provided to companies until 1 February 2021, 77 days after the deadline for the questionnaire responses.

921. MOFCOM failed to indicate there were any grounds for urgency in the investigation. At no time did MOFCOM provide a timeline of the investigation to interested parties to demonstrate any time pressures.

922. Therefore, MOFCOM acted inconsistently with Article 6.1.1 of the Anti-Dumping Agreement by failing to grant reasonable extension requests for which the requesting parties had shown cause by giving detailed reasons supported by verifiable evidence, in circumstances where it was practicable for MOFCOM to grant the extensions as requested.

923. Further, by failing to grant the extension requests in accordance with Article 6.1.1, MOFCOM also acted inconsistently with the obligation under Article 6.2 of the Anti-Dumping Agreement to provide "interested parties" with "a full opportunity for the defence of their interests". This obligation is "a fundamental due process provision"[1086] which applies to the entirety of the investigation,[1087] and it is additional to the specific procedural requirements otherwise provided for in the Anti-Dumping Agreement (including in the remainder of

[1086] Panel Report, *Guatemala – Cement II*, para. 8.179.
[1087] Appellate Body Report, *EC – Fasteners (China),* para. 615. Panel Report, *EU – Footwear (China)*, para. 7.604.

Article 6.2 itself).[1088] In this case, the interested parties who requested the extensions explained in detail the reasons why they required additional time to properly complete and submit their questionnaire responses, and supported these explanations with verifiable evidence. By failing to give due consideration to these requests and to grant them in accordance with Article 6.1.1, MOFCOM refused to permit the additional time that the parties had explained they needed under the circumstances in order to submit complete responses to the questionnaire questions. In so doing, MOFCOM failed to provide the parties with "a full opportunity for the defence of their interests" within the meaning of Article 6.2.

(b) Failure to provide notice of deficiencies in information submitted and opportunities to present all evidence interested parties considered relevant

924. MOFCOM's refusal to consider the detailed evidence provided by Casella Wines on the basis of the format in which it was submitted, without having made Casella Wines aware of its decision to do so prior to the Final Disclosure, denied Casella Wines a full opportunity for defence of its interests under Article 6.2 of the Anti-Dumping Agreement. In the absence of express notice to the contrary, Casella Wines was entitled to assume that MOFCOM would have regard to the data it had submitted.

925. On 3 December 2020,[1089] less than one week (four business days) after the publication of the Preliminary Determination on 27 November 2020, Casella Wines wrote to MOFCOM and explained that an [[ ]]. This led to incomplete data being provided, as detailed by MOFCOM in the Preliminary Determination.[1090] In the same communication, Casella Wines submitted a corrected and complete set of data in three different formats and offered the following explanation of the issue and the proposed solution:

[[ ]]

[1088] Appellate Body Report, *EC – Fasteners (China),* para. 615. See also Panel Report, *EU – Footwear (China),* para. 7.604.
[1089] While the document's cover page states 4 December 2020, the public record states this was submitted and received by MOFCOM on 3 December 2020.
[1090] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 35.

[redacted]]]

926. MOFCOM did not raise any concerns about the approach taken by Casella Wines to ensure that MOFCOM had a complete set of the relevant data on the investigation record, correcting the issue that it had identified. Further, MOFCOM did not issue any follow-up questions, or requests on this issue, or provide any notice that it required Casella to re-submit the complete set of data in an alternative format.

927. The Supplementary Questionnaire provided to Casella Wines on 1 February 2021 simply outlined MOFCOM's perception of the deficiencies in the information provided by Casella Wines, asked why the electronic data in the original response was incomplete, and asked why Casella Wines had not submitted an application to provide its original response in a different format within 15 days of receipt of the questionnaire.[1092] Casella Wines responded by reiterating the explanation given in the above-mentioned submission, adding that it had been impossible for it to submit an application within 15 days of the questionnaire being issued given the problem had not been identified until much later.

928. There were no further relevant communications from MOFCOM to Casella Wines until the Final Disclosure. In the absence of any concern having been raised by MOFCOM, Casella Wines was entitled to assume that its initial error had been corrected and any decision affecting its interests would be made having regard to the complete data that it had provided.

929. In the Final Disclosure on 12 March 2021, 98 days after Casella Wines informed MOFCOM of the error in the data, MOFCOM made adverse findings against Casella Wines on the basis of the deficiencies in the *original* data submitted by Casella Wines in WPS format, notwithstanding that Casella Wines had provided an explanation for the issues affecting the data and provided a complete replacement in three different formats on 3 December 2020. There is no reference in the Final Disclosure to the complete data submitted by Casella Wines in Excel and PDF, both of which are commonly used formats. MOFCOM acknowledged that a

[1091] [redacted] (Exhibit AUS-29 (BCI)), [redacted].]]
[1092] Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 5-8.

printed copy of the complete data had been submitted but refused to consider it as the data in it was "inconsistent" with the original WPS submission.[1093]

930. The same findings were repeated in the Final Determination on 26 March 2021, 112 days after Casella Wines had first provided an explanation for the issues and provided MOFCOM with corrected and complete replacement data.

931. The approach taken by MOFCOM placed Casella Wines in an impossible position, denying Casella Wines the opportunity for a full defence of its interests. The original error in the completeness of data in those forms was regrettable, as Casella acknowledged. However, from that point on, MOFCOM's approach was that it would only base its findings on the original incomplete data, disregarding all subsequent attempts by Casella Wines to correct this error. As explained above, MOFCOM maintained its criticisms of the incompleteness of the data originally submitted, disregarding Casella Wines' submissions which recognised and corrected this issue. In doing so, MOFCOM failed to consider the complete data provided in commonly-used Excel and PDF formats, neither issuing a request to Casella Wines to provide the complete data in an alternate format, nor identifying any deficiency in that data, nor offering any explanation for its refusal to take the complete data into account.

932. Given the limitations of the WPS file format there was nothing more Casella Wines could reasonably have been expected to do. It provided complete and correct data to MOFCOM within four days of publication of the Preliminary Determination. Taking all of the relevant circumstances into account, there was no basis on which an objective and unbiased investigating authority could have determined that Casella Wine's original error, swiftly correct, either impeded the investigation or constituted a failure to provide necessary information within a reasonable period. Casella Wines promptly identified the error, brought it to MOFCOM's attention, and submitted corrected and complete data that completely addressed and resolved the error. MOFCOM's approach was therefore inconsistent with Article 6.2 and entirely undermined Casella Wines' entitlement to a "full opportunity for defence" of its interests.[1094]

[1093] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 24.
[1094] See above, section II.F.3.

(c) Failure to provide evidence presented in writing to other interested parties

933. Article 6.1.2 guarantees interested parties' rights to see non-confidential information submitted by another interested party.[1095]

934. As set out above,[1096] Australia submits that MOFCOM upheld a wide range of claims for confidentiality by CADA and the Chinese companies that responded to the Domestic Producer Questionnaire over material that it could not have been satisfied met the requirements of Article 6.5 of the Anti-Dumping Agreement. The inevitable consequence of upholding these overbroad claims was to deny interested parties the opportunity to see information that, was in truth, non-confidential and that otherwise fell within the scope of Article 6.1.2.

3. Conclusion

935. For the foregoing reasons, MOFCOM acted inconsistently with China's obligations under Articles 6.1, 6.1.1, 6.1.2, and 6.2 of the Anti-Dumping Agreement. The manner in which MOFCOM conducted its investigation failed to give Australian interested parties ample opportunity to present in writing all evidence which they considered relevant to the investigation and denied them their fundamental right to a full opportunity to defend their interests.

E. MOFCOM'S FAILURE TO SATISFY ITSELF AS TO THE ACCURACY OF INFORMATION BREACHED CHINA'S OBLIGATIONS UNDER ARTICLE 6.6 OF THE ANTI-DUMPING AGREEMENT

936. MOFCOM acted inconsistently with China's obligations under Article 6.6 of the Anti-Dumping Agreement by failing to satisfy itself of the accuracy of the information on which its findings were based, including with respect to: (i) MOFCOM's calculation of total domestic output; (ii) MOFCOM's analysis of the responses to the Domestic Producer Questionnaire, particularly in light of the contradictions in the data; (iii) MOFCOM's finding that the information supplied by the three sampled Australian exporters could not be verified; (iv) the

[1095] Panel Report, *Guatemala – Cement II*, para. 8.133.
[1096] See above, section VII.B.

methodology that MOFCOM used to verify the information provided by the sampled companies; and (v) MOFCOM's decision to resort to "facts available".

937. There is limited evidence on the record that MOFCOM undertook any sort of activity to satisfy itself as to the accuracy of the information provided by the interested parties. Instead, MOFCOM chose to make only limited enquiries that were incapable of allowing it to assess the accuracy of the majority of the information before it.

1. Legal framework

938. Article 6.6 of the Anti-Dumping Agreement provides that:

> Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

939. Article 6.6 does not prescribe the activities which an investigating authority must undertake in order satisfy itself as to the accuracy of the information.[1097] While an investigating authority is not required to undertake "on-the-spot" verification of the type permitted by Article 6.7, it nonetheless has a "general obligation" to ensure that the information on which it bases its findings is accurate.[1098]

940. Exporters are not required to submit evidence to demonstrate the accuracy of the information they supply unless otherwise indicated. If an investigating authority decides that no on-the-spot verification is going to take place, but that certain additional documents are needed for verification purposes, the investigating authority should inform the exporter of the nature of the information for which they require such additional evidence and of any further documents they require.[1099]

2. MOFCOM failed to satisfy itself as to the accuracy of information

(a) MOFCOM's calculation of total domestic output

941. Despite concerns about the accuracy of the statistics contained in CADA's application raised by interested parties at the start of the investigation, MOFCOM took no steps to satisfy

[1097] Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *US – DRAMS*, para. 6.78 and *US – Steel Plate*, fn 67.
[1098] Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *US – DRAMS*, para. 6.78; and *US – Steel Plate*, fn 67.
[1099] Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

itself of the accuracy of the information prior to the initiation of the investigation.[1100] Following initiation, MOFCOM sought to verify the accuracy of the statistics on overall output of Chinese wines for the purpose of determining the domestic industry. It concluded that the statistics were inflated by the inclusion of a range of products outside the scope of the investigation request, and that it was unable to rely upon them.[1101]

942. MOFCOM chose instead to try to estimate the overall domestic output of Chinese wine by extrapolating it from statistical metrics provided by unnamed "authoritative domestic organizations".[1102] The identify of these organizations it unknown, and there is no factual foundation for the Panel to conclude that MOFCOM satisfied itself of the accuracy of these statistics.

943. The record shows that the estimate of total domestic output that MOFCOM calculated was substantially lower than the Applicant's claimed level of total domestic output. MOFCOM was justified in rejecting the Applicant's data having found it unreliable. However, that finding, together with the fact that MOFCOM's estimate of total domestic output was so different to that claimed by the Applicant, meant that MOFCOM had no real-world data with which to verify the estimate it had determined. This should have underscored for MOFCOM the importance of ensuring the accuracy and suitability of the statistics upon which it based that estimate. MOFCOM failed to do so.

(b) Responses to the Domestic Producer Questionnaire

944. On 10 October 2020, MOFCOM issued a Domestic Producer Questionnaire, which included questions on the operations, production methods and output of those producers.[1103] While MOFCOM was aware that CADA represented 122 domestic producers, and that there were "hundreds" more, it only received responses from 21 domestic producers.[1104] MOFCOM then relied upon those 21 Domestic Producer Questionnaire responses to make a range of findings in its assessment of injury and causation.[1105]

[1100] See above section VI.A.
[1101] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 108-109.
[1102] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[1103] Anti-Dumping Final Determination (Exhibit AUS-2), p. 11; Issuance of Anti-Dumping Questionnaire Notice (Exhibit AUS-42), pp. 1-2.
[1104] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 18, 108.
[1105] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 110-131.

945. MOFCOM only sought to verify the accuracy of the responses given in only two of the 21 Domestic Producer Questionnaire responses it received:

> In order to verify the documents and evidence provided in the applications and responses and gain an understanding of other respects of the investigation, the Investigating Authority distributed the Notice on the Verification of Relevant Matters Regarding the Relevant Wines Anti-Dumping and Countervailing Duty Cases to Yantai Changyu Pioneer Wine Company Limited and COFCO Greatwall Wines & Spirits Co., Ltd. on 27 January 2021, and demanded these two enterprises to prepare and submit relevant written documents and supporting evidence promptly based on the requirements of the List of Verification Questions.[1106]

946. As the responses provided by Changyu Wines and COFCO Greatwall are almost entirely subject to claims of confidentiality that mean other interested parties had no visibility or information regarding the content of those responses. Based on the limited information available, the responses provided appear to relate entirely to information about each of those two individual companies, their operations, their sales activities, and financial reports.[1107] Such information can provide very little reliable information, if any, about the circumstances of any *other* Chinese importers or producers. The fact that one or both of these companies may (or may not) have submitted verifiable information in their questionnaire does not provide a rational basis for an objective investigating authority to draw inferences about the accuracy of data from other unrelated entities.

947. MOFCOM did nothing to satisfy itself as to the accuracy of the responses to the Questionnaire for Domestic Producers submitted by the other 19 respondents.

948. This is striking given MOFCOM's earlier conclusion that it could not rely upon the statistical data submitted about the industry by CADA. Given that MOFCOM was aware that the domestic industry had already provided inaccurate information, including the inflation of domestic production through the inclusion of products outside of the scope of the investigation, it should have been particularly attentive to the need to actively investigate the accuracy of submissions by the domestic industry. In such circumstances an objective investigating authority would have concluded that it was not appropriate to rely solely on simple assertion from the domestic industry to assess the accuracy of their responses.

