

**Before the World Trade Organization**  
**Panel Proceedings**

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

**AUSTRALIA'S SECOND WRITTEN SUBMISSION**

**Business Confidential Information Redacted**

28 November 2022

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<i>Korea – Pneumatic Valves (Japan)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935

Short Title	Full Case Title and Citation
<i>Korea – Radionuclides</i>	Appellate Body Report, <i>Korea – Import Bans, and Testing and Certification Requirements for Radionuclides</i> , WT/DS495/AB/R and Add.1, adopted 26 April 2019, DSR 2019:VII, p. 3653
<i>Korea – Stainless Steel Bars</i>	Panel Report, <i>Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars</i> , WT/DS553/R and Add.1, circulated to WTO Members 30 November 2020, appealed on 22 January 2021
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico - Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Morocco – Definitive AD Measures on Exercise Books (Tunisia)</i>	Panel Report, <i>Morocco – Definitive Anti-Dumping Measures on School Exercise Books from Tunisia</i> , WT/DS578/R and Add.1, circulated to WTO Members 27 July 2021, appealed on 28 July 2021
<i>Morocco – Hot-Rolled Steel (Turkey)</i>	Panel Report, <i>Morocco – Anti-dumping Measures on Certain Hot-Rolled Steel from Turkey</i> , WT/DS513/R and Add.1, adopted 8 January 2020; appeal withdrawn by Morocco as reflected in Appellate Body Report WT/DS513/AB/R
<i>Pakistan – BOPP Film (UAE)</i>	Panel Report, <i>Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates</i> , WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed on 22 February 2021
<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R and Add.1, adopted 9 April 2018, DSR 2018:III, p. 1167
<i>Russia – Commercial Vehicles</i>	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R, DSR 2018:III, p. 1329
<i>Russia – Pigs (EU)</i>	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361

Short Title	Full Case Title and Citation
<i>Russia – Railway Equipment</i>	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/R and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
<i>Russia – Tariff Treatment</i>	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>Ukraine – Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/R, Add.1 and Corr.1, adopted 30 September 2019, as upheld by Appellate Body Report WT/DS493/AB/R, DSR 2019:X, p. 5339
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, p. 3833
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797

Short Title	Full Case Title and Citation
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, p. 2485
<i>US – Stainless Steel (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p. 2073
<i>US – Supercalendered Paper</i>	Appellate Body Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/AB/R and Add.1, adopted 5 March 2020
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

Short Title	Full Case Title and Citation
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

**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.
AFBG	Australian Food and Beverage Group Pty Ltd
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
Australia's response to Panel questions	Australia's Responses to Questions from the Panel Following the first substantive meeting
Australian Food and Beverage	Australian Food and Beverage Group Pty Ltd
BCI	Business Confidential Information
CADA	China Alcoholic Drinks Association
CADA's 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 Wines	Yantai Changyu Pioneer Wine Co Ltd
China's response to Panel questions	China's Responses to Questions from the Panel Following the first substantive meeting



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	Means 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 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
PUC	Products under consideration
POI	Means 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
PRR	Preliminary Ruling Request
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 Vinters 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-120 (BCI)	Product Mix Treasury Wines vs Casella Wines (Confidential version)	Product Mix Treasury Wines vs Casella Wines
AUS-121	<i>The Concise Oxford English Dictionary</i> , Tenth Edition, Judy Pearsall, ed. (Oxford University Press, 1999) definition of "should"	Oxford English Dictionary, definition of "should"
AUS-122	Swan Vintage, "Registration Form Response" (English translation)	Swan Vintage Registration Form

<b>Exhibit No.</b>	<b>Exhibit Name</b>	<b>Short Title</b>
AUS-123	Swan Vintage, "Sampling Questionnaire Response" 25 September 2020 (public version) (English Translation)	Swan Vintage Sampling Questionnaire Response

## I. INTRODUCTION

1. This is a dispute of unusually wide scope. From beginning to end, MOFCOM's investigation has involved errors, omissions, deficiencies, and unfair conduct that contravened many of the procedural and substantive obligations in the Anti-Dumping Agreement and the GATT 1994. As a consequence, this dispute traverses claims that, both individually and collectively, have practical and systemic importance.

2. Australia has set out a clear *prima facie* case that MOFCOM's conduct did not reflect the actions of an objective and unbiased investigating authority. Serious irregularities in the investigation culminated in the imposition of extremely high anti-dumping duties that defy logic and are contrary to the actual evidence that was before MOFCOM.

3. The submissions and evidence presented by China in this dispute to date have exacerbated, rather than addressed, Australia's concerns. China's explanations of the bases for MOFCOM's determinations of dumping, injury and causation were provided for the first time through China's submissions and responses to the Panel's questions. The depth and detail of these explanations highlight Australia's procedural fairness, due process, and transparency concerns. The substance of them affirms Australia's view that MOFCOM's conduct was inconsistent with the requirements of Articles 2, 3, 4, 5, and 6 of the Anti-Dumping Agreement.

4. China's responses to Australia's claims appear designed to distract and mislead. Through extensive jurisdictional objections and similar "threshold" complaints, China seeks to avoid engaging with Australia's claims on their merits. Elements of Australia's arguments have been ignored entirely, while detailed responses are provided to "straw" arguments that Australia has simply never made. The meritless jurisdictional objections have been agitated at great length. In almost every section of China's submissions, there are repeated and baseless assertions that Australia has "abandoned" certain claims or failed to make a *prima facie* case, coupled with an insistence that Australia is barred from making any further arguments on these points. While the number and volume of China's procedural objections mean that Australia's responses to them take up a significant part of this submission, the Panel should not infer from this that they have any merit.

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5. Australia has organised these reply submissions using the same thematic structure that was adopted in its first written submission, which China followed in its own first written submission. This has been done for ease of reference for the Panel and Secretariat. However, it is important to underscore that many of the claims are interrelated.

6. In particular, MOFCOM's contraventions of procedural, due process, and transparency obligations contributed to and exacerbated the errors it made in its determinations of dumping, injury and causation. For example, the purported lack of cooperation by sampled companies that MOFCOM relied upon to resort to facts available was engineered entirely by MOFCOM's own unreasonable refusal to grant extensions where good cause had been shown and its subsequent refusal to accept any information submitted after MOFCOM's arbitrary deadlines, even where there was ample time to review it. MOFCOM's complaint that it was unable to verify certain data was entirely a result of its own refusal to take up invitations from the sampled companies to conduct either a remote or in-person verification of the data directly from their respective accounting systems.

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

## **II. ISSUES CONCERNING THE CONDUCT OF THE DISPUTE**

### **A. CHINA IMPROPERLY ATTEMPTS TO NARROW THE PANEL'S TERMS OF REFERENCE**

8. China has gone to extraordinary lengths to restrict the Panel from considering Australia's claims, arguments, and evidence on their merits. Whether by erroneously alleging that Australia has abandoned certain claims or improperly expanded others, China's attempts to delimit the Panel's jurisdiction are without basis.

9. Australia provided a detailed and comprehensive reply to China's PRR. Australia stands upon those submissions.

10. Subsequent to its PRR, China has asserted further jurisdictional objections including: (i) that Australia's first written submission adduced arguments for claims that were not

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present in its panel request; (ii) that Australia's claims have "unreasonably" evolved; and (iii) that Australia's claims were insufficiently clear in its panel request.<sup>1</sup> To the extent that China raises new considerations, Australia addresses these below.

## 1. Legal framework

### (a) Standard pursuant to Article 6.2 of the DSU

11. Australia set out in detail the proper interpretation of Article 6.2 of the DSU in its response to China's PRR.<sup>2</sup> In summary, Article 6.2 sets out two requirements that a complaining party's panel request must satisfy: (i) identification of the specific measures at issue; and (ii) provision of a brief summary of the legal basis of the complaint.<sup>3</sup> These two elements form the "matter" referred to the DSB under Article 7.1 of the DSU and establish the boundaries of a panel's jurisdiction.<sup>4</sup>

12. To meet the Article 6.2 requirements, a complainant must have "plainly connected" the measure at issue with the obligation allegedly infringed in a manner sufficient to present the problem clearly.<sup>5</sup> This allows the respondent to understand the nature of the allegation against it and to "begin" preparing a defence.<sup>6</sup> Explanations of how or why a violation occurred are not required.<sup>7</sup> Multiple panels, and the Appellate Body, have confirmed this standard.<sup>8</sup>

13. Application of this standard requires a case-by-case assessment,<sup>9</sup> considering the narrative of the panel request as a whole, the obligation infringed, and the nature of the

<sup>1</sup> China's first written submission, paras. 29, 45, 135-159.

<sup>2</sup> Australia's response to China's PRR, paras. 28-35; 36-41.

<sup>3</sup> See Australia's response to China's PRR, para. 26 and footnotes thereto; Appellate Body Reports, *US – Carbon Steel*, para. 125; *Russia – Railway Equipment*, para. 5.26, *China – Raw Materials*, para. 219; *Korea – Dairy*, para. 120.

<sup>4</sup> Australia does not understand China to argue that the measures at issue were insufficiently clear. Australia thus proceeds on the basis that China is challenging only element (ii). Australia further notes that, in this respect, Australia agrees with China's first 'ground' that a complainant's panel request delimits the panel's terms of reference: see China's first written submission, para. 139.

<sup>5</sup> Appellate Body Reports, *Korea – Dairy*, para. 124; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14-5.16 (quoting Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.5).

<sup>6</sup> Australia's response to China's PRR, paras. 7, 12, 137, 142, 161, 190, 218, 232 and footnotes thereto; particularly noting Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.14-5.16 ("notifying [parties] of the nature of the complainant's case"). See also China first written submission, paras. 89-90.

<sup>7</sup> See Australia's response to China's PRR, paras. 18-23.

<sup>8</sup> See Australia's response to China's PRR, paras. 27-34.

<sup>9</sup> Australia and China agree that compliance with Article 6.2 of the DSU must be determined on a case-by-case basis: Australia's response to China's PRR, para. 34; China's first written submission, paras. 962, 1681.

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measure at issue.<sup>10</sup> Where the connection between measure and obligation is not clear from these contextual considerations, more may be required to present the problem clearly.<sup>11</sup>

(b) China's interpretation of Article 6.2 is incorrect

14. In response, China continues to argue that the Panel should adopt not only a different standard to that set out by Australia and supported by prior panels and the Appellate Body, but one that the Appellate Body has *expressly* found to be incorrect.<sup>12</sup>

15. China's proposition is best understood as an obligation to explain "how or why" each obligation was infringed in a panel request, including elaborating on specific instances of infringement. China further asserts that a complainant's panel request should allow for a "full examination" of the complainant's case.<sup>13</sup> The alternative standard that China proposes improperly adds to the obligations on Members set forth in Article 6.2 of the DSU, and departs from the ordinary meaning of its text, object and purpose and its confirmed interpretation in prior panel and Appellate Body reports.

16. Australia's response to China's PRR set out the reasons for this in detail and Australia will not repeat that analysis here. However, Australia is compelled to correct the misleading approach that China has adopted in its first written submission and at the first substantive meeting with the Panel with respect to the interpretation and application of Article 6.2 in previous Appellate Body and panel reports.

17. First, Australia reiterates that the Appellate Body in *Korea – Pneumatic Valves* expressly rejected China's proposed "how or why" obligation as implying any new standard.<sup>14</sup> The Appellate Body correctly identified that reading in such an obligation would mandate "a level of detail going beyond setting out the claim underlying the complaint" and require that

<sup>10</sup> See Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.5-5.9 and footnotes thereto. In its first written submission, China suggests Australia's position would divorce a panel request from its factual context. However, Australia contends that this contextual analysis accounts for precisely the facts of a specific dispute by considering the nature of measure and provision at issue: see China's first written submission, para. 59, Australia's response to China's PRR, para. 52.

<sup>11</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.25, 5.34, 5.69, 5.70 and 5.78; Australia's response to China's PRR, para. 13. Australia notes that China improperly distinguishes between ordinary provisions of the Anti-Dumping Agreement and a 'special class' of obligations that require 'greater degree of clarity and specification'. As each claim's compliance is assessed on its merits and on a case-by-case basis, such a 'special class' is nonsensical: China's first written submission, para. 85.

<sup>12</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.7, 5.33.

<sup>13</sup> China's first written submission, paras. 66-67, 90, 157, see also para. 1687; China's PRR, paras. 20-21, 26, 92, 95, and 107 (citing Panel Report, *Korea – Pneumatic Valves*).

<sup>14</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.7, 5.33.

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a complainant adduce arguments properly included in a written submission.<sup>15</sup> The Appellate Body also clearly explained that any reference to the phrase "how or why" should not imply a standard new or different to the language of Article 6.2, and corrected the panel's overreliance on this language.<sup>16</sup> It is sufficient that the respondent is made aware of the "nature" of the complainant's case.<sup>17</sup>

18. Second, China cites three disputes in support of its proposed standard, each from more than a decade prior to the Appellate Body's clarification in *Korea – Pneumatic Valves*.<sup>18</sup> As discussed below, none of the disputes that China cites in support of its interpretation support its position. It is Australia's view that China has not read beyond the appearance of the phrase "how or why" in these reports and has failed to consider how the Appellate Body has actually assessed compliance with Article 6.2.

19. In the first, *China – Raw Materials*, a third party participant and the joint appellants used the terminology "how or why" or "how and why".<sup>19</sup> However, the Appellate Body itself did not consider whether a complainant must explain "how or why" the respondent allegedly infringed each obligation. In implementing Article 6.2, it assessed instead whether the complainant had *clearly connected* the specific measures cited to the provisions cited in its panel request, particularly in light of the unclear references to measures at issue.<sup>20</sup> In the current dispute, it is this connection that Australia contends was clear on the face of the panel request.

20. In the second, *EC – Selected Customs Measures*, the phrase "how or why" did arise. Once again, the Appellate Body never considered whether the complainant explained "how" and "why" each obligation was allegedly infringed in its analysis of compliance with Article 6.2. Instead, the Appellate Body considered whether the complainant had made its claim "clearly", based on narrative, context and wording.<sup>21</sup> It further considered whether the respondent had

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<sup>15</sup> Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.31.

<sup>16</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, paras. 5.7, 5.12, and 5.33; see further *Russia – Railway Equipment*, paras. 5.26-5.28; Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>17</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.90-93.

<sup>18</sup> See China's opening statement at the first meeting of the Panel, para. 12.

<sup>19</sup> The Appellate Body's reasoning contains a single footnote reference to Appellate Body Report, *EC – Selected Customs Measures*, but does not in any way engage with a "how or why" standard in its analysis: Appellate Body Report, *China – Raw Materials*, para. 226.

<sup>20</sup> Appellate Body Report, *China – Raw Materials*, para. 226-230.

<sup>21</sup> See Appellate Body Report, *EC – Selected Customs Matters*, paras. 141, 167. See for application paras. 168-172.



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been made aware of the "nature" of the case, which is precisely the language used in *Korea – Pneumatic Valves* and which, according to China, should not be accepted.<sup>22</sup> Similarly, that dispute concerned the complainant's identification of complex and diverse measures, a matter not at issue in the current dispute.

21. Finally, China cites *US – Countervailing Measures (China)*. The Appellate Body in that dispute found that whether a panel request is "sufficient to present the problem clearly" should be analysed holistically, on a case-by-case basis.<sup>23</sup> Although that panel used the term "how or why", citing *EC – Selected Customs Matters*, it qualified this phrase with the terms "succinct" and "brief summary" and ultimately determined compliance on the basis of the text of Article 6.2 — that is, *not* whether a complainant adequately explained "how or why" each obligation was allegedly infringed, but whether the panel request was, as a whole, "sufficient to present the problem clearly".<sup>24</sup>

22. China's attempt to read in an additional requirement into Article 6.2 of the DSU — that a complainant explain "how and why" each obligation was infringed in its panel request — is not supported by the text nor how the Appellate Body has applied Article 6.2 in practice. As such, the Panel should reject China's interpretation.

(c) Role of Article 6.2 within the dispute settlement framework

23. Despite China's assertions to the contrary, a panel request alone is not intended to enable or facilitate the preparation of a "full" defence.<sup>25</sup> It is obviously incapable of this function, as it does not include the arguments and evidence that the complaining Member adduces to establish a *prima facie* case in relation to each of its claims. Instead, a panel request

<sup>22</sup> See Appellate Body Report, *EC – Selected Customs Matters*, paras. 141, 167; China's first written submission, paras. 92-99.

<sup>23</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.9, 4.15-4.27.

<sup>24</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.9, 4.15-4.27.

<sup>25</sup> For China's interpretation of this obligation, see e.g. China's first written submission, para. 140 ("the due process rights of the respondent, to prepare its defence upon the receipt of the complainant's panel request..."); fn. 92 ("[China's] ability to prepare a proper defence on receipt of the panel request is 'fundamental' to ensuring a fair and orderly conduct of dispute settlement proceedings."); para. 90 (in response to Australia's position that a panel request is not intended to allow a full defence: "[a]t the outset, China believes that it is improper for Australia to openly attempt to dilute China's due process rights as a respondent").

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informs the responding Member of the nature of the case and allows it to "begin" preparing a defence.<sup>26</sup>

24. In arguing that Australia "hollows out" due process protections,<sup>27</sup> China conflates the purpose of the panel request with the complainant's subsequent submissions. Pursuant to Article 12, Annex 3 and the Working Procedures, Australia adduces argumentation to demonstrate a *prima facie* case in oral and written submissions to which China has full rights to respond.<sup>28</sup>

*i. Article 6.2 does not require a complainant to disclose arguments in its panel request*

25. Australia and China agree that a complainant is not obliged to include its arguments in its panel request.<sup>29</sup> As the Appellate Body has explained, "Article 6.2 demands only 'a *brief summary*' of the legal basis of the complaint and not the arguments in support of the complaint".<sup>30</sup> This first component – a brief summary of the legal basis of the complaint – is the complainant's "claim".<sup>31</sup> An argument, by contrast, is an explanation of the way in which an obligation is said to have been infringed; including, for example, with reference to an instance or evidence of infringement,<sup>32</sup> or a particular element of noncompliance, such as failure to consider a specific factor.<sup>33</sup> Such arguments are set out and clarified in written submissions and panel meetings.<sup>34</sup> In this sense, Australia agrees with China that a respondent

<sup>26</sup> Appellate Body Report, *US – Carbon Steel*, para. 126; Australia's response to China's PRR, para. 7; see generally Working Procedures (Rev 1), 19 April 2022, para. 3.

<sup>27</sup> China's opening statement at the first meeting of the Panel, para. 10.

<sup>28</sup> Working Procedures, (Rev 1), 19 April 2022, paras. 3, 14-17; Anti-Dumping Agreement, Article 17.5; DSU, Article 12.

<sup>29</sup> China's first written submission, paras. 81 and 134-145. See also Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.26-4.27; *Korea – Pneumatic Valves*, paras. 5.93 – 5.94; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139.

<sup>30</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.6, 5.74 and 7.93; see Australia's response to China's PRR, paras. 32, 54 and footnotes thereto.

<sup>31</sup> See Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.74.; Australia's response to China's PRR, para. 32.

<sup>32</sup> Consequently, multiple arguments may describe a single infringed obligation: *Korea – Pneumatic Valves (Japan)*, paras. 5.93-5.94; *US – Countervailing Measures (China)*, para. 4.15 ("it is the measures at issue that are to be 'plainly connected' to the provision that is alleged to be infringed, 'and not the instances' in which the investigating authorities 'allegedly acted inconsistently with that provision'"); Australia's response to China's PRR, para. 118 and footnotes thereto. (emphasis added)

<sup>33</sup> In this regard, Australia notes that Japan is correct to state that "[...] detailed specific aspects are not the 'obligations' themselves, but rather requirements or elements thereof. A panel request needs to identify only 'claims' underlying the complaint as the 'legal basis of the complaint', but need not include detailed 'arguments'. And the descriptions of requirements and/or elements at issue can be considered as 'arguments', rather than 'claims'." Japan's response to Panel question No. 1 following the third-party session, para. 9. (footnotes omitted)

<sup>34</sup> See generally Australia's response to China's PRR, paras. 9, 17 and 32; Panel Report, *Australia – Apples*, para. 7.926 (citing Appellate Body Report, *EC – Bananas III*, para. 141).

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should not be "left to wonder" at the "precise contours of the complainant's case".<sup>35</sup> However, detailed arguments are made clear in *submissions*. In fact, the very dispute that China cites in support of its proposition concerned a respondent's ability to understand details of the claims against it in written submissions, *not* the panel request.<sup>36</sup>

26. China's first written submission suggests to Australia that China incorrectly understands the distinction between a claim and an argument.<sup>37</sup> China continues to submit that a panel request must adduce evidence, detail and reasoning regarding each different element of a claim in its panel request.<sup>38</sup> This would go far beyond a "brief summary of the legal basis" i.e. the claim, and would instead extend into evidence and reasons adduced in support of each claim, i.e. arguments.<sup>39</sup> This is unsurprising given China's erroneous insistence that a complainant must explain in its panel request "how and why" each obligation is allegedly infringed.

27. There is significant tension between China's position and the Appellate Body reports that it cites in support. For example, when convenient, China concedes that there is a distinction between a "claim" and an "instance" of alleged infringement.<sup>40</sup> China further notes, correctly, that where the Appellate Body has considered that elements of a particular claim, along with "reasons why" a provision is allegedly violated, both constitute *arguments*.<sup>41</sup> However, despite China's purported endorsement of this interpretation, it continues to assert that Australia must put forward such arguments in its panel request. China's position in this regard is untenable; it cannot endorse the Appellate Body's clarifications and in practice depart from those clarifications at its own convenience.

<sup>35</sup> China's first written submission, para. 89.

<sup>36</sup> Appellate Body Report, *Chile – Price Band System*, para. 164. In *Chile – Price Band System*, the concern was whether Argentina had made a claim under the second sentence of Article II:1(b) implicitly in its arguments under Article 4.2 of the Agreement on Agriculture. Australia agrees with the panel's determination that, while Argentina's request for the establishment of a panel was phrased broadly enough to include a claim under both sentences of Article II:1(b) of the GATT 1994, it needed to make both claims "explicitly" in the WTO dispute settlement process.

<sup>37</sup> China's first written submission, paras. 143-151.

<sup>38</sup> See e.g. China's first written submission, fn 74: "In China's view, identifying the specific instances of breach of the provision at issue is essential in 'present[ing] the [legal] problem clearly'; see also paras. 65-67, 101-106, 110, 129, and fn. 2070.

<sup>39</sup> See Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.33, 5.74, 5.77, 5.93, and 5.125; see also Australia's response to China's PRR, paras. 32, 54, 123, 192, 201, 210, 219, 235, and 245.

<sup>40</sup> China's first written submission, para. 2456.

<sup>41</sup> China's first written submission, paras. 147-148. For completeness, Australia observes that paragraph 115 of China's first written submission = states that the issue of factors or indices as arguments was not raised on appeal in *Korea – Pneumatic Valves*. This is not correct; see for example Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.108.

*ii. The development of the complainant's case*

28. The parties agree that there are limitations on arguments a complainant can bring throughout the dispute settlement process. In particular, arguments and evidence presented in submissions should reasonably develop from the claims set forth in the panel request. However, without certain flexibility a case could not advance and responses to questions, and subsequent submissions – including this one – would have no value.<sup>42</sup> It is therefore open to a Member to reasonably prioritise the emphasis of its claims and allow its argumentation to develop with the dispute.<sup>43</sup>

**2. Australia complied with the legal framework**

29. Australia plainly connected each measure to the obligation allegedly infringed in a manner sufficient to present the problem clearly, considering the measures and provisions at issue.<sup>44</sup> It therefore complied with the legal framework under Article 6.2 of the DSU.

30. Further to its objections in its PRR, to which Australia has replied in detail, China purports to raise an additional "five grounds" that it alleges demonstrate Australia's noncompliance with Article 6.2.<sup>45</sup> These "grounds" are not only unfounded, they are also not distinct issues. Rather, they are a muddle of overlapping ideas that reflect China's misunderstanding of the legal obligation under Article 6.2.

31. Australia addresses China's overlapping allegations below, demonstrating where China disregards the relevant context. Australia addresses allegations relevant to specific claims in Annex A.

(a) Australia adduced no new claims in its first written submission

32. China's first "ground" alleges that Australia adduced claims in its first written submission that were not present in its panel request.<sup>46</sup> This allegation closely mirrors China's

<sup>42</sup> Australia noted this same logical conclusion in its response to China's PRR regarding reasonable evolution from consultations to panel request: Australia's response to China's PRR, paras. 253-254 and footnotes thereto.

<sup>43</sup> In the current dispute, for example, Australia did exactly this in relation to its claim under Article 2.3 upon establishing that MOFCOM had not utilised the method for constructing export price under Article 2.3.

<sup>44</sup> Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.6.

<sup>45</sup> China's first written submission, paras. 138-159.

<sup>46</sup> China's first written submission, para. 141.

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third and fourth "grounds" that Australia either: (i) altered the "legal basis" for its claims;<sup>47</sup> or (ii) did not establish in its panel request a legal basis for certain claims in its first written submission.<sup>48</sup> These assertions are incorrect.

33. Australia reiterates that the "legal basis" of the complaint is, in the words of the Appellate Body, "the claims underlying this complaint and not the arguments in support thereof."<sup>49</sup> Accordingly, Australia addresses China's assertions in relation to an alleged failure to provide a "legal basis" and "claim" together.

34. At no point does Australia adduce a new claim in its first written submission nor alter the "legal basis" of the complaint as set out in its panel request.<sup>50</sup> Australia has, however, brought forward *arguments* to demonstrate its *prima facie* case in its first written submission, as it is obliged to do. China consistently mischaracterises these arguments as "new claims".<sup>51</sup> In particular, it incorrectly assesses instances of infringement or elements of an obligation to be claims when Australia has demonstrated that they are correctly considered *arguments*.<sup>52</sup>

35. China's objection to "*inter alia*"<sup>53</sup> is similarly misplaced. Australia notes that the term "*inter alia*" in its panel request, to which China objects, indicates an intention to bring further examples, evidence and arguments in support of its claim.<sup>54</sup> It is open to a claimant to allow its case to reasonably develop and to refine the emphasis of its arguments, including those arguments that were not set out in its panel request. As China does acknowledge, "it is clear which provisions of the Anti-Dumping Agreement are being claimed as having been violated".<sup>55</sup> China has had a full opportunity to respond to Australia's arguments in its written submissions and at the first substantive meeting with the Panel.

36. China incorrectly asserts that an argument is a "new claim" on numerous occasions. In Annex A, Australia sets out a clear response to each such objection.

<sup>47</sup> China's first written submission, para. 153.

<sup>48</sup> See China's first written submission, para. 141, 152.

<sup>49</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, paras. 5.6, 5.74, 5.108 ("the legal basis of the complaint, that is, its claim [...]"); see also *Russia – Railway Equipment*, para. 5.27.

<sup>50</sup> C.f. China's opening statement at the first meeting with the Panel, para. 2.

<sup>51</sup> China first written submission, paras. 135-137, 1268-1269, 1532-1538, 1597, 1697-1702.

<sup>52</sup> See above, section II.A.1(c).

<sup>53</sup> See China's first written submission, para. 975.

<sup>54</sup> See above, para. 25.

<sup>55</sup> China's first written submission, para. 519.

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(b) Australia's case has reasonably developed from the claims  
set out in its panel request

37. China's second "ground" alleges that certain arguments in Australia's first written submission did not reasonably evolve from its panel request.<sup>56</sup> This objection overlaps with China's third and fourth "grounds", which assert that Australia has either changed the legal basis for certain claims or never adduced a legal ground for other claims, and with China's assertion that Australia's arguments are disconnected from its claims.<sup>57</sup>

38. China's objections are unfounded. Each argument in Australia's first written submission has reasonably, and permissibly, developed from its panel request. The legal bases of Australia's complaints have remained unchanged. Australia's case has maintained the same "nature".

39. In fact, China's cited panel reports demonstrate the clear distinction between Australia's conduct, which is permissible, and conduct that would constitute changing the legal basis of the problem, which is impermissible. In both China's cited reports, *EU – Energy Package* and *US – Carbon Steel (India)*, the complainant completely altered the party who was allegedly harmed by a measure or made a claim stemming from entirely different factual or legal circumstances.<sup>58</sup> This was sufficient to change the legal basis of the complaint and constituted unreasonable evolution. The circumstances in these disputes are not comparable to those before the Panel in the current matter. Australia has maintained that the same provisions, measures, parties, and conduct are at issue throughout this dispute. At no time did Australia alter the articles or facts at issue, and at no time did Australia change the parties affected; "the problem" that Australia "seek[s] to resolve through recourse to dispute settlement" is unchanged.<sup>59</sup> The comparison to the cited reports only serves to confirm that

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<sup>56</sup> China's first written submission, para. 142.

<sup>57</sup> China's first written submission, para. 149.

<sup>58</sup> Panel Reports, *EU – Energy Package*, para. 7.103; *US – Carbon Steel (India)*, 1.29-1.38. In the former dispute, Russia made the decision to completely alter who was purportedly affected by a measure. In the latter, in India first asserted that the US failed to initiate or investigate effects of new subsidies then entirely changed its claim to state that there had been an initiation, but it lacked evidence.

<sup>59</sup> C.f. China's first written submission, para. 154; Panel report, *EU – Energy Package*, para. 7.98.

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Australia's claims maintain the same fundamental nature.<sup>60</sup> China's allegation of an "open-ended and essentially limitless challenge" is hyperbolic, incorrect, and unsubstantiated.<sup>61</sup>

40. China incorrectly asserts that Australia's claims have unreasonably evolved on numerous occasions. In ANNEX A, Australia sets out a clear response to each such objection.

(c) Australia's claims are clear and specific

41. China's fifth "ground" alleges that Australia's claims were unclear or insufficiently specific.<sup>62</sup> This assertion is also implicit in China's third "ground", detailed above.<sup>63</sup> China's allegations in this regard misunderstand both the purpose of the panel request within the dispute settlement process, and the appropriate standard under Article 6.2 of the DSU.

42. Australia submits that it plainly connected each measure to the obligation allegedly infringed in a manner sufficient to present the problem clearly, taking into account the measures and provisions at issue.<sup>64</sup> Australia observes in this regard that the Appellate Body has held that while the identification of the treaty provision claimed to have been violated is "always necessary",<sup>65</sup> a reference to or summarisation of an article of a covered agreement – what China refers to as "paraphrasing" – can, in context, be sufficient to present the legal problem clearly.<sup>66</sup>

43. Australia referenced or paraphrased a provision only where this was sufficient to present the problem clearly.<sup>67</sup> In this respect, Australia's panel request closely matches the panel request in contention in *Korea – Pneumatic Valves*, which the Appellate Body ruled compliant with Article 6.2. Japan's panel request in that dispute outlined a narrative in which Korea's investigating authority incorrectly defined the domestic industry, and Japan cited or

<sup>60</sup> See Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.37-7.38.

<sup>61</sup> China's first written submission, para. 80.

<sup>62</sup> China's first written submission, para. 157.

<sup>63</sup> See above, para. 37.

<sup>64</sup> Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.6-5.8.

<sup>65</sup> Australia's response to China's PRR, para. 30 and footnotes thereto. China points to Appellate Body jurisprudence suggesting that a panel cannot make a finding on a provision that was not cited in a panel request. Australia agrees with that position: China's first written submission, para. 140 (citing Appellate Body Report, *Korea – Radionuclides*, para. 5.94-5.130).

<sup>66</sup> See particularly Australia's response to China's PRR, paras. 13, 16, 32, and 41 and footnotes thereto; Canada's third-party submission on the preliminary ruling request, para. 7; European Union's third-party submission on the preliminary ruling request, paras. 14-15; Japan's response to Panel question No. 1 following the third-party session, para. 8; c.f. China's opening statement at the first meeting with the Panel, para. 11-13; China's first written submission, section III.A.

<sup>67</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.9.

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paraphrased the specific provisions at issue.<sup>68</sup> This narrative and citation in combination provided context that made the nature of the claim clear to the respondent. The panel further noted that specific provisions could be well-delineated, "such that Japan's identification of these provisions in the narrative of the panel request would seem to plainly connect the measure at issue with the provisions of the covered agreement alleged to have been breached".<sup>69</sup> Australia submits that, similarly, where it paraphrased or referenced a particular provision, the narrative context and the nature of the provisions at issue rendered this sufficient to present the problem clearly. China was able to commence preparing its defence on this basis.

44. Where China alleges lack of clarity in relation to a specific claim or argument, Australia addresses this at ANNEX A of this submission.

(d) Conclusion

45. Australia's panel request met the requirements pursuant to Article 6.2 of the DSU, as properly interpreted and applied. For each claim, Australia: (i) identified the obligations in the Anti-Dumping Agreement that it alleged to be infringed, and (ii) provided a brief summary of the legal basis of the complaint that was sufficient to present the problem clearly.<sup>70</sup> Each claim in its panel request falls within the Panel's terms of reference pursuant to Article 7.1 of the DSU, China has suffered no due process impairment.<sup>71</sup>

**B. AUSTRALIA HAS MADE OUT A PRIMA FACIE CASE WITH RESPECT TO ITS CLAIMS**

**1. Legal framework**

46. It is not disputed that Australia, as the complainant, bears the burden of establishing a *prima facie* case that the measure at issue is inconsistent with the provisions of the Anti-Dumping Agreement which it claims have been infringed.

<sup>68</sup> See Australia's response to China's PRR, para. 13 and footnotes thereto.

<sup>69</sup> China incorrectly suggests that assessing the clarity of a particular provision was *obiter dicta*. This is manifestly incorrect: China's first written submission, para. 69; Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.27, 5.34; Australia's response to China's PRR, paras. 13, 198 and footnotes thereto.

<sup>70</sup> See Appellate Body Reports, *US – Carbon Steel*, para. 125; *Russia – Railway Equipment*, paras. 5.26-5.28; *China – Raw Materials*, para. 219-220. See also Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>71</sup> C.f. China's opening statement at the first meeting with the Panel, para. 2; see above section II.A.1(c).



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47. A complaining party will satisfy this burden by putting forward adequate legal arguments and evidence to establish a *prima facie* case. The nature and scope of arguments and evidence required will "necessarily vary from measure to measure, provision to provision, and case to case".<sup>72</sup> Notwithstanding China's assertions to the contrary, no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party.<sup>73</sup> This is a matter for the panel to determine.<sup>74</sup>

48. Australia agrees with the Appellate Body that "a panel is not required to make an explicit ruling that a complaining party has established a *prima facie* case of inconsistency before examining the responding party's defence and evidence".<sup>75</sup> Australia therefore submits that, where China has alleged a failure to make out a *prima facie* case, the Panel should consider China's arguments and evidence, as well as the further evidence that the Panel itself has requested, concurrently with Australia's arguments and evidence.

49. China correctly notes that paragraph 3(1) of the Panel's Working Procedures requires each party to "submit a written submission in which it presents the facts of the case and its arguments".<sup>76</sup> However, this does not override the prerogative of Members to reasonably develop their arguments as the issues develop.<sup>77</sup> Nor does it render inutile the arguments and evidence the complaining party submits in oral arguments, written responses to Panel questions, or the second written submission. Without this flexibility a case could not advance, and responses to questions, and subsequent submissions – such as this one – would have no value. Australia therefore submits that a complainant's arguments can reasonably develop following its first written submission.<sup>78</sup>

<sup>72</sup> See Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134 (citing Appellate Body Report, *EC – Hormones*, para. 104); *US – Wool Shirts and Blouses*, para. 335; see Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>73</sup> See e.g. Appellate Body report, *Canada – Aircraft*, para. 192 ("no Member is free to determine for itself whether a *prima facie* case or defence has been established by the other party.")

<sup>74</sup> Australia notes that the party asserting a fact is responsible for providing proof of that fact and China must therefore prove its own defence. See Appellate Body Reports, *Japan – Apples*, para. 157; *India – Patents (US)*, para. 74; *Canada – Wheat Exports and Grain Imports*, para. 191.

<sup>75</sup> Appellate Body Report, *Korea – Dairy*, para. 145, concerning the DSU and the *Agreement on Safeguards*.

<sup>76</sup> China's first written submission, para. 940; Working Procedures (Rev 1), 19 April 2022, para. 3(1).

<sup>77</sup> See above, section II.A.1(c)ii.

<sup>78</sup> Appellate Body Report, *EC – Bananas III*, para. 145.

## 2. Australia complied with the legal framework

50. Australia has established a *prima facie* case and China has failed to rebut that case. Australia has tendered sufficient evidence in its first written submission to demonstrate that its claims are well-founded, including the more than 100 exhibits on the record. Australia sets out details of its compliance with this burden where relevant throughout this submission.

### C. CHINA'S ALLEGATIONS OF ABANDONED CLAIMS

51. In its first written submission, China argues that Australia had abandoned several claims because they were mentioned in the panel request but, in China's view, not raised in Australia's first written submission.<sup>79</sup> China further argued that, as Australia has exercised its "prerogative" to abandon the claims, they cannot be resurrected later in the proceedings and that the Panel is now precluded from examining or making a finding on these claims.<sup>80</sup> For several of the claims China alleged were abandoned, arguments were presented in Australia's first written submissions. These spurious allegations of abandonment are addressed in the relevant sections below.<sup>81</sup>

52. For the balance, those objections were premature at the time they were made. There is no requirement for arguments on all claims to be set out in a complainant's first written submission.<sup>82</sup> But Australia confirms now that it will not be pursuing claims under Articles 2.3,<sup>83</sup> 2.4.2,<sup>84</sup> 6.1.3,<sup>85</sup> and 6.13, and independent claims under Article 12.1 and 12.1.1(iii).<sup>86</sup> However, while not pressing for findings that these Articles have been independently contravened, Australia reserves its right to refer to these Articles as context for establishing the contraventions of other obligations.

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<sup>79</sup> China's first written submission, para. 160.

<sup>80</sup> China's first written submission, para. 161.

<sup>81</sup> See sections VII.E.1, VII.D.2; paras. 368-369.

<sup>82</sup> Appellate Body Report, *EC – Bananas III*, para 145.

<sup>83</sup> Australia's response to China's PRR, paras. 155, 248.

<sup>84</sup> Australia's response to China's PRR, para. 180.

<sup>85</sup> Australia's response to China's PRR, para. 90.

<sup>86</sup> Australia's response to China's PRR, Australia, para. 237.

#### **D. JUDICIAL ECONOMY**

53. Australia requests that the Panel exercise its discretion to make findings with respect to each claim set out in its written submissions.

54. Australia's claims intersect and interact, but it is precisely these interactions that demonstrate the absurdity of China's measures. To ensure a full and objective examination of the dispute at hand, Australia requests that the Panel consider and rule on each of its claims on their merits.

55. These rulings will enable the Dispute Settlement Body to make sufficiently precise recommendations and rulings pursuant to Article 11 of the DSU and will facilitate prompt compliance with the Agreements. As such, rulings on each of the claims are necessary to ensure the effective and complete resolution of this dispute.<sup>87</sup>

56. Where Australia considers that a particular ruling is not required for the effective and complete resolution of the dispute, it notes this in the appropriate subsection of this submission.

#### **E. CHINA'S RELIANCE ON DOMESTIC CONFIDENTIALITY OBLIGATIONS TO WITHHOLD INFORMATION**

57. China's answers to the Panel questions following the first substantive meeting contain multiple instances where China declines to provide information to the Panel that would otherwise assist in the resolution of the dispute, because China says that it is bound not to provide that information because of Chinese domestic confidentiality assurances.

58. These responses create difficulties for the Panel's work. Panels are reliant on the cooperation of the parties to ensure that the information essential to the discharge of their functions is made available to them. Where a party declines to provide information, that refusal is itself a fact the Panel should have regard to in assessing the evidence before it.

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<sup>87</sup> See Appellate Body Reports, *Argentina – Import Measures*, para. 5.190; *US – Gambling*, para. 344.; the former being cited and applied Panel Reports, *Russia – Tariff Treatment*, para 7.65; *Ukraine – Passenger Cars*, para 7.20; *Russia – Pigs (EU)*, para 7.1404; Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 257; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.87, 5.92–5.93.

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59. In respect of each of questions 6, 14, 17, 25, 26; 28, 49, 51 and 77, the Panel requested that China provide documents or information provided to MOFCOM in the course of MOFCOM's anti-dumping investigation. In each case, it is information that formed part of MOFCOM's investigation record. In its written response to these questions China declined to provide the information because it considers that MOFCOM is constrained by confidentiality obligations owed to the relevant entities under Chinese domestic law that arose as a result of MOFCOM's dealings with those entities.<sup>88</sup>

60. Australia recalls that Article 17.5(ii) of the Anti-Dumping Agreement requires that the Panel examine this matter in light of the facts made available to the investigating authority. Article 17.6(i) requires that the Panel assess the facts of the matter by determining whether the investigating authorities' establishment of the facts was proper, and whether the evaluation of those facts was unbiased and objective. The necessary consequence of these requirements is that the Panel should be provided with all relevant information and documents that formed part of the record of the investigating authority. Without such information and documents the Panel is impeded in conducting the assessment required by Article 17.

61. Australia further recalls that where the Panel has made a request for information, China has a "duty and an obligation"<sup>89</sup> under Article 13.1 of the DSU to respond promptly and fully to such a request. It is apparent that MOFCOM holds the requested documents and information. China is under an obligation to take such steps as are necessary for it to respond promptly and fully to the Panel's request. If it is the case that domestic Chinese law, and / or promises made by MOFCOM during the investigation, have created a situation where China faces some constraint in providing the requested information to the Panel, then China should have taken such steps as were necessary to remove that constraint.

62. At least in some instances, it is not apparent that China has taken *any* steps to seek the consent of the entities to provide the requested information to the Panel.<sup>90</sup>

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<sup>88</sup> China's response to Panel questions No. 6, para. 25; No. 14, para. 49; No. 17, para. 58; No. 25, paras. 112, 115; No. 25, para. 165; No. 49, para. 305; No. 51, para. 324 to 329; and No. 77, para. 396.

<sup>89</sup> Appellate Body Report, *US – Wheat Gluten*, para. 171 (citing Appellate Body, *Canada Aircraft*, para 187).

<sup>90</sup> China's response to Panel question No. 3, para. 25; No. 14, para. 49; No. 17, para. 58; No. 49, para. 305; No. 51, para. 324 to 329; and No. 77, para. 396.

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63. Australia notes that in some of China's responses to the Panel's questions, China submits that, as the information was submitted to MOFCOM by exporters based in Australia, Australia should (i) approach the exporters to seek their consent for MOFCOM to disclose the information, and (ii) communicate that response to China.<sup>91</sup>

64. It is entirely unreasonable for China to expect Australia to act as an intermediary between MOFCOM and private companies that MOFCOM investigated in the context of the anti-dumping investigation. This is particularly inappropriate for the purpose of resolving an alleged impasse that is said to arise under Chinese domestic law as a result of MOFCOM's interactions with these private companies and concerning documents which the Government of Australia has not seen. Australia brings this proceeding as a sovereign nation, not as the representative or agent of those (or any other) private companies. Australia does not know the legal nature, scope or content of the assurance or the Chinese domestic law obligation said to arise from it, or what Chinese domestic law requires from the companies to release MOFCOM from the obligation. If China considers that it needs to communicate with those companies in order to provide necessary information to the Panel, then it should do so directly (and should already have done so).

65. It is common in panel proceedings to disclose confidential information on the investigation record of an investigating authority under the protection of confidentiality procedures. Such procedures have been established in this proceeding. These procedures will protect the confidentiality of all business confidential information, both within and outside the proceeding. Australia has repeatedly offered to engage in urgent discussions with China about additional procedures for the management of business confidential information, if China considers them necessary, to facilitate the provision of the requested information. However, Australia has received no response from China.

66. If China maintains its position of refusing to provide documents requested by the Panel, then that choice has implications for how the Panel assesses the material before it. Australia recalls that, as the Appellate Body observed in *US – Wheat Gluten*,<sup>92</sup> "[w]here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal

<sup>91</sup> China's response to Panel question No. 3, para 25; No. 14, para 49; and No. 77, para 396.

<sup>92</sup> Appellate Body Report, *US – Wheat Gluten*, para. 174.

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will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn."

## **F. TRANSLATIONS**

67. China submitted alternative translations of several documents that Australia exhibited. Unless specifically indicated otherwise, Australia submits that its own translation is correct and relies upon these translations in its submissions.

68. Australia further notes that China has identified only a small handful of translation differences that it considers material to the current dispute. Australia disagrees that any of those discrepancies are material to Australia's claims, as they have no bearing on MOFCOM's failure to comply with the Anti-Dumping Agreement. Australia submits that it is open to the Panel to assess only translations that have a bearing in resolving the dispute at hand; those that do not impact on this resolution need not be determined.<sup>93</sup> Australia reserves its right to respond should China identify further translation discrepancies that it considers material to the resolution of the dispute.

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

### **A. INTRODUCTION**

69. In this section, Australia addresses China's issues that relate to the dumping determination in respect of the sampled companies. These are:

- China's contention that MOFCOM undertook a "holistic analysis" in deciding whether to resort to facts available for the purpose of determining dumping for the three sample companies; and
- certain legal issues concerning the obligation on MOFCOM to make a fair comparison pursuant to Article 2.4 of the Anti-Dumping Agreement.

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<sup>93</sup> Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1391; *China – Rare Earths*, para. 7.1052; *China – HP-SSST*, fns. 137, 254, 262 (confirmed in Appellate Body Report, *China – HP-SSST*, para. 5.58); *China – Broiler Products*, fns. 434 and 760; *Korea – Certain Paper (Art 21.5)*, fn. 96.

70. Australia then sets out its claims with respect to MOFCOM's dumping determination for each of the sampled companies, Treasury Wines, Casella Wines, and Swan Vintage, followed by the "Other named Australian exporters", and the "All Others" rate.

**B. MOFCOM DID NOT UNDERTAKE A "HOLISTIC ANALYSIS" IN DECIDING WHETHER TO RESORT TO FACTS AVAILABLE**

71. In its first written submission, China asks the Panel to consider the alleged "deficiencies [in the information submitted by the sampled companies] holistically, and not [...] on an individual basis."<sup>94</sup> According to China, MOFCOM's decision to resort to facts available was made on the basis of a particular deficiency "combined with all the other deficiencies" identified by MOFCOM.<sup>95</sup> Moreover, China contends that some deficiencies were more important than others in reaching the decision to apply facts available.<sup>96</sup> Australia understands this is what China means when it refers to a "holistic analysis".<sup>97</sup>

72. First, there is no legal basis for a "holistic analysis" in Article 6.8 and Annex II of the Anti-Dumping Agreement.<sup>98</sup> In this context, China's reliance on the panel report in *US – Steel Plate* as a basis to disregard *all* information provided by a respondent is misplaced and inconsistent with Article 6.8 and paragraphs 3 and 5 of Annex II. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* stated that "assuming a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any."<sup>99</sup> In particular, paragraph 3 of Annex II "obliges an investigating authority to 'take [...] into account' the information supplied by a respondent, *even if other information requested has not been provided by the respondent* and will need to be supplemented by facts available". In addition, paragraph 5 of Annex II "prevents an investigating authority from rejecting the information supplied by a respondent, *even if incomplete*, where the respondent 'acted to the best of its ability'".<sup>100</sup> An unbiased and

<sup>94</sup> China's first written submission, para. 272 with respect to Treasury Wines, para. 583 with respect to Casella Wines, and para. 726 with respect to Swan Vintage. See also China's response to Panel question No. 2, para. 1.

<sup>95</sup> China's first written submission, para. 269.

<sup>96</sup> China's response to Panel question No. 2, para. 1. See also China's first written submission, paras. 367, 407.

<sup>97</sup> China's response to Panel question No. 2, para. 1.

<sup>98</sup> See Australia's opening statement at the first meeting of the Panel, para. 50.

<sup>99</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 288.

<sup>100</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 287. (emphasis added)

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objective investigating authority faced with the evidence before MOFCOM would clearly find that the respondents acted to the best of their abilities.

73. Second, even if such an assessment was permissible, there is no evidence of a "holistic analysis" in MOFCOM's determinations, or elsewhere on the record. Contrary to China's assertions, MOFCOM's "holistic analysis" was not addressed in Australia's first written submission not because of deliberate avoidance,<sup>101</sup> but rather because it was not the framework that MOFCOM used to assess the information, nor was it the basis of MOFCOM's decision to resort to facts available. Finally, assuming, *arguendo*, that MOFCOM did undertake a "holistic analysis", it follows that an error in any one element of the analysis must undermine the entirety of the "holistic analysis".

**1. US – Steel Plate does not support a "holistic analysis"**

74. China selectively quotes from the panel report in *US – Steel Plate* to support its argument that the Panel should consider the alleged deficiencies "from an overall perspective"<sup>102</sup>. The decision in *US – Steel Plate* does not support China's proposition, but rather provides that whether information that otherwise meets the criteria of paragraph 3 can be rejected because other information is rejected must be determined on the specific facts and circumstances of an investigation, and any such decision must be explained by the investigation authority.<sup>103</sup> China offers no other support for its position.

75. The panel in *US – Steel Plate* was not considering whether, as a general proposition, an investigating authority is permitted to have recourse to facts available based on an "overall perspective", or because of the "totality of the deficiencies".<sup>104</sup> In fact, the panel specifically rejected the argument that if an "'essential' element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available."<sup>105</sup> According to the panel, "[t]o conclude otherwise would fly in the face of one of the fundamental goals of the [Anti-

<sup>101</sup> China's first written submission, para. 269.

<sup>102</sup> China's first written submission, para. 272.

<sup>103</sup> Panel Report, *US – Steel Plate*, para. 7.62 and fn 60.

<sup>104</sup> China's first written submission, para. 272.

<sup>105</sup> Panel Report, *US – Steel Plate*, para. 7.60.



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Dumping] Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts." <sup>106</sup>

76. The panel went on to explain that:

[W]hen there is a question whether necessary information has been submitted, the investigating authority must, with reference to the guidance given in paragraph 3 of Annex II, consider whether the information that has been submitted satisfies the criteria therein. If yes, it must be taken into account in making determinations. If not, it may be rejected and facts available used instead. In a case in which some information is rejected and facts available used instead, the further question may arise whether the fact that some information submitted was rejected has consequences for the remainder of the information submitted. In particular, the investigating authority may need to consider whether the fact that some information is rejected results in other information failing to satisfy the criteria of paragraph 3. In this context, we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information. <sup>107</sup>

The panel was clearly considering a situation where there was some information that met the criteria in paragraph 3 of Annex II. Unless China concedes that at least some of the information submitted by the three sample companies did, in fact, meet the criteria contained in paragraph 3 of Annex II, its reliance on *US- Steel Plate* is misplaced.

77. China's assertion that other provisions of the Anti-Dumping Agreement also provide for a "holistic analysis" does not support its argument that such an analysis is permitted by Article 6.8. <sup>108</sup> China relies on Article 3.4 as an example of where a "holistic analysis" is permitted, yet ignores the clear textual differences between Articles 3.4 and 6.8. The text of Article 3.4 explicitly requires an examination of all relevant economic factors, and provides that not "one or several of these factors necessarily give decisive guidance." On the other hand, the text of Article 6.8 provides that it is only when an interested party refuses access to or, or otherwise does not provide, necessary information that an investigating authority may have recourse to facts available. There is no basis to read into Article 6.8 similar text.

78. Indeed, to the contrary, as explained above, paragraph 3 of Annex II explicitly requires that information which meets the criteria is taken into account, even if other

<sup>106</sup> Panel Report, *US – Steel Plate*, para. 7.60.

<sup>107</sup> Panel Report, *US – Steel Plate*, paras. 7.60-7.61. (footnotes omitted)

<sup>108</sup> China's closing statement at the first meeting of the Panel, para. 3.

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requested information is not provided.<sup>109</sup> This confirms that a "holistic analysis" cannot be read into Article 6.8. The panel in *US – Steel Plate* expressly rejected the respondent's position that the reference to "'information' in Article 6.8 means all information, such that Members have an unlimited right to reject all information submitted in a case where some necessary information is not provided."<sup>110</sup> The panel in *China – Broiler Products* also adopted this position, explaining 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.<sup>111</sup> (emphasis original; footnotes omitted)

79. Moreover, paragraph 5 of Annex II reads "[e]ven 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". This provision "prevents an investigating authority from rejecting the information supplied by a respondent, even if incomplete, where the respondent 'acted to the best of its ability'".<sup>112</sup> Information that satisfies the requirements of paragraph 3, even if not "ideal in all respects", may not be disregarded provided the interested party has acted to the best of its ability.<sup>113</sup>

80. Finally, there does not appear to be any dispute between the parties that "a failure to provide certain information may have ramifications beyond the category into which it falls" and that the absence of certain information "may affect the relative ease or difficulty of using the information that has been submitted".<sup>114</sup> However, pursuant to the reasoning of the panel in *US – Steel Plate*, it must be demonstrated, and not simply assumed or asserted, that the absence of a piece of information has an impact on the use of another piece of information. As will be demonstrated below, in the present case there is no evidence of that analysis having been undertaken by MOFCOM.

<sup>109</sup> See above, para. 72. See also Australia's first written submission, paras. 71-72.

<sup>110</sup> Panel Report, *US – Steel Plate*, para. 7.57.

<sup>111</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

<sup>112</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 287.

<sup>113</sup> Panel Report, *China – Broiler Products*, para. 7.357.

<sup>114</sup> Panel Report, *US – Steel Plate*, para. 7.60. See also Australia's opening statement at the first meeting of the Panel, para. 50.

## 2. There is no evidence on the record of a "holistic analysis"

81. The concept of a "holistic analysis" appears for the first time in China's submissions as *ex post facto* argument. There is no evidence of it on MOFCOM's record or in its determinations, nor reference to any comparable concept or mode of reasoning.<sup>115</sup>

82. The only evidence to which China refers is MOFCOM's use of the phrase "in summary", and "to sum up".<sup>116</sup> A "summary" is a shortened account of what has come before.<sup>117</sup> When used in the phrase "in summary", it indicates a conclusion. As such, these phrases signpost MOFCOM's concluding summary remarks on the issues addressed in the preceding sections of the determination. This is clear from the context in which these references appear in MOFCOM's Preliminary and Final Determinations.<sup>118</sup> In no way does MOFCOM's use of these phrases explain that it had undertaken an assessment China now refers to as a "holistic analysis", any comparable mode of reasoning, or exactly what such an assessment entailed.

83. China also contends that certain issues were of "little to no relevance" to MOFCOM's ultimate determination to apply facts available, while others were "major issues".<sup>119</sup> *Even if* the phrases "in summary" and "to sum up" evidenced a "holistic analysis", they do not explain the varying levels of importance MOFCOM purportedly assigned to each issue as part of that analysis.

84. For example, China argues that evidence on the following elements of the dumping calculation was of limited or no relevance, but fails to identify where on the record of the investigation MOFCOM made such findings about relative weight:

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<sup>115</sup> See Australia's opening statement at the first meeting of the Panel, para. 49.

<sup>116</sup> China's response to Panel question No. 2, para. 2.

<sup>117</sup> "Summary" is defined as "[a] shortened statement or account which gives only the main or essential points of something, not the details; an abridgement, digest, synopsis." Oxford English Dictionary online, definition of "summary", <https://www.oed.com/view/Entry/193933>, accessed 28 November 2022.

<sup>118</sup> See Anti-Dumping Final Determination (Exhibit AUS-2), pp. 60, 80, 83 and 91; Anti-Dumping Preliminary Determination (Exhibit AUS-35), pp. 25, 27, 31

<sup>119</sup> See for example China's first written submission, paras. 372, 437, 548 and 648: response to Panel question No. 2, paras. 1, 9, 20.

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- Treasury Wines' alleged missing cost of production figures and cost calculation sheets, and the initial lack of reconciliation between Treasury Wines' forms;<sup>120</sup>
- Treasury Wines' alleged missing raw material descriptions and the common accounting codes;<sup>121</sup>
- the description of PCNs by Casella Wines as #N/A;<sup>122</sup>
- the relevance of Casella Wines' special price arrangements;<sup>123</sup> and
- the alignment of Forms 6-3 and 6-4 provided by Casella Wines.<sup>124</sup>

85. Similarly, China argues that the following issues were the main, or major reasons for MOFCOM's resort to facts available, but again fails to identify where on the record these issues were identified as such:

- for Treasury Wines, in the company's responses to Forms 6-3 and 6-4, Treasury Wines did not report of cost of production of *all* PCNs sold on the domestic market and, instead, reported only those domestically sold PCNs that matched the PCNs of the wines that the company exported to China<sup>125</sup> and, although referred to inconsistently as a "major reason" or "serious deficiency" and a "minor" reason, the absence of cost of production for [REDACTED];<sup>126</sup> and
- for Casella Wines, the non-provision of Form 6-3 in the requested format, the absence of monthly cost of production, and the non-reporting of the cost of production of Clean Skin.<sup>127</sup>

86. Australia does not contend that it was necessary for MOFCOM to assign specific weightings in its determinations to the reasons identified above. However, to the extent that

<sup>120</sup> China's first written submission, paras. 372, 433, 437; response to Panel question No. 2, para. 7.

<sup>121</sup> China's first written submission, para. 412; response to Panel question No. 2, para. 9.

<sup>122</sup> China's response to Panel question No. 2, paras. 19-20.

<sup>123</sup> China's first written submission, para. 548.

<sup>124</sup> China's first written submission, paras. 651-652; response to Panel question No. 2, para. 22.

<sup>125</sup> China's first written submission, paras. 274-277, 352, 357-358, 361-364, 407; response to Panel question No 2, paras. 7, 11, 14.

<sup>126</sup> China's response to Panel question No. 2, para. 9.

<sup>127</sup> China's response to Panel question No. 2, para. 20.

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China argues MOFCOM's dumping determination turned on its appreciation of certain evidence differently, and its consideration of various issues to be more or less important in its decision to disregard all information submitted by the sampled companies, this process needed to be explained by MOFCOM. It was not.

**3. A flaw in any part of the "holistic analysis" undermines the entirety of the analysis**

87. Assuming, *arguendo*, China's contention of a "holistic analysis" is legally permissible and supported by evidence on the record, it logically follows that if any individual part of the holistic assessment was defective, so was the whole of the analysis that incorporated it. This is the natural consequence given the nature of a holistic analysis, which is that each element of it is integral to the whole.

88. This is true whether China's approach is conceived of as a traditional application of the reasoning process described in *US – Steel Plate*, or a novel "holistic assessment". A decision predicated on the logical relationship between a purported error in one piece of evidence and the implications that has for the reliability of another piece of evidence will be defective if it is shown that the purported error did not exist.

**4. Conclusion**

89. China asserts that MOFCOM was permitted to have recourse to facts available for the sampled companies on the basis of a "holistic assessment" of the submitted information. There is no legal basis for China's contention that MOFCOM was permitted to undertake a "holistic analysis", and on that basis, disregard information and resort to facts available for the three sampled companies. Moreover, China points to no evidence on the record that MOFCOM undertook this type of assessment. The concept of a "holistic analysis" appears for the first time in China's submissions.

90. For the reasons set out above, China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement in resorting to facts available for each of the sampled companies on the basis of a "holistic analysis" of the submitted information.

**C. MOFCOM FAILED TO MAKE A FAIR COMPARISON BETWEEN EXPORT PRICE AND  
NORMAL VALUE FOR THE SAMPLED COMPANIES UNDER ARTICLE 2.4**

91. In Australia's first written submission, Australia demonstrated that MOFCOM determined normal value for each sampled company in a manner inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement, and failed to make its determinations in accordance with Article 2.1, 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.<sup>128</sup> As a consequence, it did not correctly establish one of two "component elements" of a fair comparison and could not have made a fair comparison between these values to determine margins of dumping for each sampled company as required under Article 2.4 of the Anti-Dumping Agreement.<sup>129</sup>

92. Even if, *arguendo*, the Panel were to find MOFCOM's normal value determinations for each sampled company to be consistent with the Anti-Dumping Agreement, MOFCOM failed to make a fair comparison between those normal values and export prices as required by Article 2.4, in its calculation of the dumping margins for the sampled companies and other dumping margins calculated with reference to these margins (specifically the "Other named Australian exporters").<sup>130</sup>

93. Australia and China appear to be in broad agreement that Article 2.4 confers an overarching obligation on investigating authorities to ensure a fair comparison between the export price and the normal value and to make due allowance, or adjustments, for differences affecting price comparability.<sup>131</sup> China acknowledged that the fair comparison requirement in Article 2.4 applies in all anti-dumping investigations irrespective of the methodology used to determine normal value.<sup>132</sup> Thus, Australia and China appear to agree that the requirement

<sup>128</sup> Australia's first written submission, paras. 493-523.

<sup>129</sup> 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 Panel Report, *Egypt – Steel Rebar*, para. 178, and Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.

<sup>130</sup> Australia's first written submission, para. 500.

<sup>131</sup> China's first written submission, para. 814.

<sup>132</sup> China's first written submission, para. 811.

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applies to the determination of dumping for Treasury Wines, Casella Wines and Swan Vintage, notwithstanding that MOFCOM resorted to facts available.

94. China indicated that the "too high" dumping margins were the result of the sampled companies' alleged failure to provide certain information and MOFCOM's subsequent recourse to facts available.<sup>133</sup> As Australia has shown, the sampled companies made their "best efforts" to cooperate with MOFCOM's investigation.<sup>134</sup> Regardless of its use of facts available, MOFCOM was still obliged to make a fair comparison under Article 2.4.

95. MOFCOM failed to meet the procedural obligations contained in the final sentence of Article 2.4 as well as in Article 6 and Annex II and failed to make the necessary adjustments to ensure a fair comparison. China's argument appears to be that, having deprived the sampled companies of essential information, the companies did not request relevant adjustments and MOFCOM was therefore under no obligation to make any adjustments.<sup>135</sup>

**1. MOFCOM's procedural errors precluded the sampled exporters from requesting adjustments to ensure a fair comparison**

96. In its first written submission, Australia established that MOFCOM's procedural errors precluded it from making a fair comparison, in breach of the obligations under Article 2.4.<sup>136</sup>

97. Depending on the particular circumstances, the last sentence of Article 2.4 may require an investigating authority to share certain information with interested parties to the extent that these parties require this information in order to make requests for adjustments.<sup>137</sup> This may not always require the disclosure of "raw data" but does require adequate disclosure of methodology. According to the Appellate Body "[w]ithout knowing which particular method the authority will use [...] it would not be possible for the interested parties to know what information will be necessary for purposes of ensuring a fair comparison, and to request adjustments accordingly."<sup>138</sup> The obligation to inform is even more pertinent where the normal value is not established on the basis of a foreign producer's domestic sales,

<sup>133</sup> China's first written submission, para 167; see also paras. 809-810 (citing Panel Report, *US — Steel Plate*, para. 7.60).

<sup>134</sup> Australia's first written submission, paras. 108-111.

<sup>135</sup> Australia's claims under Articles 6.1, 6.1.1, 6.2, 6.4 and 6.9 are elaborated upon in Section VII.D of this submission.

<sup>136</sup> Australia's first written submission, paras. 518-522.

<sup>137</sup> Appellate Body Report, *EC — Fasteners (China) (Article 21.5 China)*, para. 5.178.

<sup>138</sup> Appellate Body Report, *EC — Fasteners (China)*, para. 490.

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as was the case for Casella Wines and Swan Vintage.<sup>139</sup> This informational process has been described as a "dialogue" between the authority and the interested parties.<sup>140</sup>

98. In this case, the adjustments required by MOFCOM to make a fair comparison for the sampled companies were affected by the methodologies MOFCOM used to establish their normal values.<sup>141</sup> MOFCOM did not share this information with the companies nor did it enter into a dialogue with the companies regarding price comparability. Without this information, the sampled companies were prejudiced because they could not request adjustments. Moreover, MOFCOM could not ensure a fair comparison between normal value and export price and, therefore could not make an accurate determination of dumping.

99. In the case of Treasury Wines, MOFCOM's normal value methodology relied upon [REDACTED] to determine normal values. This methodology utilised Treasury Wines' own data, therefore there were no confidentiality considerations preventing disclosure. The normal value resulting from this methodology resulted in clear differences affecting price comparability, including physical characteristics and consumer preferences and quantities.<sup>142</sup>

100. In the cases of Casella Wines and Swan Vintage, even though third-party confidential information was used, Article 2.4 still required MOFCOM to make its best efforts to disclose information to allow them to make informed decisions regarding possible adjustments.<sup>143</sup>

101. In the case of Casella Wines, MOFCOM's normal value methodology relied upon an adjusted weighted average of [REDACTED].<sup>144</sup> The methodology is set out in Exhibit CHN-11 (BCI).<sup>145</sup> As shown in Exhibit AUS-104 (BCI), Casella Wines' domestic product mix is very different from [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>139</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 491.

<sup>140</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 489.

<sup>141</sup> 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.

<sup>142</sup> Australia's first written submission, paras. 509-517.

<sup>143</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 China), para. 5.195.

<sup>144</sup> China's response to Panel question No. 9, paras. 33-34.

<sup>145</sup> [REDACTED]



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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Since the normal value determined by MOFCOM does not reflect Casella Wines' domestic product mix, it inherently creates differences affecting price comparability when compared with Casella Wines' export prices, [REDACTED]

[REDACTED].<sup>146</sup>

102. In the case of Swan Vintage, MOFCOM used a similar normal value methodology, determining a normal value that did not reflect Swan Vintage's domestic product mix that inherently created differences affecting price comparability when that normal value was compared to Swan Vintage's export prices.

103. There is no evidence that MOFCOM made any attempt to disclose the normal value methodology to Treasury Wines, Casella Wines and Swan Vintage in sufficient detail to allow them to make informed decisions regarding possible adjustments, even though the normal value methodologies resulted in clear differences affecting price comparability. Thus, MOFCOM acted inconsistently with the last sentence of Article 2.4. In addition, withholding this information prevented the sampled companies from defending their interests and was, therefore, inconsistent with Article 6 and Annex II.<sup>147</sup>

**2. MOFCOM was still obliged to make a fair comparison where differences affecting price comparability resulted from its methodology**

104. China appears to argue that there is an exemption to the general obligation to ensure a fair comparison<sup>148</sup> where the differences affecting price comparability arise as a result of the investigating authority's methodology.<sup>149</sup> This argument is not supported by the text of Article 2.4, which imposes an explicit obligation on investigating authorities to ensure a fair

<sup>146</sup> China's response to Panel question No. 27, para. 136, Table.

<sup>147</sup> See section III.B.

<sup>148</sup> See above, para. 93.

<sup>149</sup> China's first written submission, paras. 809-813.

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comparison.<sup>150</sup> The panel in *Egypt – Steel Rebar* reasoned that an adjustment must be made "where it is demonstrated by one or another party in a particular case, or *by the data itself* that a given difference affects price comparability".<sup>151</sup> Thus, in practice, an investigating authority must participate in the process to ensure a fair comparison. This obligation applies whenever differences affect price comparability between the normal value and export price. It is the existence of such differences that is relevant, and not the cause of the differences (e.g. the methodology). As discussed above, it is clear that the methodologies used for the normal values of Treasury Wines, Casella Wines and Swan Vintage created differences affecting price comparability. They had to be disclosed to the sampled companies or MOFCOM had to take other action to comply with its obligation to ensure a fair comparison. Accepting China's argument that there is an exemption from the fair comparison obligation would render the obligation to make a fair comparison inutile in the circumstances of this dispute.

105. China incorrectly paraphrases the panel report in *EU – Biodiesel (Argentina)* as "conclud[ing] that a difference that is caused because of a methodology adopted in determining the normal value does not become subject to Article 2.4 because, while it might affect prices; it did not affect price comparability."<sup>152</sup> China observed in its footnote that "the Appellate Body expressed reservations about the Panel's reference to there being a general proposition but did not overrule the Panel as it did not consider it necessary to rule on this issue".<sup>153</sup> In fact the Appellate Body expressly disagreed, stating:

The Panel's statement, in which it referred to the "general proposition", merely expresses its understanding of the Appellate Body's findings in *EC – Fasteners (China)* (Article 21.5 – China). We do not share this understanding. The Appellate Body report in *EC – Fasteners (China)* (Article 21.5 – China) does not contain any such "general proposition".

[...] Moreover, we would have serious reservations regarding what the Panel referred to as the "general proposition". The text of Article 2.4 itself makes clear that "[d]ue allowance shall be made in each case, on its merits". This indicates that the need to make due allowance must be assessed in light of the specific circumstances of each case.<sup>154</sup>

<sup>150</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.20.

<sup>151</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.352. (emphasis added)

<sup>152</sup> China's first written submission, para. 812 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.302).

<sup>153</sup> China's first written submission, para. 812, footnote 817.

<sup>154</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.87-6.89.

**3. MOFCOM did not compare sales made at the "same level of trade" or "as nearly as possible the same time"**

106. China did not engage with the substance of Australia's claims concerning MOFCOM's failure to compare sales made at the "same level of trade" or "as nearly as possible the same time".<sup>155</sup> Rather, China's objection appears to be that Australia's claims were made under the second, rather than third, sentence of Article 2.4.<sup>156</sup> This narrow interpretation of Article 2.4 artificially separates the *obligation* to make a fair comparison from the *process* by which a fair comparison should be made.

107. China also argued semantically that the term "level of trade" has one meaning under the second sentence (being "the shipment term of a sale")<sup>157</sup> and a different definition under the third sentence (being one of several "differences which affect price comparability").<sup>158</sup> This duality of definitions finds no support in either the text of the Anti-Dumping Agreement or prior panel or Appellate Body reports.

108. China argues that the term "'level of trade' in the second sentence of Article 2.4 essentially refers to the shipment term of a sale" and that "the reference to 'level of trade' in the second sentence of Article 2.4 has to do with ensuring that, normally, an ex-factory normal value is compared with an ex-factory export price though an investigating authority can also compare, for example, a Freight On Board ('FOB') normal value with an FOB export price".<sup>159</sup> Based on this interpretation, China argues that MOFCOM complied with its obligation under the second sentence of Article 2.4 "to compare the normal value and the export price at the same level of trade, in this case at the ex-factory level".<sup>160</sup>

109. China's interpretation is flawed. Both the second and third sentences of Article 2.4 refer to "levels of trade" and "terms of sale", which are separate factors. The second sentence mandates that the comparison "shall" be made at the same level of trade and specifies that, normally (i.e., not mandatory), the terms of sale for that comparison should be "*ex-factory*". The third sentence requires adjustments where differences in "levels of trade" or "terms of

<sup>155</sup> Australia's first written submission, paras. 502-507.

<sup>156</sup> China's first written submission, para. 835.

<sup>157</sup> China's first written submission, para. 825.

<sup>158</sup> China's first written submission, paras. 824, 830.

<sup>159</sup> China's first written submission, para. 825.

<sup>160</sup> China's first written submission, para. 827.

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sale" affect price comparability. With respect to levels of trade, where necessary [REDACTED] adjustments must be made in order to comply with the mandatory requirement in the second sentence. MOFCOM did not make the necessary adjustments and therefore did not comply with the mandatory requirement in the second sentence. By not making the adjustments, MOFCOM also contravened the third sentence of Article 2.4.

110. China stated that "[i]n the present case, MOFCOM complied with its obligation under the second sentence of Article 2.4 to compare the normal value and the export price at the same level of trade, in this case at the ex-factory level."<sup>162</sup> While China appears to tacitly concede that it did not meet its obligation to make "due allowance" under the third sentence, there is no basis for the claim that it met its obligation under the second sentence. The record of evidence does not support China's claim that it compared the normal value and export price at the same level of trade, or on the same terms of sale, as required by Article 2.4.<sup>163</sup>

111. Regarding Australia's related claim that MOFCOM failed to compare sales made at "as nearly as possible the same time", China does not raise the same arguments concerning its view of the relationship between the second and third sentences of Article 2.4. Instead, China argues that "[a]s the complainant, it is for Australia to submit evidence and legal arguments in relation to its claim."<sup>164</sup> Australia has clearly set out its *prima facie* case in its prior submissions.<sup>165</sup> As Australia has argued, there is simply no reference on MOFCOM's record to suggest that it compared sales made at "as nearly as possible the same time". China's *ex post facto* rationalisations, which are in any event of questionable relevance – related to the use of averaging under Article 2.4.2.<sup>166</sup> which China never claimed to use – cannot absolve MOFCOM's of its failures in this regard.

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<sup>161</sup> [REDACTED]

See Australia's first written submission, paras. 122 and 503. See also [REDACTED]

<sup>162</sup> China's first written submission, para. 827.

<sup>163</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 48.

<sup>164</sup> China's first written submission, para. 837.

<sup>165</sup> Australia's first written submission, paras. 502-507.

<sup>166</sup> China's first written submission, para. 836-843.

**4. MOFCOM did not engage in dialogue to facilitate fair comparison**

112. Likewise, China reduced the process of "dialogue" between an investigating authority and interested parties to "an exporter demonstrat[ing] to the authorities that there is a difference affecting price comparability".<sup>167</sup> The obligation to engage in dialogue is significantly broader and more substantial than such a unilateral demonstration.

113. MOFCOM did not engage in "dialogue" with the sampled companies at any stage of the investigation.<sup>168</sup> This further restricted its ability to achieve a fair comparison under Article 2.4, the final sentence of which required MOFCOM to "indicate to the parties in question what information was necessary to ensure a fair comparison" before it could make "due allowance" for differences affecting price comparability.

114. Australia does not agree that that "when, such as in Treasury Wines' case, the normal value is based on an exporter's own data, there is no obligation on an investigating authority to indicate what information is necessary to ensure a fair comparison".<sup>169</sup> This obligation comprises an integral part of Article 2.4. It cannot be "implied" away, as China suggested.<sup>170</sup>

115. Whether dialogue facilitates a fair comparison involves "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."<sup>171</sup> By China's own admission, MOFCOM denied interested parties this opportunity. It argued that:

When normal values are [...] based on data from a producer in a third country (under the analogue country methodology, for example), the foreign exporter will be left in the dark to the extent it does not have access to the normal value information.

It is only in such a particular factual situation that an investigating authority bears the burden – which does not extend as far as suggesting to exporters for which differences they can claim an adjustment – to find ways to disclose as much information on the normal value as the exporter would need to meaningfully participate in the fair comparison process.<sup>172</sup>

<sup>167</sup> China's first written submission, para. 261; see also paras. 846, 875.

<sup>168</sup> Australia's first written submission, paras. 29, 518-522, and 983-985.

<sup>169</sup> China's first written submission, para. 883.

<sup>170</sup> China's first written submission, para. 883.

<sup>171</sup> Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.191.

<sup>172</sup> China's first written submission, para. 818-819, citing Panel Report, *EC – Fasteners (China)*, para. 7.149.

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116. MOFCOM's actions put the sampled companies in the identical position by denying them access to the normal value information through its rejection of relevant data, recourse to facts available and failure to disclose both the quantum and methodology of its adjustments. China conceded this, stating:

[T]here is no situation where the normal value is [...] based on Casella Wines' or Swan Vintage's own data because of the application of a methodology similar to the analogue country methodology.<sup>173</sup>

117. China recognised that "there are some additional disclosure requirements on an investigating authority"<sup>174</sup> in certain situations and that, in this case, MOFCOM was obliged "to find ways to disclose as much information on the normal value as the exporter would need to meaningfully participate in the fair comparison process."<sup>175</sup> Instead, it failed to meet even its basic obligation under Article 2.4. In its own words:

China does not consider that, when a party does not cooperate to the best of its abilities, and normal value ... is therefore based on facts available, an investigating authority should provide information to that party in order for it to meaningfully participate in the fair comparison process.<sup>176</sup>

118. MOFCOM effectively punished Casella Wines and Swan Vintage for what it perceived to be their lack of cooperation (though not categorising them as "All Others") by withholding information that would enable them to "meaningfully participate in the fair comparison process".<sup>177</sup> China even suggested Casella Wines and Swan Vintage were "fully aware of... Treasury Wines' operations",<sup>178</sup> despite the fact MOFCOM never identified Treasury Wines as the "other respondents"<sup>179</sup> and its data was not publicly available. Casella Wines and Swan Vintage could not object to what MOFCOM did not disclose<sup>180</sup>, having been "left in the dark".<sup>181</sup>

<sup>173</sup> China's first written submission, para. 885.

<sup>174</sup> China's first written submission, para. 887.

<sup>175</sup> Panel Report, *EC – Fasteners (China)*, para. 7.149.

<sup>176</sup> China's first written submission, para. 885.

<sup>177</sup> Panel Report, *EC – Fasteners (China)*, para. 7.149.

<sup>178</sup> China's first written submission, para. 888.

<sup>179</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 85 (Casella Wines); and p. 92 (Swan Vintage)

<sup>180</sup> China's first written submission, para. 890.

<sup>181</sup> China's first written submission, para. 817-820.

## **5. Obligation to "not impose an unreasonable burden of proof on those parties"**

119. As Australia noted in its first written submission, MOFCOM's conduct of the investigation established an unreasonable burden of proof on the sampled companies.<sup>182</sup> These procedural breaches also resulted in a breach of the final sentence of Article 2.4.

## **6. Conclusion**

120. For the reasons set out above and in Australia's first written submission, China acted inconsistently with its obligations under Article 2.4 of the Anti-Dumping Agreement.

### **D. TREASURY WINES**

121. Australia claims that MOFCOM's dumping determination for Treasury Wines was inconsistent with Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.4, 6.1, 6.1.1, 6.2, 6.4, 6.8, 6.9, 9.1, 9.2, 9.3, 18.1 and paragraphs 1, 3, 5, 6 and 7 of Annex II. China has failed to rebut these claims.<sup>183</sup>

122. Australia set out, above, that MOFCOM acted inconsistently with Article 2.4 because it did not disclose relevant information and enter into a dialogue with Treasury Wines in order to ensure a fair comparison between export price and normal value, and MOFCOM acted inconsistently with Article 6.8 because of its recourse to facts available on the basis of a "holistic analysis" of the information submitted by Treasury Wines.

123. In this section, Australia will address the additional errors MOFCOM committed with respect to its recourse to and selection of facts available for Treasury Wines' cost of production, and provide further details on MOFCOM's failure to make a fair comparison under Article 2.4.

### **1. The principal basis for MOFCOM resorting to facts available**

#### **(a) Forms 6-3 and 6-4**

124. In its first written submission and in its responses to the Panel's questions, China takes the position that the principal reason for MOFCOM resorting to the use of facts available

<sup>182</sup> Australia's first written submission, para. 108-110; see also paras. 73-74.

<sup>183</sup> Australia's claims under Articles 6.1, 6.1.1, 6.2, 6.4 and 6.9 are elaborated upon in Section VII.D of this submission.

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was that, in the company's responses to Forms 6-3 and 6-4, Treasury Wines [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>184</sup> China argues that:

- the missing information in Forms 6-1-1 and 6-1-2 was not directly used in the calculation of the cost of production but was relevant only for verification purposes;<sup>185</sup>
- the different per unit costs under the same accounting codes, non-reporting of [REDACTED] and non-provision of detailed cost break downs for certain PCNs were minor reasons for the ultimate decision to apply facts available;<sup>186</sup> and
- the issues related to the reconciliation of the forms was of limited to no relevance to the decision to apply facts available.<sup>187</sup>

125. Thus, China argues that the [REDACTED]

[REDACTED] is the foundation for MOFCOM's recourse to facts available.<sup>188</sup> Its argument is based on the language in the questionnaire that requested "costs and expenses related to the production and sales of the product under investigation and its like product" which China interprets to mean "the requested information needed to be provided for *all* product control codes (or PCNs) that were produced [in the domestic Australian market] during the investigation period".<sup>189</sup> In China's view, Form 6-3 (and presumably Form 6-4) "clearly stated that cost of production information for *all* PCNs had to be provided".<sup>190</sup>

<sup>184</sup> China's first written submission, paras. 274-277, 352, 357-358, 361-364, and 407; response to Panel question No 2, paras. 7, 11, and 14.

<sup>185</sup> China's first written submission, paras. 288, 319.

<sup>186</sup> China's first written submission, para. 407.

<sup>187</sup> China's first written submission, para. 436.

<sup>188</sup> MOFCOM found that [REDACTED] on the domestic market and only [REDACTED], resulting in [REDACTED]. See China's first written submission, paras. 402-403. China argues that at least [REDACTED] were not reported. (China's first written submission, para. 445). The difference in figures is not material, as in Australia's submission, it was reasonable for Treasury Wines to interpret the questionnaire and respond in the manner it did.

<sup>189</sup> China's first written submission, paras. 274-276. (emphasis added)

<sup>190</sup> China's opening statement at the first meeting of the Panel, para. 43. (emphasis added)



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126. China is simply wrong about the wording of the questionnaire. Forms 6-3 and 6-4 requested "costs and expenses related to the production and sales *of the product under investigation* and its *like* product".<sup>191</sup> The questionnaire [REDACTED] requests information "about the product under investigation *exported to China*, the identical or similar products ("like products") sold in the exporting country, and the like products exported to other countries (regions).<sup>192</sup> MOFCOM classified what it asserted to be "like products" using PCNs. In its Final Determination, MOFCOM stated:

[T]he Investigating Authority concluded 18[-digit] product control codes for the classification of the product under investigation and its like products based on eight major product features, including type, colour, sugar level, specifications, variety, vintage, and large and small producing regions.<sup>193</sup>

127. MOFCOM required that these PCNs be used in responding to the questionnaires.

[T]he Investigating Authority distributed the Reply to Questions about the Product Control Codes of Relevant Products Involved in the Relevant Wines Anti-Dumping Case on 29 October 2020 and demanded that relevant stakeholders should fill in and submit the responses in strict accordance with product control numbers and questionnaire requirements developed by the Investigating Authority.<sup>194</sup>

128. Thus, the explicit language of the questionnaire matched the domestic PCNs for which cost of production was being sought to the exported PCNs. Interpreting the questionnaire in this way is consistent with the PCN-by-PCN methodology MOFCOM used to calculate dumping.

129. Accordingly, [REDACTED]

[REDACTED] China appears to agree with this when it takes the position that "MOFCOM's questionnaire specifically instructs exporters to 'include all costs and expenses related to the production and sales of the product under investigation [i.e., *the exported*

<sup>191</sup> China's first written submission, paras. 274, 390. (emphasis added)

<sup>192</sup> [REDACTED] (emphasis added) This is consistent with the definition of "product under investigation" in the domestic producers' questionnaire which reads: "Product under investigation: This refers to the imported product subject to this anti-dumping investigation as determined by the Investigation Authority in this case". See Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), p. 10, II. Relevant definitions in this questionnaire, paragraph 1.

<sup>193</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p.12.

<sup>194</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 16-17.

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product] and its like product [i.e., the domestically sold product]' and that for each different product specification or model".<sup>195</sup>

130. Australia's position is that information on the additional [REDACTED] was not only not requested, but it was also not necessary for the dumping calculations because margins of dumping were calculated on a PCN-by-PCN basis which required export and domestic PCNs to be matched. There were [REDACTED] and, therefore, no margins of dumping to be calculated.

131. Even if it was necessary information, in light of the foregoing, an unbiased and objective investigating authority would have found that it was valid for Treasury Wines to interpret the questionnaire in the manner it did and [REDACTED]

[REDACTED] It would also have found that in responding in the manner it did, Treasury Wines acted to the best of its ability within the meaning of paragraph 5 of Annex II. There is no factual basis to support China's assertion that [REDACTED]

132. If, after reviewing Treasury Wines' responses, such an investigating authority determined that the questionnaire was deficient because it did not "specify in detail" the sought-after information, it would have clarified the scope of the question with Treasury Wines and would have provided a reasonable period of time for Treasury Wines to provide the additional information. MOFCOM failed to do this and, therefore, acted inconsistently with paragraph 1 of Annex II (by failing to "specify in detail the information required from any interested party") and paragraph 6 of Annex II (by failing to "inform [...] forthwith of the reasons [for not accepting the information], and [giving Treasury Wines] an opportunity to provide further explanations [including the additional information] within a reasonable period".

133. If an investigating authority has legitimate concerns regarding the information provided, it must take reasonable steps to investigate and clarify before it may permissibly

<sup>195</sup> China's first written submission, para. 363 (emphasis added).

<sup>196</sup> China's first written submission, para. 277.

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have recourse to the facts available.<sup>197</sup> By not doing so and acting inconsistently with paragraphs 1 and 6 of Annex II, MOFCOM acted inconsistently with Article 6.8 in resorting to facts available on the basis that Treasury Wines did not report of cost of production of *all* PCNs sold on the domestic market when responding to Forms 6-3 and 6-4. Alternatively, if China's argument that the information on the [REDACTED] was required by MOFCOM is accepted, not only did MOFCOM fail to act in accordance with paragraph 1 of Annex II, as set out below, it also acted inconsistently with Article 6.1 because it did not give Treasury Wines "notice of the information which the authorities require".

[REDACTED]

134. China's position regarding MOFCOM's findings about Treasury Wines' reporting of [REDACTED] and the application of facts available is inconsistent.

135. China argues that:

- Treasury Wines' non-reporting of [REDACTED] [REDACTED] was a "minor reason [...] for the ultimate decision to apply facts available";<sup>198</sup> and
- "the [REDACTED] [REDACTED]" was a "main reason why MOFCOM had recourse to facts available" and was a "serious deficiency".<sup>199</sup>

136. According to China, it is clear from a combined reading of the Final Disclosure, Final Determination, and Supplementary Questionnaire that MOFCOM's "concern" related to Treasury Wines not reporting the cost of [REDACTED] in Form 6-1-2 "as instructed in the questionnaire".<sup>200</sup>

<sup>197</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.196 (citing Panel Report, *Morocco–Hot-Rolled Steel (Turkey)*, para. 7.92 and footnote 135, in turn referring to Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130).

<sup>198</sup> China's first written submission, para. 407.

