

Before the World Trade Organization

Panel Proceedings

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

(DS602)

AUSTRALIA'S INTEGRATED EXECUTIVE SUMMARY
Business Confidential Information Redacted

14 April 2023

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<i>Russia – Commercial Vehicles</i> , paras. 5.53, 5.96.	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 – Railway Equipment</i>	Appellate Body Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/AB/R and Add.1, adopted 5 March 2020
<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>US - Anti-Dumping and Countervailing Duties (Korea)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available</i> , WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021 [appealed; adoption pending]
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<i>US- Hot Rolled Steel</i>	Appellate Body Report, <i>United States - Anti-Dumping Measures on</i>

Short Title	Full Case Title and Citation
	<i>Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<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- Steel Plate</i>	Panel Report, <i>United States - Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002, DSR 2002:VI, p.2073

LIST OF ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on the Implementation of Article VI of GATT 1994
Anti-Dumping Questionnaire	Unless otherwise specified means the Exporter Questionnaire issued by MOFCOM to Australian exporters on 10 October 2020
BCI	Business confidential information
Casella Wines	Casella Wines Pty Ltd
CADA	China Alcoholic Drinks Association
CADA 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
ChAFTA	China-Australia Free Trade Agreement
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
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
Injury POI	The injury investigation period adopted by MOFCOM, being 1 January 2015 to 31 December 2019
MOFCOM	Ministry of Commerce of the People's Republic of China
PCN	Product Control Number
WTO	World Trade Organization
Supplementary Questionnaire	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
Treasury Wines	Treasury Wine Estate Vintners Limited

I. INTRODUCTION

1. Australia has established that China's measures imposing anti-dumping duties on Australian wine are inconsistent with China's obligations under the Anti-Dumping Agreement and the GATT 1994. China's investigating authority, MOFCOM, conducted a WTO-inconsistent investigation that resulted in China imposing extremely high anti-dumping duties. No objective and unbiased investigating authority could have made the anti-dumping determination that MOFCOM made on the basis of the investigation record.

2. China has failed to rebut Australia's *prima facie* case in respect of each claim that Australia advanced. China failed to engage at all with a number of Australia's arguments.¹ Instead, China has engaged in lengthy rebuttals of arguments Australia never made, introduced *ex post facto* rationalisations, and devoted a large part of its submissions to baseless jurisdictional objections that seek to avoid the adjudication of Australia's claims on their merits.

A. MEASURES AT ISSUE

3. At the conclusion of its investigation, MOFCOM determined that Australian bottled wine was being dumped into the Chinese market and causing material injury to the Chinese wine industry.² MOFCOM acknowledged receipt of interested parties' questionnaire responses, but rejected the information provided in those responses, instead making this determination largely with recourse to "facts available". Anti-dumping duties were imposed on imported Australian wine ranging between 116.2% to 218.4%, to remain in force for five years.³

B. STANDARD OF REVIEW

4. Article 11 of the DSU and Articles 17.5 and 17.6 of the Anti-Dumping Agreement establish the standard of review in this dispute. In sum, the questions before the Panel are: (i) whether MOFCOM's establishment of the facts was proper; and (ii) whether an unbiased and objective investigating authority, in light of the evidence that was before it and the explanations provided, could have reached MOFCOM's conclusions.⁴

C. PANEL'S TERMS OF REFERENCE

5. China's many jurisdictional objections are entirely without merit.⁵ However, the sheer number of China's objections necessitated responses from Australia at each stage of the

¹ Australia's second written submission, section II.B.

² Anti-Dumping Final Determination (Exhibit AUS-2), p. 147.

³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 1.

⁴ Panel Report, *US – Softwood Lumber VI*, para. 7.15; Australia's first written submission, section I.E.