[1106] Anti-Dumping Final Determination (Exhibit AUS-2), p. 28.
[1107] COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), pp. 1-53; Changyu Wines Anti-Dumping Questionnaire Response (Exhibit AUS-53), pp. 1-52.

(c) The Sampling Questionnaire

949. MOFCOM chose to conduct its investigation through sampling, with the samples constructed by selecting, purportedly, the three Australian producers with the largest levels of exports. MOFCOM explained that it identified those producers "based on their reported exports" in their "submitted responses" to the sampling questionnaire.[1108]

950. MOFCOM's decision to only select three companies in the sample was a significant step in the investigation, since the choice of sampled companies had the potential to very significantly affect the margins of dumping applicable to the non-sampled companies.[1109] However, there is no evidence that MOFCOM took any steps to satisfy itself of the accuracy of these responses.

951. MOFCOM issued a notice setting out its "preliminary identification" of the three sampled companies.[1110] In response to this, Pernod Ricard (which had not been selected as a sampled company) provided a submission in which it said that, [[ ]].

952. Despite this direct challenge to the accuracy of the data upon which MOFCOM was basing this significant step, there is nothing on the record to show that MOFCOM did anything to satisfy itself of the accuracy of the data upon which it relied.[1112]

(d) Defective assessment of the responses from the sampled companies

953. In the Final Determination, MOFCOM makes repeated reference to having been unable to "verify" information provided by the sampled companies in particular forms attached to the Questionnaire. MOFCOM determined that, as a result of these findings it would not use the information submitted by the sampled companies and instead would resort to "known facts and best information available". The process used by MOFCOM to purportedly

[1108] Anti-Dumping Final Determination (Exhibit AUS-2), p. 10; Anti-Dumping Sampling Notice (Exhibit AUS-92), p. 1.
[1109] See above, section VII.C.2.
[1110] Anti-Dumping Sampling Notice (Exhibit AUS-92), p. 1.
[1111] [(Exhibit AUS-93), .]]
[1112] See above, section VII.C.2.

satisfy itself as to the accuracy of the information provided by the sampled companies was defective and led to MOFCOM improperly rejecting information.

954. Australia's detailed submissions on the inadequacy of these findings are set out in above sections II.C, II.E, II.F and II.G.

955. The approach adopted by MOFCOM to the assessment of the accuracy of the material submitted by the sampled companies also contravenes China's obligations under Article 6.6. Necessarily inherent in the obligation on an investigating authority to "satisfy itself as to the accuracy" of information is that the process it uses to make that assessment must be rationally capable of determining the reliability and probity of the information being assessed. The information submitted by the sampled companies was accurate and MOFCOM should readily have been able to satisfy itself as to its accuracy but instead employed a methodology that improperly led to it rejecting the data. The record shows that the findings made by MOFCOM to identify purported deficiencies instead reflect decisions by MOFCOM to:

- treat inconsequential omissions in substantially complete data sets as a basis for rejecting the data sets in their entirety;
- insist upon direct comparability between different data sets given in different forms, and disregard explanations from the companies about differences between them; and
- maintain findings that certain information had not been provided in a questionnaire response, even once it had been provided with submissions from the company identifying where the information had been included in the original response.

956. MOFCOM also chose not to take readily available steps that would have allowed it to satisfy itself of the accuracy of the information. For example, as discussed above,[1113] MOFCOM did not seek to verify the information submitted by the sampled companies during the investigation by reference to their respective accounting systems, despite being informed of their existence.

[1113] See above, section II.

3. Conclusion

957. For the foregoing reasons, MOFCOM acted inconsistently with China's obligations under Article 6.6 of the Anti-Dumping Agreement by failing to satisfy itself of the accuracy of the information on which its findings were based, including with respect to: (i) MOFCOM's calculation of total domestic output; (ii) MOFCOM's analysis of the responses to the Questionnaire for Domestic Producers, particularly in light of the contradictions in the data; (iii) MOFCOM's finding that the information supplied by the three sampled Australian exporters could not be verified; (iv) the methodology that MOFCOM used to verify the information provided by the sampled companies; and (v) MOFCOM's decision to resort to "facts available".

F. MOFCOM'S FAILURE TO PROVIDE INTERESTED PARTIES TIMELY OPPORTUNITIES TO SEE ALL INFORMATION BREACHED CHINA'S OBLIGATIONS UNDER ARTICLE 6.4 OF THE ANTI-DUMPING AGREEMENT

958. MOFCOM acted inconsistently with Article 6.4 of the Anti-Dumping Agreement by failing to provide timely opportunities for interested parties to see all non-confidential information. This failure denied interested parties a full opportunity to prepare presentations on the basis of this information and defend their interests.

959. Specifically, MOFCOM failed to provide interested parties opportunities to see all information that was used in, and relevant to:

- the calculation of the total production of the domestic industry and the proportion of that production accounted for by the participating Chinese producers;
- the determination of normal value;
- the adjustments to ensure a fair comparison between normal value and export price;
- differences in price comparability;
- the calculation of the dumping margins; and
- the determination of injury and causation.

960. In respect of each of the above categories of information, discussed in more detail in subsections 2(a)-(f) below, Australia's submission is that the relevant information was *never* disclosed to interested parties. In addition, in subsection 2(g), Australia submits that where certain non-confidential information was provided to interested parties, it was incomplete and insufficient, and MOFCOM failed to provide it in a "timely" basis as required under Article 6.4.

961. To the extent that the Panel finds MOFCOM acted inconsistently with Article 6.5 by failing to objectively assess "good cause" for claims of confidentiality or that MOFCOM acted inconsistently with Article 6.5.1 by failing to furnish interested parties with nonconfidential summaries, MOFCOM acted inconsistently with Article 6.4 in respect of the information that should have been disclosed.

1. Legal framework

962. Interested parties have a right to see information used by investigating authorities. Article 6.4 of the Anti-Dumping Agreement provides that:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

963. The obligation in Article 6.4 applies to "all information" that meets the following criteria:[1114]

- the information is relevant to the presentation of the interested parties' cases (this may include interested Members);
- the information is not confidential, as defined in Article 6.5; and
- the information is used by the investigating authority in an anti-dumping investigation.

[1114] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142.

964. Importantly, the obligation in Article 6.4 has been interpreted expansively and extends both to information provided by "interested parties" and to other information collected by investigating authorities, provided it meets the criteria set out above.[1115]

965. The concept of information that is "used by" an investigating authority is not limited to information which the authority is required to consider, or which it does, in fact, consider in the course of an investigation.[1116] The scope of whether information is properly characterised as having been "used by" an investigating authority depends on the circumstances of the investigation, the stage of the investigation and the particular issues before the investigating authority.[1117] A broader interpretation of the phrase "used by" is necessary in order to give effect to the purpose of Article 6.4: for interested parties to see, and to prepare presentations on the basis of information that is before the investigating authority that the interested parties consider is relevant.[1118]

966. The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* confirmed that Article 6.4 captures a broad range of information used by an investigating authority for the purposes of carrying out a required step in an anti-dumping investigation. It found as follows:[1119]

> [I]n our view, there is no textual basis in Article 6.4 for limiting information "relevant to the presentation of [parties'] cases" and "used by the authorities" to facts or raw data unprocessed by the authorities. Indeed, the broad range of information subject to the obligation under Article 6.4 may take various forms, including data submitted by the interested parties, and information that has been processed, organized, or summarized by the authority. We do not see why only facts and raw data would be relevant to the parties' presentation of their cases. A proper interpretation of Article 6.4 does not mean, however, that an investigating authority's reasoning or internal deliberation in reaching its final determination is also subject to the obligation under Article 6.4. Article 6.4 concerns the information that is used by an authority, rather than an authority's detailed analysis of the information, or the determination it reaches based on such information.

[1115] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.82; and Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 480-481.
[1116] See Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286.
[1117] See Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286. See also, Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 485.
[1118] Panel Report, *China – Broiler Products (Article 21.5)*, paras. 7.285-7.286.
[1119] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 480.

967. The "relevance" of the information must be assessed from the perspective of the interested parties,[1120] and with reference to the issues under consideration.[1121] The Panel in *EC – Salmon (Norway)* explained that relevance is determined with reference to the issues considered by the investigating authority. Therefore, any information that relates to issues the investigating authority was required to consider, or exercised its discretion to consider during the investigation, presumptively falls within the scope of Article 6.4.[1122]

968. The matters that the Appellate Body and previous panels have found to be "relevant information" that needed to be disclosed under Article 6.4 include:

- information relating to the injury factors set out in Article 3.4, including "wide ranging information" concerning the state of the industry and alleged injury;[1123] and
- information that the investigating authority will need to ensure a fair comparison, including the product groups by which the authority will conduct a price comparison.[1124]

969. The obligation on the investigating authority to "provide timely opportunities" to see relevant information is not conditional on receiving a request from an interested party.[1125] Interested parties cannot request to see information that they may not know exists.[1126]

970. The obligation to provide information is subject to the confidentiality protections established by Article 6.5.[1127] An investigating authority is not required to provide information that is by its nature confidential or provided on a confidential basis, where the conditions in Article 6.5 for protecting that information are met, namely where confidentiality has been

[1120] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145; and Panel Report, *China – Broiler Products (Article 21.5)*, para. 7.291.
[1121] Panel Report, *EC – Salmon (Norway)*, para. 7.769 (cited with approval in Panel Report, *EU – Footwear (China)*, para. 7.602); and Appellate Body Report, *EC – Fasteners (China), para. 485*.
[1122] Ibid.
[1123] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[1124] Appellate Body Report, *EC – Fasteners (China)*, para. 490.
[1125] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.
[1126] The panel in *China – Broiler Products (Article 21.5 – US)* noted the evidentiary difficulties with a claim based on an alleged omission, in that it may be difficult to prove the *absence* of an opportunity to see information. The panel explained that from an evidentiary perspective, it may be useful if a complainant can demonstrate that an interested party requested to see information. However, this does not mean that a request is *necessary* in order to demonstrate a violation of Article 6.4. The fact remains that a failure to provide opportunities to see information which meets the criteria in Article 6.4 is a violation by omission. See Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.291-7.292.
[1127] See above, section VII.B.

asserted and "good cause" for maintaining confidentiality has been shown. Confidentiality cannot be used as a basis to deny access to an interested party's own confidential information.[1128]

971. The ordinary meaning of "timely" is "done… at a fitting, suitable, or favourable time; opportune, well-timed",[1129] while an "opportunity" is defined as "a time, condition, or set of circumstances permitting or favourable to a particular action or purpose".[1130] The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* explained that what constitutes "timely opportunities" must be determined on a case-by-case basis.[1131] In finding that the provision of three weeks for interested parties to view information was sufficient in those circumstances, the Appellate Body found that:

> [W]hether 'timely opportunities' have been provided to see information for the purposes of Article 6.4 must be considered in the light of the circumstances of each case, taking into account the specific information at issue, the step of the investigation to which such information relates, the practicability of disclosure at certain points of the investigation vis-à-vis other points, and the stage of the investigation at which the interested parties have made a request to see the information at issue…[1132]

2. MOFCOM failed to provide interested parties timely opportunities to see all information

(a) Calculation of the production of domestic industry and the proportion of that production accounted for by the participating Chinese producers

972. MOFCOM did not provide all non-confidential information that was relevant to the calculation of the production of the domestic industry. In particular, MOFCOM did not provide all information on the statistics it relied upon to determine domestic industry production volumes, including what these statistics showed, where the statistics originated from and who the relevant domestic producers were.

[1128] Panel Report, *Korea – Certain Paper*, para. 7.201.
[1129] Oxford English Dictionary online, definition of "timely", https://www.oed.com/view/Entry/202120 (accessed 28 April 2022).
[1130] Oxford English Dictionary online, definition of "opportunity", https://www.oed.com/view/Entry/131973 (accessed 28 April 2022).
[1131] Appellate Body Report, *EC – Fasteners (China) (Article 21.5)*, para. 5.122.
[1132] Appellate Body Report, *EC – Fasteners (China) (Article 21.5)*, para. 5.122.

973. In the Final Determination, MOFCOM identified the domestic market as comprising the "21 producers who submitted the response to the Domestic Producer Questionnaire".[1133] It further found that these domestic producers "occupied" 66.95%, 68.27%, 60.75%, 62.76%, and 60.72% of the output of the domestic like products between 2015 and 2019, respectively.[1134]

974. MOFCOM explained that it relied upon information in the form of "statistics from authoritative domestic organizations" to calculate the production of the domestic producers for the purposes of identifying the "domestic industry" within the meaning of Article 4 of the Anti-Dumping Agreement. The only description given of the statistics were that they related to "the area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines".[1135] MOFCOM did not disclose to the interested parties what these statistics showed, the calculations made on the basis of these statistics, including all assumptions used in the calculations, who these "domestic organizations" were that provided the statistics, why these organisations were considered "authoritative", and how these statistics were confirmed to reflect the total domestic production of the like products.

975. There is nothing on the record to suggest that this information was confidential. No explanation was given for why it was not disclosed, even though it was directly relevant to the interested parties' ability to understand and prepare submissions about the adequacy of these data and whether the identified representatives of "domestic industry" accounted for a major proportion of total domestic production of like products. Indeed, interested parties consistently indicated to MOFCOM that they did not understand the data that MOFCOM had relied upon to identify the domestic industry.[1136] MOFCOM's failure to allow interested parties to see the information denied the parties a full opportunity to defend their interests.