<sup>199</sup> China's first written submission, paras. 435, 446.

<sup>200</sup> China's response to Panel question No. 2, para. 4.

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137. Contrary to China's assertion, Form 6-1-2 did *not* request information with respect to [REDACTED] and nor did MOFCOM refer to [REDACTED] in its Final or Preliminary Determinations.<sup>201</sup>

138. The Anti-Dumping Questionnaire requested, *inter alia*, the following information with respect to raw materials:

If you are a producer of raw materials for the product under investigation and its like product, please provide relevant production cost info of the raw materials used for the product under investigation and its like product which were sold during the investigation period following the format of "Form 6-1-2: Production Cost of Raw Materials".<sup>202</sup>

Form 6-1-2 concerned the "production cost of raw material" and requested respondents to "provide the cost of the input for the PUI and like product".<sup>203</sup>

139. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] It was only *after* MOFCOM issued the Preliminary Determination that [REDACTED]  
[REDACTED]<sup>205</sup> In response, [REDACTED]  
[REDACTED]

140. In the Supplementary Questionnaire, MOFCOM queried [REDACTED]  
[REDACTED] in Form 6-4. In response, [REDACTED]  
[REDACTED]

<sup>201</sup> China now argues that [REDACTED] was addressed in the Final Disclosure to Treasury Wines and the Final Determination and that it was a "major issue". (China's response to Panel question No. 2, para. 5). Whereas in its first written submission, China argued that MOFCOM was "particularly concerned about the absence" of data for [REDACTED] (China's first written submission, para. 315). Contrary to China's responses to the Panel's questions, MOFCOM's determinations do not contain any reference to [REDACTED]. (China's response to Panel question No. 2, para. 9).

<sup>202</sup> Anti-Dumping Questionnaire (Exhibit AUS-3), p. 93.

<sup>203</sup> See [REDACTED]  
[REDACTED]

<sup>204</sup> [REDACTED]

<sup>205</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 24. [REDACTED]  
[REDACTED]

<sup>206</sup> [REDACTED]

<sup>207</sup> [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED] and on that basis, Treasury Wines acted to the best of its ability within the meaning of paragraph 5 of Annex II in providing information concerning [REDACTED] in the relevant form.

141. Although China's position is unclear, to the extent that China now argues [REDACTED]  
[REDACTED]  
and that it was a "serious deficiency" and a "major reason" for MOFCOM's recourse to facts available, this information was not requested in Form 6-1-2, as required by paragraph 1 of Annex II, and nor did MOFCOM make any such finding in its Preliminary or Final Determinations.<sup>209</sup> Moreover, MOFCOM failed to notify Treasury Wines of the alleged deficiencies concerning [REDACTED], or provide an opportunity for Treasury Wines to provide further explanations, as required by paragraph 6 of Annex II.

142. If MOFCOM had legitimate concerns regarding the information provided concerning [REDACTED] it was required to take reasonable steps to investigate and clarify before resorting to the facts available.<sup>210</sup> By not doing so and acting inconsistently with paragraphs 1 and 6 of Annex II (as set out above), MOFCOM acted inconsistently with Article 6.8 in resorting to facts available on the basis that Treasury Wines did not report information concerning [REDACTED] in Form 6-1-2.

**2. Treasury Wines provided the requested data for Forms 6-3 and 6-4 in a reasonable manner and did not "sample" or "self-select"**

143. In its first written submission, Australia explains how [REDACTED]  
[REDACTED]  
[REDACTED]<sup>211</sup> Australia

<sup>208</sup> [REDACTED]

<sup>209</sup> China's first written submission, paras. 331 and 423.

<sup>210</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.196 (citing Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.92 and footnote 135, in turn referring to Appellate Body Report, *EU–PET (Pakistan)*, para. 5.130).

<sup>211</sup> Australia's first written submission, paras. 172-182. [REDACTED]  
[REDACTED]  
[REDACTED]

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also explained why the approach was reasonable in the circumstances.<sup>212</sup> This approach was necessary because, *inter alia*, MOFCOM refused to grant a reasonable extension for filing the questionnaire response and thereby acted in a manner inconsistent with Article 6.1.1.<sup>213</sup> Taking into account all relevant facts, an unbiased and objective investigating authority would have found that the information was submitted within a reasonable time and that Treasury Wines acted to the best of its ability within the meaning of paragraph 5 of Annex II.

144. China incorrectly characterises what Treasury Wines did as "sampling" within the meaning of Article 6.10 and argues that such sampling is impermissible and that the PCNs were "self-selected" and not "representative of domestic sales".<sup>214</sup> China further argues that under Treasury Wines' approach, "an exporter could lower its dumping margin by only providing detailed cost information for those product types that have lower costs of production on the basis that these product types with the lower costs are somehow 'representative'".<sup>215</sup> China imputes that Treasury Wines' provision of data was favourable to the company's own interests.

145. It is clear Treasury Wines did not "sample" nor did it "self-select" data in order to reach a favourable outcome. Rather, Treasury Wines provided all data explicitly requested for Forms 6-3 and 6-4 in two-parts and had valid reasons for providing it in that manner.

146. China's argument misunderstands the dumping calculations undertaken by MOFCOM. Those calculations were done on a PCN-by-PCN basis, requiring that the export price of specific PCNs sold in China be compared against the normal value of the matched PCNs sold in the Australian domestic market. There was no need to compare the export price of specific PCNs sold in China against the normal value of unmatched PCNs sold in Australia, nor was there a need to consider the "representativeness" of a particular PCN sold in Australia with other PCNs sold in Australia.

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<sup>212</sup> Australia's first written submission, paras. 172-182.

<sup>213</sup> See Section VII.D.4.

<sup>214</sup> China's first written submission, paras. 354-360, 400-407, and 459. See also China's opening statement at the first meeting of the Panel, para. 36.

<sup>215</sup> China's first written submission, para. 362.

### **3. There was no necessary information missing from the record**

147. Australia maintains that there was no "necessary" information relating to cost of production missing from the record when the valid explanations and supplementary information submitted by Treasury Wines (within a reasonable time while acting to the best of its ability) are accounted for. China's submissions do not rebut Australia's position.

#### **(a) Forms 6-1-1 and 6-1-2**

148. China agrees with Australia that the data in these forms is not used in the calculation of cost of production but argues that it is necessary to verify cost of production data.<sup>216</sup> Treasury Wines explained to MOFCOM that the cost of production data could be verified by direct reference to Treasury Wines' accounting system.<sup>217</sup> Thus, the absence in the forms of the beginning and ending inventories and consumption data does not mean that the cost of production data provided by Treasury Wines was unverifiable. Moreover, Treasury Wines provided valid reasons why the data could not be provided within the investigation timeline and it provided an alternative means to verify the cost of production data. If an unbiased and objective investigating authority was of the view that the common practice of verification through direct reference to an interested party's accounting system was not acceptable, it would have communicated this to the interested party so that any perceived deficiencies could be addressed. There is no evidence that MOFCOM did this. In these circumstances, MOFCOM was not justified in resorting to facts available in respect of Forms 6-1-1 and 6-1-2. To the extent that it relied on these forms in resorting to facts available, MOFCOM acted inconsistently with Article 6.8.

#### **(b) Forms 6-3 and 6-4**

149. As explained above, Treasury Wines provided the cost of production and expense information in these forms for all PCNs sold in the domestic market that were "like" the PCNs of the wine exported to China. Since MOFCOM determined dumping on a PCN-by-PCN basis, all necessary cost of production information was provided. Treasury Wines provided valid explanations for all other deficiencies alleged by MOFCOM including the reconciliation with

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<sup>216</sup> Australia's first written submission, paras. 144-156, 157-169; China's first written submission, paras. 288-290, 319.

<sup>217</sup> Australia's first written submission, paras. 145-146.

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other forms.<sup>218</sup> In these circumstances, MOFCOM was not justified in resorting to facts available in respect of Forms 6-3 and 6-4. To the extent that it relied on these forms in resorting to facts available, MOFCOM acted inconsistently with Article 6.8.

#### 4. MOFCOM acted inconsistently with paragraph 1 of Annex II

150. China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraph 1 of Annex II. Paragraph 1 of Annex II requires an investigating authority to be "prompt and precise" in setting out the information it requires.<sup>219</sup> Furthermore, an interested party must be aware of what information is required and the consequences of not providing that information before an investigation authority can resort to facts available.<sup>220</sup> China asserts that Australia's claims of inconsistency with paragraph 1 of Annex II "cannot be accepted" but provides no evidence or argument.<sup>221</sup>

151. As set out above, if China is correct that MOFCOM intended that the questionnaire to seek information on the additional [REDACTED], then MOFCOM acted inconsistently with paragraph 1 of Annex II by failing to "specify in detail" that this information was required. In addition, if China is correct that MOFCOM intended information on [REDACTED] to be reported in Form 6-1-2, then MOFCOM acted inconsistently with paragraph 1 of Annex II by failing to "specify in detail" that this information was required.

152. For the reasons set out above and in Australia's previous submissions, China has failed to rebut Australia's claims that it acted inconsistently with Article 6.8 and paragraph 1 of Annex II with respect to the information requested from Treasury Wines.

#### 5. MOFCOM acted inconsistently with paragraphs 3 and 5 of Annex II

153. China argues that Forms 6-1-1, 6-1-2, 6-3 and 6-4 could not be used without "undue difficulties", and were not submitted in a timely manner.<sup>222</sup> According to China, these two criteria in paragraph 3 of Annex II were not met and MOFCOM was not required to take the

<sup>218</sup> Australia's first written submission, paras. 172-189, 190-213, 216-217, 223-229.

<sup>219</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.453 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259).

<sup>220</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

<sup>221</sup> China's first written submission, paras. 186, 380, 420.

<sup>222</sup> China's first written submission, paras. 304, 335, 384, 388, 425, 430.



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information contained in the forms into account when its determinations were made.<sup>223</sup> Contrary to China's assertions, MOFCOM did not make an assessment of "undue difficulties". Moreover, the record does not support such a finding. In addition, the information was not untimely, and MOFCOM failed to make an assessment about whether the forms were submitted in a reasonable period.

154. China also contends that Treasury Wines did not act to the best of its ability and did not demonstrate a willingness to cooperate.<sup>224</sup> The record evidence directly contradicts China's arguments.

(a) MOFCOM did not find that the information could not be used without undue difficulties

155. China asserts that because Forms 6-1-1, 6-1-2, 6-3 and 6-4 submitted by Treasury Wines were not complete, they could not be used without undue difficulties.<sup>225</sup>

156. An investigating authority is required to explain in what way the information it rejects does not meet the requirements set out in paragraph 3 of Annex II.<sup>226</sup> Whether using information would give rise to "undue difficulties" has been held to be a highly fact specific issue, requiring an investigating authority to explain the basis of its conclusion.<sup>227</sup> The rationale of "undue difficulties" does not appear in MOFCOM's determinations. In the Preliminary Determination, MOFCOM stated in relation to Form 6-1-1 that Treasury Wines "did not fill in the inventory, consumption and unit price of each raw material at the beginning and end of the period as required by the questionnaire."<sup>228</sup> In relation to Form 6-1-2, MOFCOM stated that "the bulk liquor of the main raw materials for the product under investigation is self-produced, but the Company did not fill in the production cost of its own

<sup>223</sup> China explicitly refers to only these two criteria in paragraph 3 of Annex II in its first written submission. China does not offer any rebuttal to Australia's *prima facie* case that the information submitted by Treasury Wines met the criteria of paragraph 3 of Annex II and therefore MOFCOM was required to take that information into account when making its determinations. For completeness, Australia addresses China's arguments that the information was not verifiable in para. 159.

<sup>224</sup> China's first written submission, paras. 277, 302-303, 334, 336, 383-384, 424-425.

<sup>225</sup> China's first written submission, paras. 304, 335, 384, 425.

<sup>226</sup> See Australia's first written submission, paras. 68 and 71; Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.

<sup>227</sup> 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.

<sup>228</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 24.

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bulk wine in accordance with the requirements of the questionnaire."<sup>229</sup> Similar reasons appear in the Final Determination.<sup>230</sup>

157. MOFCOM's determination to reject the information in Treasury Wines' is based on the lack of certain information, not because using the submitted information was unduly difficult. In relation to the submitted information, MOFCOM does not attempt to justify its rejection because of difficulty in using the information, but rather because what was provided could not be verified.<sup>231</sup> For example, MOFCOM concluded that "the production costs and expenses of the product under investigation and like products could not be verified".<sup>232</sup>

158. MOFCOM does not explain how the submitted information could not be used without "undue difficulties". China's arguments concerning the "undue difficulties" criterion of paragraph 3 of Annex II are *ex post facto* rationalisations and should not be considered further by the Panel.

159. However, if these arguments are considered, as explained by Treasury Wines, the information in Forms 6-1-1 and 6-1-2 could be used as submitted for one of the two possible uses for the information.<sup>233</sup> With respect to MOFCOM's assertion that information could not be verified, there is no evidence on the record that MOFCOM even considered the alternative method of verification proposed by Treasury Wines (i.e. direct verification against the company's accounting system) let alone that utilising that method would give rise to "undue difficulties". Given that verification against an exporter's accounting records is a common step in anti-dumping investigations, an unbiased and objective investigating authority would have investigated this method of verification and, for a profitable publicly listed company like Treasury Wines,<sup>234</sup> would have found it to be acceptable and to not give rise to undue difficulties.

160. In any event, as Australia set out in its first written submission, there was no necessary information missing in order for MOFCOM to use Treasury Wines' reported costs of

<sup>229</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 24.

<sup>230</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 59.

<sup>231</sup> See Anti-Dumping Final Determination (Exhibit AUS-2), pp. 59-60. MOFCOM's purported inability to verify information is confirmed as the basis of its determinations to reject information in China responses to the Panel's questions. See China's response to Panel question No. 2, paras. 2, 12, 14.

<sup>232</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 60.

<sup>233</sup> Australia's first written submission, paras. 146 and 161.

<sup>234</sup> Australia's first written submission, para. 261.

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production.<sup>235</sup> MOFCOM could have used the submitted information without "undue difficulties" in order to determine the costs of production for Treasury Wines and ascertain a normal value based on the information provided by the company.

(b) Information submitted after the Preliminary  
Determination was not untimely

161. China also argues that Forms 6-1-1, 6-1-2, 6-3 and 6-4 were not supplied in a "timely fashion".<sup>236</sup> According to China, the updated forms were submitted after the Preliminary Determination and, on that basis, not supplied in a "timely fashion" within the meaning of paragraph 3 of Annex II.

162. It is well established that an investigating authority is not entitled to reject information for the sole reason that it was submitted after a deadline.<sup>237</sup> An investigation authority must consider whether the information was nonetheless submitted in a "timely fashion", or within a "reasonable period".<sup>238</sup> This is a highly fact specific assessment.

163. There is no evidence that MOFCOM considered whether the information was submitted within a "reasonable period". Treasury Wines' submission of the updated version of the forms after MOFCOM published the Preliminary Determination does not, without more, make the information untimely. Treasury Wines submitted the updated forms in response to the Preliminary Determination on 7 December 2020, within the deadline set by MOFCOM. MOFCOM then proceeded to issue a Supplementary Questionnaire some two months later, in February 2021. The fact that MOFCOM issued a Supplementary Questionnaire requesting further information and evidence from Treasury Wines after publishing the Preliminary Determination is evidence that MOFCOM was still able to consider information submitted after that time.

(c) Relationship between paragraphs 3 and 6 of Annex II

164. China argues that pursuant to paragraph 6 of Annex II, an interested party must have an opportunity to provide further explanations, "although this does not mean that a party may

<sup>235</sup> Australia's first written submission, paras. 144-145, 157-159, 172-189, 218.

<sup>236</sup> See China's first written submission, paras. 304, 335, 384, 425.

<sup>237</sup> See Appellate Body Report, *US – Hot-Rolled Steel*, para. 89. See also Australia's first written submission, para. 69.

<sup>238</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 81-83. See also Panel Report, *US – Steel Plate*, para. 7.76.

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submit new information".<sup>239</sup> Australia will discuss further below, it does not accept China's narrow interpretation of paragraph 6 of Annex II.<sup>240</sup> However, even if China's contention about the scope of paragraph 6 of Annex II is correct, this is not dispositive as to whether the information submitted by Treasury Wines met the criteria of paragraph 3 of Annex II. Before rejecting the updated forms submitted by Treasury Wines, MOFCOM was required to assess the information against the criteria in paragraph 3 of Annex II. This is independent from the scope of paragraph 6. As explained above, Treasury Wines' updated Forms 6-1-1, 6-1-2, 6-3 and 6-4 did meet these criteria and as such, MOFCOM was required to take the information into account when making its determinations.

(d) Treasury Wines did not demonstrate an unwillingness to cooperate

165. China argues that Treasury Wines' information was not ideal, and that the company did not act to the best of its ability and did not demonstrate a willingness to cooperate.<sup>241</sup>

166. China's contentions are directly contradicted by the facts on the record. Not only did Treasury Wines demonstrate a *willingness* to cooperate, but Treasury Wines did, *in fact*, cooperate with MOFCOM throughout the investigation. For example, Treasury Wines responded to the Anti-Dumping Questionnaire, explained in detailed comments why it had responded in the way that it did within the timeframe set by MOFCOM for commenting on the Preliminary Determination, resubmitted information which MOFCOM alleged was deficient, and also responded to the Supplementary Questionnaire. Treasury Wines was clearly disposed to do what MOFCOM required, and willing to cooperate.

167. On the contrary, MOFCOM's failure to engage in a dialogue with Treasury Wines shows its lack of cooperation. MOFCOM did not initiate any contact with Treasury Wines after the issuing the Supplementary Questionnaire. MOFCOM did not even acknowledge Treasury Wines' response to the Preliminary Determination in the Supplementary Questionnaire. Cooperation requires joint effort from the interested party and investigating authority. The

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<sup>239</sup> China's first written submission, paras. 306, 309.

<sup>240</sup> See paras. 174-177.

<sup>241</sup> China's first written submission, paras. 302-303, 334.

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record clearly shows that the lack of cooperation was on the part of MOFCOM and not Treasury Wines.

168. China also argues that Treasury Wines' failure to provide updated forms demonstrates it was not willing to cooperate.<sup>242</sup> Yet China also argues that MOFCOM was not required to take into account the information submitted after the Preliminary Determination as it was not supplied in a "timely fashion".<sup>243</sup> If MOFCOM actually adopted these conflicting standards that China argues Treasury Wines was expected to meet (it is not clear from the record that MOFCOM adopted them), they demonstrate the unreasonable burden MOFCOM placed on the company during the investigation. The Appellate Body has explained 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."<sup>244</sup> Despite Treasury Wines' participation in the investigation with a "very significant degree of effort", MOFCOM imposed "unreasonable burdens" on the company. Treasury Wines' failure to meet the absolute standards that China now contends was required is not evidence of the company's failure to cooperate. Rather, Treasury Wines' participation must be assessed against the standards set out in the Anti-Dumping Agreement. The record demonstrates that Treasury Wines acted to the best of its ability, within the meaning of paragraph 5 of Annex II. Even if the information it submitted was not ideal, MOFCOM was not permitted to disregard it.

169. Finally, Australia has explained above that Treasury Wines did not "sample" or "self-select" when providing information to MOFCOM within the timeframe.<sup>245</sup> As such, China's allegations of "self-selection" are unfounded and are not evidence that Treasury Wines was unwilling to cooperate.

#### (e) Conclusion

170. China has failed to rebut Australia's claims that the information supplied by Treasury Wines in Forms 6-1-1, 6-1-2, 6-3 and 6-4 met the criteria of paragraph 3 of Annex II, and

<sup>242</sup> China's first written submission, paras. 301, 333, 382, and 422.

<sup>243</sup> China's first written submission, paras. 304, 335, 384, and 425.

<sup>244</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 102. (emphasis original)

<sup>245</sup> See above paras. 143-146. See also Australia's response to Panel question No. 3, paras. 17-24. At section VII.D.4 of this submission, Australia explains how MOFCOM failed to give due consideration to Treasury Wines' extension request.

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MOFCOM should have taken it into account when making determinations. China's contentions that the information did not meet two criteria, that the information was not supplied in a "timely fashion" and could not be used without "undue difficulties", are not supported by evidence on the record. China offers no rebuttal to Australia's claims that the information satisfied the other criteria of paragraph 3 of Annex II.

171. Even if the Panel were to consider that the information submitted by Treasury Wines was not ideal, the evidence on the record directly contradicts China's assertions that Treasury Wines did not act to the best of its ability and did not demonstrate a willingness to cooperate. MOFCOM was not permitted to disregard all information submitted by Treasury Wines in Forms 6-1-1, 6-1-2, 6-3 and 6-4 on the premise that the company did not act to the best of its ability.

172. Based on the reasons set out above and in Australia's previous submissions, China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraphs 3 and 5 of Annex II.

## **6. MOFCOM acted inconsistently with paragraph 6 of Annex II**

173. Australia sets out the extent of its claims with respect to paragraph 6 of Annex II in its response to Panel question No. 1.<sup>246</sup> In this section, Australia responds to China's arguments concerning the scope of paragraph 6 of Annex II, and that MOFCOM informed Treasury Wines "forthwith" of the reasons for rejecting information.

### **(a) China's interpretation of paragraph 6 is unduly narrow**

174. China argues that pursuant to paragraph 6 of Annex II, parties "must *only* get an opportunity to 'provide further explanations'".<sup>247</sup> Citing the panel in *Korea – Certain Paper*, China argues that paragraph 6 does not give interested parties a second chance to submit information.<sup>248</sup>

175. There is no support for China's assertion. First, the factual circumstances in *Korea – Certain Paper* must be distinguished from those before the Panel. In that dispute, the

<sup>246</sup> Australia's response to Panel question No. 1, paras. 4-9.

<sup>247</sup> China's first written submission, para. 229.

<sup>248</sup> China's first written submission, para. 228 (citing Panel Report, *Korea – Certain Paper*, para. 7.85).

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respondent company did not submit any information initially concerning sales made through an affiliated company.<sup>249</sup> Subsequently, after being informed by the investigating authority of the defects, the respondent company submitted sales information pertaining to its affiliated company for the first time in the investigation. In the underlying investigation, Treasury Wines provided a comprehensive and timely response to the Anti-Dumping Questionnaire, including detailed responses to all requested forms. This is not a situation where Treasury Wines submitted new information, as was the case in *Korea – Certain Paper*, but rather Treasury Wines "resubmitted" forms with information to supplement what had already been provided. Indeed, MOFCOM subsequently requested supplementary information in its Supplementary Questionnaire, confirming that the provision of additional, but connected information was a routine part of MOFCOM's investigation.

176. Second, China's distinction between "explanations" and "information" is tenuous at best. The ordinary meaning of "explanations", in the context of paragraph 6 of Annex II, is "[t]he action or process of explaining something."<sup>250</sup> The action of explaining something may involve describing, analysing, or providing information or evidence. As such, it is arbitrary to draw a distinction between explanations and information devoid from factual circumstances. In the underlying investigation, there was a clear nexus between the information requested, Treasury Wines' explanations, and information submitted in the context of those explanations. It possible to conceive of circumstances, such as the case in *Korea – Certain Paper*, where there is no nexus between the explanation and the information, however this is not the situation before the Panel. China's assertion that paragraph 6 of Annex II only obliges an investigating authority to provide explanations as distinct from information is unduly narrow as it fails to account for the complex factual circumstances faced by investigating authorities and interested parties.

177. Finally, and in any event, China's argument that paragraph 6 of Annex II provides "only" for an opportunity to submit further explanations is moot. The premise of China's arguments appears to be that MOFCOM did, in fact, consider the forms resubmitted by Treasury Wines and these were rejected on the basis that they were not timely, the

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<sup>249</sup> Panel Report, *Korea – Certain Paper*, para. 7.81.

<sup>250</sup> Oxford English Dictionary online, definition of "explanations", <https://www.oed.com/view/Entry/66604>, accessed 28 November 2022.

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information contained therein could not be used without undue difficulties, and even with the provision of additional information, necessary information was nonetheless missing from the record.<sup>251</sup>

(b) MOFCOM's reasons for rejection were not provided  
"forthwith"

178. China argues that MOFCOM provided reasons for the rejection of Treasury Wines' evidence "forthwith".<sup>252</sup> In support of its assertion, China refers only to the deficiencies raised in the Preliminary Determination. China largely ignores the provision of information in response to the Preliminary Determination, and importantly, the Supplementary Questionnaire. Treasury Wines provided a timely response to the Supplementary Questionnaire on 9 February 2021. MOFCOM did not make any contact with Treasury Wines until the Final Disclosure was issued more than four weeks later.

179. China's assertion that the Final Disclosure was the "first possible point" where Treasury Wines could be informed of the deficiencies is without merit.<sup>253</sup> Paragraph 6 of Annex II does not prescribe the form in which notice must take. It is within MOFCOM discretion how it notifies interested parties that evidence is not accepted, provided that the notice is provided without delay. As such, it was open to MOFCOM to provide notice to Treasury Wines independent of the Final Disclosure. Indeed, MOFCOM was obliged to do so. In waiting for the Final Disclosure to give Treasury Wines notice, MOFCOM acted inconsistently with paragraph 6 of Annex II.

(c) The reasons provided by MOFCOM's were not precise

180. Moreover, the reasons provided by MOFCOM for its rejection of the information in its Final Determination were not sufficiently precise. China argues that MOFCOM considered the deficiencies in Treasury Wines' information holistically, and not on an individual basis.<sup>254</sup> Australia argues that China's argument is an *ex post facto* rationalisation and should not be

<sup>251</sup> For example, in relation to Form 6-1-1, China argues that "even that updated version was not complete". China's first written submission, para. 304.

<sup>252</sup> China's first written submission, paras. 304, 339, 386, 427.

<sup>253</sup> China's first written submission, paras. 340, 429.

<sup>254</sup> China's first written submission, para. 272.



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considered by the Panel.<sup>255</sup> However, even if the Panel agrees that the phrases "in summary" or "to sum up" evidence a holistic analysis, as China contends, MOFCOM failed to provide "reasons" of the standard required by paragraph 6 of Annex II.

181. The ordinary meaning of "reason" is "an account or explanation of, or answer to, something".<sup>256</sup> MOFCOM's use of the phrases "in summary" and "to sum up" to do not provide an account or explanation of the "holistic analysis" China now argues it undertook, and the varying level of importance assigned to different parts of the analysis.

182. For example, China now contends that the principal basis to resort to facts available was Treasury Wines' failure to report the cost of production of all PCNs sold on the domestic market. MOFCOM was obliged to inform Treasury Wines without delay that the failure to report this information was the "major reason" for resort to facts available and given Treasury Wines an opportunity to provide further explanations. MOFCOM failed to do so.

#### (d) Conclusion

183. China has failed to rebut Australia's claims that MOFCOM failed to notify Treasury Wines "forthwith" that its information was not accepted, and failed to provide "reasons" which sufficiently explained why MOFCOM was rejecting the information. Moreover, Australia has explained that China's interpretation of paragraph 6 of Annex II is unduly narrow.

184. For the reasons set out above and in Australia's previous submissions, China acted inconsistently with Article 6.8 and paragraph 6 of Annex II.

### **7. MOFCOM's selection of facts was not a reasonable replacement for the missing necessary information**

185. Australia does not accept that MOFCOM was permitted to use facts available to determine the cost of production for Treasury Wines necessary for the below cost test, and ultimately the constructed normal value. Assuming, *arguendo*, the Panel finds MOFCOM was permitted to use facts available, China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraph 7 of Annex II by selecting the

<sup>255</sup> See above, section III.B.2

<sup>256</sup> Oxford English Dictionary online, definition of "reason", <https://www.oed.com/view/Entry/159068> (accessed 28 November 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".

██████████ as the replacement fact to determine the cost of production used in the below cost test, and in the constructed normal value for Treasury Wines.

186. China provides three bases as *ex post facto* justifications for MOFCOM's selection of facts.<sup>257</sup> China also argues that MOFCOM had "more flexibility" in its selection of facts because there was not a "high level of cooperation".<sup>258</sup> There is no support for China's interpretation, and in any event, the record evidence does not support these assertions.

(a) China's justifications for MOFCOM's selection of facts are  
*ex post facto* rationalisations

187. The parties agree that an investigating authority is under an obligation to use the "best information available".<sup>259</sup> Implicit in this obligation is the requirement to undertake an evaluation of the facts on the record. There is also no disagreement between the parties that such an evaluation is required.<sup>260</sup> In this regard, the Appellate Body has explained that the selection of facts is a *process* that an investigating authority must undertake:

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 [...].<sup>261</sup> (footnotes omitted)

188. There must be evidence of this reasoning and evaluation either in the determinations, or elsewhere on the record. No such evidence exists in the present case. The full extent of MOFCOM's so-called reasoning and evaluation is as follows:

After comparisons, the Investigating Authority temporarily decided to 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.<sup>262</sup>

<sup>257</sup> China's first written submission, para. 457.

<sup>258</sup> China's first written submission, para. 454.

<sup>259</sup> China's first written submission, para. 232.

<sup>260</sup> See China's first written submission, paras. 456.

<sup>261</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.172. See also *US – Carbon Steel (India)*, in which, in relation to the comparable provision in the SCM Agreement, Article 12.7, the Appellate Body explained that "ascertaining the reasonable replacements for the missing 'necessary information' involves a process of reasoning and evaluation. As with Article 6.8 of the Anti-Dumping Agreement, this in turn calls for a consideration of all substantiated facts on the record." (Appellate Body Report, *US – Carbon Steel (India)*, para 4.424.)

<sup>262</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 60-61.

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MOFCOM's passing reference to "[a]fter comparisons" in no way evidences the required process.

189. China now provides three distinct bases for MOFCOM's selection of facts.<sup>263</sup> It is abundantly clear that these reasons do not appear in MOFCOM's Final Determination, nor its Preliminary Determination. These *ex post facto* justifications should not be considered further. In any event, they are also not supported by facts on the record, as will be discussed below.

(b) China has failed to demonstrate MOFCOM selected the best information available

190. Recalling the agreement between the parties that an investigating authority must conduct a comparative evaluation or assessment of all available facts on the record,<sup>264</sup> implicit in China's position is that MOFCOM *did* undertake an evaluation of the facts on the record despite there being no evidence of this. However, China argues that MOFCOM did so on the basis of a "more limited and less robust record" because Treasury Wines did not cooperate.<sup>265</sup> There is no legal or factual basis for China's assertions.

191. As part of the process of selecting a reasonable replacement, no facts can be *a priori* excluded from consideration. Yet this is precisely what China asserts MOFCOM did. China argues that MOFCOM evaluated information pertaining to the [REDACTED] [REDACTED] in order to select a reasonable replacement. MOFCOM's selection of these [REDACTED] as a starting point is illogical and arbitrary given its rejection of all information provided by Treasury Wines.

192. First, China infers that MOFCOM was limited to examining the [REDACTED] because Treasury Wines provided this information within the deadline.<sup>266</sup> Australia has already established that information cannot be disregarded simply because it was submitted after a deadline, especially in circumstances where MOFCOM had sufficient time to consider the

<sup>263</sup> China's first written submission, para. 457.

<sup>264</sup> China's first written submission, para. 456.

<sup>265</sup> China's first written submission, paras. 456-457.

<sup>266</sup> China's first written submission, para. 457.

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additional information and MOFCOM itself requested additional information in the Supplementary Questionnaire.

193. Second, China asserts that using cost information from Treasury Wines meant MOFCOM could avoid using secondary sources. China does not establish, but merely asserts, the information is not a secondary source. In any event, simply because the information selected was provided by Treasury Wines itself does not, without more, mean it is a reasonable replacement for the missing necessary information.

194. Finally, China argues that the information was not "excessively high". Whether information is (or is not) "excessively high" is not dispositive, and nor is it the correct legal standard to be applied under Article 6.8 and paragraph 7 of Annex II. In this respect, China asserts that Australia's complaint is that [REDACTED]<sup>267</sup> This is incorrect. Australia claims that MOFCOM's selection of facts was not a reasonable replacement for the allegedly missing necessary information in order to lead to an accurate dumping determination – the applicable legal standard. Information must be the "best information available". The fact that that the [REDACTED] was not "excessively high", does not, without more, make it the best information available.

195. In any event, in order to demonstrate that the [REDACTED] was not "excessively high" China relies on the very information it alleges MOFCOM did not consider because it was not submitted within the deadline. China argues that the [REDACTED] was comparable to [REDACTED]  
[REDACTED] Whether the [REDACTED]  
[REDACTED] is meaningless in isolation from the respective matching export volumes the domestic PCNs account for. In order to determine an accurate margin of dumping on a PCN-by-PCN basis (the methodology applied by MOFCOM), the domestic PCNs must reflect the makeup of the export PCNs. [REDACTED]

<sup>267</sup> China's first written submission, para. 449. China argues that the issue before the panel in *Mexico – Anti-Dumping Measures on Rice* does not arise because MOFCOM did not select [REDACTED] (China's first written submission, para. 452.) This is incorrect. China concedes that MOFCOM did, in fact, [REDACTED], the body of information it asserts is relevant. In any event, China's contention that the reasoning of the panel in *Mexico – Anti-Dumping Measures on Rice* only applies when the highest cost is selected is reductive. The Appellate Body (and the panel) found that in selecting the best information available, an investigating authority is required to undertake a comparative evaluation of the information on the record. MOFCOM failed to do so.

<sup>268</sup> China's first written submission, para. 457.

[REDACTED]

[REDACTED], given the [REDACTED] exported to China, the [REDACTED] subsequently submitted by Treasury Wines accounted for such a small portion of wine exported to China that they provide no meaningful comparison.<sup>270</sup> In this regard, not only has China failed to consider respective matching export volumes in its arguments that the [REDACTED] was representative, it ignores all other product characteristics. An objective and unbiased investigating authority would have given consideration to prices, volume, and other product characteristics when undertaking a genuine evaluation of all facts on the record in selecting a reasonable replacement. MOFCOM failed to do so.

196. China disagrees with Australia's "implied suggestion" that the lowest cost of production, or average cost of production, would have been more appropriate.<sup>271</sup> Not only is China attempting to rebut arguments not made by Australia, these examples provide further evidence of MOFCOM's failure to engage in a process of reasoning and evaluation. There is no evidence on the record that MOFCOM considered these two potential replacement facts and made a reasoned choice not to use them.

(c) The alleged lack of cooperation does not justify MOFCOM's selection of facts

197. China argues that if there is no "high level of cooperation, an investigating authority has more flexibility" in its selection of facts.<sup>272</sup> China's assertion has no basis in the texts of Article 6.8 or Annex II.

198. 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.<sup>273</sup> On this point China agrees, and acknowledges that even in circumstances where there is a lack of cooperation, "this does not

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<sup>269</sup> The production cost of the [REDACTED] See Australian Government Section II Dumping Tables (confidential version) (Exhibit AUS-5 (BCI)), p. 10; MOFCOM Essential Facts Disclosure Calculation Sheet (confidential version) (Exhibit AUS-4 (BCI)), sheet 2 row 26.

<sup>270</sup> See Australia's first written submission, para. 172.

<sup>271</sup> China's first written submission, para. 458.

<sup>272</sup> China's first written submission, para. 454.

<sup>273</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

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justify arbitrary selection of the data to be used in the place of the missing data" and an investigating authority does not have "*carte blanche*".<sup>274</sup> MOFCOM's arbitrary exclusion of certain data submitted by [REDACTED] is an example of acting with *carte blanche*, contrary to China's own submissions.

199. China also argues that if MOFCOM used either the lowest of the [REDACTED] [REDACTED] it would "incentivise exporting producers to manipulate the dumping margin calculation."<sup>275</sup> Again, this reasoning does not appear in MOFCOM's determinations. In any event, Australia has set out in detail how Treasury Wines did not manipulate the presentation of its data (including by withholding data) in order to receive a favourable dumping margin.<sup>276</sup> Treasury Wines [REDACTED]

This behaviour is evidence of [REDACTED] [REDACTED]. Had this indeed been [REDACTED]

200. China's attempts to distinguish the present case from the dispute in *Canada – Welded Pipe* are without merit.<sup>277</sup> In that dispute, the panel held that "by singling out the highest transaction-specific amount of dumping from a cooperative exporter without any comparative evaluation and assessment, and without any form of explanation, the [investigating authority] went beyond what was appropriate and necessary to achieve the objectives of encouraging cooperation and preventing circumvention."<sup>278</sup> In this dispute, MOFCOM selected the [REDACTED] without any comparative evaluation and assessment, and without any form of explanation, despite Treasury Wines' cooperation and extensive submission of information. As such, MOFCOM's conduct went beyond what was necessary in order to encourage cooperation. China argues

<sup>274</sup> China's first written submission, para. 456, referring to Panel Report, *Korea – Certain Paper (Article 21.5 - Indonesia)*, para. 6.26.

<sup>275</sup> China's first written submission, para. 459.

<sup>276</sup> See above section III.D.2. See also Australia's response to Panel questions Nos. 3 and 4, paras. 17-27.

<sup>277</sup> China's first written submission, para. 460.

<sup>278</sup> China's first written submission, para. 460 referring to Panel Report, *Canada – Welded Pipe*, para. 7.143.

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there is a distinction to be made between incentivising cooperation and incentivising manipulation of dumping margins.<sup>279</sup> Implicit in China's argument is that it was necessary for MOFCOM to [REDACTED] would incentivise manipulation of dumping margins. China itself acknowledges that MOFCOM's selection of facts was designed to disincentivise the alleged manipulation of dumping margins, i.e., it was not a selection of facts in order to arrive at an accurate dumping determination.

201. In any event, Australia has demonstrated that China's contention that Treasury Wines did not act to the best of its ability cannot be maintained. It was MOFCOM, not Treasury Wines, who failed to cooperate. Therefore, the greater degree of flexibility China alleges to exist does not apply on the facts of this dispute.

(d)      Conclusion

202. MOFCOM failed to undertake "a process of reasoning and evaluation" to select facts which reasonably replaced the alleged missing necessary information in order to arrive at an accurate determination of dumping. China's *ex post facto* rationalisations in no way justify MOFCOM's selection of facts, or demonstrate that the cost of production for the [REDACTED] was the "best information available".

203. Based on the reasons set out above, and in Australia's first written submission, China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraph 7 of Annex II in its selection of facts for Treasury Wines' cost of production.

**8.            Articles 2.1, 2.2, 2.2.1 and 2.2.1.1**

204. As a result of MOFCOM acting inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II, the foundation for its dumping determination for Treasury Wines was fatally flawed, resulting in a dumping determination that was inconsistent with Articles 2.1, 2.2, 2.2.1 and 2.2.1.1.<sup>280</sup>

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<sup>279</sup> China's first written submission, para. 460.

<sup>280</sup> Australia's first written submission, paras. 240-285.

**9. MOFCOM did not make a fair comparison under Article 2.4**

205. Even if the Panel finds MOFCOM's calculation of the normal value for Treasury Wines is consistent with the Anti-Dumping Agreement, MOFCOM still failed to make a fair comparison between its normal value and export prices as required by Article 2.4.<sup>281</sup>

206. In determining the normal value for Treasury Wines, MOFCOM's selected domestic sales prices and costs used for the constructed normal value reflected significant differences affecting price comparability with export prices making them unsuitable for comparison with export sales unless appropriate adjustments were made.<sup>282</sup> These differences concerned, *inter alia*, levels of trade and product mix (e.g. physical characteristics, quality, consumer preferences, and price).<sup>283</sup> They were not taken into account by MOFCOM when determining normal value and, therefore, needed to be taken into account when ensuring a fair comparison between normal value and export price under Article 2.4 by making the appropriate adjustments.<sup>284</sup> Although MOFCOM made some adjustments, it omitted crucial adjustments related to the above level of trade and product mix differences as well as "other discounts and rebates and advertising fees" requested by Treasury Wines.<sup>285</sup>

(a) MOFCOM did not adjust for level of trade and timing of sales

207. Treasury Wines established that [REDACTED]

Notwithstanding this evidence, 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

<sup>281</sup> Australia's first written submission, paras. 493-523.

<sup>282</sup> Australia's first written submission, para. 270.

<sup>283</sup> Australia's first written submission, para. 271-285.

<sup>284</sup> The Appellate Body in *EU – Biodiesel (Argentina)* observed that "[t]he manner in which the normal value is calculated pursuant to Article 2.2 of the Anti-Dumping Agreement may inform the types of adjustments required under Article 2.4" (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.48). China acknowledges that MOFCOM did not take these differences into account when determining Treasury Wines' normal values. See China's first written submission, paras. 503-510.

<sup>285</sup> Australia's first written submission, paras. 499-500; 516-17.

<sup>286</sup> Australia's first written submission, paras. 122 and 503. See also [REDACTED]



context.<sup>287</sup> This complete absence is a *prima facie* breach of the second sentence of Article 2.4.

208. Further, by not making the adjustments, MOFCOM also acted inconsistently with the third sentence of Article 2.4.<sup>288</sup> Contrary to China's argument, as explained above, the mere fact that MOFCOM compared the normal value and export price at the *ex-factory* level does not establish that it compared them at the same level of trade and does not establish that it complied with the mandatory requirements in the second and third sentences.<sup>289</sup>

209. Likewise, as Australia has demonstrated,<sup>290</sup> the evidence contradicts China's claim that MOFCOM compared sales made at "as nearly as possible the same time". There is no reference to this being a consideration in MOFCOM's comparison. By not even considering the necessity of adjustments for timing of sales – as the record of evidence shows – MOFCOM again acted inconsistently with the second and third sentences of Article 2.4.

(b) MOFCOM did not fulfil its procedural obligation under Article 2.4 which prevented Treasury Wines requesting relevant adjustments

210. As Australia has demonstrated<sup>291</sup>, MOFCOM's failure to meet the Article 2.4 procedural obligation during its investigation prevented Treasury Wines from requesting relevant adjustments arising from MOFCOM's methodology. Since the company was "left in the dark",<sup>292</sup> it was incumbent upon MOFCOM to "find ways to disclose as much information on the normal value as the exporter would need to meaningfully participate in the fair comparison process",<sup>293</sup> which it did not do.<sup>294</sup> MOFCOM was still obliged to make

<sup>287</sup> See paras 106-111. See also Australia's first written submission at paras. 502-508.

<sup>288</sup> China argues that "Australia has not raised a *claim* related to 'level of trade' under the third sentence. Its claim is limited to a violation of the second sentence of Article 2.4 of the Anti-Dumping Agreement" (China's first written submission, para. 835, emphasis added), referencing Australia's *argument* in its first written submission. China confuses the difference between a "claim" and an "argument". Australia's "claim" under Article 2.4 is set out in paragraph xiv of its Panel Request in broad terms that covered the entirety of Article 2.4. It is irrelevant that Australia focused its "argument" in its first written submission on the mandatory requirement in the second sentence of Article 2.4.

<sup>289</sup> See paras. 106-111.

<sup>290</sup> See paras. 94-121.

<sup>291</sup> See paras. 96-103. See also Australia's first written submission, paras. 493-522.

<sup>292</sup> China's first written submission, para. 818.

<sup>293</sup> China's first written submission, para. 819 quoting Panel Report, *EC – Fasteners (China)*, para. 7.149.

<sup>294</sup> See paras. 105-106.

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adjustments "where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability",<sup>295</sup> which it also did not do.<sup>296</sup>

(c) MOFCOM erroneously rejected adjustments requested by  
Treasury Wines

211. MOFCOM accepted Treasury Wines' requested adjustments for "invoice discount, wine equalisation tax adjustment, inland freight and other adjustment items" but rejected its claims for "other discounts and rebates and advertising fees",<sup>297</sup> apparently because Treasury Wines did not include "[s]ome of the information requested in the questionnaire".<sup>298</sup> MOFCOM concluded in its Preliminary Determination that "insufficient evidence was provided to support the claimed adjustments",<sup>299</sup> to which Treasury Wines responded in extensive detail, referencing its original response as well as providing supplementary information.<sup>300</sup> Despite that comprehensive response, China claimed that Treasury Wines "did not explain how these were directly linked to (export or domestic) sales of the product under investigation and why this would have an impact on price comparability"<sup>301</sup>. [REDACTED]

[REDACTED]

[REDACTED]

212. China acknowledged that "discounts, rebates and advertising fees could, in principle, give rise to the need to make a due allowance in the form of an adjustment to either the export price or the normal value (or both)".<sup>303</sup> The adjustments sought by Treasury Wines indicate that such differences did in fact affect price comparability. The record does not show that MOFCOM made any attempt to clarify the information provided by Treasury Wines. China stated only that "it was incumbent on Treasury Wines to not only show the existence of a difference, but also that this difference has an impact on price comparability. Treasury Wines did not do so."<sup>304</sup>

<sup>295</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

<sup>296</sup> See paragraphs 104-105.

<sup>297</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 70-71.

<sup>298</sup> China's first written submission, para. 871.

<sup>299</sup> Preliminary Determination, Exhibit CHN-3, page 23.

<sup>300</sup> [REDACTED]

<sup>301</sup> China's first written submission, para. 872.

<sup>302</sup> [REDACTED]

<sup>303</sup> China's first written submission, para. 873.

<sup>304</sup> China's first written submission, para. 875.

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213. Regarding China's claim that "Australia does not argue that these differences identified by Treasury Wines affect price comparability",<sup>305</sup> Australia refers back to Treasury Wines' request for adjustments and subsequent comments.<sup>306</sup> China's assumption that "the same adjustments were claimed on both the normal value (domestic sales) side as on the export side, thereby indicating that there is no impact on price comparability"<sup>307</sup> is not grounded in the facts.

214. Australia submits that an unbiased and objective investigating authority would have sought to correct the deficiency through engaging with the exporter and participating in a dialogue to understand the effect of this data on its comparison under Article 2.4 before deciding whether to reject them.

(d) MOFCOM did not make "due allowance" for differences affecting price

215. Separately to Treasury Wines' specific requests, MOFCOM failed to meet its procedural requirements under Article 2.4, which precluded it from making "due allowance" in the form of other adjustments for what it recognised as "the logical consequence"<sup>308</sup> of its methodology.<sup>309</sup>

216. Treasury Wines demonstrated significant differences between wines that affected price comparability. Its domestic and export sales comprised a diverse product mix including different physical characteristics, quality and consumer preferences.<sup>310</sup> MOFCOM gave no consideration to, nor made any adjustments for, these differences. This deficiency was exacerbated by MOFCOM's reliance on [REDACTED]. This complete absence of adjustments is a *prima facie* breach of the second and third sentences of Article 2.4.<sup>312</sup>

<sup>305</sup> China's first written submission, para. 876.

<sup>306</sup> [REDACTED]

<sup>307</sup> China's first written submission, para. 876.

<sup>308</sup> China's first written submission, para. 853.

<sup>309</sup> China's first written submission, para. 818.

<sup>310</sup> Australia's first written submission, para. 509 and Exhibit AUS-5 (BCI), Tables 1 and 3.

<sup>311</sup> Australia's first written submission, paras. 510-511.

<sup>312</sup> Australia's first written submission, para. 512-517.

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217. In its first written submission, China vaguely stated that "the manner in which the normal value has been determined could be pertinent to the question how a fair comparison has to be made."<sup>313</sup> It referenced the Appellate Body's view that a lack of cooperation may lead to a "less favourable" result<sup>314</sup> and emphasised that "a failure to provide certain information may have ramifications beyond the category into which it falls."<sup>315</sup> China did not clearly articulate what it considers that to mean in the context of its actual investigation. It appears that China incorrectly considers Article 2.4 to be a mechanism for effectively punishing exporters deemed to be insufficiently cooperative.<sup>316</sup>

218. Having deprived Treasury Wines of information about its calculations and methodologies, and thereby prevented it from requesting other relevant adjustments, MOFCOM apparently perceived no obligation to make any other adjustments to ensure a fair comparison in accordance with Article 2.4.

219. In its first written submission, China stated that "[g]iven that neither Treasury Wines nor Casella Wines ever requested an adjustment for differences in quality, China considers that there was no obligation on MOFCOM under the third sentence of Article 2.4 of the Anti-Dumping Agreement to make an adjustment for differences in quality."<sup>317</sup>

220. This gives effect to China's assertion that "if it is not demonstrated to the authorities that there is a difference affecting price comparability, then there is no obligation to make an adjustment".<sup>318</sup> China considered that MOFCOM was under no obligation to "take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited"<sup>319</sup> because "no request was made at all."<sup>320</sup>

221. As Australia has demonstrated<sup>321</sup>, the sampled companies' obligation to request adjustments was dependent upon MOFCOM's obligation to meet its procedural obligations under the sixth sentence of Article 2.4. This constitutes the threshold requirement for an

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<sup>313</sup> China's first written submission, paras. 811; and 853.

<sup>314</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.

<sup>315</sup> Panel Report, *US – Steel Plate*, para. 7.60.

<sup>316</sup> See paras. 91-121.

<sup>317</sup> China's first written submission, para. 860.

<sup>318</sup> China's first written submission, para. 815.

<sup>319</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 488.

<sup>320</sup> China's first written submission, para. 860.

<sup>321</sup> See paras. 96-105.

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exporter to "meaningfully participate in the fair comparison process",<sup>322</sup> especially when "left in the dark"<sup>323</sup> by an investigating authority. The reason for the absence of requests for adjustments is MOFCOM's failure to abide by this obligation.<sup>324</sup>

222. MOFCOM sought a large amount of information from Treasury Wines but never indicated what information it actually required to ensure a fair comparison. When MOFCOM identified that it required certain information that had allegedly not been provided, it did not engage in a dialogue with Treasury Wines. Instead, MOFCOM supplemented this information by applying a methodology that it did not disclose to Treasury Wines during the investigation.

223. Having done that, MOFCOM failed to make any adjustments for what it recognised as "the logical consequence"<sup>325</sup> of its methodology, attributing this outcome to "ramifications" related to the use of facts available. MOFCOM failed to meet its procedural obligation under Article 2.4 then ignored its obligation to make adjustments that had not been specifically requested by Treasury Wines, which it had "left in the dark"<sup>326</sup> in order for it "to meaningfully participate in the fair comparison process".<sup>327</sup> MOFCOM effectively penalised Treasury Wines for not requesting any adjustments to account for an undisclosed methodology and unknowable "consequence"<sup>328</sup> of Treasury Wines' alleged failure to provide information that MOFCOM had never indicated as necessary to ensure a fair comparison in the first place.

224. Australia makes a further observation with respect to China's claim that "even after having been informed of the use of facts available – and which facts available were used – in

<sup>322</sup> China's first written submission, paras. 817-820.

<sup>323</sup> China's first written submission, para. 818.

<sup>324</sup> China argues that "Treasury Wines did not claim an adjustment for differences in quality in its questionnaire reply. China notes that the absence of such a claim does not come as a surprise. As can be observed from Tables 1 and 3 of Exhibit AUS-5 (BCI), the share of low-quality wines in total sales on the domestic and export market was similar (i.e. [REDACTED] respectively" and that "if an adjustment would need to be made on account of differences in quality, this would be a downward adjustment to the export price or an upward adjustment to the normal value" (China's first written submission, para. 852). This argument is *ex post facto*. There is no evidence on MOFCOM's record that this was a consideration in its decision to not make adjustments. Moreover, this argument is factually incorrect. It appears that China's argument is grounded in the application of an average normal value and export price. Following MOFCOM's methodology, adjustments would be made on a PCN-by-PCN basis, not on an average basis. Thus, the quality of the wines being compared for normal values and export prices would be comparable. For example, where the premium wine normal value is compared to a lower quality wine export price, the normal value would be adjusted downward or the export price adjusted upward to allow for a fair comparison.

<sup>325</sup> China's first written submission, para. 853.

<sup>326</sup> China's first written submission, para. 818.

<sup>327</sup> China's first written submission, paras. 817-820.

<sup>328</sup> Panel Report, *US – Steel Plate*, paras. 7.60-7.61. (footnotes omitted)

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the Preliminary Determination, Treasury Wines did not request an adjustment for differences in quality."<sup>329</sup> This over-states MOFCOM's actual level of disclosure. The record of evidence does not indicate that MOFCOM informed Treasury Wines "which facts available were used", let alone how they were used.

225. The same errors of disclosure apply to MOFCOM's consideration of Treasury Wines' other requests for adjustments. Having failed to make adequately and timely disclosure of relevant information, MOFCOM expected Treasury Wines to make requests for adjustments "in the dark".<sup>330</sup> (This is even more the case for the other sampled exporters.)

226. MOFCOM stated that "[s]ome of the information requested in the questionnaire, however, was not included."<sup>331</sup> Following Treasury Wines' response to the preliminary determination<sup>332</sup> elaborating on its original questionnaire response<sup>333</sup>, China claimed that it "did not explain how these were directly linked to (export or domestic) sales of the product under investigation and why this would have an impact on price comparability"<sup>334</sup> but did not seek this specific information or engage Treasury Wines in dialogue. Australia has addressed the obligation on the investigating authority, as well as the exporter, to ensure a fair comparison.<sup>335</sup>

227. Regarding China's claim that "Australia does not argue that these differences identified by Treasury Wines affect price comparability", these differences commonly result in price comparability issues and the absence of proper consideration of price comparability by MOFCOM prevents further elaboration upon this point. In any event, the obligation was on MOFCOM to properly consider whether the differences affected price comparability and it did not. China's assumption that "the same adjustments were claimed on both the normal value (domestic sales) side as on the export side, thereby indicating that there is no impact on price comparability"<sup>336</sup> is *ex post facto* and incorrect. An adjustment is only necessary where a "difference" affects price comparability. In order to ensure a fair comparison, this difference

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<sup>329</sup> China's first written submission, para. 854.

<sup>330</sup> China's first written submission, para. 817-820.

<sup>331</sup> China's first written submission, para. 871.

<sup>332</sup> [REDACTED]

<sup>333</sup> [REDACTED]

<sup>334</sup> China's first written submission, para. 872.

<sup>335</sup> See paras. 91-121.

<sup>336</sup> China's first written submission, para. 876.

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must be neutralised through an adjustment, which can be made to either normal value, export price or to both. The fact that it can be made to either normal value or export price does not mean that the difference affecting price comparability "has no impact on price comparability".

228. Australia submits that an unbiased and objective investigating authority would have sought to correct any perceived deficiencies through engaging with the exporter and participating in a robust two-way dialogue to understand the data and ensure a fair comparison under Article 2.4.

229. Separately to Treasury Wines' specific request, Australia again notes MOFCOM failed to make any other adjustments for what it recognised as "the logical consequence"<sup>337</sup> of its methodology, as it ignored its obligation to make adjustments that had not been requested by the same exporters which it had "left in the dark".<sup>338</sup>

230. For the foregoing reasons, and those set out in Australia's prior submissions, MOFCOM acted inconsistently with Article 2.4, including the first, second, third and sixth sentences of the provision, with respect to Treasury Wines.

## **E. CASELLA WINES**

231. Australia claims that MOFCOM's dumping determination for Casella Wines was inconsistent with Articles 1, 2.1, 2.2, 2.4, 6.1, 6.1.1, 6.2, 6.4, 6.8, 6.9, 9.1, 9.2, 9.3, 18.1 and paragraphs 1, 3, 5, 6 and 7 of Annex II. China has failed to rebut these claims.<sup>339</sup>

232. Australia set out, in sections III.B and III.C above, issues relating to MOFCOM's obligation to make a fair comparison under Article 2.4, and demonstrated that MOFCOM acted inconsistently with Article 6.8 because of its recourse to facts available on the basis of a "holistic analysis" of the information submitted by the sample companies.

233. In this section, Australia will address the additional errors MOFCOM committed with respect to its recourse to and selection of facts available for Casella Wines' normal value, and MOFCOM's failure to make a fair comparison under Article 2.4.

<sup>337</sup> China's first written submission, para. 853.

<sup>338</sup> China's first written submission, para. 818.

<sup>339</sup> Australia's claims under Articles 6.1, 6.1.1, 6.2, 6.4 and 6.9 are elaborated upon in Section VII.D of this submission.

## **1. MOFCOM's recourse to facts available had no proper basis**

234. In its first written submission, China argued that MOFCOM's decision to reject Casella Wines' cost of production data should be understood in the context of "an overall perspective, taking into account the totality of the deficiencies".<sup>340</sup> As set out above, this alleged "holistic assessment" approach has no proper basis in law;<sup>341</sup> nor is it reflected in MOFCOM's Final Determination.

235. Instead, it appears that the principal basis for MOFCOM resorting to facts available in the context of Casella Wines was the company's alleged failure to provide full cost of production data.

236. As Australia demonstrates in detail in section III.E.2(b)i below, Casella Wines provided all the data requested by MOFCOM. Indeed, China does not deny that Casella Wines provided complete and accurate response to Form 6-3 in both hard copy and PDF format. Rather, China's only complaint is that Casella Wines did not provide a complete version of Form 6-3 in the requested WPS format.

237. Accordingly, MOFCOM rejected Casella Wines' cost of production data on the sole basis that one of the three versions in which the data was required to be provided to the investigating authority was incomplete. This was despite Casella Wines' prompt and clear explanation of the technical difficulties it faced, and despite Casella Wines having provided MOFCOM with the complete Form 6-3 in Excel format, an equivalent format that allowed MOFCOM to manipulate and analyse the data easily and effectively.

238. This unjustified and officious approach is characteristic of MOFCOM's whole investigation. It is not the approach of an unbiased and objective investigating authority.

## **2. There was no necessary information missing from the record**

239. Contrary to MOFCOM's findings, Australia has established that Casella Wines provided all necessary information to establish its actual production costs, and that no necessary information was missing from MOFCOM's record. China has failed to rebut these

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<sup>340</sup> China's first written submission, para. 583.

<sup>341</sup> See above, section III.B.



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arguments and has provided no evidence to the contrary. Australia will address each of the forms MOFCOM alleged to be deficient below, namely Forms 6-1-2, 6-3 and 6-4.

(a) Form 6-1-2

240. Casella Wines provided all necessary information to establish its actual production costs in Form 6-1-2. As Australia explained in its first written submission, the data that MOFCOM found was missing was the cost of production data for "clean skin" wine, a raw material for the like domestic product. This was not necessary information within the meaning of Article 6.8 of the Anti-Dumping Agreement.<sup>342</sup> This is because [REDACTED]

[REDACTED] As a result, this data cannot be used to determine the cost of production of domestic like products for the purposes of calculating normal value within the meaning of Article 2 of the Anti-Dumping Agreement.

241. In the Final Determination, MOFCOM asserted that the "absence of and inconsistency in the data related to raw material costs affected the Investigating Authority's identification of production costs for the product under investigation and like products."<sup>344</sup> China elaborates in its first written submission, arguing that the information contained in Form 6-1-2 was not necessary in and of itself, but because it was required to verify "the correctness of the information provided on cost of production as reported in Forms 6-3 and 6-4."<sup>345</sup> According to China, the cost of production of internally produced input materials such as "clean skin" is necessary "to verify whether the cost of production of the product under investigation has been correctly reported".<sup>346</sup> While this may be true for some investigations, in this investigation, [REDACTED]

[REDACTED] made this approach futile. Instead, as Casella Wines explained, MOFCOM could have verified the data by referring directly to Casella Wines' accounting systems.<sup>347</sup>

<sup>342</sup> Australia's first written submission, paras. 160, 320-326.

<sup>343</sup> Australia's first written submission, para. 321.

<sup>344</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 83.

<sup>345</sup> China's first written submission, para. 595.

<sup>346</sup> China's first written submission, para. 603.

<sup>347</sup> This includes remote "desktop" verification, which could easily have been conducted by MOFCOM within the timeframes of the investigation.

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242. In attempting to dismiss Casella Wines' explanation, China fails to reconcile its own admission that the information reported in Form 6-1-2 was required *only* to ascertain the correctness of information provided on cost of production as reported in Forms 6-3 and 6-4, with the explanation from [REDACTED]

[REDACTED] Yet, there is no evidence on the record that MOFCOM undertook any reasoning as to the whether the cost of production data in Forms 6-3 and 6-4 were otherwise verifiable. Consideration of this issue was essential to determining whether or not the information in Form 6-1-2 was "necessary". Accordingly, MOFCOM was obliged to consider this issue and did not.

243. For the foregoing reasons, and the reasons set out in Australia's prior submissions, Australia submits that the information MOFCOM found to be missing from Form 6-1-2 was not capable of amounting to necessary information for the purpose of calculating normal value for Casella Wines under Article 2 of the Anti-Dumping Agreement. Moreover, MOFCOM's disregard of the information that was provided in Form 6-1-2 on the basis that it was not "verifiable" in absence of any evidence that MOFCOM considered any other means of verification, was inconsistent with Article 6.8 and paragraph 3 of Annex II of the Anti-Dumping Agreement.

(b) Form 6-3

*i. MOFCOM's refusal to accept replacement spreadsheet data*

244. MOFCOM did not find, and China has not argued, that Casella Wines failed to provide complete information in Form 6-3. MOFCOM acknowledged that Casella Wines provided hard copy and PDF versions of Form 6-3. The deficiency of which MOFCOM complained was that the third version of this form, in WPS format, was not consistent with the first two. Hence, China does not argue that MOFCOM disregarded the data submitted by Casella Wines in Form

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<sup>348</sup> Australia's first written submission, paras. 321-324.

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6-3 due to any alleged absence of necessary information, but only because the data submitted in WPS format was inconsistent with that submitted in hard copy and PDF formats.<sup>349</sup>

245. China argues that MOFCOM required the data in WPS format, in preference to PDF or hard copy in order to be able to use the data without undue difficulty.<sup>350</sup> This preference for the WPS formatted response over either the hard copy or PDF formatted responses is not indicated anywhere on the record of MOFCOM's investigation, nor in the questionnaire instructions.<sup>351</sup> MOFCOM also failed to explain how the submission of the data in Excel format (in addition to hard copy and PDF) caused it undue difficulty such that it was entitled to reject the data wholesale without considering it at all. This is particularly so given Excel is a widely accepted spreadsheet format that until recently was used by MOFCOM.<sup>352</sup> Given MOFCOM has previously had the capability and indeed preferred to use Excel, it appears unlikely that it was unable to use Casella Wines' complete data submitted in that format without undue difficulty. In any event, MOFCOM failed to provide the necessary explanation during the investigation and China is therefore precluded from relying on any *ex post facto* explanation to justify its conduct in this proceeding.

246. Further, even accepting, *arguendo*, China's *ex post facto* argument, that WPS was MOFCOM's preferred format, the WPS Office application, which is used to view and manipulate WPS formatted spreadsheets, is also capable of importing, viewing and manipulating Excel formatted data. Indeed, the publisher of WPS Office markets the product as, "WPS Office, A Free Excel Spreadsheet Editor".<sup>353</sup> It states that, "WPS Office is compatible with the xls,xlsx formats and is one of the best alternatives to Microsoft Excel."<sup>354</sup> Casella Wines submitted its data in xlsx format.<sup>355</sup> Given that the WPS Office application includes the capability to view and manipulate the data in Excel formats, MOFCOM's usage of WPS does

<sup>349</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 77-79.

<sup>350</sup> China's response to Panel question No. 75, para. 390.

<sup>351</sup> Questionnaire for Foreign Exporters or Producers (Exhibit AUS-3), pp. 12-13.

<sup>352</sup> China has indicated that it has been using the WPS format since August 2020. See "Note" to page 1 of MOFCOM, List of investigations using the WPS format (Exhibit CHN-10), p. 1.

<sup>353</sup> WPS, *Excel*, <https://www.wps.com/academy/excel-spreadsheet>, accessed 28 November 2022.

<sup>354</sup> WPS, *Excel*, <https://www.wps.com/academy/excel-spreadsheet>, accessed 28 November 2022. Australia notes for completeness that xls and xlsx are two commonly used Excel spreadsheet formats.

<sup>355</sup> See relevantly, [REDACTED]

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not rationally prevent it from having been able to view and manipulate the data Casella Wines submitted in Excel format.

247. Casella Wines' submission of the data in this format allowed MOFCOM to use it with the same ease as WPS format. Indeed, given that it was impossible due to the technical limitations of the WPS format to submit the complete data set in a single spreadsheet, had MOFCOM used the Excel formatted data it would have been able to use it with even greater ease.

248. China's purported rationalisation of MOFCOM's wholesale rejection of Casella Wines' data, in absence of any attempt to use it, even though it may not have been ideal in all respects, fails to engage with the fact that all necessary information was provided by Casella Wines. As all of the necessary information was provided to MOFCOM in formats that were requested (hardcopy and PDF), and in an additional format that gave MOFCOM all the functionality it required (Excel), there was no basis for MOFCOM find that necessary information was absent.

*ii. MOFCOM's complaint about the absence of cost sheets saved in daily operations*

249. MOFCOM also determined that necessary information was missing from its record because Casella Wines did not provide "cost sheets saved in daily operations".<sup>356</sup> Australia has established that this was not necessary information for the purposes of MOFCOM's determination of a dumping calculation.<sup>357</sup> Hence, their absence could not have been a reason justifying MOFCOM's recourse to facts available. In its first written submission, China concedes that "the absence of costs sheets [...] was not the main reason for the recourse to facts available".<sup>358</sup> China similarly goes on to argue that it was a "supplementary" reason, but provides no explanation as to why MOFCOM determined that the information was "necessary" for the purpose of its dumping calculation.

250. Having conceded that the absence of cost sheets saved in daily operations was, at most, a "supplementary" reason for MOFCOM's decision to have recourse to facts available,

<sup>356</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 80.

<sup>357</sup> Australia's first written submission, paras. 344-348.

<sup>358</sup> China's first written submission, para. 630.

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China then lists two other reasons which were not referred to in MOFCOM's Final Determination, and which are irrelevant to the question of whether or not the daily cost sheets were provided. In particular China now provides *ex post facto* rationalisations for MOFCOM's decision, referring again to the submission of the incomplete WPS version of Form 6-3, and the absence of monthly cost of production data.<sup>359</sup>

251. China fails to engage with Casella Wines' explanation that the data in the cost sheets was drawn from its accounting system, and that there was a reasonable and conventional avenue available to MOFCOM to verify the data, namely by direct reference to Casella Wines' accounting system. Indeed, China acknowledges that this may have been possible, conceding that the data was in fact verifiable within the meaning of paragraph 3 of Annex II.

252. For these reasons, China has failed to rebut Australia's arguments that MOFCOM had no basis to reject the data provided by Casella Wines in Form 6-3 and instead to resort to facts available.

(c) Form 6-4

i. *Costs for bulk wine*

253. China has sought to dismiss Australia's claims concerning MOFCOM's erroneous finding that it was permitted to have recourse to facts available under Article 6.8 of the Anti-Dumping Agreement on the basis that the costs for bulk wine were not provided by Casella Wines in Form 6-4, and that this was necessary information.<sup>360</sup> China argues that, while MOFCOM queried the absence of bulk wine cost data from Form 6-4 initially, it was satisfied with the explanation Casella Wines provided and ceased to pursue the issue. However, China's explanation is not only *ex post facto*, it is inconsistent with MOFCOM's Final Determination in which it indicated that Casella Wines had "failed to fill in the costs for bulk wine" in Form 6-4.<sup>361</sup> Nowhere in the Final Determination did MOFCOM state that it no longer pressed this issue, in fact it stated the opposite.

<sup>359</sup> China's first written submission, para. 630.

<sup>360</sup> China's first written submission, paras. 633-636.

<sup>361</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.

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254. It is clear from MOFCOM's own explanation that it erroneously relied on the absence of bulk wine costs to justify its improper recourse to facts available contrary to China's obligations under Article 6.8. Accordingly, Australia maintains its claim in this regard and notes that China has, so far, not engaged with the substance of that claim.

*ii. The use of product control code marker "#N/A"*

255. China has asserted that Casella Wines' use of the product control code marker "#N/A" was "ultimately not one of the reasons – let alone a (or the) main reason – for the recourse to the facts available".<sup>362</sup> In its response to Panel question No. 2(h), China further argued that this issue "was not explicitly mentioned in the Final Disclosure or the Final Determination because Casella Wines had explained that these #N/A product codes related to products that were not sold during the investigation".<sup>363</sup> This is a misrepresentation of MOFCOM's findings. Contrary to China's argument, in its Final Determination, MOFCOM referred to Casella Wines' explanation, but did not accept it.<sup>364</sup> Further, after raising the issue, MOFCOM did not indicate that it no longer pursued the issue as China has claimed. Accordingly, it is clear from the Final Determination that Casella Wines' use of the product control marker "#N/A" was one MOFCOM's grounds for its recourse to facts available. As Australia has explained, MOFCOM's reliance on this issue, in this way was inconsistent with Article 6.8 of the Anti-Dumping Agreement.<sup>365</sup>

(d) Conclusion

256. Based on the above, China has failed to rebut Australia's claim that there was no necessary information missing from the record. In particular, China has sought to argue that MOFCOM did not rely on the alleged deficiencies in Forms 6-1-2, 6-3 and 6-4 to justify its recourse to facts available. Rather, China suggests first that MOFCOM's determination that necessary information was missing from the record was based on the totality of the evidence, though no such basis was referred to in the Final Determination. To the contrary, Australia has established that MOFCOM determined that certain information was necessary without foundation contrary to Article 2. Accordingly, for the reasons set out above and in Australia's

<sup>362</sup> China's first written submission, para. 639.

<sup>363</sup> China's response to Panel question No. 2(h), para. 19.

<sup>364</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 82.

<sup>365</sup> Australia's first written submission, paras. 358-362.

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first written submission, China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement by resorting to facts available with respect to Casella Wines' normal value.

### **3. MOFCOM acted inconsistently with paragraph 1 of Annex II**

#### **(a) Product control code marker "#N/A"**

257. China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraph 1 of Annex II. Paragraph 1 of Annex II requires an investigating authority to be "prompt and precise" in setting out the information it requires. Furthermore, an interested party must be aware of what information is required and the consequences of not providing that information before an investigation authority can resort to facts available.

258. In spite of China's claims to the contrary, MOFCOM did rely on the absence of data relating to PCNs that were not sold during the period of the investigation as a basis for rejecting Casella Wines' data and using facts available. As established in section III.E.2(c)ii, above, contrary to China's claims, the Final Determination indicates that MOFCOM did persist in requiring this information even though it was expressly excluded from the scope of the investigation and the questionnaire. This is a breach of paragraph 1 of Annex II because the relevant question read in its context in the questionnaire would not encompass such PCNs and hence the question did "not specify in detail" the information required.

### **4. MOFCOM acted inconsistently with paragraphs 3 and 5 of Annex II**

#### **(a) Verification of cost of production data in Forms 6-3 and 6-4**

259. MOFCOM rejected Casella Wines' cost of production data on the basis that it was not verifiable. In service of this argument, China repeatedly referred to the panel report in *Egypt – Steel Rebar* to support its claim that the information it requested to facilitate verification was necessary information. However, that report is not relevant to this case. Unlike the panel in *Egypt – Steel Rebar*, the question before the Panel in this case is not whether information requested to facilitate verification is necessary or not. Rather the question is whether, given the facts on the record, an objective and unbiased investigating authority could have disregarded the information provided by Casella Wines on the basis that it was not verifiable. In *US – Steel Plate*, the panel considered that "verifiable" information for the purpose of paragraph 3 of Annex II was information whose "accuracy and reliability [...]"

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can be assessed by an objective process of examination".<sup>366</sup> In applying this interpretation, the panel in *EC – Salmon (Norway)* found that it was incumbent on an investigating authority to consider objectively whether particular information was verifiable and not merely whether it was convenient to verify it. It found that such a determination "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".<sup>367</sup>

260. Notably, in *EC – Salmon (Norway)*, the panel considered whether the investigating authority's finding that particular information was not verifiable because it had been submitted after the conclusion of the on-site investigation which could otherwise have verified it, was consistent with paragraph 3 of Annex II. It found that "[b]ecause the [Anti-Dumping] Agreement envisages that there may be other ways to assess the accuracy and reliability of information, the mere fact that a piece of information may have been submitted after an on-the-spot investigation has taken place, does not mean that its accuracy and reliability cannot be objectively assessed through any other process of verification."<sup>368</sup>

261. The facts of that case are strongly analogous to MOFCOM's approach to the data submitted by Casella Wines in this dispute. China has conceded that the information it claims was missing was only necessary to verify the data provided. Accordingly, before discarding the data that Casella Wines did provide, MOFCOM was required to consider whether that data was objectively verifiable or not. It did not do this. Instead, it considered only whether it could verify the data based on the information it had already requested in the various forms. Casella Wines had explained why the data MOFCOM requested to facilitate verification was not suitable for that purpose. Yet MOFCOM did not consider whether the data was verifiable by any other means as required by paragraph 3 of Annex II. Instead, it simply disregarded all of the data provided by Casella Wines without basis.<sup>369</sup>

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<sup>366</sup> Panel Report, *US – Steel Plate*, para. 7.71.

<sup>367</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.360.

<sup>368</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.360.

<sup>369</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 77-84.



(b) Verification of "clean skin" production costs

262. China asserts that Casella Wines did not submit data relating to the production costs of the "clean skin" wine, an input. China's only argument in defence of MOFCOM's compliance with paragraphs 3 and 5 of Annex II is that by failing to provide this data, Casella Wines had shown that it was not fully cooperating with the investigation.<sup>370</sup> China claims that this relieved MOFCOM of its obligations under paragraph 5 not to reject information even though it may not be ideal in all respects.

263. However, China's argument is flawed. Casella Wines went to great lengths to assist MOFCOM and cooperated fully with the investigation. China seeks to frame the Casella Wines' failure to provide the data relating to "clean skin" wine as a refusal to provide necessary information.<sup>371</sup> In reality, as Australia has established, this data was not necessary to the investigation. As Annex II to the Anti-Dumping Agreement relates only to the procedure for substituting necessary information that is not provided or otherwise not available, it does not apply to conduct relating to information that is not necessary, including the "clean skin" production cost data.<sup>372</sup>

264. China has also conceded that this information was requested solely to facilitate verification.<sup>373</sup> Casella Wines explained why the data was not suitable for that purpose and offered other more accurate data to facilitate verification. This is precisely the purpose of paragraph 5 of Annex II. The information offered by Casella Wines, was "not ideal in all respects" in that it was not precisely what MOFCOM had requested. Nonetheless, in offering it, Casella Wines was acting to the best of its abilities and by operation of paragraph 5 therefore, MOFCOM was not justified in disregarding it.

265. China does not complain that the data submitted by Casella Wines otherwise did not meet the requirements of paragraphs 3 and 5 of Annex II. MOFCOM also did not record any reasoning to this effect. For these reasons, MOFCOM acted contrary to paragraphs 3 and 5 of Annex II by disregarding the evidence submitted by Casella Wines.

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<sup>370</sup> China's first written submission, paras. 604-607.

<sup>371</sup> China's first written submission, paras. 606-607.

<sup>372</sup> See section III.E.2(a) above.

<sup>373</sup> China's first written submission, paras. 595-603.

(c) Minor alleged deficiencies used to justify rejection of whole categories of evidence

266. MOFCOM rejected wholesale Casella Wines' reported domestic sales on the basis that it did not sufficiently explain special price arrangements.<sup>374</sup> However, the percentage of sales affected by special price arrangements was very small.<sup>375</sup> Similarly, in its approach to Casella Wines' service provider, Austral Wines Pty Ltd, MOFCOM used an alleged deficiency affecting a very small quantity of sales as a reason to reject the entirety of Casella Wines sales. While such deficiency may mean the data is not ideal in all respects, it was inconsistent with China's obligations under Article 6.8 and paragraph 6 of Annex II to the Anti-Dumping Agreement for MOFCOM to reject these data in their entirety.

**5. MOFCOM acted inconsistently with paragraph 6 of Annex II**

267. Australia maintains its claims under paragraph 6 of Annex II in respect of Casella Wines as explained in its first written submission and clarified in its responses to the Panel's questions after the first substantive meeting.<sup>376</sup>

268. In sum, MOFCOM was obliged to give Casella Wines notice forthwith of the rejection of its evidence or information, and the reasons for such a decision. Casella Wines was also entitled to an opportunity to comment on any such a finding.

269. Australia's claims under paragraph 6 encompass:

- MOFCOM's conduct concerning Casella Wines' responses to the Preliminary Determination as it relates to reconciliation between certain forms;<sup>377</sup>
- MOFCOM's rejection of Casella Wines' Form 6-1-2 and its conduct concerning [REDACTED]

<sup>374</sup> See Australia's first written submission, paras. 301-308.

<sup>375</sup> Australia's first written submission, para. 306; [REDACTED]

<sup>376</sup> Australia's first written submission, paras. 329-330 and 374; response to Panel question No. 1.

<sup>377</sup> See Australia's first written submission, paras. 363-381.

<sup>378</sup> [REDACTED]

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- MOFCOM's silence as to its rejection of the company's response to the Supplementary Questionnaire.<sup>379</sup>

270. Australia has established that Casella Wines was not informed forthwith that the information it submitted in response to the Preliminary Determination regarding Form 6-1-2 was not accepted. MOFCOM did not reference Casella Wines' previous submissions in the Supplementary Questionnaire. Moreover, Casella Wines was not provided with an opportunity to provide further explanations within a reasonable period of time. If the explanations Casella Wines provided in response to the Preliminary Determination were not accepted, it was incumbent upon MOFCOM to explain this in a timely manner. MOFCOM did not explain in any reasonable level of detail why the explanations provided by Casella Wines were rejected.

██████████ In relation to alleged inconsistencies between Forms 6-1-2, 6-3 and 6-4 submitted by Casella Wines, Australia confirms that its arguments under paragraph 6 of Annex II only relate to MOFCOM's conduct concerning ██████████

(a) Reconciliation between different forms

272. Australia demonstrated that MOFCOM had rejected data due to alleged inconsistencies between Forms 6-1-2 and 6-4 on the one hand, and the "alignment" between Forms 6-3 and 6-4 on the other.<sup>381</sup> As established in Australia's first written submission, however, MOFCOM gave no notice that it would insist on this standard.<sup>382</sup>

273. China now asserts that this issue was of "limited to no relevance",<sup>383</sup> and that the Final Determination should be interpreted in a certain way in light of the Preliminary Determination.<sup>384</sup> Even if the Panel considered there to be any merit in these *ex post facto* assertions, they are directly contradicted by the terms of MOFCOM's Final Determination. The

379 Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30). See Australia's first written submission, paras. 329-330.

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<sup>381</sup> Anti-Dumping Final Determination (Exhibit AUS-02), p. 81.

<sup>382</sup> Australia's first written submission, paras. 368 and 380.

<sup>383</sup> China's first written submission, para. 648.

<sup>384</sup> China's first written submission, para. 648.

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Final Determination clearly indicates that one of MOFCOM's reasons for having recourse to facts available was the inconsistencies between these forms. This issue was first raised during the narrative discussion of the alleged problems with Casella Wines' response to the first questionnaire, including that the cost data in Form 6-4 was said to be inconsistent with Form 6-1-2 and that the "[c]ompany also did not elaborate the alignment between Form 6-3 and Form 6-4".<sup>385</sup> MOFCOM refers to this section again in its summary of the issues leading to its determination to use facts available two pages later, stating, "[t]o sum up, [...] [t]he inconsistency in the sheets provided by it made it impossible for the Investigating Authority to verify its transaction integrity".<sup>386</sup> This is an explicit reference to the alleged inconsistency and lack of alignment referred to earlier.

274. It is clear that China's attempt to play down MOFCOM's erroneous findings in this regard finds no support in the record. That MOFCOM used the alleged inconsistencies between these forms as a basis for refusing to consider the data, when no indication was ever given by MOFCOM that the data was required to be reconcilable. In so doing, MOFCOM failed to provide reasons and an opportunity to provide additional explanation in breach of paragraph 6 of Annex II.<sup>387</sup> China has thus far not engaged with the substance of this claim.

(b) Special price arrangements

275. China argued that Casella Wines failed to provide sufficient explanations of special price arrangements in the original exporter questionnaire, and that it was precluded from providing this at a later stage due to paragraph 6 of Annex II.<sup>388</sup>

276. MOFCOM accepted that Casella Wines provided "additional explanations" of special price arrangements in both its comments on the Preliminary Determination and its response to the Supplementary Questionnaire.<sup>389</sup> Despite this, China submitted that Casella Wines did not explain what special price arrangements were in the initial questionnaire.<sup>390</sup> Under

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<sup>385</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.

<sup>386</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 83-84.

<sup>387</sup> Australia's first written submission, paras. 363-381.

<sup>388</sup> China's first written submission, paras. 549-551.

<sup>389</sup> China's first written submission, paras. 549.

<sup>390</sup> China's first written submission, paras. 550-551.

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paragraph 6 of Annex II, China claims that Casella Wines was only entitled to provide further explanations rather than new information.<sup>391</sup>

277. Australia first notes the discrepancy in China's arguments on this point. China has argued that Casella Wines was only entitled to provide further explanations following the initial exporter questionnaire. However, China itself characterised the information provided by Casella Wines in its Comments on the Preliminary Determination and Supplementary Questionnaire as being "additional explanations". According to China's own interpretation of paragraph 6 of Annex II, Casella Wines was entitled to provide these explanations and MOFCOM was required to take them into account.

278. China appears to have conflated Casella Wines' explanation of existing information, provided consistent with paragraph 6, with the provision of new information in the course of the investigation. As explained at section III.D.6(a), China's interpretation of paragraph 6 of Annex II is unduly narrow. This is particularly clear in cases such as this, where supplementary questionnaires were issued specifically requesting parties to provide additional information.

279. Casella Wines provided sufficient evidence on the record to explain the special price arrangements. As China itself has acknowledged, Casella Wines cooperated and clarified any concerns MOFCOM raised during the investigation at each possible opportunity. MOFCOM did not raise any concerns with the explanations provided by Casella Wines on this point.

(c) Holistic analysis

280. China has asserted that MOFCOM did not rely on each, individual, alleged deficiency in the information provided by Casella Wines to make its facts available determination. Rather, it argues that MOFCOM made a holistic assessment.<sup>392</sup> However, as discussed above, there is no legal basis for an investigating authority to adopt such an approach to in deciding whether to facts available.<sup>393</sup> To the extent that MOFCOM did, it contravened Article 6.8.

281. Further, there is no evidence on the record supporting the assertion that MOFCOM undertook such an analysis with respect to Casella Wines. No mention of such an approach is

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<sup>391</sup> China's first written submission, para. 54.

<sup>392</sup> China's response to Panel question No. 2(h).

<sup>393</sup> See above section III.B.

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made in the Final Determination and China has not offered any evidence that MOFCOM in fact adopted such an approach. Even assuming there was evidence that MOFCOM did take such an approach, it failed to give the interested parties notice of that approach. By failing to inform the interested parties that it intended to adopt such an approach to rejecting their information and resorting to facts available, and that they should structure the data they were to provide accordingly, MOFCOM contravened paragraph 6 of Annex II of the Anti-Dumping Agreement and, as a result, did not comply with the requirements of Article 6.8 in respect of its recourse to facts available.

282. For example, China has said that the alleged special price arrangements deficiency, discussed in the preceding section,<sup>394</sup> was of "limited to no relevance"<sup>395</sup> and "was not the main reason for disregarding the domestic sales".<sup>396</sup> Rather, China submits that MOFCOM rejected Casella Wines' domestic sales based on the totality of this evidence,<sup>397</sup> and specifies that the main reasons were: (i) the absence of information on the expenses incurred by Austral Wines Pty Ltd; (ii) the fact that not all domestic sales were initially reported in Form 4-2; and (iii) the absence of detailed and complete cost of production data.<sup>398</sup>

283. These explanations are entirely *ex post facto*. Nowhere in MOFCOM's determination does it suggest that special price arrangements were not a main reason for its decision to discard Casella Wines' domestic sales. To the contrary, MOFCOM's repeated reference to special price arrangements in the Preliminary and Final Determinations, and the fact that it specifically asked a question on this issue in the supplementary questionnaire, suggests the opposite. Nor does MOFCOM ever suggest there had been a weighted, totality of evidence, evaluation.

284. In any event, if MOFCOM did adopt a holistic assessment of the evidence, as China asserts, it raises the additional risk, identified at section III.B above,<sup>399</sup> that any single error in the analysis would undermine the entire analysis. If as China claims, the analysis was conducted on a holistic basis, it means that every step of the process must be assumed to be

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<sup>394</sup> See above section III.E.5(b).

<sup>395</sup> China's first written submission, para. 548.

<sup>396</sup> China's first written submission, para. 546.

<sup>397</sup> China's first written submission, para. 547.

<sup>398</sup> China's first written submission, para. 546.

<sup>399</sup> See above section III.B.

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interlinked. If an error is identified in any of those steps, the entire process would then be contaminated by an erroneous intermediate finding, that may jeopardise the whole enterprise.

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

285. As established in section III.E.3 above, contrary to China's claims, the Final Determination indicates that MOFCOM did rely on the absence of data relating to PCNs that were not sold during the period of the investigation as a basis for rejecting Casella Wines' data and using facts available. It persisted in requiring this information even though it was expressly excluded from the scope of the investigation and the questionnaire, as set out at section III.E.2(c)ii, above. In so doing, MOFCOM rejected Casella Wines' evidence as to why it had not provided the data for the PCNs labelled "#N/A" without informing the supplying party, Casella Wines, forthwith (or at all) of the reasons therefor. Nor did MOFCOM allow an opportunity for Casella Wines to provide further explanations. Accordingly, this conduct contravenes paragraph 6 of Annex II because an unbiased and objective investigating authority would have informed the interested party of this and permitted it to provide an explain within a reasonable period.<sup>400</sup>

**6. MOFCOM's selection of facts was not a reasonable replacement for the missing necessary information**

286. Assuming, *arguendo*, that MOFCOM's recourse to facts available complied with Article 6.8 and paragraphs 1, 3, 5, and 6 of Annex II, Australia submits that MOFCOM contravened Article 6.8 and paragraph 7 of Annex II by failing to select reasonable replacement facts for Casella Wines' allegedly missing necessary information.