⁵ The term "jurisdictional objections" encompasses China's preliminary ruling request, "threshold issues", allegations of "abandoned claims" and allegations of "new claims" being introduced.

proceedings.⁶

6. Australia recognises the importance of the requirements specified in Article 6.2 of the DSU.⁷ Australia's panel request fully complied with these requirements.⁸ First, it identified the specific measures at issue as China's measures imposing definitive anti-dumping duties on bottled wine from Australia.⁹ Second, it set forth claims alleging that the measures at issue are inconsistent with "China's commitments and obligations" under specific provisions of the GATT 1994 and the Anti-Dumping Agreement.¹⁰ Article 6.2 "demands only 'a *brief* summary' of the legal basis of the complaint, and not the arguments in support of the complaint".¹¹ As such, each claim provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly, plainly connecting the challenged measure to the WTO provisions that Australia alleged to be infringed.¹²

7. China was at all times aware of the "nature" of Australia's case and could begin preparing its defence from the date it received the panel request.¹³ The panel request naturally evolved from Australia's consultations request and the essence of its complaint did not change.¹⁴ China has had a full and complete opportunity to respond to Australia's case.¹⁵

8. Contrary to China's allegations, Australia has neither introduced "new claims" in its written submissions, oral statements, or responses to the Panel's questions, nor altered its claims or the "legal basis" of such claims set out in its panel request.¹⁶ Rather, throughout this proceeding Australia has brought forward *arguments* to demonstrate its *prima facie* case, including in response to China's arguments and evidence.¹⁷

⁶ See Australia's response to China's preliminary ruling request; opening statement at the first substantive meeting, para. 14; closing statement at the second meeting of the Panel, para. 7; second written submission, paras. 4, 8-45, 46-50, 51-52, and Annex A; opening statement at the second meeting of the Panel, paras. 7-11; closing statement at the second meeting of the Panel, paras. 13-19; comments on China's response to Panel question No. 79, paras. 1-7.

⁷ Australia's response to China's preliminary ruling request, paras. 6, 286.

⁸ Australia's response to China's preliminary ruling request, paras. 28-35; 36-41. For clarity, multiple panels, and the Appellate Body, have confirmed that explanations of how and why a violation occurred are not required in a panel request: Australia's response to China's preliminary ruling request, paras. 18-34.

⁹ Australia's panel request, para. 4.

¹⁰ Australia's panel request, para. 4 and paras. 4(i)-4(xxvi).

¹¹ Australia's response to China's preliminary ruling request, paras. 32, 54, citing Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.6, 5.74 and 7.93. 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"; second written submission, para. 33, citing Appellate Body Reports, *Korea – Pneumatic Valves*, paras. 5.6, 5.74, 5.108 and *Russia – Railway Equipment*, para. 5.27.

¹² Australia's response to China's preliminary ruling request, paras. 4, 36, 42, 51, 63, 74, 80, 91, 102, 125, 132, 145, 151, 156, 161, 165, 172, 181, 194, 206-211, 212, 222, 238.

¹³ Australia's response to China's preliminary ruling request, paras. 7, 12, 26, 137, 142, 161, 190, 218, 232 and footnotes thereto; c.f. China's first written submission, section III.A.2.b.

¹⁴ Australia's response to China's preliminary ruling request, section III, paras. 247-263.

¹⁵ Australia's opening statement at the second meeting of the Panel, para. 11; second written submission, para. 35.

¹⁶ Australia's second written submission, paras. 34-35, 37-40, and Annex A; closing statement at the second meeting of the Panel, paras. 13-19; comments on China's response to Panel question No. 79, paras. 6-7. There have been no changes to Australia's claims as set out in the panel request.

¹⁷ Australia's second written submission, paras. 28, 34-35, 37-40, 49, and Annex A (esp. paras. 4, 37, 57, 59); closing statement at the second meeting of the Panel, paras. 13-19; comments on China's response to Panel question No. 79, para. 7.