[1133] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[1134] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[1135] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[1136] Australian Government Submission on Initiation (Exhibit AUS-87), pp. 1, 6-7; Australian Government Comments on the Final Disclosure (Exhibit AUS-96), p. 3; AGW Submission on Initiation of the Investigation (Exhibit AUS-71), p. 7; see also AGW Comments on the Final Disclosure (Exhibit AUS-97), p. 1.

(b) Determination of Normal Value

976. MOFCOM failed to provide interested parties with all relevant non-confidential information that it relied upon when calculating normal value for Casella Wines and Swan Vintage, notwithstanding that interested parties had requested it.[1137]

977. Australia recalls that MOFCOM relied upon facts available to determine the weighted average price of domestic sales for Casella Wines and Swan Vintage.[1138] MOFCOM identified the best information available that it relied upon included the "weighted average price of the domestic sales of *other respondents*" (emphasis original)[1139], but did not identify who the "other respondents" were. MOFCOM should have identified whether "other respondents" referred to the other sampled companies, the companies that were not sampled but cooperative, or both. This lack of non-confidential information, particularly in relation to MOFCOM's chosen methodology, made it impossible for the sampled companies to comment on the normal value calculations and therefore defend their interests.

978. In the event that this refers to the other sampled respondents, this failure to disclose information relevant to the calculation of normal values is aggravated because the limited explanation provided appears inconsistent with MOFCOM's treatment of those respondents. Only the three sampled companies responded to the survey questionnaire and provided sufficient detail to allow an average price of domestic sales to be calculated. MOFCOM rejected the sales data for two of the three companies for which it had sufficient information. For that reason, it is impossible to understand what a "weighted average" could constitute.

979. MOFCOM explained that it made the decision to use this "weighted average" after conducting a comparative analysis of "information from the investigation" from which it took "into account" "the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors".[1140]

[1137] Casella Wines Comments on the Preliminary Determination (Exhibit AUS-98), pp. 1, 3; AGW Comments on the Final Disclosure (Exhibit AUS-97), p. 3; AGW Comments on the Preliminary Determination (Exhibit AUS-69), p. 2; Swan Vintage Comments on the Final Disclosure (Exhibit AUS-39), pp. 1-2; and Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), pp. 1-2, 14.
[1138] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 85, 92.
[1139] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 85, 92.
[1140] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84, 91.

980. MOFCOM did not provide to the interested parties the information it factored into this comparative analysis. It did not explain:

- what "information from the investigation" was subject to the "comparative analysis, nor what the "comparative analysis" involved;
- which "physical properties of the product under investigation" it took into account, or for what purpose it took them into account;
- which "costs differences in different product types" it took into account, what it determined those differences were, which data it relied upon to identify the differences or for what purpose it took them into account;
- which "trade links" it took into account, why it was considering "trade links", the data from which the "trade links" were determined or the purpose for which it took them into account; and
- what the "other influencing factors" were that it had regard to, why it selected those factors, which data it drew upon to assess these unknown factors, how it they were taken into account and weighed against each, or the purpose for which it took them into account.

981. There is nothing on the record to suggest that this information was confidential. No explanation was given for why it was not disclosed, even though it was directly relevant to the interested parties' ability to understand and prepare submissions about the adequacy of this data and the decision to resort to "facts available" to make this determination. This failure denied interested parties a full opportunity to defend their interests.

(c) Adjustments to ensure a fair comparison between normal value and export price

982. MOFCOM failed to provide all non-confidential information in relation to the adjustments that were taken into account to ensure due allowance was made for differences affecting price. There were two types of information that MOFCOM failed to provide. The first concerns the information that the interested parties needed to know in order to substantiate their requests for adjustments, including adjustments to ensure a fair comparison. The second

was the information that MOFCOM relied upon to accept or reject the requested adjustments. MOFCOM ignored an interested party request to see this information.[1141]

983. Pursuant to Article 2.4, MOFCOM was obligated to inform the interested parties what information it required to ensure a fair comparison so that they would be in a position to make a request for adjustments. Consistent with the Appellate Body's finding in *EC – Fasteners (China)*, this obligation includes telling the parties what information they will need to substantiate their assertions of adjustments.[1142] This active engagement has been described as a "dialogue" between the authority and interested party.[1143]

984. In the Final Determination, MOFCOM provided that it "reviewed the adjustment items…that affected the price comparability one-by-one" for each sampled company.[1144] It also found that "…on the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal value and export price at the ex-factory level in a fair and reasonable manner".[1145] While MOFCOM provided some limited information concerning which adjustments it accepted and rejected for the sampled companies, it failed to provide interested parties the remaining non-confidential information that was relevant to the conduct of a fair comparison.

985. MOFCOM failed to provide all of the non-confidential information to interested parties that was relevant and necessary to substantiate their requests for adjustments. There is no evidence that MOFCOM engaged in a "dialogue" with the sampled companies regarding the information that would need to be included in a request for adjustments. While MOFCOM did provide information on the adjustments it accepted or rejected for the sampled companies, MOFCOM did not provide the information that would have enabled interested parties to understand whether these constituted all the adjustments that were requested. MOFCOM also did not inform the interested parties what the "various comparable factors affecting price" it referenced were.

986. For example, for Casella Wines, MOFCOM only provided that it "decided to accept adjustment items such as invoice, discount, rebate, credit fee, and inland freight". The use of

[1141] Swan Vintage Comments on Preliminary Determination (Exhibit AUS-38), p. 2.
[1142] Appellate Body Report*, EC – Fasteners (China)*, para. 489.
[1143] Appellate Body Report*, EC – Fasteners (China)*, para. 489.
[1144] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 70, 86, 93.
[1145] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.

"such as" indicates that this list might be incomplete and not a conclusive list of all requested adjustments. Similarly, for Swan Vintage, MOFCOM only proposed to accept export price adjustments "such as pre-sale warehousing costs, inland freight (from factory/warehouse to port of export), international transport costs, international transport insurance premiums, and port load-unload charges".[1146] In both examples, there is no clear indication of whether MOFCOM considered all the price adjustments requested, and in the case of Swan Vintage, what the requested adjustments were. MOFCOM also failed to explain how these adjustments were taken into account when it calculated constructed normal value through the weighted average domestic sales of "other respondents".

987. MOFCOM did not provide the non-confidential information that was relevant to its decision to reject or accept the requested adjustments. Consistent with Australia's earlier submissions on the deficiencies of Treasury Wines' requested adjustments to normal value,[1147] MOFCOM did not provide all non-confidential information concerning its decision to reject the requested adjustments of discounts, rebates and advertising costs for Treasury Wines. This includes the information that MOFCOM used to reach its conclusions that: (i) there was "no sufficient evidence", (ii) Treasury Wines "did not elaborate the discount standards and bases and the methods for determining the discounts", and (iii) it "did not explain the method of determining advertising fees" or indicate "whether relevant fees were directly related to the sales".[1148] It is clear that MOFCOM only provided general reasons which is insufficient for the interested parties to understand the basis upon which MOFCOM rejected or accepted the adjustments. As a consequence, the interested parties were unable to understand MOFCOM's approach to adjustments to prepare presentations in defence of their interests.

988. There is no basis for suggesting that the information set out above relating to price adjustments was confidential in its entirety. Further, it is clear that the information was in fact used by MOFCOM, as it influenced which adjustments were accepted or rejected for the purposes of a fair comparison of normal value and export price. The information relating to price adjustments was therefore highly relevant for the interested parties, as it directly related

[1146] Anti-Dumping Final Determination (Exhibit AUS-2), p. 94.
[1147] See above, section II.E.3.
[1148] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 71-72.

to their ability to challenge or otherwise critique MOFCOM's chosen methodology for calculating the dumping margin. MOFCOM's failure to provide all non-confidential information in relation to adjustments and methodology has therefore deprived the interested parties of the opportunity to prepare presentations on the basis of this information and to defend themselves.

(d) Differences in price comparability

989. Consistent with MOFCOM's errors in relation to price adjustments, MOFCOM also failed to provide all information that was relevant in determining the differences in price comparability relevant to conducting a fair comparison under Article 2.4 of the Anti-Dumping Agreement. MOFCOM failed to respond when an interested party requested this information.[1149]

990. In the Final Determination, MOFCOM noted that: "on the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal value and export price at the ex-factory level in a fair and reasonable manner".[1150] MOFCOM did not provide the non-confidential data, calculations, formula or its methodology. MOFCOM also did not inform the interested parties what the "various comparable factors affecting price" referenced in the Final Determination were, nor did it sufficiently explain how the comparison was made in a "fair and reasonable" manner.

991. MOFCOM failed to provide to interested parties any indication of how it accounted for differences in comparability for wine of different qualities. The Australian wine exporters and producers exported and sold domestically a range of wine during the period of investigation that covered different price points. Accordingly, MOFCOM was obligated to provide all non-confidential information that was relevant to how it accounted for different high, middle, and low-quality wines when conducting a fair comparison. It failed to do so. MOFCOM also failed to provide any information on its consideration of the time of sales when ensuring that the sales were made "at nearly as possible the same time" pursuant to Article 2.4.

[1149] Treasury Wines Comments on the Final Disclosure (Exhibit AUS-99) p. 15.
[1150] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.

992. This information was relevant for the interested parties to verify that fair comparison was conducted properly and in accordance with Article 2.4 of the Anti-Dumping Agreement. This information would also have been used by MOFCOM to ensure the comparability of prices when conducting a fair comparison between normal value and export price. By failing to provide this information, MOFCOM denied the interested parties a full opportunity to defend their interests.

(e) Calculation of dumping margins

993. MOFCOM failed to provide the interested parties with all non-confidential information in relation to the calculation of dumping margins, including (i) information that supported MOFCOM's method in calculating the dumping margin, and (ii) information that was relevant to its recourse to facts available to calculate the dumping margin for "All Others". Although interested parties expressly advised MOFCOM that they lacked this information, they were ignored by MOFCOM.[1151]

994. The Final Determination provides limited information on how MOFCOM calculated the margins of dumping for the other named Australian exporters. It provides that "[i]n calculating the dumping margin, the Investigating Authority compared the weighted average normal value with the weighted average export price to obtain the dumping margin".[1152] MOFCOM did not provide the information, figures or calculations for the weighted average normal value and the weighted average export price. Accordingly, the interested parties did not receive the necessary non-confidential information to understand or make submissions on the final dumping margins.

995. Further, MOFCOM relied on information to calculate the dumping margin for companies deemed non-cooperative on the "basis of known facts and available best information".[1153] However, MOFCOM failed to disclose to the interested parties all of the non-confidential information relevant to its determination of this "All Others" rate. The interested parties did not receive any information concerning what information was selected as "facts available" to calculate this margin and the basis for selecting these facts. It was impossible for

[1151] AGW Comments on the Final Disclosure (Exhibit AUS-97), pp. 3, 7; Swan Vintage Comments on the Final Disclosure (Exhibit AUS-39), p. 1; Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 1; Australian Government Comments on the Final Disclosure (Exhibit AUS-96), p. 1.
[1152] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.
[1153] Anti-Dumping Final Determination (Exhibit AUS-2), p. 98.

the interested parties to even speculate on the basis of the calculations, as the rates set appear to be entirely unrelated to the rates fixed for the sampled companies.

996. Even if the information relied upon by MOFCOM was properly designated as confidential pursuant to Article 6.5, it should nonetheless have been provided in a non-confidential form. It was used by MOFCOM in calculating the final dumping margin for the sampled companies, the other named Australian companies and the "All Others" category. It was therefore highly relevant for the interested parties to understand the final dumping margins and duties. It follows that MOFCOM's failure to provide this information prevented these parties from preparing presentations on the basis of this information and defending their interests.

(f) Determination of injury and causation

997. MOFCOM failed to provide all non-confidential information that was relevant and that was used in its determination of injury and causation, including the non-confidential information related to the total production of the Chinese domestic industry and the proportion accounted for by the participating domestic producers. In addition, despite AGW requesting information concerning MOFCOM's determination of injury and causation,[1154] MOFCOM failed to provide all non-confidential information that was relevant to: (i) the economic factors listed in Article 3.4; (ii) the calculation of the import price for Australian wine; (iii) the calculation of the factory price for domestic like products; and (iv) the calculation of the import price of non-subject imports.

998. MOFCOM's failure to provide this information impeded the interested parties' capacity to understand and make submissions about whether MOFCOM correctly conducted an objective examination based on positive evidence regarding the impact of the allegedly dumped imports on the domestic industry, as required under Article 3.1 of the Anti-Dumping Agreement.

999. MOFCOM was required to provide all non-confidential information connected to the economic factors listed in Article 3.4.[1155] When read with Article 3.1, this obligation

[1154] AGW Comments on Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 5, 7, 23; AGW Comments on the Preliminary Determination (Exhibit AUS-69), pp. 2, 10, 14.
[1155] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 146.

necessitates "positive evidence" with "wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of the investigation concerning the relevant economic factors".[1156] MOFCOM considered 16 factors to assess the impact of the "dumped" products on domestic industry.[1157] For the factors it did consider, MOFCOM's consideration merely consists of a conclusive statement coupled with data of an unknown origin. There was no disclosure to the interested parties of the sources for this data, which deprived the parties of the opportunities to make submissions on the accuracy and relevance of that information. The mere statement of conclusions omits any information concerning the objective analysis MOFCOM allegedly engaged on each index. It also falls far short of the "wide-ranging information" threshold established in WTO jurisprudence.[1158]

1000. In relation to the calculation of the average import price for Australian wine, as set out above,[1159] MOFCOM failed to provide all non-confidential information concerning: (i) the methodology it adopted to calculate the average import price; (ii) the value of adjustments it applied during the calculation process; and (iii) the CIF price data, exchange rate, tariff rate and customs clearance costs it relied upon. In the Final Determination, MOFCOM stated that the import price for subject imports was "[b]ased on the CIF price of the dumped imported product provided by China Customs", with adjustments applied for exchange rates, tariff rates and customs clearance costs.[1160] MOFCOM then provided yearly average unit values that it asserted were the import price for Australian wine. These average prices clearly resulted from some form of calculation. MOFCOM did not provide information about the pre-adjustment CIF price used as the base for its calculation or the adjustment figures it applied.[1161] No information was provided about adjustments that are by their nature non-confidential, such as exchange rates, tariff rates, customs clearance costs and the monthly average exchange rate published by the People's Bank of China. The failure to provide this non-confidential information prevented interested parties from being able to understand and prepare submissions on the calculation of CIF price and the final import price.