(a) MOFCOM's failures to provide reasons for its selection of facts

287. During this proceeding China provided an explanation of the replacement facts it asserts MOFCOM selected. Referring to Exhibit CHN-11 (BCI)<sup>401</sup>, China explained that:

<sup>400</sup> Australia's first written submission, paras. 358-362.

<sup>401</sup> [REDACTED]

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[T]he normal value for Casella Wines [...] is based on the weighted average ex-factory price of Treasury Wines for all its domestic sales; not only those sales that passed the above-cost test.<sup>402</sup>

288. This was not explained in MOFCOM's Final Determination, nor was it disclosed as required by paragraph 6 of Annex II to the Anti-Dumping Agreement, as well as Article 6.9.<sup>403</sup>

289. Further, MOFCOM's failure to communicate its selection of facts and the reasons for that selection prevented MOFCOM from meeting other obligations as well. Transparency at that stage of the investigation was crucial to ensuring that the selected data allowed a fair comparison to be made between normal value and export price, as required by Article 2.4. If the selected facts and reasons for that selection are not communicated, the relevant interested parties are unable to engage in the necessary dialogue with the investigating authority to request adjustments or comment on the authority's reasons. Without the input provided via such a dialogue MOFCOM was not able to select the best available information, as required by Article 6.8.

(b) Alleged lack of cooperation does not justify MOFCOM's selection of facts

290. The record indicates that Casella Wines cooperated to the best of its ability. Indeed, China is able to point to only two failings that it claims illustrate the alleged lack of cooperation by Casella Wines. These are the absence of Forms 4-2 and 6-3 in WPS format, and the absence of monthly cost sheets. The issue of WPS formatted spreadsheets has been dealt with at section III.E.2(b)i above and, as MOFCOM noted in its Final Determination, Casella Wines explained to MOFCOM during the investigation that it did not maintain monthly cost sheets and hence could not provide them.<sup>404</sup> MOFCOM rejected this explanation without explaining why it was not satisfied, nor requesting additional or supplemental evidence from Casella Wines. Given these are the only bases on which China claims MOFCOM found Casella Wines

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<sup>402</sup> China's first written submission, para. 573. (Footnotes omitted) China also noted at footnote 689 of its first written submission that "an additional downward adjustment was made to that weighted average ex-factory domestic price to include other discounts" that it said were "not relevant" but did not provide further explanation.

<sup>403</sup> See sections III.E.5 above, and below section VII.G.

<sup>404</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 81.



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to be uncooperative, such a finding is unreasonable. Australia recalls that the Appellate Body in *US – Hot Rolled Steel* observed that:

[C]ooperation is a process, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well "cooperate" to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of "cooperating" is in itself not determinative of the end result of the cooperation.<sup>405</sup>

The Appellate Body also found that:

In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon absolute standards or impose unreasonable burdens upon those exporters.<sup>406</sup>

291. Australia submits that by failing to engage with Casella Wines' explanations with respect to these two narrow and discrete issues, MOFCOM did not display "joint effort" or "work together towards a common goal" as directed by the Appellate Body. In basing its decision on these two issues alone, MOFCOM was insisting upon absolute standards and imposing unreasonable burdens on Casella Wines. Accordingly, Australia submits that MOFCOM's obligation to exercise special circumspection and to engage in a comparative analysis of the replacement information was not lessened in any way by operation of the final sentence of paragraph 7 of Annex II.

(c) It was irrational for MOFCOM to reject Treasury Wines' data, but use it to calculate normal value for Casella Wines

292. China sought to rebut Australia's claim, that MOFCOM had not checked the replacement information with other sources at its disposal, as required by paragraph 7 of Annex II, by suggesting that "using verified information relating to another investigated company already complies with th[is] obligation."<sup>407</sup> China also noted that one of Australia's hypotheses, that MOFCOM might have reintroduced Casella Wines' rejected data via Article 6.8, was not possible. This was because:

That would essentially mean reintroducing information that was first found to be deficient pursuant to Article 6.8 of the Anti-Dumping Agreement, back into play, through the

<sup>405</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 99.

<sup>406</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 102.

<sup>407</sup> China first written submission, para. 677.

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consideration of this information to be the best information available pursuant to Paragraph 7 of Annex II of the Anti-Dumping Agreement.<sup>408</sup>

293. China concluded that "[c]learly, that is not the purpose of [p]aragraph 7 of Annex II of the Anti-Dumping Agreement."<sup>409</sup>

294. Curiously though, the same problem did not deter MOFCOM from deciding to use Treasury Wines' data as the basis to calculate a weighted average sales price. China confirmed that it used facts available in relation to the production costs and expenses as reported by Treasury Wines. MOFCOM selected as a model, [REDACTED]

[REDACTED]. Australia has explained above why the use of this data to calculate the normal value for Treasury was inappropriate.<sup>410</sup> If China's arguments regarding the validity of MOFCOM's determination of normal value for Treasury Wines were to be accepted, it would be inappropriate to use a weighted average of Treasury Wines' data, which MOFCOM incorrectly determined to be unverifiable, to calculate the normal value for Casella Wines. While China claims that some irrelevant discount was applied,<sup>411</sup> MOFCOM did not explain which data it used as a replacement, what adjustments were made (if any) and the reasoning behind these decisions. Accordingly, China's explanations in this regard are *ex post facto* rationalisations and there is simply no evidence on the record of MOFCOM having undertaken the necessary process of reasoning and evaluation in arriving at this position. This is clearly not the approach of an unbiased and objective investigating authority, nor the outcome such an authority would have reached.

(d) MOFCOM failed to engage in any comparative evaluation  
in selecting a reasonable replacement

295. MOFCOM's decision to use a weighted average of Treasury Wines' cost data is further flawed by MOFCOM's failure to engage in any comparative evaluation in selecting this data as required by paragraph 7 of Annex II. In its first written submission, China concedes that MOFCOM did not engage in such an evaluation noting that, given "the information used as

<sup>408</sup> China first written submission, para. 676.

<sup>409</sup> China first written submission, para. 676.

<sup>410</sup> See section III.D.7.

<sup>411</sup> China's first written submission, footnote 689.

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facts available [was said by China to be] information obtained from other interested parties during the investigation (i.e. from Treasury Wines), China fails to see why that information would again need to be checked by reference to information submitted by other interested parties".<sup>412</sup> This is an implicit concession that MOFCOM did not check the data as required.

296. Nevertheless, in support of its argument, China referred to a section of the panel report in *Korea – Certain Paper*, stating that use of verified data from another interested party was sufficient to meet the obligation of special circumspection.<sup>413</sup> However, that section of the panel's report dealt only with the obligation of special circumspection set out in the first sentence of paragraph 7 of Annex II. This obligation is distinct from the obligation to check or compare the information against other independent sources of data obtained during the investigation which is set out in the second sentence.<sup>414</sup> The panel in *Mexico - Anti-Dumping Measures on Rice* explained that it is a procedural requirement that an investigating authority compares the information it proposes to use as "replacement facts" against other independent evidence obtained during the investigation to ensure that the replacement data is in fact the best available information. Failure to do so is a breach of Article 6.8 and paragraph 7 of Annex II. In that case, the panel found that:

[I]n examining the record, we find no basis to consider that the authority made any attempt to check the applicant's information against information obtained from other interested parties or undertook the evaluative, comparative assessment that would have enabled the authority to assess whether the information provided by the applicant was indeed the best information available.<sup>415</sup>

297. In this case, China did not engage in the comparative evaluation mandated by sentence two of paragraph 7 of Annex II of the Anti-Dumping Agreement. It was therefore not possible for MOFCOM to have given the required consideration to whether the replacement data was the best information available.

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<sup>412</sup> China's first written submission, para. 674. (emphasis original)

<sup>413</sup> China first written submission, para. 674, citing Panel Report, *Korea – Certain Paper*, para. 7.105.

<sup>414</sup> Panel Report, *Korea – Certain Paper*, para. 7.122.

<sup>415</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.167.

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(e) The replacement information was not the best available information

298. According to Exhibit CHN-11 (BCI), Casella Wines' normal value was based on the

[REDACTED]  
[REDACTED]  
[REDACTED]. If MOFCOM was correct in relying on replacement facts from [REDACTED], this information was not the best available information. As shown in Exhibit AUS-120 and discussed above,<sup>416</sup> Casella Wines' domestic product mix is very different from [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(f) Conclusion

299. MOFCOM failed to undertake "a process of reasoning and evaluation" to select facts which reasonably replaced the alleged missing necessary information in order to arrive at an accurate determination of dumping for Casella Wines. China's *ex post facto* rationalisations in no way justify MOFCOM's selection of facts, or demonstrate that it was reasonable to use rejected Treasury Wines data as the basis for normal value for the Casella Wines was the "best information available".

300. Based on the reasons set out above, and in Australia's first written submission, China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 6.8 and paragraph 7 of Annex II in its selection of facts for Casella Wines' normal value.

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<sup>416</sup> See section III.C.2.

## 7. Articles 2.1 and 2.2

301. As a result of MOFCOM acting inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II, the foundation for its dumping determination for Casella Wines was fatally flawed, resulting in a dumping determination that was inconsistent with Articles 2.1 and 2.2.

## 8. MOFCOM did not make a fair comparison under Article 2.4

302. Even if the Panel finds MOFCOM's calculation of the normal value for Casella Wines is consistent with the Anti-Dumping Agreement, MOFCOM still failed to make a fair comparison between the company's normal value and export prices as required by Article 2.4 of the Anti-Dumping Agreement.<sup>417</sup>

303. In determining the normal value for Casella Wines, MOFCOM selected domestic sales prices and costs used for the constructed normal value – based entirely on the undisclosed data for "other respondents",<sup>418</sup> subsequently revealed to be Treasury Wines<sup>419</sup> – reflected significant differences affecting price comparability with export prices making them unsuitable for comparison with export sales unless appropriate adjustments were made.<sup>420</sup> These differences concerned, *inter alia*, levels of trade and product mix (e.g. physical characteristics, quality, consumer preferences, and price).<sup>421</sup> They were not taken into account by MOFCOM when determining normal value and, therefore, needed to be taken into account when ensuring a fair comparison between normal value and export price under Article 2.4 by making the appropriate adjustments.<sup>422</sup>

304. Although MOFCOM made some adjustments, it omitted crucial adjustments related to the above level of trade and product mix differences.<sup>423</sup> China also disclosed in Exhibit CHN-11 (BCI) that [REDACTED]

<sup>417</sup> Australia's first written submission, paras. 493-523.

<sup>418</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 85.

<sup>419</sup> China's first written submission, para. 573, 668 and 813.

<sup>420</sup> Australia's first written submission, para. 270 and paras. 287-410.

<sup>421</sup> Australia's first written submission, para. 271-285.

<sup>422</sup> The Appellate Body in *EU – Biodiesel (Argentina)* observed that "[t]he manner in which the normal value is calculated pursuant to Article 2.2 of the Anti-Dumping Agreement may inform the types of adjustments required under Article 2.4" (para. 6.48). China acknowledges that MOFCOM did not take these differences into account when determining Treasury Wines' normal values. See China's first written submission, paras. 503-510.

<sup>423</sup> Australia's first written submission paras. 499-500.

(a) MOFCOM did not adjust for level of trade and timing of sales

305. MOFCOM's failure to adjust for the level of trade and timing of sales in the Final Determination constitutes a *prima facie* breach of the second sentence of Article 2.4.<sup>425</sup> The mere fact that MOFCOM compared the normal value of Treasury Wines and export price of Casella Wines at the *ex-factory* level does not establish that it compared them at the same level of trade and does not establish that it complied with the mandatory requirement in the second and third sentences.<sup>426</sup> By not even considering the necessity of adjustments for timing of sales, as the evidence shows, MOFCOM acted inconsistently with the second and third sentences of Article 2.4.<sup>427</sup>

(b) MOFCOM did not fulfil its procedural obligation under Article 2.4 which prevented Casella Wines requesting relevant adjustments

306. MOFCOM did not apply Casella Wines' requested adjustments to normal value because it "decided to determine the Company's normal value based on other respondents' domestic sale data of the product under investigation."<sup>428</sup>

307. As Australia has demonstrated<sup>429</sup>, MOFCOM's failure to meet the Article 2.4 procedural obligation during its investigation prevented Casella Wines from requesting relevant adjustments arising from MOFCOM's methodology.<sup>430</sup> Since the company was "left in the dark",<sup>431</sup> it was incumbent upon MOFCOM to "find ways to disclose as much

<sup>424</sup> Anti-Dumping Final Determination (Exhibit AUS-2), page 70-71; Australia's first written submission, paras. 516-517.

<sup>425</sup> See above, paras 106-111. See also Australia's first written submission at paras 502-508.

<sup>426</sup> See paras 207-209.

<sup>427</sup> China argues that "Australia has not raised a *claim* related to "level of trade" under the third sentence. Its claim is limited to a violation of the second sentence of Article 2.4 of the Anti-Dumping Agreement" (China's first written submission, para. 835, emphasis added), referencing Australia's *argument* in its first written submission. China confuses the difference between a "claim" and an "argument". Australia's "claim" under Article 2.4 is set out in paragraph xiv of its Panel Request in broad terms that covered the entirety of Article 2.4. It is irrelevant that Australia focused its "argument" in its first written submission on the mandatory requirement in the second sentence of Article 2.4.

<sup>428</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 86-87.

<sup>429</sup> See paras. 96-103. See also Australia's first written submission, paras 493-522.

<sup>430</sup> See paras. 91-120.

<sup>431</sup> China's first written submission, para. 818.

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information on the normal value as the exporter would need to meaningfully participate in the fair comparison process".<sup>432</sup> However, MOFCOM instead withheld this information and failed to engage in dialogue. MOFCOM was still obliged to make adjustments "where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability",<sup>433</sup> which it also did not do.<sup>434</sup>

(c) MOFCOM did not make "due allowance" for differences affecting price

308. In its first written submission, MOFCOM stated that "[g]iven that neither Treasury Wines nor Casella Wines ever requested an adjustment for differences in quality, China considers that there was no obligation on MOFCOM under the third sentence of Article 2.4 of the Anti-Dumping Agreement to make an adjustment for differences in quality."<sup>435</sup> As explained above, Australia does not agree that MOFCOM was under no obligation; this obligation resides in Article 2.4.<sup>436</sup>

309. MOFCOM made the same errors in its approach to Casella Wines as with Treasury Wines<sup>437</sup>, holding the company responsible for not requesting adjustments based on unknown data and methodology and the unknowable "consequence" of an unrelated company's alleged failure to provide information that MOFCOM had never indicated was necessary to ensure a fair comparison in the first place. In so doing, MOFCOM failed to adjust for "the data itself",<sup>438</sup> or what it deemed to be "the logical consequences" of its methodology, as it ignored its obligation to make adjustments that had not been requested by the same exporters which it had "left in the dark".<sup>439</sup>

310. An unbiased and objective investigating authority would have sought to correct perceived deficiencies of information by engaging with the exporter and participating in a dialogue to understand the effect of this data on its comparison under Article 2.4.

<sup>432</sup> China's first written submission, para. 819, citing Panel Report, *EC – Fasteners (China)*, para. 7.149.

<sup>433</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

<sup>434</sup> See paras. 104-105.

<sup>435</sup> China's first written submission, para. 860.

<sup>436</sup> See para. 220.

<sup>437</sup> See paras. 222-223.

<sup>438</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

<sup>439</sup> China's first written submission, para 817-820.

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311. For the foregoing reasons, and those set out in Australia's prior submissions, MOFCOM acted inconsistently with Article 2.4, including the first, second, third and sixth sentences of the provision, with respect to Casella Wines.

## **F. SWAN VINTAGE**

312. Australia claims that MOFCOM's dumping determination for Swan Vintage was inconsistent with Articles 1, 2.1, 2.2, 2.2.1.1, 2.4, 6.4, 6.8, 6.9, 9.1, 9.2, 9.3, 18.1 and paragraphs 1, 3, 5, 6 and 7 of Annex II. China has failed to rebut these claims.<sup>440</sup>

313. Australia set out, in sections III.B and III.C above, issues relating to MOFCOM's obligation to make a fair comparison under Article 2.4, and MOFCOM acted inconsistently with Article 6.8 because of its recourse to facts available on the basis of a "holistic analysis" of the information submitted by the sample companies.

314. In this section, Australia will address the additional errors MOFCOM committed with respect to its recourse to and selection of facts available for Swan Vintage's normal value, and MOFCOM's failure to make a fair comparison under Article 2.4.

### **1. MOFCOM's recourse to facts available had no proper basis**

315. China has asserted that there were two principal reasons for MOFCOM resorting to the use of facts available in relation to the dumping calculation for Swan Vintage. The first was that the company did not report its export prices on a PCN basis.<sup>441</sup> The second, according to China, was that a related supplier of pressing services and bulk wine did not provide a complete reply to the questionnaire.<sup>442</sup> Australia addresses each of these alleged reasons in turn.

316. First, China argued that "the absence of cost of production [data] by PCN prevented MOFCOM from calculating a normal value for each PCN based on the costs reported by the company".<sup>443</sup> This could only be true if Swan Vintage did not provide those prices on the same

<sup>440</sup> Australia's claims under Articles 6.4 and 6.9 are elaborated upon in Section VII.D of this submission.

<sup>441</sup> China's first written submission, paras. 736-740, 747-748; response to Panel question No. 6, para. 25.

<sup>442</sup> China's first written submission, paras. 760, 765, 768, 770-773.

<sup>443</sup> China's first written submission, para. 748.



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basis as its cost data so that normal values could be constructed and compared to the export PCNs. MOFCOM did not determine that this was the case. Rather it found that:

The costs reported by the Company based on product level only could not reasonably reflect the production and sales costs of the product under investigation and like products, so the Investigating Authority could not calculate normal value based on the costs reported by the Company.<sup>444</sup>

317. MOFCOM's finding does not exclude the possibility that Swan Vintage submitted both cost of production and export price evidence in compatible formats, that, contrary to China's assertion, in fact did allow comparison and calculation of normal value. However, MOFCOM did not record the reasons for its assessment. Hence, there is no evidence on the record of the reasons for this finding or the accompanying circumstances. China has also failed to adduce any other record evidence supporting its *ex post facto* claims in this regard.

318. In its response to Panel question No. 6, China sought to rely on a domestic law prohibition on disclosure of certain confidential documents to excuse its failure to provide this evidence to the Panel in spite of a direct request to do so. As established at section II.E, Australia submits that in absence of supporting record evidence, China's assertions in this regard may not be accepted.<sup>445</sup>

319. Second, China argues that a related supplier of pressing services and bulk wine did not provide a complete reply to the questionnaire,<sup>446</sup> and that that this justified MOFCOM in discarding Swan Vintage's cost of production data. The totality of MOFCOM's findings on this issue were:

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; other press and filling companies did not respond to the questionnaire.<sup>447</sup>

320. In this passage, MOFCOM observes that an unidentified service provider did not provide all of the information requested. No further analysis or reasoning is provided.

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<sup>444</sup> China's first written submission, para. 748, quoting (but without citing) the Anti-Dumping Final Determination (Exhibit AUS-2), p. 90.

<sup>445</sup> In its response to Panel question No. 6, China sought to rely on a domestic law prohibition on disclosure of certain confidential documents to excuse its failure to provide this evidence to the Panel in spite of a direct request to do so. The implications of this refusal are discussed in section II.E.

<sup>446</sup> China's first written submission, paras. 760, 765, 768, 770-773.

<sup>447</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.

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Accordingly, whatever MOFCOM determined the impact of this alleged deficiency to be, there is no evidence of its reasoning or conclusion on the record before the Panel. Therefore, China's assertions as to MOFCOM's reasoning and the significance of the omission by the service provider are entirely *ex post facto* rationalisations and cannot assist the Panel. MOFCOM itself does not so much as identify which service provider failed to provide the requested information. China's assertions that MOFCOM disregarded Swan Vintage's cost of production evidence due to the absence of certain missing necessary information and that it was entitled to do so, find no evidentiary support in the record.

## 2. There was no necessary information missing from the record

321. As Australia has established,<sup>448</sup> necessary information for the purpose of Article 6.8 is not information that is merely "required" or "requested" by an investigating authority.<sup>449</sup> Rather, 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'".<sup>450</sup>

322. In Swan Vintage's case, there is no record that MOFCOM considered whether the information not provided was in fact necessary. China's claims that this information was necessary cannot be reconciled with MOFCOM's determinations. At no point in the Preliminary Determination, Final Disclosure or Final Determination did MOFCOM describe this information as necessary. Nor did it explicitly justify its recourse to facts available on the basis that necessary information was not provided.<sup>451</sup>

323. Indeed, both MOFCOM and China appear to concede that Swan Vintage provided complete cost of production data. However, in its Preliminary Determination, MOFCOM found that Swan Vintage did not report its production cost data in the format requested. For that

<sup>448</sup> Australia's first written submission, paras. 52-55.

<sup>449</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.151.

<sup>450</sup> Appellate Body Report, *US – Supercalendered Paper*, para. 5.81. (Footnotes omitted.) In this context, such 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.

<sup>451</sup> In this regard, MOFCOM's assessment of Swan Vintage's data differs from its assessment of other exporters, including Treasury Wines and Casella Wines. In those cases, MOFCOM explicitly determined that Treasury Wines "failed to provide necessary information" (Anti-Dumping Final Determination (Exhibit AUS-2), p. 69) and that Casella Wines "failed to provide complete and necessary information" (Anti-Dumping Final Determination (Exhibit AUS-2), p. 80).

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reason alone, MOFCOM concluded that it "was unable to obtain accurate cost data according to the information reported by the Company".<sup>452</sup>

324. Swan Vintage submitted the data in question in accordance with the regulatory standards applicable to wine in Australia.<sup>453</sup> These standards are publicly accessible and widely used.<sup>454</sup> Accordingly, two options were open to MOFCOM. First, it could have processed the data provided to convert it to its PCN system. Second, MOFCOM could have conducted its calculations based on data formatted consistent with the applicable Australian standards. This would have allowed it to compare Swan Vintage's cost of production and export sales data which were both available in the same format. Clearly, Swan Vintage's dumping margin could have been calculated in this way consistent with Article 2.2, and it is likely that comparing the data in this way would have allowed for the most accurate calculations as it would have avoided the need to convert the data unnecessarily. Indeed, this was the substance of Treasury Wines' "Clarification Letter on Product Control Numbers in the Questionnaire for Relevant Foreign Exporters or Producers in the Anti-Dumping Case",<sup>455</sup> which MOFCOM received and rejected without providing reasons. Swan Vintage offered alternatives to the requested data that would have allowed MOFCOM to ascertain normal value more accurately than the method it ultimately adopted.<sup>456</sup> Yet, no reasoning was recorded that could have demonstrated that MOFCOM engaged in the required evaluation of whether or not it could use the data provided. Nor is there any record of any consideration of Swan Vintage's relevant comments on the Preliminary Determination.<sup>457</sup>

325. In spite of the clear absence of any such reasoning on the record, China has sought to argue that certain information that Swan Vintage did not submit was necessary, and that this formed the basis of MOFCOM's recourse to facts available. This is clearly *ex post facto* rationalisation and cannot be accepted by the Panel.

326. Yet, even assuming, *arguendo*, that China's *ex post facto* rationalisation could be considered by the Panel, it is clear that the information not provided by Swan Vintage was not

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<sup>452</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), pp. 55-56.

<sup>453</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 90; Australia's first written submission, paras. 434-436.

<sup>454</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 7.

<sup>455</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 5.

<sup>456</sup> See for example Australia's first written submission, paras. 475-476.

<sup>457</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), p. 5.

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"necessary". China argues that "[c]ost of production data by PCN", <sup>458</sup> and the pithily described "cost of production incurred by a related input supplier for inputs that are subsequently used in the production", <sup>459</sup> were necessary information which Swan Vintage did not submit. In contrast, China does not appear to argue that the "cost sheets" were necessary information. Rather it implies that these were necessary for verification and their absence was therefore "not the main reason" for MOFCOM's recourse to facts available. <sup>460</sup>

327. For these reasons, there was clearly no necessary information missing from the record. However, for completeness, Australia will address each item of allegedly missing necessary information in detail below.

(a) Product Control Numbers

328. In its first written submission, Australia explained that Article 2.2.1.1 instructs investigating authorities to use records consistent with GAAP that "reasonably reflect the costs associated with the production and sale of the product under consideration". Thus, Article 2.2.1.1 "identifies the records of the investigated exporter or producer as the preferred source for cost of production data, and directs an investigating authority to normally base its calculations of costs on the records of the exporter or producer under investigation" unless certain conditions are met. <sup>461</sup> Neither China nor MOFCOM claimed that either of those conditions were met in this case.

329. The preference for exporter data articulated in Article 2.2.1.1 provides context for the interpretation of Article 6.8. In applying Article 6.8, and therefore Annex II, an investigating authority must be especially cautious in departing from the normal practice mandated by Article 2.2.1.1 so long as the two conditions therein are met. In this regard, Australia observes that MOFCOM failed to articulate to Swan Vintage why its explanations for providing data in a format that conformed to the GAAP applicable to it, as preferred by Article 2.2.1.1, had been rejected.

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<sup>458</sup> China's first written submission, paras. 742, 746, 756.

<sup>459</sup> China's first written submission, paras. 767.

<sup>460</sup> China's first written submission, paras. 774-775.

<sup>461</sup> Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, para. 793.

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330. To defend MOFCOM's rejection of Swan Vintage's cost of production data, contrary to Article 6.8, interpreted in light of Article 2.2.1.1, China claimed that "Swan did not provide complete and accurate cost of production information".<sup>462</sup> However, as Swan Vintage protested in its comments on the Preliminary Determination and Final Disclosure, no explanation was given as to what was incomplete or inaccurate about the data it provided. In fact, Swan Vintage did provide complete and accurate cost of production records. These were merely formatted in a manner different than that requested by MOFCOM. China has argued that because MOFCOM requested the data organised by PCN, it was entitled to discard data provided in any other format.<sup>463</sup>

331. To the contrary, as recognised in Article 6.8 and Annex II, there are circumstances in which it is sensible for an exporter to provide data in a different format than the PCN structure requested by the investigating authority. Such a circumstance could be, as was the case here, that the market in question is structured differently or that exporters structure financial records in a different manner. It is incumbent on investigating authorities to consider these circumstances in an objective and unbiased manner.

332. In this case, in response to the Preliminary Determination, Swan Vintage went to great lengths to explain why it had submitted the data in the way that it had, including that its records and indeed, as Treasury Wines had already illustrated, that the Australian market was not structured in a manner compatible with MOFCOM's PCN structure.<sup>464</sup> Swan Vintage also provided substantial additional information to assist MOFCOM. Yet, MOFCOM simply rejected Swan Vintage's explanation without articulating how or why the explanation was deficient, in breach of the Article 6.8 and paragraph 6 of Annex II of the Anti-Dumping Agreement. There is no evidence on the record that MOFCOM gave any consideration to the issues Swan (and other exporters raised). These were issues MOFCOM was bound to consider. Clearly a difference in formatting does not render records "incomplete or inaccurate".<sup>465</sup> Yet, this was MOFCOM's complaint to Swan Vintage and its principal justification for rejecting all of Swan Vintage's data and having recourse to facts available.

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<sup>462</sup> China's response to Panel question No. 11.

<sup>463</sup> China's first written submission, paras. 736-740.

<sup>464</sup> China acknowledges this in its first written submission. See China's first written submission, para. 747.

<sup>465</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 90.

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333. MOFCOM's failure to specifically identify the deficiencies in Swan Vintage's evidence is a clear breach of paragraph 6 of Annex II of the Anti-Dumping Agreement. It prevented Swan Vintage from responding effectively to its vague and opaque criticisms and hence deprived Swan Vintage of the opportunity to defend its interests. Even when the Preliminary and Final Determinations are read together with the initial questionnaire instructions, it is impossible to glean of what inaccuracy or incompleteness MOFCOM complained. If MOFCOM's complaint was that Swan Vintage had provided the data in a different format than requested, then it should have indicated that it had rejected Swan Vintage's data and used facts available, as it did in relation to the WPS formatted spreadsheet provided Casella Wines. Yet, no such indication was given to Swan Vintage.

334. Taken together, it is clear that: (i) there was no necessary information missing in relation to the calculation of dumping for Swan Vintage; (ii) that Swan Vintage provided information to MOFCOM in a timely manner and it was verifiable; and (iii) that it was also able to be used by MOFCOM without undue difficulty.

(b) Non-affiliated service providers' data

335. MOFCOM determined that, in respect of Swan Vintage, it could not "acquire accurate costs and expenses of the product under investigation", and in that context stated only that:

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; other press and filling companies did not respond to the questionnaire [...].<sup>466</sup>

336. There is no record of any consideration having been given to Swan Vintage's explanations as to why the data could not be provided. Nor is there any consideration given to alternative methods to determine the relevant cost of production data. Had MOFCOM given due consideration to Swan Vintage's explanations, it would have determined that it could accurately assess Swan Vintage's production costs in a different manner, for example on the basis of the complete data provided in its questionnaire responses. It would also have determined that it could verify this data by reference to its accounting system as proposed by Swan Vintage. Given the availability of this data, the evidence of any of the service providers

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<sup>466</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.

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was not necessary information within the meaning of Article 6.8 and Annex II. Moreover, there is no indication on the record that MOFCOM ever determined that such information was necessary for the purposes of its dumping calculation.

337. Perhaps for this reason, China claims (despite the absence of any such analysis or finding in the Final Determination) that, rather than the specific absence of information relating to certain service providers, MOFCOM relied on the "totality of the issues" in relation to cost of production data to justify its recourse to facts available.<sup>467</sup>

338. As such, Australia maintains its submissions that:

- production cost data of unaffiliated companies was not necessary information;<sup>468</sup>
- MOFCOM did not explain the basis on which it concluded that the failures of the unaffiliated companies to submit the requested information were attributable to Swan Vintage;<sup>469</sup> and
- MOFCOM did not explain why the absence of this information meant it could not rely upon the extensive costs and expenses information provided by Swan Vintage.<sup>470</sup>

339. In any case, the costs and expenses associated with these companies were recorded and reasonably reflected in Swan Vintage's GAAP-consistent accounting system to which MOFCOM could have had reference in order to verify Swan Vintage's costs. Since the companies are not 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.

340. Notwithstanding the irrelevance of the information, Swan Vintage made good faith efforts to obtain it, demonstrating its very high level of cooperation. MOFCOM did not address Swan Vintage's explanations of its attempts to obtain information from the unaffiliated

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<sup>467</sup> China's first written submission, para. 767.

<sup>468</sup> Australia's first written submission, para. 448.

<sup>469</sup> Australia's first written submission, para. 449.

<sup>470</sup> Australia's first written submission, para. 449.

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companies, and instead concluded that it "could not acquire accurate costs and expenses of the product under investigation produced and sold by the Company".<sup>471</sup>

341. China argues that Australia has misunderstood why MOFCOM used facts available. Indeed, it is impossible for any reader of MOFCOM's Preliminary Determination, Final Disclosure or Final Determination to glean the reasons for MOFCOM's decisions as they are not in evidence anywhere on the record. In an attempt at *ex post facto* explanation of MOFCOM's reasoning, China explains that MOFCOM's "decision to apply facts available pursuant to Article 6.8 of the Anti-Dumping Agreement was based on the totality of the issues identified by MOFCOM in connection with the reporting of the cost of production whereby not all issues are equally important."<sup>472</sup> Such an approach is not supported in law,<sup>473</sup> or on the facts on the record. MOFCOM provided no analysis at all in relation to any alleged holistic analysis, hierarchy of reasons, or indeed how it considered the data from third parties to be essential. The sum total of MOFCOM's analysis in the Final Determination is the following two sentences:

Moreover, the Company also entrusted 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; other press and filling companies did not respond to the questionnaire.<sup>474</sup>

342. This is clearly insufficient to indicate what factors MOFCOM had considered and why it had rejected Swan Vintage's proposal that costs could be assessed and verified by reference to data it had provided drawn from its GAAP compliant accounting system. China's arguments do not engage with this fact and seek to make Swan Vintage responsible for MOFCOM's failure.

343. For the forgoing reasons, Australia maintains its claims that China acted inconsistently with Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement.

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<sup>471</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 91.

<sup>472</sup> China's first written submission, para. 766.

<sup>473</sup> See above section III.B.

<sup>474</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 90-91.



(c) Cost calculation sheets

344. China argues that the provision of cost sheets was "not the main reason" for MOFCOM's recourse to facts available.<sup>475</sup> However, at no stage during the investigation did MOFCOM make any such finding. Moreover, Australia has established that Swan Vintage cooperated to the best of its ability providing multiple submissions explaining its situation and how MOFCOM could best use the evidence it had provided, and provided verifiable, timely data in a format that could not cause undue difficulties. In spite of this, neither MOFCOM nor China has engaged with Swan Vintage's explanations, including that the data in its cost sheets was not necessary given the cost data submitted was verifiable by reference to Swan Vintage's accounting system.

345. China's argument in this regard is merely *ex post facto* rationalisation that cannot be of assistance to the Panel as they are not reflected in the record.<sup>476</sup> Beyond this, China has not engaged with Australia's claims and Australia persists in those claims.

(d) Conclusion

346. As set out above, China has failed to rebut Australia's argument that there was no necessary information missing from the record. The cost of production data provided by Swan Vintage was timely, verifiable and provided in a format that would not cause undue difficulty. To the extent that it did not conform to MOFCOM's requested form, Swan Vintage provided detailed explanations and made every effort to assist MOFCOM. However, as MOFCOM never explained its reasoning behind the rejection of Swan Vintage's data, it prevented Swan Vintage from effectively addressing any alleged deficiencies.

347. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement by resorting to facts available with respect to Swans production costs and expenses.

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<sup>475</sup> China's first written submission, paras. 775-776.

<sup>476</sup> China's first written submission, paras. 774-776.

### 3. Paragraphs 3 and 5 of Annex II

348. Australia established in its first written submission that MOFCOM's rejection of Swan Vintage's cost of production data, was contrary to Article 6.8 and paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement.<sup>477</sup>

349. An investigating authority is required to explain in what way the information it rejects does not meet the requirements set out in paragraph 3 of Annex II.<sup>478</sup> China asserts that Swan Vintage's cost of production data could not be used without undue difficulties because it was not organised by PCN. Certainly, in the Final Determination, MOFCOM stated that "[p]roviding cost of production on any other basis than the PCN instructions given by an investigating authority therefore creates major difficulties for an investigating authority to use that information for calculating the dumping margin."<sup>479</sup>

350. Yet MOFCOM did not explain *how* the information it rejected imposed undue difficulty, including why it was unduly difficult to make the necessary comparisons on the basis of the records organised consistent with the applicable GAAP in the Australian wine industry. MOFCOM merely stated that it imposed a "major" difficulty. It was necessary for MOFCOM to explain in what way the rejected data was deficient. This prevented Swan Vintage from understanding the nature of MOFCOM's complaint and hence deprived Swan Vintage of the opportunity to remedy the issue. Moreover, MOFCOM provided no explanation for why it rejected Swan Vintage's further explanations regarding the difficulties in its PCN classification by reference to a letter from Treasury Wines and how the data could be used without undue difficulty.<sup>480</sup> This failure to record reasons is not merely a breach of a "procedural obligation". Without such reasoning there was no recorded basis for MOFCOM's conclusion. This is not the way an unbiased and objective investigating authority would have approached the issue.

351. In relation to paragraph 5, China's contention that Swan Vintage did not cooperate to the best of its ability is directly contradicted by the facts on the record. Not only did Swan Vintage provide extensive cooperation with MOFCOM throughout the investigation, it did so

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<sup>477</sup> Australia's first written submission, paras. 424-470.

<sup>478</sup> See Australia's first written submission, paras. 71 and 151; Panel Report, *China – Broiler Products (Article 21.5 - US)*, para. 7.343.

<sup>479</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 63.

<sup>480</sup> See section III.F.2(a) above.

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to the best of its ability. For example, Swan Vintage provided extensive data and information at each stage of the investigation. Where MOFCOM expressed concern at deficiencies, Swan Vintage provided explanations and additional data.

352. Perhaps for this reason, MOFCOM did not make any determination that Swan Vintage did not cooperate to the best of its ability. No conclusion or reasoning to this effect is included in MOFCOM's determinations, nor does MOFCOM mention Swan Vintage's level of cooperation in connection with its recourse to facts available. For this reason, there is no record of this issue being a factor in MOFCOM's decision making under Article 6.8. China's claims to the contrary are mere *ex post facto* rationalisation and cannot assist the Panel.

353. China has not claimed that MOFCOM complied with the other aspects of paragraphs 3 and 5 of Annex II contrary to Australia's other submissions. Australia maintains those submissions.

#### **4. MOFCOM acted inconsistently with paragraph 6 of Annex II**

354. As Australia has established, MOFCOM did not meet its obligations under paragraph 6 of Annex II in relation to multiple items of evidence concerning the dumping calculation for Swan Vintage.

355. In relation to Swan Vintage's data from affiliated and non-affiliated service providers, Australia confirms that its arguments under paragraph 6 of Annex II relate to MOFCOM's conduct concerning the company's response to the Preliminary Determination,<sup>481</sup> and the Supplementary Questionnaire.<sup>482</sup> In response to the Supplementary Questionnaire, Swan Vintage confirmed it submitted a response on behalf of its affiliated service provider, Grower's Wine, but that it was unsuccessful in obtaining a response from the non-affiliated suppliers.<sup>483</sup> MOFCOM gave no notice that it rejected these reasonable explanations.

356. In relation to Swan Vintage's cost sheets, MOFCOM did not inform Swan Vintage "forthwith" of the reasons for not accepting the information submitted in Swan Vintage's response to the Preliminary Determination. If the explanations Swan Vintage provided in

<sup>481</sup> Swan Vintage Comments on the Preliminary Determination (Exhibit AUS-38), pp. 8-9.

<sup>482</sup> Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), pp. 2-5; Australia's first written submission, paras. 456-459.

<sup>483</sup> Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), pp. 2-5.

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response to the Preliminary Determination were not accepted, it was incumbent upon MOFCOM to explain this forthwith. For example, MOFCOM did not reference Swan Vintage's previous submissions in the Supplementary Questionnaire. MOFCOM also did not provide an opportunity to provide further explanations within a reasonable period of time, as required by paragraph 6 of Annex II.<sup>484</sup> Similar failings arise in the context of MOFCOM's rejection of information submitted by Swan Vintage in response to the Supplementary Questionnaire.

357. 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 its Final Determination.

358. China responded to Australia's arguments in this regard by asserting that MOFCOM did inform Swan Vintage that its evidence would be rejected and did provide an opportunity to provide explanations.<sup>485</sup> This response does not engage with the nature of the obligation which is to provide notice *forthwith*. In neither case did MOFCOM give notice "[i]mmediately, at once, without delay or interval".<sup>486</sup> In both cases, MOFCOM did not respond to Swan Vintage's comments, but remained silent until the issuing of its preliminary and final determinations. In order to meet the forthwith standard, MOFCOM should have responded to Swan Vintage's comments immediately and without delay. Had MOFCOM done so, if any additional information had been required, it could have been supplied in a timely fashion.

359. For these reasons, Australia maintains its claims in relation to paragraph 6 of Annex II.

## 5. MOFCOM's selection of facts was not a reasonable replacement for the missing necessary information

360. Assuming, *arguendo*, that MOFCOM's recourse to facts available complied with Article 6.8 and paragraphs 1, 3, 5, and 6 of Annex II, Australia submits that MOFCOM contravened Article 6.8 and paragraph 7 of Annex II by failing to select reasonable replacement facts for Swan Vintage's allegedly missing necessary information. As MOFCOM

<sup>484</sup> Swan Vintage Supplementary Questionnaire Response (Exhibit AUS-41), pp. 2-5; Australia's first written submission, paras. 467-469.

<sup>485</sup> China's first written submission, paras. 758 and 774.

<sup>486</sup> 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; Australia's first written submission, para. 77.

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selected the same replacement facts for Swan Vintage as it did for Casella Wines, it fell into the same errors discussed above.<sup>487</sup> Indeed, China has sought to defend its selection of facts for Swan Vintage by referring to the same arguments and assertions it made in relation to Casella Wines. It is therefore clear that these arguments will fail for the reasons set out by Australia at section III.E.5(c) above.

## 6. Articles 2.1, 2.2 and 2.2.1.1

361. As a result of MOFCOM acting inconsistently with Article 6.8 and paragraphs 1, 3, 5, 6 and 7 of Annex II, the foundation for its dumping determination for Swan Vintage was fatally flawed, resulting in a dumping determination that was inconsistent with Articles 2.1, 2.2 and 2.2.1.1.<sup>488</sup>

## 7. MOFCOM did not make a fair comparison under Article 2.4

362. Even if the Panel finds MOFCOM's calculation of the normal value for Swan Vintage is consistent with the Anti-Dumping Agreement, MOFCOM still failed to make a fair comparison between the company's normal value and export prices as required by Article 2.4 of the Anti-Dumping Agreement.<sup>489</sup>

363. In determining the normal value for Swan Vintage, MOFCOM's selected domestic sales prices and costs used for the constructed normal value – based entirely on the undisclosed data for "other respondents",<sup>490</sup> subsequently revealed to be Treasury Wines<sup>491</sup> – reflected significant differences affecting price comparability with export prices making them unsuitable for comparison with Swan Vintage's export sales unless appropriate adjustments were made.<sup>492</sup> These differences concerned, *inter alia*, levels of trade and product mix (e.g. physical characteristics, quality, consumer preferences and price).<sup>493</sup> They were not taken into account by MOFCOM when determining normal value and, therefore,

<sup>487</sup> See above section III.E.6. See also China's first written submission, para. 718.

<sup>488</sup> See Australia's first written submission, paras. 416-423.

<sup>489</sup> Australia's first written submission, paras. 493-523.

<sup>490</sup> Anti-Dumping Final Determination, p. 92.

<sup>491</sup> China's first written submission, paras. 668, 712, 718 and 813.

<sup>492</sup> Australia's first written submission, paras. 270, 411-482.

<sup>493</sup> Australia's first written submission, paras. 271-285.

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needed to be taken into account when ensuring a fair comparison between normal value and export price under Article 2.4 by making the appropriate adjustments.<sup>494</sup>

364. Although MOFCOM made some adjustments, it omitted crucial adjustments related to the above level of trade and product mix differences.<sup>495</sup> China also disclosed in Exhibit CHN-11 that [REDACTED]

(a) MOFCOM did not adjust for level of trade and timing of sales

365. MOFCOM's failure to adjust for the level of trade and timing of sales in the Final Determination constitutes a *prima facie* breach of the second sentence of Article 2.4.<sup>497</sup> The mere fact that MOFCOM compared the normal value of Treasury Wines and export price of Swan Vintage at the *ex-factory* level does not establish that it compared them at the same level of trade and does not establish that it complied with the mandatory requirement in the second and third sentences of Article 2.4.<sup>498</sup> By not even considering the necessity of adjustments for timing of sales, as the evidence shows, MOFCOM acted inconsistently with the second and third sentences of Article 2.4.<sup>499</sup>

<sup>494</sup> The Appellate Body in *EU – Biodiesel (Argentina)* observed that "[t]he manner in which the normal value is calculated pursuant to Article 2.2 of the Anti-Dumping Agreement may inform the types of adjustments required under Article 2.4" (para. 6.48). China acknowledges that MOFCOM did not take these differences into account when determining Treasury Wines' normal values. See China's first written submission, paras. 503-510.

<sup>495</sup> Australia's first written submission paras. 499-500.

<sup>496</sup> Anti-Dumping Final Determination (Exhibit AUS-2), page 70-71.

<sup>497</sup> See paras 106-111. See also Australia's first written submission, paras 502 – 508.

<sup>498</sup> See paras 207-209.

<sup>499</sup> China argues that "Australia has not raised a *claim* related to "level of trade" under the third sentence. Its claim is limited to a violation of the second sentence of Article 2.4 of the Anti-Dumping Agreement" (China's first written submission, para. 835, emphasis added), referencing Australia's *argument* in its first written submission. China confuses the difference between a "claim" and an "argument". Australia's "claim" under Article 2.4 is set out in paragraph xiv of its Panel Request in broad terms that covered the entirety of Article 2.4. It is irrelevant that Australia focused its "argument" in its first written submission on the mandatory requirement in the second sentence of Article 2.4.

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(b) MOFCOM did not fulfil its procedural obligation under Article 2.4 which prevented Swan Vintage requesting relevant adjustments

366. MOFCOM did not apply Swan Vintage's requested adjustments to normal value because it "decided to determine the Company's normal value based on other respondents' domestic sale data of the product under investigation."<sup>500</sup>

367. As Australia has demonstrated<sup>501</sup>, MOFCOM's failure to meet the Article 2.4 procedural obligation during its investigation prevented Swan Vintage from requesting relevant adjustments arising from MOFCOM's methodology.<sup>502</sup> Since the company was "left in the dark",<sup>503</sup> it was incumbent upon MOFCOM to "find ways to disclose as much information on the normal value as the exporter would need to meaningfully participate in the fair comparison process".<sup>504</sup> However, MOFCOM instead withheld this information and failed to engage in dialogue. MOFCOM was still obliged to make adjustments "where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability",<sup>505</sup> which it also did not do.<sup>506</sup>

(c) MOFCOM did not make "due allowance" for differences affecting price

368. Since its choice of methodology meant the company was "left in the dark",<sup>507</sup> it was incumbent upon MOFCOM to make adjustments "where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability".<sup>508</sup>

369. China stated that it "understands that Australia is not claiming a violation of the third sentence of Article 2.4 of the Anti-Dumping Agreement with respect to the dumping margin

<sup>500</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 94.

<sup>501</sup> See paras. 96-103. See also Australia's first written submission, paras. 493-522.

<sup>502</sup> See paras. 91-120.

<sup>503</sup> China's first written submission, para. 818.

<sup>504</sup> China's first written submission, para. 819 quoting Panel Report, *EC – Fasteners (China)*, para. 7.149.

<sup>505</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

<sup>506</sup> See paras. 104-105.

<sup>507</sup> China's first written submission, para. 818.

<sup>508</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

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calculation for Swan Vintage" for various reasons.<sup>509</sup> It promptly contradicted this statement by claiming "Australia fails to make a prima facie case for its claimed violation of the third sentence of Article 2.4".<sup>510</sup> Clearly China *did* understand Australia to be claiming a violation, even if it disagreed with the substance of that claim.<sup>511</sup>

370. Australia has also addressed the fact that the sampled companies were under no obligation to disclose their BCI material to the Australian Government. MOFCOM should have ensured this information was adequately reflected by the record of evidence, even as non-confidential summaries.<sup>512</sup>

371. As above,<sup>513</sup> Australia does not agree that MOFCOM was under no obligation; this obligation resides in Article 2.4. This applies equally to Swan Vintage as to Casella Wines and Treasury Wines, despite China's attempt to limit Australia's claim.

372. MOFCOM's failure to meet the procedural requirements in the final sentence of Article 2.4 or make due allowance where indicated "by one or another party [...] or by the data itself"<sup>514</sup> does not negate its overarching obligation to make a fair comparison.

373. MOFCOM made the same errors in its approach to Swan Vintage as with Treasury Wines,<sup>515</sup> holding the company responsible for not requesting adjustments based on unknown data and methodology and the unknowable "consequence" of an unrelated company's alleged failure to provide information that MOFCOM had never indicated was necessary to ensure a fair comparison in the first place.

374. In so doing, MOFCOM failed to adjust for "the data itself",<sup>516</sup> or what it deemed to be "the logical consequences" of its methodology, as it ignored its obligation to make adjustments that had not been requested by the same exporters it had "left in the dark".<sup>517</sup>

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<sup>509</sup> China's first written submission, para. 847.

<sup>510</sup> China's first written submission, para. 848.

<sup>511</sup> See section II.C.

<sup>512</sup> See section VII.G.

<sup>513</sup> See para. 220.

<sup>514</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.352. (emphasis added)

<sup>515</sup> Paras. 222-223.

<sup>516</sup> Panel Report, *Egypt – Steel Rebar*, para 7.352.

<sup>517</sup> China's first written submission, paras. 817-820.



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375. An unbiased and objective investigating authority would have sought to correct perceived deficiencies of information by engaging with the exporter and participating in a dialogue to understand the effect of this data on its comparison under Article 2.4.

376. For the foregoing reasons, and those set out in Australia's prior submissions, MOFCOM acted inconsistently with Article 2.4, including the first, second, third and sixth sentences of the provision, with respect to Swan Vintage.

#### **G. OTHER NAMED AUSTRALIAN EXPORTERS**

377. Australia explained in its first written submission that MOFCOM identified a dumping margin of 167.1% for "Other names Australian exporters",<sup>518</sup> "based on the weighted average margin of the selected exporters and producers",<sup>519</sup> without providing any explanation about the weighting or weightings used.

378. China has still not identified the weighting or weightings used, nor the precise source of the data used to arrive at the identified dumping margin. China has also not challenged Australia's submission that the deficiencies in MOFCOM's determination of the normal value and margins of dumping for the sampled companies set out above also, inevitably, undermine its determination of the margin for these producers. Australia takes this as a concession that any errors identified in relation to the sampled exporters will necessarily apply to the identification of margins for the "Other named Australian exporters".

#### **H. ALL OTHERS**

379. Australia claimed that MOFCOM had provided insufficient explanation to clarify how it had calculated the "All Others" rate. Australia is alarmed that the rate is so much higher than both the rates identified for other exporters and the weighted average margin. Australia submits that the rate is implausibly high and in absence of any explanation from MOFCOM indicates the presence of either a significant error or a failure to verify the selected replacement data.<sup>520</sup>

<sup>518</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 1.

<sup>519</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 97.

<sup>520</sup> Australia's first written submission, paras. 486-492.

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380. In response to Australia's claim China did not seek to explain MOFCOM's methodology, nor point to any evidence justifying the margins imposed. Rather, it claims it is allowed to select facts that lead to margins that effectively punish exporters that did not engage with the investigation.<sup>521</sup> It appears to reject the notion that in the conduct of its investigation an investigating authority is obliged to seek to apply a calculation and rate that is as close to the truth as possible under the circumstances.

381. China argues that because the amount of increase between the highest individual rate and the "All Others" rate is numerically less than the equivalent rate in *Canada – Welded Pipe* that this is permitted.<sup>522</sup> Yet, it is clear even from a reading of the passages cited by China that the panel in that case did not endorse the use of dumping margins to effectively punish non-participating exporters, as China argues it is entitled to do here.

382. China also claims, *ex post facto*, that MOFCOM used the weighted average ex-factory export price (as well as the weighted average CIF price) of a single exporter and compared this (them) to the price of a single ex-factory domestic sale to determine the rate.<sup>523</sup> China claims that MOFCOM did not use the lowest and highest prices in order to achieve the implausibly high rate of dumping applied.<sup>524</sup> Yet, as MOFCOM provided no transparency about which exporter's data it used and what range of prices was applied, there is no evidence for this assertion and no way to verify it. China has not clarified any aspect of MOFCOM's methodology or data selection, nor justified its methodology in any way. Australia maintains its claims in this regard.

**I. AUSTRALIA CLAIMS UNDER ARTICLES 1, 9.1, 9.2, 9.3 AND 18.1 OF THE  
ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994**

383. In Australia's first written submission, Australia demonstrated that 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, Article 18.1 and Article VI:2 of the GATT 1994, because it: improperly imposed anti-dumping duties where all requirements for

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<sup>521</sup> China's first written submission, paras. 797-798.

<sup>522</sup> China's first written submission, paras. 798-801.

<sup>523</sup> China's first written submission, para. 801.

<sup>524</sup> China's first written submission, paras. 801-802.

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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). This is the consequence of MOFCOM's errors in its application of Article 2, which led it to erroneously identify the existence of dumping and erroneously inflate those alleged dumping margins.<sup>525</sup>

384. China argues in its first written submission that "since no violations of the substantive requirements contained in the Anti-Dumping Agreement".<sup>526</sup> China also stated that Australia's claims under Article 9.1, 9.2 and 9.3 "are dependent on a showing of violation regarding Article 2".<sup>527</sup> Australia accepts that claims under Articles 9.1, 9.2 and 9.3 are consequential on the Panel finding a breach under Article 2.<sup>528</sup> But Australia does not accept that MOFCOM made no such violations under Article 2 and therefore could not have consequentially violated Articles 9.1, 9.2 and 9.3. Australia has established a *prima facie* case that China has breached its obligations under Article 2, 2.1, 2.2, 2.2.1 and 2.4.<sup>529</sup>

385. In China's first written submission, China mistakenly appears to argue that Australia posited "an independent claim of violation regarding Article VI:1 of the GATT 1994" and asks that this claim be "summarily rejected for a lack of proper legal basis".<sup>530</sup> It is clear from Australia's Panel Request<sup>531</sup> and first written submission<sup>532</sup> that Australia's claim is that China consequentially breached Article VI:2 of the GATT 1994, by imposing duties in excess of the dumping margin that would have been determined consistently with Article VI:1. Article VI:2 permits the imposition of anti-dumping duties on a dumped product "in order to offset or prevent dumping", provided the duty is "not greater in amount than the margin of dumping in respect of such product". It intersects with Article VI:1 to the extent that "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

<sup>525</sup> Australia's first written submission, sections II.E.3, II.F.2 and II.G.3.

<sup>526</sup> China's first written submission, para. 2211.

<sup>527</sup> China's first written submission, para. 2216.

<sup>528</sup> Australia's first written submission, para. 713.

<sup>529</sup> Australia's first written submission, sections II.E.3, II.2 and II.G.3.

<sup>530</sup> China's first written submission, para. 2214.

<sup>531</sup> Australia's Panel request, para. xxii: "Article VI:2 of GATT 1994 and Article 9.1, 9.2, 9.3 and 9.4 of the Anti-Dumping Agreement because, *inter alia*, China: has imposed anti-dumping duties where all requirements for their imposition have not been fulfilled; has not imposed anti-dumping duties in appropriate amounts; and has imposed anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement."

<sup>532</sup> Australia's first written submission, section VI.A, paras. 698, 700, 710, 711, 718, 725.

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As explained in Australia's first written submission, a violation under Article 9.3 would consequentially violate Article VI:2.<sup>533</sup>

386. In China's first written submission, it asks that the Panel "summarily reject Australia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement."<sup>534</sup> While Australia acknowledges that these are consequential claims,<sup>535</sup> it does not follow that they should be summarily rejected on that basis.

387. Article 18.1 of the Anti-Dumping Agreement provides that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by [the Anti-Dumping Agreement]." Any breach of the Anti-Dumping Agreement therefore constitutes a consequential violation of Article 18.1 of the Anti-Dumping Agreement. Australia has established that China has acted inconsistently with (*inter alia*) Articles 2, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement.

388. Similarly, in its first written submission, China declined to engage on the substance of Australia's claims under Article 9.1, 9.2 and 9.3 on the basis that these claims are dependent on an Article 2 violation.<sup>536</sup> It then states that "even assuming *arguendo* that there was such a violation [of Article 2], China notes that the Appellate Body in *EU – Biodiesel (Argentina)* has clarified that not every such violation results in an automatic violation of – for example – Article 9.3 of the Anti-Dumping Agreement".<sup>537</sup> Australia has established that China has violated Article 2.<sup>538</sup> Moreover, contrary to China's assertions, Australia has not argued that every violation of Article 2 results in an automatic violation of Articles 9.1, 9.2 or 9.3 of the Anti-Dumping Agreement. Rather, Australia has clearly explained in detail why China's violations of Article 2 *also* resulted in China breaching Articles 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement.<sup>539</sup>

389. Finally, in China's first written submission, it "disagrees with Australia that the 6 Australian 'traders' were 'suppliers' in the sense of Article 9.2, second sentence". It further

<sup>533</sup> Australia's first written submission, para. 740.

<sup>534</sup> China's first written submission, para. 2215.

<sup>535</sup> Australia's first written submission, para 739.

<sup>536</sup> China's first written submission, para. 2216.

<sup>537</sup> China's first written submission, para. 2216.

<sup>538</sup> Australia's first written submission, section II.

<sup>539</sup> Australia's first written submission, paras. 716-737.

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states "Australia has adduced no argument to demonstrate that such traders were required to be named in Annex I of MOFCOM's Final Determination, pursuant to Article 9.2 of the Anti-Dumping Agreement."<sup>540</sup> China fails to engage with the substance of the issue as China does not adduce any counterargument as to why "traders" should *not* be considered "suppliers of the product concerned" under Article 9.2.

390. As Australia established in its first written submission, "the term "suppliers" in Article 9.2 is broader than the narrower concept of "producers", encompassing "Australian traders" who exported subject wine products to China."<sup>541</sup> In the absence of past panel or Appellate Body reports to confer special meaning on these terms, their ordinary meanings should suffice.<sup>542</sup> To the extent that context renders these terms noninterchangeable, the difference is that the term "suppliers" encompasses both "producers" (i.e. those who make, grow or supply) and "traders" (i.e. those who buy and sell). The Australian "traders" buy and sell, making them suppliers who provide something needed.

391. For the reasons set out above and in Australia's previous submissions, China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Articles 1, 9.1, 9.2 and 9.3 of the Anti-Dumping Agreement, Article 18.1 and Article VI:2 of the GATT 1994.

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<sup>540</sup> China's first written submission, para. 2217.

<sup>541</sup> Australia's first written submission, para. 729.

<sup>542</sup> The ordinary meaning of "supplier" is "[a] person who or organization [...] which provides something needed, esp. a commodity, or necessary goods and equipment" (Oxford English Dictionary online, definition of "supplier", <https://www.oed.com/view/Entry/194660> (accessed 28 November 2022)). The ordinary meaning of "producer" is "[a] person, company, or country that makes, grows, or supplies goods or commodities for sale" (Oxford English Dictionary online, definition of "producer", <https://www.oed.com/view/Entry/151981> (accessed 28 November 2022)). The ordinary meaning of "trader" is "a person engaged in trading or commerce; a person who buys and sells goods; a dealer" (Oxford English Dictionary online, definition of "trader", <https://www.oed.com/view/Entry/204286> (accessed 28 November 2022)).

## **IV. AUSTRALIA'S CLAIMS CONCERNING MOFCOM'S DEFINITION OF DOMESTIC INDUSTRY**

### **A. CHINA HAS BREACHED ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT**

#### **1. Introduction**

392. Australia has established a *prima facie* case that MOFCOM failed to establish "a major proportion of total domestic production" of the like product in accordance with the definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement.<sup>543</sup>

393. In particular, MOFCOM failed to properly establish both the quantitative and qualitative elements of this definition.<sup>544</sup> Moreover, the process that MOFCOM used to define the domestic industry: (i) was not based on positive evidence or an unbiased and objective evaluation of that evidence; and (ii) introduced material risks of distortion into the definition.

394. China adduces several jurisdictional or "threshold" complaints concerning Australia's claims with respect to Article 4.1. These complaints, which are entirely without merit, are addressed above.<sup>545</sup>

395. As discussed below, China's arguments attempt to obfuscate or distract from the substantive issues and fail to rebut Australia's case.

#### **2. The interpretation of a "major proportion" of domestic industry**

396. China argues that Australia has misstated the Appellate Body's interpretation of a "major proportion" of the domestic industry. However, China has offered no explanation of how or why Australia's interpretation is allegedly incorrect. China's objection is particularly unclear, given that Australia and China appear to agree that there are both qualitative and quantitative components that must be addressed when defining the domestic industry as a

<sup>543</sup> Australia's first written submission, paras. 525-543; Australia's opening statement at the first meeting of the Panel, paras. 24-28; and in subsequent oral exchanges at the first substantive meeting.

<sup>544</sup> Australia's first written submission, paras. 525-543.

<sup>545</sup> See above sections II.A - II.B, and below Annex A.2.1.

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"major proportion."<sup>546</sup> However, China attempts to diminish the importance of the qualitative standard, focusing instead on the quantitative standard in its submissions.<sup>547</sup>

397. MOFCOM determined that the production figure calculated for the 21 domestic producers represented more than 50% of MOFCOM's estimation of total domestic production. The issues between the parties are whether the data that MOFCOM relied upon represented positive evidence and whether MOFCOM defined the domestic industry in a manner that satisfied the qualitative component. In Australia's submission, neither standard was met.

398. In general, a significant proportion of China's submissions concerning the "Major Proportion of Domestic Industry" appears to be directed solely at other unrelated issues and is therefore entirely irrelevant to the issues in dispute between the parties.<sup>548</sup>

### **3. MOFCOM's estimate of total domestic production does not constitute positive evidence**

399. As Australia has set out in its first written submission, the process used by MOFCOM to determine total domestic production was (i) opaque; (ii) involved considerable speculation; (iii) did not address conflicting record evidence; (iv) was not based on positive evidence and (v) was not objective.<sup>549</sup> MOFCOM only provided a vague explanation as to the process it undertook to estimate total domestic production.<sup>550</sup> This process did not identify the actual domestic production output of like products and, due to its simplicity, unsubstantiated and limited assumptions, and failure to account for relevant variable factors, it was unable to arrive at a reliable or accurate estimation.

400. In response to Australia's concerns, China focuses on the following issues: (i) whether there is a hierarchy between the two methods of defining the domestic industry (which is not relevant in this dispute);<sup>551</sup> (ii) MOFCOM did not "actively exclude" the very large number of domestic producers that it did not include in its definition of the domestic industry;<sup>552</sup> and (iii)

<sup>546</sup> China's first written submission, para. 902 and Australia's first written submission, para. 527.

<sup>547</sup> China's first written submission, paras. 902-912.

<sup>548</sup> China's first written submission, paras 902-911.

<sup>549</sup> Australia's first written submission, para. 538.

<sup>550</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109: "The Investigating Authority 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."

<sup>551</sup> China's first written submission, para. 918.

<sup>552</sup> China's first written submission, para. 920.

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the 21 domestic producers that MOFCOM included in its definition of the domestic industry allegedly account for a "very high percentage" of MOFCOM's estimate of the total domestic production, "indicating a very low risk of distortion" and "reducing any risk of distortion".<sup>553</sup> In doing so, China fails entirely to address Australia's arguments concerning the nature of the data upon which MOFCOM relied. At most, China briefly argues that "MOFCOM actively sought out additional information to ascertain the actual volume of total production in the industry",<sup>554</sup> but does not explain *how* this information was based on an objective assessment of positive evidence.

401. China implies that Exhibit CHN-32 (BCI) reflected the evidence MOFCOM relied upon for its definition of the domestic industry.<sup>555</sup> This evidence was vague, imprecise, and at odds with other evidence on the record, as elaborated below. China's exhibit does not indicate that MOFCOM's estimate was positive evidence that led to accurate injury analysis. Instead, this exhibit reveals the significant deficiencies with MOFCOM's estimation of total domestic production and demonstrates that MOFCOM remained passive in the face of possible shortcomings in the evidence that it relied upon.

(a) Specific data issues with [REDACTED] total domestic  
production calculations

402. [REDACTED] failed to provide adequate detail regarding the basis for most of its inputs, which were relied upon by MOFCOM. For example:

- [REDACTED] failed to indicate the underlying basis for the plantation area for each year of the period of the investigation and which domestic producers this sought to represent,<sup>556</sup>
- [REDACTED] "considered the average yield per acre, based on various factors",<sup>557</sup> without listing any of these factors;

<sup>553</sup> China's first written submission, paras. 919 and 930.

<sup>554</sup> China's first written submission, para. 922.

<sup>555</sup> China's response to Panel question No. 16, paras. 53-56 and [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).

<sup>556</sup> China's response to Panel question No. 16, para. 54 and [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).

<sup>557</sup> China's response to Panel question No. 16, para. 54 and [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).



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- [REDACTED] failed to provide information on the how average harvest and total harvest were determined;<sup>558</sup> and
- [REDACTED] asserted, without explanation, that the wine production rate from the fresh grapes, [REDACTED] across [REDACTED] five years, was at about [REDACTED] and the loss rate from bulk wines was estimated at [REDACTED]<sup>559</sup>

403. An unbiased and objective investigating authority would have sought further information regarding this calculation. MOFCOM remained passive in the face of the above shortcomings.

404. China's disclosure of the [REDACTED] calculations reveals that only [REDACTED] was deducted for domestic wine products that were not included in the investigation, "namely other wine products, including distilled wines, brandy, spark[ling], vermouth, and wines in containers of over 2 litres".<sup>560</sup> China failed to indicate why it [REDACTED] deducted this amount and why the same percentage was used in every year of the Injury POI.

405. This relatively [REDACTED] percentage representing other products outside the scope of the investigation should have prompted close scrutiny, given that it was entirely inconsistent with other evidence on the record. For example, when [REDACTED] calculation of total domestic product is compared with the statistical data on total wine production provided by CADA, it demonstrates that the volume of "other wines" was far greater than [REDACTED] as demonstrated in Table 1 below.

<sup>558</sup> [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)), p.2.

<sup>559</sup> China's response to Panel question No. 18, para. 54 and [REDACTED] calculations (confidential version), (Exhibit CHN-32 (BCI)).

<sup>560</sup> China's response to Panel question No. 16, para. 55 and [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)).

**Table 1** Variances between MOFCOM and CADA's Total Domestic Production

Year	CADA's "total output of domestic like- products" (kilolitre) <sup>561</sup>	"Overall output of domestic relevant wines" (kilolitre) <sup>562</sup>	Implied production of "other wines" (kilolitre)	"'s estimated proportion of domestic production represented by "other wines"	Implied level of "other wines" (as % of CADA's total output of domestic like- products)
Columns	A	B	C	D	E
Formula	Nil	Nil	A – B	Nil	C/A
2015	1,161,000	377,600	783,400		67.48%
2016	1,056,600	347,600	709,000		67.10%
2017	679,100	374,800	304,300		44.81%
2018	506,700	351,200	155,500		30.69%
2019	451,500	288,200	163,300		36.17%

406. The data in CADA's application was described to MOFCOM as "data from the National Bureau of Statistics for wine production enterprises above the scale (annual main business income of more than RMB 20 million)"<sup>563</sup>. At least as an estimate of total production (even if not of like products) it was a potentially authoritative source of data that, if anything, was an underestimate. It clearly diverged dramatically from the estimate. Faced with this evidence, MOFCOM appears to have done nothing in response, and instead accepted data without any supporting critical analysis. In Australia's view, these were not the actions of an unbiased and objective investigating authority.

(b) Cross-cutting data issues with total domestic  
production calculations

407. As previously argued by Australia,<sup>564</sup> and now confirmed through the contents of Exhibit CHN-32 (BCI), there is nothing on the record that explains how MOFCOM accounted

<sup>561</sup> 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, p. 26: "Note: The above data is based on data from the National Bureau of Statistics for wine production enterprises above the scale (annual main business income of more than RMB 20 million). According to the information available to the Association, wine producers above the scale account for the majority of the total domestic production, accounting for more than 90 %, and can represent the overall situation of China's wine industry".

<sup>562</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

<sup>563</sup> CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), p. 26.

<sup>564</sup> Australia's first written submission, para. 539.

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or controlled for year-to-year variables in the estimate of total production. The lack of such adjustments is evident. For example, [REDACTED]

[REDACTED] There is also no indication that MOFCOM made an assessment for potential margins of error in its estimate.

408. Indeed, it appears that MOFCOM would have been unable to make such an assessment. [REDACTED] did not indicate any of the sources of the underlying data inputs or explain how they were obtained, derived, or estimated (e.g. "wine plantation" area and "average harvest"). It did not provide the relevant assumptions or adjustments that were applied in determining any of its figures. Further, there is no evidence to indicate that MOFCOM had any of this information. Therefore, MOFCOM could not have determined whether and to what extent [REDACTED] figures were based on positive evidence collected from actual producers, or to what extent they were theoretical projections or estimates.

[REDACTED] only indicated one source for one particular input — that is, [REDACTED]  
[REDACTED]  
[REDACTED]

409. Therefore, contrary to China's argument that Australia "avails no evidence to show that the determination was not based on positive evidence",<sup>566</sup> Australia has clearly demonstrated that MOFCOM's estimate of total domestic production was not calculated in an objective manner and was not based on positive evidence. Thus, the total domestic production figures that MOFCOM relied upon in its definition of the domestic industry did not themselves constitute positive evidence.

#### **4. MOFCOM's process to define domestic industry gave rise to a material risk of distortion**

410. As agreed by the parties,<sup>567</sup> an investigating authority must "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."<sup>568</sup> The

<sup>565</sup> [REDACTED]

<sup>567</sup> China's first written submission, para. 913 and Australia's first written submission, para. 533.

<sup>568</sup> Appellate Body Report, *EC – Fasteners*, para. 416.

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Appellate Body has found that the qualitative assessment of a "major proportion" implies that, at a minimum, an investigating authority's approach and methodology for selecting the domestic industry does not create this risk.<sup>569</sup> However, MOFCOM introduced this risk of distortion in the following ways, thereby undermining the accuracy of its injury analysis:

- limiting its definition of the domestic industry to the 21 domestic producers who submitted questionnaire responses when the actual number of producers was substantially higher;<sup>570</sup>
- failing to undertake a qualitative assessment of the suitability of the 21 domestic producers; and
- failing to satisfy itself as to the accuracy of the production volume information of at least 16 of the 21 responding domestic producers.<sup>571</sup>

411. As discussed below, China has failed to rebut each of Australia's arguments.

(a) MOFCOM introduced a risk of material distortion by limiting its definition of domestic industry to the 21 domestic producers that responded to the Domestic Producer Questionnaire

412. MOFCOM introduced a material risk of distortion into its definition of domestic industry by only including those 21 domestic producers who responded to the Domestic Producer Questionnaire responses. These 21 domestic producers were *all* members of CADA. They did not contain a single domestic producer from the "hundreds" of domestic producers that are outside CADA's membership. The Appellate Body has cautioned that where only the applicants respond to the questionnaires, this in itself does not necessarily mean that the qualitative aspect of the definition of domestic industry has been met.<sup>572</sup> An unbiased and

<sup>569</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.6 Australia's first written submission, para. 533, and China's first written submission, para. 913.

<sup>570</sup> Australia's first written submission, para. 535.

<sup>571</sup> Australia's first written submission, para. 536, noting through the course of the first substantive meeting, China indicated an ex post facto process of verifying some responses as discussed below.

<sup>572</sup> Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.55("Thus, although only the applicants initially responded to the questionnaires, this in itself did not necessarily mean that the qualitative aspect of the definition of the domestic industry at issue comports with the requirements of Articles 3.1 and 4.1. Rather, completing the legal analysis on Japan's claim under Articles 3.1 and 4.1 would require an assessment of whether the producers included in the domestic industry as defined by

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objective investigating authority would have recognised the introduction of a material risk of distortion that was created as a consequence of this approach and adjusted its methodology accordingly. MOFCOM failed to do this.

413. Further, by definition, the 21 domestic producers that responded to the questionnaire were those that were willing to voluntarily invest resources into preparing and submitting their responses.<sup>573</sup> It follows that these domestic producers were more likely to be those who considered themselves injured by the dumped imports, especially as members of CADA (the applicant) than the hundreds of other domestic producers of like products in China.

414. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body further cautioned against defining the domestic industry in a way that would include predominantly those domestic producers that consider themselves to be injured and thus willing to be part of an injury sample.<sup>574</sup> The Appellate Body recalled that an "'objective examination' under Article 3.1 requires that the domestic industry, and the effects of dumped imports, 'be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.'"<sup>575</sup>

415. In the circumstances of the investigation at issue in this dispute, unlike those that the Appellate Body was called to consider in the case referenced above, MOFCOM did not use an express sampling method for its injury and causation analyses. Nonetheless, its decision to define the domestic industry as the 21 producers to the exclusion of the "hundreds" of other domestic producers introduced a comparable risk of distortion. Further, by limiting its definition to the 21 domestic producers, MOFCOM failed to base its injury determination on "wide-ranging information regarding domestic producers" as required by the Appellate Body.<sup>576</sup>

416. In response, China argues that its definition of the domestic industry did not introduce material risks of distortion because it did not *actively*<sup>577</sup> exclude any domestic

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the KTC were indeed representative, and whether the Korean investigating authorities acted in a manner that gave rise to a material risk of distortion").

<sup>573</sup> Australia's first written submission, para. 535.

<sup>574</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.319.

<sup>575</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.319.

<sup>576</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 419.

<sup>577</sup> Emphasis added.

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producers from being part of the definition of domestic industry.<sup>578</sup> However, as the Appellate Body has indicated, "excluding a whole category of producers of the like product" is an "example"<sup>579</sup> of an action that gives rise to a material risk of distortion. It follows that this is not the *only* way in which an investigating authority can introduce a risk of material distortion.

417. China asserts that "the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted."<sup>580</sup> Australia does not disagree. However, the quantitative threshold is not the sole criterion for a "major proportion", and an investigating authority's analysis does not necessarily end there. There is still an onus on the investigating authority to ensure that there is no material risk of distortion even where this threshold has been met.<sup>581</sup> MOFCOM failed to do so.

(b) MOFCOM failed to undertake a qualitative assessment of the suitability of the 21 domestic producers

418. Australia reiterates that MOFCOM introduced a material risk of distortion into its definition of domestic industry by failing to undertake a qualitative assessment of the suitability of the 21 domestic producers, including whether they were suitably representative in terms of geographic spread, product mix, scale of operations, economic indicators, or any other relevant factor to ensure they were reflective of domestic industry.<sup>582</sup> There is nothing on the record to indicate that such an assessment was undertaken, and China has not argued otherwise.

(c) MOFCOM failed to satisfy itself as to the accuracy of the production volume information of the majority of the 21 domestic producers

419. As set out in its first written submission, Australia argues that that the risk of distortion was compounded by MOFCOM's failure to verify the data provided by 19 of the 21

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<sup>578</sup> China's first written submission, para. 900.

<sup>579</sup> Appellate Body Report, *EC – Fasteners*, para. 414 (emphasis added).

<sup>580</sup> Appellate Body Report, *EC – Fasteners (China)*, para 413, as cited in China's first written submission, para. 913.

<sup>581</sup> This is notwithstanding Australia's claims regarding the deficiencies in MOFCOM's calculation of total domestic production, as discussed above, meaning that Australia firmly argues that MOFCOM failed to meet the quantitative threshold in the circumstances of this case. In such circumstances, an objective and unbiased investigating authority would have been particularly sensitive to a potential material risk of distortion arising.

<sup>582</sup> Australia's first written submission, para. 541.

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questionnaire responses.<sup>583</sup> At the first substantive meeting, China claimed, *ex post facto*, that MOFCOM "cross-checked" the data of three companies, despite there being nothing on the record to suggest that this had occurred.<sup>584</sup> Australia will not repeat its arguments in response, which are set out in its written response to Panel question No. 18.<sup>585</sup> However, *arguendo*, even if China's *ex post facto* rationalisation was accepted, it remains clear that, at a minimum, China failed to satisfy itself as to the accuracy of the production information of at least 16 of the 21 domestic producers.

(d) China's misleading claims regarding statements made by interested parties regarding MOFCOM's total domestic production calculation

420. China relies on misrepresentations of the evidence on the record in defence of MOFCOM's failures. In particular, China argues that, after the Preliminary Determination, Australian Food and Beverage Group (AFBG) indicated in its comments on the Preliminary Determination that "it respected the verified statistical data of the overall wine output in China."<sup>586</sup> Looking at AFBG's actual comments, it merely stated as follows: "Identification of the domestic industry [*sic*] AFBG must respect the verified statistics of the overall output of the Chinese Wines".<sup>587</sup> This is not a confirmation that the statistics are accurate or that AFBG agrees with the data. Rather, AFBG is merely stating that it has no choice but to "respect" MOFCOM's "overall output" statistics – i.e., it "must" respect them – which it appears to have assumed were "verified". AFBG's use of this subjective word does not mean that the data was verified. Indeed, given that this data was never disclosed to interested parties, AFBG could not have known whether or to what extent any of the data was "verified".

421. For the same reasons, Australia also rejects China's unsubstantiated assertion that "at least tacitly, [other interested parties] agreed that this methodology was sufficient for the purposes of the anti-dumping investigation."<sup>588</sup>

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<sup>583</sup> Australia's first written submission, para. 536.

<sup>584</sup> China's comments on Australia's response to Panel question No. 18 at the first meeting of the Panel.

<sup>585</sup> Australia's response to Panel question No. 18.

<sup>586</sup> Final Determination (Exhibit CHN-1), p. 53. See also: AFBG Comments on Preliminary Determination (Exhibit CHN-12), para. IV(ii), p. 5.

<sup>587</sup> AFBG Comments on Preliminary Determination (Exhibit CHN-12), p. 5.

<sup>588</sup> China's first written submission, para. 917.

**5. China's argument that the wine industry was fragmented is *ex post facto* rationalisation and should be rejected by the Panel**

422. In yet another *ex post facto* rationalisation, China refers to the Chinese domestic wine industry as fragmented.<sup>589</sup> There is no record that MOFCOM made such a finding. However, *arguendo*, even if MOFCOM had made such a finding, the Appellate Body has found that even in circumstances where there is a fragmented industry, the investigating authority still "bears the same obligation to ensure that the process of defining domestic industry does not give rise to a material risk of distortion."<sup>590</sup> In this regard, the Appellate Body explains that, in such circumstances, "an investigating authority would need to make a *greater effort* to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion".<sup>591</sup> As Australia has established above and throughout this case, MOFCOM failed to fulfil this obligation.<sup>592</sup>

**B. CONCLUSION**

423. Contrary to China's assertions, Australia has demonstrated that MOFCOM's process to identify and define the domestic industry was inherently flawed.<sup>593</sup> For the reasons outlined above, and in Australia's prior submissions, MOFCOM failed to define the domestic industry in accordance with Article 4.1 of the Anti-Dumping Agreement. It follows that MOFCOM's subsequent injury and causation analyses are also inconsistent with the provisions of Article 3 of the Anti-Dumping Agreement.

<sup>589</sup> China's first written submission, para. 911.

<sup>590</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303.

<sup>591</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.302-5.303 (emphasis added).

<sup>592</sup> China's first written submission, para. 911. China has claimed that "despite the wine industry being a highly fragmented industry, the producers included in the definition of 'domestic industry' not only represented 46% of the total output of the industry as a whole, but well over 60% in each year of the investigation period." It is unclear to Australia as to how 60% of total domestic production in each year of the POI can equate to "46% of the total output of the industry as a whole". It may be that China intends this as a reference to the Panel Report in *Argentina – Poultry Anti-Dumping Duties*, which China discusses in para. 907 of its first written submission, although this is not entirely clear from the wording in para. 911.

<sup>593</sup> China's first written submission, para. 926.



## V. AUSTRALIA'S CLAIMS CONCERNING THE INJURY AND CAUSATION DETERMINATION

### A. INTRODUCTION

424. It is clear from the text of its Final Determination that MOFCOM considered all injurious effects to flow from the alleged suppression of domestic price and its injury determination was grounded solely on this basis.<sup>594</sup> According to MOFCOM, the price of domestic like products was suppressed over the Injury POI because the sale price failed to increase at the same rate as unit cost increases over the same period.<sup>595</sup> That is, over the Injury POI, the unit cost of domestic like products increased by 658 RMB/kilolitre more than the increase in the sale price of domestic like products.<sup>596</sup> This amount represents only 2% of the average unit price of domestic like products in the "base year" of 2015. In short, the foundation for MOFCOM's affirmative injury determination is a finding that the sale price of domestic like products in 2015 was suppressed by a mere 2% over the course of the five-year Injury POI.<sup>597</sup>

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

<sup>594</sup> Anti – Dumping Final Determination (Exhibit AUS-2), p. 132 ("the price of the dumped imported product suppressed the prices of domestic like products, and the production and operation of domestic like products deteriorated. The domestic relevant wine industry has suffered material injury"); 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"), p. 139 ("The comparison data showed that during the injury investigation period, 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 under the background of increased costs*, leading to a continuous drop of sales revenue, PBT, return on investment (ROI) and other main operating indicators of domestic like products, and causing material injury to the domestic industry"); p. 142 ("the dumped imported product suppressed the prices of domestic like products, affecting the profitability of the domestic industry and further leading to a continuous decline in both PBT and ROI during the injury investigation period"); and p. 145 ("the dumped imported product suppressed the prices of domestic like products, affecting the profitability of the domestic industry and further leading to a continuous decline in both PBT and ROI during the injury investigation period") (underline emphasis added).

<sup>595</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120 – 121.

<sup>596</sup> Anti-Dumping Final Determination, (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551; 600; and 602; China's first written submission, para. 1377.

<sup>597</sup> China accepts that 2015 represents the "base year" for a non-injurious state for the domestic industry. See China's first written submission, paras. 1324; 1332; 1475; 1635; 1650; and 1667.

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Injury POI. This suppression margin allegedly resulted in material injury to the domestic industry,<sup>598</sup> despite domestic prices increasing by more than 20% over the same period.<sup>599</sup>

426. In its submissions throughout these proceedings, Australia has established a *prima facie* case that MOFCOM's injury determination was inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement as set out below:

- first, Australia claims that MOFCOM's examination of price effects was inconsistent with Articles 3.1 and 3.2. Australia's position is that MOFCOM's price effects evaluation was deficient in multiple respects, most importantly because MOFCOM: (i) failed to ensure price comparability between the prices it calculated for subject imports and domestic like products; (ii) did not consider whether the price suppression it identified was significant; (iii) did not examine the relationship between subject imports and the price of domestic like products in order to examine explanatory force; and (iv) based its price effects analysis on average unit values that were not positive evidence.
- second, Australia claims that MOFCOM's examination of the impact of subject imports on the domestic industry was inconsistent with Articles 3.1 and 3.4 because MOFCOM's evaluation: (i) was fatally undermined by MOFCOM's errors in defining the domestic industry under Article 4.1; (ii) did not evaluate the relationship between subject imports and the state observed in the domestic industry; (iii) did not consider "factors affecting domestic prices"; and (iv) included significant errors and omissions.
- third, Australia claims that MOFCOM's examination of causation and non-attribution factors was inconsistent with Articles 3.1 and 3.5. Australia's position is that MOFCOM's evaluation of causation: (i) was 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; (ii) failed to

<sup>598</sup> China's First Written Submission, para. 1380 ("658 RMB/kilolitre was a significant amount as it led to a sharp drop in profitability and affected all the financial indicators of the domestic industry as well as their continued operations including production").

<sup>599</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 120.

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establish a causal link between the alleged dumping of the subject imports and the alleged injury suffered by the domestic industry; (iii) was not based on an objective assessment of all relevant evidence on the record; and (iv) failed to properly examine or assess the effects of the other "known" factors on the domestic wine industry based on the relevant evidence, including by identifying, separating, and distinguishing their injurious effects from that allegedly caused by subject imports through price suppression.

427. In response to Australia's claims, China's first written submission and responses to Panel questions: (i) consist, for the most part, of significant *ex post facto* reasoning that does not appear anywhere on the investigation record; (ii) often do not respond to Australia's arguments; and (iii) seek to divert attention from the key matters in dispute by placing significant focus on so called "threshold" issues. As a result, China has failed to rebut Australia's *prima facie* case.

428. In addition to the matters set out in its PRR, China has raised numerous "threshold" issues in relation to Australia's arguments under Article 3, which seek to characterise Australia's arguments as being beyond the Panel's terms of reference and/or being improperly made. Australia's response to each of these arguments is set out above.<sup>600</sup> In summary, they are entirely without merit.

## **B. CHINA ACTED INCONSISTENTLY WITH ARTICLE 3.1 AND ARTICLE 3.2 OF THE ANTI-DUMPING AGREEMENT**

### **1. Introduction**

429. MOFCOM found that the increases in volume and market share and the decrease in price of subject imports served to suppress the prices of domestic like products over the course of the Injury POI.<sup>601</sup> The quantum of the alleged price suppression that MOFCOM observed was 658 RMB/kilolitre.<sup>602</sup>

<sup>600</sup> See above sections II.A - II.B and below Annex A.3.2-A.3.3.

<sup>601</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 132; 136; 142; and 145.

<sup>602</sup> Anti-Dumping Final Determination, (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551; 600; and 602; China's First Written Submission, paras. 1377; 1380; 1332; 1650; and 1667.

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430. MOFCOM made fundamental errors and omissions at each stage of its consideration of price effects, such that its analysis and findings are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement. This is because:

- first, the prices that MOFCOM calculated and compared for subject imports and domestic like products were not comparable;
- second, MOFCOM did not engage in any consideration of whether the margin of price suppression it identified was significant;
- third, MOFCOM's consideration of the relationship between subject imports and the suppression of domestic prices was woefully inadequate, such that it failed to establish whether subject imports in fact had any explanatory force for the price suppression at all; and
- fourth, the average unit values that MOFCOM calculated for subject imports and domestic like products were not based on positive evidence.

**2. MOFCOM calculated and compared prices that were not comparable**

431. It is well-established that an investigating authority must ensure price comparability whenever it makes a price comparison during an Article 3.2 price effects analysis.<sup>603</sup>

432. Australia's position is that:

- MOFCOM compared the average unit price of subject imports to the average unit price of domestic like products during its consideration of prices effects. As a result, MOFCOM needed to ensure that these prices were comparable; and
- MOFCOM failed to ensure price comparability in the average unit prices that MOFCOM calculated for subject imports and domestic like products because

<sup>603</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323, *China – 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.

it failed to account for differences in level of trade, conditions of sale and product mix.