II. INITIATION

9. MOFCOM's initiation of the anti-dumping investigation was inconsistent with China's obligations under Articles 5.1, 5.2, 5.2(i), 5.3, 5.4 and 5.8 of the Anti-Dumping Agreement.¹⁸ No unbiased and objective investigating authority could have determined that there was sufficient evidence to justify initiating the investigation.¹⁹

A. THE CADA APPLICATION WAS NOT MADE BY OR ON BEHALF OF THE DOMESTIC INDUSTRY AND THE APPLICANT DID NOT HAVE STANDING

10. MOFCOM failed to determine whether CADA's application was made on behalf of the domestic industry in accordance with Articles 5.1 and 5.4 of the Anti-Dumping Agreement. MOFCOM's assessment was deficient for at least three reasons.

11. First, MOFCOM failed to examine the degree of support for, or opposition to, the application among CADA's "122 wine-producing member units" on the basis of the production volumes of those "domestic producers".²⁰ On China's own submissions, MOFCOM misunderstood the task that it was required to undertake.²¹

12. Second, MOFCOM failed to conduct any examination of the degree of support for, or opposition to, the application among the "hundreds" of other domestic producers who were *not* members of CADA.²² China has confirmed that no such examination took place.²³

13. Third, an unbiased and objective investigating authority could not have been satisfied that the criteria in Articles 5.1 and 5.4 were met.²⁴ The data provided in CADA's application regarding the domestic production volumes of like products included a range of products outside the scope of the investigation.²⁵ In addition, the statistical data for total domestic production was incomplete, omitting volume data from all producers below a certain income threshold.²⁶ As such, these data were incapable of allowing MOFCOM to determine the levels of production of domestic like products represented by those domestic producers who expressed support for, or opposition to, the application (even if MOFCOM had undertaken such an examination).²⁷ MOFCOM itself subsequently recognised that the deficiencies in these

¹⁸ Australia's first written submission, paras. 12, 742-826; second written submission, paras. 607-651.

¹⁹ Australia's first written submission, para. 826.

²⁰ See Australia's second written submission, paras. 611-614; opening statement at the first meeting of the Panel, para. 21; first written submission, paras. 749-756.

²¹ China's first written submission, paras. 2055-2056; response to Panel question No. 49, paras. 287-288.

²² Australia's first written submission, paras. 753-755, 767; second written submission, paras. 615-619; opening statement at the first meeting of the Panel, para. 21; opening statement at the second meeting of the Panel, paras. 111-112 (footnotes omitted).

²³ Australia's second written submission, para. 615 (referring to China's first written submission, para. 2057). See also Australia's opening statement at the second meeting of the Panel, para. 112.

²⁴ Australia's first written submission, para. 749; Australia's second written submission, paras. 621-624.

²⁵ Australia's first written submission, para. 759; second written submission, para. 621 and fn. 982 (referring to 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); and opening statement at the second meeting of the Panel, para. 110.

²⁶ Australia's second written submission, para. 624; first written submission, para. 760.

²⁷ Australia's second written submission, para. 621; opening statement at the first meeting of the Panel, para. 23.

data rendered them unusable for the purpose of determining the domestic industry for the injury investigation.²⁸ However, there is no evidence that MOFCOM undertook any assessment of the reliability of these data for the purposes of initiation.²⁹

14. Further, CADA's application acknowledged that it was aware of "hundreds" of other domestic wine producers, but identified none of them, instead listing only CADA's 122 member companies.³⁰ This is inconsistent with the Article 5.2(i) requirement to adduce "a list of all known domestic producers of the like product".