[1156] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[1157] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-134.
[1158] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[1159] See above, section IV.
[1160] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.
[1161] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.

1001. MOFCOM failed to provide all non-confidential information regarding its calculation of the average unit price of domestic like products. In its Final Determination, MOFCOM stated that "[b]y summarizing the responses to the Questionnaire for Domestic Producers, the Investigating Authority took the weighted average price of the factory prices of domestic like products as the price of these products".[1162] MOFCOM did not disclose the non-confidential information relating to: (i) price data provided by the Chinese domestic industry that it relied upon; (ii) the summarising process that it undertook; (iii) the weighting that was applied and why it was required; or (iv) the adjustments it applied, if any. The lack of all non-confidential information prevented the interested parties from preparing presentations on the price of domestic like products.

1002. Further, MOFCOM failed to provide all non-confidential information regarding its calculation of the yearly average import price of non-subject imports. In the Final Determination, MOFCOM only provides the average import price for non-subject imports for two of the five years in the Injury POI, 2015 and 2019.[1163] MOFCOM did not provide all non-confidential information regarding: (i) the methodology it adopted to calculate the average import price for non-subject imports; (ii) the value of adjustments (if any) that were applied; (iii) that data that it relied upon; or (iv) the average yearly import prices for the years of 2016, 2017 and 2018. Additionally, MOFCOM provided the Australian import price and domestic prices in RMB/kl, but then provided the prices of non-subject imports in USD/kl. MOFCOM should have provided the non-subject import prices in RMB/kl to enable proper comparison. Failure to provide the foregoing on non-subject import prices undermined the due process rights of the interested parties.

1003. This information was non-confidential and should have been provided on a timely basis. It was essential information that was used by MOFCOM in its determination that Australian bottled wine exports to China were causing injury to the domestic industry. It was therefore highly relevant. Access to this information would have enabled the interested parties to prepare submissions that demonstrated to an objective examiner that subject imports of Australian wine were not causing the alleged injury to domestic producers.

[1162] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.
[1163] Anti-Dumping Final Determination (Exhibit AUS-2), p. 144.

(g) To the extent that non-confidential information was disclosed to some interested parties, MOFCOM failed to provide those parties timely opportunities to see the information and prepare presentations

1004. To the extent that MOFCOM made some disclosures of relevant non-confidential information, it failed to do so in a manner that provided timely opportunities for the interested parties that received this information to see the information and prepare their presentations. Article 6.4 imposes an obligation on investigating authorities to provide timely opportunities for all interested parties to see all relevant non-confidential information that is used in the investigation. As discussed above, MOFCOM failed to make disclosures of relevant information. To the extent that some information was disclosed to the three sampled Australian producers, as described below, disclosure was not done in a timely manner, which resulted in a further breach of Article 6.4.

1005. MOFCOM alerted the interested parties to the existence of new and highly relevant information concerning the facts available for the constructed normal value of Casella Wines and Swan Vintage. However, MOFCOM failed to provide timely opportunities to the interested parties to see this information and consequently undermined their ability to understand the information and prepare presentations.

1006. In determining the facts available for the calculation of Casella Wines' constructed normal value, MOFCOM initially used "the prices of some of the transactions reported by the Company"[1164] in the Preliminary Determination. In the Final Disclosure and Final Determination, it instead relied upon the "weighted average price of other domestic sales of the product under investigation given by other respondents".[1165] Similarly, in the Preliminary Determination, MOFCOM determined that the facts available for calculating the normal value of Swan Vintage were "the costs and expenses of some of the product under investigation reported by the Company, as well as the profit margin reported by the Company".[1166] However, in the Final Disclosure and the Final Determination, MOFCOM inexplicably decided

[1164] Anti-Dumping Preliminary Determination (Exhibit AUS-35), pp. 29, 51-52.
[1165] Anti-Dumping Final Disclosure (Exhibit AUS-16 (BCI)), p. 60; Anti-Dumping Final Determination (Exhibit AUS-2), p. 92.
[1166] Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 31.

that the new, replacement facts would be the "weighted average price of other domestic sales of the product under investigation given by other respondents".[1167]

1007. The interested parties were only provided a 10-day period to see the information and prepare written submissions after being informed of this new methodology in the Final Disclosure. During this period, they were expected to consider the non-confidential information and address the technological and linguistic barriers to prepare their presentations. They also needed time to engage with counsel and receive legal advice. Given that the purpose of Article 6.4 is to protect the due process rights of interested parties and enable them to prepare presentations to defend their interests, the 10-day period for comment on the Final Disclosure cannot be considered to have provided "timely opportunities" (within the ordinary meaning of this term, interpreted in its context and in light of its object and purpose) to see the information and prepare presentations.[1168] The timeframe permitted was hardly "well-timed" or "favourable" to facilitate the actions referred to in Article 6.2, namely, for interested parties to first see the information and then prepare presentations. The context provided by Article 6.2 affirms that the timely opportunity requirement in Article 6.4 obliged MOFCOM to afford interested parties sufficient time to fully defend their interests, which MOFCOM failed to do.

1008. Non-sampled Australian companies were entirely deprived of access to the key sections of the Final Disclosure at all and provided with no opportunity to review that information and prepare submissions in response.

3. Conclusion

1009. For the foregoing reasons, MOFCOM acted inconsistently with Article 6.4 of the Anti-Dumping Agreement by failing to provide timely opportunities for interested parties to see all non-confidential information. This failure denied interested parties a full opportunity to prepare presentations on the basis of this information and to defend their interests.

[1167] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 66; Anti-Dumping Final Determination (Exhibit AUS-2), 92. [1168] Article 31 of the Vienna Convention on the Law of Treaties.

G. MOFCOM'S FAILURE TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION BREACHED CHINA'S OBLIGATIONS UNDER ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

1010. China acted inconsistently with Article 6.9 by failing to inform interested parties of all the essential facts under consideration relating to MOFCOM's decision to impose definitive antidumping duties on Australian bottled wine.

1011. MOFCOM released its Final Disclosure on 12 March 2021, with a deadline of ten days to comment (i.e. until 22 March 2021).[1169] [[ ]] On 17 March 2021, MOFCOM provided an additional, supplementary disclosure to Australia in response to complaints by Australia about the inadequacy of the first disclosure (the Additional Final Disclosure), which omitted essential facts relating to the determination of the dumping duties on the sampled companies.[1170]

1012. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to make available to interested parties all of the essential facts that formed the basis of its decision to impose definitive antidumping measures, prior to that determination. As a result, interested parties were deprived of a full opportunity for the defence of their interests. Specifically, MOFCOM failed to disclose to interested parties all of the essential facts in relation to:

- the calculation of the total production of the Chinese domestic industry and the proportion of that production accounted for by the participating Chinese producers;
- the information selected as "facts available" for the sampled companies and the basis for those selections;
- decisions concerning adjustments to ensure a fair comparison of normal value and export price;
- differences in price comparability;

[1169] Anti-Dumping Final Disclosure Notice (Exhibit AUS-100), p. 1.
[1170] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), pp. 1-34.

- the decisions concerning adjustments to ensure a fair comparison of normal value and export price;
- the details of the methodologies and calculations of the dumping margins;
- the determination of injury and causation;
- the treatment of the other named Australian companies; and
- the treatment of the "All Others" category of Australian companies.

1. Legal framework

1013. Article 6.9 of the Anti-Dumping Agreement provides that:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

1014. The Appellate Body in *China – GOES* found that the word "essential … carries a connotation of significant, important, or salient".[1171] What is "significant, important, or salient" must be understood in light of the substantive obligations at issue and the factual circumstances of the investigation.[1172] The Appellate Body explained that:

> [W]e understand the "essential facts" to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.[1173]

1015. Investigating authorities must disclose the essential facts in a coherent manner.[1174] Interested parties should not be required to engage in "back-calculations and inferential reasoning" in order to ascertain the essential facts.[1175] Furthermore, the Appellate Body has

[1171] Appellate Body Report, *China – GOES*, para. 240. See also, Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[1172] Appellate Body Report, *China – GOES*, para. 241.
[1173] Appellate Body Report, *China – GOES*, para. 240.
[1174] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227. See also, Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[1175] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

held that a "narrative description of the data used" does not constitute sufficient disclosure of essential facts.[1176] In "all cases", the investigating authority is required to disclose the facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping.[1177] The panel in *US – Ripe Olives from Spain* agreed that the disclosure of essential facts under Article 12.8 of the SCM Agreement (which is relevantly identical to Article 6.9 of the Anti-Dumping Agreement) "must be done in such a way that permits an interested party to understand how they have been used and potentially relied upon by an investigating authority".[1178]

1016. The panel in *Argentina – Poultry Anti-Dumping Duties* considered that the term "essential facts" referred to "factual information" rather than "reasoning".[1179] The failure to inform an interested party of the reasons why the authority failed to use certain data does not equate to a failure to inform an interested party of an essential fact. Nor does "fact" extend to "motives, causes or justifications".[1180] The panel in *China – Broiler Products (Article 21.5 – US)* concluded that Article 6.9 requires disclosure of essential data, calculation methodology and formulae but not the final calculations.[1181]

1017. The investigating authority is not exempt from the requirement to disclose a fact because interested parties made no further arguments on a particular issue.[1182] The panel in *China – GOES* found that "[Article] 6.9 of the Anti-Dumping Agreement [is] not a means by which authorities respond to arguments made by interested parties".[1183] Investigating authorities remain subject to that disclosure obligation even with respect to confidential information. The panel in *China – GOES* found that an investigating authority could meet its Article 6.9 obligations in respect of confidential information by providing a "non-confidential summary of the information" to parties.[1184]

[1176] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133.
[1177] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.
[1178] Panel Report, *US – Ripe Olives from Spain*, para. 7.386.
[1179] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.228.
[1180] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.224-7.225.
[1181] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.376-7.378.
[1182] Panel Report, *China – GOES*, para. 7.651.
[1183] Panel Report, *China – GOES*, para. 7.651.
[1184] Panel Report, *China – GOES*, para. 7.410.

1018. Under Article 6.9, the disclosure of essential facts must take place "before a final determination is made", and with "sufficient time for the parties to defend their interests". The sufficiency of time afforded to interested parties to respond will depend on, *inter alia*, the nature and complexity of the issue to which the parties have to respond in order to defend their interests.[1185]

2. MOFCOM failed to disclose all of the essential facts under consideration

(a) Calculation of the output of domestic industry and the proportion of that production accounted for by the participating Chinese producers

1019. MOFCOM acted inconsistently with Article 6.9 by failing to sufficiently disclose all of the essential facts relating to its calculation of the output of like products by Chinese domestic industry pursuant to Article 4. In particular, MOFCOM failed to disclose all of the essential facts underpinning its calculation of the total Chinese domestic production of like products, which was critical to assessing injury to the domestic industry.

1020. In its Final Disclosure, MOFCOM claimed that it had identified the scope of domestic industry based on the Domestic Producer Questionnaire responses of 21 Chinese domestic producers, purportedly constituting around 60.72%-68.72% of domestic production over the Injury POI.[1186] The calculation of the proportion of domestic production represented by these producers was based on a determination by MOFCOM that the total output of domestic relevant wines was 377,600 kl, 347,600 kl, 374,800 kl, 351,200 kl and 288,200 kl per year from 2015 to 2019, respectively.[1187]

1021. The essential facts underpinning MOFCOM's calculation of total domestic output were not set out in the Final Disclosure. MOFCOM explained that its findings were not based on actually identifying the real domestic output, but rather by calculating "the overall output by the area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines" based on statistics

[1185] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.
[1186] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 57.
[1187] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 58.

from "authoritative domestic organizations".[1188] There was no disclosure to the interested parties of these statistics, the calculation methodology used to determine output from these statistics, or anything about the identity or character of the "authoritative domestic organisations".

1022. There is nothing on the record to suggest that this information was confidential. No explanation was given for why it was not disclosed, even though it was directly relevant to the interested parties' ability to understand and prepare submissions about the adequacy of these data and whether the identified representatives of "domestic industry" accounted for a major proportion of total production of like products. MOFCOM's failure to disclose these salient facts denied interested parties the opportunity to defend their interests in the investigation.

(b) The information selected as the "facts available" for the sampled companies and the basis for those selections

1023. Contrary to Article 6.9, MOFCOM failed to disclose the facts it selected to replace the allegedly missing or deficient information from the sampled companies. These data, relating to price, volume, sales and product types, were salient facts for the purposes of undertaking price comparisons and calculating the final dumping margins for all interested parties. The information MOFCOM relied upon as "facts available" was never disclosed to the parties, depriving them of the opportunity to understand the basis of MOFCOM's decisions and respond accordingly.