433. The effect of this is that MOFCOM's price effects analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

(a) MOFCOM compared the price of subject imports to the price of domestic like products

434. As a so called "threshold issue", China argues that MOFCOM was not required to ensure price comparability during its prices effects analysis because: its consideration of price suppression was based on a "holistic consideration" of factors other than price,<sup>604</sup> and MOFCOM "did not compare the prices of the dumped imports and the domestic like product, nor relied on such a price comparison" during its consideration of price suppression.<sup>605</sup> These arguments are without merit. The Final Determination and investigation record make clear that MOFCOM did compare the prices of subject imports and domestic like products during its price effects analysis and relied on this comparison to make its finding of price suppression. Australia asks the Panel to reject China's arguments for the following reasons.

435. First, the average unit price of subject imports was central to MOFCOM's findings that "during the period of injury investigation, the price of the dumped imported product suppressed that of domestic like products".<sup>606</sup> In this respect, MOFCOM did compare the price of subject imports and domestic like products and relied on this comparison both during its consideration of price effects and throughout the balance of the injury determination.<sup>607</sup>

<sup>604</sup> China's first written submission, paras. 1081-1084.

<sup>605</sup> China's first written submission, para. 1089, see also paras. 1085-1087, 1089-1092.

<sup>606</sup> Anti-Dumping Final Determination (Exhibit CHN-1), p. 59, see also pp. 59 ("the price effect of the dumped imported product on the price of domestic like products included the impact of the increased volume and price of the dumped imported product on the price of domestic like products"; "the volume of the dumped imported products accumulatively increased by 113.05% and the price dropped by 15.91%, directly suppressed the price increase of the domestic like products"); 64 ("The evidence showed that from 2015 to 2019, the volume of the dumped imports from Australia continued to increase significantly, the price of the dumped imports suppressed the prices of the domestic like products, and the production and operation of the domestic like products of the domestic industry deteriorated"); and 68 ("The comparison data showed that during the period of injury investigation, the price of the dumped imports was in a downtrend with a cumulative decline of 15.91% in 2015-2019, suppressing the price of the domestic like products [...]"). Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120-121, 132, 139.

<sup>607</sup> Anti-Dumping Final Determination (Exhibit CHN-1), pp. 55, 57-58 ("After further review, the IA held that [...] the price competition between the Subject Product and the domestic like products didn't just occur at the retail level. Secondly, the prices of the dumped imported product and the domestic like products should be compared at the same level of trade to ensure that they were comparable when conducting price comparisons"); and 58-59. Anti-Dumping Final Determination (Exhibit AUS-2), pp. 113-114, 117-118, 120-121.

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436. Second, it is well established that price comparability is required any time a price comparison is made during a price effects analysis.<sup>608</sup> A failure to do so results in a violation of Articles 3.1 and 3.2.<sup>609</sup> The fact that factors other than price may also have been considered during a price effects analysis is: (i) irrelevant; and (ii) not an answer to the obligation to ensure price comparability.

437. Australia's claim regarding price comparability was clearly identified in claim xix of Australia's panel request and is within the panel's terms of reference. Australia has established a *prima facie* case and discharged its burden of proof. Australia addresses China's argument relating to facts available in section V.B.2(d)i below.

(b) MOFCOM failed to ensure price comparability by failing to account for differences in level of trade

438. There are three key points of disagreement between the parties as to how differences in level of trade should have been reflected in MOFCOM's price calculation.

439. First, China asserts that level of trade requires consideration of two distinct aspects: market stage and customer categories (or sales channels).<sup>610</sup> Australia does not agree with China's view that these two aspects relate to "distinct factual and legal issues". For example, it is not clear how China's "customer categories" differ from the customer types referred to as relating to the "market stage". However, in this instance, nothing turns on the distinction that China seeks to draw. That is, MOFCOM's analysis and price calculation did not consider or account for alleged differences in either of the categories described by China.

440. Second, China and Australia disagree as to how differences in the level of trade should have been accounted for in MOFCOM's price calculation. China argues that MOFCOM's price calculation accounted for those differences because it compared prices at what it determined to be the first point of competition in the Chinese market, being the "liquidation" price of

<sup>608</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323, *China – 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.

<sup>609</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323, *China – 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.

<sup>610</sup> China's first written submission, para. 1232.

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imports to the ex-factory price of domestic like products.<sup>611</sup> China's argument is premised on the assumption that all wine sales in China occurred in a rigid supply chain, where domestic producers or exporters only ever made sales to a distributor and never to a retailer or an end-user. This assumption is not supported by the evidence on the record.

441. Rather, the evidence established that the reality of the market was more complex – in that it showed that domestic producers and Australian exporters made sales to [REDACTED].<sup>612</sup> As a result, the average price data forming the basis of MOFCOM's price calculations reflected prices for sales occurring at different levels of trade [REDACTED]. MOFCOM failed to account for that complexity in its price calculation. China accepts that differences of this nature could "affect price comparability in different ways".<sup>613</sup> MOFCOM was required to consider and reflect these differences in its price calculation in order to ensure the prices were comparable. It did not do so.

442. Third, China argues that because the majority (by volume) of sales by the sampled Australian companies and the domestic producers were to [REDACTED] MOFCOM was not required to consider level of trade issues in its price analysis.<sup>614</sup> Australia makes two observations in relation to China's argument. First, as a preliminary matter, China's argument is entirely *ex post facto* rationalisation. There is no evidence in the Final Determination or elsewhere on the investigation record to suggest that MOFCOM undertook the type of examination described by China in its first written submission.<sup>615</sup> Second, as to the substance of China's argument, Australia agrees that the evidence before MOFCOM established that the majority of sales (by volume) by Treasury Wines and Casella Wines in 2019 were made to [REDACTED].<sup>616</sup> However, the volume of sales made to customers at other levels of trade in

<sup>611</sup> China's first written submission, paras. 1241-1247; China's response to Panel question No. 30, paras. 168; 170. MOFCOM chose to calculate and compare annual average unit values based on customs data (for subject imports) and a simple average of sales volumes and prices reported by the 21 domestic producers (for domestic like products).

<sup>612</sup> Australia's first written submission, paras. 587-590.

<sup>613</sup> China's first written submission, para. 1232.

<sup>614</sup> China's first written submission, paras. 1257-1264.

<sup>615</sup> China's first written submission, paras. 1254-1261.

<sup>616</sup> Australia's first written submission, para. 588. There is no evidence before the Panel (or to which Australia has access) to support China's arguments regarding the level of trade mix of Swan Vintage (China's first written submission, paras. 1260). There is no evidence before the Panel (or to which Australia has access) to establish China's argument that the questionnaire responses of the domestic industry showed that [REDACTED] (China's first written submission, paras. 1261).

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2019 were not insignificant. There is nothing on the investigation record or in the subsequent *ex post facto* reasoning provided in China's first written submission which shows that MOFCOM actually considered whether such sales to different levels of trade resulted in price differences. As a result of this failure, MOFCOM's price calculation methodology did not ensure price comparability as required under Article 3.2. In particular, MOFCOM did not include any consideration or adjustment to reflect differences between the "liquidated" prices of subject imports and the ex-factory prices of domestic like products in sales to purchasers in China at different levels of trade (what China refers to as "customer categories" or "sales channels").

443. Finally, China accused Australia of deliberately withholding or not putting relevant evidence before the Panel because it was not supportive of its case.<sup>617</sup> This allegation is baseless. Australia's argument is based on a fulsome and accurate reflection of the data that was before MOFCOM, to which Australia has access. Australia did refer to and exhibit the Casella Wines level of trade data in its first written submission, and accurately stated that [REDACTED] [REDACTED]<sup>618</sup> – this does not impact or detract from Australia's argument. Australia does not have access to the Swan Vintage data, or the data provided by the 21 domestic producers. As a result, Australia is not able to consider or exhibit that data. To the extent that China wishes the Panel to make findings on the basis of data provided to it by Swan Vintage or the 21 domestic producers, it must put that information before the Panel. Australia would welcome China doing so.

(c) MOFCOM failed to ensure price comparability by failing to account for differences in conditions of sale

444. There are four key points of disagreement between the parties as to how different conditions of sale should have been reflected in MOFCOM's price calculation.

445. First, China argues that conditions of sale are not a recognised factor that needs to be considered to ensure price comparability during a price effects analysis under Articles 3.1 and 3.2.<sup>619</sup> This is because, in China's view, "there are limits to transposing the Article 2.4

<sup>617</sup> China's first written submission, paras. 1255-1256.

<sup>618</sup> Australia's first written submission, para. 598, fn. 684. See also Casella Wines Anti-Dumping Questionnaire Response Form 3-4 (confidential version), Exhibit AUS-37 (BCI).

<sup>619</sup> China's first written submission, paras. 1271-1290.



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factors to the price effects analysis".<sup>620</sup> Australia's position is that Article 3.1 and 3.2 require an investigating authority to ensure price comparability any time it makes a price comparison.<sup>621</sup> The factors that may be relevant to ensuring price comparability are not limited and may vary depending on the facts and circumstances of each case. In this instance, there was a material difference between the annual average unit values MOFCOM calculated for subject imports and domestic like products caused by the difference between the conditions of sale reflected in each price. That is, the ex-factory price for domestic like products reflected the price of goods available for inland shipment. The CIF price for subject imports did not. MOFCOM failed to include all of the adjustments to the CIF price that were necessary to address the differences between the ex-factory price and the costs incurred in making the imported Australian goods available for inland shipment. Australia's reference to Article 2.4 was only to demonstrate that conditions of sale are recognised as having an impact on price comparability.<sup>622</sup>

446. Second, contrary to China's assertion, Australia's argument does not conflate conditions of sale with levels of trade.<sup>623</sup> Australia's position is that conditions of sale and level of trade are separate and distinct concepts. Level of trade is concerned with the characteristics of the parties to a transaction, specifically their relative position in the supply chain from producer to end user. Conditions of sale is concerned with differences in the sale terms governing transactions between vendors and purchasers.<sup>624</sup> The terms ex-factory, ex-warehouse and CIF relate to conditions of sale<sup>625</sup> not to levels of trade. This is because they describe the terms on which a good is sold, not the relative positions of the parties to the transaction in the supply chain. This understanding is consistent with China's characterisation

<sup>620</sup> China's first written submission, para. 1279.

<sup>621</sup> Appellate Body Reports, *Korea – Pneumatic Valves*, para. 5.323, *China – 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.

<sup>622</sup> Australia's first written submission, para. 591.

<sup>623</sup> China's first written submission, paras. 1288 – 1290. In relation to the matters raised by China at paragraphs 1286 – 1287, Australia notes that it has clarified the adjustments that were required to account for conditions of sale. These are: (i) stevedoring and logistics associated with unloading the goods from the vessel of entry; (ii) transportation costs associated with moving the goods from the dock to warehousing facilities; and (iii) warehousing and storage costs (see Australia's response to Panel question No. 30, para. 76).

<sup>624</sup> For example, goods may be sold to customers at different levels of trade (i.e. distributors and retailers) on the same conditions of sale (i.e. CIF). Similarly, goods may be sold to customers at the same level of trade (i.e. distributors) on different conditions of sale (i.e. CIF, FOB or ex-factory). The table at paragraph 1311 of China's first written submission is consistent with this understanding.

<sup>625</sup> Cf. China's first written submission, para. 1289. See International Chamber of Commerce Incoterms 2010 (Exhibit AUS-83).

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of level of trade as relating to either the market stage at which a sale is made, or the customer category or sales channel for the sale.<sup>626</sup> Neither of the 'level of trade' categories posited by China capture differences in conditions of sale.

447. Third, China misunderstands the factual basis of Australia's argument.<sup>627</sup> Australia's argument is that, to ensure price comparability, MOFCOM needed to compare the price of goods on conditions of sale that reflected a similar level of availability to the customer, or apply adjustments to the annual average unit values it calculated to reflect differences.<sup>628</sup> As a result, Australia does not need to establish that the ex-factory price included adjustments for stevedoring, dock transportation and storage or warehousing.<sup>629</sup> Nor does it need to establish that Australian exporters in fact included these cost items in the export price of subject imports.<sup>630</sup> This is for the following two reasons:

- the adjustments Australia argues needed to be applied reflect the additional costs associated with making an imported good available for inland transport by a customer. That is, they are to account for the differences between a good sold on CIF terms and a good sold on ex-factory terms.<sup>631</sup> In that way, they are akin to an adjustment for a tariff or customs clearance fee, neither of which are reflected in an ex-factory price for domestic products, but which were nonetheless appropriately applied by MOFCOM to the liquidation price for subject imports in this case.<sup>632</sup>
- Australia's argument is grounded in the price calculation methodology that MOFCOM adopted, which used annual CIF price data as the base for the liquidation price.<sup>633</sup> That is, the prices forming the base of MOFCOM's calculation were normalised on a CIF basis, which does not include the additional costs associated with bringing goods across the border and

<sup>626</sup> China's first written submission, para. 1232.

<sup>627</sup> China's first written submission, paras. 1296-1313.

<sup>628</sup> Australia's first written submission, paras. 591-599.

<sup>629</sup> Cf China's first written submission, paras. 1296(i), 1302-1303.

<sup>630</sup> Cf China's first written submission, paras. 1296(ii), 1304-1313.

<sup>631</sup> See also Australia's response to Panel question No. 32.

<sup>632</sup> Australia has provided its views in relation to the *China – Broiler Products* in its response to Panel question No. 32, paras 79-83.

<sup>633</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 113; China's response to Panel question No. 31, paras. 176-177.

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making them available for inland shipment.<sup>634</sup> As a result, whether or not these additional costs were actually included in the export price charged by Australian exporters is irrelevant. They were not reflected in the data forming the basis of MOFCOM's price calculation and nor were they reflected in any of the adjustments MOFCOM subsequently applied.

448. Fourth, Australia does not accept that the adjustments MOFCOM applied to the annual CIF price in fact account for the difference in conditions of sale.<sup>635</sup> The record evidence establishes that MOFCOM applied an adjustment to the CIF price for "customs clearance costs" which were "adopted from the responses to the Questionnaire for Chinese Importers".<sup>636</sup> China has subsequently asserted "they include all the costs involved in getting the goods customs cleared, i.e. customs brokerage and handling fees, and the logistics costs for getting the goods from the vessel (including unloading) to the docks for the importer to take delivery."<sup>637</sup> There is simply no evidence before the Panel that establishes this.<sup>638</sup> Australia's position is that adjustments were required to account for: (i) stevedoring and logistics associated with unloading the goods from the vessel of entry; (ii) transportation costs associated with moving the goods from the dock to warehousing facilities; and (iii) warehousing and storage costs.<sup>639</sup> Even if the Panel were to accept China's unsubstantiated assertions concerning the costs included in the "customs clearance costs", it remains the case that MOFCOM did not apply adjustments to account for at least items (ii) and (iii).

(d) MOFCOM failed to ensure price comparability by failing to account for differences in product mix

449. China argues that either: (i) MOFCOM did consider product mix and determined that it was not a relevant to price comparability and so did not need to be accounted for in the price calculation;<sup>640</sup> or (ii) alternatively, MOFCOM had recourse to facts available and, as a result, MOFCOM's average unit prices reflected the "best information" and, in that respect,

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<sup>634</sup> China's response to Panel question No. 31, para. 176.

<sup>635</sup> China's first written submission, para. 1297. China's responses to Panel questions Nos. 25 and 31.

<sup>636</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 113; Final Determination (Exhibit CHN-1), p. 55.

<sup>637</sup> China's first written submission, para. 1064. See also China's response to Panel question No. 25, para. 108.

<sup>638</sup> See China's first written submission, paras. 1058-1066; China's responses to Panel questions 25 and 31. Australia challenges MOFCOM confidential treatment of these responses.

<sup>639</sup> Australia's response to Panel question No. 32, para. 76.

<sup>640</sup> China's first written submission, paras. 1101-1116, 1131-1146.

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did account for product mix.<sup>641</sup> China's arguments are inconsistent with each other and without merit. Australia's position is that MOFCOM's price calculation methodology did not account for differences in product mix. It should have done so. China's arguments regarding MOFCOM's supposed recourse to facts available are inconsistent and, ultimately, not an answer to MOFCOM's failure to account for product mix.

*i. MOFCOM's alleged recourse to facts available  
does not address the price compatibility issues*

450. China alleges that MOFCOM had recourse to facts available for its calculation of the liquidation price of subject imports.<sup>642</sup> According to China, this has two implications. First, MOFCOM did not need to ensure price compatibility between the average unit values it calculated for subject imports and domestic like products.<sup>643</sup> Second, Australia's arguments regarding product mix and price comparability should have been made in relation to a claim under Article 6.8, not Articles 3.1 and 3.2, and the claim is therefore outside the Panel's terms of reference.<sup>644</sup> China's arguments are not supported by record evidence and are inconsistent with each other. This is for three reasons.

451. First, MOFCOM did not have recourse to facts available for the purposes of its price calculation for subject imports and domestic like products under Article 3.2. Rather, MOFCOM acknowledged that there were differences in the product mix between subject imports and domestic like products,<sup>645</sup> but ultimately concluded (incorrectly) that subject imports and domestic like products were "almost identical".<sup>646</sup> MOFCOM then proceeded to calculate average unit prices and compare them, without taking any steps to address the differences in product mix. In contrast, in circumstances where MOFCOM did have recourse to facts available, this was clearly identified in the Final Determination through the use of specific language, such as "in accordance with Article 21 of the Regulation, the IA determined ... on the basis of the facts available and best information available...".<sup>647</sup> No such language was

<sup>641</sup> China's first written submission, paras. 1117-1130.

<sup>642</sup> China's first written submission, para. 1125-1130, 1094.

<sup>643</sup> China's first written submission, para. 1096-1098.

<sup>644</sup> China's first written submission, paras. 1094-1098.

<sup>645</sup> Final Determination (Exhibit AUS-2), pp. 104-105, 115-116.

<sup>646</sup> Final Determination (Exhibit CHN-1), p. 52.

<sup>647</sup> Final Determination (Exhibit CHN-1), pp. 18; 29; 32; 33; 41; 43; 46; and 47; Anti-Dumping Final Determination (AUS-2), pp. 37; 60; 67; 84; 89; 91; 95; and 98.]

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used in the Final Determination to describe MOFCOM's decision to use the customs data as the basis for calculating the import price of subject imports.<sup>648</sup>

452. Second, China's arguments regarding price comparability, product mix and MOFCOM's use of annualised average unit values on the basis of facts available are internally inconsistent. Specifically, China argues that price comparability was not relevant to MOFCOM's examination of price effects because "MOFCOM did not compare the prices",<sup>649</sup> and/or because subject imports and domestic like products were "almost identical".<sup>650</sup> MOFCOM either used average unit prices: (i) because it determined that product mix and price comparability were not relevant to its price effects analysis, in which case there was no necessary information missing from the record and, therefore, no recourse to facts available; or (ii) because price comparability was relevant to MOFCOM's examination, but it considered that the Australian interested parties had not supplied the necessary information to determine the appropriate adjustments or to segregate the analysis into categories, such that recourse to the facts available was justified. China cannot have it both ways. Recourse to facts available cannot be invoked on an "alternative" *ex post facto* basis. MOFCOM either considered product mix and price comparability were irrelevant to its price effects analysis, and was therefore not missing any necessary information, or it had recourse to facts available because it determined that it lacked necessary information to assess and ensure price comparability.

453. Third, in the event that the Panel accepts that MOFCOM did properly have recourse to facts available, it failed to do so in accordance with the requirements of Article 6.8 and Annex II.<sup>651</sup> This is because there was verifiable and appropriately submitted information before MOFCOM that demonstrated that there were significant differences in the product mix of subject imports and domestic like products.<sup>652</sup> MOFCOM's recourse to average unit values without applying adjustments to reflect the product mix differences did not take this information into account. The fact that the available information may not have been perfect in every respect, did not entitle MOFCOM simply disregard it. As a result, MOFCOM's recourse

<sup>648</sup> Final Determination (Exhibit CHN-1), pp. 55-58; Anti-Dumping Final Determination 9Exhibit AUS-2), pp. 112-119.

<sup>649</sup> China's first written submission, paras. 1092; 1089; and 1091.

<sup>650</sup> Final Determination (Exhibit CHN-1), p. 52. See also Anti-Dumping Final Determination (Exhibit AUS-2), pp. 107 – 108.

<sup>651</sup> This argument is captured by claim ix in Australia's panel request.

<sup>652</sup> This evidence is discussed in detail in Australia's first written submission, paras. 563-599.

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to annual average unit values, without applying adjustments to reflect the diversity in the product mix, was inconsistent with paragraphs 3 and 5 of Annex II. MOFCOM did not engage in a process of evaluation or reasoning to support the selection of appropriate replacement data and, consequently, the replacement data that MOFCOM selected did not reflect the best information available.

*ii. MOFCOM's price calculation did not ensure price comparability*

454. China argues that MOFCOM's detailed consideration of product mix issues is set out in its Preliminary Determination, Disclosure of Essential Facts and Final Determination.<sup>653</sup> In this context, China asserts that on the basis of the information available to MOFCOM, its price calculation did appropriately consider and account for product mix differences.<sup>654</sup> Australia disagrees.

455. First, the Preliminary Determination, Disclosure of Essential Facts and Final Determination do not disclose any meaningful examination of product mix by MOFCOM. The passages relied on by China as allegedly recording MOFCOM's consideration of product mix,<sup>655</sup> relate to MOFCOM's assertions that subject imports and domestic like products were sufficiently similar to be considered "like products" and competed with each other. MOFCOM's analysis was insufficient to establish price comparability.

456. Second, China acknowledges that the statements made at paragraphs 1135 - 1137 and 1198 of its First Written submission reflect *ex post facto* analysis by China. They do not reflect analysis or consideration performed by MOFCOM.<sup>656</sup> Similarly, the analysis of evidence, calculations and reasoning set out in China's response to question 27 does not appear in the Final Determination or elsewhere on the investigation record. In that light, it is unclear what China's references to the "official internal record" relate to.<sup>657</sup> The record shows that

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<sup>653</sup> China's first written submission, para. 1101.

<sup>654</sup> China's first written submission, paras. 1101-1145.

<sup>655</sup> China's first written submission, para. 1101 citing Preliminary Determination, Exhibit CHN-3, pages 30-31; 33-36; Disclosure of Essential Facts, Exhibit CHN-2, pages 29-32; 34-38; Final Determination, Exhibit CHN-1, pages 48-52; 55-58.

<sup>656</sup> China's response to Panel question no. 27, para. 125 ("the statements noted in the question were made by China in its first written submission on the basis of a comparison of the data available pertaining to the dumped imports on the one hand, and the domestic industry like product sales on the other hand.")

<sup>657</sup> China's response to Panel question no. 27, para. 152.

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MOFCOM did not examine whether product mix impacted price comparability during its investigation. China's *ex post facto* submissions cannot be relied on to remedy that defect.<sup>658</sup>

457. Third, the extensive *ex post facto* reasoning provided by China in its first written submission<sup>659</sup> and in response to Panel questions<sup>660</sup> does not support the position allegedly adopted by MOFCOM that "there was sufficient similarity between the basket of the dumped imports and the basket of the domestic like product",<sup>661</sup> such that it did not need to apply adjustments to address product differentiation. Rather, the evidence discussed by China confirms that [REDACTED]

[REDACTED]<sup>661</sup>

458. China's extensive *ex post facto* explanations provided in response to Panel question No. 27 establish two things: (i) China accepts that the evidence before MOFCOM established that the exports of the Australian sampled companies and the domestic industry could be categorised [REDACTED]

[REDACTED],<sup>662</sup> and (ii) [REDACTED]

[REDACTED].<sup>663</sup> Changes in the product composition arising from either of these factors are likely to have impacted the annual average unit values MOFCOM calculated. Yet, despite being considered, apparently in some detail by MOFCOM, these differences are not reflected in the price calculation methodology MOFCOM adopted.<sup>664</sup>

459. Indeed, contrary to MOFCOM's ultimate findings, [REDACTED] does not provide a basis on which to conclude that the products were sufficiently similar such that annual average unit values

<sup>658</sup> In this respect, Australia notes that despite a request from the Panel, China has not produced the "official internal record". The analysis described by China in response to Panel question no. 27, self-evidently was not reflected on the investigation record, rather it reflects entirely *es-post facto* reasoning.

<sup>659</sup> China first written submission, paras. 1132-1143; response to Panel question no. 27.

<sup>660</sup> China's first written submission, para. 1138.

<sup>661</sup> China's first written submission, paras. 1132-1143; China's response to Panel question no. 27. Australia notes that China's response to question 27 relies heavily on evidence that China has not provided to the panel, on the basis of domestic confidentiality obligations.

<sup>662</sup> China's response to Panel question no. 27, paras. 134-138, 141-145, 150, and 151-152.

<sup>663</sup> China's response to Panel question no. 27, paras. 139-140.

<sup>664</sup> The matters raised by China in response to question 27 do not establish that MOFCOM addressed product mix issues in its price calculation methodology. Rather, they demonstrate that MOFCOM ignored the issues, despite clear evidence of their importance. See China's response to Panel question No. 27, paras. 155-164.

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were comparable, without any adjustments to reflect the differences in product mix. It is quite the opposite - these differences are precisely the kind of product mix considerations that need to be accounted for, to ensure that price changes are attributable to the effects of dumping, not changes in product mix composition.<sup>665</sup> The fact that MOFCOM asserted, in the context of its like product determination, that subject imports and domestic like products competed with each other is not an answer to this issue.<sup>666</sup> A determination that a basket of subject import products and a basket of domestic products are "like products" is insufficient to establish price comparability where the products within each basket are not homogenous.<sup>667</sup>

460. Finally, China's assertion that accepting Australia's argument would somehow set a "dangerous precedent" is without merit.<sup>668</sup> Australia's argument is: (i) grounded in the particular facts and circumstances of this case; and (ii) entirely consistent with the text of Articles 3.1 and 3.2 and supported by the prior panel and Appellate Body reports which confirm that price comparability must be ensured.

*iii. China's arguments do not address MOFCOM's failure to consider product mix*

(A) Australia has established a *prima facie* case

461. Contrary to China's assertion,<sup>669</sup> Australia has established a *prima facie* case in relation to its argument that MOFCOM failed to ensure price comparability by failing to consider the impact of differences in the product mix between the basket of subject imports and the basket of domestic like products.

462. China misconstrues Australia's argument and misstates the burden that Australia must meet in this regard.<sup>670</sup> Australia's argument is that MOFCOM failed to ensure price comparability during its price effects analysis by, *inter alia*, failing to account for differences in the product mix. In its first written submission, Australia has pointed to the significant

<sup>665</sup> Panel Reports, *China – Autos (US)*, para. 7.256; *China - X-Ray Equipment*, para. 7.57; *China - Broiler Products*, para. 7.483.

<sup>666</sup> Cf China's first written submission, para. 1139.

<sup>667</sup> Panel Report, *China - Broiler Products*, para. 7.483.

<sup>668</sup> China's first written submission, para. 1146.

<sup>669</sup> China's first written submission, paras. 1147-1150.

<sup>670</sup> China's first written submission, para. 1147.



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evidence on the record which demonstrated the existence of differences in product mix affecting price comparability.<sup>671</sup> China also accepts that the evidence before it demonstrated that there were significant differences in the product mix of subject imports and domestic like products.<sup>672</sup> In light of this evidence, there is nothing on the investigation record which justifies or supports MOFCOM's finding that the average unit prices that it calculated for the basket of subject imports and for the basket of domestic like products were sufficiently similar to be compared without adjustments.

463. In asserting that Australia has conflated quality and product categorisation,<sup>673</sup> China seeks to draw a distinction without difference, which, ultimately, is irrelevant to Australia's argument. Australia's position is that differences in product types, grades and categorisations are all factors which impact product quality. These differences are ultimately reflected in the prices that purchasers are willing to pay for different products in the market. Australia's argument is directed to MOFCOM's failure to ensure price comparability during its price effects analysis. The reality is that MOFCOM did not make any adjustments or take any steps to address product mix differences, whether characterised as differences in "quality *per se*" or as differences in type, grade, or categorisation that are ultimately related to the questions of quality and value.<sup>674</sup>

(B) Australia's arguments are not based on misrepresentations

464. China asserts that Australia's argument regarding product mix is based on factual misrepresentations.<sup>675</sup> This is incorrect.

465. First, contrary to China's assertion, Australia has not quoted the Final Determination out of context.<sup>676</sup> Australia's argument is grounded in and reflects the consideration that MOFCOM gave to product mix, as evidenced on the investigation record. That is, both parties agree that MOFCOM's decision not to consider product mix was made on the basis of its like

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<sup>671</sup> Australia's first written submission, paras. 566-586.

<sup>672</sup> China's first written submission, paras. 1132-1143; response to Panel question No. 27.

<sup>673</sup> China's first written submission, para. 1148.

<sup>674</sup> China's first written submission, para. 1148.

<sup>675</sup> China's first written submission, paras. 1152-1163.

<sup>676</sup> China's first written submission, paras. 1155-1158.

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product determination.<sup>677</sup> As set out above, a determination that a basket of subject imports and a basket of domestic products are "like products" is insufficient to establish price comparability where the products within each basket are not homogenous.<sup>678</sup>

466. Second, the panel's reasoning in *China – Autos (US)* is highly relevant to this case. In that dispute, the panel found that MOFCOM's determination that the annual average unit values were comparable was inadequate for two reasons: (i) there was evidence before MOFCOM suggesting that the mix of products differed between the subject imports and the domestic like product; and (ii) MOFCOM's determination acknowledged some lack of competitive overlap between subject imports and the domestic like product.<sup>679</sup> Both of these features are also present in the present dispute. In *China – Autos (US)*, the panel concluded that these two reasons meant that MOFCOM was aware of product mix differences and, as a result, an objective decision maker should have conducted further enquiries into those differences to determine whether they affected prices.<sup>680</sup> The panel in that dispute further noted that MOFCOM's final determination did not contain a discussion of the product mix differences in the context of the price effects analysis.<sup>681</sup> Both observations are equally true in this dispute.

467. China attempts to distinguish the present dispute from *China – Autos (US)* by asserting that the Australian sampled companies in this dispute failed to provide some data sought by MOFCOM, meaning that, having regard to the evidence on the record, MOFCOM could not enquire into or account for the differences in product mix in its price effects analysis. This assertion is not supported by the facts. Australia acknowledges that while the evidence before MOFCOM was not perfect, there was significant and detailed evidence concerning differences in product composition resulting in price differences.<sup>682</sup>

468. The balance of the "differences" included in China's table at paragraph 1161 of its First Written Submission are irrelevant to the panel's reasoning in *China – Autos (US)* and do

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<sup>677</sup> China's first written submission, para. 1155 (citing Final Determination (Exhibit CHN-1) pp. 50-51, which records MOFCOM's like products determination). See also first written submission, para. 1139.

<sup>678</sup> Panel Report, *China – Broiler Products*, para. 7.483.

<sup>679</sup> Panel Report, *China – Autos (US)*, paras. 7.279-7.280.

<sup>680</sup> Panel Report, *China – Autos (US)*, para. 7.281.

<sup>681</sup> Panel Report, *China – Autos (US)*, para. 7.281.

<sup>682</sup> See Australia's first written submission, paras. 571-580.

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nothing to undermine Australia's position concerning the clear applicability of the panel's reasoning in that dispute to the facts before the Panel in this dispute.

(C) Australia has identified relevant and cogent evidence regarding product mix for subject imports

469. China asserts that the evidence relied on by Australia in support of its product mix argument is "partial", "incomplete" or "misleading".<sup>683</sup> This is incorrect. In particular, China alleges that Australia's argument is based on incomplete and misleading evidence on four grounds: (i) the Australian sampled companies did not provide data sought by MOFCOM;<sup>684</sup> (ii) Australia relies on assertions rather than evidence;<sup>685</sup> (iii) China disagrees with Australia's analysis of the product mix data that was available to MOFCOM;<sup>686</sup> and (iv) China could not rely on Treasury Wines data alone.<sup>687</sup> Each of these allegations is without merit and is not an answer to Australia's argument regarding MOFCOM's failure to account for the potential impact of differences in product mix on price comparability.

470. First, the missing data does not provide a basis for MOFCOM to fail to ensure price comparability as required by Articles 3.1 and 3.2. Australia's first written submission, China's first written submission and China's responses to Panel questions demonstrate that there was significant and cogent evidence regarding product mix before MOFCOM.<sup>688</sup>

471. Second, China characterises some of the evidence that Australia relies on regarding product mix as "assertions".<sup>689</sup> Australia rejects this characterisation on two grounds: (i) the evidence was duly submitted to MOFCOM by interested parties during the course of the investigation, and it should have been considered by MOFCOM; (ii) China's allegation that Australian interested parties "did not provide any proof or evidence that Australian wines had

<sup>683</sup> China's first written submission, paras. 1164-1200. The matters raised by China at paragraphs 1164-1172 of its first written submission are irrelevant to the question of price comparability and product mix. They do not advance China's argument that Australia's case is based on partial and misleading evidence and can be disregarded.

<sup>684</sup> China's first written submission, paras. 1173-1178.

<sup>685</sup> China's first written submission, paras. 1179-1183.

<sup>686</sup> China's first written submission, paras. 1184-1200.

<sup>687</sup> China's first written submission, paras. 1184-1200.

<sup>688</sup> Australia's first written submission, paras. 566-580; China's first written submission, paras. 1101-1145; China's response to Panel question No. 27.

<sup>689</sup> China's first written submission, paras. 1179-1183.

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a segment or market of their own..."<sup>690</sup> appears to be at least partially inconsistent with the examination of evidence and findings we have now been told that MOFCOM made regarding the existence of low, middle and high end product categories.<sup>691</sup>

472. The issue appears to be that China disagrees with the methodology Australia adopted to consider the product mix evidence data and ultimately seeks to draw different conclusions.<sup>692</sup> That is appropriate. It is for the investigating authority to determine what methodology it adopts, so long as that methodology complies with the requirements of Articles 3.1 and 3.2. Australia's argument is not that MOFCOM must analyse the product mix data in exactly the same way and reach the same conclusions as Australia. Australia's argument is that MOFCOM failed to adopt any methodology or take any steps to ensure the comparability of the pricing information that it used in its examination of whether subject imports were suppressing the price of domestic like products, even though the necessary information was available on the record before it.

Third, China misunderstands Australia's argument as asserting that MOFCOM should have relied on the Treasury Wines data alone.<sup>693</sup> That is not Australia's argument. Quite the opposite, Australia's argument is that MOFCOM should have had regard to all product mix data available to it and ensured that data was adequately reflected in the price effects analysis. Australia's focus on the Treasury Wines data in its first written submission simply reflects the fact that of the three sampled companies, Treasury Wines

474. Finally, for completeness, Australia notes the points that China raises in relation to the product mix of domestic like products.<sup>694</sup> In sum, these are not an answer to Australia's argument and have been addressed earlier in this submission.

<sup>690</sup> China's first written submission, para. 1182.

<sup>691</sup> China's response to Panel question No. 27, paras. 134-140. This portion of China's response makes clear that Australian interested parties did submit relevant evidence to MOFCOM, which we are now told was examined in some detail by MOFCOM and informed a finding that subject imports "were of low and middle-end wine".

<sup>692</sup> China's first written submission, paras. 1189-1195.

<sup>693</sup> China's first written submission, paras. 1201-1223.

<sup>694</sup> China's first written submission, paras. 1201-1205.

(e)      Conclusion

475. In conclusion, the evidence before the Panel, the parties' submissions and responses to questions establish that:

- MOFCOM compared the average unit price of subject imports to the average unit price of domestic like products during its consideration of prices effects.
- MOFCOM failed to ensure price comparability in the average unit prices that MOFCOM calculated for subject imports and domestic like products because it failed to account for differences in level of trade, conditions of sale and product mix.

476. As a result, MOFCOM's price effects analysis was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

**3. MOFCOM did not consider whether the price suppression it identified was significant**

477. The parties agree that the margin of price suppression identified by MOFCOM was 658 RMB/kilolitre, over the course of the Injury POI.<sup>695</sup>

478. Article 3.2 requires an investigating authority to consider whether prices have been suppressed to a "significant" degree. "Significant" in the context of Article 3.2 means "noteworthy, important, consequential".<sup>696</sup> In the Final Determination, MOFCOM stated that "the growth of selling price failed to reasonably reflect the cost increase ... leading to a downward trend of the difference between the sales prices and costs of the domestic like products from 3,296 RMB/kilolitre in 2015 to 2,638 RMB/kilolitre in 2019."<sup>697</sup> Therefore, according to MOFCOM, during the Injury POI, the price of the dumped imported product suppressed that of domestic like products.<sup>698</sup>

479. However, the facts established by MOFCOM raised serious questions regarding whether price suppression of 658RMB/kilolitre over the Injury POI was "significant". This

<sup>695</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551, 600, 602; China's first written submission, para. 1377; 1380; 1332; 1650; and 1667.

<sup>696</sup> Panel Reports, *China – Cellulose Pulp*, para. 7.40; *Thailand – H-Beams*, para. 7.163.

<sup>697</sup> Final Determination (Exhibit CHN-1), p. 59; Anti-Dumping Final Determination (Exhibit AUS-2), p. 121.

<sup>698</sup> Final Determination (Exhibit CHN-1), p. 59; Anti-Dumping Final Determination (Exhibit AUS-2), p. 121.

includes: (i) that subject imports were always more expensive than domestic like products, by a margin of at least 5,848RMB/kilolitre; and (ii) prices of domestic like imports in fact increased by 20.5% or 6,576RMB/kilolitre over the Injury POI.

480. In light of these facts, it is all the more troubling that there is no evidence in the Final Determination, or elsewhere on the investigation record, to suggest that MOFCOM engaged in any consideration of whether the margin of suppression was significant. It was required to do so. As a result, MOFCOM's price suppression finding is inconsistent with Articles 3.1 and 3.2.

**4. MOFCOM did not establish that subject imports had explanatory force for the alleged price suppression**

481. China appears to misunderstand paragraphs 600 to 602 of Australia's first written submission.<sup>699</sup> For clarity, Australia's argument is as follows:

- Sections 3a and 3b of Australia's first written submission establish that the average unit prices calculated by MOFCOM and relied on for the purposes of its price effects analysis were inconsistent with Articles 3.1 and 3.2.
- In addition, even if, *arguendo*, the panel were to find that these average unit prices were consistent with Articles 3.1 and 3.2, MOFCOM's examination and finding of price suppression on the basis of these values was inconsistent with Articles 3.1 and 3.2 because it failed to consider whether the subject imports had "explanatory force" for the alleged suppression of the prices of the domestic like products. In this respect, Australia argues that MOFCOM failed to:
  - examine the factors identified at paragraph 602 of Australia's first written submission; and/or
  - consider the specific factors set out at paragraphs 603 – 612 of Australia's first written submission.

482. Australia has established a *prima facie* case in relation to each of these arguments.

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<sup>699</sup> China's first written submission, paras. 1316-1320.

(a) MOFCOM's consideration of price suppression

483. China has now provided an extensive *ex post facto* explanation of the assessment MOFCOM allegedly carried out when assessing the explanatory force subject imports were said to have for the suppression of domestic prices.<sup>700</sup>

484. At the outset Australia notes that, aside from the quote at paragraph 1343, none of the reasoning or explanations attributed to MOFCOM by China appear in the Final Determination or elsewhere on the investigation record.<sup>701</sup> Australia asks the Panel to disregard this *ex post facto* justification. Australia also makes four additional points.

485. First, China now seeks to minimise the role that price played in MOFCOM's price suppression finding, saying that prices were only considered in the context of subject imports' volume and market share increases.<sup>702</sup> This mischaracterises MOFCOM's price suppression finding. It is clear from the text of the Final Determination that the average unit prices of the subject imports were central to MOFCOM's examination of price effects and its finding that "during the period of injury investigation, the price of the dumped imported product suppressed that of domestic like products".<sup>703</sup> It is also clear from the text of the Final Determination and related documents that MOFCOM directly compared the average unit prices of subject imports and domestic like products.<sup>704</sup> MOFCOM's suppression finding is

<sup>700</sup> China's first written submission, paras. 1321-1344.

<sup>701</sup> This is evidenced by China's failure to provide references to the investigation record evidencing MOFCOM's reasoning or consideration of factors described in the following paragraphs of this section of China's first written submission: 1323 (final sentence); MOFCOM consideration of the factors described in 1326; 1327 (final sentence); 1328 (first, third, fourth, sentences) 1329 (whole paragraph); 1330 (second, third sentences); 1334 (first, second, fourth, fifth sentences); 1335 (whole paragraph); 1336 (first sentence from "at a minimum"); 1337 (whole); 1338 (whole paragraph and rows 5 and 6 of table); 1339 (whole); 1340 (whole); and 1342 (whole).

<sup>702</sup> China's first written submission, para. 1326.

<sup>703</sup> Anti-Dumping Final Determination (Exhibit CHN-1), p. 59, see also pp. 59 ("the price effect of the dumped imported product on the price of domestic like products included the impact of the increased volume and price of the dumped imported product on the price of domestic like products"; "the volume of the dumped imported products accumulatively increased by 113.05% and the price dropped by 15.91%, directly suppressed the price increase of the domestic like products"); 64 ("The evidence showed that from 2015 to 2019, the volume of the dumped imports from Australia continued to increase significantly, the price of the dumped imports suppressed the prices of the domestic like products, and the production and operation of the domestic like products of the domestic industry deteriorated"); and 68 ("The comparison data showed that during the period of injury investigation, the price of the dumped imports was in a downtrend with a cumulative decline of 15.91% in 2015-2019, suppressing the price of the domestic like products [...]"). Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120-121, 132, and 139.

<sup>704</sup> Final Determination (Exhibit CHN-1), pp. 59 ("the IA held that: first, the price effect of the dumped imported product on the price of domestic like products included the impact of the increased volume and price of the dumped imported product on the price of domestic like products [...] Therefore, the volume increase and price decrease of the dumped imported product sufficed to cause a material adverse impact on the price of the domestic like products [...] Despite the fact that the price of the dumped imported product was higher than that of the domestic like products, during the period of injury

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undermined by the errors in its price comparison, as discussed in detail above. The fact that MOFCOM also considered volume and market share trends is not an answer to this fundamental flaw.

486. Second, an investigating authority is not entitled to simply assume "that an increase in subject import volume and market share will have a price suppressing or depressing effect on domestic prices".<sup>705</sup> This is because allowing such an assumption would render the second sentence of Article 3.2 redundant.<sup>706</sup> Rather, an investigating authority must establish a link between the volume increase and the price effect.<sup>707</sup> This requires, at a minimum, consideration of the relative prices of subject imports and domestic like products.<sup>708</sup> A failure to do so will mean that the investigating authority "could not have reached a reasoned and adequate conclusion that the domestic industry's prices were suppressed by the volume of subject imports, having failed to consider the relative prices of subject imports and the domestic like product at all."<sup>709</sup>

487. Third, China now seeks to maximise the importance of MOFCOM's volume and market share analysis to its price suppression finding. For the reasons set out at paragraphs 680 - 684 of Australia's first written submission, MOFCOM's market share comparison is flawed.<sup>710</sup> As a result, these same flaws also undermine the price suppression finding.

488. Fourth, China accepts that: (i) the product mix differed between subject imports and domestic like products and that differences in the product mix resulted in significant price differences;<sup>711</sup> and (ii) that the declining price trend observed by MOFCOM "may or may not

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investigation, the volume of the dumped imported products accumulatively increased by 113.05% and the price dropped by 15.91%, directly suppressed the price increase of the domestic like products. As a result, the price of the domestic like products was unable to increase accordingly [...]"); 66 ("During the period of injury investigation, the price of the dumped imports declined continuously. While the unit cost of the domestic like products increased by 25.19% as a whole, especially while the unit cost increased by 30.24%, the sales price only increased by 20.54% which was lower than the increase of costs in the same period"); and 68 (The comparison data showed that during the period of injury investigation, the price of the dumped imports was in a downtrend with a cumulative decline of 15.91% in 2015-2019, suppressing the price of the domestic like products on conditions of the increases in cost[...]). See also Anti-Dumping Final Determination (AUS-2), pp. 120-123; 136, 139-140.

<sup>705</sup> Panel Report, *China – GOES (Article 21.5 - US)*, para. 7.50.

<sup>706</sup> Panel Report, *China – GOES (Article 21.5 - US)*, para. 7.50.

<sup>707</sup> Panel Report, *China – GOES (Article 21.5 - US)*, para. 7.50-7.51.

<sup>708</sup> Panel Report, *China – GOES (Article 21.5 - US)*, para. 7.58.

<sup>709</sup> Panel Report, *China – GOES (Article 21.5 - US)*, para. 7.63.

<sup>710</sup> See also section V.D.3(b)i.

<sup>711</sup> China's first written submission, para. 1187(ii-iii); response to Panel question no. 27, paras. 134-138, 141-145, 150, and 151-152.



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be indicative of a change in the category or grade of products exported".<sup>712</sup> The fact that MOFCOM's calculation of the "liquidation price" of subject imports did not account for these potential differences means that MOFCOM failed to ensure that the average unit values used for its price effects analysis were comparable. As a consequence, the price trends that MOFCOM observed and relied upon for its price suppression finding may not result from price changes brought about through the effects of dumping, but instead could result from changes in product composition over the course of the Injury POI.

(b) MOFCOM was required to conduct a counterfactual analysis

489. China misunderstands Australia's argument regarding the counterfactual analysis.<sup>713</sup> It appears that the parties generally agree as to the applicable legal standards.<sup>714</sup> The key difference appears to be what those standards required in this particular case. To assist the Panel, Australia provides two further points of clarification below.

490. First, Australia uses the term counterfactual analysis as shorthand for the analysis required by the phrase "otherwise would have occurred" in Article 3.2. That is, price suppression requires an analysis of whether price increases, that otherwise would have occurred, have been prevented through the effect of dumped imports. This analysis is mandated by the text of Article 3.2 and, in particular, the requirement to establish "explanatory force" in any price effects analysis.<sup>715</sup> MOFCOM undertook no such analysis.

491. Second, Australia considers that the balance of China's argument<sup>716</sup> is largely irrelevant to the determination of this case. The parties agree that a consideration of price suppression must include an examination of whether the subject imports have "explanatory force" for the suppression of domestic prices.<sup>717</sup> This requires an evaluation of whether subject imports have prevented price increases that "otherwise would have occurred". This, in turn, requires some evaluation of what price increases would have occurred, but for, or

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<sup>712</sup> China's first written submission, para. 1200, see also paras. 1195, 1199.

<sup>713</sup> China's first written submission, paras. 1347-1370.

<sup>714</sup> Australia agrees with the legal principles articulated by China at paragraphs 1357 and 1358 of its first written submission.

<sup>715</sup> Australia understands this interpretation to be entirely consistent with Appellate Body Report, *China – GOES*, paras. 136-142 (cited in China's first written submission at para. 1364).

<sup>716</sup> China's first written submission, para. 1359-1363, 1365-1370.

<sup>717</sup> China's first written submission, paras. 1357, 1358, 1364, 1365, and 1366.

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without, the impact of subject imports. In this instance, there is no record of any such analysis or evaluation by MOFCOM. MOFCOM's apparent failure in this regard is particularly problematic in the circumstances of this case because: (i) the average unit price of subject imports was significantly higher than that of domestic like products; (ii) the average unit price of domestic like products increased by 20.5% of the course of the Injury POI; and (iii) the magnitude of the price suppression that MOFCOM observed was only 2% of the average unit price of domestic like products in the base year of 2015.

(c) Subject imports did not have explanatory force for the price suppression

492. The parties disagree as to whether MOFCOM considered that subject imports had explanatory force for the alleged price suppression. Australia's position is that explanatory force was asserted by MOFCOM, but not examined. In an attempt to overcome MOFCOM's apparent inaction, China has now provided significant *ex post facto* rationalisation with respect to MOFCOM's alleged consideration of explanatory force.<sup>718</sup> This explanation is not found anywhere on the record of the investigation and should be disregarded by the Panel.

493. The thrust of China's lengthy submissions on this point is that MOFCOM's "holistic consideration" established that subject imports had explanatory force for the price suppression. This "holistic consideration"<sup>719</sup> appears to be based on MOFCOM's observations that, during the Injury POI: (i) the subject imports increased in absolute volume and market share; and (ii) at the same time, the domestic industry could not raise the average unit price of domestic like products enough to fully cover its increasing average unit costs.<sup>720</sup> In this regard, MOFCOM's examination of price effects appears to contemplate a wine market in which there are only subject imports from Australia and domestic like products to supply a steady demand. Absent from MOFCOM's "holistic analysis"<sup>721</sup> was any consideration of the much larger volume of like imports from third countries, whose average unit prices were

<sup>718</sup> China's first written submission, paras. 1371-1380; 1381-1397. See also paras. 1321-1344.

<sup>719</sup> China's first written submission, para. 1382.

<sup>720</sup> China's first written submission, paras. 1382-1385. Australia notes that an investigating authority is not entitled to simply assume that rising volumes and declining prices will have a suppressing effect on domestic prices. See Panel Report, *China - GOES (Article 21.5 - US)*, paras. 7.50-7.51, 7.58.

<sup>721</sup> China's first written submission, para. 1392.

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significantly lower than the average unit prices of domestic like products, or the substantial changes in market demand during the Injury POI.

494. China's *ex post facto* arguments do not assist it in establishing that MOFCOM properly considered whether the subject imports had explanatory force for the alleged suppression of domestic prices. This is because:

- MOFCOM's consideration of price effects was premised on its finding that all Australian wine products compete equally with and are substitutable with all Chinese wine products.<sup>722</sup> It is for this reason that the price gap between the average unit price of subject imports and domestic like products is important.<sup>723</sup> That is, if all wine products are "relatively highly competitive and interchangeable",<sup>724</sup> and "price has become the primary factor for consideration when downstream customers choose products",<sup>725</sup> how did subject imports prevent the average domestic unit price from increasing by 658 RMB/kilolitre over the Injury POI, when such an increase would still have resulted in domestic like products being cheaper than subject imports? It was incumbent on MOFCOM to "demonstrate how its factual findings concerning price competition support its conclusions regarding the price effects of subject imports on the domestic like product."<sup>726</sup> It failed to do so.
- The year-on-year volume increases in subject imports apparently relied upon by MOFCOM, do not explain the significant volume losses experienced by the domestic industry. The differences in absolute volumes show that the Chinese wine market was significantly more complex than simply Australian imports taking market share from domestic like products. The absolute figures are set out below.

<sup>722</sup> China's first written submission, para. 1330; 1343; 1419; 1747; 1833; and 1856; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 106, 118, and 120.

<sup>723</sup> Australia notes the legal argument advanced by China at 1389-1391 of its first written submission. Australia's argument is not that higher priced goods cannot cause price suppression. Australia's argument is that, due to the particular factual findings MOFCOM made, the price gap is relevant to examining explanatory force in this instance.

<sup>724</sup> Final Determination (Exhibit CHN-1), p. 51. See also Anti-Dumping Final Determination (Exhibit AUS-2), pp. 106-107.

<sup>725</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 135-136; Final Determination (Exhibit CHN-1), p. 66.

<sup>726</sup> Panel Report, *China - GOES (Article 21.5 - US)*, para. 7.111.

**Table 2 Volume comparison over Injury POI**

	2015	2016	2017	2018	2019
Subject import volume <sup>727</sup>	56,700	79,400	105,800	117,800	120,800
<b>Difference</b>		<b>22,700</b>	<b>26,400</b>	<b>12,000</b>	<b>3,000</b>
Domestic like product sale volume <sup>728</sup>	242,100	227,800	219,300	217,100	182,400
<b>Difference</b>		<b>-14,300</b>	<b>-8,500</b>	<b>-2,200</b>	<b>-34,700</b>
Domestic price increase <sup>729</sup>		3.77%	4.01%	3.97%	7.41%

**(d) Price undercutting and price depression**

495. Australia's arguments regarding price undercutting and price depression are directed to the importance of the price gap between subject imports and domestic like products in establishing explanatory force in this investigation.<sup>730</sup> Australia's argument is that the price gap shown in the evidence on the record in this investigation required MOFCOM to consider how subject imports had explanatory force for the price suppression. MOFCOM did not do so, whether by conducting a price undercutting or depression analysis or by some other mechanism. As a result, the Panel does not need to address the matters raised by China at paragraphs 1401-1412 of its first written submission.

496. For completeness, Australia notes that the matters raised by China at paragraphs 1413-1432 of its first written submission in the context of its response to Australia's arguments concerning price undercutting and price depressions are duplicative of issues Australia's has already raised and addressed above in this submission.<sup>731</sup>

**(e) Third country imports**

497. Australia will set out in greater detail its position regarding the important effect of third country imports, which MOFCOM failed to consider, in its submissions relating to Article 3.5. However, it will make three brief observations regarding their relevance to the Article 3.2 evaluation.

<sup>727</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>728</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>729</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>730</sup> See discussion above at paras. 497-500.

<sup>731</sup> See above, paras. 495- 496.

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498. First, as set out in Australia's first written submission,<sup>732</sup> and evidenced by information that was before MOFCOM, third country imports played a very significant role in the Chinese wine market. In particular, the evidence established that third country imports occupied a significant portion of the Chinese market (by volume) and had average unit prices that were: (i) much lower than the average unit prices of subject imports; and (ii) generally lower than the average unit prices of the domestic like products (and, in some cases, much lower). MOFCOM also found that all wine products competed equally in the Chinese market.<sup>733</sup> As a consequence, MOFCOM needed to consider the effect of third country imports on domestic prices during its Article 3.2 analysis.

499. Second, it is evident that MOFCOM did not evaluate or consider any of this evidence concerning the impact of third country imports at all during its price effects analysis. China's submissions at paragraphs 1436 to 1439 are entirely *ex post facto*. This is confirmed by China's inability to point to any references from the evidentiary record showing the alleged consideration by MOFCOM.

500. In light of MOFCOM's failings in this regard, "it is unclear how MOFCOM reached the conclusion that domestic industry prices were precluded from increasing as a result of the increased volume of subject imports, but that the significant volume of non-subject imports in the Chinese market, at prices similar to those of domestic like products, had no such effect".<sup>734</sup>

(f) Yearly price fluctuations

501. As Australia set out in its first written submission, the wine market in China was far more complex than MOFCOM's examination revealed. MOFCOM failed to account for yearly

<sup>732</sup> Australia's first written submission, paras. 696-704.

<sup>733</sup> China's first written submission, paras. 1330, 1343, 1419, 1747, 1833, and 1856; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 106, 118, and 120.

<sup>734</sup> Panel Report, *China - GOES (Article 21.5 - US)*, para. 7.54.

price fluctuations in the context of its price suppression finding. China's submissions do not establish that MOFCOM examined this issue.<sup>735</sup>

502. For example, evidence concerning the volume and price changes occurring between 2018 and 2019 showed that:

- apparent consumption experienced its most significant decline of 112,700 kilolitres;
- sales volumes for domestic like products experienced their most significant decline of 34,700 kilolitres, while their prices increased by 7.41%; and
- conversely, Australian import volumes increased by just 3,000 kilolitres and prices increased by 11.48%.

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

**5. The annual average unit values calculated by MOFCOM were not based on positive evidence**

504. As Australia established in its first written submission, MOFCOM's explanation of its price calculation methodology was grossly deficient. This, coupled with MOFCOM's failure to adequately disclose the underlying data both in the Final Determination and elsewhere on the investigation record, mean that the annual average unit values used by MOFCOM are not based on positive evidence.<sup>736</sup>

505. In essence, China's appears to argue in response that the description of the price calculation methodology provided in the Final Determination, coupled with the fact that some of the data MOFCOM relied on to calculate the "liquidation price" of subject imports was publicly available, means that the annual average unit values were based on positive evidence. However, as Australia will set out below, this response only raises additional questions as to

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<sup>735</sup> China's first written submission, paras. 1441-1449.

<sup>736</sup> Australia's first written submission, paras. 558-562.

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whether the HS code and apparent consumption data that MOFCOM relied on as the basis for its volume and price calculations was positive evidence.

506. If the panel accepts Australia's view that MOFCOM's volume and price calculations were not based on positive evidence, the effect is that MOFCOM's observations regarding volume and market share trends and its price suppression determination are inconsistent with Articles 3.1 and 3.2.

(a) HS code

507. China's first written submission has now clarified that MOFCOM did not undertake any filtering process of the customs import data that formed the basis of its volume and price calculations for subject imports. Rather, MOFCOM simply relied on the total volume and price figures relating to all imports classified under tariff code HS22042100.<sup>737</sup>

508. Tariff code HS22042100 included data relating to fortified wine products.<sup>738</sup> A fundamental difficulty with MOFCOM's process, if not inconsistency, is that it is unclear whether fortified wines were included in the scope of products under consideration ("PUC"). This is because: (i) in the Preliminary Determination, MOFCOM "stressed that the scope of the product under investigation is based on the product description";<sup>739</sup> (ii) MOFCOM's product description of the PUC did not include any reference to "fortified wines";<sup>740</sup> and (iii) MOFCOM expressly excluded "liqueur wines" from the definition of like domestic products<sup>741</sup> and did not include fortified wines in its estimate of total domestic production.<sup>742</sup> As a result, it is unclear whether MOFCOM's examination of price suppression reflected an objective

<sup>737</sup> China's first written submission, paras. 1023-1029.

<sup>738</sup> China's response to Panel question No. 21; Australia's response to Panel question No. 21.

<sup>739</sup> Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 11.

<sup>740</sup> Rather, the subject products are defined as "wines in containers holding 2 litres or less that are made from full or partial fermentation, with fresh grapes or grape juice as raw material". The Final Determination provides that "[t]his product is listed under the tariff heading 22042100 in the Customs Import and Export Tariff of the People's Republic of China". Further clarification provides that "all the Subject Products were listed under the tariff heading of 22042100 [...], and the products listed under other tariff headings did not belong to the Subject Product" (Exhibit CHN-1, p. 15; Exhibit AUS-2, pp. 31-32). These statements do not indicate that tariff code 22042100 defines the product under investigation, but rather that all products falling within the scope of the investigation are classified under this tariff code.

<sup>741</sup> China's response to Panel's question 15 states that the products which it excluded from the scope of the domestic like products "included certain (but not all) liqueur wines" (para. 52), and that the scope "included certain (but not all) liqueur wines" (para. 52). This is *ex post facto* rationalisation. MOFCOM's Final Determination does not contain these detailed explanations. Rather, it plainly states that CADA's data included "other wines beyond the product scope subject to the Application, including liqueur wines, [...] distilled wines". It did not state "some" liqueur wines or "certain" liqueur wines.

<sup>742</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109; China's response to Panel question No. 16, para. 55; and Exhibit CHN-32 (BCI).

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examination of positive evidence, because the volume and price trends observed in subject imports may have been attributable to: (i) the inclusion of non-subject imports in the data; and/or (ii) reflected the difference between the types of products included in the scope of the PUC as opposed to products in the scope of domestic like products.

(b) Apparent consumption

509. In order to arrive at its finding of price suppression, MOFCOM considered subject import volumes and domestic sales volumes relative to "apparent consumption". China has now confirmed that the "apparent consumption" figures that MOFCOM relied on were based on its estimate of total domestic production.<sup>743</sup> The estimate of total domestic production is derived from: (i) underlying values of unknown provenance and unknown veracity; and (ii) a very simple formula that does not include relevant variables or controls and is therefore incapable of reaching an accurate estimate. As a result, MOFCOM's apparent consumption figures are not positive evidence.

(c) Explanation of price calculation methodology

510. China misconstrues Australia's argument in relation to MOFCOM's deficient explanation of its price calculation methodology. Australia's argument is not that Article 3.1 is a procedural obligation regarding transparency, due process, and disclosure with respect to MOFCOM's examinations under Article 3.2, including its determinations of average unit values.<sup>744</sup> Nor is it Australia's argument that information relied upon by MOFCOM had to actually be verified by interested parties in order to comply with Article 3.1,<sup>745</sup> or that Article 17.6 should somehow be read as imposing an additional obligation into Article 3.1.<sup>746</sup> Rather, consistent with the text of the provision as interpreted and applied in prior panel and Appellate Body reports, Australia's position is that Article 3.1 requires an investigating authority to base its determination of injury on an objective examination of evidence that is

<sup>743</sup> China's first written submission, para. 1879.

<sup>744</sup> China's first written submission, paras. 981-999.

<sup>745</sup> China's first written submission, paras. 988-999, 1012-1017; China's response to Panel question No. 20, paras. 61-70.

<sup>746</sup> China's first written submission, paras. 1000-1009.



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positive, in the sense of "admitting no question" and being "definite, precise", "affirmative, objective, verifiable, and credible".<sup>747</sup>

511. China has dedicated over 40 pages of its first written submission to describing MOFCOM's price calculation methodology and the sources of the underlying data that MOFCOM relied on.<sup>748</sup> This level of detail does not appear anywhere on the investigation record. While some of the information relied upon for the calculation of the liquidation price also appeared to be included in annexures to CADA's Application,<sup>749</sup> there is nothing on the investigation record that confirms that this was an accurate representation of the actual data used by MOFCOM. Indeed, MOFCOM rejected data included in CADA's Application on the basis that it was not accurate for the purposes of the investigation.<sup>750</sup>

512. The net result of this is that the explanation of MOFCOM's price calculations methodology on the investigation record, was insufficient to establish that it was based on an objective examination of positive evidence. This defect cannot be remedied by China's *ex post facto* explanations.

## 6. Conclusion

513. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement.

### C. CHINA ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

#### 1. Introduction

514. MOFCOM determined that subject imports had a material impact on the state observed in the domestic industry. Australia's position is that MOFCOM's examination of the impact that subject imports had on the domestic industry was wholly deficient, such that it did not provide a rational basis for the injury determination. As a result, the evaluation and

<sup>747</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.257; Appellate Body Reports, *China – GOES*, para. 126; *US – Hot-Rolled Steel*, para. 192; *Mexico – Anti-Dumping Measures on Rice*, para. 192.

<sup>748</sup> China's first written submission, paras. 944-1078.

<sup>749</sup> China's first written submission, paras. 1025-1026, 1048-1051, and 1055.

<sup>750</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109.

findings are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. This is because:

- first, MOFCOM made fundamental errors in defining the domestic industry. As a result, its examination of the state of that industry under Articles 3.1 and 3.4 was also fundamentally undermined.
- second, MOFCOM asserted rather than examined the relationship between subject imports and the state observed in the domestic industry. As a result, the examination was a mechanical exercise that did not examine whether subject imports had explanatory force the state observed at all.
- third, MOFCOM did not examine a mandatory Article 3.4 factor, being "factors affecting domestic prices".
- fourth, MOFCOM's examination contained significant errors and omissions, such that the examination did not reflect an objective examination of positive evidence and did not provide a proper examination of explanatory force.

515. Australia has established a *prima facie* case in relation to each of these arguments. If the Panel accepts any of Australia's arguments regarding MOFCOM's flawed analysis, the result is that MOFCOM's injury determination is inconsistent with Article 3.1 and 3.4.

## 2. The domestic industry was incorrectly defined

516. Australia argues that errors in MOFCOM's domestic industry definition resulted in an Article 3.4 violation. As such, this argument is consequential to Australia's claim under Article 4.1. The parties agree on this point.<sup>751</sup> If the Panel accepts Australia's arguments relating to Article 4.1, the consequence is that the entirety of MOFCOM's examination of the impact of the subject imports on the domestic industry is also inconsistent with Article 3.4.

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<sup>751</sup> China's first written submission, paras. 1457-1458; Australia's first written submission, paras. 616-618.

### 3. MOFCOM's evaluation of the domestic industry was a mechanical exercise that did not examine explanatory force

517. Both Australia and China<sup>752</sup> appear to agree that the evaluation required by Article 3.4 must be sufficient to enable an investigating authority to "derive an understanding of the *impact of* subject imports on" the domestic industry.<sup>753</sup> This requires an investigating authority to engage in more than mechanical or "check list" review of the relevant economic factors and indices.<sup>754</sup> It requires an investigating authority to examine the explanatory force of subject imports for the state observed in the domestic industry.<sup>755</sup> Australia also agrees with China that the analysis under Article 3.2 is relevant to the evaluation under Article 3.4.<sup>756</sup>

518. Where the parties appear to disagree is whether MOFCOM's "review of the relevant economic factors and indicators of the domestic industry",<sup>757</sup> as recorded in the Preliminary Determination, Essential Facts Disclosure and Final Determination, met the agreed standard outlined above.<sup>758</sup> Australia's position is that it did not.

519. Relevantly, MOFCOM's Article 3.2 analysis included the following outcomes: (i) there was a significant price gap between the average unit values of subject imports and domestic like products, showing that subject imports were significantly more expensive;<sup>759</sup> (ii) during the Injury POI, subject imports occupied a maximum share of 16.30% of the annual consumption volumes that MOFCOM had estimated;<sup>760</sup> and (iii) to the extent that the price of domestic like products was being suppressed, the magnitude of that suppression was just 658

<sup>752</sup> China's first written submission, paras. 1463, 1466, 1488-1489,

<sup>753</sup> Appellate Body Report, *China – GOES*, para. 149 (emphasis original)

<sup>754</sup> 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. See also China's first written submission, para. 1463.

<sup>755</sup> Appellate Body Report, *China – GOES*, para. 149. See also China's first written submission, paras. 1454, 1482, 1561, 1597, 1608.

<sup>756</sup> China's first written submission, para. 1469 citing Appellate Body Reports, *China – HPSSST (Japan) / China – HPSSST (EU)*, para. 5.209.

<sup>757</sup> Final Determination (Exhibit CHN-1), p. 60; Anti-Dumping Final Determination (Exhibit AUS-2), p. 123.

<sup>758</sup> Australia first written submission, paras. 626-638; China's first written submission, paras. 1459-1530.

<sup>759</sup> Australian Government, Section IV, Injury and Causation Tables (Exhibit AUS-65) (BCI), Table 1, p. 2.

<sup>760</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

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RMB/kilolitre over the course of the Injury POI, which was only 2% of the average unit price in the 2015 "base year".<sup>761</sup>

520. These considerations were highly pertinent to MOFCOM's examination of the impact of the subject imports on the domestic industry and the materiality thereof, including with respect to the evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry. However, MOFCOM's evaluation did not engage with these considerations at all. Rather, MOFCOM mechanically recited the trends that it observed in the data pertaining to the relevant economic factors and indices,<sup>762</sup> to which it added its findings regarding "the continuous significant increase in the absolute volume and market share of the dumped imports, and the cumulative decline in the price of the dumped imports by 15.91%".<sup>763</sup>

521. On this basis, MOFCOM simply stated the following conclusions: "[t]he evidence showed that from 2015 to 2019, the number of the dumped imported product from Australia continued to increase significantly, the price of the dumped imported product suppressed the prices of domestic like products, and the production and operation of domestic like products deteriorated" and "[t]he domestic relevant wine industry has suffered material injury".<sup>764</sup> There was no examination as to how the subject imports had explanatory force for the state of the domestic industry — that is, "the relationship between subject imports and the state of the domestic industry"<sup>765</sup> — let alone any consideration of circumstances calling into question such a relationship. As a result, MOFCOM's evaluation of the domestic industry was insufficient to allow it to derive an understanding of the *impact of* subject imports on the domestic industry, as required under Article 3.4.

522. Moreover, there was no examination of whether any impact of the subject imports on the domestic industry was material. This failure is striking in the light of MOFCOM's own evidence that: (i) the subject imports accounted for a smaller share of apparent consumption

<sup>761</sup> China accepts that 2015 represents the "base year" for a non-injurious state for the domestic industry (see China's first written submission, paras. 1324, 1332, 1475, 1635, 1650, and 1667). For the magnitude of the suppression see Anti-Dumping Final Determination (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551; 600; and 602; China's First Written Submission, paras. 1377; 1380; 1332; 1650; and 1667.

<sup>762</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123-131.

<sup>763</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 130.

<sup>764</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 132.

<sup>765</sup> Appellate Body Report, *China – GOES*, para. 149 (cited in Australia's first written submission, para. 620).

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than domestic like products and third country imports,<sup>766</sup> and (ii) the margin of suppression identified by MOFCOM was just 658RMB/kilolitre over the Injury POI.<sup>767</sup>

523. Finally, China relies on the panel report in *Egypt – Steel Rebar* as support for its proposition that the evaluation of a relevant economic factor or index under Article 3.4 can be satisfied by a perfunctory "one-line" statement.<sup>768</sup> The panel's reasoning in *Egypt – Steel Rebar* does not stand for the notion that, in order to assess compliance with Articles 3.1 and 3.4, all a panel must do is count the number of words used by an investigating authority in its analysis of a given factor. Rather, the panel's reasoning in *Egypt – Steel Rebar* makes clear that: (i) whether or not an investigating authority's examination complies with Articles 3.1 and 3.4 is a question to be decided on the facts and circumstances of each case; and (ii) this assessment must take into account the full context of the analysis conducted by the investigating authority.<sup>769</sup>

524. In the circumstances of this case, Australia's position is that due to the considerations outlined above and below, including the context provided by MOFCOM's own evidence,<sup>770</sup> MOFCOM's evaluation failed to examine the explanatory force or relationship between subject imports and the state observed in the domestic industry as required under Article 3.4.

(a) Labour productivity, salary per capita and dumping margins

525. MOFCOM omitted labour productivity, salary per capita and dumping margins from the narrative component of its impact analysis.<sup>771</sup> As such, Australia understood that MOFCOM did not consider these three factors to be relevant to its discussion of the state of the domestic industry (and ultimately the injury determination).

526. China now argues that, despite the omission of these three factors from the narrative discussion of the state of the domestic industry, MOFCOM considered them to be relevant

<sup>766</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>767</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551, 600, and 602; China's first written submission, paras. 1377; 1380; 1332; 1650; and 1667.

<sup>768</sup> China's first written submission, paras. 1509-1510. See also paras. 1527-1529.

<sup>769</sup> Panel Report, *Egypt – Steel Rebar*, paras. 7.49-7.53.

<sup>770</sup> See para. 519.

<sup>771</sup> Australia's first written submission, paras. 633-634.

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and duly considered them.<sup>772</sup> Australia considers this *ex post facto* rationalisation from China to be implausible. Article 3.4 requires an investigating authority to do more than simply gather data – it must analyse and interpret that data in order to properly examine the impact of subject imports on the state observed in the domestic industry.<sup>773</sup> Listing broad annual or total figures and reciting simple year to year changes, as MOFCOM did in the Final Determination, is insufficient for this purpose.<sup>774</sup>

527. China's entirely *ex post facto* submissions regarding MOFCOM's supposed consideration of labour productivity and salary per capita are in and of themselves based on assertion. Neither MOFCOM's evaluation nor China's *ex post facto* rationalisation contain any evaluation of the relationship between subject imports and productivity or salary per capita.<sup>775</sup> The evaluation contained in China's first written submission and responses to Panel questions 34 and 35 does not appear anywhere on the investigation record.<sup>776</sup> In particular, nowhere in MOFCOM's review of economic factors or elsewhere in the Final Determination is there anything to indicate that MOFCOM considered that: (i) "labour costs accounted for a small percentage of the total production costs";<sup>777</sup> (ii) "productivity was not the key or driving factor for the domestic industry's situation or an indicator thereof";<sup>778</sup> or (iii) labour productivity and salary per capita data did not negate, conflict or detract from the finding of a link between subject imports and the state observed in the domestic industry.<sup>779</sup>

528. Rather, the evidence established that labour productivity exhibited an increasing trend between 2015 and 2018, and then experienced a substantial decline between 2018 and 2019.<sup>780</sup> This trend conflicts with the year-to-year decline trends exhibited by production and

<sup>772</sup> China's first written submission, paras. 1485-1530.

<sup>773</sup> Panel Reports, *Egypt – Steel Rebar*, para. 7.44; *Korea – Certain Paper*, para. 7.268.

<sup>774</sup> China's analysis of the impact of subject imports on productivity, labour costs and salary per capita is entirely *ex-post* (China's first written submission, paras. 1514, 1515, 1522-1523). With respect to China's *ex post* rationalisation that "productivity was also evaluated implicitly" (China's first written submission, para. 1513; China's response to Panel question no. 34, para. 194), this assertion acknowledges the absence of an evaluation of labour productivity in the text of the Final Determination and is insufficient to remedy that omission.

<sup>775</sup> China's first written submission, paras. 1514, 1513-1523; response to Panel question Nos. 34 and 35.

<sup>776</sup> China's first written submission, paras. 1514, 1513-1523; response to Panel question Nos. 34 and 35. The extracts of the Final Determination relied on by China do not show any evaluation of the relationship between subject imports and labour productivity or salaries.

<sup>777</sup> China's first written submission, para. 1515.

<sup>778</sup> China's first written submission, para. 1515.

<sup>779</sup> China's first written submission, para. 1514, 1522-1523.

<sup>780</sup> Final Determination (Exhibit CHN-1), p. 62; Anti-Dumping Final Determination (Exhibit AUS-2), p. 127.

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employment.<sup>781</sup> MOFCOM was required to explain how conflicting trends in the data were considered in its analysis.<sup>782</sup> There is nothing on the investigation record to suggest that MOFCOM did so. Indeed, China's assertion that productivity was somehow evaluated "implicitly" acknowledges the absence of an evaluation of labour productivity in the text of the Final Determination.<sup>783</sup> China's *ex post facto* rationalisations cannot remedy this omission in MOFCOM's analysis.

529. There is nothing on the investigation record or elsewhere in China's first written submission or responses to Panel questions that discloses MOFCOM's reasoning and evaluation to support the conclusion that labour and salary costs did not have a significant impact on the financial indices of the domestic industry. This omission is notable in circumstances where MOFCOM considered that: (i) a price suppression margin of 658RMB/kilolitre (2% of the sale price in 2015) resulted in material injury to the domestic industry; but (ii) at the same time considered a labour cost increase of 1,097RMB/kilolitre to have no significant impact on the financial state of the domestic industry.<sup>784</sup>

530. Finally, China argues that MOFCOM's simple observation that the dumping margins that it had calculated "were not *de minimis*" is sufficient to satisfy the evaluation required under Article 3.4.<sup>785</sup> As set out above, a simple perfunctory statement is not, in and of itself, sufficient to satisfy the evaluation required by Article 3.4.<sup>786</sup> Rather, the assessment and evaluation required depends on the circumstances of the particular case.<sup>787</sup> In this instance, MOFCOM's determinations resulted in a significant delta between the dumping margins of Australian imports on the one hand and the resulting margin of price suppression on the other. MOFCOM's evaluation did not consider the materiality of the impact that subject imports that

<sup>781</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 124, 127; Final Determination (Exhibit CHN-1), pp. 60, 62.

<sup>782</sup> Panel Reports, *Pakistan - BOPP Film (UAE)*, para. 7.352; *China - X-Ray Equipment*, paras. 7.215-7.216; *EU - Footwear (China)*, para. 7.413; *Korea - Pneumatic Valves*, para. 7.179.

<sup>783</sup> China's first written submission, para. 1513; China's response to Panel question no. 34, para. 194.

<sup>784</sup> See China's first written submission, para. 1521. Australia has calculated the labour cost per kilolitre by dividing the "Total labor costs for the output of the domestic like product" (item C in the table: China's first written submission, para. 1521) by the "Output of the domestic like product (kilolitre)" (item E in the table at para. 1521). The 1,097RMB/kilolitre figure is the difference between the labour cost in 2019 (3,043RMB/kilolitre) against the labour cost in 2015 (1,946RMB/kilolitre).

<sup>785</sup> China's first written submission, paras. 1524 – 1530. As set out earlier in these submissions, Australia does not accept that MOFCOM's process for calculating these dumping margins was consistent with China's obligations under the Anti-Dumping Agreement.

<sup>786</sup> See above para. 523; Panel Report, *Egypt - Steel Rebar*, paras. 7.49-7.53.

<sup>787</sup> Panel Reports, *Pakistan - BOPP Film (UAE)*, para. 7.352; *Russia - Commercial Vehicles*, paras. 7.126; *EU - Footwear (China)*, para. 7.413.

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were allegedly sold at dumping margins of over 100% but were allegedly causing price suppression of just 2%, were actually having the domestic industry. In these circumstances, MOFCOM's single line of observation regarding the dumping margins does not establish that MOFCOM evaluated the factor as a "substantive matter".<sup>788</sup>

#### 4. MOFCOM did not evaluate "factors affecting domestic prices"

531. The second key point of disagreement between the parties is: (i) whether MOFCOM was required to consider market supply and demand and the cost of raw materials as "factors affecting domestic prices" during its evaluation of relevant economic factors and indices under Article 3.4;<sup>789</sup> and (ii) if an evaluation of such factors was required, whether MOFCOM in fact did so.<sup>790</sup>

##### (a) MOFCOM was required to consider market supply and demand and raw material costs as factors affecting domestic prices

532. Australia's position is that, having regard to the particular facts and circumstances of this case, MOFCOM was required to consider, as "factors affecting domestic prices", the impact of: (i) market supply and demand; and (ii) the cost of raw materials in order to undertake a proper Article 3.4 evaluation.<sup>791</sup> In response, China argues that MOFCOM was not required to consider these factors because: (i) Australia's arguments relate to either price effects to be examined under Article 3.2 or causation to be examined under Article 3.5;<sup>792</sup> and/or (ii) Australia has misinterpreted the evidence from the domestic industry that these factors affected domestic prices during the Injury POI.<sup>793</sup> Both of China's arguments are without merit. Australia has set out in detail the basis for its position in its first written submission and in response to Panel questions 36 and 37.<sup>794</sup> Australia continues to rely on those submissions and, in addition, makes the following three points.

<sup>788</sup> Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.189.

<sup>789</sup> Australia's first written submission, paras. 639-645; China's first written submission, paras. 1539-1548, 1459-1559.

<sup>790</sup> Australia's first written submission, paras. 639-645; China's first written submission, paras. 1560-1589.

<sup>791</sup> Australia's First Written Submission, paras. 639-645; Australia's response to Panel question No. 36, paras. 85-95.

<sup>792</sup> China's first written submission, paras. 1539-1548; China's response to panel question No. 39 (paras. 208-214), question 40 (para. 230)

<sup>793</sup> China's first written submission, paras. 1549-1559; China's response to panel question No. 39 (paras. 208-214), question 40 (para. 230)

<sup>794</sup> Australia's first written submission, paras. 639-645; Australia's responses to Panel questions No. 36 and 37.



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533. First, the evidence on the investigation record clearly established that the domestic industry informed MOFCOM that three main factors affected domestic prices during the Injury POI: market supply and demand, raw material costs and subject imports. This is apparent from: (i) a plain reading of question 39(5) in the questionnaire to the domestic industry;<sup>795</sup> and (ii) the responses from the 21 domestic producers.<sup>796</sup> In contrast, the interpretation of question 39(5) advanced by China in its first written submission and at the first substantive meeting requires a contorted and illogical reading of this evidence and should not be accepted by the Panel.<sup>797</sup> Further, China relies on the domestic industry's responses to questions 51 and 52 in the questionnaire to support its argument that demand and supply changes did not affect domestic prices.<sup>798</sup> However, these questions did not seek information regarding "factors affecting domestic prices".<sup>799</sup> As a result, they are irrelevant to Australia's argument.

534. Second, the evidence in the underlying investigation established that there were three factors affecting domestic industry prices.<sup>800</sup> In order to properly evaluate the explanatory force of subject imports for the state observed in domestic prices, MOFCOM was required to evaluate all three of the factors. MOFCOM was not entitled, as it did, to consider only the impact of subject imports, to the exclusion of the other two factors (i.e. (i) market supply and demand and (ii) raw material costs on domestic prices). By failing to take *all* relevant factors into consideration, MOFCOM conducted its examination in a manner that made a finding that subject imports were having an impact on the domestic industry more likely. According to the Appellate Body, "investigating authorities are not entitled to conduct

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<sup>795</sup> Anti-Dumping Questionnaire for Domestic Producers (Exhibit CHN-16), pp. 34 – 36.

<sup>796</sup> See responses from the 21 domestic producers to question 39(5) in the anti-dumping questionnaire to domestic producers. For pinpoint references to each of the 21 domestic industry responses, see Australia's first written submission, para. 640, fn 739. For a detailed explanation of the textual basis of Australia argument see Australia's response to panel question No. 37, paras. 96-102.

<sup>797</sup> China's first written submission, paras. 1549-1559.

<sup>798</sup> China's first written submission, paras. 1555-1557.

<sup>799</sup> China's first written submission, paras. 1555, 1557; Anti-Dumping Questionnaire for Domestic Producers (Exhibit CHN-16), pp. 43-44. Questions 51 and 52 of the Anti-Dumping Questionnaire for Domestic Producers sought information regarding "factors that may affect the domestic industry" and "the relationship between changes in your business operation and financial indicators and the imported products under investigation".

<sup>800</sup> See responses from the 21 domestic producers to question 39(5) in the anti-dumping questionnaire to domestic producers. For pinpoint references to each of the 21 domestic industry responses, see Australia's first written submission, para. 640, fn 739. For a detailed explanation of the textual basis of Australia argument see Australia's response to Panel question No. 37, paras. 96-102.

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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".<sup>801</sup>

535. As Australia outlined at the first substantive meeting and in written responses to Panel questions, while there may be overlap, the analyses required under Articles 3.2, 3.4 and 3.5 are distinct – they are directed to different questions, which require different analyses to resolve.<sup>802</sup> In the current context, Australia's argument is directed to the Article 3.4 obligation to examine the explanatory force — that is, the relationship — between subject imports and the state observed in the domestic industry, including through an evaluation of, *inter alia*, the "factors affecting domestic prices".

536. Third, the panel reports upon which China relies, *Egypt – Steel Re-Bar* and *EC – Tube or Pipe Fittings*, do not support its arguments.<sup>803</sup> Australia's argument is wholly consistent with the principle adopted by the panel in *Egypt – Steel Rebar (Turkey)*, that in conducting an "evaluation of the state of the industry, an investigating authority must in every case include a price analysis of the type required by Articles 3.1 and 3.2 [...] In addition, in our view, an investigating authority must consider generally the question of 'factors affecting domestic prices'".<sup>804</sup>

537. Further, China's reliance on *EC – Tube and Pipe Fittings* is of little relevance and is not determinative of Australia's argument in this proceeding. The argument advanced and rejected by the panel in *EC – Tube and Pipe Fittings* was that all factors affecting prices needed to be considered.<sup>805</sup> This is fundamentally different to Australia's argument in this proceeding.

<sup>801</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 196; Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.272.

<sup>802</sup> See Australia's responses to Panel questions 36 (paras. 87-90), 41 (paras. 107-110). Australia's position is that, in this case: (i) Article 3.2 required consideration of whether the volume and price of subject imports has the effect of or explanatory force for domestic prices exhibiting one of the three price effects. Article 3.4 is not limited to an evaluation of just the three price effects listed in Article 3.2. Rather, it requires an evaluation of relevant evidence relating to factors affecting domestic prices, in order to consider the explanatory force between subject imports and the state observed therein.

(ii) if MOFCOM had properly considered all three factors affecting domestic prices for the purposes of Article 3.4, it may have necessitated consideration of supply and demand or raw material costs under Article 3.5. However, any such examination would have been directed to a different question. That is, Article 3.5 would have required consideration of whether, based on the analysis under Article 3.2 and 3.4, supply and demand or raw material costs caused material injury to the domestic industry and, if so, identification and separation of that injury.

<sup>803</sup> China's first written submission, paras. 1542, 1544.

<sup>804</sup> Panel Report, *Egypt – Steel Rebar (Turkey)*, para. 7.61. Relevantly, the panel in *Egypt – Steel Rebar* noted at this paragraph that the investigating authority "considered the potential price effects of imports from third countries". As set out in Australia's first written submission and above, MOFCOM did not consider third country imports during its price effects analysis.

<sup>805</sup> Panel Report, *EC – Tube and Pipe Fittings*, para. 7.335. See also Panel Report, *Egypt – Steel Rebar (Turkey)*, paras. 7.59-7.60.

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Australia's argument is that once an Investigating Authority has collected information concerning "factors affecting domestic prices", or is otherwise informed by the interested parties of a specific factor affecting domestic prices, the obligations under Articles 3.1 and 3.4 require the evaluation of that factor, or factors, in the examination of the impact of the subject imports on the domestic industry.

(b) MOFCOM did not evaluate how supply and demand or raw material costs affected domestic prices

538. At the outset, Australia notes that China mischaracterises the burden of proof and *prima facie* case standards.<sup>806</sup> Australia's argument, as set out in its first written submission, is that MOFCOM was required to evaluate market supply and demand and raw material costs as "factors affecting domestic prices". It did not do so. Australia's argument is directed to MOFCOM's failure to evaluate a mandatory Article 3.4 factor. As a result, contrary to China's submissions, to be successful Australia is not required to demonstrate "exactly what was the impact of these two factors on domestic prices" or identify how MOFCOM's determination "would have been different" if it had conducted an evaluation of these factors.<sup>807</sup> Rather, Australia is required to establish that MOFCOM did not evaluate a mandatory Article 3.4 factor, being "factors affecting domestic prices". Australia has done so. Nonetheless, Australia has provided its views on the importance of market supply and demand in response to Panel question No. 38.

539. Turning to the substance of the dispute, the parties disagree as to whether the investigation record shows any evaluation by MOFCOM of these "factors affecting domestic prices".<sup>808</sup> Australia submits that there is nothing in the Final Determination, related documents, or elsewhere on the record to indicate that MOFCOM conducted any such evaluation. In response, China is only able to offer entirely *ex post facto* explanations which are largely irrelevant. As Australia will set out in detail below, China has failed to point to any evidence on the record of the investigation which shows that MOFCOM evaluated the effects that supply, demand or raw material costs had on the price of domestic like products.

<sup>806</sup> China's first written submission, paras. 1560-1565.

<sup>807</sup> China's first written submission, para. 1561.

<sup>808</sup> Australia's first written submission, paras. 641-644; China's first written submission, paras. 1567-1589.