B. CADA'S APPLICATION CONTAINED INSUFFICIENT EVIDENCE OF DUMPING, INJURY AND CAUSATION FOR THE PURPOSES OF INITIATION

15. CADA's application did not include any evidence that dumping was occurring, as required under Article 5.2 of the Anti-Dumping Agreement.³¹ Contrary to Articles 5.2 and 5.3, MOFCOM simply accepted CADA's assertions without examination of their adequacy,³² including with respect to:

- normal value: CADA did not provide sufficient evidence of normal value because it used prices of wines imported into Australia from China as a proxy,³³ without any evidence that this would provide a reasonable basis to determine the normal value of Australian wine.³⁴
- export price: CADA supplied insufficient evidence for the export price that it calculated, including with respect to the adjustments that it applied to reduce the average unit value of subject imports of Australian wine.³⁵
- fair comparison: CADA failed to make due allowance for factors affecting price comparability to ensure a fair comparison between normal value and export price.³⁶

16. CADA's application also did not contain sufficient evidence of injury to the domestic industry, nor evidence that the alleged dumping of the subject imports had caused any injury.³⁷

17. An unbiased and objective investigating authority could not have found that there was "sufficient evidence" of dumping, injury and causation to justify the initiation of the

²⁸ Australia's second written submission, para. 622 (referring to Anti-Dumping Final Determination (Exhibit AUS-2), pp. 108-109; Anti-Dumping Preliminary Determination (Exhibit AUS-35), p. 36; Anti-Dumping Final Disclosure (Exhibit AUS-16), p. 58; and China's response to Panel question No. 49, para. 295). See also Australia's opening statement at the second meeting of the Panel, para. 110.

²⁹ Australia's first written submission, paras. 760-764; second written submission, paras. 621-624.

³⁰ Australia's first written submission, para. 767; second written submission, paras. 725-730.

³¹ Australia's first written submission, para. 801.

³² Australia's first written submission, paras. 801; second written submission, para. 647.

³³ Australia's first written submission, para. 777; second written submission, para. 633.

³⁴ Australia's first written submission, paras. 779, 784-789; second written submission, para. 635.

³⁵ See Australia's second written submission, paras. 642, 645; first written submission, paras. 790-797.

³⁶ Australia's first written submission, paras. 798-800; second written submission, para. 643-645;

³⁷ Australia's first written submission, paras. 802-823.

investigation.³⁸ As such, MOFCOM was required to reject the application in accordance with China's obligations under Article 5.8 of the Anti-Dumping Agreement.³⁹ It failed to do so.

III. CONDUCT OF THE INVESTIGATIONS

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

18. China acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement by: (i) failing to objectively assess whether there was "good cause shown" for the confidential treatment of information supplied in CADA's application and the domestic producers' questionnaire responses, and (ii) failing to require that interested parties furnish either non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information so as to allow interested parties to defend their interests, or statements of reasons summarisation was not possible.⁴⁰

19. CADA's non-confidential application contains express references to a confidential version of that application.⁴¹ However, if, as China contends,⁴² no confidential version existed, then Australia accepts that its claims under Articles 6.5 and 6.5.1, with respect to the confidential version of the body of CADA's application, cannot be established.

20. MOFCOM breached the Anti-Dumping Agreement by granting confidential treatment over the entirety of Annex 3 of CADA's application without assessing whether "good cause" had been shown.⁴³ CADA's claim that disclosing the information could cause "inconvenience or other adverse effects" was not sufficient, on its own, to establish "good cause."⁴⁴ Additionally, the non-confidential summary of Annex 3 omitted key information relevant to assessing CADA's standing to apply on behalf of the domestic industry and was therefore insufficient to meet the requirements under Article 6.5.1 of the Anti-Dumping Agreement.⁴⁵

21. Multiple times, MOFCOM granted blanket confidential treatment to entire answers in the questionnaire responses provided by domestic producers without assessing whether there was "good cause shown", including because the nature of the information was very unlikely to support such a finding.⁴⁶ Contrary to China's attempted justification,⁴⁷ it is inconsistent with Article 6.5 for non-confidential information to be treated as confidential

³⁸ Australia's first written submission, paras. 801, 823; second written submission, paras. 647, 649.

³⁹ Australia's first written submission, paras. 824, 826; second written submission, paras. 648–649.

⁴⁰ Australia's first written submission, paras. 831–880; second written submission, paras. 654–738.