1024. MOFCOM did not disclose the essential facts that formed the basis of its determination of normal value and export price pursuant to Article 2, including the underlying data. The panel in *China – Broiler Products* concluded that "essential facts" in the context of Article 2 included, *inter alia*:

> [The underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like products in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); [and] export price (including any information used to construct export price under Article 2.3)… Such data form the basis

[1188] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 58.

> for the calculation of the margin of dumping, and the margin established cannot be understood without such data.[1189]

1025. Australia recalls that MOFCOM relied upon "facts available" to determine costs and expenses when determining whether sales were below cost and calculating constructed normal value for Treasury Wines. For Treasury Wines, MOFCOM found in the Final Disclosure that it would "use the data of some product types reported by the Company to determine the production costs and expenses of the product under investigation and like products".[1190] The Final Disclosure did not disclose what costs and expenses were accepted, and how these were sufficiently representative to permit a proper comparison.

1026. MOFCOM's methodology for calculating the dumping margin for Treasury Wines was to use [[ ]]

1027. For Casella Wines, MOFCOM found that the company "neither provided complete information about domestic sale as required by the questionnaire, nor offered convincing explanations",[1192] and therefore MOFCOM resorted to "known facts and best information available" to determine normal value.[1193] MOFCOM elaborated on its normal value methodology as follows:

> [A]fter taking into account the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors, the Investigating Authority held that the expenses properly adjusted based on weighted average prices of domestic sales of other respondents could be used to determine the normal value that reflected market conditions in a reasonable manner.[1194]

1028. Contrary to MOFCOM's Article 6.9 due process obligations, however, MOFCOM did not identify with any specificity the "product types, trade links and other influencing factors" it considered, or how those facts were used in MOFCOM's methodology. Similarly, MOFCOM's

[1189] Panel Report, *China – Broiler Products*, para. 790. (footnotes omitted)
[1190] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 39.
[1191] See above, section II.E.3.
[1192] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 24.
[1193] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 25.
[1194] Ibid.

description of having adjusted Casella Wines' reported expenses based on a weighted average of the sales of other respondents was not a sufficient disclosure of the "significant, important or salient" facts relevant to MOFCOM's methodology.[1195] Casella Wines was not in a position to know what expenses had been used (after MOFCOM had said it could not verify most of Casella Wines' data), what weights were used, or generally how the "adjustments" were made.

1029. For Swan Vintage, MOFCOM found that it "could not calculate the Company's constructed normal value based on the costs and expenses reported by it".[1196] MOFCOM then announced it "conducted a comparative analysis of the information from the investigation",[1197] without explaining what information was compared or what this "review" involved. MOFCOM further stated that:

> [A]fter taking into account the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors, the Investigating Authority decided in the Final Ruling that weighted average prices of *typical* domestic sales of the product under investigation given by other respondents would be used as known facts and the best information available to determine the Company's normal value. During this process, the Investigating Authority had adjusted other respondents' weighted average prices of domestic sale of the product under investigation to the ex-factory price level.[1198] (emphasis original)

1030. MOFCOM did not inform parties what constituted a "typical" domestic sale or which sales in fact met this criterion. In addition to not explaining the term, the reference to "typical" domestic sales was then omitted in the corresponding section of the Final Determination,[1199] suggesting the methodology set out in the Final Disclosure was different to that adopted in the Final Determination, denying parties the opportunity to comment on the methodology used to determine the final duties.

1031. Apart from a broad reference to "product types, trade links and other influencing factors", MOFCOM failed to disclose what information it was taking into account and how it sought to use this information to calculate normal value. That is, the factors that formed the

[1195] Appellate Body Report, *China – GOES*, para. 240. See also, Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[1196] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 31.
[1197] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 31.
[1198] Ibid.
[1199] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 91-92.

basis of MOFCOM's analysis and its methodology were left unexplained to interested parties. MOFCOM did not explain:

- from which other "respondents" it was deriving average prices;
- what "information from the investigation" was subject to the "comparative analysis", nor what the "comparative analysis" involved;
- which "physical properties of the product under investigation" it took into account, or for what purpose it took them into account;
- which "costs differences in different product types" it took into account, what it determined those differences were, what data it relied upon to identify the differences or for what purpose it took them into account;
- which "trade links" it took into account, why it was considering "trade links", the data from which the "trade links" were determined or the purpose for which it took them into account; or
- what the "other influencing factors" were that it had regard to, why it selected those factors, which data it drew upon to assess these unknown factors, how they were taken into account and weighed against each, or the purpose for which it took them into account.

1032. In *China – Broiler Products*, the panel held that "a declaration of the weighted-average dumping margin for a particular model will not suffice as a disclosure of essential facts under Article 6.9 without being accompanied by the data relied upon to reach that conclusion".[1200] MOFCOM failed to provide such data in this instance. Australia acknowledges that this information may have needed to be disclosed in summary form to meet confidentiality obligations. Such a summary would need to have been in "sufficient detail to permit a reasonable understanding of the substance of the information" to meet the requirements of Article 6.5.1. Nonetheless, the data constituted essential facts for the calculation of dumping margins and needed to be disclosed to interested parties.

1033. This lack of non-confidential information, particularly in relation to MOFCOM's chosen methodology, made it impossible for the sampled companies to comment on the

[1200] Panel Report, *China – Broiler Products*, para. 7.90.

normal value calculations and, therefore, to defend their interests. No explanation was given as to how, even at a conceptual level, MOFCOM purported to calculate a weighted average when only partial data from a single company was accepted.[1201]

1034. Further, MOFCOM failed to (i) disclose the methodology or factual basis relied upon to determine the "facts available" for Casella Wines or Swan Vintage, and ii) provide an explanation as to why it was not practicable to make these disclosures.[1202]

1035. There is nothing on the record to suggest that all of the facts relied upon by MOFCOM were confidential. To the extent they were confidential, there was no attempt by MOFCOM to provide a meaningful non-confidential summary, which effectively precluded interested parties from defending their interests prior to the Final Determination.

(c) Differences in price comparability

1036. MOFCOM did not provide all the essential facts that were relevant to accounting for differences in price comparability, pursuant to conducting a fair comparison under Article 2.4.

1037. In relation to price comparability, MOFCOM only provided the following brief statement in the Final Disclosure:

> [O]n the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal value and export price at the ex-factory level in a fair and reasonable manner. In calculating the dumping margin, the Investigating Authority compared the weighted average normal value with the weighted average export price to obtain the dumping margin.[1203]

1038. MOFCOM did not provide the non-confidential data, formulae or methodology used to conduct this price comparison. MOFCOM did not elaborate on its methodology for comparing prices in a "fair and reasonable manner". While MOFCOM said that it had compared normal value and export price at the ex-factory level, it did not explain whether adjustments had been applied to ensure that prices were being compared at the "same level of trade" as required under Article 2.4.

1039. In particular, MOFCOM did not disclose what "allowances" were made, if any, to ensure fair comparison, such as, for example, accounting for differences in "physical

[1201] See sections II.F.3(b) and II.G.4(b) concerning Casella Wines and Swan Vintage, respectively.
[1202] See above, sections II.F and II.G concerning Casella Wines and Swan Vintage, respectively.
[1203] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 51.

characteristics" of wine, such as wine quality.[1204] The Australian wine exporters and producers exported a range of wine during the period of investigation that covered different price points. Accordingly, MOFCOM was obliged to provide all non-confidential information that was relevant to how it accounted for different high-end and mid-range and low-priced wines when conducting a fair comparison. It failed to do so. MOFCOM also failed to provide any information on its consideration of the *time* of sales to ensure that sales were made "at as nearly as possible the same time" under Article 2.4.

1040. Further, MOFCOM failed to disclose the essential fact of the exchange rate(s) at which MOFCOM conducted its practice comparison. Article 2.4.1 provides that "[w]hen the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale". This is a fundamental essential fact relevant to the obligation in Article 6.9. Presumably, for example, MOFCOM converted its "normal value" data from AUD into RMB, but it did not disclose the rate(s) at which this conversion was done. MOFCOM expressed relevant figures in AUD/kl, RMB/kl and USD/kl at different points in the Final Disclosure (consider import prices from 2015 to 2019, which are defined in terms of "RMB/kl" in the body of the Final Disclosure,[1205] but listed as "USD/kl" in the data table appended at the end of the document).[1206] However, the Final Disclosure contains no explanation of how exchange rates were determined, what the rates of conversion were, or how MOFCOM purported to account for fluctuations in exchange rates over time.

1041. These were all essential facts because they were critical to assessing MOFCOM's approach to price comparison and MOFCOM's compliance with its WTO obligations, and they formed the basis of the dumping margins that MOFCOM ultimately calculated. A bare assertion that MOFCOM conducted the comparison fairly and reasonably was not a "coherent" statement of the essential facts that were relied upon. Rather, MOFCOM's approach required interested parties to engage in extensive back calculations (to the extent possible) to attempt to comprehend MOFCOM's methodology and defend their interests in the investigation.[1207]

[1204] Article 2.4 of the Anti-Dumping Agreement.
[1205] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 62.
[1206] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 93.
[1207] See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

(d) Decisions concerning adjustments to ensure a fair comparison of normal value and export price

1042. Consistent with MOFCOM's errors in relation to price comparability, MOFCOM failed to disclose to interested parties the price adjustments that were used to ensure a fair comparison between normal value and export price.

1043. In the Final Disclosure, MOFCOM made price adjustments relating to normal value for Treasury Wines and relating to export price for all sampled companies for the purposes of undertaking a fair comparison pursuant to Article 2.4. However, MOFCOM's explanation of which adjustments it proposed to accept and which it would reject was inadequate. To the extent that MOFCOM accepted proposed adjustments, it failed to provide any non-confidential assessment of the quantum of the adjustments (e.g. an indicative range).

1044. In the context of undertaking fair comparison, the Panel in *China – Broiler Products* found that "essential facts" under Article 6.9 included:

> The comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made […]. In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used, but also the formula being used to compare them.[1208]

1045. In relation to Swan Vintage and Casella Wines, MOFCOM "adjusted other respondents' weighted average prices of domestic sale of the product under investigation to the ex-factory level".[1209] The normal value may have been based on Treasury Wines' sales data, although this, too, was unclear, given the bare reference to the domestic sales prices of "other respondents". MOFCOM also failed to disclose the adjustments it accepted in relation to the export price of Casella Wines and Swan Vintage, for example, for Casella Wines, only noting it had "decided to accept adjustment items *such as* inland transport (from factory/warehouse to port of export), credit fees and advertising expenses claimed by the Company".[1210]

[1208] Panel Report, *China – Broiler Products*, para. 7.91. (footnotes omitted)
[1209] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), pp. 25, 31.
[1210] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 27. (emphasis original) For Swan Vintage, MOFCOM similarly provided a non-exhaustive list: see Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 33.

1046. A similar failure to provide essential facts arose in the context of fair comparison for the "All Others" category of Australian companies. MOFCOM calculated an "All Others" dumping margin that was "determined… on the basis of the known facts and available best information".[1211] However, MOFCOM provided no further information on the basis on which a fair comparison was conducted for this "All Others" margin.

1047. Australia submits that there is no basis for suggesting the information on the nature of the adjustments that were applied was confidential, and, if confidential, that a non-confidential summary could not have been provided. It is clear that the information was in fact used by MOFCOM as it influenced which adjustments were accepted or rejected for the purposes of making due allowance to ensure price comparability. This information was therefore highly relevant for the interested parties as it directly related to their ability to challenge or otherwise critique MOFCOM's chosen methodology for calculating the dumping margin prior to the imposition of definitive duties. MOFCOM's failure to provide all non-confidential information in relation to adjustments and methodology has therefore deprived the interested parties of the opportunity to defend their interests.

1048. A disclosure of essential facts would have demanded the release of, *inter alia*, the sales data that was being used to calculate normal value, the quantum of adjustments that were being accepted or rejected, and MOFCOM's methodology in reconciling price adjustments proposed by one firm with sales price data from other respondents. None of the above was provided, which amounted to a breach of Article 6.9. As a consequence, the interested parties were unable to understand MOFCOM's approach to adjustments to fully defend their interests.

(e) Details of the methodologies and calculations of the dumping margins

1049. MOFCOM failed to adequately disclose the essential facts underpinning its dumping margin methodology and calculations. As set out above,[1212] MOFCOM failed to properly disclose the data and formulae it used to determine normal value and export price for the

[1211] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 49.
[1212] See above, sections II.E, II.F and II.G.

three sampled companies, precluding interested parties from a meaningful opportunity for the full defence of their interests.

1050. The Final Disclosure contained no detail on the dumping margin calculations or methodology for the sample companies; it was left to be inferred from the narrative description of MOFCOM's process and MOFCOM's criticisms of the quality of the data those companies provided. The Appellate Body has held that a "narrative description of the data used" is not sufficient disclosure pursuant to Article 6.9.[1213] Neither Treasury Wines, Casella Wines nor Swan Vintage could reasonably have known what the essential facts were that led to the final margins.

1051. In relation to the other named Australian exporters, MOFCOM determined that the dumping margin "should be determined based on the weighted average margin of the selected exporters and producers".[1214] However, MOFCOM failed to elaborate on the methodology actually used to determine this "weighted average". In particular, MOFCOM failed to specify the "weights" that were employed – whether volume of imports, volume of sales, prices or some other variable. MOFCOM's process for calculating the "cooperative" dumping margin was a salient fact that formed the basis of the imposition of final measures.