540. First, in asserting MOFCOM's evaluation of the effect(s) of supply on domestic prices, China relies on the following extracts of the Final Determination, none of which evidence that such an evaluation took place:<sup>809</sup>

- pages 54, 58 – 59, 63 – 64, 66 – 67.<sup>810</sup> These extracts relate to MOFCOM's purported evaluation of the effect of volume and price of *subject imports* only on the price of domestic like products – not the effect(s) of supply from all sources on domestic prices;
- pages 58-59, 61, 63-64, 66-67, 69-70.<sup>811</sup> These extracts do not show any evaluation of the effect(s) that *supply* of domestic like products or like products from third countries had on domestic prices; and
- pages 73 – 74.<sup>812</sup> These extracts are data tables. They do not evidence any evaluation or consideration by MOFCOM.

541. Second, in asserting MOFCOM's evaluation of the effect(s) of demand on domestic prices China relies on the following extracts of the Final Determination, none of which evidence that such an evaluation took place:

- pages 54, 57-58.<sup>813</sup> These extracts relate to MOFCOM's purported evaluation of the effect of volume and price of *subject imports* on the price of domestic like products – not the effect(s) of demand on domestic prices;
- pages 60, 61 and 63.<sup>814</sup> These extracts do not show any evaluation of the effect(s) of demand on domestic prices; and
- pages 69, 71.<sup>815</sup> As China identifies, these extracts relate to MOFCOM's purported evaluation of "how the effect of the dumped imports – and not changes in apparent consumption – affected the domestic industry

<sup>809</sup> Australia notes China's assertion at paragraph 231 of its response to Panel question No. 40. Australia does not accept that MOFCOM gave any consideration to the impact of supply on domestic prices.

<sup>810</sup> China's response to Panel question No. 40, para. 234.

<sup>811</sup> China's response to Panel question No. 40, para. 235.

<sup>812</sup> China's response to Panel question No. 40, para. 235.

<sup>813</sup> China's response to Panel question No. 39, paras. 220, 221-223.

<sup>814</sup> China's response to Panel question No. 39, paras. 220, 225-226.

<sup>815</sup> China's response to Panel question No. 39, paras. 220, 227.

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economic indicators including prices."<sup>816</sup> That is, these extracts do not evidence MOFCOM's alleged evaluation of the effect(s) of demand on domestic prices.

542. Third, China has not referenced any evidence on the investigation record showing that MOFCOM evaluated the evidence relating to raw material costs at all, let alone how it affected domestic prices. This is despite the fact that the extracts of the domestic industry questionnaire set out in China's first written submission show that MOFCOM sought information from its domestic industry regarding raw material costs over the Injury POI.<sup>817</sup>

543. Finally, China asserts that MOFCOM did not need to consider market supply and demand or raw material costs, because they were not raised as relevant economic factors by Australian interested parties during the investigation.<sup>818</sup> As Australia has explained above, these factors were identified as being relevant by the domestic industry directly in response to MOFCOM's request for information on the factors affecting domestic prices. MOFCOM's failure to evaluate how these factors affected domestic prices is inconsistent with the obligations under Article 3.1 and 3.4.

**5. The errors and omissions in MOFCOM's evaluation mean that it has not established explanatory force**

**(a) Australia's arguments relate to the obligations under Articles 3.1 and 3.4**

544. Contrary to China's mischaracterisation,<sup>819</sup> Australia's arguments are directed to errors and omissions in MOFCOM's evaluation of the impact that subject imports had on the state observed in the domestic industry. They relate to China's obligations under Articles 3.1 and 3.4.

<sup>816</sup> China's response to Panel question No. 39, para. 227.

<sup>817</sup> China's first written submission, paras. 1581-1584.

<sup>818</sup> China's first written submission, paras. 1589, China's response to Panel question No. 39, paras. 218, 229.

<sup>819</sup> China's first written submission, paras. 1590-1599.

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545. As Australia has explained, while there may be overlap, the analysis required under Articles 3.4 and 3.5 are distinct and the focus of each examination is different.<sup>820</sup> The analysis under Article 3.5 requires an analysis of whether subject imports or other known factors have caused *material injury* to the domestic industry.<sup>821</sup> This is different from the evaluation required by Article 3.4 which focuses on an examination of the impact that subject imports have for the state observed in the domestic industry. China agrees that Article 3.4 requires an investigating authority to examine the "explanatory force" between subject imports and the state observed in the domestic industry,<sup>822</sup> but does not elaborate on what that requires. Rather, China seeks to create unnecessary confusion by mischaracterising all of Australia's arguments relating to "explanatory force" as falling within the scope of Article 3.5.<sup>823</sup>

546. Australia's position is that the requirement to examine "explanatory force" under Article 3.4 is necessary in order to enable an investigating authority to "derive an understanding of the impact of subject imports on the domestic industry".<sup>824</sup> This is distinct from the analysis required under Article 3.5 in that it does not require an investigating authority to "*demonstrate* that dumped imports are causing injury to the domestic industry".<sup>825</sup> In this way, the requirement to evaluate the explanatory force "is concerned with 'the relationship between subject imports and the state of the domestic industry'".<sup>826</sup>

547. Australia's arguments regarding the errors and omissions in MOFCOM's Article 3.4 analysis are directed to MOFCOM's failure to objectively examine the explanatory force or relationship between subject imports and the state observed in the various economic indicia of the domestic industry. At its core, Australia's argument is directed to the fact that MOFCOM's examination of the domestic industry simply assumed that subject imports had

<sup>820</sup> See Australia's responses to Panel question No. 41 (paras. 107-110). China appears to rely on the Appellate Body Report in *Korea – Pneumatic Valves (Japan)* as authority for the principle that Articles 3.4 and 3.5 require separate analysis. Australia agrees with this statement of principle. However, notes that the arguments before the Appellate Body were materially different to those advanced by Australia in this case. In particular, Australia's argument is not that Article 3.4 and 3.5 both require a causation and non-attribution analysis.

<sup>821</sup> Appellate Body Report, *China – GOES* (2012), para. 150.

<sup>822</sup> See also China's first written submission, paras. 1454, 1482, 1561, 1597, 1608.

<sup>823</sup> China's first written submission, paras. 1451-1456, 1596-1598.

<sup>824</sup> Appellate Body Report, *Korea – Pneumatic Valves* (DS504), para. 5.166, citing Appellate Body Reports, *China – HP-SSST (Japan)* / *China–HP-SSST (EU)*, para. 5.205 (citing Appellate Body Report, *China–GOES*, para. 149).

<sup>825</sup> Appellate Body Report, *Korea – Pneumatic Valves* (DS504), para. 5.166, citing Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.205 (referring to Appellate Body Report, *China – GOES*, para. 150). See also Appellate Body Report, *Korea – Pneumatic Valves* (DS504), para. 5.190.

<sup>826</sup> Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.205.

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explanatory force for the state observed in the domestic industry, it did not include any meaningful examination of the relationship between the two. Additionally, the errors and omissions ultimately served to make a determination of injury more likely. As a result, MOFCOM's analysis is inconsistent with Articles 3.1 and 3.4.

(b) There were errors and omissions in MOFCOM's evaluation that undermine the consideration of explanatory force

*i. Apparent consumption*

548. Australia's position is that, having regard to the factual circumstances of this case, MOFCOM was required to consider the impact that apparent consumption had on domestic prices and the domestic industry.<sup>827</sup> This is because the evidence showed: (i) a significant increase that was followed by a significant contraction;<sup>828</sup> and (ii) the domestic industry identified market supply and demand as one of the three main factors affecting domestic prices;<sup>829</sup> and (iii) at the beginning of MOFCOM's examination of the impact of the subject imports on the domestic industry, MOFCOM recited its estimates of "apparent consumption" and observed the year-to-year changes,<sup>830</sup> treating this information in the same way that it subsequently treated the information relating to each of the fifteen economic factors and indices.<sup>831</sup>

549. As set out above, there is nothing on the investigation record or in China's submissions that establishes that MOFCOM considered the impact that changes in apparent consumption had on the state observed in the domestic industry.<sup>832</sup>

*ii. Domestic industry capacity expansion plan*

550. The parties disagree as to whether MOFCOM made a finding relating to the domestic industry's capacity expansion plan. Australia's position is that MOFCOM made a factual finding

<sup>827</sup> As Australia has already explained, such an analysis, required under Article 3.4, is distinct from the analysis required under Article 3.5.

<sup>828</sup> See apparent consumption figures, Anti-Dumping Final Determination (Exhibit AUS-2), pp. 111, 123, and 148.

<sup>829</sup> See responses from the 21 domestic producers to question 39(5) in the anti-dumping questionnaire to domestic producers. For pinpoint references to each of the 21 domestic industry responses, see Australia's first written submission, para. 640, fn 739.

<sup>830</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 123; Anti-Dumping Final Determination (Exhibit CHN-1), p. 60.

<sup>831</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 123.

<sup>832</sup> See above, paras. 548-549

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that "evidence shows ... the domestic industry capacity expansion plan was suspended with the volume increase and price decrease of" subject imports.<sup>833</sup> China's assertion that MOFCOM did not make such a finding is contradicted by the clear and unambiguous statement made by MOFCOM in the Final Determination.<sup>834</sup>

551. Further, China has confirmed that the domestic industry informed MOFCOM during the investigation that they did not plan to increase production capacity.<sup>835</sup> As a result, there was no evidence before MOFCOM to support its finding that: (i) a capacity expansion plan existed; and (ii) it was suspended due to the effect of subject imports.<sup>836</sup> As a result, MOFCOM's finding is inconsistent with the obligation in Articles 3.1 and 3.4 to objectively examine the explanatory force between subject imports and the state observed in the domestic industry on the basis of positive evidence.

*iii. Capacity utilisation*

552. As Australia has demonstrated in its prior submissions, MOFCOM did not properly consider the totality of the evidence regarding low domestic capacity utilisation, before asserting that "capacity could not be released effectively" due to subject imports. Australia's argument is not concerned with what "other factors" were causing the low utilisation or whether the low utilisation caused material injury to the domestic industry. Rather, it is addressed to the materiality of the impact of subject imports on the low utilisation observed. MOFCOM's failure to consider or provide reasons for its finding mean that it did not properly consider if subject imports were the explanatory force for this occurrence.

*iv. Price*

553. Australia has also demonstrated in prior submissions that MOFCOM did not evaluate the materiality of the impact or explanatory force that subject imports had for the state observed in domestic prices, including by failing to examine factors affecting domestic prices.

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<sup>833</sup> Australia's first written submission, paras. 649 – 650; Anti-Dumping Final Determination (Exhibit AUS-2) p. 129; Final Determination (Exhibit CHN-1), p. 63.

<sup>834</sup> China's response to Panel question No. 42, para. 237.

<sup>835</sup> China's response to Panel question No. 42, paras. 240-242.

<sup>836</sup> This is consistent with the evidence highlighted by Australia relating to idle capacity and falling demand in 2017-2019, which raised questions regarding the link between subject imports and the suspension of the alleged plan to expand domestic production. See Australia's first written submission, paras. 649-650; Australia response to Panel question No. 43, paras. 112-113.



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China's reliance on MOFCOM's price effects analysis under Article 3.2 is not a remedy to this failure because, it too failed to establish the link or explanatory force between subject imports and the alleged suppression of domestic prices and did not include an evaluation of supply, demand or raw material costs.

*v. Production and operation of the domestic industry*

554. Australia acknowledges there is ambiguity in the meaning of the phrase "deterioration of the production and operation" of the domestic industry. Australia uses this phrase because it is the one MOFCOM used it in the Final Determination.<sup>837</sup> Australia understood this phrase to refer to the production and operating rates of the domestic industry.<sup>838</sup> Australia's argument relates to MOFCOM's failure to evaluate the explanatory force that subject imports had for the deterioration observed in relation to these factors.

555. China has now clarified that the phrase "is an integral part of and should be considered in the full context of MOFCOM's overall evaluation and explanation of the explanatory force of the dumped imports for the domestic industry's situation".<sup>839</sup> Evidence on the record indicated that the "deterioration of the production and operation" of the industry was most profound in relation to products outside the scope of domestic like products. This is evidenced by the significant gap between the yearly total wine production data from the Chinese National Bureau of Statistics<sup>840</sup> and MOFCOM's estimate of total production of subject products.<sup>841</sup> This evidence shows a significant decline in domestic production of wine products outside the scope of the investigation ("other products") over the course of the Injury POI (from 783,500 kilolitres in 2015 to 163,000 kilolitres in 2019).<sup>842</sup> This loss in production volume of 620,500 kilolitres represents a drop of about 79% of production in the "base year" of 2015.

556. Such a profound collapse in production of other wine products would ordinarily be expected to have a significant impact on the domestic industry, given the closely intertwined

<sup>837</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 131, quoted in Australia's first written submission, paras. 655-656.

<sup>838</sup> Australia's response to Panel question No. 44, para. 116.

<sup>839</sup> China's response to Panel question No. 44, para. 244.

<sup>840</sup> CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex V, p. 20.

<sup>841</sup> Anti-Dumping Final Determinations (Exhibit AUS-2), pp. 148.

<sup>842</sup> Australia has calculated output (kilolitre) of non-subject domestic products by subtracting "Total national output" (Final Determination, AUS-2, p. 148) from "Output" (CADA Application Annexures, AUS-90, p. 20).

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production processes used for the domestic like products and other products, including by contributing to increases in average unit costs for domestic like products and the associated decline in profitability. This is because where there is a fall in the production of other products, there would be fewer units of overall production (i.e., domestic like products and other products), to account for shared fixed and overhead costs. MOFCOM was clearly aware of the significant difference in domestic like products and other products. The record shows that MOFCOM examined the National Bureau of Statistics data, concluded that it included products outside the scope of the investigation, and then proceeded to estimate the total production of domestic like products in order to arrive at significantly lower figures.<sup>843</sup> MOFCOM also anticipated that there was overlap in equipment and labour used by the domestic industry to produce subject and non-subject products.<sup>844</sup> Yet there is nothing on the record to suggest that MOFCOM considered the impact that the significant decline in the production volumes of other products had on the domestic industry, before concluding that subject imports had explanatory force for the "domestic industry's situation".<sup>845</sup>

## 6. Conclusion

557. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

### D. CHINA ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

#### 1. Introduction

558. MOFCOM considered that subject imports had suppressed the prices of domestic like products over the Injury POI. China agrees that the quantum of the alleged price suppression

<sup>843</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109; China's responses to Panel questions 15 and 16; Exhibit CHN-32 (BCI).

<sup>844</sup> Domestic Producer Questionnaire (Exhibit CHN-16), questions 19, 20, 21, pp. 20-21. It appears the domestic industry provided responses to these questions that were granted confidential treatment, suggesting that data providing an allocation of shared equipment and labour expenses was provided: see for example Tonghua Winery Anti-Dumping Questionnaire Response (Exhibit AUS-43), pp. 24-21; COFCO Anti-Dumping Questionnaire Response (Exhibit AUS-44), pp. 24-26; Xinjiang West Region Pearl Winery Anti-Dumping Questionnaire Response (Exhibit AUS-45), pp. 22-24.

<sup>845</sup> China's response to Panel question No. 44, para. 244.

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that MOFCOM observed was 658 RMB/kilolitre.<sup>846</sup> MOFCOM determined that this margin of suppression, coupled with rising import volumes, caused the material injury experienced by the domestic industry over the Injury POI.<sup>847</sup> Australia maintains that, having regard to the relevant facts and circumstances of this case, MOFCOM's determination was not one that an objective and unbiased investigating authority could make. MOFCOM's determination is therefore inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. This is because:

- first, in making its material injury determination, MOFCOM relied on the flawed outcomes and evaluations under Articles 3.2 and 3.4 of the Anti-Dumping Agreement;
- second, MOFCOM did not establish that a genuine relationship of cause and effect existed between the subject imports and the material injury alleged to have been experienced by the domestic industry; and
- third, MOFCOM did not appropriately identify, separate and distinguish injury that was caused by other known factors from the injury said to have been attributable to the subject imports.

## **2. Errors in MOFCOM's Article 3.2 and 3.4 examinations undermine the causation determination**

559. The parties agree that Australia's argument at paragraphs 664 – 666 of its first written submission is consequential to its claims under Articles 3.1 and 3.2 and 3.1 and 3.4.<sup>848</sup> That is, if the Panel finds that MOFCOM's price effects or domestic industry analyses are inconsistent with Articles 3.1, 3.2 or 3.4, the consequence is that MOFCOM's determination of causation is also inconsistent with Article 3.5. This is because MOFCOM's determination of causation relied on the WTO inconsistent findings resulting from the earlier examinations.

560. At paragraph 1731 of its first written submission, China mischaracterises Australia's arguments.<sup>849</sup> In the interests of clarity, Australia notes the following: (i) Australia does

<sup>846</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551, 600, and 602; and China's first written submission, paras. 1377, 1380, 1332, 1650, and 1667.

<sup>847</sup> China's first written submission, paras. 1737, 1739-1757; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 134-136.

<sup>848</sup> China's first written submission, paras. 1727-1732.

<sup>849</sup> China's first written submission, paras. 1731.

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challenge MOFCOM's flawed market share analysis, specifically because it is incapable of supporting MOFCOM's finding that subject imports suppressed the price of domestic like products or its affirmative causation determination;<sup>850</sup> (ii) Australia does challenge MOFCOM's assertion of the competitive relationship between subject imports and domestic like products;<sup>851</sup> (iii) Australia does challenge MOFCOM's examination of the impact of the dumped imports on the domestic industry, including MOFCOM's assessment of the explanatory force that subject imports were said to have on the state observed in the domestic industry;<sup>852</sup> and (iv) MOFCOM's consideration of price effects was flawed, and China's *ex post facto* description of a "holistic analysis" does not remedy MOFCOM's errors, omissions, and failure to conduct an objective examination.

### **3. MOFCOM did not establish that subject imports caused material injury to the domestic industry**

561. The parties disagree as to whether MOFCOM established the existence of a genuine relationship of cause and effect between subject imports and material injury to the domestic industry. Australia's position is that MOFCOM did not. The parties' first written submissions disclose two key categories of difference. First, the parties disagree as to the legal standard required to establish causation under Article 3.5 and its relationship with the analyses under Articles 3.2, 3.4 and the third sentence of Article 3.5. Second, the parties disagree as to whether MOFCOM's causation determination in fact complied with the standard required by Articles 3.1 and 3.5.

#### **(a) Correct legal standard**

562. In its first written submission, China outlines four principles which it argues are "well-established WTO jurisprudence" regarding the causation standard under Article 3.5.<sup>853</sup> Australia agrees with the first principle, that a "'causal relationship' between dumped imports and material injury may exist even though other factors are also causing injury to the domestic industry at the same time as the dumped import",<sup>854</sup> and the fourth principle, "that the

<sup>850</sup> Australia's first written submission, paras. 680-684.

<sup>851</sup> Australia's first written submission, paras. 674-679.

<sup>852</sup> Australia's first written submission, paras. 615, 624, 626-657.

<sup>853</sup> China's first written submission, paras. 1713-1724.

<sup>854</sup> China's first written submission, para. 1716.

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principal question before the Panel is whether MOFCOM's causal link analysis 'has a sufficient basis of evidence on the record and reflects an objective examination of the evidence, as called for in Articles 3.1 and 3.5 of the Anti-Dumping Agreement.'"<sup>855</sup>

563. However, Australia disagrees with the second and third points articulated by China.<sup>856</sup> These do not accurately reflect the Article 3.5 standard.

564. In relation to China's second point,<sup>857</sup> Australia agrees that "the inquiries under Articles 3.2 and 3.4 ... are necessary in order to answer the question [of causation] under Article 3.5".<sup>858</sup> However, this does not mean that an investigating authority is entitled to rely on the outcomes of its analyses under Articles 3.2 and 3.4 to simply assume that a causal relationship exists between subject imports and injury to the domestic industry.<sup>859</sup> Rather, Article 3.5 requires an investigating authority to objectively examine "all relevant evidence" in order to *demonstrate* that a causal relationship exists. That is, MOFCOM was required to examine all relevant evidence, not simply assert (as it did) that a causal relationship existed between subject imports and injury to the domestic industry.<sup>860</sup>

565. China's third point seeks to create an artificial distinction between the first two sentences of Article 3.5 and the non-attribution analysis required by the third sentence.<sup>861</sup> Nothing in the text or context of Article 3.5 supports the argument that the demonstration of causation and the examination of non-attribution factors are to be severed and conducted entirely independently of one another.<sup>862</sup> Rather, the text of Article 3.5 makes clear that the causation determination is to take account of "all relevant evidence". This includes the outcomes of the Article 3.2 and 3.4 examinations, any non-attribution factors and, indeed, any other evidence that is relevant to the causation determination.

<sup>855</sup> China's first written submission, para. 1724.

<sup>856</sup> China's first written submission, paras. 1717-1722.

<sup>857</sup> China's first written submission, paras. 1717-1720.

<sup>858</sup> China's first written submission, para. 1718.

<sup>859</sup> Cf China's first written submission, paras. 1717, 1720.

<sup>860</sup> This is consistent with the passage of the Appellate Body in *Korea – Pneumatic Valves (Japan)* cited by China at paragraph 1719 of its first written submission, in that the panel confirmed that Article 3.5 requires an investigating authority base its determination of causation on "a proper linkage among the various components, in light of all evidence and factors set out in [Article 3.5]" (para. 5.194).

<sup>861</sup> China's first written submission, paras. 1721-1722.

<sup>862</sup> The passage from the panel report in *Japan – DRAMs (Korea)* does not support this proposition either (see China's first written submission, para. 1721).

(b) MOFCOM's determination did not demonstrate a causal relationship between subject imports and injury to the domestic industry

566. China has provided significant *ex post facto* explanations and reasoning that it alleges underpin MOFCOM's determination.<sup>863</sup> This level of detail, explanation and analysis was never provided by MOFCOM and does not appear in the Final Determination or elsewhere on the investigation record.<sup>864</sup> As such, it should be disregarded.

567. In any event, China now argues that MOFCOM's causation determination was based on three key and related findings:

- First, the increasing volume and declining average unit price of subject imports caused all of the sales volume and market share declines experienced by the domestic industry over the Injury POI.<sup>865</sup>
- Second, subject imports caused the market share and sales volume declines in the domestic industry because there was a competitive relationship between subject imports and domestic like products.<sup>866</sup>
- Third, subject imports caused the domestic industry's profitability to decline, through a combination of taking market share and preventing price increases. The profitability decline resulted in further declines in other relevant economic factors.<sup>867</sup>

568. Australia maintains that there are fundamental errors in relation to each of these findings.

<sup>863</sup> China's first written submission, paras. 1737, 1739-1742, 1744-1749, 1751, 1754-1755, 1757, and 1758-1759.

<sup>864</sup> China has confirmed that MOFCOM's causation analysis is contained in section VI of the Preliminary Determination, Disclosure of Essential Facts and Final Determination: China's first written submission, para. 1738.

<sup>865</sup> China's first written submission, para. 1741 (" [...] all of the domestic industry's loss of market share, and more, was as a result of the increase in dumped imports").

<sup>866</sup> China's first written submission, paras. 1745-1747.

<sup>867</sup> China's first written submission, paras. 1754-1757. See also China's first written submission, para. 1380.

*i. Volume and market share*

569. At the outset, contrary to China's first written submission,<sup>868</sup> Australia clarifies that its argument is not that MOFCOM needed to establish that subject imports caused injury to Chinese wine producers that were not included in the "domestic industry" as defined by MOFCOM. Rather, Australia's argument is that MOFCOM's comparison of volume and market share did not provide an objective and unbiased basis for concluding that subject imports caused the sales volume and market share declines experienced by the domestic industry or the resulting material injury.

570. In particular, having regard to the facts and circumstances of this case, MOFCOM's causation determination was: (i) not based on positive evidence; (ii) overly simplistic; and (iii) inconsistent with evidence on the record.

571. First, the apparent consumption figure underpinning MOFCOM's market share comparisons was not based on positive evidence.<sup>869</sup> China has now confirmed that MOFCOM calculated the apparent consumption figure using the estimate of "total national output" that it calculated using statistics provided to it by the confidential "authoritative domestic organization".<sup>870</sup> In turn, MOFCOM used the apparent consumption figures to calculate the market share percentages for subject imports and the domestic industry. As a result, the market share percentages are tainted by the same issues Australia outlined in section III of its first written submission and above in section IV.A.

572. Second, MOFCOM's determination that subject imports caused all of the market share and sales volume declines experienced by the domestic industry,<sup>871</sup> is overly simplistic. In its first written submission, China now argues that MOFCOM's determination was based on an asserted correlation between the percentage point changes in the market share of subject imports and the domestic industry.<sup>872</sup> China has now confirmed that MOFCOM's analysis did not include an objective examination of market dynamics between the "domestic industry" (as MOFCOM defined it), the hundreds of other Chinese producers of domestic like

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<sup>868</sup> China's first written submission, paras. 1865-1871.

<sup>869</sup> Australia's first written submission, para. 683.

<sup>870</sup> China's First Written Submission, para. 1879; China's response to Panel question No. 47, paras. 268-269.

<sup>871</sup> China's first written submission, para. 1741.

<sup>872</sup> China's first written submission, paras. 1741.

products,<sup>873</sup> or imports from third countries.<sup>874</sup> Australia's position is that the circumstances of this case — including all of the relevant evidence on the record before MOFCOM — required it to do so. This is because: (i) MOFCOM's causation determination was based on its finding that subject imports caused the market share and sales volume declines experienced by the domestic industry; (ii) the evidence established that, throughout the Injury POI, subject imports were significantly more expensive and occupied a significantly smaller market share than either the like domestic products or third country imports;<sup>875</sup> (iii) the Chinese market experienced a significant increase and then a significant contraction in demand over the Injury POI;<sup>876</sup> and (iv) imports from third countries occupied a significant share of the market, at average prices closer to, and generally lower than, average prices of the domestic like products.<sup>877</sup>

573. Further, the *ex post facto* rationalisations provided by China illustrate the extent to which MOFCOM failed to objectively examine the evidence of the complexities in the Chinese market that was before it in this investigation.<sup>878</sup> The table below summarises the evidence on MOFCOM's investigation record regarding yearly volume changes for subject imports, domestic like products produced by both the domestic industry and other Chinese producers, and third country imports. This evidence demonstrates that, contrary to the assumption underpinning MOFCOM's determination, the Chinese market was far more complex than subject imports simply taking volume and market share from the domestic industry. For example:

- Between 2015 – 2016: The domestic industry's sales of domestic like products declined by -14,300 kilolitres. MOFCOM does not examine or explain why this volume decline was caused by the 22,700 kilolitres increase in subject import volumes, as opposed to the 63,000 kilolitres increase in third country imports.

<sup>873</sup> China's first written submission, paras. 1739-1761, 1762-1812.

<sup>874</sup> China's first written submission, paras. 1778-1784.

<sup>875</sup> Australian Government, Section IV Injury and Causation Tables (Exhibit AUS-65) (BCI), Tables 1 and 8, pp. 2, 13.

<sup>876</sup> Australian Government, Section IV Injury and Causation Tables (Exhibit AUS-65) (BCI), Table 6, p. 11.

<sup>877</sup> Australia's first written submission, paras. 700-702.

<sup>878</sup> China's first written submission, paras. 1872-1885; China's response to panel question No. 47, paras. 263-273.



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- Between 2016 – 2017: The domestic industry's sales of domestic like products declined by -8,500 kilolitres. MOFCOM does not examine or explain why this volume decline was caused by the 26,400 kilolitres increase in subject import volumes, as opposed to the 44,100 kilolitres increase in third country imports or the apparent 37,500 kilolitres increase in the production of domestic like products by other Chinese producers (based on MOFCOM's own estimate of total domestic output).<sup>879</sup>
- Between 2017 - 2018: The domestic industry's sales volumes declined by -2,200 kilolitres. MOFCOM does not examine or explain why this volume decline was caused by the 12,000 kilolitres increase in subject import volumes, considering that apparent consumption contracted by -64,100 kilolitres,<sup>880</sup> third country imports declined by -55,600 kilolitres and the output volume other Chinese producers declined by -13,300 kilolitres.
- Between 2018 – 2019: The domestic industry volumes declined by -34,700 kilolitres and subject import volumes increased by just 3,000 kilolitres. MOFCOM's analysis does not include any consideration of what caused the additional 31,700 kilolitre decline in domestic industry volumes.

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<sup>879</sup> Australia does not have access to sales volume data for the other Chinese domestic producers. As a result, Australia has calculated the output volumes of the other Chinese domestic producers, using MOFCOM's "total national output" estimate and export figures. For a description of the calculation and data relied on, see footnote 883. As set out elsewhere in this submission, Australia does not accept the accuracy of MOFCOM's estimate of total national output. However, evidence that was before MOFCOM that shows that yearly output volumes of the other Chinese producers exhibited a dramatically different trend to that shown in the sales volumes of the Chinese domestic industry. MOFCOM did not consider this evidence.

<sup>880</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 123,

**Table 3 Market volumes during Injury POI**

		2015	2016	2017	2018	2019
<b>Domestic industry</b>	Yearly change in sale volume (kilolitre) <sup>881</sup>	NA	-14,300	-8,500	-2,200	-34,700
	Market share <sup>882</sup>	31.62%	27.80%	23.90%	25.43%	24.61%
<b>Other Chinese producers</b>	Yearly change in output volume (kilolitre) <sup>883</sup>	NA	-16,500	37,500	-13,300	-14,500
	Output as a percentage of consumption <sup>884</sup>	15.27%	12.26%	15.03%	14.60%	14.86%
<b>Subject imports</b>	Yearly change in import volume (kilolitre) <sup>885</sup>	NA	22,700	26,400	12,000	3,000
	Market share <sup>886</sup>	7.40%	9.69%	11.53%	13.80%	16.30%
<b>Third country imports</b>	Yearly change in import volume (kilolitre) <sup>887</sup>	NA	63,000	44,100	-55,600	-55,700
	Market share <sup>888</sup>	44.31%	49.09%	48.63%	45.77%	45.22%
		<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>

<sup>881</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148. Australia has calculated the yearly change by subtracting the "Domestic sales volume" for each year, from the value provided for the preceding year.

<sup>882</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>883</sup> Australia has calculated the output volumes for the other Chinese producers into the Chinese market using the "total national output" and "output of domestic like product" (Anti-Dumping Final Determination (Exhibit AUS-2), pp. 124, 148) and the total Chinese export figures (China's first written submission, paras. 1879). The formula used is: Total national output – (Domestic industry output + Chinese exports). Australia has then calculated the yearly change by subtracting each yearly total from the preceding year. The output volumes calculated for each year are: 117,000kl (2015), 100,500kl (2016), 138,000kl (2017), 124,700kl (2018), 110,200kl (2019).

<sup>884</sup> Australia has calculated the percentage using the following formula: (Output volume / apparent consumption)\*100.

<sup>885</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148. Australia has calculated the yearly change by subtracting the "Import volume of the product under investigation" for each year, from the value provided for the preceding year.

<sup>886</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148.

<sup>887</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 148. Australia has calculated the yearly import volumes for third countries using this formula: "Total national imports" – "Import volume of the product under investigation". Australia has then calculated the yearly change volume for third country imports by subtracting each yearly total from the preceding year.

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574. Finally, the above clearly demonstrates that MOFCOM's determination that subject imports caused the sales volume and market share declines experienced by the domestic industry was inconsistent with evidence on the record.<sup>889</sup> Having regard to the totality of the evidence before MOFCOM, the asserted correlation between end-to-end volume and market share trends was insufficient to establish a relationship of cause and effect between subject imports and the volume and market share declines experienced by the domestic industry.<sup>890</sup> China's first written submission does not address or rebut the issues raised by Australia. Rather, it simply confirms the improper basis of MOFCOM's causation determination, that is, the alleged correlation between the market share percentage point changes in subject imports and the domestic industry.<sup>891</sup>

*ii. Competition between subject imports and domestic like products*

575. The parties disagree on two key points regarding MOFCOM's consideration of the competitive relationship between subject imports and domestic like products.

576. First, the parties disagree as to whether MOFCOM properly established that subject imports were in direct competition or were substitutable with domestic like products. This disagreement is largely factual in nature.<sup>892</sup> China's position is that MOFCOM's determination was justified based on its finding that the products were sufficiently similar because they had the same end use, physical characteristics and sales channels.<sup>893</sup> In contrast, Australia's position is that MOFCOM's determination was insufficient because its examination failed to account for: (i) differences in product mix and the segmentation of China's market;<sup>894</sup> and (ii) that consumer preferences and perceptions resulted in subject imports being considered to

<sup>888</sup> Australia has calculated the market share of third country imports using the following formula: (Third country import volume / apparent consumption)\*100.

<sup>889</sup> See also Australia first written submission, paras. 670-682.

<sup>890</sup> Australia's first written submission, paras. 670-673.

<sup>891</sup> China's first written submission, paras. 1741.

<sup>892</sup> Australia's argument is consistent with the principle established by the Appellate Body in *China – HP-SSST* that an affirmative determination of causation under Article 3.5 cannot be made if the products under consideration are not substitutable (para. 5.262). The factual differences do not undermine the applicability of this principle to this case (Cf. China's first written submission, paras. 1817-1821.)

<sup>893</sup> China's first written submission, paras. 1822-1831.

<sup>894</sup> China now accepts that the evidence established that the product market could at least be classified in to high, middle and low end products (China's first written submission, paras. 1830-1833). This is not reflected in MOFCOM's price effects analysis or during its evaluation of substitutability during causation.

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be in a higher quality category than domestic like products.<sup>895</sup> Australia has set out its arguments in detail above and in its prior submissions,<sup>896</sup> which, if the Panel accepts, also render MOFCOM's causation determination inconsistent with Articles 3.1 and 3.5.

577. Second, even if MOFCOM properly established that subject imports and domestic like products were substitutable and in direct competition, Australia's position is that this would further undermine MOFCOM's determination that Australian imports were responsible for the sales volume and market share losses experienced by the domestic industry. This is because, if all subject imports and all domestic like products are substitutable and compete directly with each other in China's market on the basis that they have the same end use, physical characteristics and sales channels, then the same must equally be true of the domestic like products produced by the hundreds of other domestic producers (i.e. other than the 21 producers that MOFCOM defined as the "domestic industry") and like imports from third countries.<sup>897</sup> This further highlights why MOFCOM was obligated to examine all of the relevant evidence on market dynamics, including with respect to third country imports and the like products of other domestic producers. MOFCOM's failure to do so means that it could not have established the existence of a genuine causal relationship between the subject imports and the alleged price suppression, volume decrease, and market share decline experienced by the domestic industry.

*iii. Deterioration in profitability and other relevant economic factors*

578. The parties disagree as to whether MOFCOM properly established the existence of a genuine causal relationship between the subject imports and the "continuous deterioration of the production and operation" of the domestic like products that MOFCOM observed in the domestic industry. Australia's position is that MOFCOM did not demonstrate that subject imports caused this decline.

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<sup>895</sup> Australia's first written submission, para. 678. China's submissions addressing this point are entirely *ex-post* and do not establish that MOFCOM actually considered this issue (China's first written submission, paras. 1838-1859).

<sup>896</sup> See above, section 155V.B.2(d). Australia's first written submission, paras. 563-586; 674-679; and 708-710.

<sup>897</sup> Or, at the very least, some explanation or evaluation of why this is not the case is required. As set out above, there is no evidence to suggest that MOFCOM considered the impact of third country imports and the other Chinese domestic producers during its volume and market share analysis.

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579. Australia's position is that MOFCOM's determination was based, at most, on its assumption of a causal relationship rather than a *demonstration* of such a relationship based on an objective *examination* of all relevant evidence on the record.<sup>898</sup> In particular, Australia recalls that MOFCOM's factual findings established that: (i) there was a significant price gap between the average unit values of subject imports and domestic like products, such that subject imports were significantly more expensive;<sup>899</sup> and (ii) based on MOFCOM's evidence, the margin of price suppression experienced by the domestic industry was just 658RMB/kilolitre over the Injury POI (i.e. 2% of the average price of domestic like products in the "base year", 2015).<sup>900</sup> MOFCOM failed to explain how it took this evidence into account in reaching its conclusions. The Final Determination does not contain any examination or demonstration as to how the subject imports caused the deterioration that MOFCOM observed in the domestic industry. Rather than demonstrating a genuine relationship of cause and effect, MOFCOM simply assumed that all of the negative trends and adverse conditions experienced by the domestic industry had been caused by the subject imports.<sup>901</sup> MOFCOM ignored a much larger and more complex domestic market, and dismissed all of the other factors and evidence that were before it on the investigation record and brought to its attention by the interested parties.

580. China's first written submission simply reiterates these assertions.<sup>902</sup> It does not point to any examination undertaken by MOFCOM or demonstration of a causal relationship between the subject imports and the material injury to the domestic industry.

#### **4. MOFCOM did not conduct a non-attribution analysis in relation to known factors**

581. The parties disagree as to whether MOFCOM's examination of other known factors was consistent with China's obligations under Article 3.5. The correct and well accepted

<sup>898</sup> Australia's first written submission, paras. 668-669, and 670-684.

<sup>899</sup> Australian Government, Section IV Injury and Causation Tables (Exhibit AUS-65) (BCI), Table 1, p. 2.

<sup>900</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 121; Final Determination (Exhibit CHN-1), p. 59; Australia's first written submission, paras. 551, 600, 602; and China's first written submission, paras. 1377, 1380, 1332, 1650, and 1667.

<sup>901</sup> China's first written submission, para. 1380 ("658 RMB/kilolitre was a significant amount as it led to a sharp drop in profitability and affected all the financial indicators of the domestic industry as well as their continued operations including production").

<sup>902</sup> China's first written submission, paras. 1751-1761.

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standard, including by China in this dispute,<sup>903</sup> is that that the non-attribution analysis in Article 3.5 requires an investigating authority to assess, separate and distinguish injury caused by other factors from injury caused by the subject imports, through the effects of dumping.<sup>904</sup>

582. MOFCOM's examination of the evidence relating to the four known factors in the context of its causation assessment was unobjective and wholly deficient. As a result, its dismissal of these factors and failure to assess, separate and distinguish injury caused by these factors: (i) was not based on an objective examination of positive evidence; (ii) did not reflect an examination by an objective and unbiased investigating authority; and (iii) ultimately means that MOFCOM's determination that subject imports caused material injury to the domestic industry did not have a proper basis.

(a) Tariff reductions under ChAFTA

583. Australia's argument in relation to MOFCOM's flawed non-attribution analysis of tariff reductions under ChAFTA is a simple one, grounded in the price calculation methodology that MOFCOM adopted and the causation determination that it made. That is, MOFCOM applied an adjustment to the CIF price (RMB/kilolitre) of subject imports to reflect the applicable import tariff.<sup>905</sup> The value of that adjustment declined from 14% to 0% over the course of the Injury POI.<sup>906</sup> As a result, the import price that MOFCOM calculated for subject imports reflected this 14% reduction.<sup>907</sup> MOFCOM's determination was that the price decline and volume increase in subject imports caused the material injury to the domestic industry.<sup>908</sup> At least 14% of the price decline observed in the import price that MOFCOM calculated for subject imports was attributable to a factor other than dumping – that is, the progressive elimination of the applicable import tariff pursuant to China's commitments under the ChAFTA. As a result, MOFCOM needed to identify, separate and distinguish any injury being

<sup>903</sup> China's first written submission, paras. 1891-1892.

<sup>904</sup> Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *China – GOES* para. 151, *China – HPSSST (EU)/ China – HPSSST (Japan)*, para. 5.283; *EU – PET (Pakistan)*, paras. 5.171.

<sup>905</sup> China's first written submission, paras. 1044, 1052.

<sup>906</sup> Australia's first written submission, paras. 690; China's first written submission, paras. 1052-1057.

<sup>907</sup> China's first written submission, para. 1057.

<sup>908</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 135 ("the market share of domestic like products was obviously squeezed by the dumped imported product."), 136 ("During the injury investigation period, the price of the dumped imported product declined continuously [...] 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.")

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caused to the domestic industry by the impact of the decreasing import tariff in order to ensure that such injury would not be improperly attributed to the allegedly dumped imports.

584. As Australia understands it, China's position appears to be either that: (i) MOFCOM dismissed the impact of tariff reductions on the basis that it did not "sever the causal link" between the dumped imports and injury to the domestic industry; and/or (ii) Australia has not established that the progressive elimination of the import tariff in fact caused material injury to the domestic industry. For the following reasons, China's arguments are without merit.

585. First, to the extent that China's argument is that MOFCOM did not need to consider tariff reductions as a non-attribution factor because it is not an "other factor" causing injury, Australia strongly disagrees.<sup>909</sup> Tariff reductions were clearly an "other factor" that is separate from the dumped imports. This is because the tariff reductions have the ability to bring about price and volume changes in subject imports that are entirely separate to the alleged effects of dumping. China's reliance on the panel's reasoning in *EU – Footwear (China)* to support its position is to no avail.<sup>910</sup> China seeks to draw equivalence between two completely different factual scenarios.<sup>911</sup> The lifting of a quota which removes restrictions on volume, as was the case in *EU – Footwear (China)*, differs from the elimination of an import tariff, which decreases the overall costs that an importer must pay to import a product. In contrast to *EU – Footwear (China)*, Australia's argument is not that the tariff reductions allowed the importation of additional imports that otherwise would not have occurred. Rather, Australia's argument is that the tariff reductions over the course of the Injury POI (14%) accounted for most of the 15.91% decrease in the average unit price of subject imports that MOFCOM observed over the same period. This price decrease formed the basis for MOFCOM's finding of price suppression and, in turn, its determinations of injury and causation.

586. Second, China argues that the facts do not support Australia's argument, because: (i) there is no year-to-year correlation between the tariff reductions and the decline in the subject import price;<sup>912</sup> and (ii) the unadjusted CIF price (USD/kl) of subject imports also

<sup>909</sup> China's first written submission, paras. 1925-1926.

<sup>910</sup> C.f. China's first written submission, paras. 1925-1926.

<sup>911</sup> See Panel Report, *EU – Footwear (China)*, paras. 7.524-7.527.

<sup>912</sup> China's first written submission, paras. 1927-1929.

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exhibited a decline.<sup>913</sup> These submissions are not an answer to Australia's argument. This is because they do not address the simple fact that implicit in MOFCOM's price calculation was a 14% reduction in the price of subject imports over the Injury POI that was attributable to the progressive elimination of the import tariff.<sup>914</sup> This is demonstrated when the price decline in the unadjusted CIF price (RMB/kilolitre) is compared to the price decline exhibited in CIF price (RMB/kilolitre) with the tariff adjustment applied.<sup>915</sup> That is, the un-adjusted CIF price declined by just 4.04% over the Injury POI, whereas the CIF price plus tariff declined by 15.82%.

**Table 4 Comparison of average CIF and CIF + tariff prices over Injury POI**

	2015	2016	2017	2018	2019	<i>End to end change</i>
<b>CIF Price (RMB/kl)<sup>916</sup></b>	48,317	45,378	43,493	40,266	46,367	-4.04%
<b>CIF price + tariff adjustment (RMB/kl)</b>	55,081	49,190	45,929	41,393	46,367	-15.82%

587. Third, China argues that Australia "did not provide any proper evidence to prove its assertion that the progressive tariff elimination under the ChAFTA *caused material injury* to the domestic industry".<sup>917</sup> It was MOFCOM that determined that the price decline in subject imports caused material injury to the domestic industry.<sup>918</sup> Australia's argument is that at least 14% of the price decline that MOFCOM described was directly and unequivocally attributable

<sup>913</sup> China's response to Panel question No. 48, paras. 278-280.

<sup>914</sup> There are myriad reasons why there could be year-to-year differences between the tariff reduction percentage and the percentage price decline. Notably changes in product mix, level of trade, conditions of sale, market supply and demand and consumer perceptions, all of which are addressed in Australia's first written submission (see Australia first written submission, paras. 563-599, 610-612, 639-642, 647-648, 678) and above in this submission.

<sup>915</sup> Australia notes that China's response to Panel question No. 48 provides the unadjusted CIF price in USD/kilolitre. Australia's position is that the price must be considered in RMB/kilolitre as that the price and currency to which MOFCOM applied the tariff adjustment and based its injury determination (see China's first written submission, paras. 1044; 1052).

<sup>916</sup> China's response to Panel question 48, table at para 278. Australia has converted the unadjusted CIF price (USD/kl) to RMB/kl using the yearly average exchange rates included at China's first written submissions, paras. 1051; CADA Application, Appendix 14.

<sup>917</sup> China's response to Panel question No. 48, paras. 283-285.

<sup>918</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 122 ("Therefore, the volume increase and price declination of dumped imported product sufficed to cause a material adverse impact on the price of domestic like products."); 136 ("During the injury investigation period, the price of the dumped imported product declined continuously [...] 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. In summary, the Investigating Authority determined in the Preliminary Ruling that there is a causal link between the dumped imported product and the material injury suffered by the domestic relevant wine industry.").



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to a known factor other than dumped imports. As a result, MOFCOM was obligated to identify and separate the injury caused by the price decline associated with the tariff reductions from the injury it determined was caused by the price decline alleged to have resulted from the effects of dumping. Under the circumstances, an objective and unbiased investigating authority could not have summarily dismissed this factor without conducting an objective non-attribution analysis to identify, separate, and distinguish the impact it was having.

588. The balance of China's submissions appears to fundamentally misunderstand Australia's argument on this issue. China's submissions on FTAs generally<sup>919</sup> or the behaviour of exporters and importers and their price dynamics, as interpreted by researchers in a completely different context,<sup>920</sup> are irrelevant to the facts and circumstances in this case, the evidence that was on the investigation record before MOFCOM, and the resolution of this dispute. Finally, Australia clarifies that the phrase "other negotiated outcomes" is not intended to denote a separate or distinct non-attribution factor. The phrase is used in a general sense to refer to the broader implications of an FTA agreement – namely facilitating open and preferential cross-border trade.<sup>921</sup>

(b) Third country imports

589. The evidence before MOFCOM established that third country imports played a significant role in the Chinese wine market over the course of the Injury POI.<sup>922</sup> Australia's position is that, having regard to the facts and circumstances of this investigation, MOFCOM's cursory dismissal of the impact of third country imports was wholly insufficient. MOFCOM needed to identify, separate and distinguish the injury caused to the domestic industry by

<sup>919</sup> China's first written submission, paras. 1923-1924; China's response to Panel question No. 48, paras. 281-282. Australia does not accept China's argument that tariff reductions result in import prices increasing and notes that it not supported by any evidence on the record or indeed Exhibit CHN-24. However, ultimately this issue is irrelevant to Australia's argument and the dispute between the parties. This is because Australia's argument is not directed to any alleged impact of FTAs generally. Rather, it is grounded in the specific circumstances of this case – which is that MOFCOM's price calculation reflected a 14% tariff reduction.

<sup>920</sup> China's response to Panel question No. 48, para. 282. Australia does not accept China's argument that "foreign exporters, seeking to maximize the profit, would logically increase their prices and profits to offset the tariff reductions". This argument is not supported by any evidence on the record. However, ultimately this issue is irrelevant to Australia's argument and the dispute between the parties. This is because Australia's argument is directed to the price calculation methodology that MOFCOM adopted, which was to apply an adjustment to reflect the applicable tariff to annual average CIF prices in RMB/kilolitre. As a result, even if China's assertion that exporters would increase their prices is correct (which Australia does not accept) MOFCOM's price calculation methodology would still reflect that 14% decline, because the tariff adjustment reduced by 14%.

<sup>921</sup> Contra. China's first written submission, paras. 1930.

<sup>922</sup> Australia's first written submission, paras. 696-704.

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third country imports. It did not do so. As a result, MOFCOM's determination that third country imports did not sever the causal link between subject imports and material injury to the domestic industry, in part because there was no evidence they were dumped: (i) applied the incorrect standard; and (ii) was not a decision that an objective and unbiased investigating authority would make.<sup>923</sup>

590. First, MOFCOM dismissed third country imports and declined to undertake a proper non-attribution examination of their impact on the domestic industry on the basis that there was no evidence they were dumped.<sup>924</sup> As set out in Australia's first written submission, this is a clear legal error that is *prima facie* inconsistent with Article 3.5.<sup>925</sup>

591. Second, MOFCOM did not objectively consider the evidence relating to third country imports, either during its examination of price effects or elsewhere during its injury evaluation.<sup>926</sup> Rather, MOFCOM's consideration as described in its Final Determination was cursory and unobjective. MOFCOM only considered third country imports as a homogenous block, for two of the five years in the Injury POI, and focused purely on isolated end-to-end trends.<sup>927</sup> The careful consideration that China asserts MOFCOM undertook does not appear anywhere on the investigation record.<sup>928</sup> Rather, it is an *ex post facto* justification that cannot be relied upon, and which, in any event, does not address MOFCOM's failure to objectively consider third country imports as a non-attribution factor.

592. Third, the substance of China's argument appears to be that MOFCOM's dismissal of third country imports is justified on the basis that third country imports exhibited a decline in import volume and average unit value (USD/kl) when 2015 is compared to 2019.<sup>929</sup> MOFCOM apparently concluded that because the volume trend exhibited by third country imports was different to Australian wines and the overall price decrease was smaller, third country imports did not break the causal link between subject imports and the material injury to the domestic

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<sup>923</sup> Australia's first written submission, paras. 696-704.

<sup>924</sup> Cf. China's first written submission, paras. 1963-1964.

<sup>925</sup> Australia's first written submission, para. 704.

<sup>926</sup> Cf. China's first written submission, para. 1941.

<sup>927</sup> Australia's first written submission, paras. 696-704; China's first written submissions, paras. 1941-1943, 1951, 1959; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 137-138, 140-145.

<sup>928</sup> China's first written submission, paras. 1330, 1337-1340, 1436-1439, 1938-1966.

<sup>929</sup> China's first written submission, paras. 1952, 1953, 1957, 1959, 1961-1962.

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industry.<sup>930</sup> This analysis is overly simplistic and does not provide an objective examination of the relevant evidence. As set out in Australia's first written submission, the evidence on the record before MOFCOM established that the Chinese wine market was far more complex than MOFCOM's simple assertions reveal.<sup>931</sup> As a result, MOFCOM's analysis does not provide any examination of the relationship between third country imports and the domestic industry, nor does it assess, separate and distinguish injury caused to the domestic industry, from that said to have been caused by subject imports.

593. In the circumstances of this case, MOFCOM's cursory examination of end-to-end rates of change and assertions that third country imports "did not sever the causal link" between subject imports and injury, was wholly insufficient. This is because:

- MOFCOM determined that subject imports and domestic like products competed in all product grades and segments on price.<sup>932</sup> China's submissions also make clear that MOFCOM accepted that third country imports competed with subject imports and domestic like products on price;<sup>933</sup> and
- the evidence established that in all years of the Injury POI: (i) third country imports accounted for significantly greater import volumes than Australian wine; and (ii) were lower and, in some cases, much lower than the average unit prices of domestic like products.<sup>934</sup>

594. The fact that the rates of change between Australian and third country imports were different does not provide an objective basis for concluding that volume and price changes exhibited by a more significant market participant, in a market that competes on price,<sup>935</sup> did not "break the causal link" between subject imports and material injury to the domestic industry.<sup>936</sup> Rather, it necessitated careful consideration of the price pressures by and

<sup>930</sup> China's first written submission, paras. 1952, 1953, 1957, 1959, 1961-1962.

<sup>931</sup> Australia's first written submission, paras. 696-704.

<sup>932</sup> China's first written submission, para. 1330, 1343, 1419, 1747, 1833, 1856; Anti-Dumping Final Determination (Exhibit AUS-2), p. 106, 118, 120.

<sup>933</sup> China's first written submission, paras. 1330, 1337-1340, 1436-1439, 1938-1966.

<sup>934</sup> Australia's first written submission, para. 696-704.

<sup>935</sup> China's first written submission, para. 1330; 1343; 1419; 1747; 1833; and 1856; Anti-Dumping Final Determination (Exhibit AUS-2), p. 106; 118; and 120.

<sup>936</sup> Cf. China's first written submission, para. 1962.

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between all of the major market participants in order to assess and separate price pressure and associated injury that was caused by third country imports, from the price pressure and injury said to have been caused by subject imports. MOFCOM's cursory and unobjective examination of the evidence, as recorded in the Final Determination, does not engage with this at all.<sup>937</sup> Nor do China's extensive *ex post facto* submissions. Rather, China's submissions simply repeat MOFCOM's fundamental error in asserting that third country imports did not break the causal link on the basis of so called "disparate trends".<sup>938</sup> There is no attempt to assess, separate and distinguish injury caused by third country imports.

595. The example that China highlights at paragraph 1962 of its first written submission demonstrates MOFCOM's failure in this regard. The 482USD/kl end-to-end decline in French prices, changed French imports from overselling domestic products by 46USD/kl in 2015 to underselling them by 891USD/kl in 2019. The 1,036USD/kl end-to-end decline in Australian prices, simply narrowed the overselling margin between Australian wine and domestic like products from 2,618USD/kl in 2015 to 1,127USD/kl in 2019. This is cogent and persuasive evidence that imports from third countries exerted price pressure on domestic like products. China's assertion that the "disparate trends" support the conclusion that third country imports did not break the causal link was not a conclusion that an objective and unbiased investigating authority would draw based on the available evidence.

596. Finally, China's attempt to characterise Australia's argument as relying on "piecemeal" data or suggesting that MOFCOM should have ignored data pertaining to 2018 or imports from countries outside of the top five is entirely without merit.<sup>939</sup> Australia's argument reflects: (i) that the evidence on the record, as provided by CADA, omits the 2018 data;<sup>940</sup> and (ii) that the proportion of import volumes accounted for by countries outside the top five was very low.<sup>941</sup>

<sup>937</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 137-138, 140-145.

<sup>938</sup> China's first written submission, para. 1962.

<sup>939</sup> China's first written submission, paras. 1948-1950, 1958, 1962. The passage of *China – Cellulose Pulp* cited by China at paragraph 1950 is not relevant to the issues in dispute in this proceeding.

<sup>940</sup> Australia's first written submission, para. 699. CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 2) (Exhibit AUS-66); Annex 8; pp. 45 (2015); 46 (2016); 47 (2017); and 48 (2019). Australia notes that MOFCOM could have obtained this information from the Chinese Customs Authority. It certainly did so at least in relation to subject imports, as it relied on that data for the basis of its volume and price analysis under Article 3.2. Australia's omission of the 2018 data simply reflects that it is not available anywhere on the public record of the investigation.

<sup>941</sup> Australia's first written submission, para. 700, fn 845.

(c) Exchange rates

597. Australia's position is that exchange rates were a "known factor" that had the potential to cause injury to the domestic industry. As a result, MOFCOM needed to assess, separate and distinguish any injury being caused to the domestic industry by exchange rate fluctuations and separate such injury from the injury said to have been caused by the subject imports through the effects of dumping. China's position appears to be that: (i) Australia's argument should fail because it is speculative and does not establish that exchange rates in fact caused injury;<sup>942</sup> (ii) MOFCOM was not required to consider exchange rates as an "other factor";<sup>943</sup> and (iii) in any event, MOFCOM did examine the impact of exchange rates and was justified in dismissing them on the basis that they did not "negate the causal link" between subject imports and injury.<sup>944</sup> This creates two key differences between the parties.

598. First, China appears to argue that MOFCOM did not need to consider exchange rates as a non-attribution factor because it is not an "other factor" causing injury. Australia rejects this argument. Exchange rates are clearly capable of being an "other factor" that is separate from the subject imports. This is because fluctuations in the exchange rate have the ability to bring about price changes in subject imports that are entirely separate to the alleged effects of dumping. Contrary to China's assertions, *EU – Footwear (China)* is not authority for the proposition that exchange rates can never be a factor causing injury.<sup>945</sup> Rather, *EU – Footwear (China)* concerned a circumstance, where exchange rates were raised, the investigating authority properly assessed them and determined on the basis of available evidence in that case, that they were not a factor that was causing injury to the domestic industry.<sup>946</sup> This is fundamentally different to this case, where there is nothing to suggest MOFCOM actually considered the impact of exchange rates at all.

599. Second, contrary to China's allegation, Australia has established a *prima facie* case. Australia has shown that exchange rates were raised as a factor causing injury to the domestic industry during the investigation. There is nothing on the investigation record or in China's

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<sup>942</sup> China's first written submission, paras. 1970-1975.

<sup>943</sup> China's first written submission, paras. 1979-1980.

<sup>944</sup> China's first written submission, paras. 1976-1978.

<sup>945</sup> Cf. China's first written submission, paras. 1979-1980.

<sup>946</sup> Panel Report, *EU – Footwear (China)*, para. 7.516.

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first written submission to show that, upon becoming known, MOFCOM took steps to identify if exchange rates were causing injury before it dismissed them. Australia's argument is not speculative, it simply reflects the absence of consideration by MOFCOM.<sup>947</sup>

(d) Consumer perceptions

600. Australia's position is that the evidence on the investigation record before MOFCOM established that: (i) consumer preferences and perceptions regarding wine products played an important role in the overall dynamics of the Chinese wine market; and (ii) Australian wine products benefited from comparatively better consumer perceptions and preferences than Chinese domestic like products.<sup>948</sup>

601. As Australia set out in prior submissions, consumer perceptions and preference for Australian products was a factor, separate from the effects of the alleged dumping, that was having an injurious impact on the domestic industry.<sup>949</sup> As a result, MOFCOM was required to consider this factor in order to identify any injury being caused to the domestic industry by consumer preferences and separate such injury from the injury said to have been caused by the subject imports through the effects of dumping. It did not do so.

602. In response, China has argued that MOFCOM: (i) did consider consumer perceptions and preferences as a non-attribution factor; (ii) the evidence did not establish that this was a relevant factor; and (iii) as a result, MOFCOM was justified in dismissing consumer perceptions and preferences on the basis that they did "not negate the causal link" between subject imports and material injury.<sup>950</sup> This creates three key differences between the parties.

603. First, MOFCOM did not consider consumer perceptions and preferences as a non-attribution factor. The portions of the investigation record relied on by China do not evidence any consideration by MOFCOM of whether differences in consumer perceptions and

<sup>947</sup> The matters raised by China at paragraphs 1976-1978 of its First Written Submission are not directed to Australia's argument and do assist China in showing that MOFCOM's treatment of exchange rates complied with Article 3.5. The rationale provided by China confirms that the price calculation methodology for subject imports involved at least one currency conversion - thus confirming that any changes in exchange rates are reflected in the price that MOFCOM calculated for subject imports.

<sup>948</sup> Australia's first written submission, paras. 708-710.

<sup>949</sup> Australia does not accept that all Australian wine products compete directly or are interchangeable/substitutable with all domestic like products (as MOFCOM determined); but to the extent that there is competitive overlap in the baskets of subject imports and domestic like products, consumer preferences and perceptions of Australian wine provided a competitive advantage that was separate, distinct, unrelated to any effects of the alleged dumping.

<sup>950</sup> China's first written submission, paras. 1998, 2001, 2003.

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preferences between Australian and Chinese wine products caused injury to the domestic industry.<sup>951</sup> The balance of China's first written submission on this issue are entirely *ex post facto* and should be disregarded.<sup>952</sup>

604. Second, the parties disagree as to whether the evidence on the record established that: (i) consumer preference and perceptions were a material factor; or (ii) that Australian products were perceived as being higher quality and preferred by Chinese consumers compared to domestic like products.<sup>953</sup> Australia's position is that, to the extent there is some competitive overlap in the baskets of subject imports and domestic like products, the evidence of consumer preferences and perceptions of Australian wine indicated a competitive advantage unrelated to any effects of the alleged dumping.<sup>954</sup> China's first written submission criticises the evidence placed on the record by interested parties.<sup>955</sup> These criticisms cannot remedy the deficiencies and gaps in MOFCOM's analysis.

605. Third, China's first written submission incorrectly characterises Australia's argument as speculative and attempts to conflate the argument with changes in apparent consumption.<sup>956</sup> Australia's argument is grounded in MOFCOM's finding that subject imports occupied a strong position in the Chinese market and evidence establishing that Chinese consumers preferred Australian wine products.<sup>957</sup> It is not speculative, nor is Australia's argument directed to material injury caused by changes in apparent consumption.<sup>958</sup> Rather, Australia's argument is that the evidence showed that despite consuming more wine between 2015 – 2017, Chinese consumers chose not to consume more *Chinese* wine. This is evidence in support of Australia's argument that consumer perceptions and preferences had a material

<sup>951</sup> China's first written submission, paras. 1996, 2000-2002, 2003-2004, 2010, 2025, 2029. These extracts relate to MOFCOM's: (i) dismissal of broader structural issues with the domestic industry as a non-attribution factor; (ii) like product determination; (iii) determination that subject imports compete with domestic like products; (iv) dismissal of Chinese domestic consumption policies as a non-attribution factor. At paragraph 2012 of its first written submission, China asserts that consumer perceptions were also considered by MOFCOM during its causation analysis as addressed in Section VII.E.5 of China's first written submission. This section does not detail any consideration of consumer perceptions by MOFCOM either during the investigation or by way of *ex post* justification.

<sup>952</sup> China's first written submission, paras. 1989-1995, 1998-1999, 2007-2009.

<sup>953</sup> Australia's first written submission, para. 709; China's first written submissions, paras. 1989-2032.

<sup>954</sup> Cf. China's first written submission, para. 1994.

<sup>955</sup> China's first written submission, paras. 1992-1993.

<sup>956</sup> China's first written submission, paras. 2013-2018, 2019-2031.

<sup>957</sup> Australia's first written submission, para. 709; China's first written submission, paras. 1330, 2014; Anti-Dumping Final Determination (AUS-2), p. 120. The translation issue raised by China at paragraphs 2017-2018 of its first written submission is not relevant to the issues in dispute.

<sup>958</sup> Cf. China's first written submission, paras. 2019-2031.

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impact on the dynamics of the Chinese wine market and could have caused material injury. An unbiased and objective investigating authority would have conducted a proper non-attribution analysis in respect of this factor. MOFCOM did not do so.

## 5. Conclusion

606. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

## VI. AUSTRALIA'S CLAIMS CONCERNING THE INITIATION OF THE INVESTIGATION

### A. INTRODUCTION

607. Australia has established a *prima facie* case that MOFCOM's initiation of the investigation was inconsistent with the requirements of Articles 5.1, 5.2, 5.2(i), 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement,<sup>959</sup> including because:

- MOFCOM failed to determine standing in accordance with Articles 5.1 and 5.4;<sup>960</sup>
- MOFCOM failed to require CADA to provide a list of all known domestic producers, contrary to Articles 5.1 and 5.2(i);<sup>961</sup>
- MOFCOM failed to examine the accuracy and adequacy of the evidence that CADA provided in the written application contrary to Articles 5.2 and 5.3;<sup>962</sup> and
- consequently, MOFCOM failed to reject the application and promptly terminate the anti-dumping investigation as soon as MOFCOM was satisfied that there was insufficient evidence, contrary to Article 5.8.<sup>963</sup>

<sup>959</sup> Australia's first written submission, paras. 742-826; Australia's opening statement at the first meeting of the Panel, paras. 20-23.

<sup>960</sup> Australia's first written submission, paras. 743-764.

<sup>961</sup> Australia's first written submission, paras. 765-768.

<sup>962</sup> Australia's first written submission, paras. 775-823.

<sup>963</sup> Australia's first written submission, paras. 824-826.



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608. China adduces several jurisdictional or "threshold" complaints concerning Australia's claims with respect to Article 5. These complaints are entirely without merit, and are addressed in ANNEX A and section II.A of this submission.<sup>964</sup>

609. For the reasons set out below, China has failed to rebut Australia's *prima facie* case.

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

**1. MOFCOM's examination of the degree of support for the application was flawed**

610. MOFCOM's assessment of the degree of support for CADA's application was deficient for two reasons. First, MOFCOM failed to conduct an adequate examination of the degree of support for, or opposition to, the application within CADA's membership. Second, MOFCOM failed to conduct *any* examination of the degree of support for, or opposition to, the application among non-CADA domestic producers.

**(a) MOFCOM did not examine the degree of support or opposition expressed by individual CADA members**

611. MOFCOM failed to base its examination of the degree of support for the application on the production volumes of the domestic producers who expressed support for, or opposition to, the application, as required under Articles 5.1 and 5.4 of the Anti-Dumping Agreement. On China's own submissions, it is clear that MOFCOM misunderstood the task that it was required to undertake.<sup>965</sup>

612. China submits that MOFCOM was not required to consider whether individual CADA members supported, were neutral to, or opposed the application, or the level of production represented by the individual members who were neutral to or opposed to the application.<sup>966</sup> China's contention is that no such assessment was required because, as a matter of CADA's internal governance arrangements, CADA's decision to request an anti-dumping investigation was binding upon all members of their organisation since "quorum" was met when this

<sup>964</sup> See above sections II.A - II.B and below Annex A.4.1.

<sup>965</sup> China's first written submission, paras. 2055-2056; response to Panel question No. 49, paras. 287-288.

<sup>966</sup> China's response to Panel question No. 49, para. 287.

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decision was made at a CADA meeting.<sup>967</sup> China argues that MOFCOM should have been able to "accept at face value a decision taken by an association".<sup>968</sup> China reiterated this in its written response to Panel question No. 49 following the first substantive meeting, stating that such decisions are "binding on all members, regardless of whether they voted in favour of the motion, or whether they were present."<sup>969</sup> As Australia explained in the first substantive meeting,<sup>970</sup> this approach, which China says MOFCOM took, is inconsistent with the requirements of Articles 5.1 and 5.4 of the Anti-Dumping Agreement.

613. In effect, China's contention is that an investigating authority is permitted to count the production volume of any domestic *producers* within an industry association who *oppose* the application as if it were support. This is contrary to the plain meaning of Article 5.4 of the Anti-Dumping Agreement. The production volume of members who oppose the application, even if they are the minority within their association, cannot be counted toward the degree of support of the domestic industry. This volume must instead be directed towards determining the degree of *opposition* in the domestic industry. The task imposed on an investigating authority by the Anti-Dumping Agreement to assess the level of support cannot be deprived of effect by the internal governance arrangements of an industry association.

614. Rather than engaging with Australia's arguments in this regard, China mischaracterises Australia's position to be that "*all* CADA members should have been present at the meeting."<sup>971</sup> That is not Australia's argument. Rather, Australia's argument is that CADA failed to indicate whether those domestic producers who supported the written application represented more than 50% of the total *production* of the like product produced by the portion of those domestic producers expressing either support for or *opposition* to the written application.

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<sup>967</sup> China's first written submission, paras. 2053 and 2056.

<sup>968</sup> China's first written submission, para. 2055.

<sup>969</sup> China's response to Panel question No. 49, para. 287.

<sup>970</sup> Australia's comments on China's response to Panel question No. 49 at the first meeting of the Panel.

<sup>971</sup> China's first written submission, para. 2054.

(b) MOFCOM failed to examine the degree of support for or opposition to CADA's written application outside CADA's membership

615. As set out in Australia's first written submission, there is no evidence on the record indicating any examination by MOFCOM of the level of support for the application among domestic producers outside CADA's membership.<sup>972</sup> China has confirmed that no such examination took place, but states that MOFCOM was prohibited from doing so because of Article 5.5 of the Anti-Dumping Agreement.<sup>973</sup>

616. China's reliance on Article 5.5 is misplaced. Article 5.5, in relevant part, provides that "authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation."<sup>974</sup> The ordinary meaning of "publicize" is "to bring to public notice or attention; to make generally known".<sup>975</sup> The obligation in the first sentence of Article 5.5 does not prevent an investigating authority from undertaking the examination required under Article 5.4, and China cannot invoke this provision to excuse MOFCOM's failure to do so. An examination of the degree of support for, or opposition to, an application can be readily conducted without "publicizing" the application to the general public. This may involve, for example, direct communications with the domestic producers (or with a statistically valid sample of producers, pursuant to footnote 13 of the Anti-Dumping Agreement).

617. Finally, China contends that MOFCOM's failure to undertake an examination of the degree of support or opposition is inconsequential, since "even if all other producers had opposed the application, CADA would have still had industry standing" as it had "well over 50 per cent of the total production in China".<sup>976</sup> This argument suffers from two flaws.

<sup>972</sup> Australia's first written submission, paras. 753-755.

<sup>973</sup> China's First Written Submission, para. 2057.

<sup>974</sup> Article 5.5 of the Anti-Dumping Agreement.

<sup>975</sup> Oxford Dictionaries online, definition of "publicize" <https://www.oed.com/view/Entry/154066> (accessed 1 November 2022).

<sup>976</sup> China's first written submission, para. 2059.

618. First, the obligation in Article 5.4 was for MOFCOM to undertake an examination of the degree of support. China's *ex post facto* assertions about what MOFCOM might have found had it undertaken such an examination are insufficient.

619. Second, China's contention that CADA's application had "well over 50 per cent of the total production in China"<sup>977</sup> is made by reference to the data provided by CADA on the output of its members and total domestic production figures. As Australia has demonstrated, and MOFCOM has conceded, that data was unreliable because it included a range of products outside the scope of the investigation, and only a subset of producers.<sup>978</sup> MOFCOM made no adjustments for these deficiencies in the data.<sup>979</sup>

## **2. China relies on documents that it has not disclosed to support its arguments**

620. In its first written submission, China provided a summary of the information regarding the alleged percentage of CADA members that supported the written application,<sup>980</sup> but failed to point to any supporting evidence. Moreover, even taken at face value, the summary information that China provided still failed to indicate the production volumes of those CADA members who allegedly supported the application. During the first substantive meeting, the Panel expressly requested that China submit evidence from the record, but China declined to provide this information on confidentiality grounds.<sup>981</sup> Under these circumstances, Australia requests that the Panel take into consideration not only China's failure to substantiate its assertions, but also its refusal to take the steps necessary to provide relevant information the Panel has requested.

<sup>977</sup> China's first written submission, para. 2059.

<sup>978</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p.26; CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), p. 20; and China's first written submission, para. 2061 (CADA relied upon wine production data from China's National Bureau of Statistics "for wine production enterprises above the scale (annual main business income of more than RMB 20 million)").

<sup>979</sup> Australia's first written submission, paras. 758-764.

<sup>980</sup> China's first written submission, para. 2055.

<sup>981</sup> See above section II.E.

### 3. CADA's domestic production data was unreliable for MOFCOM's standing determination

621. The domestic production values of like products that CADA included in its application, both for the total output of CADA's members and the total domestic production of all domestic producers, was based on data that included products outside the scope of the investigation.<sup>982</sup> MOFCOM treated this data as reliable for the purposes of assessing the degree of support for the application, even though it was, by its nature, incapable of allowing MOFCOM to determine the level of production of domestic like products represented by those domestic producers who supported or opposed the application.

622. MOFCOM itself recognised that the data was deficient,<sup>983</sup> a fact China has also subsequently conceded, stating that "MOFCOM found that the data in the application not only covered the like product, but also some non-subject product wines."<sup>984</sup> These deficiencies should have been evident to MOFCOM at the time it made the decision to initiate the investigation.<sup>985</sup>

623. China has offered no arguments at all to rebut Australia's claim and arguments as set out in its first written submission concerning MOFCOM's improper initiation of an investigation in light of the unreliable data and, in particular, data that included products outside the scope of the investigation.<sup>986</sup>

624. Finally, in addition to the inclusion of data on products outside the scope of the investigation, data supplied by CADA from China's National Bureau of Statistics only purported

<sup>982</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 108-109; Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 36; and Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 58.

<sup>983</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 108-109; Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 36; and Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 58.

<sup>984</sup> China's response to Panel question No. 49, para. 295.

<sup>985</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 108 ("Australian Grape & Wine Incorporated claimed in its Comments on the Ministry of Commerce Initiating the Anti-Dumping Investigation into Relevant Imported Wines Originating in Australia that they were sceptical about the overall output of Chinese wines provided in the Application because there were some problems in the reliability of its market statistics. It believed that some statistics were 'counted twice' in the application form"). See also China's response to Panel question No. 49, paras. 294-295.

<sup>986</sup> See Australia's first written submission, paras. 757-764; and China's response to Panel question No. 49, para. 293. China attempts to justify MOFCOM's failure by asserting that "all products classifiable under HS Code 22042100 were included in the scope of the investigation" and says that this included some liqueur wines. Even if this is the case, it is not an answer to the deficiencies in the data, which included a range of other wine products that all parties accept were outside of the scope of the investigation, such as bulk wines.

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to identify 90% of total domestic production.<sup>987</sup> China's response, that "there is nothing on the record to suggest that the 'missing 10%' were CADA members",<sup>988</sup> is irrelevant. Australia does not argue that CADA represented the missing 10%. Rather, Australia argues that this missing 10% of total domestic production should have been included in the volume of total domestic production that CADA relied upon (had it been based on accurate data). Excluding a proportion of domestic production from the figure for total domestic output would skew the proportion calculated under Article 5.4.<sup>989</sup> Furthermore, China states that a 10% error is immaterial if CADA's figures are correct.<sup>990</sup> China's response misses the point. Given the data CADA submitted contained clear errors, such as the inclusion of products outside the scope of the investigation, the omission of 10% of total domestic production may have had the potential to be of decisive significance to whether, on the basis of accurate data, the numerical thresholds in Article 5.4 have been satisfied.

#### **4. China failed to require CADA to provide a list of all known domestic producers**

625. China breached its obligations under Article 5.2(i) of the Anti-Dumping Agreement by failing to require CADA to provide a list of all known domestic producers. China appears to accept that CADA only provided a list of CADA members, omitting any detail about the "hundreds" of other producers that CADA describes in general terms.<sup>991</sup>

626. China submits that this is defensible, because it interprets Article 5.2(i) to mean that the "application ... only needs to include either a list of producers known to the applicant, or of the associations of domestic producers."<sup>992</sup>

627. This interpretation is contrary to the evident purpose of the clause of Article 5.2(i) "(or associations of domestic producers of the like product)". This purpose is to provide an

<sup>987</sup> CADA Application for Anti-Dumping Investigation, Annexes 1-12 (Part 1) (Exhibit AUS-90), p. 26 ("Note: The above data is based on data from the National Bureau of Statistics for wine production enterprises above the scale (annual main business income of more than RMB 20 million). According to the information available to the Association, wine producers above the scale account for the majority of the total domestic production, accounting for more than 90 %, and can represent the overall situation of China's wine industry").

<sup>988</sup> China's first written submission, para. 2060.

<sup>989</sup> Australia's first written submission, para. 760.

<sup>990</sup> China's first written submission, para. 2061.

<sup>991</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 10 ("According to the relevant statistics, there are hundreds of domestic wine producers in more than 20 provinces, autonomous regions, and directly-controlled cities, [...]"), p. 60 ("China's wine industry is very spread out, with hundreds of wine production enterprises concerned").

<sup>992</sup> China's first written submission, para. 2062.

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alternative mechanism for efficiently identifying individual members, rather than as a way to entirely discharge the obligation to identify the producers. In circumstances where, as China contends, there was a single known association with 122 members, and "hundreds" of producers outside that association, it was insufficient to identify "the industry" only through naming the single association. Rather, an applicant must *also* provide a list of *known* producers outside of that association.

628. China also argues, in the alternative, that "it is not reasonable to expect the applicant to have information on producers not part of the association, and especially not on each and every producer in China".<sup>993</sup> This mischaracterises Australia's argument. Australia has not argued that CADA should have submitted information on each and every producer in China. Rather, it was required to provide a list of those that were *known* to it.

629. Australia's case is that CADA, as the peak organisation for the Chinese alcoholic drinks industry, would have reasonably known of *some* domestic producers outside its members given it 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."<sup>994</sup> China provides the *ex post facto* rationalisation that "even though CADA was aware of the fact that there were several other producers in China, CADA did not know who these other producers were, nor what their production volumes were".<sup>995</sup> China's assertion in this regard is not evidenced by any information on the record submitted by CADA. Instead, as China emphasises in its submissions, CADA's purported functions include the following: "reflect the situation and opinions of the industry", "develop industry cooperation", "promote the healthy development of the industry" and "macro management of the wine industry".<sup>996</sup> In this light, it seems improbable that CADA, including its 122 members, did not know the name of a single domestic producer of like domestic products outside of its own membership.

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<sup>993</sup> China's first written submission, para. 2062.

<sup>994</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 10.

<sup>995</sup> China's first written submission, para. 2064.

<sup>996</sup> China's first written submission, paras. 2044-2045 (citing CADA Application for Anti-Dumping investigation (Exhibit AUS-64), pp. 6-7).

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630. Further, information that is available to CADA's members is information that is reasonably available to CADA within the meaning of the chapeau of Article 5.2. Given that CADA describes hundreds of other producers<sup>997</sup>, CADA's members would have known who at least some of their non-CADA competitors in the Chinese market were, at least on a regional or product-specific basis. Therefore, MOFCOM failed to require CADA to provide a list of all known domestic producers of the like product.

**C. CADA'S WRITTEN APPLICATION CONTAINED INSUFFICIENT EVIDENCE OF DUMPING, INJURY AND CAUSATION FOR THE PURPOSES OF INITIATION**

**1. Australia and China appear to agree on the legal standard applicable under Articles 5.2 and 5.3 of the Anti-Dumping Agreement**

631. Australia and China appear to agree that the relevant legal standard under Articles 5.2 and 5.3 of the Anti-Dumping Agreement in relation to an application for initiation of an investigation contains the following elements:

- 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;<sup>998</sup> and
- an investigating authority must determine whether the application contains information that might be used to establish dumping, injury, and a causal link, of a quantity and scope to justify the initiation of an investigation.<sup>999</sup> In this context, "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph."<sup>1000</sup>

<sup>997</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), pp. 10, 60.

<sup>998</sup> Australia's first written submission, para. 770; and China's first written submission, para. 2069.

<sup>999</sup> Australia's first written submission, para. 771; and China's first written submission, para. 2070.

<sup>1000</sup> Australia's first written submission, para. 773; and China's first written submission, para. 2072.



632. The parties diverge in terms of whether the evidence submitted by CADA met the standard as described above.

**2. CADA's written application contained insufficient evidence of dumping**

**(a) Normal value**

633. In its application, CADA provided the prices of wines imported into Australia from China as a proxy to determine the normal value of Australian wine. As Australia set out in its first written submission, this is not a permitted basis upon which to support a finding of sufficiency of evidence of dumping for the purpose of initiation.<sup>1001</sup>

634. China's response is that the specific language in Article 5.2(iii) permits MOFCOM's approach because it refers only to "information on prices at which the product in question is sold when destined for consumption in the domestic market of the country or countries of origin or export."<sup>1002</sup> The difficulty with this argument, which China ignores, is that the concept of "product in question" is clearly contextually the "allegedly dumped product" referred to in Article 5.2(iii). The investigation did not concern allegations of dumping of Chinese wines exported to Australia. Contrary to China's submissions, the fact that the approach taken by MOFCOM is not expressly prohibited in the Anti-Dumping Agreement does not mean it is consistent with it.<sup>1003</sup>

635. In any event, even if that method were permissible, it would only be in circumstances where the sale price of Chinese wines imported into Australia could be shown to be a reasonable basis on which to make relevant findings about the price at which the product in question is sold in Australia more generally. There was no information before MOFCOM to make such a finding, with the only relevant information being that Chinese imported wines were sold at extremely low volumes in Australia. The material available to MOFCOM showed

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<sup>1001</sup> Australia's first written submission, paras. 782-789. China attempts to misrepresent Australia's argument on this point by stating that Australia "does recognise the possibility that prices could be determined on this basis" (China's first written submission, para. 2088). This is entirely disingenuous, as China is cherry-picking a partial quote from a different section of Australia's first written submission and treating this as Australia's position. Australia has set out its detailed arguments with respect to this issue (Australia's first written submission, paras. 782-789).

<sup>1002</sup> China's first written submission, para. 2094.

<sup>1003</sup> China's first written submission, para. 2096.

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that Chinese imports represented approximately 0.003% of total imports of Australian wine into China in 2019.<sup>1004</sup>

636. China attempts, on an *ex post facto* basis, to assert that these very low volumes lead to an inference that MOFCOM's approach was a conservative one, since low volumes should imply those were low-priced wines.<sup>1005</sup> There is no evidence that this was MOFCOM's reasoning and, in any event, the evidence about low volumes was more consistent with those products being unusual high-end examples of Chinese wine. It is commercially improbable that importers sought to export very low quantities of low-quality wines. However, the volumes and values would be more consistent with high-end boutique or novelty products.

637. Australia reiterates that where evidence on normal value before the investigating authority at the time of initiation does not pertain to a producer or exporter of the product under consideration, 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.<sup>1006</sup> In this regard, MOFCOM chose to do nothing.

638. China argues that "Australia itself acknowledges that the normal value did not have to be established with reference to the prices of *Australian* producers", by incorrectly relying on the panel report in *Mexico – Steel Pipes and Tubes*.<sup>1007</sup> Australia clarifies that the relevant issue is whether the evidence put forward by CADA was an appropriate proxy for normal value and whether an unbiased and objective investigating authority would have been satisfied of the adequacy and accuracy of this evidence for the purposes of initiation.

639. Australia briefly clarifies the panel's position in *Mexico – Steel Pipes and Tubes* for the Panel's benefit. In that dispute, the panel found that the relevant investigating authority acted inconsistently with its obligations under Article 5.3 of Anti-Dumping Agreement because it failed to consider obvious issues with the normal value evidence put forward by the applicant.<sup>1008</sup> One of these issues was "the sufficiency of the nexus with producer/exporter

<sup>1004</sup> Australia's first written submission, para. 788; 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 8.

<sup>1005</sup> China's first written submission, paras. 2093, 2105.

<sup>1006</sup> Australia's first written submission, para. 783; Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.35, 7.37-7.39.

<sup>1007</sup> China's first written submission, paras. 2100-2101.

<sup>1008</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.43.

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pricing in the Guatemalan home market for the product under investigation."<sup>1009</sup> In that dispute, the normal value evidence put forward did not pertain to the only known Guatemalan exporter of the allegedly dumped product. Similarly, in this case, the normal value put forward by CADA does not pertain to any *Australian* domestic producer or exporter.

640. In *Mexico – Steel Pipes and Tubes*, the panel found that Mexico had pointed to no evidence on the record that indicated the investigating authority took *any* steps to determine whether the products were reflective of the only identified Guatemalan producer or exporter or "even that these products were of Guatemalan origin."<sup>1010</sup> Similarly, in this case, there is no evidence on the record to indicate that MOFCOM took any steps to determine whether the Chinese imports into Australia were reflective of prices in the Australian market, let alone of the domestic sales of any Australian exporter or producer.

641. Finally, to clarify a further mischaracterisation by China of Australia's argument, Australia does *not* argue that CADA should have provided normal values for each of the products corresponding to their specific PCNs.<sup>1011</sup> Australia argues that MOFCOM should have made its best endeavours to ensure that the normal value evidence submitted by CADA *reflected* the prevailing home market pricing in Australia. There is no evidence on the record to indicate that MOFCOM did this.<sup>1012</sup>

(b) Export price

642. Australia maintains that CADA supplied insufficient evidence for the purposes of initiation with respect to export price.<sup>1013</sup> China has failed to rebut Australia's argument in this regard. Instead, China again seeks to mischaracterise Australia's arguments.<sup>1014</sup> To be clear, Australia does *not* argue that CADA should have provided transaction-by-transaction export prices.<sup>1015</sup> Australia's claims with respect to CADA's purported export price relate to its failure to make a proper fair comparison, as discussed below.

<sup>1009</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.34.

<sup>1010</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.36.

<sup>1011</sup> China's first written submission, paras. 2090-2092, 2095.

<sup>1012</sup> Australia's first written submission, para. 783.

<sup>1013</sup> Australia's first written submission, paras. 790-797.

<sup>1014</sup> China's first written submission, paras. 2107-2108.

<sup>1015</sup> Australia's first written submission, para. 790.

(c) Fair comparison

643. Australia argues that CADA failed to make due allowance for factors affecting price comparability so as to ensure a fair comparison between normal value and export price. China offers unsubstantiated *ex post facto* assertions of the hypothetical impact that adjustments would have made to normal value and export price.<sup>1016</sup> These explanations do not indicate the actions of an unbiased and objective investigating authority.

644. Australia maintains that MOFCOM should have made further enquiries to CADA to understand why CADA found normal value to be "representative and comparable",<sup>1017</sup> notwithstanding the reasons discussed above and previous submissions made by Australia as to why it is, in fact, *not* representative nor comparable.<sup>1018</sup> The fact that CADA proposed *no* adjustments to normal value should have triggered further enquiries by MOFCOM as to whether this information was sufficiently accurate for the purposes of initiation.

645. With respect to export price, Australia maintains that speculative adjustments CADA made for domestic links were inadequate.<sup>1019</sup> Further, CADA failed to provide original sources in several annexes. It only provided unsubstantiated screenshots of information which should have prompted an unbiased and objective investigating authority to make further enquiries.

**3. CADA's written application contained insufficient evidence of injury and causation**

646. Australia clarifies that paragraph 804 of its first written submission should be understood to read that Article 5.2(iv) of the Anti-Dumping Agreement "requires investigating authorities to have before them, at the time of initiation, the same type of evidence of injury

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<sup>1016</sup> China's first written submission, paras. 2102 and 2104. China argues that even without making upwards adjustments for additional costs that would be incurred after customs clearance in Australia, such as inland freight and warehousing, the information already showed dumping. China acknowledges that CADA did not indicate the adjustments made to normal value to bring it to the same level of Australian sales. However, China states that "it is important to note that that had such adjustments been made to include, for instance, inland transport in Australia and the SG&A costs of Australian producers, this would have significantly increased the normal value, thus strengthening the allegation that dumping was taking place".

<sup>1017</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 28.

<sup>1018</sup> Australia's first written submission, paras. 777-789.