⁴¹ Australia's first written submission, paras. 846–849; second written submission, paras. 680–682; and CADA Application for Anti-Dumping Investigation, (AUS-64), p. 82.

⁴² China's first written submission, para. 2281.

⁴³ Australia's first written submission, paras. 852–854; second written submission, paras. 685–696.

⁴⁴ Australia's first written submission, paras. 853–854; second written submission, paras. 686, 691, 695.

⁴⁵ Australia's first written submission, paras. 855–859; second written submission, paras. 697–701.

⁴⁶ Australia's first written submission, paras. 860–861; response to Panel question No. 55, paras. 131–136. In response to the latter, Australia provided additional submissions on every instance in which it alleged an inconsistency with Article 6.5.1.

⁴⁷ See Australia's second written submission, paras. 702–710, citing China's first written submission, paras. 2297–2302. See also Australia's first written submission, para. 861.

solely because it appears as part of a larger response that contains other information for which "good cause" has allegedly been shown. Further, MOFCOM failed to require that parties provide meaningful non-confidential summaries. Given China has acknowledged that at least part of the information in question was non-confidential, it is inexplicable why the non-confidential summaries failed to include, at a minimum, that information.⁴⁸

22. Furthermore, MOFCOM treated certain information in the verification responses from COFCO Greatwall and Changyu Wines as confidential without either (i) requiring "good cause" to be shown, or (ii) assessing whether "good cause" was shown,⁴⁹ breaching China's Article 6.5 obligations. Moreover, no meaningful non-confidential summaries were provided, as required under Article 6.5.1⁵⁰

23. MOFCOM's failure to require good cause in its treatment of confidential information is also evident in relation to Exhibit CHN-32 (BCI).⁵¹ This document contains no more than unsourced assumptions and aggregated or averaged data, and there is no record evidence to suggest this information is business sensitive, or that the this information is otherwise confidential. It does not contain any identifying information about the "authoritative domestic organisation" that submitted it nor to the business information of any identifiable producer or group of producers.⁵² The non-confidential summary" of Exhibit CHN-32 (BCI)⁵³ contained no information aside from a generic heading and an assertion of confidentiality. It contained no description of the substance of the allegedly confidential information and did not even disclose information that MOFCOM relied upon as public in its Final Determination and related documents.⁵⁴

B. MOFCOM FAILED TO PROPERLY CONSTRUCT THE SAMPLE

24. Given MOFCOM chose to construct the sample using the second method permitted under Article 6.10, it was required to examine the "largest percentage of the volume of the exports from the country in question which [could] reasonably be investigated". MOFCOM failed to do so. At the time the sample was established, MOFCOM was put on notice of a potential error in the data that had caused it to omit a major exporter. MOFCOM should have, but failed to, take any steps to seek clarification about the level of exports to "remove any doubts".⁵⁵ In any event, even if there was no error in the data, the record shows, and China appears to acknowledge, that MOFCOM was able to reasonably examine a larger percentage

⁴⁸ Australia's second written submission, paras. 712-713. See also China's first written submission, paras. 2297-2302.

⁴⁹ Australia's first written submission, para. 870; second written submission, paras. 716-719. See also China's first written submission, para. 2306.

⁵⁰ Australia's first written submission, paras. 870, 877-879; second written submission, paras. 720-722.

⁵¹ [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)). See Australia's second written submission, paras. 727-737; Australia's opening statement at the second meeting of the Panel, para. 102.

⁵² [REDACTED] calculations (confidential version) (Exhibit CHN-32 (BCI)). See Australia's second written submission, paras. 727-737; opening statement at the second meeting of the Panel, para. 102..

⁵³ [REDACTED] calculations (confidential version), (Exhibit CHN-32) (BCI).

⁵⁴ Australia's second written submission, para. 734.