(f) Determination of injury and causation

1052. In its Final Disclosure, MOFCOM did not provide all of the non-confidential, essential facts that formed the basis of its determination of injury to domestic industry and causation pursuant to Article 3. In particular, MOFCOM failed to provide all essential facts that were relevant to: the economic factors listed in Article 3.4; the methodology for calculating the average yearly import price for Australian wine; the methodology for calculating the average yearly factory price for domestic like products; and the methodology for calculating the average yearly import price for non-subject imports. MOFCOM's failure to provide this information impeded the interested parties' capacity to understand and make submissions about whether MOFCOM correctly conducted an objective examination of the impact of the allegedly dumped imports on domestic producers as required under Article 3.1.

[1213] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133.
[1214] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 48.

1053. MOFCOM was required to provide all non-confidential information connected to the economic factors listed in Article 3.4.[1215] When read with Article 3.1, this obligation necessitated "positive evidence" with "wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of the investigation concerning the relevant economic factors".[1216] MOFCOM considered 16 factors to assess the impact of the "dumped" products on domestic industry.[1217] For the factors it did consider, MOFCOM's consideration merely consisted of a conclusive statement coupled with data of an unknown origin. There was no disclosure to the interested parties of the sources for this data, which deprived the parties of the opportunities to make submissions on the accuracy and adequacy of that information.

1054. MOFCOM made a series of bare assertions that sought to tie the aforementioned trends in Australian wine imports to domestic industry conditions, such as "the price of the dumped imported product suppressed the prices of domestic like products".[1218] However, MOFCOM did not provide the evidentiary basis to support the chain of causality. MOFCOM did not provide the essential facts under consideration, if such facts existed, establishing anything more than mere correlation in time series trends. These were essential to understanding MOFCOM's causal analysis. MOFCOM's approach also fell far short of the "wide-ranging information" threshold.[1219]

1055. In relation to the calculation of the average import price for Australian wine, MOFCOM failed to provide all non-confidential, essential facts concerning: the methodology it adopted to calculate the average import price; the value of adjustments it applied during the calculation process; and the CIF price data, exchange rate, tariff rate and customs clearance costs. In its Final Disclosure, MOFCOM stated that the import price for subject imports was "[b]ased on the CIF price of the dumped imported product provided by China Customs", with adjustments applied for exchange rates, tariff rates and customs clearance costs.[1220] MOFCOM then provided the yearly average import price for Australian wine products. This amounted to a statement of conclusion, rather than a detailed explanation

[1215] Appellate Body, *EC – Fasteners (China)*, para. 413.
[1216] Ibid.
[1217] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 71-76.
[1218] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 78.
[1219] Appellate Body, *EC – Fasteners (China)*, para. 413.
[1220] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 62.

outlining the essential facts. MOFCOM did not provide information about the pre-adjustment CIF price it used as the base for its calculation or the adjustment figures it applied.[1221] Exchange rates, tariff rates, imported customs clearance costs and the monthly average exchange rate published by the People's Bank of China are by their nature non-confidential and constituted essential facts for the purposes of this investigation, underpinning the calculation of the CIF price and the final import price.

1056. MOFCOM failed to provide all non-confidential essential facts regarding its calculation of the average unit price of domestic like products. In its Final Disclosure, "[b]y summarizing the responses to the Questionnaire for Domestic Producers, the Investigating Authority took the weighted average price of the factory prices of domestic like products as the price of these products".[1222] MOFCOM did not disclose the non-confidential essential facts relating to: price data provided by the Chinese domestic industry that it relied upon; the summarising process that it undertook; the weighting that was applied and why it was required; or the adjustments (if any) it applied. The lack of all non-confidential, "significant, important, or salient" facts prevented the interested parties from understanding how MOFCOM arrived at the prices of domestic like products that MOFCOM relied upon in its injury analysis. This denied the interested parties the opportunity to defend their interests.

1057. MOFCOM failed to provide all non-confidential information regarding its calculation of the yearly average import price of non-subject imports. In its Final Disclosure, MOFCOM only provided the average import price for non-subject imports for two of the five years in the Injury POI, 2015 and 2019.[1223] MOFCOM did not provide all non-confidential essential facts regarding: the methodology it adopted to calculate the average import price for non-subject imports; the value of adjustments (if any) that were applied; the data that it relied upon; or the average yearly import prices for the years of 2016, 2017 and 2018.

1058. Additionally, MOFCOM provided the Australian import price and domestic prices in RMB/kl, but then provided the prices of non-subject imports in USD/kl. MOFCOM should have provided the non-subject import prices in RMB/kl to the interested parties as an essential fact to enable proper comparison. The failure to provide the essential facts relating non-subject

[1221] Ibid.
[1222] Ibid.
[1223] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 86.

import prices undermined the due process rights of the interested parties. This information was essential to MOFCOM's injury analysis, it was non-confidential, and it should have been disclosed to the interested parties to ensure they had a meaningful opportunity for a full defence of their interests. Access to this information would have enabled these parties to prepare submissions that demonstrated to an objective and unbiased investigating authority that subject imports of Australian wine were not causing the alleged injury to domestic producers.

(g) Treatment of the other named Australian exporters

1059. Australia does not have access to the version of the Final Disclosure that was provided to the other named Australian exporters. However, Australia's understanding is that it reflected the version of the Final Disclosure that was distributed to the Australian Government on 12 March 2021. This version omitted any information relating to normal value and export price for the sampled companies, constituting 34 pages of reasoning.[1224] This narrative description of MOFCOM's methodology in respect of the sampled companies, incomplete as it was, was never circulated to the non-sampled exporters. It was only set out [[ ]] and in the Additional Final Disclosure to the Australian Government on 17 March 2021.

1060. Thus, MOFCOM failed to make *any* disclosure of essential facts to the other named Australian exporters in relation to the calculation of the dumping margins. The Final Disclosure merely stated that MOFCOM had determined a dumping margin based on a weighted average of the sampled companies.[1225] However, these companies were not provided with any detail in relation to the determination of normal value or export price for the sampled companies. Given that MOFCOM's approach to "facts available" for the sampled companies affected all "cooperative" companies, it was critical for these parties to have access to this information to be able to defend their interests.

1061. Further, these sections could not have been confidential, as evidenced by the fact that they were supplied to Australia in the supplementary disclosure of 17 March 2021, and they were included in the Final Determination, accessible to all interested parties.

[1224] Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), pp. 1-34.
[1225] Anti-Dumping Final Disclosure (Exhibit AUS-16), pp. 47-49.

(h) Treatment of the "All Others" category of Australian companies

1062. China breached Article 6.9 because MOFCOM failed to provide the essential facts that justified resorting to "facts available" with respect to the "All Others" category of companies. In relation to "All Others", MOFCOM simply declared a range of values for key elements of the dumping determination:

> Since the confidential information of these companies might be involved, the Investigating Authority decided to disclose relevant information via data intervals. Normal value is 12,000-14,000 AUD/kl; export price is 3,000-3,200 AUD/kl; CIF price is 4,500-4,700 AUD/kl; the dumping margin is 218.4%.[1226]

1063. The panel in *China – Broiler Products* held as follows:

> Interpreting Article 6.9 in the light of Article 6.8, the 'essential facts' that MOFCOM was expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information.[1227]

1064. It was therefore incumbent upon MOFCOM to disclose the precise basis for its decision to resort to "facts available" in relation to the "All Others" category, and to set out the information on which it sought to rely, such that interested parties could understand the factual basis for the dumping margins that MOFCOM calculated.

1065. MOFCOM's data and methodology for constructing normal value for the "All Others" category were opaque. MOFCOM compared "the export data to China of companies that registered to participate in the investigation and export data to China of companies that filled in the dumping sampling questionnaire with the China Customs statistical data, and found there was a big gap between them and the China Customs' statistical data".[1228] This finding was capable of explaining why MOFCOM considered that companies outside of those registered *existed*, but not why MOFCOM chose to adopt the calculation methodology that it

[1226] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 51.
[1227] Panel Report, *China – Broiler Products*, para. 7.317.
[1228] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 49. Australia objects to this approach because it seeks to compare data that are not directly comparable. Export data will not equate or necessarily align with a Member's statistical import data. Furthermore, in circumstances where MOFCOM had been apprised by Australia that there were thousands of Australian wine producers and exporters, and MOFCOM indicated that it would proceed with sampling, it begs the question what the purpose of registration is.

did. MOFCOM concluded without further details that it would use "best information available", which it judged to be the information provided by the sampled companies.

1066. No explanation was provided as to the origin or basis for the normal value, export price, or CIF price that were relied upon, save that they were derived in some unknown way from "information provided by the respondents".[1229] No explanation was given for how these values were identified from amongst that information. This is striking, considering that these were not values relied upon to calculate the dumping margins for any of the sampled companies, but rather appear to have been derived in some other way.

1067. Based on the Final Disclosure it is impossible for Australia or other parties to even speculate on the basis of the calculations, as the rates set appear to be entirely unrelated to the rates fixed for the sampled companies. From the limited information included in the Final Disclosure, it appears that MOFCOM applied an *adverse* methodology for this category of companies, which resulted in an inflated dumping margin compared to both the sampled companies and the "cooperative" but non-sampled companies. However, MOFCOM made no such findings, nor did it provide any other explanation as to why the "non-cooperative rate" significantly exceeds the "cooperative rate".

1068. Australia accepts that the specific data from the sampled companies was confidential and could not be disclosed in full. Nonetheless, a meaningful non-confidential summary should have been provided, consistent with Article 6.5.1. Such claims of confidentiality would not have precluded MOFCOM from disclosing the methodology it applied to select and integrate data from across the respondents, and to articulate why that methodology resulted in a dumping margin that was vastly different from the others it calculated apparently from the same data sources.

3. Conclusion

1069. For the foregoing reasons, China acted inconsistently with Article 6.9 by failing to inform interested parties of all the essential facts under consideration relating to MOFCOM's decision to impose definitive anti-dumping duties on Australian bottled wine.

[1229] Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 49.

H. MOFCOM'S PUBLIC NOTICE OF INITIATION FAILED TO CONTAIN ADEQUATE INFORMATION IN BREACH OF CHINA'S OBLIGATIONS UNDER ARTICLE 12.1.1 OF THE ANTI-DUMPING AGREEMENT

1070. The public notice of initiation issued by MOFCOM did not meet the requirements of Article 12.1.1(iv) of the Anti-Dumping Agreement because it failed to provide "a summary of the factors on which the allegation of injury is based".

1. Legal framework

1071. Article 12.1 provides that:

> When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

1072. Pursuant to Article 12.1.1, this notice must contain, or otherwise make available through a separate report, "adequate information", including "(iv) a summary of the factors on which the allegation of injury is based".

2. MOFCOM's Public Notice of Initiation failed to contain a summary of the factors on which the allegation of injury was based

1073. On 18 August 2020, MOFCOM issued a public notice regarding the initiation of an anti-dumping investigation into wine imported from Australia through an announcement on its website, which included the non-confidential versions of CADA's written application, and the annexes to that application.[1230]

1074. The notice did not set forth, or otherwise make available through a separate report, a "summary of the factors on which the allegation of injury is based", as required by Article 12.1.1(iv). In fact, the word "injury" does not appear in the notice at all. The requirement for a "summary" to be provided places a positive duty on MOFCOM to disclose, by way of a summary, the factors on which the allegation of injury is based.

[1230] Anti-Dumping Final Determination Announcement (Exhibit AUS-1), pp. 1-3; and Anti-Dumping Final Determination (Exhibit AUS-2), pp. 1-149.

3. Conclusion

1075. For the reasons set out above, the public notice of initiation issued by MOFCOM failed to meet the requirements of Article 12.1.1(iv) of the Anti-Dumping Agreement because it failed to provide "a summary of the factors on which the allegation of injury is based".

I. CHINA VIOLATED ARTICLES 12.2 AND 12.2.2 BECAUSE MOFCOM'S PUBLIC NOTICE OF THE FINAL DETERMINATION FAILED TO CONTAIN ALL RELEVANT INFORMATION

1076. MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 by failing to provide, in the public notice of the Final Determination, all relevant information on the matters of fact and law and reasons which led to the imposition of final measures, and the reasons for the acceptance and rejection of relevant arguments and claims made by the exporters and importers. In particular, MOFCOM's Final Determination failed to disclose all matters of fact and law and reasons relating to:

- the calculation of the total production of the domestic industry and the proportion of that production accounted for by the Chinese producers surveyed for the purpose of defining the domestic industry;
- MOFCOM's recourse to "facts available" to determine normal value and selection of the facts available;
- decisions concerning adjustments to ensure a fair comparison of normal value and export price;
- the differences in price comparability;
- the calculation of dumping margins for exporters and the reasons for the calculation methodology used; and
- the determination of injury and causation.

1. Legal framework

1077. Article 12.2 of the Anti-Dumping Agreement provides, in relevant part, as follows:

> Public notice shall be given of any preliminary or final determination[…] Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the

findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

1078. The disclosure obligations in relation to final affirmative determinations are elaborated in Article 12.2.2 as follows:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

1079. A notice of final determination must contain or otherwise make available through a separate report all relevant information, in sufficient detail, on the matters of fact and law and reasons which have led to the imposition of final measures, including the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers.[1231] Article 12.2.2 provides that the notices must contain, *inter alia*, the following information listed in Article 12.2.1:

> (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
>
> (ii) a description of the product which is sufficient for customs purposes;
>
> (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
>
> (iv) considerations relevant to the injury determination as set out in Article 3;
>
> (v) the main reasons leading to the determination.