<sup>1019</sup> Australia's first written submission, paras. 795-797.

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and causation as defined in Article 3 [...]"<sup>1020</sup> It is not Australia's position that an investigating authority must conduct a full investigation prior to initiation.<sup>1021</sup>

647. For the reasons outlined in Australia's first written submission,<sup>1022</sup> there was insufficient evidence of injury and causation provided by CADA for the purposes of initiation, and, moreover, MOFCOM failed to assess the accuracy and adequacy of this evidence.

#### **4. The application should have been rejected**

648. Pursuant to Article 5.8 of the Anti-Dumping Agreement, as soon as an investigating authority is "'satisfied' that there is not sufficient evidence"<sup>1023</sup> of either dumping, injury or causation, it must reject the application and terminate an investigation.<sup>1024</sup>

649. As detailed in Australia's first written submission and 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.

#### **D. CONCLUSION**

650. MOFCOM failed to: (i) determine standing adequately; (ii) require CADA to provide a list of all known domestic producers; (iii) examine the accuracy and adequacy of the evidence provided by CADA in the written application; and (iv) reject the application and promptly terminate the anti-dumping investigation as soon as it was satisfied that there was insufficient evidence.

651. For the reasons set out above, and in Australia's first written submission,<sup>1025</sup> China has failed to rebut Australia's claims that MOFCOM acted inconsistently with Article 5 in its improper initiation of the anti-dumping investigation.

<sup>1020</sup> Australia's first written submission, para. 804 (corrected); China's first written submission, para. 2142.

<sup>1021</sup> China's first written submission, para. 2164.

<sup>1022</sup> Australia's first written submission, paras. 802-823.

<sup>1023</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books* (Tunisia), paras. 7.359-7.360.

<sup>1024</sup> 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 [...]").

<sup>1025</sup> Australia's first written submission, paras. 742-826.

## **VII. AUSTRALIA'S CLAIMS CONCERNING MOFCOM'S CONDUCT AND TRANSPARENCY OF THE INVESTIGATION**

### **A. INTRODUCTION**

652. Australia's claims with respect to MOFCOM's conduct of the investigation, including the lack of transparency, inadequate disclosures on MOFCOM's part, and the quality of the reasons it provided, form a significant part of this dispute. MOFCOM's investigation was characterised by fundamental procedural deficiencies from beginning to end that undermined its findings with respect to dumping, injury and causation. The Panel cannot address errors in the substantive determination without also addressing the procedural errors that underpin and compound them.

653. In this section, Australia addresses key issues concerning the due process framework in Articles 6 and 12 of the Anti-Dumping Agreement, including rebuttal of certain arguments China has advanced. For the reasons set out below and in Australia's previous submissions, China has failed to rebut Australia's *prima facie* case that 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**

654. Australia has established a *prima facie* case with respect to its claims under Article 6.5.<sup>1026</sup> For the reasons set out below, China has failed to rebut those claims.

655. Furthermore, China adduces several jurisdictional or "threshold" complaints concerning Australia's claims with respect to Article 6.5. These complaints, which are entirely without merit, are specifically addressed below in Annex A.<sup>1027</sup>

<sup>1026</sup> See Australia's first written submission, paras. 831-880; opening statement at the first meeting of the Panel, paras. 119-130; response to Panel question No. 55, including Attachment A.

<sup>1027</sup> See above sections II.A - II.B and below Annex A.4.

# **1. The legal framework for the assessment of "good cause" under Article 6.5**

656. China's submissions contain a lengthy recital of what it describes as the "correct interpretation" of the legal standards under Articles 6.5 and 6.5.1.<sup>1028</sup> Although this section is entitled "Australia's claims are based on an incorrect and/or improper interpretation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement", China does not identify Australia's alleged errors or impropriety in its discussion under this heading.<sup>1029</sup>

657. That aside, there appears to be some convergence between the parties on the applicable legal standards. However, there are certain points of disagreement, addressed below, and substantial disagreement concerning the application of those standards to the factual circumstances in the investigation.

658. By way of summary, Australia understands that the parties do not disagree on the following principles relevant to a panel's assessment of Australia's claim that MOFCOM's conduct contravened Article 6.5:

- the "good cause" alleged by an interested party must constitute a reason sufficient to justify withholding the information from both the public and other interested parties. It must demonstrate the risk of a potential adverse consequence that would follow from the disclosure of the information, the avoidance of which is important enough to warrant the non-disclosure of the information;<sup>1030</sup>

<sup>1028</sup> China's first written submission, paras. 2243-2270. The headings to these sections are "Australia's claims are based on an incorrect and/or improper interpretation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement", "The correct interpretation of the requirement to show 'good cause' in Article 6.5 of the Anti-Dumping Agreement", and "The correct interpretation of 'in sufficient detail' and 'statement of the reasons why summarization is not possible' in Article 6.5.1 of the Anti-Dumping Agreement".

<sup>1029</sup> The one inconsequential exception is China's first written submission, fn. 2093. China argues that "[c]ontrary to what Australia asserts, it is not the investigating authority, as such, that has to be 'unbiased and objective'. Rather, it is the investigating authority's assessment that has to be 'unbiased and objective'." The distinction China alleges appears to lack any meaningful difference; Australia fails to understand how an investigating authority that is biased and lacks objectivity could undertake an unbiased and objective investigation. See also Panel Report, *US – Softwood Lumber VI*, para. 7.15, in which the panel defined the evaluation of facts in an unbiased and objective manner as an assessment that could have been reached by "an unbiased and objective decision maker".

<sup>1030</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 537 (cited China's first written submission, para. 2247, fn. 2095); and Australia's first written submission, para. 836.

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- it is not the role of a panel to undertake a "*de novo* review" in order to determine whether there was a legal basis for according confidential treatment to the information;<sup>1031</sup> and
- a panel's task is to assess whether an investigating authority has objectively assessed "good cause". It does so by examining 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.<sup>1032</sup>

659. The apparent disagreement as to the legal standard is therefore limited to three areas, which Australia addresses in turn below.

660. First, China contends that the Panel's role, in the present case, is limited to a "simpl[e] check" of *whether* there is evidence that MOFCOM conducted an assessment of the existence of "good cause".<sup>1033</sup> Australia disagrees. The Appellate Body has made clear that a panel's task is to assess both whether there is evidence of such an assessment, and whether the assessment was "objective".<sup>1034</sup> While this Panel is not required to undertake a *de novo* review, it is required to assess whether MOFCOM's assessment of "good cause" was that of an unbiased and objective investigating authority.

661. Second, China "posits" that if an investigating authority properly classifies certain information as "by nature" confidential, then the requirement to check for "good cause" is "*ipso facto* satisfied". China cites *EU – Footwear (China)* in support of this proposition.<sup>1035</sup> Australia disagrees. While, as China notes, this was the submission made by the European Union in that dispute, it was not an interpretation adopted by that panel either expressly or implicitly. Moreover, the Appellate Body has repeatedly confirmed that a showing of "good cause" is required for both categories of information under Article 6.5.<sup>1036</sup>

<sup>1031</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.102 (cited China's first written submission, para. 2246, fn. 2092).

<sup>1032</sup> Appellate Body Report, *China – HP-SST (Japan)*, para. 5.97 (cited China's first written submission, para. 2249, fn. 2098); Australia's first written submission, para. 839.

<sup>1033</sup> China's first written submission, para. 2247.

<sup>1034</sup> Appellate Body Report, *China – HP-SST (Japan)*, para. 5.97.

<sup>1035</sup> China's first written submission, para. 2256.

<sup>1036</sup> Appellate Body Reports, *China-HPSSST (Japan)*, para. 5.95; *EC – Fasteners (China)*, paras. 536-537.



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662. Australia accepts that, as a matter of practicality, if an investigating authority "properly classifies" certain information as "by nature" confidential, then that process of "properly" classifying the information *may* occur in parallel to an assessment of whether there is "good cause". But the requirements of the two assessments are legally distinct. As the Appellate Body has explained, the assessment of "good cause" involves a balancing of the submitting party's interest in protecting its confidential information with the prejudicial effect of non-disclosure on the transparency and due process interests of other parties involved in the investigation.<sup>1037</sup> It is not simply an assessment of whether the information is capable of being regarded as confidential.

663. Third, in its first written submission China emphasises excerpts from the Appellate Body report in *EC – Fasteners (China)* in which the Appellate Body observed that "[t]he degree of risk [of potential commercial retaliation if certain information was not kept confidential] does not define what constitutes 'good cause' within the meaning of Article 6.5".<sup>1038</sup> Australia does not take issue with this proposition, but considers that it needs to be placed in its full context, including the relevant circumstances of the dispute in which it arose.

664. In particular, the Appellate Body's explanation was provided in the context of rejecting China's submission that confidential treatment was only justified if it could be shown that commercial retaliation "would", rather than merely "could", happen.<sup>1039</sup> It was not, as might be thought from the extract presented in China's submissions, a finding that the degree or likelihood of the risk materialising is irrelevant to the assessment of whether good cause has been shown. Rather, as the Appellate Body went on to explain in that report, the degree of risk of commercial retaliation is: "a matter relevant to the extent and nature of the evidence required by an investigating authority to support a showing of 'good cause'"<sup>1040</sup>; "[i]n reviewing the authority's determination of 'good cause', the panel's assessment of the likelihood that commercial retaliation will occur goes to the panel's weighing of the evidence"<sup>1041</sup>; and "[t]he level of risk and, more particularly, the likelihood or probability that

<sup>1037</sup> Appellate Body Reports, *China-HPSS (Japan)*, para. 5.95; *EC-Fasteners (China)*, para. 539.

<sup>1038</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 587 (as cited in China's first written submission, para. 2258, fn. 2120).

<sup>1039</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 586-587.

<sup>1040</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 587.

<sup>1041</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 587.

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such risk may come about are matters of degree and must be assessed on the facts, and the Panel conducted such an assessment in reaching its finding".<sup>1042</sup>

**2. The legal framework for the requirement to provide a summary in sufficient detail or a statement of reasons as to why summarisation is not possible**

665. It does not appear to Australia that there is any disagreement between the parties as to the applicable legal standard, which requires non-confidential summaries to be furnished "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

666. Rather than contest Australia's account of the applicable legal standard,<sup>1043</sup> China's submissions instead emphasise what are described as "systemic issues" that China considers would arise if a "high level of detail" were required to be provided as part of the non-confidential summaries.<sup>1044</sup> In respect of these points, Australia makes the following observations.

667. First, China's so called "systemic issue" sets up a straw argument. Contrary to what China's submissions imply, Australia does not contend (and has not contended) that Article 6.5.1 imposes a general obligation to provide a "high level of detail" or requires a "highly granular non-confidential summary". Australia's claims are clearly directed at whether the non-confidential summaries at issue provided "sufficient detail to permit a reasonable understanding of the substance of the information", as per the requirement of Article 6.5.1. China does not dispute this requirement.

668. Second, even if a situation arose in which a "highly granular non-confidential summary" was required to meet the standard set out in Article 6.5.1, then it would be a fact-specific question as to whether providing that level of granular information could be done without disclosing the information for which confidential treatment was requested. That is, it is not, as China suggests,<sup>1045</sup> inevitable, as a matter of either practice or logic, that a high

<sup>1042</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 588.

<sup>1043</sup> Australia's first written submission, paras. 841-843.

<sup>1044</sup> China's first written submission, paras. 2261-2264.

<sup>1045</sup> China's first written submission, para. 2262.

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degree of granular detail would always require the disclosure of confidential information. However, even if such disclosure was required, then Article 6.5.1 provides the solution. Such a situation would fall within the "exceptional circumstances" contemplated in the last two sentences of Article 6.5.1, which provide as follows: "[i]n 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".<sup>1046</sup>

669. Accordingly, contrary to China's submissions, there is no basis to treat the spectre of such a hypothetical situation occurring as a "systemic issue" that should artificially limit the requirement for non-confidential summaries to be provided in "sufficient detail".

670. China's submissions also contain several paragraphs on what it considers to be the limits on a panel's power to review an investigating authority's assessment of the reasons for the impossibility of summarisation of confidential information.<sup>1047</sup> In Australia's submission, this issue does not arise in the present dispute, as there is no evidence on the record of any interested party having claimed that the confidential information they submitted was not susceptible of summary. Article 6.5.1 is clear that such a claim must be accompanied by a "statement of reasons", meaning there is no scope for such claims to be made by inference or implication.<sup>1048</sup> The Appellate Body confirmed in *EC – Fasteners (China)* that an investigating authority's preparedness to infer such a claim from an assertion that information was by nature confidential was inconsistent with the obligations in Article 6.5.1.

671. Nonetheless, even if the Panel were to entertain the inference that "exceptional circumstances" did arise in this matter, then Australia disagrees with China's assertions that a panel has no power to examine MOFCOM's assessment of the reasons for the impossibility of summarisation of confidential information and that a panel "has no role to play, other than

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<sup>1046</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 552 (In explaining the standard for such statements, the Appellate Body explained as follows: "summarization of confidential information will not be possible where no alternative method of presenting the information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence" In Australia's view, China's hypothetical scenario falls squarely within the circumstances the Appellate Body described.)

<sup>1047</sup> China's first written submission, paras. 2266-2269.

<sup>1048</sup> The Appellate Body rejected an attempt to infer such a claim in Appellate Body Report, *EC-Fasteners (China)*, para. 544.

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checking that reasons have indeed been submitted".<sup>1049</sup> This Panel's role is undoubtedly, as China appears to accept elsewhere in its submissions,<sup>1050</sup> to assess whether MOFCOM's establishment of the facts was proper and its evaluation of those facts "unbiased and objective".

672. For completeness, Australia notes China's assertion that its mere statement that "due to the very nature of the (confidential) information [...] [it] is not susceptible to summarization" is sufficient to meet the requirement to provide a "statement of reasons" for purposes of Article 6.5.1.<sup>1051</sup> This is not the factual situation that is presented to the Panel in this matter. There is no evidence on the record that any party claimed confidential information was not susceptible of summarisation.

673. However, even if the issue did arise, China's interpretation is plainly inconsistent with the text of Article 6.5.1. It contains two separate requirements:

- as set out in the third sentence, to "indicate that such information is not susceptible of summary"; and
- as set out in the fourth sentence, in such exceptional circumstances "a statement of reasons why summarization is not possible must be provided".

674. China's interpretation would strip the requirement set out in the fourth sentence of any effect, since it reduces a "statement of reasons" to the briefest of bare assertions. China advanced essentially the same interpretation, and the panel rejected it, in *China – X-Ray Equipment*. In that dispute, the panel held that: "a simple reference to the 'nature' of confidential information does not adequately explain why, exceptionally, that information cannot be summarized."<sup>1052</sup>

### **3. China misrepresents Australia's arguments**

675. Rather than engaging with the arguments that Australia has presented, China misrepresents Australia's arguments, including alleging the existence of arguments that Australia has not made. In doing so, China's submission gives the appearance of points of

<sup>1049</sup> China's first written submission, para. 2266.

<sup>1050</sup> China's first written submission, paras. 2268, 2339.

<sup>1051</sup> China's first written submission, para. 2269.

<sup>1052</sup> Panel Report, *China X-Ray Equipment*, para. 7.368.

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disagreement between the parties that simply do not exist. Once the misrepresentations are corrected, Australia's arguments in this context remain uncontested.

676. First, China contends that Australia asks the Panel to engage in a *de novo* review of MOFCOM's grant of confidentiality.<sup>1053</sup> No such request is made. China's asserted basis for this claim are submissions made by Australia that certain information is "unlikely to be genuinely confidential on its face".<sup>1054</sup>

677. This complaint is surprising given that China *itself* submits that an investigating authority's finding of "good cause" has to be made, *inter alia*, "in light of the **nature** of the information at issue".<sup>1055</sup> Australia agrees with this proposition, which was taken from the Appellate Body's report in *EC – Fasteners (China)* and quoted in Australia's first written submission.<sup>1056</sup> Further, this proposition is consistent with Australia's submission that regard should be had by an investigating authority, and a reviewing panel, to the apparently non-confidential character of the information in making its assessment of "good cause shown" for confidential treatment. Such consideration does not involve the Panel undertaking a "*de novo*" review, but instead informs its assessment of whether the investigating authority's assessment was unbiased and objective. Australia does not understand China to disagree with this proposition.

678. Second, China unfairly and inaccurately alleges that Australia "posited" that the Panel should "restrict itself to MOFCOM's determinations and supporting documents" when identifying "evidence" of whether MOFCOM objectively assessed the existence of "good cause".<sup>1057</sup> The paragraph of Australia's first written submission that China cites to

<sup>1053</sup> China's first written submission, para. 2328. China states that "Australia seeks to improperly request the Panel to conduct a *de novo* review of MOFCOM's grant of confidential treatment". However, China does not cite where from where the "request" was taken.

<sup>1054</sup> China's first written submission, para. 2273.

<sup>1055</sup> China's first written submission, paras. 2252 (emphasis original). See also para. 2275 ("the Panel in the present case, is not to restrict itself to MOFCOM's determinations and supporting documents, when identifying 'evidence' for MOFCOM's 'objective assessment' of the existence of 'good cause' for the grant of confidential treatment. In its task of identifying such evidence, the Panel also needs to consider the actual nature of the information at issue, and also assess the reasons given by the interested parties requesting confidential treatment").

<sup>1056</sup> Australia's first written submission, para. 838.

<sup>1057</sup> China's first written submission, para. 2275. China goes on to incorrectly argue that "contrary to what Australia posits, [...] the Panel also needs to consider the actual nature of the information at issue, and also assess the reasons given by the interested parties requesting confidential treatment".

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substantiate this allegation clearly states the opposite, providing as follows and citing the Appellate Body reports in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, :

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.<sup>1058</sup>

679. It is clear from a review of Australia's submission that the argument said to have been "posited" by Australia simply was not made. Moreover, it does not appear that there is any controversy between the parties that the standard actually set out in Australia's submission, extracted above, is the applicable standard, noting that China cites and paraphrases the same paragraph of the Appellate Body reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*.<sup>1059</sup>

#### **4. The body of CADA's application**

680. China asserts that no confidential treatment was given to the body of CADA's application, and that the only part of the application treated as confidential was Annex 3.<sup>1060</sup>

681. China's assertion in this regard is hard to reconcile with CADA's application. The application included a section entitled "Confidential application" in which CADA:

- requested that "the materials and attachments in this application be treated as confidential"; and
- said that the applicant "hereby prepares a public version of the application and attachments which provide descriptions or non-confidential summary for the confidential materials and information".<sup>1061</sup>

682. Given that the request for confidential treatment covers the application, and there are explicit references to the "confidential application" and "a public version of the application and attachments", Australia does not accept China's assertion that it was "clear from an objective reading" that no information was withheld from the body of the application.<sup>1062</sup>

<sup>1058</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97 (cited in Australia's first written submission, para. 853, fn. 1011.)

<sup>1059</sup> China's first written submission, para. 2249.

<sup>1060</sup> China's first written submission, para. 2281.

<sup>1061</sup> CADA Application for Anti-Dumping Investigation (Exhibit AUS-64), p. 82.

<sup>1062</sup> China's first written submission, para. 2281.

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Rather, the above indicates that there was both a confidential application and a public version of the application.

683. Nonetheless, if it is the case that no confidential version existed, then Australia accepts that its claims under Articles 6.5 and 6.5.1 cannot be established in respect of the body of CADA's application.

## **5. Annex 3 to CADA's application**

### **(a) Introduction**

684. There is no disagreement between the parties that CADA provided a written request for confidential treatment of Annex 3 to its application and a non-confidential summary of the information it contained. The parties differ in whether, given the requirements of Articles 6.5 and 6.5.1, MOFCOM properly assessed the existence of "good cause" to uphold that request for confidential treatment and whether the non-confidential summary was furnished in sufficient detail.

### **(b) Failure to assess good cause**

685. China appears to accept in its submissions that the only potential evidence of MOFCOM's assessment of "good cause" identifiable on the record is the text of CADA's request for confidentiality, whatever information was the subject of that request, and the fact that MOFCOM upheld that request. No other evidence or potential evidence of that assessment is identified in China's submissions.

686. The request for confidentiality was predicated on an unspecified, ambiguous risk of harm, which was described as follows: "disclosure to the public may cause inconvenience or other adverse effects".<sup>1063</sup> China's submission appears to be that the Panel should conclude that "good cause" was assessed, because in China's view CADA was "not required to furnish reasons justifying [confidential] treatment".<sup>1064</sup>

687. As a starting point, Australia clarifies that it does not contend that, as a general rule, a party seeking confidential treatment is required to submit explicit reasons justifying

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<sup>1063</sup> China's first written submission, para. 2287.

<sup>1064</sup> China's first written submission, para. 2285.

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confidential treatment. Whether such a rule existed was the sole point in issue in the paragraphs China cites from *Korea – Stainless Steel Bars*.<sup>1065</sup> However, the panel in that dispute also confirmed that what is required to justify "good cause" can only be determined on a case-by-case basis and in some cases something more than an "implicit assertion" may be required. Relevantly, that panel noted that:

It may well be the case that, for a given piece of information, a submitting party needs to do more than "implicitly assert" through a redaction that it falls within a given category under the Enforcement Rule and warrants protection as confidential. [...] whether an "implicit assertion" [of confidentiality] falls short of the requirements of Article 6.5 can only be determined on the basis of a case-by-case evaluation of the piece of information concerned.<sup>1066</sup>

688. In any event, the present case is not one where no "reasons" were provided. CADA submitted reasons for its claim to confidentiality and those reasons form part of the material that the Panel should consider in examining whether MOFCOM conducted an objective and unbiased assessment of the existence of "good cause". In Australia's submission, those reasons were incapable of evidencing an objective assessment of "good cause shown" for confidential treatment.

689. In its attempt to rebut Australia's submissions in this regard, China once again misrepresents Australia's arguments. In particular, China takes issue with Australia's citation of the Appellate Body Report in *EC – Fasteners*, alleging that Australia's position is that CADA was *obliged* to submit an explanation that identified significant adverse effects.<sup>1067</sup> That is not an argument Australia made.

690. Similarly, China further alleges that Australia argues, as China did in *EC – Fasteners*, that a party claiming confidentiality has to show that the asserted detriment "would", rather than "could", happen.<sup>1068</sup> That also is not an argument Australia made.

691. Contrary to such misrepresentations by China, Australia's case, set out clearly in its first written submission, is that the reasons CADA submitted form part of the material to be

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<sup>1065</sup> China's first written submission, paras. 2285-2286.

<sup>1066</sup> Panel Report, *Korea-Stainless Steel Bars*, para. 7.208.

<sup>1067</sup> China's first written submission, paras. 2287-2288.

<sup>1068</sup> China's first written submission, paras. 2289-2290.



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considered to identify whether MOFCOM properly assessed the existence of "good cause".<sup>1069</sup> Australia went on to observe that those stated reasons – that disclosure "may cause inconvenience or other adverse effects" – do not fall within the scope of the examples that the Appellate Body has considered "helpful in interpreting 'good cause' generally".<sup>1070</sup> Australia submitted that, among other things, CADA's explanation "did not identify any significant adverse effects that would reasonably be expected to result from disclosure".<sup>1071</sup> These propositions are entirely consistent with the Appellate Body's findings in *EC – Fasteners*.<sup>1072</sup> Nothing turns on the fact that Australia chose to use the words "would reasonably be expected to result" rather than – as China appears to consider necessary – verbatim repeating the Appellate Body's formulation (i.e. "demonstrate the risk of a potential consequence").

692. China further argues that since the examples the Appellate Body gave included "the experience of an adverse effect on the submitting party", the fact that CADA referred to the phrase "may cause inconvenience or other adverse effect" is sufficient without any further detail being required.<sup>1073</sup> This misunderstands the effect of that example given by the Appellate Body in *EC – Fasteners*. Those comments cannot be understood as meaning that the mere assertion of an "other adverse effect", without more, is necessarily sufficient to establish that "good cause" has been shown.

693. China's first written submission then shifts direction entirely, to claim that all of the information in Annex 3 is "by nature" confidential, being of the type regularly treated as confidential in anti-dumping investigations, the potential harm for which is "self-evident".<sup>1074</sup> The Panel should not be satisfied that this is correct from the material before it. Article 6.5 would be stripped of all effect if – as China contends – material CADA describes merely as "work plans" or "internal and external confidential work" was found, solely on the basis of this description, to be "by nature" confidential.<sup>1075</sup>

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<sup>1069</sup> Australia's first written submission, paras. 851-854.

<sup>1070</sup> Appellate Body Report, *EC – Fasteners (China)* para. 538; Australia's first written submission, para. 853.

<sup>1071</sup> Australia's first written submission, para. 853.

<sup>1072</sup> Appellate Body Report, *EC – Fasteners (China)* para. 538.

<sup>1073</sup> China's first written submission, para. 2288.

<sup>1074</sup> China's first written submission, para. 2291.

<sup>1075</sup> CADA Application for Anti-Dumping Investigation Annexes 1-12 (Part 1) (Exhibit AUS-90), Annex 3.

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694. China then goes on to – inexplicably and unfairly – assert that Australia has argued "that CADA's use of the term 'inconvenience' somehow robbed interested parties of a 'meaningful opportunity for the defence of their interests'".<sup>1076</sup> This is not an argument that Australia made. Australia's case is that:

[The term] "inconvenience" does not indicate the type of harm, or the protectable interests involved, that would outweigh the transparency and due process 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.<sup>1077</sup>

695. It was MOFCOM's failure to objectively assess whether "inconvenience" was sufficient to show "good cause" for the confidential treatment of the entirety of Annex 3 that had a "prejudicial effect" on the transparency and due process interests of interested parties. In a practical sense, MOFCOM's failure denied interested parties the opportunity to meaningfully comment on key aspects of CADA's application.<sup>1078</sup>

696. Finally, China makes the submission that, since CADA's application included a statement that the information must be kept confidential and "shall not be disclosed", MOFCOM was "obligated" to respect it because of the last sentence of Article 6.5.<sup>1079</sup> As a matter of law, Australia disagrees. The last sentence is expressly stated to apply only to "such information", which is plainly a reference to information that satisfies the criteria in the first sentence of Article 6.5. In this case, as MOFCOM failed to properly determine whether the relevant criteria were met, China's argument is misplaced. In any event, the Anti-Dumping Agreement provides how information subject to an unwarranted confidentiality claim should be treated in Article 6.5.2.

(c) The non-confidential summary lacked sufficient detail

697. In response to Australia's submissions about the inadequacy of CADA's non-confidential summary, China once again unfairly misconstrues the arguments made by

<sup>1076</sup> China's first written submission, para. 2293.

<sup>1077</sup> Australia's first written submission, para. 853. Australia referred to the balance described by the Appellate Body Appellate Body Report, *EC – Fasteners (China)*, para. 538.

<sup>1078</sup> See those matters identified in Australia's first written submission, paras. 857-858.

<sup>1079</sup> China's first written submission, para. 2295.

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Australia in its first written submission. Inexplicably, China's submissions appear to be framed on the premise that Australia alleged that there was "no summary" provided by CADA.<sup>1080</sup>

698. Australia did not allege that no non-confidential summary was provided. As set out in its first written submission, Australia's argument is that CADA's non-confidential summary contained no summary of the "information that was key to the initiation of the investigation".<sup>1081</sup> As Australia set out, the information subject to the confidentiality claim went directly to CADA's standing to bring an application on behalf of domestic industry in accordance with Article 5.4 of the Anti-Dumping Agreement. Disclosure of the key information relevant to the assessment of standing should have been disclosed, in a meaningful summary form, to allow interested parties to defend their interests.<sup>1082</sup>

699. Contrary to what China implies, Australia has not sought – and does not ask the Panel – to be prescriptive about the specific information that was required to be included in a non-confidential summary.<sup>1083</sup> The obligation set out in Article 6.5.1 was for MOFCOM to require CADA to provide a non-confidential summary "in sufficient detail to permit a reasonable understanding of the substance of the information" that was subject to a claim for confidential treatment. It is readily apparent that no summary capable of meeting that standard was provided. No detail – let alone "sufficient detail to permit a reasonable understanding of the substance" – was provided about the key information relevant to the written application that CADA allegedly made on behalf of the domestic industry, including, *inter alia*, information about the degree of support for, or opposition to, the application expressed by the domestic producers.

700. Finally, China makes the unsustainable argument that the failure to provide adequate non-confidential summaries cannot have denied interested parties a meaningful opportunity to engage with MOFCOM about CADA's standing, because Australia submitted comments about its concerns regarding the initiation of the investigation.<sup>1084</sup>

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<sup>1080</sup> China's first written submission, para. 2314.

<sup>1081</sup> Australia's first written submission, para. 856.

<sup>1082</sup> Australia's first written submission, paras. 855-858.

<sup>1083</sup> China's first written submission, paras. 2316-2318.

<sup>1084</sup> China's first written submission, para. 2319.

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701. The fact that Australia filed comments concerning the initiation of the investigation says nothing about the adequacy of those summaries, nor consequently whether interested parties had a meaningful opportunity for the defence of their interests. Australia's comments raised concerns about issues unrelated to the matters that should have been addressed in CADA's non-confidential summaries, namely about the independence of CADA from the Chinese government, because, *inter alia*, it was managed by the Ministry of Civil Affairs and State-owned Assets Supervision and Administration Commission of the State Council. The fact that Australia made such submissions cannot show that interested parties had all necessary information sufficient to permit a reasonable understanding of the substance of the information in relation to standing, nor a meaningful opportunity to make submissions about whether CADA's application had standing by virtue of the level of support within the domestic industry.<sup>1085</sup>

## 6. The responses to domestic producers' questionnaires

### (a) Failure to assess good cause

702. In its first written submission, Australia identified a number of instances where MOFCOM provided confidential treatment to information provided by domestic producers without requiring "good cause" to be shown. Australia further set out multiple examples where, on the material available to Australia, the nature of the information appeared very unlikely to support such a finding.<sup>1086</sup>

703. China's reply to these examples is twofold.

704. First, China alleges that, in respect of each of these examples, the confidential treatment did not relate to the direct answer to the question but rather to some other aspect of the response.<sup>1087</sup>

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<sup>1085</sup> Australian Government Submission on Initiation (Exhibit AUS-87), p. 6 (cited in China's first written submission, para. 2319, fn. 2222).

<sup>1086</sup> Australia's first written submission, paras. 860-861; response to Panel question No. 55. In response to the latter, Australia provided additional submissions on every instance in which it alleged an inconsistency with Article 6.5.1.

<sup>1087</sup> China's first written submission, paras. 2297-2302.

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705. Second, China says that for several of the examples, the response contained at least some public information, which MOFCOM was, therefore, under no obligation to disclose.<sup>1088</sup>

China cites previous decisions relating to Article 6.4 to support this assertion.

706. Neither of China's replies provide an answer to Australia's claim. Indeed, even taking them on face value, each contains a concession that MOFCOM afforded confidential treatment to material for which "good cause" had not (and could not have) been shown, simply because *some other* part of the answer contained confidential information. It is inconsistent with the requirements of Article 6.5 for non-confidential information to be treated as confidential solely because it appears as part of a larger response that contains other information for which "good cause" has purportedly been shown.

707. For instance, one of the questions Australia has identified as an example where the nature of the information provided by domestic producers would not support a finding that "good cause" had been shown were the responses to question 12. That question asked for the identification of the "main raw materials, fuels and power used in the production of like products". Australia, in its first written submission, submitted that there appeared to be no basis to grant broad confidential treatment to responses concerning "the main raw materials", when both the questionnaire itself, and the response given by the domestic producer respondents to another question, had identified that the main raw materials used are "fresh grapes or grape juice".<sup>1089</sup>

708. China argues that the grant of confidentiality did not concern the "main raw materials", but rather other parts of the question.<sup>1090</sup> Yet confidential treatment was granted to the responses in their entirety, precluding the disclosure of the information, which China concedes was non-confidential, as well as the allegedly confidential information. This blanket treatment was granted on the basis of the generic assertion that, *inter alia*, details about the raw materials constituted a "trade secret".<sup>1091</sup> China's submissions offer no explanation – Australia infers because there is none – for why broad-brush confidentiality was granted to

<sup>1088</sup> China's first written submission, paras. 2299-2302.

<sup>1089</sup> Australia's first written submission, para. 861.

<sup>1090</sup> China's first written submission, para. 2300.

<sup>1091</sup> COFCO Anti-Dumping Questionnaire Response (Exhibit Aus-44), p. 19.

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information that China appears to now accept was of a nature such that "good cause" could not be shown.

709. Essentially the same issue, and implied concession, arises with respect to each of Australia's identified examples in which broad-brush confidentiality requests were upheld without any objective assessment of "good cause". On China's own submissions, confidential treatment was granted to the entirety of the identified producers' responses even though some or most of the information was of a nature that could not support such a finding. In particular, China states that:

- the reason for the grant of confidential treatment to the entirety of the response to question 5, which related to product use, "does not concern 'product use', but rather, the other elements of that question";<sup>1092</sup>
- the reason for the grant of confidential treatment to the entirety of the response to question 9, which related to the classification of wines including the qualities, price ranges and brand levels of wines, was not to do with any of those matters, but only the element of the question that "required the provision of 'relevant qualification material'";<sup>1093</sup>
- the reason for the grant of confidential treatment to the entirety of the response to question 14, which related to production equipment used in the production of wine, "does not concern 'production equipment', but rather, the other elements of that question";<sup>1094</sup> and
- the reason for the grant of confidential treatment to the entirety of the answer to question 30, which related, *inter alia*, to sales channels "does not concern 'sales channels', but rather the other elements of that question".<sup>1095</sup>

710. As to the information said to be publicly available, it proves, rather than excuses, that there was no objective assessment of "good cause" for the confidential treatment of all of the information in those questions for the purposes of Article 6.5. "Good cause" cannot be

<sup>1092</sup> Australia's first written submission, para. 861; China's first written submission, para. 2298.

<sup>1093</sup> Australia's first written submission, para. 861; China's first written submission, para. 2299.

<sup>1094</sup> Australia's first written submission, para. 861; China's first written submission, para. 2301.

<sup>1095</sup> Australia's first written submission, para. 861; China's first written submission, para. 2302.

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demonstrated for information supplied by an interested party where that information, by reason of being publicly available, is not confidential. Whether or not it is public, the rights and obligations relating to due process and transparency require the investigating authority to ensure that such information, as evidence relevant to the question(s) asked by the investigating authority for the purposes of its investigation, is disclosed in the context of the questionnaire response.

711. Finally, Australia notes that China takes issue with Australia's argument that certain information was of a nature that was very unlikely to qualify as a "trade secret". China says that it has formed the view that that this argument is inconsistent with unrelated parts of the Australian domestic legislative framework.<sup>1096</sup> There is no inconsistency. In its first written submission, Australia considered that processes, materials, and equipment that are common to *all* wine production would not constitute a trade secret. This is a sound understanding of any conventional definition of a trade secret, because such information lacks a confidential character due to its notoriety.<sup>1097</sup> Even if that were not the case, the summary website that China cites in its first written submission, which is about "getting started" on understanding the types of intellectual property recognised under Australian domestic law, has no – or at most, extremely tangential – relevance to assessing whether MOFCOM objectively assessed whether there was "good cause shown".

(b) The non-confidential summary lacked sufficient detail

712. In response to Australia's claims about the inadequacy of the non-confidential summaries in the responses to the domestic producers' questionnaire, China acknowledges that some information could have been summarised, but asserts that other information could not have been.<sup>1098</sup> It will be readily apparent to the Panel that no meaningful summaries were provided even of the information that China itself acknowledges was susceptible of summarisation.

713. Australia has already addressed China's apparent acknowledgement that "good cause" was not shown for the confidential treatment granted to certain information in the

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<sup>1096</sup> China's first written submission, para. 2303.

<sup>1097</sup> Australia's first written submission, para. 865.

<sup>1098</sup> China's first written submission, para. 2320.

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questionnaire responses. While this confirms that MOFCOM breached Article 6.5 by granting confidential treatment without objectively assessing whether "good cause" was shown, it also illustrates the insufficiency of the non-confidential summaries. Given that China acknowledges that at least some information was not confidential, it is inexplicable why the non-confidential summaries failed to include a sufficiently detailed – if not fulsome – description of at least these items of information.

714. While it appears to Australia that a contravention of Article 6.5.1 can be established solely on the basis of the concessions that appears China has made, Australia maintains the full breadth of its arguments set out in its first written submission and in response to Panel question No. 55.

715. In addition, it appears that China now asserts that certain information in these responses was incapable of summarisation.<sup>1099</sup> However, there is no evidence on the record that MOFCOM required the domestic producers to provide statements of the reasons as to why this was the case. There are simply no such statements on the record. In turn, there is no evidence that MOFCOM scrutinised such statements to determine whether they established "exceptional circumstances" and whether the reasons given appropriately explained why, under the circumstances, no summary that would permit a reasonable understanding of the information's substance was possible.<sup>1100</sup> Rather, this appears to be an entirely *ex post facto* rationalisation. If the Panel were to accept that this was the reason for the lack of an adequate non-confidential summary in certain instances, then Australia considers that, in each of those instances, a statement of the reasons why summarisation was not possible was entirely absent in contravention of Article 6.5.1.

## **7. The responses to the notices of verification from domestic industry**

### **(a) Failure to assess good cause**

716. China provides two responses to Australia's arguments that MOFCOM treated certain information in the verification responses from COFCO Greatwall and Changyu Wines as

<sup>1099</sup> China's first written submission, paras. 2311-2312 ("evidences the fact that MOFCOM duly assessed whether there were circumstances due to which the information could not be summarized").

<sup>1100</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 544.



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confidential without either (i) requiring "good cause" to be shown, or (ii) objectively assessing whether "good cause" was shown.<sup>1101</sup>

717. First, China appears to allege that "good cause" was shown in respect of *all* of the confidentiality requests simply because both of the companies asserted that the disclosure of the information "will have a severe adverse impact".<sup>1102</sup> While the risk of such an impact might be a justification for confidential treatment, as Australia noted in its first written submission, MOFCOM's reliance on the formulaic recitation of this phrase to uphold confidentiality claims made by both companies across a wide range of materials and information (from "brochures" to audit reports, over the entirety of each of the annexures) indicates that there was no objective assessment of whether "good cause" had been shown.

718. Second, China asserts that the confidentiality requests at issue provided "much more information and context regarding the companies' need for confidential treatment" than Australia acknowledged.<sup>1103</sup> However, as the Panel will observe when it reviews the underlying documents, the phrases that China alleges provided "much more information" in the requests for confidentiality are little more than paraphrasing of the question to which the confidentiality request is made in response.

719. For example, China considers that the request for confidential treatment over Annex II made by each domestic producer provides "much more information and context" because it clarifies that "the information at issue concerns ... product standards".<sup>1104</sup> But when regard is had to the response itself, it is apparent that the statement China is referring to is that "[t]he annexe here relates to the product standards of the like products", which is made in response to MOFCOM's request for the "Quality Standards for Like Product". A request that merely paraphrases the question posed does not provide any, let alone "much more", information and context than the bare fact of the question having been posed.

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<sup>1101</sup> China's first written submission, para. 2306; Australia's first written submission, para. 870.

<sup>1102</sup> China's first written submission, para. 2307.

<sup>1103</sup> China's first written submission, paras. 2308-2309.

<sup>1104</sup> China's first written submission para. 2308.

**(b) The non-confidential summaries lacked sufficient detail**

720. In respect of the non-confidential summaries of the verification materials, China appears to acknowledge that some information could have been summarised, while asserting that other information could not have been.<sup>1105</sup> It will be readily apparent to the Panel that no meaningful summaries were provided even of the information that China itself acknowledges was susceptible of summarisation.

721. While it appears to Australia that a contravention of Article 6.5.1 can be established solely on the basis of the concessions that China appears to have made, Australia maintains the full breadth of its arguments set out in its first written submission.<sup>1106</sup>

722. In addition, it appears that that China now asserts that certain information in these responses was incapable of summarisation. There is no evidence on the record that this was a claim made or considered by MOFCOM, and it appears to be an entirely *ex post facto* rationalisation. If the Panel were to accept that this was the reason for the lack of an adequate non-confidential summary in certain instances, then Australia considers that, in each of those instances, a statement of the reasons why summarisation was not possible was entirely absent, in contravention of Article 6.5.1.

**8. The significance of the verbatim identical requests from domestic producers**

723. Finally, Australia notes China's concerns about Australia's argument that the verbatim identical requests for confidential treatment and non-confidential summaries evidenced some form of central coordination or planning.<sup>1107</sup> China takes umbrage at an exaggerated straw version of Australia's argument and fails to engage with the substance of the points Australia made.

724. Contrary to China's suggestion, Australia did not allege that MOFCOM in fact provided guidance to the domestic producers. Australia's case, with which it appears China firmly agrees, is that *if* such guidance were provided that would have been inappropriate.<sup>1108</sup>

<sup>1105</sup> China's first written submission, para. 2322.

<sup>1106</sup> Australia's first written submission, paras. 870-879.

<sup>1107</sup> China's first written submission, paras. 2324-2326.

<sup>1108</sup> Australia first written submission, paras. 863-873.

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As Australia's submissions made explicitly clear, Australia's arguments about the verbatim identical requests for confidential treatment and non-confidential summaries had equal force "regardless" of whether or not such a scenario arose.<sup>1109</sup>

725. The actual argument Australia raised was as follows:<sup>1110</sup>

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.

726. China's response in its first written submission does not contest these arguments, but rather *positively confirms* that the reason why verbatim identical requests were given was because of a form of coordination or planning – namely that they used a common law firm. This explanation – that a single law firm was used for all 21 firms – confirms, rather than rebuts, Australia's argument. For a law firm to have apparently given identical advice to 21 different clients, and drafted identical responses for each of them, demonstrates that there was "central planning involved in determining that the answers to certain questions in every questionnaire response would be treated as confidential in their entirety" and gives rise to a strong inference that this was done in a generic way "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".

## 9. The authoritative domestic organisation's information about the total output of the Chinese domestic wine industry

727. In its first written submission, Australia raised a number of complaints about the failure to make available to interested parties information concerning the identity of an "authoritative domestic organisation" and the statistical data it provided that was used by

<sup>1109</sup> Australia first written submission, paras. 863-873.

<sup>1110</sup> Australia first written submission, para. 863, see also similar language in para. 873.

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MOFCOM to calculate the total output of the Chinese domestic wine industry.<sup>1111</sup> As those submissions made clear, they were based on the fact that there "is nothing in the record to suggest that this information was confidential".<sup>1112</sup>

728. In its first written submission China replied that both the identity of the organisation and the statistics provided by the organisation were confidential.<sup>1113</sup> This was the first time that Australia became aware of this request for, or grant of, confidential treatment over this information. In its response to the Panel's questions following the first substantive meeting, China identified the name of the authoritative domestic organisation, and provided a copy of the statistics it had provided and the calculations it had prepared.<sup>1114</sup> China also provided a redacted version of the request for confidential treatment as an exhibit to its response to the Panel's questions.<sup>1115</sup> This was the first time Australia became aware of the reasons given to support the request for confidential treatment.

729. Australia does not take issue with the confidential treatment granted to the identity of the "authoritative domestic organisation". Although Australia does not know whether the disclosure of [REDACTED]  
[REDACTED],<sup>1116</sup> Australia accepts that conceptually a [REDACTED] might be a basis for a finding that there was good cause for confidential treatment.

730. However, nothing in the material now disclosed, nor the investigative record, provides any basis for a finding that good cause was either required or assessed by MOFCOM in respect of the underlying data, calculation methodology, and calculations set out in Exhibit CHN-32 (BCI). Nothing in Exhibit CHN-32 (BCI) contains any identifying information about the authoritative domestic organisation or any other organisation. It is comprised entirely of aggregated and/or averaged statistical information and unsourced assumptions.

<sup>1111</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109; Australia's first written submission, paras. 532, 538, 540, 974-975, 1021-1022, and 1088-1089.

<sup>1112</sup> Australia first written submission, paras. 975, 1022, and 1088.

<sup>1113</sup> China's first written submission, para. 2458.

<sup>1114</sup> China's response to Panel question No. 15, para. 51; [REDACTED] calculations (confidential version) Exhibit CHN-32 (BCI).

<sup>1115</sup> Minutes of Meeting (confidential version) (Exhibit CHN-42 (BCI)).

<sup>1116</sup> Minutes of Meeting (confidential version) (Exhibit CHN-42 (BCI)).

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731. The record shows that, notwithstanding this grant of confidential treatment, MOFCOM itself did not treat certain information in Exhibit CHN-32 (BCI), or the end result of the calculation of total national output for each year, as confidential, since it included that information in the Final Determination.<sup>1117</sup> [REDACTED]

[REDACTED] without any indication that it is confidential. The [REDACTED]  
[REDACTED] are each set at a fixed rate that remains consistent across all 5 years of the injury POI. This strongly implies that they are assumptions rather than derived from real world data. In any event, to the extent that they are based on real world data, they must be rounded averages from aggregated sources. The [REDACTED] figures, even if based on real world data, are clearly an aggregate and an average that have no capacity to disclose the identity or production of any individual entity. Yet confidential treatment was given to the entirety of this information.

732. In its response to Panel question No. 50, China asserts that the information in Exhibit CHN-32(BCI) is "business-sensitive" and that the need for it to be confidential is "self-evident".<sup>1118</sup> Given it was comprised entirely of information MOFCOM was content to include in the Final Determination, unsourced assumptions, and aggregated and/or averaged data, there is no evidence on the record to support the assertion that this information was "business-sensitive", let alone that an unbiased and objective investigating authority could have concluded it was "self-evidently" confidential.

733. Accordingly, in Australia's view, MOFCOM treated the information in Exhibit CHN-32(BCI) as confidential without requiring "good cause" to be shown for such treatment and without assessing whether "good cause" had been shown. The nature of this information was non-confidential, since it did not relate to the identity of the organisation that had submitted it or to the business information of any identifiable producer or group of producers. There is no evidence on the record that MOFCOM assessed whether "good cause" had been shown in

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<sup>1117</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 109 ("The Investigating Authority 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. Hence, based on the statistics from authoritative domestic organizations, the Investigating Authority calculated the overall output of domestic relevant wines at 377,600 kl, 347,600 kl, 374,800 kl, 351,200 kl and 288,200 kl, respectively.").

<sup>1118</sup> China's response to Panel question No. 50, para. 309.

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respect of Exhibit CHN-32(BCI). MOFCOM appears to have accepted the request 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.

734. Further, the document that purportedly contained a non-confidential "summary" of Exhibit CHN-32 (BCI), which China produced as Exhibit CHN-38, contained no information aside from the heading "Relevant Materials in Relation to Data on Total Domestic Like Products Production" and an assertion of confidentiality. It gave the other interested parties no information about the substance of the purportedly confidential information. It did not disclose even the information that MOFCOM was content to include in the Final Determination, including that it was sourced from an "authoritative domestic organisation" and the volume of total output calculated for each year.

735. 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".<sup>1119</sup> The heading or phrase given in place of the allegedly confidential information of the "authoritative domestic organisation" concerning the estimate of total domestic output — i.e., "relevant materials in relation to data on total domestic like products production" — offered no more than a vague impression of the nature of the information. It provided no detail at all, let alone "sufficient detail to permit a reasonable understanding of the substance of the information". This left the interested parties without a meaningful opportunity to defend their interests in relation to the information.

736. This "summary" did not meet the standard required by Article 6.5.1, even if the Panel were to uphold the grant of confidential treatment over the information in Exhibits CHN-32 (BCI) and CHN-38.

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<sup>1119</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 541 (citing Appellate Body Reports, *US – Gambling*, para. 270; *China – HP-SSST (Japan) / HP-SSST (EU)*, para. 5.96).

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737. For completeness, Australia notes that China has not contended that Article 6.5.1 would be inapplicable to this data by reason of the [REDACTED] [REDACTED] not falling within the categories of "interested party" set out in subparagraphs (i), (ii), (iii) of Article 6.11 of the Anti-Dumping Agreement. Australia understands that this is because MOFCOM treated the [REDACTED] as an "interested party" within the meaning of the last sentence of Article 6.11, at least for the purposes of Articles 6.5 and 6.5.1. Australia recalls the Appellate Body's finding in *EC — Fasteners (China) (Article 21.5)* that the treatment of an entity as an "interested party" can be inferred from the conduct of an investigating authority and does not require an express finding.<sup>1120</sup>

## 10. Conclusion

738. For the reasons set out above, and in Australia's earlier submissions, China acted inconsistently with its obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

### C. MOFCOM'S FAILURE TO CONSTRUCT A SAMPLE USING A PERMITTED METHOD UNDER ARTICLE 6.10 OF THE ANTI-DUMPING AGREEMENT

739. Where a sampling approach is used under Article 6.10 of the Anti-Dumping Agreement, the construction of the sample is critical to ensuring the fairest outcome for the non-sampled exporters.

740. The evident object and purpose of the sampling methods set out in Article 6.10 is to require an investigating authority to select a representative subset of data, because the findings made on the basis of those data are extrapolated to all of the non-sampled companies. As a result, errors in the construction of the sample can have significant consequences for an investigation, even if every subsequent step is conducted in accordance with the disciplines of the Anti-Dumping Agreement.

<sup>1120</sup> Appellate Body report, *EC — Fasteners (China) (Article 21.5)*, para. 5.150. Australia notes that in China's response to the Panel's question No. 50, paras. 306, 310, China positively asserts that Article 6.5 applied to the information provided by the [REDACTED]

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741. China adduces several jurisdictional or "threshold" complaints concerning Australia's claims with respect to Article 6.10. These complaints, which are entirely without merit, are addressed in the respective subsections of this submission.<sup>1121</sup>

**1. MOFCOM impermissibly failed to act in response to Pernod Ricard's submission that there were errors in the sample data**

742. 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".<sup>1122</sup> China did not contest the correctness of this principle in its first written submission, and in oral comments at the first substantive meeting appeared to accept it.

743. After Pernod Ricard was notified of the results of the sample, it wrote to MOFCOM, identified its understanding of the method used to determine the respondents to a sample, and said that if that method had been applied it would have identified Pernod Ricard as the third largest exporter under investigation.<sup>1123</sup> Pernod Ricard expressed concern that an alternative method of the calculation may have been used.

744. In its submissions, China indicates that, in the factual circumstances of this case, MOFCOM's approach did not make use of an alternative method.<sup>1124</sup> Rather than excusing MOFCOM's failure to act, as China seems to think it does, the fact that Pernod Ricard's understanding of the method was *correct* meant that MOFCOM was squarely on notice of Pernod Ricard's concern that there was an apparent error in its sampling determination. Pernod Ricard's submission was that [REDACTED]

[REDACTED].<sup>1125</sup> China and MOFCOM both appear to have proceeded on the mistaken basis that, since Pernod Ricard's specific hypothesis as to why MOFCOM's assessment of the data was incorrect (i.e. that an alternative method had been used), MOFCOM was not obliged to take any further steps. The opposite was true.

<sup>1121</sup> See above sections II.A - II.B; below Annex A.

<sup>1122</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.203.

<sup>1123</sup> China's first written submission, para. 2347; Pernod Ricard Comments on Sampling (Exhibit AUS-93), p. 2.

<sup>1124</sup> China's first written submission, para. 2347.

<sup>1125</sup> Pernod Ricard Comments on Sampling (Exhibit AUS-93), p. 2.



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745. In its response to the Panel's questions following the first substantive meeting with the Panel, China stated that:

If [...] Australia seeks to take issue with the fact that MOFCOM did not check the veracity of the information submitted by the Australian exporters (in their sampling questionnaire responses), then China submits that this is an entirely unreasonable standard to impose upon an investigating authority, particularly in a situation where there were no indications at all that the information submitted by the Australian exporters was not correct.<sup>1126</sup>

746. As will be apparent from Australia's submissions to date, Australia does not contend that there is a *general* obligation to verify the accuracy of *all* information submitted by respondents to a sampling questionnaire.

747. Rather, on the facts of this investigation, MOFCOM was put squarely on notice of a potential error in the data by a major exporter. Australia's case is that an unbiased and objective investigating authority, when on notice of a potential error in its unverified data that may have led to the omission of a major exporter from the sample, would have taken steps to clarify the accuracy of the data. Despite this, there is nothing on the record to show (and China does not contend) that MOFCOM took any steps to do so. MOFCOM's failure in this regard was inconsistent with the requirements of Article 6.10.

748. China asserts in its response to Panel question No. 61 that the ordinary practice is that if an investigating authority finds that a company has submitted incorrect information in its sampling response, then the investigating authority may "add an additional company to the sample".<sup>1127</sup> Implicit in China's answer is that it considers MOFCOM could practically have taken such a step in this investigation. This observation from China is striking, given that Pernod Ricard specifically requested that it be added as a sampled exporter.<sup>1128</sup> MOFCOM refused that request and provided no explanation for its decision aside from the general assertion that three exporters was the "most practical" number.<sup>1129</sup>

749. If MOFCOM was able to reasonably examine a larger percentage of exports by considering more than three exporters, as China now appears to implicitly acknowledge it could, then it was required to do so under Article 6.10. MOFCOM was required to do so

<sup>1126</sup> China's response to Panel question No. 61, para. 359.

<sup>1127</sup> China's response to Panel question No. 61, para. 359.

<sup>1128</sup> Pernod Ricard Comments on Sampling (Exhibit AUS-93), p. 2.

<sup>1129</sup> Australia's first written submission, para. 892 (quoting from Anti-Dumping Final Determination (Exhibit AUS-2), p.11).

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regardless of whether it accepted Pernod Ricard's submission that there was an apparent error in the data. As Australia noted in its first written submission, the parallel countervailing duty investigation that was conducted with respect to the same wine products from Australia was done using a sample comprised of four respondents, including Pernod Ricard.<sup>1130</sup> This reinforces the inference that MOFCOM could have reasonably examined a larger percentage of exports than it did.

## 2. Australia is not required to submit copies of the confidential responses from the sampled companies

750. In an attempt to defend MOFCOM's inaction in response to Pernod Ricard's submission, China has made unsupported assertions that:

- in order to establish a *prima facie* case in this dispute, Australia is required to adduce external evidence that was not on the investigation record. In this regard, China asserts that: "Australia does not submit any evidence that the export volume from the three selected exporters was not the largest percentage of the volume of exports";<sup>1131</sup> and Australia did not submit evidence showing that Pernod Ricard's claim [REDACTED] [REDACTED] was factually correct;<sup>1132</sup> and
- Australia did not provide confidential versions of the sampling responses, which China vaguely alleges "would have dispelled any doubt as to whether Pernod Ricard should have been included in the sample".<sup>1133</sup>

751. China's arguments replicate the error that MOFCOM made in its construction of the sample. Whether or not the data in the sampled companies' responses was accurately reflected in MOFCOM's findings is not determinative of Australia's claim. Nor was it a basis for MOFCOM to disregard Pernod Ricard's submission about: (i) apparent errors in the data that MOFCOM relied upon, and (ii) the apparent arbitrariness of including Pernod Ricard in the

<sup>1130</sup> Australia's first written submission, para. 892.

<sup>1131</sup> China's first written submission, para. 2339.

<sup>1132</sup> China's first written submission, paras. 2342-2343.

<sup>1133</sup> China's first written submission, para. 2345.

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sample for the CVD investigation while excluding it from the sample for the anti-dumping investigation.

752. Australia's case concerns MOFCOM's failures to take steps to seek clarification, including by: (i) checking the accuracy of the data on which its selection was purportedly based; and (ii) properly considering Pernod Ricard's submissions and request to be included when put on notice that it was a major exporter of subject products that had been included in the CVD investigation sample. In order to make out this claim Australia is not required, as China asserts, to adduce evidence that was not on the investigation record that would substantiate Pernod Ricard's allegation [REDACTED]XXXXXXXXXXXXXXXXXXXXX XXXXXXXX]]. Accordingly, China's assertion that the potentially defective data was correctly sequenced by MOFCOM is not directly relevant to Australia's arguments and incapable of establishing a rebuttal.

753. Further, China's professed regret at Australia having "opted to not provide the confidential versions" of the sampling responses is both misleading and disingenuous.<sup>1134</sup> China has confirmed that, unlike Australia, "MOFCOM obviously has these confidential Sampling Responses", but has declined to submit them as exhibits in this dispute.<sup>1135</sup> If, as China contends, evidence of what these showed is relevant to the issues in dispute, then only China can put this evidence before the Panel. However, in Australia's view, the Panel does not need these data to find that MOFCOM's conduct was inconsistent with China's obligations under Article 6.10.

### **3. Conclusion**

754. For the reasons set out above and in Australia's earlier submissions MOFCOM acted inconsistently with China's obligations under Article 6.10 of the Anti-Dumping Agreement.

<sup>1134</sup> China first written submission, para. 2344; see also China's response to Panel question No. 14, para. 49.

<sup>1135</sup> China first written submission, para. 2346.

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**D. MOFCOM FAILED TO PROVIDE INTERESTED PARTIES WITH AMPLE OPPORTUNITIES TO PRESENT EVIDENCE THEY CONSIDERED RELEVANT, IN BREACH OF CHINA'S OBLIGATIONS UNDER ARTICLES 6.1, 6.1.1, 6.1.2 AND 6.2**

**1. Introduction**

755. As set out in Australia's previous submissions and this submission, MOFCOM breached its obligations under Articles 6.1, 6.1.1, 6.1.2 and 6.2. This is because MOFCOM failed to give Australian interested parties notice of information which the investigating authority requires, failed to give 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.<sup>1136</sup> In particular, MOFCOM: (i) did not grant extensions to interested parties when due cause was shown and it was practicable to do so; (ii) failed to provide notice of deficiencies in information submitted and opportunities to present all evidence which interested parties considered relevant; and (iii) failed to provide evidence presented in writing to other interested parties.<sup>1137</sup>

756. In relation to this claim, Australia notes that China has raised certain jurisdictional objections in its first written submission, which Australia has addressed in Annex A, section A.5.2, and above section II.A.2 of this submission.<sup>1138</sup>

**2. China's assertion that Australia abandoned its claim regarding Article 6.1 is without merit**

757. China alleges in its first written submission that Australia has abandoned its claim regarding Article 6.1 because "no argument has been raised [...] to demonstrate the alleged violation of this provision".<sup>1139</sup>

<sup>1136</sup> see Australia's first written submission, section VII.D, paras. 899-935; responses to the Panel's questions Nos. 56 and 58, paras. 137-144.

<sup>1137</sup> Australia also presses an Article 6.1 argument in the event the Panel accepts China's submission that information on [REDACTED] See para. 133.

<sup>1138</sup> See below Annex A, section A.5.2; above section II.A.2.

<sup>1139</sup> China's first written submission, para. 2350. Given this assertion, it is striking that in the same submission China also refers to "Australia's arguments regarding Articles 6.1" (see China's first written submission, para. 2353).

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758. This allegation is entirely without merit. In Australia's first written submission, Australia:

- repeatedly and specifically alleged a breach of Article 6.1;<sup>1140</sup>
- summarised the obligation in Article 6.1 in light of previous Appellate Body and panel reports;<sup>1141</sup>
- expressly stated that Australia's case was that the obligations under Articles 6.1, 6.1.1, 6.1.2 and 6.2 "operate together to ensure that interested parties can properly defend their interests",<sup>1142</sup> and that "MOFCOM failed to observe the framework of procedural and due process obligations in Article 6" because "interested parties were not given ample opportunities to present relevant evidence";<sup>1143</sup> and
- expressly articulated an aspect of the obligation in Article 6.1 as intersecting and overlapping with Article 6.1.1, and set out detailed factual and legal arguments.<sup>1144</sup>

759. China seeks to separate and isolate the overarching obligation to give interested parties "ample opportunity" in Article 6.1 from the requirements set forth in Articles 6.1.1 and 6.1.2. Australia disagrees with China's understanding of the operation of Article 6.1 and its sub-paragraphs. Article 6.1 establishes an overarching obligation that interested parties "shall be given ... ample opportunities". In this way, an investigating authority's failure to observe the requirements of Article 6.1.1 or 6.1.2, including those which China considers optional, may indeed lead to a breach of Article 6.1.

760. As set out in Australia's first written submission and this submission, Australia claims that MOFCOM's conduct was in breach of Article 6.1 of the Anti-Dumping Agreement because it failed to give the interested parties "ample opportunity to present in writing all evidence which they consider[ed] relevant in respect of the investigation".<sup>1145</sup> This conduct included: (i)

<sup>1140</sup> Australia's first written submission, see e.g. paras. 899, 905, 907, 908-935.

<sup>1141</sup> Australia's first written submission, para. 900 to 901.

<sup>1142</sup> Australia's first written submission, para. 905.

<sup>1143</sup> Australia's first written submission, para. 906.

<sup>1144</sup> Australia's first written submission, para. 908.

<sup>1145</sup> Australia's first written submission, para. 907.

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MOFCOM's arbitrary refusal to grant reasonable extension requests, notwithstanding good cause shown; (ii) MOFCOM's failure to provide notice to Casella Wines of deficiencies in the information supplied or to accept the information that Casella Wines proactively re-submitted to correct such deficiencies; and (iii) MOFCOM's failure to properly make available the evidence of the interested parties in the "domestic industry".<sup>1146</sup>

761. China is entitled to present submissions disagreeing with Australia's construction of Article 6.1. But it is misleading, and inappropriate, to submit that Australia has not made any argument where one has clearly been set out. As discussed below, it is similarly misleading for China to misrepresent Australia's arguments in an apparent attempt to avoid addressing the merits of the arguments that Australia has actually made.

### 3. Legal framework

#### (a) Article 6.1 and 6.1.1

762. Articles 6.1, 6.1.1, and 6.1.2 of the Anti-Dumping Agreement are the embodiment of "fundamental" due process rights.<sup>1147</sup> Article 6.1 is also fundamental to the correct application of Article 6.8 because if an interested party has not been properly notified and informed of the information it is required to submit under Article 6.1, it cannot be argued that the party has refused access to necessary information, or has otherwise withheld necessary information, or has significantly impeded the investigation.<sup>1148</sup> China's proposed interpretation of the provisions would improperly limit both the scope and application of the relevant obligations.<sup>1149</sup> If accepted, China's approach would upset the careful balance between the rights and obligations of an investigating authority and those of interested parties including, in particular, by elevating the interests and discretion of the investigating authority<sup>1150</sup> and diminishing the value of the information supplied by interested parties.<sup>1151</sup> It would also impede the proper functioning of Article 6.8 and Annex II.

<sup>1146</sup> Australia also presses an Article 6.1 argument in the event the Panel accepts China's submission that information on [REDACTED] See para. 133.

<sup>1147</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

<sup>1148</sup> Panel Report, *Mexico – Antidumping Measures on Rice*, paras. 7.193-7.194.

<sup>1149</sup> China's first written submission, paras. 2357-2368.

<sup>1150</sup> China's first written submission, paras. 2358, 2359, 2360, and 2362-2365.

<sup>1151</sup> China's first written submission, para. 2368.

763. China's arguments on the combined legal effect of Articles 6.1 and 6.1.1 can be reduced to two propositions.

764. First, China focuses on the statements from the Appellate Body and previous panels that outline the authority that necessarily resides with an investigating authority to control its investigative process. This authority includes the following: the ability of investigating authorities to establish deadlines;<sup>1152</sup> a confirmation that these provisions do not create "indefinite rights" to interested parties;<sup>1153</sup> and that the interpretation of these provisions should not be "too expansive",<sup>1154</sup> and that an investigation conducted in the total absence of deadlines would be unmanageable.<sup>1155</sup>

765. None of these propositions are in contention between the parties. Australia has neither argued nor suggested that Articles 6.1 or 6.1.1 should be interpreted to provide "indefinite rights" to interested parties, to undermine the use of deadlines, or to otherwise prevent investigations from proceeding expeditiously. However, it is equally the case that the balance between the role of the investigating authority in this regard and the due process rights enshrined by the text of the provision must be respected.

766. Indeed, in Australia's view, the text recognises that in certain circumstances an expeditious investigation may require, rather than preclude, reasonable extensions of questionnaire deadlines in order to: (i) give interested parties sufficient opportunities, under the circumstances, to supply information relevant to the investigation and, in turn, (ii) ensure that the investigation record is as complete and accurate as possible.

767. Second, China contends that because Article 6.1.1 contains the word "should", the Panel's assessment should be restricted to cover only an examination of whether MOFCOM considered the requests and whether MOFCOM rejected them because it would not be practicable to grant them.<sup>1156</sup> Australia disagrees with this description of the Panel's task.

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<sup>1152</sup> China's first written submission, para. 2359.

<sup>1153</sup> China's first written submission, para. 2358.

<sup>1154</sup> China's first written submission, para. 2360.

<sup>1155</sup> China's first written submission, para. 2360.

<sup>1156</sup> China's first written submission, paras. 2362-2366.

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768. The fact that Article 6.1.1 uses the word "should" does not render meaningless the obligations to (i) give "due consideration" to extension requests, and (ii) "upon cause shown", grant such requests "whenever practicable".<sup>1157</sup>

769. First, Article 6.1.1 must be read in the context of Article 6.1, which requires that all interested parties "*shall* be given ... ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation".<sup>1158</sup> Where an extension request is made in a timely manner and shows cause, an investigating authority that fails to give it "due consideration" and/or grant it "whenever practicable" fails to provide the "ample opportunity" required under Article 6.1.

770. Second, the word "should" in Article 6.1.1 must be given its ordinary meaning, that is, the verb "should" is "used to indicate obligation, duty, or correctness".<sup>1159</sup>

771. Third, in the context of Article 6.1.1, the word "should" serves a practical purpose, building in sufficient flexibility for those situations in which it may not be reasonable or appropriate under the specific circumstances for an investigating authority to give "due consideration" or to grant an extension that is otherwise (e.g., technically) "practicable". In this regard, Article 6.1.1 plainly does not mandate that every request for an extension *must* be granted in all cases. However, at the same time, it also plainly does not provide the investigating authority with unfettered discretion.

772. For the above reasons, China's submission that the presence of the word "should" means that the provision is non-mandatory is mistaken. China's proposed interpretation is based on a highly selective<sup>1160</sup> reading of the interpretations of different obligations in different provisions of different WTO agreements (i.e. Article III:1 of the GATT 1994 and Articles 9.1 and 21.2 of the DSU). China's purported authorities for its interpretation of the word "should" are completely unrelated to the context of the Anti-Dumping Agreement and, therefore, unrelated to the present matter before the Panel. Specifically:

<sup>1157</sup> c.f. China's first written submission, paras. 2362-2363.

<sup>1158</sup> Emphasis added.

<sup>1159</sup> Oxford English Dictionary, definition of "should", (Exhibit AUS-121).

<sup>1160</sup> China's selective analysis omits previous Appellate Body reports where the word "should" was found to express a duty or obligation, and to carry a normative force, such as Appellate Body Report, *Canada – Aircraft*, para. 187.



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- in *India — Patents (EC)*, the panel's finding that Article 9.1 of the DSU was directory or recommendatory, rather than mandatory, was based on the terms of Article 9.1 as a whole, including the reference to steps being taken "whenever feasible" and not simply on the presence of the word "should";<sup>1161</sup>
- in *Japan — Alcoholic Beverages II*, the panel's finding that Article III:1 of the GATT 1994 did not contain a legally binding obligation was based not just on the word "should", but also the word "recognize" and the wording in Article III:2 of "the principles";<sup>1162</sup> and
- in *EC — Bed Linen (Article 21.5 — India)*, the panel's finding that Article 21.2 of the DSU was not mandatory was based not just on the presence of the word "should", but also "the fact there is no specific action set out" in Article 21.2 of the DSU.<sup>1163</sup>

773. Unlike China's selective and irrelevant citations of prior panel and Appellate Body reports, Australia's interpretation of the term "should" is founded on its ordinary meaning, in its context and in light of the object and purpose of the Agreement. In Article 6.1.1, the two uses of "should" clearly carry a mandatory character. Article 6.1.1 is, by its numbering within the Anti-Dumping Agreement, identified as a specific aspect of the more general obligation in Article 6.1, in particular the requirement that all interested parties "*shall* be given [...] ample opportunity to present in writing all evidence which they consider relevant".<sup>1164</sup> As noted above, given the obligation in Article 6.1.1 is a specific aspect of what is textually undoubtedly a mandatory obligation in Article 6.1, it would be nonsensical to construe Article 6.1.1 as merely recommendatory. Read in its context, each use of the word "should" in Article 6.1.1 is clearly intended to express a duty or obligation that is mandatory in character.

774. Finally, Australia observes China's apparent disagreement with Australia's statement that "interested parties are the 'primary sources of information in an investigation'".<sup>1165</sup>

<sup>1161</sup> Panel Report, *India — Patents (EC)*, para. 7.14.

<sup>1162</sup> Panel Report, *Japan — Alcoholic Beverages II*, para. 6.12.

<sup>1163</sup> Panel Report, *EC — Bed Linen (Article 21.5 — India)*, para. 6.267.

<sup>1164</sup> Emphasis added.

<sup>1165</sup> China's first written submission, para. 2368 (referring to Australia's first written submission, para. 906).

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Australia does not understand why China takes exception to what appears to be an uncontroversial statement. Indeed, China first appears to agree with Australia's statement, saying that it considers "the questionnaire responses of interested parties constitute the basis for investigating authorities to make its determinations".<sup>1166</sup> However, in the same paragraph, China expresses its disagreement, citing the panel report in *Argentina – Ceramic Tiles* to support its declaration that MOFCOM is "expressly allowed" under Article 6.8 to "disregard the primary source information [from the interested parties] and resort to the facts available".<sup>1167</sup> To the extent that China's intended point is that interested parties are not the *only* source of information, this was plainly never in contention – the very phrase "primary source" necessarily implies the existence of other sources of information.

(b) Article 6.2

775. There appears to be limited substantive disagreement between the parties as to the legal interpretation of Article 6.2 of the Anti-Dumping Agreement. However, Australia notes that China's submissions place disproportionate emphasis on the fact that there are *some* limits on Article 6.2, rather than in engaging in what the obligation to give a full opportunity for the defence of interests entails.

776. China appears to imply some disagreement between the parties through its use of the heading "the correct interpretation of Article 6.2", and its emphasis that Article 6.2:

- does not give specific guidance on the type of procedural steps an investigating authority should take in ensuring the rights of interested parties;<sup>1168</sup>
- that the question of whether interested parties were given their full rights of defence must be determined on a case-by-case basis, in light of the particular circumstances of the investigation;<sup>1169</sup>
- does not provide "indefinite rights" to interested parties;<sup>1170</sup> and

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<sup>1166</sup> China's first written submission, para. 2361.

<sup>1167</sup> China's first written submission, para. 2368 (referring to Panel Report, *Argentina – Ceramic Tiles*, para. 6.20). As is clear from the text, the panel described the interested parties as the "primary source information".

<sup>1168</sup> China's first written submission, para. 2370.

<sup>1169</sup> China's first written submission, para. 2371.

<sup>1170</sup> China's first written submission, para. 2372.

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- does not mean that parties can participate in the inquiry as and when they choose.<sup>1171</sup>

777. Australia does not disagree with any of these propositions. However, the fact of these propositions does not diminish the rights of interested parties to a "full opportunity for the defence or their interests" or the investigating authority's corresponding obligation to conduct its investigation in a manner that provides for and protects these rights. In other words, the legal considerations on which China focuses in its first written submission cannot be used to "read down" the guarantee that the first sentence of Article 6.2 provides to "all interested parties".

778. In both its first written submission<sup>1172</sup> and its response to Panel question No. 58,<sup>1173</sup> China places emphasis on the statement by the panel in *EU – Footwear (China)* that Article 6.2 does not contain a disclosure obligation. As Australia explained in its response to Panel question No. 58, *EU – Footwear (China)* does not contain a categorical statement that the fundamental right and obligation set forth in Article 6.2 will never require the provision of key information to an interested party. Rather, the panel only considered that Article 6.2 does not itself contain a "specific" obligation with respect to the disclosure of information.<sup>1174</sup> The obligation in the first sentence of Article 6.2 is broader in scope, and an infringement may arise where the investigating authority's conduct improperly deprives an interested party of its right to a full opportunity for the defence of its interests.

779. In Australia's view, a failure to provide key information to an interested party or to improperly withhold relevant information (e.g. by improperly granting confidential treatment without requiring good cause to be shown, or by failing to require a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information granted confidential treatment) may, depending upon the relevant circumstances, have the effect of depriving the interested party of a full opportunity for the defence of its interests.

780. In any event, the wider issue of principle that China seeks to agitate does not arise in this case. Australia's arguments do not relate to the existence of a general obligation of

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<sup>1171</sup> China's first written submission, para. 2373.

<sup>1172</sup> China's first written submission, para. 2374.

<sup>1173</sup> China's response to Panel question No. 58, paras. 340-344.

<sup>1174</sup> Australia's response to Panel question No. 58, para. 141.

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"disclosure" of substantive information by MOFCOM analogous to the type of information considered in *EU – Footwear (China)*.<sup>1175</sup> Australia's arguments are concerned with a specific course of dealings between MOFCOM and Casella Wines that denied Casella Wines an opportunity for a full defence of its interests in breach of China's obligations under Article 6.2.

**4. MOFCOM failed to give due consideration to extension requests or to grant extensions whenever practicable**

**(a) Failure to give due consideration to extension requests**

781. MOFCOM's failure to give due consideration to the requests of Treasury Wines and Casella Wines for extensions of time to submit their questionnaire responses is evident from the lack of reference in MOFCOM's reasons to any of the compelling grounds the parties presented.<sup>1176</sup> These grounds were reasonable on their face and supported by evidence, but, apparently, MOFCOM summarily dismissed them.

782. In its first written submission, China put forward a number of speculative, unfair assumptions in an attempt to rationalise a basis for MOFCOM's refusal to grant the extension.<sup>1177</sup> Subsequently, in response to Panel question No. 57, China asserted that these matters were in fact findings that MOFCOM made.<sup>1178</sup> These assertions have no basis in the record.

783. For example, China asserted that MOFCOM found that since there is "nothing to show that the companies requesting extensions stopped other activities" during COVID-19 lockdowns, good cause for an extension request had not been shown.<sup>1179</sup> There is no evidence on the record that MOFCOM made such a finding.

<sup>1175</sup> Australia's response to Panel question No. 58, para. 143.

<sup>1176</sup> Australia's first written submission, paras. 916-917.

<sup>1177</sup> China's first written submission, paras. 2386-2388. These assumptions include: (i) since the interested parties "were continuing some of their operations" during the COVID pandemic, "it should have been possible for them to respond to MOFCOM in a timely fashion"; (ii) the ability of Swan Vintage to complete the questionnaire in the allocated time demonstrated "that it was indeed possible to complete the questionnaire in the allocated time" and "casts doubt on any 'cause' that Treasury Wines and Casella Wines may have sought to demonstrate"; and (iii) Australia's practice is to require questionnaire responses within a period of 37 days and its *Dumping and Subsidy Manual* (from December 2021) provides for circumstances in which late submissions do not have to be accepted. However, in this regard, China's arguments are silent on any of Australia's practices and policies with respect to granting extension requests of interested parties.

<sup>1178</sup> China's response to Panel question No. 57, paras. 335 - 338.

<sup>1179</sup> China's first written submission, para. 2386; response to Panel question No. 57, para. 336.

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784. In any event, even if MOFCOM had made such a finding, it sets an entirely unreasonable standard. Treasury Wines provided an extensive and well-documented account of the restrictions it faced that meant additional time to respond to the questionnaire was warranted. China's argument appears to be that MOFCOM found that this cannot constitute "cause shown", because Treasury Wines had not provided evidence that it had also stopped *every other* activity it undertook. Based on this standard, no exporter or producer could meet the requirement for "cause shown" except for circumstances that lead to the suspension of the entirety of the exporter or producers operations. Such an unrealistically high standard has no basis in the Anti-Dumping Agreement. Accordingly, even upon accepting China's allegations about MOFCOM's reasoning process at face value, MOFCOM's assessment was not that of an objective and unbiased investigating authority, in light of the information it had before it.

785. China asserts that MOFCOM considered the reasons Treasury Wines gave concerning the impact of the COVID-19 lockdowns and that MOFCOM's observation in the Final Determination that: "[t]he Applicant claimed in the comments on the Preliminary Ruling that [...] one of the three samples did not propose to postpone the submission, suggesting that the respondents were capable of submitting the responses within the stipulated time" evidenced this consideration.<sup>1180</sup> China's somewhat convoluted submission is that, in acknowledging this submission by the Applicant (CADA) MOFCOM was in fact making a finding that Swan Vintage "was obviously also subject to the same restrictions" and that, from this, MOFCOM assumed that the impact of the COVID restrictions on Treasury Wines was not so onerous as to warrant good cause for an extension.<sup>1181</sup>

786. Contrary to China's assertion, this *ex post facto* explanation has no connection to the record. MOFCOM's Final Determination contains no reference at all to consideration of the effect of COVID-19 lockdowns.

787. However, even assuming that MOFCOM did make such a finding, then it clearly was not one that an unbiased and objective investigating authority could reach. Treasury Wines

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<sup>1180</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 19; Anti-Dumping Final Determination (Exhibit CHN-1), p. 8 ("The Applicant claimed in the comments on the Preliminary Determination that [...] one of the three samples did not propose to extend the deadline for the submission, suggesting that the respondents were capable of submitting the responses within the specified period").

<sup>1181</sup> China's response to Panel question No. 57, para. 336.

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submissions about COVID-19 public health restrictions were explicitly based on the particular restrictions applying at the time to metropolitan Melbourne, where Treasury Wines was based.<sup>1182</sup> It would have been entirely inappropriate – and factually unsupported – for MOFCOM to have assumed it was "obvious" that the same restrictions applied to Swan Vintage, which is based in a different state of Australia.<sup>1183</sup> cursory enquiries of public source information would have shown that different and less onerous restrictions applied in the states where Swan Vintage's operations are based. In any event, it is entirely unreasonable and unfair to assume that restrictions would affect completely different companies in exactly the same way.

788. China contends that Australia's claim "must fail" since "37 days is a significant amount of time to fill in the questionnaire response, and this is indeed the amount of time that investigating authorities around the world typically grant exporting producers."<sup>1184</sup> The reason why 37 days is the standard time granted is because it is the minimum allowed by the Anti-Dumping Agreement.<sup>1185</sup> It would strip the requirement to give due consideration to a request for extension of any meaningful effect if the fact that 37 days had already been allowed was a reason to find that "cause" had been not been shown, since that will be true in *every* application for an extension.

789. Finally, Australia addressed China's claims about the level of overlap between the Anti-Dumping Questionnaire and the Sampling Questionnaire in its response to Panel question No. 56. The level of substantive overlap was negligible in the context of the breadth of information sought in the Anti-Dumping Questionnaire.

(b) Failure to find that the requested extensions were not practicable

790. As Australia argued in its first written submission, in addition to its failure to give "due consideration to the requests by failing to address the reasons given in the cause shown by the interested parties, MOFCOM did not identify that it was not 'practicable' to grant the

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<sup>1182</sup> Australia's first written submission, para. 912 (quoting from Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), pp.1-2).

<sup>1183</sup> Swan Vintage Registration Form (Exhibit AUS-122); Swan Vintage Sampling Questionnaire Response (Exhibit AUS-123). Both of these documents indicate the Head Office of Swan Vintage is in Sydney, NSW, Australia.

<sup>1184</sup> China's first written submissions, paras. 2381, 2388.

<sup>1185</sup> Article 6.1.1 of the Anti-Dumping Agreement, read with footnote 15 of the Anti-Dumping Agreement.

extensions that were requested".<sup>1186</sup> In response, China made two points in its first written submission.

791. First, China alleged that the fact that it was not "practicable" was demonstrated by MOFCOM's desire to proceed expeditiously and the terms of Article 6.14 of the Anti-Dumping Agreement. A general desire for expedition, in light of Article 6.14, is a feature of every anti-dumping investigation. It cannot provide, in itself, a justification for a finding that the grant of an extension was not practicable under the relevant circumstances. If it did, then the terms of Article 6.14 would potentially preclude an investigating authority accepting *any* extension request, rendering Article 6.1.1 inutile. Further, as noted above, in particular cases an expeditious investigation may well require, rather than preclude, reasonable extensions of deadlines.<sup>1187</sup>

792. Second, China makes the false allegation that where incomplete or inconsistent information was received from interested parties, the parties were given a "second chance" at clarifying the information contained in their questionnaire responses later in the investigation, and through the supplementary questionnaire were offered a "last chance" to submit information.<sup>1188</sup> China's submission appears to be that the purported existence of the this "second chance" informed MOFCOM's assessment of "practicable".<sup>1189</sup> If such a practice had been used in this case, then Australia agrees that it would be relevant to the reasonableness of MOFCOM's refusal to grant extensions, since the consequence of the refusal would not have had as prejudicial an impact on the parties' opportunity for the defence of their interests. It is not apparent to Australia why China considers that it would bear upon the assessment of whether the grant of the extension was "practicable".

793. In any event, China's alleged opportunity for a "second chance" simply was not given in this investigation. To the contrary, MOFCOM's Final Determination, and China's submissions before this Panel, are replete with instances where MOFCOM treated the fact that information was not provided within the original deadline as of decisive importance, and refused to have regard to information submitted after this deadline. MOFCOM regarded the supplementary

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<sup>1186</sup> Australia's first written submission, para. 920.

<sup>1187</sup> See above, para. 771.

<sup>1188</sup> China's first written submission, para. 2393.

<sup>1189</sup> China's first written submission, para. 2393.

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questionnaires only as a mechanism for explanations to be offered in response to the specific questions posed in them. An opportunity to offer *only* clarificatory responses to specific questions does not afford a comparable procedural right to an extension of time that would have permitted interested parties to submit detailed responses and supporting data in response to the original questionnaire.

794. Prominent examples of such action by MOFCOM include:

- resorting to facts available in respect of the production costs and expenses for Treasury Wines, because complete data for [REDACTED];  
[REDACTED];  
and
- resorting to facts available in respect of the Casella Wines because it did not provide complete domestic sales data and cost data until after the original deadline.

**5. MOFCOM's treatment of Casella Wines denied it a full defence of its interests**

795. MOFCOM's refusal to consider the detailed evidence submitted by Casella Wines in respect of the domestic sales and cost data by reason of its format, without prior communication of its intention to do so, denied Casella Wines a full opportunity for defence of its interests.<sup>1190</sup> China's submissions in response reiterate, rather than explain, the errors that were made by MOFCOM.

796. China, like MOFCOM, complains that Casella Wines did not give any explanation about the deficiencies in its original submission until after the Preliminary Determination.<sup>1191</sup> Given that Casella Wines did not become aware of any deficiencies – which were a result of a limitation of the software mandated by MOFCOM – until the Preliminary Determination, it is unreasonable to have expected Casella Wines to raise them any earlier. Casella Wines wrote to MOFCOM and submitted a correct set of data in Excel, an alternative format, four business

<sup>1190</sup> Australia's first written submission, para. 924.

<sup>1191</sup> China's first written submission, para. 2404.



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days after the Preliminary Determination.<sup>1192</sup> This was, realistically, the earliest possible opportunity for Casella Wines to respond to the issue. Casella Wines had already submitted complete data in PDF and hard copy format.

797. MOFCOM then did not raise any concerns about the approach taken by Casella Wines to provide alternate data, or provide notice that it required Casella Wines to submit the data in an alternative format, until the Final Disclosure, 98 days later.<sup>1193</sup>

798. While MOFCOM did issue a Supplementary Questionnaire in the intervening time, that document only outlined MOFCOM's perception of the deficiencies in the original WPS format submission, asked why the original WPS format submission was incomplete, and asked why Casella Wines had not submitted an application to provide that response in a different format within 15 days of receipt of the questionnaire.<sup>1194</sup> While this reiterated the deficiencies already identified (and accepted) with the original data submission, MOFCOM made no mention of any concerns about the re-submitted data.

799. MOFCOM in the Final Determination, and China in its first written submission, both strongly imply that MOFCOM would have accepted resubmitted data from Casella Wines after the publication of the Preliminary Determination if Casella Wines had attempted to split the data across multiple WPS sheets so that all the data were present.<sup>1195</sup> If MOFCOM would have accepted the data broken across multiple WPS sheets, then it should have asked Casella Wines to provide the data in that format. Casella Wines had demonstrated a good faith willingness to provide the data, evidenced by having provided complete data in PDF, Excel and hard copy format, and an attempt to provide it in WPS format. Yet in the Supplementary Questionnaire MOFCOM chose to instead only ask about why the original data were not complete. It did not ask for the data to be resubmitted in multiple WPS sheets, and it did not otherwise engage with Casella Wines about the resubmitted data. In the facts and circumstances of this case, that conduct denied Casella Wines a full defence of its interests.

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<sup>1192</sup> See Australia's first written submission, para. 925.

<sup>1193</sup> Australia's first written submission, paras. 926-929.

<sup>1194</sup> Australia's first written submission, para. 927, citing Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 5-8.

<sup>1195</sup> China's first written submission, para. 2406.

## 6. Conclusion

800. China has failed to rebut Australia's *prima facie* case that MOFCOM failed to provide interested parties with 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. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.1, 6.1.1 and 6.2 of the Anti-Dumping Agreement.

### 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

801. Australia has established a *prima facie* case with respect to its claims under Article 6.6.<sup>1196</sup> For the reasons set out below, China has failed to rebut those claims.<sup>1197</sup>

#### 1. China's mistaken assertion that Australia abandoned part of its claim

802. China alleges that Australia abandoned the part of its claim under Article 6.6 relating to MOFCOM's decision to resort to facts available.<sup>1198</sup> Australia has not done so.