1080. Article 12.2 requires that the notice or separate report set out in "sufficient detail" findings and conclusions on all issues of fact and law considered "material" by the investigating authorities. In *EC – Tube or Pipe Fittings*, the panel explained that, although it seems that there is a degree of subjectivity on the part of the investigating authority, there are still "certain objective requirements that would necessarily require reflection in the public report of the

[1231] See Panel Report, *China — Broiler Products*, para. 7.327.

investigation".[1232] As such, a "material issue" is "an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination".[1233]

1081. Articles 12.2 and 12.2.2 require an investigating authority to provide sufficient information to permit interested parties to understand the factual basis for the final determination and "assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary".[1234] Similarly, WTO Members should be apprised of sufficient information to assess the conformity of measures with the WTO Agreement and pursue dispute settlement procedures if necessary.[1235]

1082. The purpose of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement is to provide transparency of the authority's decision-making at the final determination stage of proceedings.[1236] As such, in the context of Article 12.2, a final determination must contain details of a quantity, extent, and scope adequate to make transparent the investigating authority's decision-making.[1237] Simply reciting data is not a sufficient explanation to meet the requirements of Article 12.2.[1238] The reasons for why an investigating authority concluded as it did must be discernible from the final determination.[1239]

1083. Article 12.2.2 requires disclosure of "all relevant information". The Appellate Body has explained that:

> The obligation of disclosure under Articles 12.2.2… is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Articles 12.2.2 … seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement*.[1240]

[1232] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.422.
[1233] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[1234] Panel Report, *China – X Ray Equipment*, para. 7.459; and Appellate Body Report, *China – GOES*, paras. 256-257.
[1235] Panel Report, *China – X Ray Equipment*, para. 7.459.
[1236] Panel Reports, *Mexico – Corn Syrup*, para. 7.104; and *EU – Footwear (China)*, para. 7.844.
[1237] Panel Report, *Mexico – Corn Syrup*, para. 7.104.
[1238] Panel Report, *Mexico – Corn Syrup*, footnote 610.
[1239] Panel Report, *EU – Footwear (China),* para. 7.844. See also, Panel Report, *China – X-Ray Equipment*, para. 7.459.
[1240] Appellate Body Report, *China – GOES*, para. 258. (emphasis original)

1084. The content of the disclosure obligation – that is, whether information is "relevant" (Article 12.2.2) or "material" (Article 12.2) – must therefore be considered in light of the investigating authority's substantive obligations to establish dumping, injury and causation, given the factual circumstances of the case at hand.[1241] The panel in *EC - Tube or Pipe Fittings* noted that the phase "have led to" in Article 12.2.2 "implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty".[1242]

1085. In this respect, the Appellate Body has (in the context of relevantly identical provisions of the SCM Agreement) explained that, where a panel is required to undertake an "objective assessment" of an investigating authority's determination, the panel's assessment must consider whether:

> [T]he agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[1243]

2. MOFCOM's public notice of the Final Determination failed to contain all relevant information

(a) Calculation of the output of domestic industry and the proportion of that production accounted for by the Chinese producers surveyed for the purpose of defining "domestic industry"

1086. Relevant to MOFCOM's assessment of injury was the total domestic output of bottled wine in China. The Final Determination states as follows:

> Without the overall output of domestic relevant wines at hand, the Investigating Authority surveyed the real domestic output through different parties. The Investigating Authority

[1241] Appellate Body Report, *China – GOES*, paras. 257-258.
[1242] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424.
[1243] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186. (footnotes omitted) Although the Appellate Body's findings were made in respect of Article 22.5 of the SCM Agreement, the same obligations apply in respect of a panel reviewing a determination in an anti-dumping investigation, in accordance with Article 12.2.2 of the Anti-Dumping Agreement.

> believed that it was reasonable to calculate the overall output by the area of wine grapes, output per acre, wine yield, output and loss of finished wines made from imported wines, and the production proportion of different wines.[1244]

1087. In its Final Determination, MOFCOM found that 21 Chinese domestic producers who submitted a response to the Domestic Producer Questionnaire represented a "major proportion of the domestic industry", purportedly constituting between 60.72%-68.72% of domestic production over the Injury POI.[1245] The calculation of the proportion of domestic production represented by these producers was based on a determination by MOFCOM that the total output of domestic relevant wines was 377,600 kl, 347,600 kl, 374,800 kl, 351,200 kl and 288,200 kl per year from 2015 to 2019, respectively.[1246]

1088. MOFCOM did not indicate the source of that data, other than the broad statement that this was "based on the statistics from authoritative domestic organizations".[1247] The findings and conclusions reached by MOFCOM on the issues of fact and law underpinning this calculation of total domestic output were not set out in the Final Determination. There was no disclosure to the interested parties of these statistics, the methodology used to determine domestic output from these statistics, or anything about the identity or character of the "authoritative domestic organizations".

1089. There is nothing on the record to suggest this information was confidential. No explanation was given for why it was not disclosed, even though it was directly relevant to the interested parties' ability to understand and prepare submissions about the adequacy of this data and to whether the identified 21 domestic producers accounted for a major proportion of total production of like products. Interested parties were deprived of information that was "material" to the definition of domestic industry and to MOFCOM's determination of injury and causation. The failure to disclose the information denied interested parties a full opportunity to assess the conformity of MOFCOM's findings and to challenge those findings.

1090. In addition, MOFCOM proceeded to quote a different figure for total domestic output elsewhere in the Final Determination (i.e. "domestic sales volume"),[1248] without explaining

[1244] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[1245] Anti-Dumping Final Determination (Exhibit AUS-2), p. 108.
[1246] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[1247] Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.
[1248] Anti-Dumping Final Determination (Exhibit AUS-2), p. 124.

why it had adopted two different figures for apparently the same purpose, being, measuring the total size of the domestic industry. This further impeded interested parties' understanding of the factual basis for MOFCOM's findings.

1091. The matters of fact and reasons identified in the paragraphs above were essential for interested parties to assess MOFCOM's determination of domestic industry output pursuant to Article 4. In turn, the failure to provide all nonconfidential information in respect of domestic industry also compounded errors with respect to MOFCOM's analyses and determination of injury and causation.

(b) MOFCOM's recourse to "facts available" to determine normal value and selection of the facts available

1092. MOFCOM's Final Determination did not contain all the information on the matters of fact and law and reasons that were relevant to:

- MOFCOM's decision to resort to "facts available" to determine normal values pursuant to Article 6.8; or
- MOFCOM's findings that certain data or information otherwise constituted the "best information available".

1093. As MOFCOM had recourse to facts available to determine the margin of dumping for each of the sampled companies, it was material. Therefore, MOFCOM was obligated to provide sufficiently detailed explanations.

1094. Specifically, MOFCOM failed to provide all relevant information on the matters of fact and law and reasons for its decision to resort to "facts available" in relation to the three sampled companies. This included providing all relevant information regarding the "facts available" that MOFCOM used to replace the allegedly missing or deficient information from the sampled companies, and the basis for its selection of those facts as the "best information available".

1095. With respect to Treasury Wines, MOFCOM relied upon "facts available" to determine costs and expenses when calculating constructed normal value. In the Final Determination, MOFCOM indicated that it used "the data of some product types reported by the Company to determine the production costs and expenses of the product under investigation and like

products".[1249] As detailed above,[1250] MOFCOM's methodology for calculating constructed normal value for Treasury Wines was to use a single purportedly representative Model PCN for some Treasury Wines PCNs, irrespective of the actual costs for these PCNs reported in the Anti-Dumping Questionnaire. [[ ]]

1096. While Australia acknowledges that MOFCOM's obligations with respect to confidentiality designations in its public notice limited its capacity to disclose details of Treasury Wines' product types, MOFCOM's explanation of how it proposed to use Treasury Wines' PCNs was lacking. Specifically, MOFCOM did not explain: (i) the basis for using a single Model PCN, (ii) the basis for the selection of this Model PCN, nor (iii) the reasons for its conclusion that the Model PCN was representative of Treasury Wines' portfolio of Chinese domestic sales. [[ ]]

1097. MOFCOM's methodology in determining normal value for Treasury Wines remains a "black box" in most key respects. On the face of the Final Determination, MOFCOM did not set out its rationale for resorting to "facts available" when voluminous price and quantity information was supplied during the investigation. MOFCOM failed to disclose in the level of detail required by the Anti-Dumping Agreement the facts that it relied upon as the "best information available", or the methodology, findings or results from its constructed normal

[1249] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 60-61.
[1250] See above, section II.E.4.
[1251] [(AUS-4 (BCI)), .]] [1252] See above, sections II.E.3(a)(i) and II.J.3.

value approach (either to Treasury Wines, or through non-confidential summaries to other interested parties).

1098. With respect to Casella Wines, MOFCOM decided that "known facts and the best information available could be utilized to determine the Company's normal value" in light of alleged deficiencies and inconsistencies in its submissions.[1253] MOFCOM did not offer sufficient reasoning to explain why the information provided was regarded as deficient or inconsistent, or why that information was necessary to MOFCOM's determinations. MOFCOM described its process as follows:

> [A]fter taking into account the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors, the Investigating Authority held that the expenses properly adjusted based on the weighted average price of domestic sales of other respondents could be used to determine the normal value that reflected market conditions in a reasonable manner.[1254]

1099. Contrary to MOFCOM's obligations under Articles 12.2 and 12.2.2, it did not identify with any specificity the "product types, trade links and other influencing factors" it considered, or how that information was used in MOFCOM's reasoning. Similarly, MOFCOM's description of having adjusted Casella Wines' reported expenses based on a weighted average of the sales of other respondents was not a sufficient disclosure of facts and reasoning relevant to MOFCOM's methodology. Casella Wines was not in a position to know: (i) what expenses had been used, particularly after MOFCOM had said it could not verify most of Casella Wines' data, (ii) what weights were used in the "weighted" average, or (iii) how the "adjustment" process unfolded.

1100. Similarly, MOFCOM dismissed the information supplied by Swan Vintage on the basis of alleged deficiencies in the accuracy of the data, concluding that it "could not calculate the Company's constructed normal value based on the costs and expenses reported by it".[1255] Instead, MOFCOM resolved to use "known facts and the best information available to determine the Company's normal value".[1256] MOFCOM then announced it "conducted a

[1253] Anti-Dumping Final Determination (Exhibit AUS-2), p. 84.
[1254] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 84-85.
[1255] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.
[1256] Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.

comparative analysis of the information from the investigation", without explaining what information was compared or what this "review" involved. MOFCOM stated that:

> [A]fter taking into account the physical properties of the product under investigation, the costs differences in different product types, trade links and other influencing factors, the Investigating Authority decided in the Final Ruling that the weighted average price of domestic sales of the product under investigation given by other respondents would be used as known facts and the best information available to determine the Company's normal value. During this process, the Investigating Authority had adjusted other respondents' weighted average prices of domestic sale of the product under investigation to the ex-factory price level.[1257]

1101. Apart from broad reference to "product types, trade links and other influencing factors", MOFCOM failed to disclose what information it took into account and how it sought to use this information to calculate normal value. That is, the factors that formed the basis of MOFCOM's analysis and its methodology were left unexplained. MOFCOM failed to explain:

- from which "other respondents" it was deriving average prices;
- what "information from the investigation" was subject to the "comparative analysis", nor what the "comparative analysis" involved;
- which "physical properties of the product under investigation" it took into account, or for what purpose it took them into account;
- which "costs differences in different product types" it took into account, what it determined those differences were, what data it relied upon to identify the differences or for what purpose it took them into account;
- which "trade links" it took into account, why it was considering "trade links", the data from which the "trade links" were determined or the purpose for which it took them into account; or
- what the "other influencing factors" were that it had regard to, why it selected those factors, which data it drew upon to assess these unknown factors, how they were taken into account and weighed against each, or the purpose for which it took them into account.

[1257] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 91-92.

1102. It remains unclear why MOFCOM considered "the weighted average price of domestic sales of the product under investigation given by the other respondents" to be the "best information available" for normal value purposes.[1258] MOFCOM did not offer any reasoning in support of this statement, despite the provision of such reasoning being critical to understanding MOFCOM's decision. No explanation was given as to how, even at a conceptual level, MOFCOM purported to calculate a weighted average when only partial data from a single company was accepted.[1259]

1103. When investigating authorities resort to secondary data with respect to normal value, paragraph 7 of Annex II requires them, where practicable, to "check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation".[1260] MOFCOM failed to disclose in the level of detail required by the Anti-Dumping Agreement its methodology or the factual considerations that it took into account when assessing whether the selected data was the "best available" for these particular companies.

1104. There is nothing on the record to suggest that the information relied upon by MOFCOM was confidential in its entirety. To the extent that it was confidential, there was no attempt by MOFCOM to provide a meaningful non-confidential summary. The lack of non-confidential information, particularly in relation to MOFCOM's chosen methodology, made it impossible for the sampled companies to assess the conformity of MOFCOM's normal value calculations or to challenge them. The basis of MOFCOM's normal value calculations for the sampled companies was evidently "material" information for the purpose of calculating the final dumping margins, not only for the sampled companies but for all companies subject to the investigation.

(c) Adjustments to ensure a fair comparison of normal value and export price

1105. MOFCOM acted inconsistently with Articles 12.2 and 12.2.2 by failing to disclose to interested parties the price adjustments that were made to undertake a fair comparison

[1258] Anti-Dumping Final Determination (Exhibit AUS-2) p. 92.
[1259] See above, sections II.F.3(b) and II.G.4(b) concerning Casella Wines and Swan Vintage, respectively.
[1260] Paragraph 7 of Annex II of the Anti-Dumping Agreement.

between normal value and export price. In the Final Determination, MOFCOM made price adjustments relating to normal value for Treasury Wines and relating to export price for all sampled companies for the purposes of undertaking a fair comparison pursuant to Article 2.4. However, MOFCOM's explanation of which adjustments were made, and on what grounds, was vague, inadequate and lacking in "sufficient detail".