803. China's allegation appears to be entirely based on China having been unable to find a section with a heading using the same language as the list that appears in paragraph 936 of Australia's first written submission.<sup>1199</sup> At the same time, China acknowledges that Australia specifically raised this claim in both the introductory and concluding sections of its

<sup>1196</sup> See Australia's first written submission, paras. 936-957; opening statement at the first meeting of the Panel, para. 121-123; Australia's responses to Panel questions No. 18, paras. 53-59; Australia's response to Panel question No. 59, paras. 145-153.

<sup>1197</sup> China adduces several jurisdictional or "threshold" complaints concerning Australia's claims with respect to Article 6.6. These complaints, which are entirely without merit, are addressed above. See above sections II.A - II.B.

<sup>1198</sup> China's first written submission, para. 2416.

<sup>1199</sup> Indeed, China's assertion of abandonment appears to be entirely predicated on its drafting preference that para. 936 of Australia's first written submission should not have included the roman numeral "(v)" in a list format if that did not correspond to a separate heading. Presumably, China would have no objection if that single character had been omitted such that para. 936 instead simply read "the methodology MOFCOM used to verify the information provided by the sampled companies and MOFCOM's decision to resort to "facts available". It is not reasonable to read Australia's submissions in this manner, particularly to purportedly infer the abandonment of an element of a claim that Australia specifically raised in those submissions.

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submissions on Article 6.6.<sup>1200</sup> Australia's arguments about MOFCOM's decision to resort to "facts available" are made, from paragraph 953 of Australia's first written submission, in parallel to those concerning the defective assessment of the responses from the sampled companies. The defects in those assessments led to errors in the decision to resort to facts available.

804. Moreover, it is premature for China to infer that Australia has abandoned an aspect of its claim simply from the first written submission.<sup>1201</sup>

## 2. Legal framework

805. China alleges that Australia's arguments concerning Article 6.6 are based on an "incorrect and/or improper interpretation" of the provision.<sup>1202</sup> However, despite this serious allegation, there appears to be limited controversy between the parties as to the proper interpretation.

806. Much of China's arguments on the legal standard appear to be directed at rebutting the proposition that Article 6.6 does not *mandate* the *verification* of the accuracy of all information upon which the investigating authority relied.<sup>1203</sup> This is not a proposition that Australia has put forward. Australia's first written submission was clear that, in Australia's view, "an investigating authority is not required to undertake 'on-the-spot'" verification of the type permitted by Article 6.7".<sup>1204</sup> The previous panel decision that Australia cited in support of this view is the same that China emphasised in its responses to questions from the Panel.<sup>1205</sup>

807. Accordingly, China's suggestion that Australia's interpretation is "incorrect and/or improper" appears to be based entirely on a straw argument that Australia never made.

808. That aside, the apparent disagreement between the parties is limited to two issues concerning the standard and scope of the Panel's review.

<sup>1200</sup> China's first written submission, para. 2416.

<sup>1201</sup> See above section II.C.

<sup>1202</sup> China's first written submission, para. 2418.

<sup>1203</sup> China's first written submission, paras. 2418-2422.

<sup>1204</sup> Australia's first written submission, para. 939.

<sup>1205</sup> Panel Report, *Argentina – Ceramic Tiles*, para. 6.57 is cited in Australia's first written submission, para. 939 fn. 1099 and China's response to Panel question No. 59, China's response to Panel question No. 59, para. 351, fn. 223. See also fn. 2357 to China's first written submission.

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809. The first is China's assertion that the Panel's function in this case is to "simply check" whether MOFCOM's examination of the accuracy of the submitted information represented an "unbiased and objective evaluation of the facts".<sup>1206</sup> The use of this phrase was the subject of the Panel's question No. 59 at the first substantive meeting.

810. As Australia noted in its response to that question, if China interprets the word "simply" to mean that the Panel cannot scrutinise the investigating authority's process, this is plainly inconsistent with the requirements of Article 17.6 the Anti-Dumping Agreement and Article 11 of the DSU.<sup>1207</sup> It remains unclear to Australia what China meant by the phrase "simply check". However, Australia notes that, in China's written response to question No. 59, it stated that a reviewing panel is to "check" if the "investigating authority's assessment" of the accuracy of the information supplied by interested parties was "unbiased and objective" without any use of the qualifier "simply".<sup>1208</sup> Australia infers from this that China does not now insist on some unspecified qualification to the scope of the panel's review through the phrase "simply check".

811. The second is China's assertion in its responses to the Panel question No. 59. In this response China asserted that *EC – Fasteners (China) (Article 21.5 – China)* stands for, among other things, the proposition that "the method (or 'process') employed by an investigating authority cannot be questioned by the complainant" and that this standard should be applied in the present dispute.<sup>1209</sup> However, the paragraphs China cites simply do not contain such a proposition. While Australia agrees that investigating authorities have discretion as to the method or process they use, there is no legal basis for China's apparent position that the method or process chosen is not susceptible to scrutiny by a panel. Indeed, such a position would be inconsistent with the requirements of Article 17.6 the Anti-Dumping Agreement and Article 11 of the DSU.

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<sup>1206</sup> China's first written submission, para. 2423.

<sup>1207</sup> Australia's response to Panel question No. 59, para. 145.

<sup>1208</sup> China's response to Panel question No. 59, para. 353 ("China understands that there must be some reasonable standard that investigating authorities must follow in this regard. To this end, China finds the Panel Report in *EC – Fasteners (China) (Article 21.5 – China)*, compelling, in that, while the method (or 'process') employed by an investigating authority cannot be questioned by the complainant, a reviewing Panel is to check whether the investigating authority's assessment was "unbiased and objective").

<sup>1209</sup> China's response to Panel question No. 59, para. 353.

### 3. MOFCOM's calculation of total domestic output

812. China's arguments in its first written submission relating to the calculation of total domestic output are misdirected and irrelevant to the arguments Australia actually advanced.<sup>1210</sup>

813. Australia's argument in relation to the calculation of total domestic output is directed at the calculation used in the *investigation*, rather than for the purposes of initiation. The description in Australia's first written submission of MOFCOM's initial, uncritical acceptance of CADA's domestic production figures, and subsequent rejection of them, is introductory context.<sup>1211</sup> It is not, as China's submissions appear to assume, the substance of Australia's case concerning the information that MOFCOM used to calculate or construct an estimate of the volume of total domestic production.<sup>1212</sup>

814. The significance of this context for the assessment of the accuracy of the latter calculation of domestic output is that, by the point in time when the subsequent calculation was conducted, MOFCOM had already once been provided with unreliable data about the total output of the domestic industry. As Australia noted in its first written submission, this "should have underscored for MOFCOM the importance of ensuring the accuracy and suitability of the statistics" upon which it based its calculation of the total domestic output.<sup>1213</sup>

815. In its response to the Panel's questions following the first substantive meeting, China explained – for the first time – that the provenance of the information upon which it based its calculation of total domestic output was the [REDACTED]  
[REDACTED].<sup>1214</sup> Australia notes that China has given no explanation of any steps MOFCOM took to satisfy itself of the accuracy of that information. Nor is any explanation disclosed in the record. It is evident from this omission that no such steps were taken. MOFCOM's failure to take any steps in this regard is inconsistent with the obligations under Article 6.6.

816. Australia notes that China has not contended that Article 6.6 would not apply to this data by reason of the [REDACTED] not falling within the

<sup>1210</sup> China's first written submission, para. 2425.

<sup>1211</sup> Australia's first written submission, paras. 941-943.

<sup>1212</sup> Australia's first written submission, para. 941.

<sup>1213</sup> Australia's first written submission, para. 943.

<sup>1214</sup> China's response to Panel question No. 15, para. 51.

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categories of "interested party" set out in subparagraphs (i), (ii), (iii) of Article 6.11 of the Anti-Dumping Agreement. Australia understands that this is because MOFCOM treated the [REDACTED] [REDACTED] as an "interested party" within the meaning of the last sentence of Article 6.11. Australia recalls the Appellate Body's finding in *EC — Fasteners (China)* (Article 21.5) that the treatment of an entity as an "interested party" can be inferred from the conduct of an investigating authority, and does not require an express finding.<sup>1215</sup>

#### 4. Responses to the domestic producer questionnaires

817. China's position on the steps taken by MOFCOM to verify the responses to the domestic producer questionnaires has undergone a conspicuous shift through these proceedings.

818. Australia recalls that the Final Determination contains a specifically dedicated section entitled "Domestic industry verification". Australia submits the Panel can safely infer that this was the full extent of the steps taken by MOFCOM to satisfy itself of the accuracy of the domestic industry responses. In that section, MOFCOM describes the process of seeking information from two of the companies, which is said to have been done "[i]n order to verify the documents and evidence provided in the applications and responses and gain an understanding of other respects of the investigation".<sup>1216</sup> No reference is made, in that section or in any other section of the Final Determination, to any other steps having been taken by MOFCOM.

819. China has not contended that this process of verifying the information from two domestic industry respondents was sufficient for MOFCOM to have been satisfied of the accuracy of the *other* 19 domestic industry respondents' information. Rather, China argues that MOFCOM undertook a separate and entirely undisclosed process of independently assessing financial data from other sources for three of those 19 respondents. What China claims MOFCOM did in this regard has evolved through the dispute.

820. In China's first written submission, it submitted that MOFCOM tested the accuracy of "a number" of non-sampled companies, by cross-checking the data submitted by those

<sup>1215</sup> Appellate Body report, *EC — Fasteners (China)* (Article 21.5), para. 5.150.

<sup>1216</sup> Anti-Dumping Final Determination (Exhibit AUS-2), p. 28.

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companies against their financial reports.<sup>1217</sup> China says that this is "readily apparent from the investigation case-file" because these financial "reports were part of the record in Annex XIII to [CADA's] application".<sup>1218</sup>

821. The Panel will recall that in oral exchanges at the first substantive meeting Australia observed that, even if this *ex post facto* justification could be accepted, the material contained in CADA's application was limited to extracts of financial reports of at most three companies. China responded that it considered those extracts relatively complete, but otherwise made no claim that MOFCOM used any other information.

822. China's position then changed markedly in its written responses to the Panel's questions following the first substantive meeting. China now asserts that MOFCOM *did not* rely upon the extracted financial reports attached to CADA's application, but rather used the complete financial reports of three companies for the periods 2015-2019, which MOFCOM apparently obtained from public sources, but which were not included on MOFCOM's investigation record.<sup>1219</sup>

823. Neither the additional checks that China claims were conducted in its first written submission and at the first substantive meeting, nor the alternative or additional checks China claims were conducted in its written responses to the Panel's questions, are referred to anywhere in the investigation record. It is entirely implausible that MOFCOM would have omitted this apparently detailed process of gathering and reviewing information from a Final Determination that contained a section *specifically dedicated* to describing the steps it had taken to satisfy itself of the accuracy of the information. China's explanations are a transparently *ex post facto* account that has no connection with the record.

824. In this context, China's serious allegation in first written submission that Australia "deliberately choses to ignore the actual facts on the record" in respect of this claim is baseless.<sup>1220</sup> China's response to Australia's arguments relies entirely on a series of assertions, which have changed over the course of the proceeding, about alleged actions taken by

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<sup>1217</sup> China's first written submission, para. 2429.

<sup>1218</sup> China's first written submission, para. 2430.

<sup>1219</sup> China's response to Panel question No. 59, paras. 354-356.

<sup>1220</sup> China's first written submission, para. 2428.

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MOFCOM that were never disclosed to the interested parties and for which there is no evidence in the investigation record.

825. In any event, even on China's currently preferred account of MOFCOM's actions, MOFCOM did nothing to assess the accuracy of the responses from 16 out of the 21 domestic producers. Australia does not contend that MOFCOM was required to "verify" the responses from each of those companies, or that it was required to check "each and every" data point submitted.<sup>1221</sup> Rather, Australia's case is that MOFCOM had to do more than rely upon simple assertions from the domestic industry in circumstances where the domestic industry had already provided inaccurate information to MOFCOM in the same investigation. China has provided no explanation why it considered it necessary to verify the information from two respondents, apparently then conduct a desktop review of the data of a further three respondents selected simply because they were named in CADA's initiating application, but then to do nothing to assess the accuracy of the information provided by the other 16 respondents.

826. Finally, Australia notes that China has asserted a BCI claim over the entirety of Exhibit CHN-43 where it sets out the items of financial statements that it says MOFCOM "cross-checked".<sup>1222</sup> This document is comprised entirely of links to public documents and tables that cross-reference between public documents and the non-confidential Exhibit AUS-43. Australia recalls that the Additional Working Procedures of the Panel Concerning Business Confidential Information provided at paragraph 1 that:

The parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information.

827. Australia considers that this information should not have been designated as BCI, as it is comprised entirely of information that was "available in the public domain". As a result, the designation by China is contrary to paragraph 1 of the Additional Working Procedures of the Panel Concerning Business Confidential Information. Australia requests the Panel to

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<sup>1221</sup> As China has alleged: China's response to Panel question No. 59, paras. 356-355.

<sup>1222</sup> China's response to Panel question No. 60, para. 354.



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making a finding, in accordance with paragraph 10 of the Additional Working Procedures, that the information is not BCI.

## 5. The sampling questionnaire

828. In its first written submission, Australia submitted that there is nothing in the record to show that MOFCOM did anything to satisfy itself of the accuracy of the data upon which it relied for the selection of the sample, despite a direct challenge to the accuracy of the data from Pernod Ricard.<sup>1223</sup>

829. China's response, at least initially, was to assert that there is "ample evidence" of MOFCOM's examination of the accuracy of the data.<sup>1224</sup> However, the sole "evidence" that China identifies is MOFCOM's statements in the Final Determination that it could only select three companies for the sample, and that Pernod Ricard "did not fall into the top three category [sic]".<sup>1225</sup> China considers that these statements show the accuracy of the data was examined by MOFCOM through "juxtaposing" Pernod Ricard's data with data submitted by the other Australian wine producers.<sup>1226</sup>

830. None of the steps China described involve any attempt to assess the *accuracy* of the data used in the sample. Each of them involves MOFCOM uncritically treating the data before it as accurate. As China acknowledged in its response to the Panel's questions, the "juxtaposing" involved nothing more than a sequencing of the data to identify which company claimed the largest exports.<sup>1227</sup> It did not involve any assessment of the accuracy of the data.

831. Accordingly, even on the face of the arguments in China's first written submission, it is evident that nothing was done to assess the accuracy of the data, which was relied upon for the significant step of selecting the sampled companies.

832. In its response to the Panel's written questions, China's explanation shifted from the assertion made in its first written submission — i.e. that MOFCOM had in fact assessed the accuracy of the information — to a different assertion, which is that China considers that it is

<sup>1223</sup> Australia's first written submission, paras. 949-952.

<sup>1224</sup> China's first written submission, para. 2428.

<sup>1225</sup> China's first written submission, para. 2434.

<sup>1226</sup> China's first written submission, para. 2434.

<sup>1227</sup> China's response to Panel question No. 62, para. 362.

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"entirely unreasonable" to expect such an assessment would have occurred and that no investigating authority around the world would have undertaken such an assessment.<sup>1228</sup>

These two positions are entirely inconsistent: China cannot simultaneously deride the idea that *any* investigating authority would assess the accuracy of information used for a sample, while also asserting positively that MOFCOM "indeed examined the accuracy of the data"<sup>1229</sup> and "did in fact, examine the accuracy of the data".<sup>1230</sup>

833. The Panel should treat China's willingness to advance two different, and objectively inconsistent, arguments as a strong indication that both reflect an entirely *ex post facto* justification.

834. Further, in advancing its own inconsistent views of the obligations under Article 6.6, China misrepresents the arguments Australia actually made. China creates, and then takes issue with, a straw version of Australia's case. Australia has not submitted that MOFCOM was required to "verify"<sup>1231</sup> the data or to launch a "mini-investigation".<sup>1232</sup> Australia's submission is that, in the facts and circumstances of this case, MOFCOM – faced with a direct submission

–<sup>1233</sup> did *nothing* to satisfy itself as to the accuracy of the data upon which it would rely to select the sample. This inaction was inconsistent with the requirements of Article 6.6.

835. Finally, in its response to the Panel's questions (although, conspicuously, not its first written submission), China says that a "fact [...] of great importance" is that the sampling forms contained an attestation from the companies that the information was complete, accurate and reliable.<sup>1234</sup> In Australia's view, in the circumstances of this case, where MOFCOM had received a formal communication disputing the accuracy of the data, it was inadequate to treat such an attestation as determinative.

<sup>1228</sup> China's response to Panel question No. 61, para. 359.

<sup>1229</sup> China's first written submission, para. 2434.

<sup>1230</sup> China's first written submission, para. 2434.

<sup>1231</sup> China's response to Panel question No. 61, para. 361.

<sup>1232</sup> China's response to Panel question No. 61, para. 360.

<sup>1233</sup> Pernod Ricard Comments on Sampling (Exhibit AUS-93), p.2.

<sup>1234</sup> China's response to Panel question No. 61, para. 361.

## **6. Defective assessment of the responses from the sampled companies**

836. There is significant disagreement between the parties as to whether Article 6.6 applies to MOFCOM's assessment of the responses from the sampled companies. China's view is that this assessment is solely governed by Article 6.8 and Annex II; Australia's view is that Article 6.6 applies to the assessment that is conducted anterior to the investigating authority's finding that the circumstances in Article 6.8 have arisen. This difference of views is ventilated in detail in the parties' responses to the Panel's question No. 59, and Australia will not reiterate those submissions here.<sup>1235</sup>

837. Aside from the threshold question of the scope of Article 6.6, China's written response emphasises that Article 6.6 does not require any *particular* process or methodology to be used.<sup>1236</sup> Australia agrees. Australia's submission is that an investigating authority has discretion to use any process it chooses, provided that the process, as applied in practice, is rationally capable of determining the reliability and probity of the information being used. An unbiased and objective investigating authority would not do otherwise.

838. As set out in Australia's first written submission, MOFCOM's chosen process in relation to its assessment of the responses from the sampled companies did not meet this standard and as such was inconsistent with the obligation under Article 6.6.

## **7. Conclusion**

839. For the reasons set out above, and in Australia's earlier submissions, MOFCOM acted inconsistently with China's obligations under Article 6.6 by failing to satisfy itself of the accuracy of the information on which its findings were based.

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<sup>1235</sup> China's response to Panel question No. 59, paras. 345-350; Australia's response to Panel question No. 27, para. 145.

<sup>1236</sup> China's response to Panel question No. 59, paras. 351-353.

**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**

**1. Introduction**

840. As set out in Australia's prior submissions, MOFCOM breached its obligations under Article 6.4 of the Anti-Dumping Agreement because it did not provide timely opportunities for interested parties to see all information relevant to the presentation of their cases that was used by MOFCOM, was practicable for MOFCOM to provide, and was not confidential.<sup>1237</sup> This information related to MOFCOM's: (i) estimate of total production (or "total output") of domestic like products in China; (ii) determination of normal values and dumping margins for Australian interested parties; (iii) fair comparison adjustments; (iv) determination of price comparability for the price suppression analysis; and (v) determinations of injury and causation.

**2. Legal framework**

841. The purpose of Article 6.4 is to provide interested parties with timely opportunities to see all information and prepare presentations on the basis of this information. The disagreements of the parties over the proper interpretation and application of Article 6.4 fall into the following five key categories:

- whether the submission of any evidence, information, or comments by interested parties precludes a claim under Article 6.4;<sup>1238</sup>
- China's semantic objections to the word "disclosure" in Australia's arguments as a description for making all relevant information available for the interested parties to see;

<sup>1237</sup> Australia's arguments concerning MOFCOM's breaches of Article 6.4 are set out in: Australia's first written submission, section VII.F, paras. 958-1009; responses to Panel question Nos. 50, 53, and 54, paras. 123-130.

<sup>1238</sup> China's first written submission, para. 2442, 2460.

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- whether the obligation to provide timely opportunities for all interested parties to see all relevant information under Article 6.4 only applies if there is a specific request to see certain information;
- whether the due process and procedural rights under Article 6.4 are as limited and narrow as China suggests;<sup>1239</sup> and
- the scope of the investigating authority's discretion to determine that information falls within the scope of Article 6.4.<sup>1240</sup>

842. China's interpretation of Article 6.4 focuses explicitly on limiting the due process and procedural rights set forth in this provision and on narrowing the scope of the information that it covers.<sup>1241</sup> China's submissions on these points are based, in part, on errors and mischaracterisations of Australia's submissions. These will be addressed in detail below.

843. In general, China argues that MOFCOM satisfied the requirements of Article 6.4 for the mere reason that it "provided interested parties 'regular and routine' access to the investigation's casefile".<sup>1242</sup> On this basis, China argues that Australia has not established a *prima facie* case of violation of Article 6.4. Australia disagrees that providing access to a "case file", without more, is necessarily sufficient to meet the requirements of Article 6.4. Rather, Article 6.4 requires, *inter alia*, that "all interested parties" have access to "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". To the extent that such information is not made available in the "case file", or there is no meaningful opportunity for an interested party to see it in the "case file", the requirements under Article 6.4 will not be met.

<sup>1239</sup> China's first written submission, paras. 2442-2454.

<sup>1240</sup> China's first written submission, para. 2454.

<sup>1241</sup> See e.g. China's first written submission, paras. 2444, 2452.

<sup>1242</sup> China's first written submission, para. 2457.

(a) Whether the submission of any evidence, information, or comments by interested parties precludes a claim under Article 6.4

844. China argues in its first written submission<sup>1243</sup> that MOFCOM gave opportunities to the interested parties "to present evidence and information during the entire course of the investigation".<sup>1244</sup> However, such opportunities are, in and of themselves, insufficient to satisfy the requirements under Article 6.4. Article 6.4 requires:

- first, that "all interested parties" have timely opportunities to "see all information" that is (i) relevant to the presentation of their cases, (ii) not confidential, and (iii) used by the investigating authority in the investigation; and
- second, that "all interested parties" have timely opportunities to "prepare presentations *on the basis of this information*."

845. Thus, the question is whether all interested parties had opportunities to make presentations "on the basis of" the relevant, non-confidential information that MOFCOM used in the investigation. It is not whether MOFCOM simply permitted interested parties to submit evidence, information, or comments in general. That is, it matters whether the opportunities were meaningful.

846. It is unambiguous from the language in the second part of Article 6.4 that the reference to "this information" is the information described in the first part of Article 6.4. Logically, unless there are timely opportunities to see such information, there can be no timely opportunities to "prepare presentations on the basis of that information" within the meaning of Article 6.4. Accordingly, contrary to what appears to be China's view, whether or not an interested party was able to submit *any* comments to MOFCOM cannot be determinative of whether there was a contravention of Article 6.4.

<sup>1243</sup> China first written submission, paras 2460, 2464, 2472, 2479, 2488, and 2489.

<sup>1244</sup> China's first written submission, para. 2442.

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(b) China's semantic objections to the use of the word "disclosure" in Australia's arguments as a description for making all relevant information available for the interested parties to see

847. China complains that Australia is attempting to read the disclosure obligation under Article 6.9 into Article 6.4<sup>1245</sup> by using the words "disclose" and "disclosure" in its arguments.<sup>1246</sup> They reflect an unreasonably pedantic approach to the choice of language that Australia uses to set out its arguments. Nothing turns on Australia's use of these words as a description for making all relevant, non-confidential, and used information available for the interested parties to see. In order for the interested parties to "see" information, that information has to be "disclosed".

848. Both panels and the Appellate Body have used the term "disclosed" when referring to Article 6.4 obligations.<sup>1247</sup> In *EC – Tube or Pipe Fittings*, for example, the Appellate Body considered that: "[...] we are of the view that the information contained in Exhibit EC-12 should have been *disclosed to the interested parties, pursuant to Article 6.4*, because the information was relevant to the interested parties, used by the European Commission in the investigation, and not confidential";<sup>1248</sup> and "[o]ne of the stated objectives of the *disclosure of information required under Article 6.4* is to allow interested parties 'to prepare presentations on the basis of this information'".<sup>1249</sup>

849. Further, the panel's finding in *Korea – Certain Paper (Article 21.5 – Indonesia)*<sup>1250</sup> that the investigating authority's failure to disclose information would not amount to a violation of Article 6.4 in the circumstances of that case, should not be taken as the overarching principle of general application that China posits it to be. The point in issue in that case was whether the investigating authority should have provided a notification (i.e., "disclosure") that it intended to base its injury re-determination solely on the data collected in the original

<sup>1245</sup> For further context about the crossover between Article 6.4 and 6.9, see below para. 918.

<sup>1246</sup> China's first written submission, para. 2447-2449.

<sup>1247</sup> See e.g. Appellate Body Report, *EC – Tube and Pipe Fittings*, para. 148; Panel Report, *Korea – Certain Paper*, para 7.201.

<sup>1248</sup> Appellate Body Report, *EC – Tube and Pipe Fittings*, para. 148. (emphasis added)

<sup>1249</sup> Appellate Body Report, *EC – Tube and Pipe Fittings*, para. 149. (emphasis added)

<sup>1250</sup> Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras. 6.81-6.89.

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investigation.<sup>1251</sup> When the panel referred to there being no obligation of disclosure, it was referring specifically to writing to a party to give notice of the intention to use otherwise available information.

850. China's objections to Australia's use of the words "disclose" and "disclosure" are purely semantic and do not address MOFCOM's failure to comply with the substantive obligation in Article 6.4 to "provide timely opportunities for all interested parties to see all information". On a fair reading of Australia's submissions, there can be no confusion about the nature or meaning of Australia's arguments.

851. By way of illustrative example, it is nonsensical, if not disingenuous, for China to suggest that the word "disclosure" in paragraph 960 of Australia's first written submission could mean anything other than "failed to provide interested parties opportunities to see all information that was used" given this is the phrase that appears in the immediately preceding paragraph 959. There is no requirement for parties to limit themselves to verbatim recitations of the language of the Anti-Dumping Agreement in their submissions.

(c) Whether the obligation to provide timely opportunities for all interested parties to see all relevant information under Article 6.4 only applies if there is a specific request to see certain information

852. China's view appears to be that there is no obligation to "disclose" information unless there is a prior request.<sup>1252</sup> While the panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* held that Article 6.4 "[...] does not require the authorities to disclose information to the interested parties when there is no request to that effect [...]".<sup>1253</sup> The panel in *China – Broiler Products (Article 21.5 – US)* provides strong counter-reasoning on this point. In Australia's view, this reasoning is more persuasive and should be preferred. In particular, the panel stated:

<sup>1251</sup> Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.92.

<sup>1252</sup> China's first written submission, para. 2446.

<sup>1253</sup> Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para 6.87. At other points in China's Article 6.4 arguments on this point in its first written submission, China also refers to reasoning in the panel reports of *EC – Fasteners (China)*, para. 7.480; and *EU Footwear (China)*, para. 7.603. Both of these panel reports relied on the reasoning from *Korea – Certain Paper (Article 21.5 – Indonesia)*, and the panels in those cases add little to no reasoning for relying on this approach.



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[T]he absence of a request by an interested party in itself does not, as a matter of law or fact, mean that an investigating authority has satisfied its obligation to provide timely opportunities to see information under Articles 6.4 and 12.3. Viewed in context, the quotation from *EC – Fasteners (China)* relied on by China does not support its position to the contrary. The panel in that case had already observed that Article 6.4 did not require an investigating authority to "actively disclose" information, and was addressing China's argument that "the investigating authorities were under the obligation to provide information even in the absence of a request. The panel rejected the view that there was any obligation to actively disclose information under Article 6.4. In this context, the statement that a "violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information" in our view reflects that one way of demonstrating a violation of Article 6.4 would be to show that a request to see information was denied. This does not, however, mean that such a request (and denial) are necessary in order to demonstrate a violation of Articles 6.4 and 12.3.<sup>1254</sup>

853. As Australia noted in first written submission,<sup>1255</sup> the compliance panel in *China – Broiler Products (Article 21.5 – US)* also set out a textual analysis of the wording of Article 6.4, strengthening this interpretation:

Textually, the obligation is for investigating authorities to "provide" opportunities. This is in contrast to other obligations in Article 6 of the Anti-Dumping Agreement and Article 12 of the SCM Agreement that condition the obligation to "provide opportunities" or to "make available" on a "request".

- a. Article 6.1.3 of the Anti-Dumping Agreement and Article 12.1.3 of the SCM Agreement require that the investigating authority "shall provide" the written application to the known exporters and the authorities of the exporting Member (without reference to any request), and "shall make it available, upon request, to other interested parties involved"; and
- b. Article 6.2 of the Anti-Dumping Agreement conditions the obligation to "provide opportunities" to meet with adverse interests with the phrase "on request".<sup>1256</sup>

854. Following this in-depth textual analysis, the compliance panel then concluded that other interpretations requiring first a request to see information, such as those in the previous panel reports relied on by China,<sup>1257</sup> would logically lead to an "unreasonable result".

<sup>1254</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.292.

<sup>1255</sup> Australia's first written submission, para. 969.

<sup>1256</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.

<sup>1257</sup> See Panel Reports, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.87; *EC – Fasteners (China)*, para. 7.480; and *EU – Footwear (China)*, para. 7.603.

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Interested parties that are not aware of the existence of certain information before the investigating authority obviously cannot make a request to see that information. Such interested parties may well be most in need of the due process protection afforded by Articles 6.4 and 12.3. Yet, a requirement for a request would render void their right to have an opportunity to see information of which they are unaware. Attributing such a meaning to a treaty provision would lead to an unreasonable result.<sup>1258</sup>

855. Australia agrees with the panel's reasoning and approach in *China – Broiler Products (Article 21.5 – US)*, which is apt to the circumstances of the present matter.

(d) Whether the due process and procedural rights under  
Article 6.4 are as limited and narrow as China suggests

856. The parties disagree as to the proper application of Article 6.4 of the Anti-Dumping Agreement. In its first written submission, China attempts to improperly limit the scope of Article 6.4 by mischaracterising previous panels' findings. In particular, China has incorrectly categorised or labelled particular types of information as either "context" or "methodology". It then asserts that the information it places in such categories, *per se*, falls outside the scope of the obligation under Article 6.4. For the reasons set out below, Australia disagrees with China's approach.

857. The issue before the Panel is whether the information identified in Australia's submissions is within the scope of Article 6.4. That question must be answered by reference to the text of the Anti-Dumping Agreement. There is no basis in the Anti-Dumping Agreement (or anywhere else) to approach this question by first asking whether the information fits within the scope of *some other* vaguely defined category such as "context" or "methodology", and then attempting to determine whether *every* type of information that could fall with the scope of that vague category would be within the scope of Article 6.4.

i. *China's table at paragraph 2455 of its first written  
submission misrepresents Australia's arguments*

858. China's first written submission includes a table that purports to identify arguments purportedly made by Australia that are outside the scope of Article 6.4. It is a misrepresentation of the case made by Australia. What are described as "items" from

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<sup>1258</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.

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Australia's submissions are selectively cherry-picked phrases and incomplete parts of sentences that are abstracted from the context in which they appear.

859. Australia submits that, when read in their proper context, it is clear that each of the instances set out in China's table at paragraph 2455 of its first written submission identifies information that was relevant, non-confidential, and used by MOFCOM. As such, the information was of the kind that falls within the scope of the obligation contained in Article 6.4. To assist the Panel, Australia has provided in Annex B each of the full paragraphs in Australia's first written submission that are partially quoted in China's table. When Australia's arguments are read in their full and proper context, it is clear that China has mischaracterised them.

860. By way of one example, Australia refers the Panel to items 4, 5, 6, and 7 in China's list. In item 4, the relevant paragraph of Australia's first written submission reads in full as follows:

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 [*sic*] were taken into account and weighed against each, or the purpose for which it took them into account.<sup>1259</sup>

<sup>1259</sup> Australia's first written submission, para. 980.

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861. China has attempted to take the chapeau and the dot points out of its proper context, asserting that this amounts to "reasoning", "context to information" and/or "methodology", which falls outside the scope of Article 6.4. Once read in context, China's assertions in this regard are clearly misplaced. In particular, the above-referenced text clearly details specific information that MOFCOM used in its investigation that was relevant to the presentation of the interested parties' cases. As such, it was information of a kind that should have been made available to the parties for the purposes of Article 6.4.

*ii. China mischaracterises what information of  
"context" is captured under Article 6.4*

862. China relies on *China – Broiler Products (Article 21.5 – US)* for the proposition that "context" is outside the scope of "information" for the purposes of Article 6.4. This misrepresents that panel's analysis on this issue.<sup>1260</sup> The panel in that case did not find that "context" or "contextual details" fell outside the scope of Article 6.4. Rather, the panel determined that the United States did not, in that dispute, demonstrate that the items of "context" themselves constituted information that was relevant, non-confidential and used with the meaning of Article 6.4.<sup>1261</sup>

863. Moreover, the items of "context" which the panel in that dispute considered to be outside the Article 6.4 included "the specific products for which pricing was requested, whether the pricing was requested and/or reported on the basis of one sale, quarterly sales, annual sales, or sampled invoices; and what quantity of each producer's sales, or of the domestic industry's sales, were represented by the pricing sample".<sup>1262</sup> In the present case, none of the information Australia is requesting, and indeed none of the information outlined by China in its table,<sup>1263</sup> was information of the kind referred to as "context" by the panel in *China – Broiler Products (Article 21.5 – US)*. As a consequence, Australia does not see any legitimate basis for such information to be excluded from the scope of the obligation under Article 6.4. To the extent that China claims any of this information was confidential, a non-

<sup>1260</sup> China's first written submission, para. 2452.

<sup>1261</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.316-7.319.

<sup>1262</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.316.

<sup>1263</sup> China argues that information is "context to information" in table items 4, 7, 8, 10, 12, 13, 14, 17, 18 and 19. See China's first written submission, para. 2455.

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confidential summary should have been provided in sufficient detail to permit a reasonable understanding of the substance of that information.

*iii. China incorrectly argues that all methodologies are outside the scope of Article 6.4*

864. Regarding China's related argument that "methodologies" are not considered to be information within the scope of Article 6.4, China relies on the panel report in *EU – Footwear (China)* which states " [...] the text of Article 6.4 makes it clear that the obligation on investigating authorities applies to 'information', and not to the methodologies, reasoning, analysis, and determinations of investigating authorities".<sup>1264</sup> However, upon closer inspection of the context of this quote, it is clear that the panel in that case did not intend to posit a general principle precluding any type of "methodology" from being within the scope of "information" in Article 6.4.

865. Moreover, none of the prior reports cited and relied upon by the panel in *EU – Footwear (China)* contain any reference to "methodology". They simply focus instead on the "analysis and determination", "reasoning" and "conclusions" of the investigating authority not being "information" *per se*.<sup>1265</sup> This suggests that the panel report does not represent reasoning of general application concerning the characterisation of information as "methodology" in the sense that China is arguing.

866. Other panel and Appellate Body reports have clearly left open the possibility for "methodologies" to be information under Article 6.4.<sup>1266</sup> As set out in Australia's first written submission,<sup>1267</sup> the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* confirmed that a wide variety of information is captured under Article 6.4:

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

<sup>1264</sup> Panel Report, *EU – Footwear (China)*, para. 7.603.

<sup>1265</sup> See Panel Report, *EC – Fasteners (China)*, para. 7.539; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.124.

<sup>1266</sup> Panel Report, *Korea – Certain Paper*, para 7.20; Appellate Body Report, *EC – Fasteners (China)*, para. 480.

<sup>1267</sup> Australia's first written submission, para. 966.

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reasoning or internal deliberation in reaching its final determination is also subject to the obligation under Article 6.4.<sup>1268</sup>

867. On this note, the panel in *Korea – Certain Paper* found that "information relating to the [investigating authority's] calculation of the constructed normal values",<sup>1269</sup> "details of the calculations made to reach these final figures [i.e., normal values and export prices]",<sup>1270</sup> and "information regarding the calculation of the constructed normal values"<sup>1271</sup> are within the scope of Article 6.4. Australia understands that this information, as described by the panel, could be simplified into the terminology of calculation *methodologies* used by the investigating authority to determine normal value. In this regard, Australia also understands that the panel's findings were made in relation to Indonesia's argument that the investigating authority "fail[ed] to disclose ... on what basis and *how, in terms of its mechanics*, it calculated the constructed normal values".<sup>1272</sup> As such, it is clear that information relating to the methods that an investigating authority uses to determine normal values — i.e. the "methodology" — is captured under Article 6.4.

868. In the present case, China claims that several items in its table refer to information it characterises as "methodology".<sup>1273</sup> For the reasons outlined above, Australia submits that the information identified in those items which China has categorised as "methodology", such as normal value calculations, are of the kind that fall within the scope of Article 6.4. Indeed, the panel in *Korea – Certain Paper* explicitly made such a finding.<sup>1274</sup> In sum, when put in their proper context, it is clear that the information set out in the relevant items of China's table is information that was relevant, not confidential, and used by the investigating authority. It was therefore information subject to the obligations under Article 6.4.

869. Further, contrary to China's narrow and selective approach to the consideration of prior reports, it is clear that in some cases additional details of a methodology adopted by an investigating authority can also be considered information within the scope of Article 6.4, as

<sup>1268</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 480 (emphasis added).

<sup>1269</sup> Panel Report, *Korea – Certain Paper*, para. 7.197.

<sup>1270</sup> Panel Report, *Korea – Certain Paper*, para. 7.199.

<sup>1271</sup> Panel Report, *Korea – Certain Paper*, para. 7.201.

<sup>1272</sup> Panel Report, *Korea – Certain Paper*, para. 7.194. (emphasis added)

<sup>1273</sup> China argues that information is "methodology" in table items 1, 2, 3, 5, 6, 7, 9, 11, 12, 14, 15, 17 and 18. See China's first written submission, para. 2455.

<sup>1274</sup> Panel Report, *Korea – Certain Paper*, para. 7.201.

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it is considered to be "information that has been processed, organized, or summarized by the authority "as distinct from "reasoning and analysis".<sup>1275</sup> For the same reason, Australia submits that, read in its proper context, the information in items 2, 4, 5, 6, 7, 9, 12, 15 and 16 of China's table, is within the scope of Article 6.4.

870. For completeness, in the event that China claims any of the information identified in Australia's claim was confidential, Australia submits that effective non-confidential summaries should have been required in sufficient detail that would allow the interested parties to prepare presentations on the basis on the information. This did not occur.

(e) The scope of the investigating authority's discretion to  
determine that information falls within the scope of Article  
6.4

871. China asserts that the investigating authority's discretion to determine what information is "relevant", "practicable", "used", and "not confidential", is not subject to review by a panel for the purposes of assessing whether Article 6.4 obligations have been satisfied.<sup>1276</sup> Australia disagrees.

872. First, whether it was "practicable" to provide timely opportunities within the meaning of Article 6.4 must be assessed on a case-by-case basis, having regard to all of the relevant circumstances, including the nature of the information in question. Australia submits that all information received, generated, and used during MOFCOM's investigation was readily available to be disclosed to interested parties because: (i) the information was not unreasonably difficult to disclose (in terms of quantity and format); and (ii) time was available in the investigation to disclose the information and provide timely opportunities for the interested parties to see and prepare presentations on the basis of that information. All of the information that Australia identifies in its submissions that should have been disclosed by MOFCOM meets these criteria. China has not demonstrated otherwise.

873. Second, whether information was "used" is to be determined on the basis of the evidence on the investigation record, viewed in light of the relevant step in the anti-dumping

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<sup>1275</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 480.

<sup>1276</sup> China's first written submission, para. 2454.

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investigation.<sup>1277</sup> The Appellate Body in *EC – Fasteners (China)* has helpfully discussed the scope of what information is considered to be "used by" the investigating authority.

[W]hether the information was "used" by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to "a required step in the anti-dumping investigation". Thus, Article 6.4 concerns information relating to 'issues which the investigating authority is required to consider under the [Anti-Dumping Agreement], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation. The interested parties right under Article 6.4, therefore, is to see all non-confidential information relevant to the presentation of their cases and used by the investigating authority. Article 6.4 thus applies to a broad range of information that is used by an investigating authority for purposes of carrying out a required step in an anti-dumping investigation. ... In sum, under Article 6.4 of the Anti-Dumping Agreement, what information is considered 'relevant to the presentation of [the interested parties'] cases' and "used by the authorities" would depend on the specific "step" of the anti-dumping investigation and the particular issue before the investigating authority.<sup>1278</sup>

874. As such, whether information was "used by" the investigating authority will depend on the specific circumstances of each case. It is insufficient to merely assert, as China does, that MOFCOM considered it was not "used" as a response to Australia's claims. As Australia detailed in its prior submissions, the "information" identified was indeed "used by" the investigating authority in this case.<sup>1279</sup>

875. Finally, since MOFCOM failed to assess whether good cause for confidential treatment existed within the meaning of Article 6.5, it could not have been satisfied that there was a basis for withholding the information under Article 6.4. While Australia acknowledges that this would not automatically result in a violation of Article 6.4, it is clear that whether information is "not confidential" cannot solely be determined from the perspective of the investigating authority.

<sup>1277</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 479-480, 485.

<sup>1278</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 479-480, 485.

<sup>1279</sup> Australia's first written submission, paras. 972-1008.



**3. MOFCOM failed to provide opportunities for interested parties to see information relevant to their cases**

**(a) Calculation of the production of domestic industry and the proportion of that production accounted for by the participating Chinese producers**

876. China mischaracterises Australia's submission as falling within the scope of Article 6.6. While Australia *also* has an Article 6.6 claim in respect of this information and MOFCOM's failure to satisfy itself as to the accuracy of the information, it has a distinct Article 6.4 claim arising from MOFCOM's failure to disclose *what* it did (if it did anything at all) to satisfy itself of the accuracy of the data. If China's position is that MOFCOM did nothing to satisfy itself of the accuracy of the information, then Australia accepts an Article 6.4 claim could not be made out. Australia considers such a situation would affirmatively establish a contravention of Article 6.6.

877. What is important to Australia's claims under Article 6.4 is whether this information meets the standard for disclosures under the provision. At the outset, Australia does not accept China's assertion that the data used in the estimate of total domestic production provided by [REDACTED] was confidential and therefore excluded from the scope of Article 6.4. In this respect, Australia has set out its claims in relation to the related breach of Articles 6.5 and 6.5.1 separately in this submission.<sup>1280</sup> What remains to be determined for the purposes of Australia's Article 6.4 claim is whether the information in question was "relevant" and "used by" the investigating authority.

878. The information was highly relevant to the presentation of interested parties' cases. Without it, interested parties were not able to prepare presentations on the basis of this information concerning the investigating authority's calculation of the production of the domestic industry. Further, as MOFCOM relied heavily on this data to determine the output of the domestic industry, it was clearly "used" by the investigating authority in the course of the anti-dumping investigation. The information was also "used" by MOFCOM in estimating

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<sup>1280</sup> See above, section VII.B.

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apparent consumption volumes and market shares, and in evaluating price effects, injury factors, and causation.

(b) Determination of normal value

879. There is a fundamental inconsistency in China's submission in respect of the position it takes on whether it made information available about the basis of the normal value calculation for Casella Wines and Swan Vintage.

880. In its first written submission, China contends that it was obvious that the term "other respondent(s)" meant Treasury Wines, stating: "[i]t is clear from various documents on the investigation file that the normal value for both Casella Wines and Swan Vintage was established on the basis of the domestic sales of Treasury Wines only".<sup>1281</sup> Yet elsewhere, China takes the opposite position, insisting that the use of "other respondent(s)" was specifically used so as to avoid identifying Treasury Wines. At the first substantive meeting, China admitted it purposefully used this term, which could mean both one or multiple respondents in Mandarin, to be deliberately vague to the sampled companies. China confirmed this contradictory position in its response to Panel question No. 56. Here, China stated that "[s]ince the sales data of only one producer (Treasury Wines) was used to calculate the normal value of Casella Wines and Swan Vintage, the term "other respondent(s)", which is ambiguous, was used, in order to preserve confidentiality."<sup>1282</sup>

881. Australia's submission is that it is clear from the record that this relevant information was never made available to Casella Wines and Swan Vintage. Moreover, it should have been made available, noting that China – at least on some occasions – contends that this was information that could have been disclosed.<sup>1283</sup> The first time that China disclosed that the "other respondent(s)" was Treasury Wines was in China's first written submission,<sup>1284</sup> and China confirmed this in its written answer to the Panel question No. 54.<sup>1285</sup> As such, China's

<sup>1281</sup> China's first written submission, para. 2461.

<sup>1282</sup> China's responses to Panel question No. 54, para. 332.

<sup>1283</sup> See e.g. China's first written submission, paras. 2463, 2542. China states it was "obvious" that the sales data Treasury Wines was used for Casella Wines and Swan Vintage.

<sup>1284</sup> China's first written submission, para. 2461.

<sup>1285</sup> China's responses to Panel question No. 54, para 332.

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argument that it was clear the ex-factory price was based on Treasury Wines' data,<sup>1286</sup> is neither accurate nor consistent with the facts or China's own submissions.<sup>1287</sup>

882. Further, China states that it was clear from the explanation in the Final Determination – i.e., that MOFCOM used the "weighted average" –that the normal values for Casella Wines and Swan Vintage were "based on the weighted average ex-factory price of *all* domestic sales of Treasury Wines".<sup>1288</sup> However, as this information was not provided to interested parties throughout the investigation, it was not at all clear how MOFCOM determined the weighted average for the other sampled companies during the course of the investigation. Regarding MOFCOM's comparative analysis, China's arguments that, as MOFCOM used Treasury Wines' data it was "obvious" it compared Casella Wines and Swan Vintage's data to those of Treasury Wines, are equally unsupported by the facts.<sup>1289</sup> At the time of the investigation, MOFCOM's disclosures were completely inadequate; China has provided no justification for this failure.

883. China incorrectly claims that, because some comments were submitted, this is proof that its Article 6.4 obligations were met. To the contrary, comments provided by interested parties routinely addressed the insufficient nature of MOFCOM's disclosures. For example, the comments provided on normal value by [REDACTED]

[REDACTED]

[REDACTED]<sup>1290</sup> Without this information, interested parties were not properly able to prepare presentations or to defend their interests on this issue. Whether or not an interested party was able to submit *any* comments to MOFCOM cannot be determinative of whether there was a contravention of Article 6.4.<sup>1291</sup> In particular, comments which clearly criticise MOFCOM's disclosure as deficient cannot be considered to be proof that MOFCOM met the Article 6.4 standard.

<sup>1286</sup> China's first written submission, para. 2462.

<sup>1287</sup> See e.g. China's first written submission, paras. 2463, 2542.

<sup>1288</sup> China's first written submission, para. 2462.

<sup>1289</sup> China's first written submission, para. 2463.

<sup>1290</sup> [REDACTED]

<sup>1291</sup> See above, section VII.F.2(a).

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884. As set out above and in Australia's first written submission, the information in question was "relevant", "non-confidential" and "used". As such, timely opportunities to see this information, and to prepare presentations on the basis of such, should have been provided to the relevant sampled companies as required under Article 6.4.

(c) Fair comparison

885. Australia's submission is that MOFCOM failed to provide all information that was relevant in determining the differences in price comparability in conducting a fair comparison under Article 2.4 of the Anti-Dumping Agreement.

886. As Australia notes in its first written submission, MOFCOM states that it made the comparison between normal value and export price: (i) "on the basis of considering various comparable factors"; and (ii) "in a fair and reasonable manner".<sup>1292</sup> Despite these assertions, MOFCOM did not provide any information about what the "various comparable factors were" or what it did that apparently meant that the comparison was made in a "fair and reasonable" manner.<sup>1293</sup>

887. Australia does not know what the "various comparable factors" MOFCOM referred to were, because at no time have MOFCOM or China identified what occurred. The examples given by Australia of a failure to provide any indication of how MOFCOM dealt with differences in comparability of wine of different qualities or of the consideration of the timing of sales are matters that Australia envisaged might have been part of the assessment opaquely described in the Final Determination. China's response that in fact MOFCOM considered neither of those factors, and therefore did not need to disclose them, provides no answer to Australia's primary complaint.

888. Further, and in any event, China's argument that information relating to price comparability was not "used" by MOFCOM does not answer Australia's concern with respect to that particular example. As the Appellate Body explained "whether the information was 'used' by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to 'a required step in

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<sup>1292</sup> Australia's first written submission, para. 990 and footnotes thereto.

<sup>1293</sup> Australia's first written submission, para. 990 and footnotes thereto.

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the anti-dumping investigation'.<sup>1294</sup> The requirement to ensure price comparability and to make a fair comparison, including applying any adjustments, is a required step of an anti-dumping investigation under Article 2.4.

889. China states that there was "no additional requirement upon MOFCOM to test for whether the timing of the sales affected price comparison",<sup>1295</sup> relying on the panel in *US – Stainless Steel (Korea)*. In that dispute, the panel stated:

[W]e consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires as a general matter that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same.<sup>1296</sup>

890. While this paragraph indeed does not state that an additional "test" is required relating to timing of sales, it clearly does state that in conducting this comparison, the "periods [of time] on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same". This is in line with both the express requirement in Article 2.4 and Australia's arguments in its first written submission.<sup>1297</sup> As such, MOFCOM had an obligation to consider in its assessment of price comparability if sales were made at nearly as possible the same time. In failing to provide interested parties with this information that was "used", "not confidential" and "relevant", MOFCOM prohibited the interested parties from making presentations on the basis of this information, breaching the requirements of Article 6.4.

891. In its first written submission, Australia considers there to be two categories of information that MOFCOM failed to disclose with respect to a fair comparison. The first relates to information that the interested parties needed to know in order to substantiate their requests for adjustments, while the second was the information that MOFCOM relied upon to accept or reject the requested adjustments.<sup>1298</sup> China appears to misunderstand Australia's argument.

<sup>1294</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 479-480, 485.

<sup>1295</sup> China's first written submission, para. 2470.

<sup>1296</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.121.

<sup>1297</sup> Australia's first written submission, para. 991.

<sup>1298</sup> Australia's first written submission, para. 982.

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892. Here, Australia is referring to the fact that MOFCOM used the data of "other respondent(s)" for Casella Wines and Swan Vintage's normal value, export price, and fair comparison determinations. However, Australia's argument is not confined to the adjustments requested by the interested parties on their own data. In the event that the investigating authority did not use the sampled companies' own data, it needed to provide a non-confidential summary to interested parties in sufficient detail to permit a reasonable understanding of the information in order to enable them to make presentations on the information actually used.

893. China also argues that accepted adjustments were presented in the Final Determination, contending that "the Investigating Authority decided to accept adjustment items *such as* invoice discount, rebate, credit fee, and inland freight (from factory/warehouse to clients) claimed by the company" and that this is an appropriate level of detail to discharge the obligation.<sup>1299</sup> Australia disagrees. By using the term "such as" in the Final Determination, MOFCOM introduced a level of ambiguity regarding the extent of adjustments that MOFCOM actually accepted. This prevented interested parties from understanding whether MOFCOM had not accepted adjustments it should have.

894. As the Panel will appreciate, with Casella Wines and Swan Vintage being faced with ambiguous terms including "other respondent(s)" and "such as", they were not given the opportunity to see the information relevant to the presentation of their case, completely inhibiting their ability to make presentations, including to request further adjustments.

895. Finally, China argues that the question of whether the information relating to price adjustments was confidential in its entirety<sup>1300</sup> should be dealt with under Australia's Article 6.5 arguments. However, this is a misunderstanding by China of Australia's claims. Here, Australia is not challenging a decision of MOFCOM to grant confidential treatment to information (which Australia agrees would be an Article 6.5 claim). Rather, Australia is arguing that since information relating to price adjustment was not confidential in its entirety, the non-confidential information should have been disclosed. Failure to do so breached the obligations under Article 6.4.

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<sup>1299</sup> China's first written submission, para. 2466.

<sup>1300</sup> See Australia's first written submission, para. 988.

(d) Calculation of dumping margins

896. Australia's argument in relation to the calculation of dumping margins focuses on the "Other named Australian exporters" and "All Others" categories of exporters.

897. Both parties agree the approach MOFCOM took to the "Other named Australian exporters" category is that "the weighted average margin of the sampled companies shall be used to determine the dumping margin for them".<sup>1301</sup> For the "All others" category, MOFCOM stated that it compared "the weighted average normal value with the weighted average export price to obtain the dumping margin".<sup>1302</sup> In both instances, MOFCOM failed to provide to the interested parties the necessary non-confidential information to understand or make submissions on the final dumping margins.

898. China states it disagrees that interested parties were not able to understand and make submissions on the final dumping margin simply because AGW "made extensive comments regarding the calculation of dumping margins".<sup>1303</sup> In reality, AGW provided four short paragraphs which began with the proposition that it could not understand how the margin had been calculated, and continued with the observation that it appeared unrealistic.<sup>1304</sup>

899. This submission by AGW highlights, rather than excuses, MOFCOM's failure to provide opportunities to see this information. It demonstrates that whether or not an interested party was able to submit *any* comments to MOFCOM cannot be determinative of whether there was a contravention of Article 6.4.<sup>1305</sup> Particularly where such comments clearly criticise information provided as deficient.

900. In relation to the "All Others" category, 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 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. China attempts to excuse MOFCOM's failure by

<sup>1301</sup> Final Determination, (Exhibit CHN-1), p. 46.

<sup>1302</sup> Final Determination, (Exhibit CHN-1), p. 48.

<sup>1303</sup> China's first written submission, para. 2472.

<sup>1304</sup> AGW Comments on Final Disclosure, (Exhibit AUS-97), p. 7. (emphasis added)

<sup>1305</sup> See above, section VII.F.2(a).

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arguing that the companies caught in the "All Others" rate are not interested parties.<sup>1306</sup> Australia categorically disagrees.

901. There is no question that exporters in the "All Others" category meet the criteria under Article 6.11(i), being that they are "an exporter or foreign producer or the importer of a product subject to investigation". China's argument that the "All Others" group were not interested parties is based entirely on a citation to the Appellate Body decision in *EC – Fasteners (China) (Article 21.5 – China)*, which China says set out "criteria" for when an entity is an interested party. However, that citation concerns the situation in which an entity that is not of a type listed in Article 6.11 can nonetheless constitute an interested party.<sup>1307</sup> It is irrelevant to the present situation.

902. Moreover, in addition to the companies in the "All Others" category, industry bodies such as Australian Grape and Wine that represented the interests of the wider industry, and the Australian Government, undoubtedly were "interested parties" who had a direct interest in the calculation of the "All Others" rate, and to which MOFCOM also failed to provide opportunities to see the information in relation to the calculation of dumping margins.

(e) Determination of injury and causation

903. In its first written submission, Australia outlines a large number of instances where MOFCOM breached its obligations under Article 6.4. China takes issue with only some of these claims.

904. First, in response to Australia's claim that MOFCOM failed to provide all non-confidential information relating to average import price, China simply copies and pastes in the same section of the Final Determination<sup>1308</sup> that Australia argued was insufficient.<sup>1309</sup> China has dedicated over 40 pages of its first written submission to describing MOFCOM's price calculation methodology and the sources of the underlying data on which MOFCOM relied.<sup>1310</sup> This level of detail does not appear anywhere on the investigation record. While some of the information relied on for the calculation of the liquidation price also appeared to

<sup>1306</sup> China's first written submission, para. 2473.

<sup>1307</sup> *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.139.

<sup>1308</sup> China's first written submission, para. 2475 (referring to Final Determination (Exhibit CHN-1), p. 55).

<sup>1309</sup> Australia's first written submission, para 100 (referring to Anti-Dumping Final Determination (Exhibit AUS-2), p. 113).

<sup>1310</sup> China's first written submission, paras. 944-1078.



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be included in annexures to CADA's application,<sup>1311</sup> there is nothing on the investigation record that confirms that this was an accurate representation of the actual data used by MOFCOM. Indeed, MOFCOM rejected data included in CADA's Application on the basis that it was not accurate for the purposes of the investigation.<sup>1312</sup>

905. Even if such disclosure was sufficiently timely, it did not include all information that was relevant, non-confidential and used by MOFCOM, as required under Article 6.4. For example, the information relating to pre-adjustment CIF price and adjustments clearly meet these criteria and is well within the scope of Article 6.4. AGW made comments that it "cannot understand the analysis", the analysis was "misconceived", "irrelevant", "fundamentally flawed", and "[i]t does not and cannot demonstrate whether one has had an effect on the other and, if so, where, when, how, why and to what extent. It is simply a comparison of two prices, nothing more and hence of no utility."<sup>1313</sup>

906. These comments on the inadequate nature of this information and how it inhibited the interested parties' ability to prepare meaningful presentations does not demonstrate that interested parties were able to prepare presentations, as China claims.<sup>1314</sup> Instead, these comments confirm that MOFCOM failed to provide interested parties the opportunity to see the information relevant to their case that was used by the investigating authority.

907. Third, in response to Australia's arguments concerning information relating to the "yearly average import price of non-subject imports", China argues that the specific information Australia refers to in its first written submission should be considered matters of "context".<sup>1315</sup> As previously discussed, such information is clearly captured under Article 6.4 if it is "information" that was "relevant", "non-confidential" and "used".<sup>1316</sup>

908. Each of these categories of information was clearly used by MOFCOM in the investigation, and it was extremely relevant to the determination that Australian bottled wine exports to China were causing injury to the domestic industry. Access to the non-confidential versions of this information would have enabled the interested parties to prepare submissions

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<sup>1311</sup> China's first written submission, paras. 1025-1026, 1048-1051, and 1055.

<sup>1312</sup> Anti-Dumping Final Determination, (Exhibit AUS-2), pp. 107-109.

<sup>1313</sup> AGW Comments on Final Disclosure, (Exhibit AUS-97), p. 6.

<sup>1314</sup> China's first written submission, para. 2479.

<sup>1315</sup> China's first written submission, para. 2486.

<sup>1316</sup> See above, section 864VII.F.2(d)iii.

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in defence of their case, showing that subject imports of Australian wine were not causing the alleged injury to domestic producers.

- (f) 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

909. In Australia's first written submission, Australia identified certain information that was disclosed by MOFCOM to interested parties for the very first time in the Final Disclosure.<sup>1317</sup> China's response confirms that was the case.<sup>1318</sup> Australia infers that MOFCOM must have had this information available to it for some period of time prior to the issue of the Final Disclosure and China has not suggested otherwise in its first written submission. If, as appears to be the case, MOFCOM had that information available to it from an earlier period (perhaps many months earlier), then it should have been made available to interested parties in a timely manner. An investigating authority cannot comply with Article 6.4 by only disclosing information at the stage of the Final Disclosure where it holds that information at earlier stages. This is particularly so where only a short time is allowed to interested parties to respond to the Final Disclosure.

910. China's response in its first written submission does not engage with Australia's arguments with respect to timeliness. It is instead directed to the general question of how long should be permitted for a response to a Final Disclosure. This is insufficient to explain why MOFCOM did not provide the information in a timely manner as required by Article 6.4.

#### 4. Conclusion

911. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.4 of the Anti-Dumping Agreement, by failing to allow interested parties to see all non-confidential information that was relevant to the presentation of their cases and used by the investigating authority. As such, interested parties were unable to prepare presentations on key issues

<sup>1317</sup> Australia's first written submission, para. 1004.

<sup>1318</sup> China's first written submission, para. 2461.

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considered by MOFCOM, ultimately denying those interested parties a full opportunity to defend their interests.

**G. MOFCOM'S FAILURE TO DISCLOSE THE ESSENTIAL FACTS UNDER  
CONSIDERATION BREACHED CHINA'S OBLIGATIONS UNDER ARTICLE 6.9 OF THE  
ANTI-DUMPING AGREEMENT**

**1. Introduction**

912. As established in Australia's prior submissions, MOFCOM failed to disclose to interested parties all of the essential facts related to MOFCOM's: (i) estimate of total production (or "total output") of domestic like products in China; (ii) recourse to "facts available" to determine normal value; (iii) fair comparison adjustments; (iv) differences affecting price comparability; (v) methodology for calculating dumping margins; (vi) determination of injury and causation; and (vii) treatment of the "Other named Australian exporters" and the "All Others" category of Australian companies.<sup>1319</sup> MOFCOM's failure to disclose this information is inconsistent with China's obligations under Article 6.9 of the Anti-Dumping Agreement.

913. In response, China argues that MOFCOM satisfied the requirements of Article 6.9 because it disclosed to interested parties all "essential facts" that formed its decision to apply final anti-dumping duties, and because interested parties submitted comments based on disclosed facts.<sup>1320</sup> As Australia will outline below, China's responses are without merit and do not rebut the *prima facie* case put forward by Australia.

914. As a preliminary issue, Australia notes that China takes issue with Australia's characterisation of Exhibit AUS-101 as an "Additional Final Disclosure".<sup>1321</sup> There is nothing misleading or unfair about Australia's use of this label for a disclosure document that was provided to Australia after the Final Disclosure. Contrary to what is implied by China's submissions,<sup>1322</sup> the information contained in Exhibit AUS-101, the Additional Final Disclosure,

<sup>1319</sup> Australia's arguments concerning MOFCOM's breaches of Article 6.9 are set out in Australia's first written submission, Section VII.G, paras. 1010-1069; Australia's responses to Panel question Nos 63, 64, 66, and 68, paras. 155 – 222.

<sup>1320</sup> China's first written submission, paras. 2533-2570.

<sup>1321</sup> China's first written submission, para. 2509.

<sup>1322</sup> China's first written submission, paras. 2509-2513.

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was *not* contained in what China described as the "General Disclosure" document (Exhibit CHN-2). It is true that the Additional Final Disclosure contains additional information to what was provided in the first disclosure to the Australian government, because it sets out, rather than excising, the section relating to the "[p]articular market situation of the Australian wine industry".<sup>1323</sup> However, it still does not contain the non-confidential findings about the three sampled companies that were disclosed in Exhibit AUS-101. China's affirmative submission that it was done without "negligence or fault" suggest it was not an oversight or innocent mistake, but rather a deliberate choice MOFCOM made to withhold this obviously significant information.<sup>1324</sup>

915. Australia notes that China has made several jurisdictional objections concerning Australia's claims pursuant to Article 6.9.<sup>1325</sup> These objections are entirely without merit, and Australia addresses China's specific allegations under the appropriate subsections of this submission.<sup>1326</sup>

## 2. Legal framework

916. Article 6.9 reinforces the fundamental due process rights provided to parties to allow them to defend their interests by understanding the essential facts an investigating authority is relying on when making decisions whether to apply definitive measures.

917. Australia and China disagree over the proper interpretation and application of Article 6.9 of the Anti-Dumping Agreement, including with respect to:

- the relationship between Articles 6.9 and other articles of the Anti-Dumping Agreement;<sup>1327</sup>
- the scope of Article 6.9;<sup>1328</sup>

<sup>1323</sup> Australia observes that 12 pages of non-confidential information relating to the "particular market situation" were purposefully removed from this Final Disclosure to Australian Embassy, (Exhibit CHN-26), p. 15. This information was included in the Disclosure of the Essential Facts, (Exhibit CHN-2), pp. 14-26.

<sup>1324</sup> China's first written submission, para. 2513.

<sup>1325</sup> China's first written submission, paras. 2498-2508.

<sup>1326</sup> See section II.A; Annex A, section A.5.4.

<sup>1327</sup> China's first written submission, paras. 2514-2521.

<sup>1328</sup> China's first written submission, paras. 2522-2526.

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- the level of detail required to comply with the disclosure obligation under Article 6.9;<sup>1329</sup> and
- whether comments from an interested party can be evidence that the requirements of Article 6.9 have been met.<sup>1330</sup>

(a) Australia does not conflate the obligations under Article 6.9 with Articles 6.4 and 12.2 of the Anti-Dumping Agreement

918. China states that Australia has conflated the obligations in Articles 6.9 and 6.4 because "Australia has raised similar (if not identical) arguments [...] with respect to the alleged violations of [these provisions]".<sup>1331</sup> China's reliance on the report of the panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* to support its argument in this regard is misplaced.<sup>1332</sup> Australia is not "conflating" these obligations. Australia properly understands that Articles 6.9 and 6.4 establish separate obligations related to "essential facts" and "timely opportunities to see information", and Australia has treated them as such. The provisions of the Anti-Dumping Agreement, including Articles 6.9 and 6.4, apply cumulatively, and the same actions or inactions can be subject to discipline under multiple provisions. This is precisely the case in the present matter. That is, any apparent overlap in Australia's arguments concerning the provisions arises not from conflation of the obligations but rather because MOFCOM *never* disclosed (or made available to the parties) certain information that it was required to disclose under multiple obligations.

919. For completeness, Australia has not improperly conflated the obligations in Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement in respect of its panel request, or in its

<sup>1329</sup> China's first written submission, paras. 2527-2531.

<sup>1330</sup> China's first written submission, para. 2532.

<sup>1331</sup> China's first written submission, para. 2520.

<sup>1332</sup> Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras. 6.90-6.92. The cited quotation is simply the panel summarising what it viewed Indonesia's argument to be. It was not making a finding. The panel in that dispute dealt with each argument under Article 6.4 and 6.9 separately, as Australia would similarly expect in this dispute.

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arguments.<sup>1333</sup> To clarify, Australia recognises that Article 6.9 applies only to the disclosure of "essential facts" and has properly made out its claim on this basis.<sup>1334</sup>

(b) Australia's claims are within the scope of Article 6.9

920. China appears to attempt to evade MOFCOM's obligations to disclose certain information under Article 6.9 by categorising information at issue as "reasoning" or "explanations", "decisions" or "intentions", "methodologies", and/or "calculations".<sup>1335</sup> It then argues that certain categories of information are outside the scope of Article 6.9. Australia has dealt with China's arguments at length in its response to the Panel's questions.<sup>1336</sup> In particular, as set out in Australia's response to Panel question No. 64, Australia's submission is that each of the instances provided for in China's table at paragraph 2524 are "essential facts" for the purposes of Article 6.9, except in two cases which are headings, as opposed to arguments made by Australia in its first written submission.<sup>1337</sup>

(c) A "narrative description" of the "essential facts" is insufficient for the purposes of Article 6.9

921. China relies on the panel report in *China – HP-SSST (Japan) / China – HP-SSST (EU)* for the proposition that "[i]f facts are already within the possession of the interested parties, a 'narrative description' of the facts would also suffice".<sup>1338</sup> However, China omits that this point of law was overturned by the Appellate Body, which held that a "narrative description of the data used" is not sufficient disclosure under Article 6.9.<sup>1339</sup>

922. The purpose of the disclosure required under Article 6.9 is to "allow interested parties to understand the factual basis for the decision whether to apply definitive measures in order to be able to defend their interests, before a final determination is actually made".<sup>1340</sup> The Appellate Body in *China – GOES* stated "[i]n our view, disclosing the essential facts under

<sup>1333</sup> China's first written submission, paras. 2375 and 2517-2519. Australia has addressed MOFCOM's arguments concerning its panel request separately. See Australia's response to China's Preliminary Ruling Request, paras. 274-281; above, section II.A and Annex A.

<sup>1334</sup> Australia's first written submission, section VII.G.

<sup>1335</sup> China's first written submission, para. 2524.

<sup>1336</sup> Australia's response to Panel question No. 64, paras. 159-214.

<sup>1337</sup> China's first written submission, para. 2524, table items 10, 13.

<sup>1338</sup> China first written submission, para 2530.

<sup>1339</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133

<sup>1340</sup> Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para 7.240.

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consideration pursuant to Articles 6.9 and 12.8 is *paramount* for ensuring the ability of the parties concerned to defend their interests".<sup>1341</sup> In this vein, the panel in *EC – Salmon (Norway)* considered this standard to be whether the level of disclosure enabled parties to comment on the "completeness and correctness" of the facts under consideration by the investigating authority.<sup>1342</sup>

923. For the same reason, investigating authorities are also required to present the essential facts in a coherent manner. The panel in *Ukraine – Ammonium Nitrate* held that:

[E]ssential facts must be disclosed in a coherent manner so as to permit an interested party to understand the basis for the decision to apply definitive measures. This means that the interested party must be able to clearly understand what data was used by the investigating authorities in their determinations, and how, so that it can defend its interests.<sup>1343</sup>

924. The panel went on to state that "interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts".<sup>1344</sup> Accordingly, if interested parties are not able to ascertain certain essential facts on the basis of the information disclosed, the investigating authority has failed to comply with the obligations in Article 6.9. In the present case, interested parties had to engage in detailed back calculations in order to comprehend how MOFCOM made its determinations. The need to engage in this process demonstrates that MOFCOM's disclosures were inadequate.

(d) The provision of comments by an interested party is not evidence that the requirements of Article 6.9 have been met

925. Further, China seems to contend that the provision of comments by interested parties is proof that the requirement in Article 6.9 has been met. Australia disagrees. The comments provided by interested parties often criticised MOFCOM for the lack of disclosure of necessary information that would have allowed them to defend their interests. As such, China's arguments are significantly flawed.

<sup>1341</sup> Appellate Body Report, *China – GOES*, para 240. (emphasis added)

<sup>1342</sup> Panel Report, *EC – Salmon (Norway)*, para 7.805.

<sup>1343</sup> See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.207.

<sup>1344</sup> See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

**3. MOFCOM failed to disclose all essential facts under consideration****(a) MOFCOM's estimate of total domestic output and the proportion accounted for by the domestic producers defining "domestic industry"**

926. As set out in its first written submission, Australia has established that MOFCOM did not disclose the essential facts with *respect to the underlying* statistical data or the methodology that it used to calculate the estimate of total domestic output.<sup>1345</sup>

927. At the outset, Australia does not accept China's assertion that the data used in the estimate of total domestic production provided by [REDACTED] was confidential and therefore excluded from the scope of Articles 12.2 and 12.2.2. In this respect, Australia has set out its claims in relation to the related breach of Articles 6.5 and 6.5.1 separately in this submission.<sup>1346</sup>

928. On the question of whether the information at issue was "essential facts" within the meaning of Article 6.9, MOFCOM's estimate of total domestic output was central to its definition of the domestic industry under Article 4.1. This definition is a "keystone" of an investigation because it lays the foundation for the injury and causation analyses.<sup>1347</sup> Moreover, it was an essential element in MOFCOM's estimates of apparent consumption and the market shares of subject imports and domestic like products (relative to consumption).

929. In its first written submission, China erroneously argues that Australia admitted that MOFCOM explained its calculation methodology for determining domestic output.<sup>1348</sup> The part of Australia's first written submission to which China refers reads as follows:

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 from "authoritative domestic organisations".<sup>1349</sup>

<sup>1345</sup> Australia's first written submission, para. 1021.

<sup>1346</sup> See section VII.B.

<sup>1347</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.397.

<sup>1348</sup> China's first written submission, para. 2535.

<sup>1349</sup> Australia's first written submission, para. 1021.



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930. Contrary to China's assertion, the above passage was written by Australia to identify the insufficient nature of the disclosure. MOFCOM's explanation does not inform interested parties about the weightings of any of the factors, how the factors were calculated in relation to each other, or any other necessary information that would be needed for such a statement to be considered a "methodology".

931. China goes on to refer to a remark made by the Australian Government in its Comments on the Final Disclosure that MOFCOM "was unable to distinguish the production volume of the product under investigation from other products such as sparkling wine and liqueurs".<sup>1350</sup> China argues that this comment is evidence that MOFCOM satisfied the requirements of Article 6.9. As explained above, the mere fact that interested parties made comments on the Final Disclosure does not mean that the requirements of the provision are met.<sup>1351</sup> Australia could not comment on the calculation methodology used to determine output from the industry using the statistics, as that methodology and the underlying statistical data were essential facts that were not disclosed. As such, interested parties were prevented from commenting on the completeness and correctness of MOFCOM's calculation of the output of domestic industry and the proportion of that production accounted for by the participating Chinese producers.

(b) MOFCOM's recourse to "facts available" to determine  
normal value and selection of the facts available

932. Australia has established that, in relation to the three sampled companies, MOFCOM failed to disclose essential facts related to its recourse to facts available and the selection of replacement facts as the best information available.<sup>1352</sup>

*i. Treasury Wines*

933. For Treasury Wines, the Final Disclosure did not disclose what costs and expenses were accepted, and what information was relied upon when having recourse to facts available. China argues that MOFCOM's disclosure of essential facts was complete and did not

<sup>1350</sup> China's first written submission, para. 2536 (referring to Australian Government Comments on Final Disclosure, (Exhibit AUS-96), p. 3).

<sup>1351</sup> See section VII.G.2(d).

<sup>1352</sup> See section III; Australia's first written submission, paras. 1023-1035.

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deprive interested parties of the opportunity to understand the basis of MOFCOM's decision and respond accordingly.<sup>1353</sup> However, MOFCOM's disclosure was deficient on its face. MOFCOM stated 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". However, it did not identify which product types were included in its reference to "some". As such, interested parties were unable to defend their interests as they did not know how many or which product type data they chose to accept and use, and what they did not have regard to.<sup>1354</sup>

934. Further, China cannot rely on the fact that Treasury Wines made comments on the Final Disclosure as a basis to argue that the disclosure obligation was met.<sup>1355</sup> To the contrary, the comments submitted by Treasury Wines confirm that it was required to engage in extensive back calculations to attempt to comprehend how MOFCOM determined what was the "best information available".<sup>1356</sup>

935. Moreover, even after Treasury Wines put to MOFCOM its speculation – ultimately correct – [REDACTED] MOFCOM failed to confirm or explain its approach in its Final Determination. This failure was a clear breach of the obligations under Article 6.9.

## ii. *Casella Wines and Swan Vintage*

936. Regarding Casella Wines and Swan Vintage, China states that specific information relating to "product types, trade links and other influencing factors" is not captured under Article 6.9. Australia disagrees. Contrary to China's contention, the information to which Australia is referring does not include the decisions MOFCOM made on these facts, but what "product types", "trade links", and "other influencing factors" that MOFCOM considered. Such information is, without any doubt, essential facts relied on by MOFCOM when making a decision on whether or not to impose anti-dumping duties. And yet MOFCOM failed to disclose this information.

<sup>1353</sup> China's first written submission, para. 2537.

<sup>1354</sup> Anti-Dumping Additional Final Disclosure (Exhibit AUS-101), p. 39. (emphasis added)

<sup>1355</sup> China's first written submission, para. 2537.

<sup>1356</sup> See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

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937. China goes on to argue that "[i]t was clear from the disclosures [...] that all adjustments that were requested by Treasury Wines (whose data formed the basis for the normal value for Casella Wines and Swan Vintage) were accepted for Casella Wines and Swan Vintage." However, as explained earlier,<sup>1357</sup> this position by China is contradictory to its response to the Panel question No. 56 and its response in the first substantive meeting where China admitted that MOFCOM used the term "other respondent(s)" (instead of stating it used Treasury Wines' data) to be deliberately vague.<sup>1358</sup> China now cannot argue that it was obvious Treasury Wines' data was used when MOFCOM purposefully introduced ambiguity to prevent this from indeed being "obvious". As such, in order for interested parties to develop any idea of how MOFCOM reached their determinations, interested parties were forced to engage in extensive back calculations (to the extent possible) to attempt to comprehend MOFCOM's methodology and defend their interests in the investigation.<sup>1359</sup>

(c) Fair comparison

938. Australia has established that MOFCOM did not provide all of the essential facts that were relevant to accounting for differences in price comparability, including price adjustments, to enable a fair comparison under Article 2.4.<sup>1360</sup>

939. China's submission appears to be that as no adjustments were requested or needed, MOFCOM was under no obligation to disclose them. Australia acknowledges that no details needed to be disclosed by MOFCOM of an adjustment that was never undertaken. However, Australia maintains that MOFCOM did not provide the non-confidential data, formulae or methodology used to conduct its price comparison. Even in the absence of any adjustments, MOFCOM's simple statement that it "compared the normal value and export price at the ex-factory level"<sup>1361</sup> is not an essential fact under Article 6.9, but simply the actual requirement presented in Article 2.4.<sup>1362</sup> Such sparse information did not allow interested parties to

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<sup>1357</sup> See generally section VII.F.

<sup>1358</sup> China's responses Panel question No. 56, para. 332.

<sup>1359</sup> See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227.

<sup>1360</sup> See paras. 91-119; Australia's first written submission, paras. 493-523, paras. 1036-1041.

<sup>1361</sup> Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 51.

<sup>1362</sup> In relevant part, Article 2.4 reads: "[a] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level [...]"

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comment on the completeness and correctness of how MOFCOM undertook the price comparability analysis.

*i. Treasury Wines*

[REDACTED] In relation to Treasury Wines, China argues that the "quantum" of adjustments was "clear" from the [REDACTED]<sup>1363</sup>

However, it was not clear at all. While the [REDACTED]  
[REDACTED], information relating to the actual quantum of adjustments for Treasury Wines were not di [REDACTED]  
[REDACTED]  
[REDACTED]

941. As Australia explains in detail in its response to Panel question No. 68, the quantum of adjustments is an essential fact, as "[w]ithout this disclosure, interested parties would be unable to comment on the completeness and correctness of the adjustments or provide additional information or correct perceived errors in relation to the adjustments."<sup>1365</sup>

*ii. Casella Wines, Swan Vintage and All Others*

942. In respect of the quantum of adjustments for Casella Wines and Swan Vintage, as Australia submits in its response to the Panel question No. 68,<sup>1366</sup> Australia accepts that disclosure of the data relied on to determine their normal values was limited by confidentiality considerations. However, while the actual quantum could not be disclosed, MOFCOM was required to provide non-confidential summaries of the adjustment data on which it relied, which could have included an indicative range. This would have enabled some visibility of the methodology MOFCOM applied. Without such a summary, Casella Wines and Swan Vintage were in no position to request adjustments for differences affecting price comparability, should such adjustments be necessary.

943. Australia has similarly established the insufficient nature of the Final Disclosure to the "All Others" group of exporters and how MOFCOM failed to conduct a fair comparison

<sup>1363</sup> [REDACTED]

<sup>1364</sup> [REDACTED]

<sup>1365</sup> Australia's response to Panel question No. 68, paras. 217-218.

<sup>1366</sup> Australia's response to Panel question No. 68, paras. 219-222.

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when calculating the extremely high margin applied to this group.<sup>1367</sup> China has not responded to Australia's arguments on this point.

(d) Details of the methodologies and calculations of the dumping margins

944. Australia has established that MOFCOM failed to adequately disclose the essential facts underpinning its dumping margin methodology and calculations.<sup>1368</sup>

945. In response to Panel question No. 63, Australia provided a detailed explanation regarding how and why dumping margin calculation methodologies are indeed essential facts under Article 6.9, as confirmed by the Appellate Body in *Russia – Commercial Vehicles*<sup>1369</sup> and *China – HP-SSST (Japan) / China – HP-SSST (EU)*,<sup>1370</sup> and by the panels in *China – Broiler Products (Article 21.5 US)*,<sup>1371</sup> *China – HP-SSST (Japan) / China – HP-SSST (EU)*,<sup>1372</sup> and *Ukraine – Ammonium Nitrate*.<sup>1373</sup>

946. China also appears to agree, stating that "the dumping margin methodology used by an investigating authority can be considered as an essential fact that needs to be disclosed under Article 6.9".<sup>1374</sup> However, China attempts to minimise the definition of methodology by stating that:

[A] dumping margin methodology has to be distinguished from the dumping "calculations". These calculations, in turn, consist of the underlying data, and the formulae to which the data are actually applied by the investigating authority.<sup>1375</sup>

947. China elaborates on this point further in its response to Panel question No. 78 by splitting the definition of "formula" into two sections – "as such" and "as applied". China states that the following lines from the panel reports in *China – Autos (US)* and *China – Broiler Products*, are relevant:<sup>1376</sup> "we see a formula [as such], which in our view is a fact within the

<sup>1367</sup> Australia's first written submission, paras. 1046-1048.

<sup>1368</sup> Australia's first written submission, paras. 1049-1051.

<sup>1369</sup> Appellate Body Report, *Russia – Commercial Vehicles*, para 5.230.

<sup>1370</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.125.

<sup>1371</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.376.

<sup>1372</sup> Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.239.

<sup>1373</sup> Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.206.

<sup>1374</sup> China's response to Panel question No. 63, para. 363. (footnotes omitted)

<sup>1375</sup> China's response to Panel question No. 63, para. 364. (footnotes omitted)

<sup>1376</sup> China's responses to Panel question No. 63, para. 398 (referring to Panel Reports, *China – Autos (US)*, para. 7.73; *China – Broiler Products*, para. 7.92).

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meaning of Article 6.9, as being different from the application of such a formula in a given investigation, which represents an aspect of the IA's reasoning".<sup>1377</sup> The formulae (as applied) and data are contained in "files or spreadsheets created during the calculations".<sup>1378</sup>

948. In Australia's view, the application of a formula (i.e., China's "as applied" formula) is not formula at all, as once the formula is applied to the data, it then becomes the actual calculations. Therefore, logically, there is no distinction between two types of formula as China suggests, as the formula would always be "as such" until it becomes the calculation. In *China – Broiler Products (Article 21.5 – US)*, the panel indeed found that while calculations themselves were out of scope of Article 6.9, the underlying data and formulae were considered to be essential facts.<sup>1379</sup>

*i. Treasury Wines*

While some information for Treasury Wines was disclosed in the [REDACTED] [REDACTED] important information was absent relating to methodology or formula to aid interested parties to understand how MOFCOM arrived at the dumping margin. For example,

[REDACTED]  
[REDACTED]  
[REDACTED].<sup>1380</sup> Moreover, MOFCOM failed to disclose that a [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

950. As such, Treasury Wines had to engage in detailed back calculations in order to piece together what MOFCOM did.<sup>1381</sup> This does not meet the standard required under Article 6.9.

<sup>1377</sup> Panel Report, *China – Autos (US)*, para. 7.73.

<sup>1378</sup> Panel Report, *China – Broiler Products*, para. 7.92.

<sup>1379</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.376.

<sup>1380</sup> [REDACTED]

<sup>1381</sup> See Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.227. ("interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts")

ii. *Casella Wines and Swan Vintage*

951. In respect of Casella Wines and Swan Vintage, while Australia accepts that the data itself was subject to confidentiality restrictions (which we now know was based on the data of Treasury Wines), MOFCOM was required to disclose the non-confidential dumping margin calculation methodology.<sup>1382</sup> It did not do so. China asserts that this information was provided to each sampled company, referencing Exhibit CHN-9 as an example of such disclosure.<sup>1383</sup> However, a review of Exhibit CHN-9 [REDACTED]

952. The mere fact that Swan Vintage provided comments on the Final Disclosure is not evidence that MOFCOM fulfilled its Article 6.9 obligation.<sup>1384</sup> Those comments only confirm that MOFCOM did not provide sufficient disclosure. In particular, Swan Vintage states in the opening paragraph of its comments that:

The Final Ruling Disclosure of the Bureau is oversimplified, which makes it impossible for Swan Vintage to know the method and basis for calculating normal value and export price on the basis of which the Bureau calculated the dumping margin, limiting the right of Swan Vintage to make an effective defence.<sup>1385</sup>

953. In attempting to defend MOFCOM's failure, China asserts that "[...] when an exporter's own data are used for calculating the dumping margin (without any adjustments being made), the requirement to disclose the formulae used in great detail applies to a much lesser extent".<sup>1386</sup> However, the Panel does not need to decide on the correctness of the proposition, as it would not be applicable in this dispute.<sup>1387</sup> As MOFCOM had recourse to facts available in determining the dumping margin, it used only limited amounts of Casella Wines' data and none of Swan Vintage's own data. In other words, even based on China's self-implemented "lesser" standard, MOFCOM was still required to disclose its dumping margin calculation methodology for the purposes of Article 6.9. It failed to do so.

<sup>1382</sup> Australia's response to Panel question No. 63, paras 155 – 158.

<sup>1383</sup> China's response to Panel question No. 63, para. 365.

<sup>1384</sup> See above, section VII.G.

<sup>1385</sup> Swan Vintage Comments on the Final Disclosure, (Exhibit AUS-39), p. 1.

<sup>1386</sup> China's response to Panel question No. 78, para. 404.

<sup>1387</sup> For clarity, Australia does not accept this argument made by China.

(e) Determination of injury and causation

954. Australia has established that MOFCOM did not provide all the non-confidential, essential facts that formed the basis of its determination of injury and causation pursuant to Article 3.<sup>1388</sup> In response, China has made a number of arguments, which Australia will address below.

955. First, China has responded that Australia has improperly made arguments related to obligations under Article 3 in the context of its Article 6.9 claim.<sup>1389</sup> Australia disagrees. The Appellate Body in *China – GOES* explained the link between procedural obligations under Article 6.9 and substantive obligations under Articles 3.1, 3.2, 3.4, and 3.5 as follows:

What constitutes an "essential fact" must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, inter alia, Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.<sup>1390</sup>

956. Australia is therefore not, as China is alleging, confusing its arguments between Article 6.9 and the provisions of Article 3. Rather, the Appellate Body has confirmed that Article 6.9 needs to be read in the light of the other obligations set out in the Anti-Dumping Agreement, including Article 3.

957. Second, turning to MOFCOM's failure to disclose its methodology regarding price suppression, China attempts to argue that the methodology was disclosed, but Australia misunderstands it.<sup>1391</sup> This is not the case. The significant *ex post facto* rationalisations which China now asserts,<sup>1392</sup> including details related to MOFCOM's consideration of price suppression, do not appear anywhere on the investigation record. As such, the Panel should

<sup>1388</sup> Australia's first written submission, paras. 1052-1058.

<sup>1389</sup> China's first written submission, paras. 2557-2558.

<sup>1390</sup> Appellate Body Report, *China – GOES*, para. 241-242.

<sup>1391</sup> China's first written submission, para. 2559.

<sup>1392</sup> For example, Australia notes China's explanation that: "... China purely used the customs import statistics for the applicable tariff code. To the extent there was a methodology involved, it entailed a simple data extraction of the total yearly volume (litre) and yearly value (in USD) of the dumped imports, classified in tariff code 22042100 from the website of the General Administration of Customs of China, and dividing the total yearly value by the total yearly volume to get the weighted average unit price of the dumped imports per year of the injury POI". China's first written submission, para. 1023. (emphasis added)



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disregard this information.<sup>1393</sup> However, if this was genuinely information concerning MOFCOM's analytical methodology, it should have been disclosed as essential facts under Article 6.9. The absence of this detail during the investigation deprived interested parties of their ability to comment on the completeness and correctness of the information relied upon by MOFCOM.

958. Third, contrary to China's claims, Australia does not consider that the "yearly average import price" provided by MOFCOM was sufficient to meet the Article 6.9 standard of disclosure of essential facts.<sup>1394</sup> MOFCOM failed to provide: (i) the underlying data used to determine the average unit price of subject imports, and (ii) a description of the methodology that it applied to calculate the average unit price of subject imports – in particular, in relation to the adjustments that were made – with sufficient clarity and in sufficient detail to permit interested parties to understand the basis of MOFCOM's determinations.

959. Fourth, China further attempts to justify MOFCOM's failure to disclose information on the basis that the information relating to the CIF price data, exchange rates, tariff rates and non-subject imports was publicly available, and that Australia or other interested parties could have collected it from the appropriate websites. However, public or not, this information constituted essential facts that MOFCOM should have provided to the interested parties, either in a document on the record (or even simply through a link in a record document).

960. Fifth, Australia observes that China now asserts that MOFCOM had recourse to facts available for the purposes of its price calculation for subject imports and domestic like prices under Article 3.2.<sup>1395</sup> While Australia does not accept this assertion,<sup>1396</sup> if this in fact was the case, MOFCOM's failure to disclose this information as an essential fact would have been a clear breach of the requirements of Article 6.9.

961. Finally, China's reliance on the proposition that where an interested party provided comments on an issue, this meant that they were appropriately able to defend their interests is both incorrect as a matter of law, but also unsustainable in light of the submission actually

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<sup>1393</sup> See above, section V.B.6

<sup>1394</sup> China's first written submission, para. 2560.

<sup>1395</sup> China's first written submission, paras. 1089-1092.

<sup>1396</sup> See above, section V.B.

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made.<sup>1397</sup> The opening sentence of AGW's comments regarding injury and causation on which China relies states that MOFCOM's Final Disclosure is "deficient in that there are no facts that support that injury is being caused to a domestic industry".<sup>1398</sup> It is nonsensical that China is attempting to rely on such comments as proof that interested parties were able to defend their interests. To the contrary, the comments themselves complain that this was not possible.

(f) Treatment of Other named Australian exporters

962. In relation to Other named Australian exporters, China submits that simply providing the statement that the "weighted average margin of the sampled companies shall be used to determine the dumping margin" was sufficient disclosure of essential facts.<sup>1399</sup> Australia disagrees. MOFCOM was required to provide sufficient detail for interested parties to be able to comment on the completeness and correctness of the data being relied upon by the investigating authority.<sup>1400</sup> It failed to do so.

(g) Treatment of the "All Others" category

963. MOFCOM was required to provide additional information regarding how it determined the excessive dumping margin which it applied to the "All Others" category. This information is without a doubt considered to be essential facts within the meaning of Article 6.9, and it was information that was missing from MOFCOM's disclosures.<sup>1401</sup>

#### 4. Conclusion

964. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement as MOFCOM failed to inform interested parties of all the essential facts which formed the basis of its decision to impose definitive anti-dumping measures.

<sup>1397</sup> See section VII.G.2(d).

<sup>1398</sup> AGW Comments on Final Disclosure, (Exhibit AUS-97), p. 5.

<sup>1399</sup> Disclosure of the Essential Facts (Exhibit CHN-2), p. 26.

<sup>1400</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.805.

<sup>1401</sup> Australia's first written submission, paras. 1062-1068.

**H. MOFCOM'S PUBLIC NOTICE OF INITIATION FAILED TO CONTAIN A SUMMARY  
OF THE FACTORS ON WHICH THE ALLEGATION OF INJURY IS BASED**

965. There appears to be no disagreement between Australia and China that the notice of initiation issued by MOFCOM did not contain any summarisation of the factors on which the allegation of injury was based, but did include the non-confidential version of CADA's written application and its annexes.<sup>1402</sup>

966. The point of disagreement between the parties is therefore whether the requirement in Article 12.1.1 to provide a "summary of the factors on which the allegation of injury is based" can be discharged by provision of the entirety of the information submitted in connection with the allegation of injury. In Australia's view, 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 is based. The investigating authority's obligation to summarise cannot be discharged by providing the entire application, unless that application itself includes a summary that is adequate to meet the requirements of Article 12.1.1(iv), and that summary is expressly adopted by the investigating authority as its own. The "injuries of the domestic industry" section of CADA's written application was approximately 20 pages long and was in no sense a "summary". No other part of the application purported to summarise that section in a manner that met the requirements of Article 12.1.1(iv). In any event, there is no reference to MOFCOM adopting such a summary, had it existed.

**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**

**1. Introduction**

967. In its first written submission,<sup>1403</sup> and response to Panel question No. 70,<sup>1404</sup> Australia has established that MOFCOM did not provide its findings and conclusions reached on all matters of fact and law and reasons in its Final Determination which led to the imposition of

<sup>1402</sup> Australia's first written submission, para. 1073; China's first written submission, paras. 2582-2583.

<sup>1403</sup> Australia's first written submission, section VII.H, paras. 1070-1129.

<sup>1404</sup> Australia's response to Panel question No. 70, paras. 223-226.

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final measures, as required by Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. In particular, MOFCOM failed to provide all relevant information and reasons on: (i) its estimate of the volume of total domestic production (output); (ii) its recourse to "facts available" to determine normal value; (iii) the average unit prices of subject imports and domestic like products; (iv) adjustments to ensure a fair comparison of normal value and export price; (v) the differences affecting price comparability; (vi) the methodology for calculating dumping margins; and (vii) the determination of injury and causation.

968. In relation to this claim, Australia notes that China has raised certain jurisdictional objections in its first written submission. These objections are entirely without merit, and Australia has addressed these objections where appropriate in this submission.<sup>1405</sup>

## **2. Legal Framework**

969. It is essential for all relevant information on the matters of fact and law and reasons to be provided in the public notice under Articles 12.2 and 12.2.2 to allow for interested entities and the public to understand the reasoning behind an investigating authority's determination.

970. Australia and China disagree on certain aspects of the applicable legal standard under Articles 12.2 and 12.2.2, including:

- whether the link between an Article 6.9 claim and a claim under Articles 12.2 and 12.2.2 applies as China suggests;
- whether the scope of Articles 12.2 and 12.2.2 is as limited as China submits; and
- whether methodologies developed and applied by the investigating authority are required to be disclosed under Articles 12.2 and 12.2.2.

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<sup>1405</sup> See above section II.A; see below Annex A, section A.5.5.

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(a) China misrepresents the link between Articles 6.9, 12.2 and 12.2.2

971. In its first written submission, China states that according to the panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, if an Article 6.9 claim "essentially mirrors" a claim under Articles 12.2 and 12.2.2, and the Article 6.9 claim is defeated or rejected, then the claim under Articles 12.2 and 12.2.2 would also fail.<sup>1406</sup> However, China fails to clarify that the panel's findings were specific to the *factual* circumstances of that case. In particular, the panel reasoned that, relating to the *facts* to be disclosed, the Article 6.9 standard is broader than the relevant factual element of Articles 12.2 and 12.2.2. Therefore, when the Articles 6.9, 12.2 and 12.2.2 claims are "essentially mirrored", and the disclosure of *facts* under Article 6.9 is found to be sufficient, then such disclosure would also meet the requirements of Articles 12.2 and 12.2.2.<sup>1407</sup>

972. In contrast, in relation to the *reasons* provided in the disclosure, the opposite is true, that is the scope under Articles 12.2 and 12.2.2 is broader than the scope under Article 6.9. In the above case, the panel considered that reasoning relating to why the "All Others" rate – calculated based on the highest margin of dumping for the cooperating exporters – was not within the scope of Article 6.9. The panel found that this reasoning would indeed have been captured within the scope of Articles 12.2 and 12.2.2. As such, the panel went on to hold that the *reasons* provided by MOFCOM in the Final Determination were in fact insufficient for the purposes of Articles 12.2 and 12.2.2.<sup>1408</sup>

973. As such, Australia cautions the Panel against accepting China's attempts to impermissibly expand the application of the panel's reasoning in *China – HP-SSST (Japan)/China – HP-SSST (EU)*, concerning the relationship between Articles 6.9, 12.2 and 12.2.2 in relation to the disclosure of *facts*, to the arguments concerning the disclosure of *reasons*.

<sup>1406</sup> China's first written submission, para. 2598.

<sup>1407</sup> Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.279.

<sup>1408</sup> Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.280-7.281.

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(b) The scope of Articles 12.2 and 12.2.2 are not as limited as  
China submits

974. As a starting point, both Australia<sup>1409</sup> and China<sup>1410</sup> agree that previous panels have understood the word "material" in the context of Article 12.2 to "refer to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination".<sup>1411</sup> China then appears to submit that the investigating authority has unfettered discretion to determine what is "material". While Australia accepts there is a degree of discretion afforded to the investigating authority in this regard,<sup>1412</sup> that discretion is not unfettered. Rather, what is material depends on the substantive provision of the Anti-Dumping Agreement at issue,<sup>1413</sup> and there are "certain objective requirements that would necessarily require reflection in the public report of the investigation".<sup>1414</sup> Thus, the investigating authority's determination in this regard is properly subject to review by the Panel, to undertake an "objective assessment of the facts", including with respect to MOFCOM's determination of materiality of "issues of fact and law" for the purposes of Article 12.2.

975. China further attempts to limit the scope of Articles 12.2 and 12.2.2 by arguing that "the methodology adopted by an investigating authority as well as the decisions made by the authority" are not subject to Articles 12.2 and 12.2.2.<sup>1415</sup> However, as set out in Australia's response to Panel question No. 70,<sup>1416</sup> China's argument in this respect is inconsistent with the terms of the Anti-Dumping Agreement itself. In particular, the incorporation by reference of the information required under Article 12.2.1(iii) into Article 12.2.2 means that a Final Determination must contain "a *full explanation* of the reasons for the methodology used in the establishment and comparison of the export price and the normal value". It would be very difficult for China to provide a full explanation of the reasons for a methodology without explaining the methodology itself.

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<sup>1409</sup> Australia's first written submission, para. 1080.

<sup>1410</sup> China's first written submission, para. 2599.

<sup>1411</sup> Panel Report, *EU – Footwear (China)*, para. 7.844.

<sup>1412</sup> Australia's first written submission, para. 1080.

<sup>1413</sup> Appellate Body Report, *China – GOES*, para. 265. See also Panel Report, *EC – Salmon (Norway)*, paras. 7.828-7.834.

<sup>1414</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.422.

<sup>1415</sup> Australia's response to Panel question No. 70, paras. 223-226.

<sup>1416</sup> China's response to Panel question No. 70, paras. 373-378.

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976. China cites the panel report in *EC – Bed Linen* as support for its proposition that Articles 12.2 and 12.2.2 do not require investigating authorities to make available information concerning the methodologies adopted in investigations.<sup>1417</sup> However, the panel's reasoning in that dispute does not support China's proposition. In relevant part, the paragraph of the panel report that China cites provides:

[T]he European Communities resorted to the methodology set out in paragraph 2.2.2(ii) [of the Anti-Dumping Agreement] in accordance with Article 2(6) of its Regulation. In light of our finding in respect of the order of options set out in Article 2.2.2 and the fact that the European Communities applied what is its customary methodology for the calculation of SG&A and profit rates, and the basis for its determination in this regard is clear from the Final Determination, we do not consider that Article 12.2.2 requires the European Communities to explain its choice of methodology.<sup>1418</sup>

977. It is clear from this citation that the panel's findings in that dispute were contingent on the specific facts of that case. In particular, the panel found that " [...] the basis for [the investigating authority's] determination" was "clear from the final determination", such that further explanation of the choice of methodology was not necessary. Contrary to China's contention, the panel's reasoning does *not* stand for the proposition that, as a general rule, methodologies adopted and used by investigating authorities to reach findings and conclusions on material issues of fact and law are not subject to the obligations under Articles 12.2 and 12.2.2. Rather, as Australia has set out in its submissions,<sup>1419</sup> the opposite is in fact the case.

### **3. MOFCOM's public notice of the Final Determination failed to contain all relevant information**

#### **(a) MOFCOM's estimate of total domestic output and the proportion accounted for by the domestic producers defining "domestic industry"**

978. In its prior submissions, Australia has established that MOFCOM did not make available all relevant information relating to the calculation of its estimate of total domestic production of like products (referred to as "total output" in the Final Determination), including with

<sup>1417</sup> China's first written submission, para. 2605.

<sup>1418</sup> Panel Report, *EC – Bed Linen*, para. 6.252.

<sup>1419</sup> Australia's first written submission, paras. 1076-1129; response to Panel question No. 70, paras. 223-226.

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respect to the calculation methodology and the underlying data upon which MOFCOM relied. As a result of this failure, MOFCOM breached the obligations under Article 12.2.2 the Anti-Dumping Agreement.<sup>1420</sup>

979. First, at the outset, Australia does not accept China's assertion that the data used in the estimate of total domestic production provided by [REDACTED] was confidential and therefore excluded from the scope of Articles 12.2 and 12.2.2. In this respect, Australia has set out its claims in relation to the related breach of Articles 6.5 and 6.5.1 separately in this submission.<sup>1421</sup>

980. Second, in an apparent attempt to justify MOFCOM's failure in this regard, China asserts that "essential facts" are not required to be disclosed under Articles 12.2 and 12.2.2.<sup>1422</sup> However, China's assertion is not supported by the report of the panel in *China – X-Ray Equipment* on which it relies. In particular, the panel report in that dispute provided as follows:

In our view, [...] Article 12.2.2 does not require that all "essential facts" underlying the margin of dumping should be included in the public notice. The scope of Article 12.2.2 is more nuanced, and would not require the inclusion of all underlying data. Without a more precise description by the European Union of the specific underlying data that, in its view, should have been reflected in the public notice, there is no basis for us to uphold the European Union's claim.<sup>1423</sup>

981. Thus, the panel in *China – X-Ray Equipment* was not suggesting that "essential facts" *per se*, fall outside the scope of Article 12.2.2, as a general rule, but rather that the scope of Article 12.2.2 does not necessarily cover *all* of the "essential facts" that are covered under Article 6.9. Australia agrees. In Australia's view, although Article 12.2.2 does not require the notice of Final Determination to provide *all* the underlying facts, it does, however, require "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures" to be provided.<sup>1424</sup>

<sup>1420</sup> Australia's first written submission, paras. 1086-1091.

<sup>1421</sup> See section VII.B.

<sup>1422</sup> China's first written submission, para. 2609.

<sup>1423</sup> Panel Report, *China – X-Ray Equipment*, para. 7.465. (underline emphasis added)

<sup>1424</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.466-7.469.



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982. Third, China goes on to misquote Australia by stating that Australia "admit[s]" that MOFCOM provided the methodology it used when calculating the total domestic output of wine in China.<sup>1425</sup> This is not the case. The part of Australia's first written submission that China cites in support of the alleged admission is simply a reproduction of the insufficient paragraph from MOFCOM's Final Determination, followed by a summation of MOFCOM's findings of the total output of the domestic industry. Far from an admission that MOFCOM provided methodology, Australia is asserting the insufficiency of MOFCOM's disclosures.<sup>1426</sup> In short, it merely amounted to a statement of conclusion and did not provide the level of information on the facts, law and reasoning required under Articles 12.2 and 12.2.2.

983. The calculation methodology relied on by MOFCOM was essential to its determination of total domestic output. This determination was then used to further estimate apparent consumption in China's market and the market shares of subject imports and domestic like products (i.e., volumes relative to consumption), which China claims were material findings for the ultimate determinations of injury and causation. As such, the information was of the kind that should have been disclosed in the appropriate level of detail required under Articles 12.2 and 12.2.2. And yet, despite the length of the excerpt from MOFCOM's Final Determination which China reproduced in its first written submission,<sup>1427</sup> the explanation of how the estimate of total domestic output was calculated consists of only a single sentence.<sup>1428</sup> At no point in the Final Determination did MOFCOM provide a reasoned account of the factual basis for the estimate, including the statistical information that MOFCOM relied upon, or sufficient details of the methodology that it used. The further details relating to the confidentiality of the data and their source provided by China at the first substantive meeting and following Panel questions cannot retrospectively rectify MOFCOM's failures in this regard.<sup>1429</sup> It remains the case that MOFCOM provided no explanation or reasoning about the adequacy of the data and how it determined that the identified 21 domestic producers

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<sup>1425</sup> China's first written submission, para. 2611.

<sup>1426</sup> Australia's first written submission, para. 1087.

<sup>1427</sup> China's first written submission, para. 2611.

<sup>1428</sup> China's first written submission, para. 2611 ("[...] On the condition that the overall output of domestic certain wines could not be directly acquired, the IA surveyed the actual domestic output through different means and believed that the output data, calculated by way of the area of wine grapes, output per acre, wine yield, the volume of finished wine products made of imported bulk wines and the loss rate, as well as the production proportion of different finished wine products, was reasonable").

<sup>1429</sup> China's response to Panel question No. 15, para. 51.

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legitimately accounted for a major proportion of the domestic industry. MOFCOM's estimate of total domestic output was central to its definition of the domestic industry under Article 4.1 of the Anti-Dumping Agreement. In turn, this definition was a "keystone" of MOFCOM's investigation because it laid the foundation for its injury and causation analyses.<sup>1430</sup>

984. As China itself argues,<sup>1431</sup> what is "material" for the purposes of Articles 12.2 and 12.2.2 should be considered in light of the substantive provision at issue. The information at issue was relevant and material to defining the domestic output, and as such the determination of injury and causation. Australia submits that an unbiased and objective investigating authority could not have found otherwise. MOFCOM's failure to provide such disclosure deprived interested parties and the public from understanding the basis of MOFCOM's decision to impose definitive measures in breach of the obligations under Articles 12.2 and 12.2.2.

985. Finally, China argues that because "the Australian Government itself provided comments regarding the output of the domestic industry, at various stages of the investigation" this is somehow evidence that MOFCOM met its disclosure obligations.<sup>1432</sup> This argument is without merit. Not only did the comments referred to by China criticise MOFCOM's lack of necessary detail in its earlier disclosures, but the comments were provided prior to the Final Determination being released. In this light, China's observations about Australian Government comments are misplaced and irrelevant. The fact remains that MOFCOM's Final Determination did not contain all of the information required to meet the obligations under Articles 12.2 and 12.2.2.

(b) MOFCOM's recourse to "facts available" to determine  
normal value and selection of the facts available

986. Australia has established that MOFCOM failed to make available all relevant information on the matters of fact and law and reasons relating to its decision to resort to "facts available", as well as MOFCOM's failures to disclose certain data and information

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<sup>1430</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.397.

<sup>1431</sup> China's first written submission, para. 2600.

<sup>1432</sup> China's first written submission, para. 2614.

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relating to its determination of what information constituted the "best information available".<sup>1433</sup>

*i. Treasury Wines*

987. With respect to Treasury Wines, Australia has established that MOFCOM did not explain — that is, it did not provide a reasoned account of the factual basis for — the following matters of fact and law: (i) the basis for using a single [REDACTED]; (ii) the basis for the selection of this [REDACTED]; and (iii) the reasons for its conclusion that the [REDACTED] was representative of Treasury Wines' portfolio of Chinese domestic sales.<sup>1434</sup> China asserts that this level of detail outlined by Australia is not required under Articles 12.2 and 12.2.2.<sup>1435</sup> Australia disagrees. This information was required to have been reflected in the Final Determination because MOFCOM's recourse to facts available was material to its decision to impose definitive measures.

988. Australia has not contended that the same level of disclosure should have been provided to the other sampled companies as MOFCOM provided to Treasury Wines. Rather, Australia has submitted that the specific elements listed in paragraph 1096 of Australia's first written submission should have been outlined in MOFCOM's Final Determination as they were not subject to the same confidentiality restrictions as Treasury Wines' data.

989. Once again, China's only response to Australia's arguments is to simply reproduce the same passages of MOFCOM's Final Determination that Australia has already established are insufficient in substance to meet the requirements of Articles 12.2 and 12.2.2.<sup>1436</sup> The pages provided by China do not disclose all matters of fact and law and reasons relating to the information set out in Australia's first written submission.<sup>1437</sup> None of the above information was provided to a level that allowed interested parties to discern and understand the reasoning for MOFCOM's decisions and determinations regarding each of these issues.

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<sup>1433</sup> Australia's first written submission, paras. 1092-1104.

<sup>1434</sup> Australia's first written submission, para. 1096.

<sup>1435</sup> China's first written submission, para. 2616.

<sup>1436</sup> China's first written submission, paras. 2619, 2621.

<sup>1437</sup> Australia's first written submission, para. 1096.

ii. *Casella Wines and Swan Vintage*

990. In relation to Casella Wines, China reproduces the same parts of its Final Determination that Australia argues are insufficient.<sup>1438</sup> Specifically, in relation to the disclosure of data MOFCOM relied upon for calculating Casella Wines dumping margin, China states:

As explained previously, for Casella Wines, the data of Treasury Wines was used. Thus, at the outset, it is obvious that the "product types, trade links and other influencing factors" (all of which are reflected in the PCNs), that are being taken into consideration are those of Casella Wines on the one hand and Treasury Wines on the other. Indeed, the extent, nature and form of the evaluation that an investigating authority must conduct in this regard (as well as the "explanation and analysis" that the authority must provide) is dependent on the "nature ... and amount of evidence on record". Given that MOFCOM used information from only one company (Treasury Wines), the level of specification (i.e., detail) that MOFCOM was required to provide in its Final Determination was concomitantly limited.<sup>1439</sup>

991. However, MOFCOM did not disclose any of the underlined non-confidential information in its Final Determination even though it was material to the determination of the normal value and calculation of the dumping margin of Casella Wines. Indeed, earlier in its submission, China stated that MOFCOM could not release information that would identify Treasury Wines.<sup>1440</sup> However, in the context of Articles 12.2 and 12.2.2, China argues that MOFCOM disclosed enough information for it to be clear that Casella Wines' information was based on Treasury Wines' data. China cannot take both positions simultaneously.

992. Similarly, for Swan Vintage, Australia maintains that MOFCOM provided no details in the Final Determination relating to the comparative analysis it conducted of the information from the investigation used to determine the dumping margin for Swan Vintage. In this regard, China requests that the Panel rely on the approach adopted by the panel in *China – Autos (US)* for the proposition that the level of detail disclosed in this regard was "appropriate".<sup>1441</sup> However, Australia submits that the panel report cited by China is apposite in the context of the matter before this panel. In that dispute, the panel's reasoning related to the "other exporters" (including unknown exporters) category of interested parties, who had not

<sup>1438</sup> Australia's first written submission, para. 1099.

<sup>1439</sup> China's first written submission, para. 2623. (underlining added, footnotes omitted).

<sup>1440</sup> See e.g. China's first written submission, para. 2463.

<sup>1441</sup> China's first written submission, para. 2624. (referring to Panel Report, *China – Autos (US)*, para. 7.155)

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provided any information in the course of the investigation.<sup>1442</sup> In contrast, the panel did not apply this line or argumentation to sampled companies that had provided detailed submissions to the investigating authority. As Swan Vintage was a sampled company that provided detailed information to MOFCOM, it should have been provided with a greater level of detail regarding MOFCOM's decision to resort to facts available and how MOFCOM used those facts to determine Swan Vintage's dumping margin. The lack of detail provided by MOFCOM in this regard completely deprived Swan Vintage of the ability to understand how MOFCOM determined its dumping margin.

(c) Fair comparison

993. Australia has established that MOFCOM failed to make available all relevant information relating to the comparability of prices and adjustments for the purposes of ensuring a fair comparison pursuant to Article 2.4.<sup>1443</sup>

994. China asserts that it is "untrue" that MOFCOM failed to provide "the 'formula or methodology underlying its calculations' with respect to price comparability and ensuring a fair comparison".<sup>1444</sup> However, the only support that China provides for this proposition is a quote of the same portion of the Final Determination that Australia has demonstrated was insufficient.<sup>1445</sup> The section from the Final Determination that China reproduces is not a sufficient disclosure of the formula or methodology underlying MOFCOM's calculations with respect to price comparability and for the purposes of ensuring a fair comparison. Rather, it is simply a replication of the requirement under Article 2.4, with the mere mention that the export price and normal values were "weighted averages". An unbiased and objective investigating authority could not have considered this to be a sufficient account of the methodology relied on when conducting a fair comparison required to meet the standard under Articles 12.2 and 12.2.2.

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<sup>1442</sup> Panel Report, *China – Autos (US)*, para. 7.154.

<sup>1443</sup> Australia's first written submission, paras. 1105-1112. See also paras. 91-95.

<sup>1444</sup> China's first written submission, para. 2638.

<sup>1445</sup> China's first written submission, para 2638. See also Australia's first written submission, para. 1110.

*i. Treasury Wines*

995. In its first written submission, China alleges that, with respect to the comparison of Treasury Wines' normal value and export price, Australia's arguments concerning relevant information on adjustments "seems to be substantive than procedural".<sup>1446</sup> In support of this allegation, China selectively quotes from Australia's first written submission, replacing relevant text with an ellipsis as follows:

It is clear that Australia's issue is that MOFCOM "rejected [the] several adjustments proposed by Treasury Wines ... notwithstanding Treasury Wines' meaningful engagement [with MOFCOM]". Thus, Australia is essentially arguing that MOFCOM should have accepted the adjustments proposed by Treasury Wines.<sup>1447</sup>

996. However, the text that China omits indicates that Australia's argument is about the failure to provide sufficient explanations — that is, a reasoned account of the factual and legal bases — for rejecting certain adjustments that Treasury Wines requested and further supported with submissions to MOFCOM prior to the Final Determination. For the Panel's ease of reference, the full passage in Australia's first written submission provides as follows:

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.<sup>1448</sup>

997. Article 12.2.2 requires that the Final Determination shall contain the information described in Article 12.2.1, which includes "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". In Australia's view, this "full explanation" includes relevant information on the adjustments that MOFCOM chose to apply and chose not to apply, and the reasons for this process for the purposes of the comparison required under Article 2.4.

<sup>1446</sup> China's first written submission, para. 2626.

<sup>1447</sup> China's first written submission, para. 2627.

<sup>1448</sup> Australia's first written submission, para. 1106.

ii. *Casella Wines, Swan Vintage, and All Others*

998. China also misconstrues Australia's arguments concerning MOFCOM's failure to provide a full explanation of its methodology with respect to relevant information on the adjustments to the export price for Casella Wines and Swan Vintage. Australia's argument is that MOFCOM failed to provide all relevant information regarding the nature or quantum of the adjustments that it accepted (i.e., an indicative range),<sup>1449</sup> not that the quantum itself should have been disclosed to Casella Wines and Swan Vintage. Information relating to the nature or quantum of adjustments was material information considered by the investigating authority in order to determine the dumping margin of the sampled companies. Non-confidential information relating to the quantum of adjustments, such as the indicative range, would have permitted interested parties to have a reasonable understanding of what factors MOFCOM considered when determining the adjustments.

999. China alleges that "the case of *EU – Footwear (China)* stands for the proposition that the 'precise level' (i.e. quantum) of adjustments made by an investigating authority need not be disclosed" under Articles 12.2 and 12.2.2.<sup>1450</sup> However, Australia disagrees that the panel's reasoning reflects this proposition as a general rule. Rather, the panel considered in that case that China did not demonstrate that the precise level of the adjustment was considered to be material by the investigating authority.<sup>1451</sup> In the circumstances of the current dispute, Australia submits that the quantum of adjustments was clearly material to the investigating authority's determinations with respect to Casella Wines and Swan Vintage as for the reasons outlined above.

1000. With respect to the "All Others" category of Australian exporters, China simply quotes a passage from MOFCOM's Final Determination and states that "[t]hus, the basis of fair comparison for the 'All Others' categories of companies is [...] clear".<sup>1452</sup> However, the quoted passage is silent as to how MOFCOM conducted the comparison of normal value with export price for this group of exporters, let alone how MOFCOM ensured that it was a fair comparison.

<sup>1449</sup> Australia's first written submission, para. 1107.

<sup>1450</sup> China's first written submission, para. 2633.

<sup>1451</sup> Panel Report, *EU – Footwear (China)*, para. 7.870.

<sup>1452</sup> China's first written submission, paras. 2635-2636.

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1001. MOFCOM was obliged to provide all information on the facts, law and reasons to provide sufficient disclosures to allow interested parties to discern and understand the investigating authority's decision.<sup>1453</sup> MOFCOM's description of its methodology with respect to the "All Others" group was unclear and lacked any reasoned account or meaningful explanation. MOFCOM simply stated that it "determined the dumping margin on the basis of the known facts and best information available" and that it "believed that the information provided by the [sampled] respondents could accurately and reasonably reflect the export of product under investigation by other Australian companies to China".<sup>1454</sup> It included no details on how the margin of dumping was determined, let alone a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value. MOFCOM could have, and was required to, provide a reasoned account, based on relevant non-confidential information, of the process that it used, including to ensure a fair comparison, but it failed to do so.

1002. Further, as explained in Australia's first written submission, MOFCOM simply declared that it had "compared the normal value and export price at the ex-factory level in a fair and reasonable manner".<sup>1455</sup> In Australia's view, the inclusion of the phrase "at the ex-factory level" is insufficient, on its own, to provide a reasoned account of the factual basis of the comparability of prices for the purposes of a "full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value", the standard established under Article 12.2.1(iii) of the Anti Dumping Agreement.

(d) Calculation of dumping margins and the reasons for the  
calculation methodology used

1003. The same failings concerning MOFCOM's failure to disclose information relating to the comparability of prices for the purposes of ensuring a fair comparison pursuant to Article 2.4 also apply in respect of MOFCOM's failure to disclose the reasons and calculation methodology used to determine the dumping margins.

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<sup>1453</sup> Panel Report, *EU – Footwear (China)*, para. 7.844.

<sup>1454</sup> Anti-Dumping Final Determination (Exhibit AUS-2), pp. 98-99.

<sup>1455</sup> Australia's first written submission, para. 1110.



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1004. First, China's reliance on the panel report of *EC – Bed Linen* in support of its proposition that disclosure of such methodology was not required is misplaced.<sup>1456</sup> As set out above, it is clear from the text of Article 12.2.1(iii) itself that information relating to the methodology selected and used in the comparison of export price and normal values is required under Articles 12.2 and 12.2.2.<sup>1457</sup> Second, China argues that no additional detail was required in disclosing the methodology other than stating that MOFCOM did a comparative analysis of prices by "compar[ing] the weighted average normal value with the weighted average export price".<sup>1458</sup> However, as set out above, this is simply a reiteration of the requirement under Article 2.4<sup>1459</sup> and does not provide all information relating to fact and law and reasons MOFCOM found material when considering the methodology it applied in the establishment and comparison of the export price and the normal value.<sup>1460</sup>

*i. All Others and other named Australian exporters*

1005. Further, with regard to the "All Others" group of exporters, Australia maintains that the excerpt from the Final Determination reproduced by China in its first written submission<sup>1461</sup> does not provide any detail about the facts that MOFCOM selected in order to calculate the extremely high margin.<sup>1462</sup> Moreover, China now reveals that the weights that were used when calculating the dumping margin for the "other named Australian Exporters" were based on export volume. This is critical information that was essential for interested parties to understand how their dumping margins were calculated. However, it was not disclosed in MOFCOM's Final Determination. It was impossible for the interested parties to even speculate on the basis of MOFCOM's calculations, as the rates that were set appear to be entirely unrelated to the rates fixed for the sampled companies. This information would have been material to MOFCOM's determination of the margin of dumping for the "All Others" category and, as such, should have been disclosed in the Final Determination.

<sup>1456</sup> China's first written submission, para. 2643.

<sup>1457</sup> See above, para. VII.1.2(b).

<sup>1458</sup> China's first written submission, para. 2643.

<sup>1459</sup> In relevant part, Article 2.4 of the Anti-Dumping Agreement states: "A fair comparison shall be made between export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made as at nearly as possible the same time."

<sup>1460</sup> This is the required standard as per Article 12.2.1(iii) of the Anti-Dumping Agreement.

<sup>1461</sup> China's first written submission, para. 2644.

<sup>1462</sup> Australia's first written submission, para. 1118.

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1006. In this context, China attempts to misrepresent the nature of Australia's arguments regarding the use of adverse facts relating to the "All Others" group of exporters.<sup>1463</sup> Australia's submissions make clear that the issue claimed under Articles 12.2 and 12.2.2 is that MOFCOM did not disclose the reasons underpinning the decision to use "adverse facts" for the "All Others" group of exporters.<sup>1464</sup> Notably, in response to this claim China has not denied that MOFCOM did in fact apply adverse facts to calculate the dumping margin for the "All Others" group.<sup>1465</sup>

(e) Determination of injury and causation

1007. The facts and reasoning absent from the Final Determination in relation to MOFCOM's evaluation of the injury factors, in breach of Articles 12.2 and 12.2.2, are set out in Australia's first written submission.<sup>1466</sup> China has failed to rebut Australia's *prima facie* case in this regard.

1008. In relation to several of Australia's injury arguments China contends that the errors identified by Australia should have more properly been made under so-called "substantive" provisions related to MOFCOM's assessment and determination of injury and causation. Specifically, China's contention appears to relate to the following of Australia's arguments under Articles 12.2 and 12.2.2:

- that 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";<sup>1467</sup>
- that MOFCOM failed to properly account for the reasons that supported its conclusion that there was a causal connection between Australian imports and injury;<sup>1468</sup> and
- that MOFCOM failed to address reasonable alternative explanations for domestic industry dynamics that had been raised by interested parties.<sup>1469</sup>

<sup>1463</sup> China's first written submission, para. 2646.

<sup>1464</sup> Australia's first written submission, para. 1118.

<sup>1465</sup> China's first written submission, para. 2646.

<sup>1466</sup> Australia's first written submission, paras. 1076 – 1129.

<sup>1467</sup> Australia's first written submission, para 1122; China's first written submission, paras. 2655-2556.

<sup>1468</sup> Australia's first written submission, paras. 1124-1125; China's first written submission, paras. 2658-2659.

<sup>1469</sup> Australia's first written submission, para 1127; China's first written submission, para. 2662.

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1009. In raising these arguments, Australia understands China's position to be that this information was not required to be disclosed under Articles 12.2 and 12.2.2, because MOFCOM did not in fact undertake the underlying action or analysis. In other words, China is indicating to Australia that there was no information to disclose on these issues. If it is in fact true that MOFCOM did not consider these elements in sufficient detail during the investigation, then Australia acknowledges that this information need not be disclosed under Articles 12.2 and 12.2.2.

1010. China now submits in this context that MOFCOM had recourse to facts available for the purposes of its price calculation for subject imports and domestic like prices under Article 3.2.<sup>1470</sup> While Australia does not accept this assertion,<sup>1471</sup> if this in fact was the case, MOFCOM's failure to disclose this decision at any point throughout the investigation, in particular in the Final Determination, would have been a clear breach of the requirements of Articles 12.2 and 12.2.2.

1011. In relation to China's rebuttal to Australia's claims addressing MOFCOM's price effects analysis,<sup>1472</sup> reasonable alternative explanations,<sup>1473</sup> and non-subject imports,<sup>1474</sup> there was a striking dichotomy in the position taken by China in its response to Australia's claims under Article 12 and the detail contained in its submissions on Article 3. China argues that MOFCOM's Final Determination was complete and contained all the relevant information to satisfy its requirements under Articles 12.2 and 12.2.2. However, on the other hand, China has also provided nearly 400 pages of additional explanations in its first written submission and responses to the Panel's questions in order to explain to the Panel (and Australia) how MOFCOM conducted its injury analysis.<sup>1475</sup> As set out above,<sup>1476</sup> China's first written submission contains extensive and detailed descriptions of the assessment that MOFCOM allegedly carried out when assessing the explanatory force that subject imports were said to have for the suppression of domestic prices.<sup>1477</sup> Australia's primary position is that this

<sup>1470</sup> China's first written submission, paras. 1089- 1092.

<sup>1471</sup> See generally above, section V.B.

<sup>1472</sup> Australia's first written submission, para. 1124; China's first written submission, para. 2658.

<sup>1473</sup> Australia's first written submission, para. 1127; China's first written submission, para. 2660.

<sup>1474</sup> Australia's first written submission, para. 1128; China's first written submission, para. 2663.

<sup>1475</sup> China's first written submission, pp. 265-543; China's response to Panel questions, Section III, pp. 27-125.

<sup>1476</sup> See above, section V.B.4(a).

<sup>1477</sup> China's first written submission, paras. 1321-1344.

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content consists entirely of *ex post facto* rationalisations and should be disregarded. However, in the event that the Panel accepts that MOFCOM did in fact engage in the analysis described by China, MOFCOM should have included these details in the Final Determination.

1012. In addition to these points, Australia would like to note the following. First, China argues that MOFCOM's use of 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"<sup>1478</sup> is a disclosure of its "methodology".<sup>1479</sup> This argument is misguided. Neither this explanation nor the longer paragraph in the Final Determination reproduced by China<sup>1480</sup> provide a level of detail regarding the methodology MOFCOM undertook that would allow for the reasons for concluding that injury was caused to the domestic industry to be discerned and understood.<sup>1481</sup>

1013. Second, Australia would like to clarify its arguments relating to non-subject imports, which China expresses "confusion" over. Australia's argument relates to the impact that non-subject imports may have had on the domestic prices.<sup>1482</sup> Non-subject imports can be classified in the same groupings as subject imports and, as such, domestic prices need to be adjusted accordingly. MOFCOM needed to disclose the methodology it applied in considering these necessary adjustments to domestic prices caused by non-subject imports.

#### 4. Conclusion

1014. China has failed to rebut Australia's *prima facie* case. For the reasons set out above and in Australia's first written submission, China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

### VIII. SUMMARY OF REQUESTED FINDINGS

1015. For the reasons set out above, and in Australia's first written submission and responses to questions from the Panel, Australia respectfully requests that the Panel find that

<sup>1478</sup> Anti-Dumping Final Determination, (Exhibit AUS-2), p. 113.

<sup>1479</sup> China's first written submission, para. 2653.

<sup>1480</sup> China's first written submission, para. 2653.

<sup>1481</sup> Panel Report, *EU – Footwear (China)*, para. 7.844.

<sup>1482</sup> Australia's first written submission, para. 1123; China's first written submission, para. 2657.

China's measures, as set out above, are inconsistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994, as set out below:

- Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.4, 3.1, 3.2, 3.4, 3.5, 4.1, 5.1, 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.

1016. 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.

## **ANNEX A      Terms of reference**

1.        China's attempts to delimit the Panel's terms of reference are without merit. This annexure addresses each of China's specific objections. For ease of reference, this annex is structured following the same outline as Australia's second written submission.

### **A.1        DUMPING DETERMINATION**

#### **A.1.1      Australia's claims pursuant to Article 6.8 and Annex II are within the Panel's terms of reference.**

2.        China's first written submission repeats the allegations it makes in its PRR.<sup>1483</sup> Australia has provided detailed responses to these allegations and demonstrated that its claim was sufficiently clear on the face of the panel request, considering the nature of the provision and measure at issue.<sup>1484</sup> Australia stands on these submissions.

3.        In its first written submission, China raises a new objection to Australia's claim pursuant to Article 6.8 and Annex II: China alleges that Australia should have elaborated on each instance of recourse to facts available that it alleged to be inconsistent with Article 6.8 and Annex II.<sup>1485</sup> Australia makes two points in response.

4.        Australia first observes that, under paragraph 1 of Annex II, certain issues could not be articulated in the level of detail that China demands prior to receiving its submissions. As Japan notes, this "occurs because paragraph 1 of Annex II is a claim regarding transparency and a complainant may not have sufficient information at hand when initially framing its claim".<sup>1486</sup> Not only is China's demand impossible to meet, but this information asymmetry also demonstrates that the arguments in support of such a claim will reasonably and necessarily develop over the course of the dispute.

5.        Secondly, as detailed above, Australia's allegations with respect to these instances of inconsistency are properly considered arguments, not claims.<sup>1487</sup> China's assertion otherwise demonstrates its misinterpretation of the standard under Article 6.2 of the DSU. China's incorrect interpretation of an obligation to explain "how or why" a measure is infringed in a

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<sup>1483</sup> China's first written submission, paras. 45, 101-107, and 131; China's PRR, para. 48.

<sup>1484</sup> Australia's response to China's PRR, paras. 127-142; see above section II.A.1(a).

<sup>1485</sup> China's first written submission paras. 101, 131; see above section 24.

<sup>1486</sup> Japan's response to Panel question No. 1 following the third-party session with the Panel, para. 10.

<sup>1487</sup> See above, para. 24.

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panel request goes beyond the brief summary of the legal basis of the complaint that is required under Article 6.2. China's interpretation improperly expands that obligation to include *arguments*.<sup>1488</sup> China is therefore incorrect to suggest that Australia should have set out in detail each "instance" where Australia challenges MOFCOM's use of facts available.<sup>1489</sup>

6. Finally, China asserts that Australia's panel request did not sufficiently clarify that all instances of resort to facts available were at issue.<sup>1490</sup> Australia has responded to this allegation in detail, demonstrating both that its claim is clear on the text of the panel request and that such instances do not need to be identified in a panel request.<sup>1491</sup>

**A.1.2 Australia's claim pursuant to Article 2.1 is within the Panel's terms of reference.**

7. Article 2.1 is a definitional provision that informs compliance with all elements of a dumping determination.<sup>1492</sup>

8. Despite its fundamental cornerstone role in the Anti-Dumping Agreement, China asserts in its first written submission that the Panel should strike all "references" to this Article from its analysis merely because it does not impose an independent obligation.<sup>1493</sup> This approach is nonsensical – it would eliminate the definition of the matter in dispute.

**A.1.3 Australia's claim pursuant to Article 2.4 is within the Panel's terms of reference.**

9. Contrary to China's assertions otherwise, Australia has demonstrated that this claim is clear on the face of the panel request.<sup>1494</sup> It stands on those submissions, particularly noting that Article 2.4 does not fall within a "special class of obligations", but requires a case-by-case analysis.<sup>1495</sup>

<sup>1488</sup> See above, section II.A.1(b) and section 24.

<sup>1489</sup> China's first written submission, para. 131.

<sup>1490</sup> China's first written submission, paras. 101-107, 131; Request for establishment of a panel by Australia, WT/DS602/2 (Australia's panel request), para. (ix).

<sup>1491</sup> Australia's response to China's PRR, paras. 154-136.

<sup>1492</sup> See Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

<sup>1493</sup> China's first written submission, para. 704.

<sup>1494</sup> Australia's response to China's PRR, paras. 164-179; China's first written submission, paras. 85, 133.

<sup>1495</sup> See above, paras. 11-13.

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10. In particular, China is incorrect to imply that Australia was obligated to provide details about the factors that MOFCOM should have considered.<sup>1496</sup> Specific factors are not "obligations" themselves; these aspects do not need to be identified in a panel request, as they are properly considered arguments rather than claims.<sup>1497</sup>

**A.1.4 Australia's claim pursuant to Article 2.3 was within the Panel's terms of reference.**

11. Australia is no longer pursuing a claim under Article 2.3. It became clear to Australia as the dispute progressed that MOFCOM had not utilised the constructed export price calculation described under Article 2.3.

12. Australia has set out its reply to China's allegations in response to the PRR and it stands on those submissions.<sup>1498</sup>

**A.2 DEFINITION OF DOMESTIC INDUSTRY**

**A.2.1 Australia's claim pursuant to Article 4.1 is within the Panel's terms of reference.**

13. In its first written submission, China raises a new objection to Australia's claim pursuant to Article 4.1.<sup>1499</sup> To the best of Australia's understanding, China alleges that Australia's panel request was insufficiently clear as it used the term "*inter alia*", and, therefore, that Australia can only adduce arguments relevant to "failing to establish the quantitative and qualitative elements of a major proportion of the total domestic production of the like products".<sup>1500</sup> This objection further demonstrates that China misunderstands what is required to provide a brief summary of the legal basis of the complaint that is sufficient to present the problem clearly.

14. The Appellate Body in *Korea – Pneumatic Valves* directly overruled the objections that China now makes.<sup>1501</sup> In that dispute, the Appellate Body held that it was sufficient for a

<sup>1496</sup> China's first written submission, paras. 85, 133; see Australia's panel request, para. (xiv).

<sup>1497</sup> See above, paras. 25-27.

<sup>1498</sup> Australia's response to China's PRR, paras. 155-163.

<sup>1499</sup> China's first written submission, paras. 897-898; Australia's panel request, para. (i). For clarity, China did not raise any such objection in its PRR.

<sup>1500</sup> China's first written submission, paras. 897-898.

<sup>1501</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.19-5.35.



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complainant to identify that it was concerned with the manner in which the investigating authorities had defined "the domestic industry producing the like product"; further detail was not required.<sup>1502</sup> The well-delineated nature of the obligation meant that "identification of [Articles 3.1 and 4.1] in the narrative of the panel request would seem to plainly connect the measure at issue with the provisions of the covered agreement alleged to have been breached, as required by Article 6.2 of the DSU".<sup>1503</sup> Australia framed its panel request in a manner similar to Japan in *Korea – Pneumatic Valves*, identifying the well-delineated provision at issue, and clearly stating that "China erred in its interpretation and application of the definition of 'domestic industry'".<sup>1504</sup> As in that dispute, this makes clear that Australia is concerned with the portion of the dumping determination that concerned the definition of domestic industry and its inconsistency with Article 4.1.<sup>1505</sup> Moreover, the term "*inter alia*" signposts an intention to present additional arguments in support of this allegation.<sup>1506</sup> China is therefore incorrect to state that Australia has adduced a "new claim".

### A.3 INJURY AND CAUSATION

#### A.3.1 Australia's claims pursuant to Articles 3.1 and 3.2 are within the Panel's terms of reference.

15. In its first written submission, China raises three new jurisdictional and alternative 'threshold' objections to Australia's claim pursuant to Articles 3.1 and 3.2. It alleges this claim was either: (i) insufficiently clear; (ii) not mentioned in Australia's panel request; or (iii) did not reasonably evolve from Australia's panel request. China is incorrect on all three counts.

16. First, China's accusation that Australia's claim was "unclear" is nonsensical. Australia has articulated each reason why its allegation of inconsistency with the overarching obligation in Article 3.1 and the requirements of Articles 3.1 and 3.2 were clear on the face of the record.<sup>1507</sup> Australia stands on those submissions.

<sup>1502</sup> See particularly Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.26 and 5.34.

<sup>1503</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.27 and 5.34.

<sup>1504</sup> Australia's panel request, para. (i).

<sup>1505</sup> Australia's response to China's PRR, paras. 11-13 and footnotes thereto.

<sup>1506</sup> See above, para. 35.

<sup>1507</sup> Australia's response to China's PRR, paras. 198-202 and footnotes thereto; China's first written submission, paras. 943, 959-977; Australia's panel request, paras. (xix) and (xviii).

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17. Second, China's contention that Australia's first written submission advances an "entirely new claim" is grounded in a fundamental misunderstanding of the difference between a claim and an argument.<sup>1508</sup> In its first written submission, China declares that Australia is barred from making arguments addressing MOFCOM's failure to: (i) determine that price suppression was 'significant';<sup>1509</sup> (ii) take into account the different conditions of sale of the dumped imports and the domestic like products;<sup>1510</sup> and (iii) disclose data sets and the methodologies, exclusions, constructions, adjustments and/or calculations on which those sets relied,<sup>1511</sup> because Australia did not list these specific elements in its panel request.

18. China identified all three arguments as claims. This is incorrect. Australia's claim is that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, *inter alia*, MOFCOM's "consideration of the effect of the subject imports on the prices of like products in the domestic market: (a) did not involve an objective analysis based on positive evidence; (b) did not consider whether there had been significant price undercutting or price depression; and (c) did not properly consider whether the effect of subject imports was to prevent price increases, which otherwise would have occurred, to a significant degree".<sup>1512</sup> Australia's claim, as articulated in the panel request, even went on to explain further detail that was additional to the minimum required under Article 6.2.<sup>1513</sup> The arguments presented in Australia's first written submission to which China objects are not new claims. They are supporting arguments that substantiate and demonstrate Australia's claim that China's anti-dumping measure is inconsistent with Articles 3.1 and 3.2. As Australia has set out, the "factors" or "aspects" of a claim are properly considered to be *arguments* and do not need to be described in a panel request.<sup>1514</sup> Australia's claim in its panel request did set out extra detail of its arguments, but this does not demonstrate that each of those

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<sup>1508</sup> China's first written submission, para. 961; see above, section 24.

<sup>1509</sup> China's first written submission, para. 938.

<sup>1510</sup> China's first written submission, paras. 943, 1268-1270.

<sup>1511</sup> China's first written submission, paras. 943, 959-977.

<sup>1512</sup> Australia's panel request, para. (xix); see also para. (xviii).

<sup>1513</sup> Australia's Panel Request, claim no. xix. ("In this regard, China has, *inter alia*: (i) failed to give reasons and adequate explanations of the methodology used for calculating prices for subject imports, non-subject imports and domestic like products; (ii) failed to consider all the positive evidence available on the record relating to price undercutting and price depression; (iii) failed to conduct a counterfactual analysis in the context of making a price suppression finding; and (iv) compared volumes and prices of subject imports to domestic like product that are not comparable and failed to ensure price comparability in its analysis of price effects").

<sup>1514</sup> See above, sections II.A.1(b), 24.

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arguments was a claim.<sup>1515</sup> In fact, the elements that China alleges to be missing – including all specific factors affecting price comparability for price effects analysis, all price and other non-price factors affecting domestic prices, and conditions of sale – are not claims, they are arguments.<sup>1516</sup> Australia sets out these arguments to demonstrate its allegation that MOFCOM failed to determine injury in accordance with the specific provisions listed, Articles 3.1 and 3.2. Each of China's "new claims" is simply an argument supporting or demonstrating Australia's claim that China acted inconsistently with Article 3.2.<sup>1517</sup>

19. China's misunderstanding of the standard pursuant to Article 6.2 of the DSU is similarly evident in its allegation that Australia makes a "new claim" that MOFCOM failed to disclose price data set and methodology.<sup>1518</sup> This allegation is the result of three errors. Firstly, China incorrectly characterises Australia's argument as relating to procedural disclosure obligations; Australia's argument is that MOFCOM's failure to provide adequate reasons and explanations meant that its price effects analysis did not comply with China's Article 3.1 obligations.<sup>1519</sup> Secondly, failure "to give reasons and adequate explanations of the methodology used for calculating prices for subject imports"<sup>1520</sup> is an *argument* made in support of Australia's claim: Australia argues that this violation arises because MOFCOM failed to disclose data sets or provide an explanation of how those data sets were used.<sup>1521</sup> Third, China willfully ignores the similarities between the language of Australia's panel request and the language found to be acceptable in *Korea – Pneumatic Valves (Japan)*. As in that dispute, Australia has identified Articles 3.1 and 3.2 as the provisions at issue and identified the portion of the investigation at issue.<sup>1522</sup> In both disputes, there is a plain connection between the challenged measure and the obligation in question.<sup>1523</sup>

<sup>1515</sup> See Australia's panel request, para. (xix).

<sup>1516</sup> China repeats similar misplaced allegations throughout its submission. See China's first written submission paras. 942-943, 961-974; cite paras. 1086, 1097, 1266-1270, 1273, 1532-1548, 1678, 1692-1712.

<sup>1517</sup> Australia's panel request, para. (xix); see China's first written submission, para. 943.

<sup>1518</sup> China's first written submission, paras. 943, 961-964, 969-971, 974.

<sup>1519</sup> See China's first written submission, para. 959-964.

<sup>1520</sup> Australia's panel request, para. (xix).

<sup>1521</sup> See above, section 24.

<sup>1522</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.65, 5.71 and 5.78: "Korea's analysis of a significant increase of the imports under investigation"; c.f. Australia's panel request, para. (xix): "China's consideration of the effect of the subject imports on the prices of like products in the domestic market". In full, Australia's claim identifies that MOFCOM's consideration of price effects failed to comply with the Art 3.1 and 3.2 obligation because it "compared volumes and prices of subject imports to domestic like product that are not comparable and failed to ensure price comparability in its analysis of price effects": Australia's panel request, para. (xix).

<sup>1523</sup> See Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.89-5.91.

**A.3.2 Australia's claims pursuant to Articles 3.1 and 3.4 are within the Panel's terms of reference.**

20. China's accusation that Australia's claim pursuant to Articles 3.1 and 3.4 was "unclear" is groundless. Australia has made detailed submissions demonstrating that its panel request set out its claims pursuant to Articles 3.1 and 3.4 in a manner sufficient to present the problem clearly.<sup>1524</sup> Australia stands on those submissions.

21. In its first written submission, China declares that Australia is barred from making arguments addressing MOFCOM's failure to consider other factors affecting domestic prices and domestic industry because it did not list specific factors in its panel request.<sup>1525</sup> China argues that this detail was necessary either (i) to make the claim clear, or (ii) because each factor is a claim. China is incorrect on both accounts.

22. Contrary to China's continued assertions otherwise, a panel request does not have to include each factor or element of a claim because these elements are properly considered *arguments*.<sup>1526</sup> The Appellate Body has held that this can also include failure to consider a particular factor or to meet a specific element.<sup>1527</sup> Australia's claim is that China acted inconsistently with Articles 3.1 and 3.4, as MOFCOM failed to objectively examine, based on positive evidence, the volume of subject imports, effect of subject imports on the domestic market, and impact of this on domestic producers. In this regard, Australia's panel request is drafted similarly to Japan's claim under Article 3.4 in *Korea – Pneumatic Valves (Japan)*.<sup>1528</sup> China's allegation that Australia was required to "claim" a failure to consider a particular factor affecting domestic price, such as market supply and demand, or cost of raw materials, is misplaced. These factors are arguments that demonstrate Australia's claim that MOFCOM's examination of the impact of the subject imports on the domestic industry was inconsistent with Articles 3.1 and 3.4.

<sup>1524</sup> Australia's response to China's PRR, paras. 202, 204-211; China's first written submission, para. 1499-1500.

<sup>1525</sup> China's first written submission, paras. 943; 1531-1537; see also paras. 1451-1453; 1590-1599.

<sup>1526</sup> See above, section 24; see Australia's response to China's PRR, para. 20, 81-82 and 210.

<sup>1527</sup> See above, para. 18-19.

<sup>1528</sup> In *Korea – Pneumatic Valves (Japan)*, the panel concluded that arguments relating to specific Art 3.4 factors that had not been evaluated were within the panel's terms of reference, despite not being expressly listed in the panel report at para. 7.175. The Appellate Body confirmed this finding at para. 5.108 of the Appellate Body Report.

**A.3.3 Australia's claims pursuant to Articles 3.1 and 3.5 are within the Panel's terms of reference.**

23. Contrary to China's assertion,<sup>1529</sup> Australia's claim pursuant to Articles 3.1 and 3.5 was clear on the face of the panel request. Australia has made detailed submissions demonstrating this and it stands on those submissions.<sup>1530</sup>

24. China's expanded efforts to claim otherwise are without merit. In its first written submission, China declares that Australia is barred from making arguments addressing MOFCOM's failure to: (i) establish substitutability;<sup>1531</sup> (ii) properly compare market share of domestic like products and subject imports;<sup>1532</sup> and (iii) account for exchange rate fluctuations and non-price factors impacting domestic consumer decisions in its non-attribution analysis,<sup>1533</sup> because it did not list these specific factors in its panel request.

25. China identified all three arguments as claims.<sup>1534</sup> They are not: Australia's claim is that China acted inconsistently with Articles 3.1 and 3.5 because MOFCOM failed demonstrate that the allegedly dumped imports of bottled wine from Australia caused injury to the domestic industry. The "new claims" that China identifies are, in fact, the component arguments that demonstrate Australia's claim that China's anti-dumping measure is inconsistent with Articles 3.1 and 3.5. These elements are properly characterised as arguments or evidence, and their specific reference is not required in a panel request.

26. Moreover, China asserts that MOFCOM did not need to conduct an "objective examination" in relation to other known factors that it did not actually consider.<sup>1535</sup> In Australia's view, this is a circular argument that does not make sense and fails to engage with Australia's arguments on their merits. China misunderstands the Article 3.1 obligation to conduct an objective examination. This obligation captures circumstances where an investigating authority ignores, or failed to evaluate, relevant evidence.<sup>1536</sup> Australia noted in

<sup>1529</sup> China's first written submission, paras. 118, 1678, 1680-1685.

<sup>1530</sup> Australia's response to China's PRR, paras. 212-220; see above, paras. 42-43.

<sup>1531</sup> China's first written submission paras. 1678, 1680-1685.

<sup>1532</sup> China's first written submission, paras. 1678, 1686-1691; see Australia's panel request, para. (xxi).

<sup>1533</sup> China's first written submission, paras. 1678, 1692-1712; see Australia's panel request, para. (xxi).

<sup>1534</sup> China makes similar errors elsewhere. See above, sections II.A.1(b) and 24.

<sup>1535</sup> China's first written submission, paras. 1698-1702.

<sup>1536</sup> See Australia's first written submission, paras. 548 and footnotes thereto, 564 and footnotes thereto, see particularly fn. 639 (citing Appellate Body Reports, *China – GOES*, para. 200; *Korea – Pneumatic Valves (Japan)*, para. 5.234).

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its panel request that MOFCOM violated Articles 3.1 and 3.5 in part as it did not "objectively examine other known factors that injured the domestic industry".<sup>1537</sup> In support of this claim, Australia argues that MOFCOM failed to examine consumer preferences as a non-attribution factor. A failure to examine a particular factor is also a failure to consider factors objectively.

#### **A.4 INITIATION**

##### **A.4.1 Australia's claims pursuant to Articles 5.2, 5.2(iii), 5.2(iv), 5.3 and 5.8 are within the Panel's terms of reference.**

27. Australia's panel request set out the claims pursuant Articles 5.2, 5.2(iii), 5.2(iv), 5.3 and 5.8 in a manner sufficient to present the problem clearly and plainly link the measure at issue to the alleged inconsistency. Australia has set out detailed submissions establishing this,<sup>1538</sup> and it stands on those submissions.

28. However, China continues to assert that Australia must bring forward each factor and element that it alleges was missing from CADA's application. It argues that this is necessary to demonstrate 'how and why' the inconsistency occurred. This is incorrect, and further demonstrates China's fundamental misunderstanding of the standard required under Article 6.2 of the DSU.<sup>1539</sup>

29. The "elements" to which China refers are precisely that – arguments and evidence in support of the claim. The claim, on the other hand, consists of identifying the specific measure at issue and providing a brief summary of the legal basis of the complaint in a manner that is sufficient to present the problem clearly.<sup>1540</sup> An allegation that MOFCOM failed to consider a particular factor does not constitute an independent claim of violation, but rather an argument in support of the claim that a violation occurred. It addresses an aspect of how MOFCOM initiated and conducted the investigation in a manner that was inconsistent with the overarching obligation to ensure that an application contains evidence of dumping, injury and causation. Such aspects are properly considered arguments.

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<sup>1537</sup> Australia's panel request, para. (xxi).

<sup>1538</sup> Australia's response to China's PRR, paras. 63-88.

<sup>1539</sup> See above, section II.A.1(b).

<sup>1540</sup> See above, sections II.A.1(b); II.A.1(c)i.

30. Furthermore, Australia reiterates that China's assertion that it could not understand the nature of Australia's claim from the panel request is without merit. In particular, China's allegation that Australia was not clear whether it challenged the obligation to reject an application pre-initiation or the obligation to terminate an obligation post-initiation is groundless.<sup>1541</sup> It is clear from the text of Australia's panel request that Australia was referring to both.<sup>1542</sup> In addition to the extensive responses in Australia's response to the PRR,<sup>1543</sup> Australia corrects China's understanding of the term "or". While China asserts that "or" can only have a disjunctive meaning,<sup>1544</sup> this is not correct: it regularly has a *conjunctive* meaning.<sup>1545</sup> Australia's panel request clearly conveys the latter meaning, referring to both MOFCOM's failure to reject *and* failure to terminate. The context demonstrates this. As a practical matter, if the investigating authority rejects the application, then it will never have an investigation to terminate.

31. Furthermore, as already argued in detail,<sup>1546</sup> the narrative of the claim reflects MOFCOM's chain of errors concerning initiation: first, a failure to correctly initiate, second, a failure to terminate promptly based on insufficient evidence. The citations and language provide China with an unambiguous summary of Australia's allegation sufficient to clearly understand the nature of the claim.<sup>1547</sup>

<sup>1541</sup> China's first written submission, paras. 119-123; Australia's panel request, para. (iii).

<sup>1542</sup> Australia's Panel Request, para. 4(iii) ("Articles 5.2, 5.2(iii), 5.2(iv), 5.3 and 5.8 of the Anti-Dumping Agreement because, *inter alia*, China initiated an investigation on the basis of an application without sufficient evidence, China failed to examine or review the accuracy and adequacy of the evidence provided in the application, and China failed to reject the application or terminate promptly the investigation given the lack of sufficient evidence")

<sup>1543</sup> Australia's response to China's PRR, paras. 84-87.

<sup>1544</sup> China's first written submission, para. 122.

<sup>1545</sup> Past reports have highlighted that the word "or" may have different meanings in different contexts. For instance, in the context of Article 2.1 of the Agreement on Safeguards, the Appellate Body observed:

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

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

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

<sup>1546</sup> Australia's response to China's PRR, para. 87.

<sup>1547</sup> See also Australia's response to China's PRR, para. 80.

**A.4.2 Australia's claim pursuant to Article 5.2 is within the Panel's terms of reference.**

32. Article 5.2 informs compliance with, and creates prerequisites to, Articles 5.3 and 5.8. These provisions must be read together; it is impossible to strike a particular element of Article 5 from the dispute without compromising the corresponding analysis under these obligations.<sup>1548</sup> China's assertion that a panel should strike Article 5.2 from its analysis merely because it does not impose an independent obligation is therefore without merit.

**A.4.3 Australia's claims pursuant to Articles 5.1, 5.2(i) and 5.4 are within the Panel's terms of reference.**

33. China advances two jurisdictional or 'threshold' arguments in relation to Australia's claims pursuant to Articles 5.1, 5.2(i) and 5.4.

34. The first is a repetition of its PRR position that these claims are not sufficiently clear and paraphrase the text of the Anti-Dumping Agreement.<sup>1549</sup> Australia has advanced a detailed response to this allegation and stands on these submissions.<sup>1550</sup>

35. Secondly, China's asserts that Australia's claim has impermissibly changed from its panel request, and claims that Australia consequently cannot adduce any argument that it did not include in its panel request including its claim under Article 5.2(i).<sup>1551</sup>

36. Australia disagrees. First, China's position is predicated on a misunderstanding of the term 'legal basis', as detailed above.<sup>1552</sup> Australia reiterates that the "legal basis" is the WTO provision or obligation that is alleged to be infringed by the measure at issue. Australia set this out in its panel request,<sup>1553</sup> providing a brief summary of the legal basis of its complaint that was sufficient to present the problem clearly.

37. Moreover, the nature of Australia's claim was clear from the narrative of the panel request, the character of the provision itself and the measure at issue. In light of the nature of the measure at issue, including the fact that the application was purportedly made on

<sup>1548</sup> China's first written submission, para. 87; Australia's response to China's PRR, para. 71.

<sup>1549</sup> China's first written submission, para. 118; see Australia's panel request, para. (ii).

<sup>1550</sup> Australia's response to China's PRR, paras. 42-62.

<sup>1551</sup> China's first written submission, paras. 2035-2041; see Australia's panel request, para. (ii).

<sup>1552</sup> See above, paras. 25-26.

<sup>1553</sup> Australia's panel request, para. (ii).



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behalf of the domestic industry, Article 5.2(i) contains the clear, straightforward, and compulsory requirement to list all known domestic producers. Australia cited this provision as part of a clear narrative in which it alleged that MOFCOM had failed to require the applicant to demonstrate that it did in fact act on behalf of the domestic industry.<sup>1554</sup> Australia's claim is clear, and it is unreasonable for China to claim that it was not aware of the nature of the case against it.<sup>1555</sup> Australia provided a brief summary of the legal basis of its complaint that was sufficient to present the problem clearly.<sup>1556</sup> The arguments Australia brings to support this claim of inconsistency with Article 5.2(i) have therefore reasonably developed from Australia's panel request.<sup>1557</sup>

## **A.5 CONDUCT AND TRANSPARENCY**

### **A.5.1 Australia's claim pursuant to Article 6.1 is within the Panel's terms of reference.**

38. As submitted in its detailed response to the PRR, Australia maintains that its panel request identified its claims pursuant to Article 6.1 in a manner sufficient to present the problem clearly. In particular, Australia reiterates that Article 6.1 is a clear and well-delineated provision.<sup>1558</sup> Australia's panel request sets out the clear claim that the anti-dumping measure at issue was inconsistent with Article 6.1 because, *inter alia*, "China did not provide all interested parties ample opportunity to present all relevant information and evidence".<sup>1559</sup>

39. Australia clarifies that it has in no way abandoned the allegation that China's measures are inconsistent with Article 6.1.<sup>1560</sup>

<sup>1554</sup> In this respect, Articles 5.1, 5.2(i) and 5.4 are interrelated in that they concern the same conduct, timing, and logical basis. China's assertion that "one could argue in the extreme that the *entire* Anti-Dumping Agreement is 'interrelated'" ignores this clear narrative and context and is blustery, hyperbolic and deliberately contrarian at best. See China's first written submission, para. 109; Australia's response to China's PRR, para. 58.

<sup>1555</sup> C.f. China's first written submission, para. 118.

<sup>1556</sup> Australia's response to China's PRR, para. 80.

<sup>1557</sup> China's first written submission, para. 120.

<sup>1558</sup> C.f. China's first written submission, para. 125.

<sup>1559</sup> Australia's response to China's PRR, paras. 89-101, 266-268; c.f. China's first written submission, para. 125.

<sup>1560</sup> China's first written submission, paras. 2350-2352.

**A.5.2 Australia's claims pursuant to Articles 6.1 and 6.2 are within the Panel's terms of reference.**

40. Regarding Australia's claims pursuant to Articles 6.1 and 6.2, China alleges in its first written submission that Australia's panel request was either: (i) unclear; (ii) insufficiently detailed, in that it did not specify instances of infringement; or (iii) part of a "special class" of obligations requiring significantly more detail than would otherwise be necessary.<sup>1561</sup> China is incorrect on all three accounts.

41. With regards to objection (i), Australia has made detailed submissions in its response to the PRR and it stands on those submissions.<sup>1562</sup> Furthermore, irrespective of whether Article 6.2 contains multiple obligations or requires greater detail to present the problem clearly, Australia identified the obligation at issue by specifying the relevant text of the first sentence of Article 6.2 in its panel request.<sup>1563</sup> As Australia's case concerns only this first sentence, and it included this precise language in its panel request, China was clearly on notice as to the legal basis of Australia's complaint.

42. With regards to objection (ii), China's objection reveals its misunderstanding of the appropriate standard under Article 6.2 of the DSU as the detail that China demands does not concern Australia's claim but rather its *arguments*. Aside from the fact that Australia's panel request made clear that more than one extension request was at issue,<sup>1564</sup> each time that MOFCOM failed to consider an extension request was an *instance* of infringement of Articles 6.1.1 and 6.2. Australia sets out these occurrences to demonstrate its claim of inconsistency with the obligations under of Articles 6.1.1 and 6.2.<sup>1565</sup> These instances are properly characterised as arguments, and need not be included in a panel request pursuant to Article 6.2 of the DSU.<sup>1566</sup> It is China's flawed understanding of a "how or why" obligation that leads

<sup>1561</sup> China's first written submission, paras. 85, 125-126, see also para. 2351.

<sup>1562</sup> Australia's response to China's PRR, paras. 89-94; 98-101.

<sup>1563</sup> China "failed to provide all interested parties a full opportunity for the defence of their interests": Australia's panel request, para(iv).

<sup>1564</sup> Australia's response to China's PRR, paras. 92-95. For clarity, Australia notes that Treasury Wines and Casella Wines requested extensions to complete the anti-dumping questionnaire. Swan Vintage requested an extension for the supplementary questionnaire. As the parties agree the Article 6.1.1 concerns extension requests for the anti-dumping questionnaire and not the supplementary questionnaire, Australia correctly states that two extension requests are at issue: c.f China's first written submission, para. 124.

<sup>1565</sup> See above, paras. 25-27.

<sup>1566</sup> See above, paras. 25-27.

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it to demand Australia's arguments, evidence, and instances of allegation – its *prima facie* case – in its panel request, rather than its written submissions.

43. With regards to objection (iii), Australia disputes that Article 6.2 is part of a "class" of claims requiring "greater than usual level of specification and clarity".<sup>1567</sup> Australia agrees that whether a claim is identified in a manner sufficient to present the problem clearly depends on the nature of the provision and measure at issue.<sup>1568</sup> However, this is a contextual analysis that must take into account the specific parameters of the dispute at hand.<sup>1569</sup> These contextual factors demonstrate that, in this case, the identification of the provision was sufficient to plainly connect the imposition of dumping measures to the allegation that MOFCOM failed to provide all interested parties full opportunity for the defence of their interests. The narrative of Australia's panel request provided multiple examples of MOFCOM's failures to account for the due process protections of interested parties,<sup>1570</sup> and expressly utilised the language of the first sentence of the Article.<sup>1571</sup>

44. In this context, China is incorrect to suggest that Australia was obligated to set out an independent ground of violation of Article 6.2 in its panel report.<sup>1572</sup> Australia is not required to substantiate its claims in its panel request. Examples, instances and supporting arguments to establish a *prima facie* case of the inconsistency are alleged in Australia's written submissions.

### **A.5.3 Australia's claim pursuant to Article 6.5 is within the Panel's terms of reference.**

45. In its first written submission, China makes three new 'threshold' objections to Australia's claim pursuant to Article 6.5.<sup>1573</sup>

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<sup>1567</sup> China's first written submission, paras. 85, 124-126.

<sup>1568</sup> See above, para. 14.

<sup>1569</sup> See above, para. 14.

<sup>1570</sup> Australia's panel request paras. (iv); (v); (viii).

<sup>1571</sup> See Australia's response to China's PRR, paras. 80, 98-99 and footnotes thereto.

<sup>1572</sup> China's first written submission, paras. 126.

<sup>1573</sup> China's first written submission, paras. 127, 2221-2242.

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46. First, China alleges that Australia did not make this claim sufficiently clear in its panel request.<sup>1574</sup> It argues that Australia never sufficiently identified its concerns with granting confidentiality *per se*, as its panel request specifically referred to non-confidential summaries.

47. Australia reiterates its agreement with the Appellate Body that Article 6.5 "establishes a clear and well-delineated obligation, such that *referencing this provision in a panel request, and connecting it to the specific portion of the measure at issue*, suffices to comply with the requirements of Article 6.2 of the DSU".<sup>1575</sup> Australia has responded to this allegation in detail in its response to the PRR, and it stands on those submissions.<sup>1576</sup> At no point was China unaware of the legal basis of Australia's claim, and Australia's panel request provided a brief summary of the legal basis for its complaint pursuant Article 6.5 in a manner sufficient to present the problem clearly.<sup>1577</sup>

48. Australia's claim under Article 6.5 was clear from the text of the panel request, which expressly alleged that the anti-dumping measure at issue was inconsistent with Article 6.5. Australia also articulated allegations regarding MOFCOM's failure to furnish adequate non-confidential summaries, as required under Article 6.5.1.<sup>1578</sup> Article 6.5 concerns the treatment of information as confidential. Article 6.5.1 ensures that a non-confidential summary is supplied "in sufficient detail to permit a reasonable understanding of the substance of the information" that is treated as confidential. Where an investigating authority improperly grants confidential treatment to information in breach of Article 6.5 (e.g., by failing to require or to objectively assess a showing of good cause) and/or fails to require an adequate non-confidential summary in breach of Article 6.5.1, there may follow a breach of Article 6.4.<sup>1579</sup> In this context, the text of the claims in Australia's panel request provided brief summaries of the legal bases for the complaints that were sufficient to present the problem clearly, taking

<sup>1574</sup> China's first written submission, paras. 127-130.

<sup>1575</sup> Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.380. (emphasis added)

<sup>1576</sup> Australia's response to China's PRR, paras. 102-107; 111-124.

<sup>1577</sup> Appellate Body Report, *Korean – Pneumatic Valves*, para. 5.384 ("Article 6.5 establishes a clear and well-delineated obligation for investigating authorities to treat information submitted by parties to an investigation as confidential if it is "by nature" confidential or "provided on a confidential basis", and "upon good cause shown".)

<sup>1578</sup> Australia's panel request, para. (vi).

<sup>1579</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 China)*, at paras. 5.101-5.102 ("there would be no legal basis for according confidential treatment to that information, and such information would, for the purposes of Article 6.4, be considered as information 'that is not confidential as defined in paragraph 5'").

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into account the natures of the provisions that Australia alleged to be infringed, and the nature of the anti-dumping measure at issue.

49. Alternatively, China alleges that Australia's confidentiality claims pursuant to Article 6.5 are "new" in Australia's first written submission.<sup>1580</sup> China asserts pre-emptively that Australia cannot argue that its claim pursuant to Article 6.5 reasonably evolved from the specific allegations set out in relation to Article 6.5.1, as the provisions are too different.

50. Australia agrees that these provisions are distinct,<sup>1581</sup> and for this reason Australia expressly identified both Article 6.5 and Article 6.5.1 in its panel request.<sup>1582</sup> It does not follow from this distinction that Australia's panel request did not include an allegation of inconsistency with respect to Article 6.5. It appears to Australia that China is again arguing that Australia should have articulated not only its *claims* – which, as Australia has established, it clearly presented – but also its arguments and evidence in support of each allegation that a particular provision was infringed. This reflects China's misunderstanding of the correct standard under Article 6.2 of the DSU.<sup>1583</sup> Australia further observes that it has set forth its allegations of inconsistency with Article 6.5 in its submissions, articulating the instances at issue in the investigation record and the arguments demonstrating inconsistency. China has had full rights of response and every opportunity to defend its interests in relation to this claim.<sup>1584</sup>

51. Moreover, Australia agrees with Canada and the United Kingdom that Article 6.5 contains a singular obligation.<sup>1585</sup> The singular obligation comes from the first sentence, which imposes a requirement to treat a party's confidential information "as such". If an investigating authority were to breach the second sentence of Article 6.5 by disclosing information without

<sup>1580</sup> China's first written submission, paras. 2221-2270.

<sup>1581</sup> Appellate Body Report, *China – HP-SSST*, para. 5.105.

<sup>1582</sup> Australia considers that China's assertion that only Article 6.5 imposes an obligation on investigating authorities is plainly wrong. The first sentence of Article 6.5.1 states that "[t]he *authorities* shall require interested parties providing confidential information to furnish non-confidential summaries thereof" (emphasis added). The imperative form "shall require" refers directly to the authorities and, therefore, places responsibility for compliance with them; it is not the party's obligation to ensure compliance with this requirement. Furthermore, China's proposed distinction between "actual information" and "summaries" is not straightforward, as any summaries necessarily convey elements of the "actual information". Australia therefore agrees with the conclusion that the Articles are distinct, but does not agree with China's justifications for this conclusion.

<sup>1583</sup> See above, paras. 25-27. See China's first written submission, paras. 2221-2270; Australia's panel request, para. (vi).

<sup>1584</sup> Australia's response to Panel question No. 55 and Attachment A (Instances of Article 6.5.1 Breaches).

<sup>1585</sup> Canada's response to Panel question No. 2 following the third-party session, para. 4; United Kingdom's response to Panel question No 2 following the third-party session, para. 7; see also Appellate Body Report, *EC – Fasteners (China)*, para. 530.

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the concerned party's consent, this is necessarily a breach of the obligation to treat that party's confidential information "as such". Australia therefore submits that the second sentence of Article 6.5 elaborates how an investigating authority must comply with the overarching obligation in the first sentence. As a singular obligation, it is sufficient to identify Article 6.5 in the panel request in order to present the problem clearly and place China on notice as to the legal basis of Australia's claim.<sup>1586</sup>

52. Even if, *arguendo*, Article 6.5 contained multiple obligations, Australia's claim was still clear on the face of the panel request. As set out above, the only reasonable understanding of Australia's Article 6.5 claim based on the text of the panel request was that it related to improper treatment of information as confidential as opposed to improper disclosure of confidential information. China was at all times aware of the nature of Australia's claim.

**A.5.4 Australia's claim pursuant to Article 6.9 is within the Panel's terms of reference.**

53. Australia has explained in detail that its claim pursuant to Article 6.9 is clear on the face of the panel request.<sup>1587</sup> It stands on those submissions.

54. However, China further alleges that Australia's first written submission includes two claims that were not in its panel request. It considers that Australia cannot bring arguments regarding "the proportion of production accounted for by the participating domestic producers"<sup>1588</sup> and "differences in price comparability".<sup>1589</sup> This objection again demonstrates China's misinterpretation of the standard under Article 6.2 of the DSU, in that, by falsely inserting an obligation to explain "how or why" a measure is infringed, it improperly expands that obligation to include *arguments*.<sup>1590</sup>

55. In this instance, Australia's claim is that China failed to comply with its obligation to disclose "the essential facts under consideration which formed the basis for the determinations", including "all relevant information on the matters of fact, law and reasons"

<sup>1586</sup> See above, para. 13.

<sup>1587</sup> Australia's response to China's PRR, paras. 269-273.

<sup>1588</sup> China's First Written Submission, paras. 2499-2505.

<sup>1589</sup> China's first written submission, paras. 2506-2508; Australia's panel request, para. (viii).

<sup>1590</sup> See above, section II.A.1(b).

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pursuant to Article 6.9.<sup>1591</sup> Australia has not changed this claim between the panel request and first written submission. It has, however, adduced *arguments* – including arguments that demonstrate MOFCOM's failure to disclose certain essential facts. It was entitled to do so.

56. Australia's panel request listed the several categories of information that MOFCOM should have disclosed to interested parties in order to assist China to understand further the nature of the case against it.<sup>1592</sup> China now attempts to turn those listed examples against Australia by alleging they are each "claims" in their own right. This is incorrect, they are instances of MOFCOM's failure to disclose essential facts that demonstrate China's noncompliance with Article 6.9 and as such are properly considered *arguments*.

57. Furthermore, Australia qualified this list with the term "*inter alia*" to demonstrate Australia's intention to expand on details of these arguments. It has done so, and reasonably allowed its arguments to develop over the course of the dispute

58. China argues that Australia has conflated the obligations in Articles 6.9 and 12.2.2 in respect of Australia's panel request in an attempt to expand the scope of its legal challenge.<sup>1593</sup> Australia has dealt with these issues separately.<sup>1594</sup> Contrary to China's allegations, Australia recognises that Article 6.9 applies only to the disclosure of "essential facts" and made this clear at claim (viii) of Australia's panel request.<sup>1595</sup>

#### **A.5.5 Australia's claims pursuant to Articles 12.2 and 12.2.2 are within the Panel's terms of reference.**

59. China alleges that Australia cannot adduce arguments regarding MOFCOM's failure to disclose facts pertaining to "proportion of domestic production" and "differences in price comparability".<sup>1596</sup> It alleges that these concerns were not specified in Australia's panel

<sup>1591</sup> Australia's claim of inconsistency *directly* referred to the essential facts under consideration, stating that "China failed to disclose to the interested parties, before the final determinations were made, the essential facts under consideration which formed the basis for the determinations, and because it failed to do so in sufficient time for the parties to defend their interests...": Australia's panel request, para. (viii). Any claim made pursuant to Article 6.9, therefore, necessarily refers to a disclosure of essential facts. The same is true Australia's claim pursuant to Articles 12.2 and 12.2.2.

<sup>1592</sup> Australia's panel request, para. (viii).

<sup>1593</sup> China's first written submission, paras. 2375 and 2517-2519.

<sup>1594</sup> Australia's response to China's PRR, paras. 274-281.

<sup>1595</sup> Australia's panel request para. (viii) ("Article 6.9 of the Anti-Dumping Agreement because, *inter alia*, China failed to disclose to the interested parties, before the final determinations were made, the essential facts under consideration which formed the basis for the determinations, and because it failed to do so in sufficient time for the parties to defend their interests").

<sup>1596</sup> China's first written submission, paras. 2585-2594; Australia's panel request, para. (xxiv).

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request, and therefore cannot be raised in its submissions. This is functionally identical to China's assertions concerning Article 6.9, to which Australia has responded in detail above.<sup>1597</sup> Australia refers the Panel to its response to those assertions, in particular noting that China has again miscategorised an argument as a claim and that these arguments have reasonably developed from Australia's claim of inconsistency with Articles 12.2 and 12.2.2.

**A.5.6 Australia's claim pursuant to Article 6.13 was within the Panel's terms of reference.**

60. Australia is no longer pursuing a violation of Article 6.13.<sup>1598</sup> Australia made this decision because it assessed that the conduct at issue contravened both Article 6.13 and Article 6.8. Therefore, Australia presses only its claim pursuant to Article 6.8.

61. Nevertheless, Australia stands on its previous submissions that its claim pursuant to Article 6.13 was clear on the face of the panel request, noting particularly that details about which kind of difficulties and which kinds of assistance do not constitute claims, only examples or instances of inconsistency and are thus properly considered arguments and do not need to be included in a panel request pursuant to Article 6.2 of the DSU.<sup>1599</sup>

**ANNEX B Itemised responses to the table China provided at paragraph 2455 of its first written submission**

1. For context, China has extracted parts of sentences in its table at paragraph 2455 of its first written submission to base its arguments on. Australia submits that when read in their full context, it is clear that Australia's arguments fall within the scope of Article 6.4. To aid the Panel, Australia has extracted the full paragraphs of Australia's first written submission that the excerpts in the China's table are pulled from. The underlined proportion of each paragraph is the text extracted by China in its table.

<sup>1597</sup> See above, section A.5.4; see also Australia's response to China's PRR, paras. 275-281.

<sup>1598</sup> See China's first written submission, para. 132; Australia's panel request, para. (x).

<sup>1599</sup> See above, section II.A.1(c)i; Australia's response to China's PRR, paras. 145-154.



**B.1 ITEM 1 AND 2**

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". 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.<sup>1600</sup>

**B.2 ITEM 3**

Australia recalls that MOFCOM relied upon facts available to determine the weighted average price of domestic sales for Casella Wines and Swan Vintage. MOFCOM identified the best information available that it relied upon included the "weighted average price of the domestic sales of *other respondents*" (emphasis original), 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.<sup>1601</sup>

**B.3 ITEM 4, 5, 6 AND 7**

MOFCOM did not provide to the interested parties the information it factored into this comparative analysis. It did not explain:

(a) what "information from the investigation" was subject to the "comparative analysis", nor what the "comparative analysis" involved;

(b) which "physical properties of the product under investigation" it took into account, or for what purpose it took them into account;

(c) 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;

<sup>1600</sup> Australia's first written submission, para. 974 (footnotes omitted).

<sup>1601</sup> Australia's first written submission, para. 977 (footnotes omitted).

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(d) 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

(e) 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.<sup>1602</sup>

#### B.4 ITEM 8

In the Final Determination, MOFCOM provided that it "reviewed the adjustment items...that affected the price comparability one-by-one" for each sampled company. 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". 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.<sup>1603</sup>

#### B.5 ITEM 9

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 "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". 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".<sup>1604</sup>

#### B.6 ITEM 10

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, 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

<sup>1602</sup> Australia's first written submission, para. 980.

<sup>1603</sup> Australia's first written submission, para. 984 (footnotes omitted).

<sup>1604</sup> Australia's first written submission, para. 986 (footnotes omitted).

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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". 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.<sup>1605</sup>

## B.7 ITEM 11

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 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.<sup>1606</sup>

## B.8 ITEMS 12

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". 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.<sup>1607</sup>

## B.9 ITEM 13

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

<sup>1605</sup> Australia's first written submission, para. 987 (footnotes omitted).

<sup>1606</sup> Australia's first written submission, para. 988.

<sup>1607</sup> Australia's first written submission, para. 990 (footnotes omitted).

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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.<sup>1608</sup>

**B.10 ITEM 14**

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.<sup>1609</sup>

**B.11 ITEM 15**

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". 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.<sup>1610</sup>

**B.12 ITEM 16**

MOFCOM was required to provide all non-confidential information connected to the economic factors listed in Article 3.4. When read with Article 3.1, this obligation 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". MOFCOM considered 16 factors to assess the impact of the "dumped" products on domestic industry. 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.<sup>1611</sup>

**B.13 ITEM 17**

In relation to the calculation of the average import price for Australian wine, as set out above, MOFCOM failed to provide all non-confidential information concerning: (i) the methodology

<sup>1608</sup> Australia's first written submission, para. 991.

<sup>1609</sup> Australia's first written submission, para. 993 (footnotes omitted).

<sup>1610</sup> Australia's first written submission, para. 994 (footnotes omitted).

<sup>1611</sup> Australia's first written submission, para. 999 (footnotes omitted).

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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. 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. 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.<sup>1612</sup>

#### B.14 ITEM 18

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". 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.<sup>1613</sup>

#### B.15 ITEM 19

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. 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

<sup>1612</sup> Australia's first written submission, para. 1000 (footnotes omitted).

<sup>1613</sup> Australia's first written submission, para. 1001 (footnotes omitted).

to provide the foregoing on non-subject import prices undermined the due process rights of the interested parties.<sup>1614</sup>

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<sup>1614</sup> Australia's first written submission, para. 1002 (footnotes omitted).