1106. MOFCOM rejected several adjustments proposed by Treasury Wines without providing sufficient explanations. Instead, MOFCOM simply repeated verbatim its criticisms of certain adjustments from the Preliminary Determination and the Final Disclosure, notwithstanding Treasury Wines' meaningful engagement on those criticisms via its comments to MOFCOM prior to the Final Determination.[1261] To the extent that MOFCOM accepted adjustments proposed by Treasury Wines, it also failed to provide any relevant calculations to Treasury Wines or a non-confidential assessment of the adjustments to other interested parties.

1107. In relation to Australian Swan Vintage and Casella Wines, MOFCOM "adjusted the relevant sales expenses on the basis of the constructed normal value so as to adjust the normal value to the factory price level".[1262] It appears that MOFCOM may have relied on Treasury Wines sales price data to determine those normal values.[1263] MOFCOM failed to disclose its methodology in reconciling price adjustments proposed by one sampled company with sales price data from other respondents. MOFCOM also failed to provide all relevant information regarding the nature or quantum of adjustments it accepted in relation to the export price of Casella Wines and Australian Swan Vintage. For example, for Casella Wines, MOFCOM only noted it had "decided to accept adjustment items *such as* inland transport (from factory/warehouse to port of export), credit fees and advertising expenses claimed by the Company".[1264]

1108. A similar failure to provide relevant information arose in the context of fair comparison for the "All Others" category of Australian companies. MOFCOM calculated an "All Others" dumping margin that was "determined on the basis of the known facts and available

[1261] See above section II.J(c)(ii); [(Exhibit AUS-11 (BCI)) .]]

[1262] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 87, 93-94.

[1263] Relating to Swan Vintage, Anti-Dumping Final Determination (Exhibit AUS-2), p. 94. For Casella Wines, Anti-Dumping Final Determination (Exhibit AUS-2), p. 85.

[1264] Anti-Dumping Final Determination (Exhibit AUS-2), p. 87. (emphasis original)

best information".[1265] However, MOFCOM provided no further information as to the basis on which a fair comparison was conducted for this "all others" margin of dumping.

(d) Differences in price comparability

1109. MOFCOM failed to provide all information that was relevant in determining the differences in price comparability and conducting a fair comparison under Article 2.4 of the Anti-Dumping Agreement.

1110. In the Final Determination, MOFCOM only noted that: "on the basis of considering various comparable factors affecting price, the Investigating Authority compared the normal value and export price at the ex-factory level in a fair and reasonable manner". [1266] MOFCOM did not provide the non-confidential formula or methodology underlying its calculations. MOFCOM also provided no information regarding the "various comparable factors affecting price" that it referenced in the Final Determination,[1267] nor did it sufficiently explain how the comparison was made in a "fair and reasonable" manner.

1111. MOFCOM did not provide any indication of how it accounted for differences in comparability for wine of different qualities. The Australian wine exporters and producers exported a range of wine during the period of investigation that covered different price points. Accordingly, MOFCOM was obligated to provide all non-confidential information that was relevant to how it accounted for different high, middle, and low-price wines when conducting a fair comparison. It failed to do so. MOFCOM also failed to provide any information on its consideration of the time of sales when ensuring that the sales were made "at nearly as possible the same time" pursuant to Article 2.4.

1112. MOFCOM expressed relevant figures in AUD/kl, RMB/kl and USD/kl at different points in the Final Determination.[1268] However, the Final Determination contains no explanation of how exchange rates were determined, what the rates of conversion were, or how MOFCOM purported to account for fluctuations in exchange rates over time. The foregoing information was material to the fair comparison analysis.

[1265] Anti-Dumping Final Determination (Exhibit AUS-2), p. 98.
[1266] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.
[1267] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 35, 100.
[1268] E.g. import prices from 2015 to 2019 are defined in terms of "RMB/kl" in the body of the Final Determination (Anti-Dumping Final Determination (Exhibit AUS-2), p. 113) but listed as "USD/kl" in the data table appended at the end of the document (Anti-Dumping Final Determination (Exhibit AUS-2), p. 148).

(e) Calculation of dumping margins and the reasons for the calculation methodology used

1113. China breached the requirements of Articles 12.2 and 12.2.2 because MOFCOM failed to provide all relevant facts and reasoning that were relevant to calculating the respondent companies' final dumping margins. As set out above, MOFCOM failed to properly disclose the methodology and formulae it used to determine normal value and export price for the three sampled companies.[1269]

1114. It appears that MOFCOM undertook a comparative analysis of prices but neither fully disclosed its methodology nor the key findings that underpinned the final calculation of dumping margins.

1115. For all companies, MOFCOM simply declared that "[b]ased on the calculation results, the Investigating Authority presented the finalised dumping margins for relevant Australian companies in Annex 1 of the Announcement". MOFCOM did not provide sufficiently detailed explanations on how it conducted these calculations.

1116. For the other named Australian exporters, MOFCOM calculated the dumping margin by "compar[ing] the weighted average normal value with the weighted average export price", but failed to elaborate on the methodology used to determine the "weighted average".[1271] In particular, MOFCOM failed to disclose the basis of the "weights" that were employed – whether volume of imports, volume of sales, prices or some other variable – or precisely how averages were taken – whether across sampled companies, products or both.

1117. MOFCOM also failed to disclose the methodology or reasons that led to the imposition of the "All Others" duty rate of 218.4%. MOFCOM used "best information available" to calculate this rate because it considered there was a "big gap" between the "export data to China of companies that registered to participate in the investigation and export data to China of companies that filled in the dumping sampling questionnaire with the China Customs statistical data".[1272]

[1269] See above, sections II.E, II.F, and II.G.
[1270] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.
[1271] Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.
[1272] Anti-Dumping Final Determination (Exhibit AUS-2), p. 98.

1118. No further explanation was provided as to the facts selected to calculate the margin. Based on the very high and unexplained margin imposed on the "All Others" category, MOFCOM appears to have made a decision to impose a punitive rate by deliberatively selecting facts that would lead to an inflated margin, otherwise known as using "adverse facts available" as a means of punishing unknown exporters.[1273] There is no other reasonably apparent explanation for why the margins were determined to be significantly higher than any of the sampled companies. WTO panels have found the use of such "adverse facts available", and the failure to disclose the reasoning underpinning it, to constitute a breach of Articles 12.2 and 12.2.2.[1274]

(f) Determination of injury and causation

1119. In its Final Determination, MOFCOM failed to provide all of the non-confidential information that was relevant and used in its determination of injury and causation. In particular, MOFCOM failed to provide all the reasons that were relevant to: its evaluation of the economic factors list in Article 3.4; the methodology for calculating the average yearly import price for Australian wine; the methodology for calculating the average yearly factory price of domestic like products; and the methodology for calculating the average yearly import price of non-subject imports. MOFCOM's failure to provide this information impeded the interested parties' capacity to understand and make submissions about whether MOFCOM correctly conducted an objective examination of the impact of the allegedly dumped imports on domestic producers under Article 3.1.

1120. MOFCOM's obligation to provide all non-confidential information in relation to its analysis of the economic factors under Article 3.4 includes reference to "positive evidence" with "wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of the investigation concerning the relevant economic factors".[1275] MOFCOM considered 16 factors to assess the impact of the "dumped" products on the domestic industry.[1276] For the factors it considered, MOFCOM's analysis merely consists of a conclusive statement coupled with data of an unknown origin.[1277] This absence of facts and reasoning is

[1273] Panel Report, *China – GOES*, para. 7.391.
[1274] See e.g. Panel Reports, *China – GOES,* para. 7.426; and *China – Broiler Products*, para. 7.329.
[1275] Appellate Body Report, *EC – Fasteners (China)*, para. 413.
[1276] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-134.
[1277] Ibid.

such that interested parties are prevented from understanding the basis on which MOFCOM determined injury and causation.

1121. MOFCOM also failed to provide all non-confidential information concerning the methodology and value of adjustments applied to CIF data. MOFCOM described using CIF figures from China's General Administration of Customs as its starting point, before it "further considered exchange rates, tariff rates and imported customs clearance costs… [and] adjusted the imported price of the product under investigation accordingly".[1278] MOFCOM did not elaborate on precisely which adjustments were made or their quantum. While MOFCOM provided the adjusted price of the imported product, it did not provide information about the pre-adjustment CIF price and adjustment figures.[1279] No information was provided about adjustments that are by their nature non-confidential, such as exchange rates, tariff rates, imported customs clearance costs and the monthly average exchange rate published by the People's Bank of China. The failure to provide this non-confidential information prevented interested parties from being able to understand and prepare and make submissions on the calculation of CIF price and the final import price.

1122. MOFCOM also failed to provide all relevant matters of fact in relation to the prices of domestic like products. In its Final Determination, MOFCOM only provided a summary of the prices of the domestic like products and concluded that "the sale price of domestic like products showed an upward trend".[1280] The lack of relevant, non-confidential information that informed MOFCOM's calculations prevented the interested parties from verifying the price of domestic like products.

1123. MOFCOM further failed to provide all non-confidential information in the Final Determination in relation to the import prices of non-subject imports. MOFCOM did not indicate what adjustments were applied to domestic prices with sufficient specificity, including the methodology for rejecting or accepting these adjustments and the value of each adjustment. MOFCOM also provided the Australian import price and domestic prices in RMB/kl, but then provided the prices of non-subject imports in USD/kl. This was compounded

[1278] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.
[1279] Anti-Dumping Final Determination (Exhibit AUS-2), p. 113.
[1280] Anti-Dumping Final Determination (Exhibit AUS-2), p. 125.

by MOFCOM's failure to disclose its methodology for converting currencies (namely, the exchange rates used).

1124. The information provided in respect of MOFCOM's price effects analysis is similarly insufficient. MOFCOM made a series of bare assertions that sought to tie trends in Australian wine imports to domestic industry conditions.[1281] However, MOFCOM did not provide the evidentiary basis to support the necessary chain of causality, or sufficient reasons to support its findings.

1125. Pointing to general trends in aggregate price and volume over the POI, MOFCOM asserted that "the sales price [of domestic wine] did not rise to a due level" and therefore "the price of the dumped imported product inhibited that of domestic like products".[1282] While MOFCOM's failure to link the import dynamics to the claimed deterioration in domestic output breached MOFCOM's substantive obligations, it also constituted a breach of MOFCOM's public notice requirements, because MOFCOM failed to properly account for the reasons that supported its conclusion that there was a causal connection between Australian imports and injury. MOFCOM's salutary references to the factual basis for claiming causation (having not provided sources for its economic data, and simply adverting to "the evidence")[1283] were also insufficient for exporters to understand and critique MOFCOM's findings.

1126. MOFCOM failed to disclose almost any reasoning or factual matters related to the other "factors" that it purportedly considered and discounted as having caused injury to domestic industry. MOFCOM did not provide a statement of what evidence it used to assess the impact of these other factors, how MOFCOM proceeded with its analysis and why MOFCOM concluded that these non-attributable factors were not a cause of injury to the domestic industry, or even exhaustively list the factors under review (only listing a few broad examples, such the "impact of consumption patterns").[1284]

1127. MOFCOM also acted inconsistently with Article 12.2.2 by failing to address reasonable alternative explanations for domestic industry dynamics that had been raised by interested parties. Under Article 12.2.2, MOFCOM was required to disclose in sufficient detail

[1281] Anti-Dumping Final Determination (Exhibit AUS-2), p. 132.
[1282] Anti-Dumping Final Determination (Exhibit AUS-2), p. 121.
[1283] Anti-Dumping Final Determination (Exhibit AUS-2), pp. 113, 129, 132, 141 and 146.
[1284] Anti-Dumping Final Determination (Exhibit AUS-2), p. 137.

the "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* found that:

> The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[1285]

1128. During the course of investigations, Australian companies and the Australian Government raised several well-grounded explanations for the reduction in the price of Australian wine in China and the corresponding expansion of export volumes, including the progressive reduction in wine import tariffs under ChAFTA during the POI.[1286] MOFCOM discarded these alternative explanations merely on the basis that it reached a contrary conclusion.[1287] MOFCOM also failed to set out in sufficient detail any analysis of non-subject imports, apart from the cursory statement that there was "no evidence" that imports from other countries had caused material injury.[1288]

3. Conclusion

1129. For the foregoing reasons, MOFCOM acted inconsistently with the provisions of Articles 12.2 and 12.2.2 by failing to provide, in the public notice of the Final Determination, all relevant information on the matters of fact and law and reasons which led to the imposition of final measures, and the reasons for the acceptance and rejection of relevant arguments and claims made by the exporters and importers.

[1285] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186. (footnotes omitted)
[1286] Australian Government Submission on Initiation (Exhibit AUS-87), p. 8.
[1287] Anti-Dumping Final Determination (Exhibit AUS-2) pp. 137-147.
[1288] Anti-Dumping Final Determination (Exhibit AUS-2), p. 137.

VIII. CONCLUSION

1130. For the reasons set out in this submission, Australia respectfully requests that the Panel find that China's measures, as set out above, are inconsistent with China's obligations under the following agreements:

- Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.4, 5.8, 6.1, 6.1.1, 6.1.2, 6.2, 6.4, 6.5, 6.5.1, 6.6, 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II, 6.9, 6.10, 9.1, 9.2, 9.3, 12.1.1(iv), 12.2, 12.2.2 and 18.1 of the Anti-Dumping Agreement; and
- Article VI:2 of the GATT 1994.

1131. Australia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend to the DSB that it request China to bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.