⁵⁵ Australia's first written submission, paras. 881-898; second written submission, paras. 742-749; and Panel Report, *EC – Salmon (Norway)*, para. 7.203

of exports by considering more than three exporters.⁵⁶

C. MOFCOM FAILED TO GIVE DUE CONSIDERATION TO EXTENSION REQUESTS

25. MOFCOM acted inconsistently with Article 6.1.1 by: (i) failing to give due consideration to the reasonable requests of Treasury Wines and Casella Wines for extensions to submit their responses to the Anti-Dumping Questionnaire, and (ii) by rejecting those requests, even though good cause was shown and it was practicable for MOFCOM to grant the extensions.⁵⁷ Article 6.1.1 contains a mandatory obligation, pursuant to the ordinary meaning of the test and principles of treaty interpretation.⁵⁸

26. Treasury Wines requested a 10-day extension and Casella Wines requested a three-week extension.⁵⁹ They detailed significant barriers, including: the large volume of work involved resulting from MOFCOM's concurrent countervailing measures investigation,⁶⁰ the many different product control numbers,⁶¹ inexperience of staff in responding to anti-dumping and countervailing duty questionnaires,⁶² the vast amount of data requested,⁶³ time required to translate documents,⁶⁴ and the abnormal circumstances of significant COVID-19 lockdowns.⁶⁵ Though these grounds were reasonable on their face and supported by evidence, there is no evidence MOFCOM considered them at all.⁶⁶ MOFCOM did not identify that it was not "practicable" to grant the extensions.⁶⁷ Contrary to China's assertions, general desire for expedition cannot alone justify finding that extension is not practicable. An expeditious investigation may well require reasonable extensions of deadlines.⁶⁸

D. MOFCOM DENIED CASELLA WINES A FULL OPPORTUNITY FOR THE DEFENCE OF ITS INTERESTS

27. Without prior communication of its intention to do so, MOFCOM refused to consider Casella Wines' detailed evidence on domestic sales and cost data solely because the information was not in the requested "WPS" format. Accordingly, MOFCOM denied Casella Wines a full opportunity for the defence of its interests, contrary to Article 6.2.⁶⁹ Upon

⁵⁶ Australia's second written submission, paras. 748-749. See also China's response to Panel question No. 61, para. 359.

⁵⁷ Australia's opening statement, paras. 908-923; second written submission, paras. 781-794; opening statement at the second meeting of the Panel, paras. 51-54; comments on China's response to Panel question No. 84, paras. 14-19.

⁵⁸ Australia's second written submission, paras. 767-774.

⁵⁹ Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 1. 1072. See also Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.

⁶⁰ Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 3.

⁶¹ Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.

⁶² Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2.

⁶³ See Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p. 2; Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 2.

⁶⁴ See Casella Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-95), p.3; Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 2.

⁶⁵ See Treasury Wines Anti-Dumping Questionnaire Extension Request (Exhibit AUS-94), p. 1

⁶⁶ See Australia's first written submission, paras. 917-919; second written submission, paras. 781-789; comments on China's response to Panel question No. 84, paras. 14 - 19.

⁶⁷ Australia's first written submission, para. 920.

⁶⁸ Australia's second written submission, paras. 766 and 791.

⁶⁹ Australia's first written submission, paras. 924-932.

becoming aware of a problem affecting data initially submitted in WPS format, Casella Wines provided complete data in PDF, Excel, and hard copy formats, and attempted to provide it in WPS format.⁷⁰ MOFCOM did not raise concerns about this until informing Casella Wines that the data must be resubmitted in an alternative format in its Final Disclosure, 98 days later.⁷¹ Despite MOFCOM issuing a Supplementary Questionnaire, it neither asked for Casella Wines to resubmit the data multiple WPS sheets nor engaged with it about resubmitted data.⁷²

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

28. Contrary to the obligations under Article 6.6, the record shows that MOFCOM did nothing to satisfy itself as to the accuracy of:

- the information supplied by the ██████ concerning the estimate of total domestic production of like products, despite obvious shortcomings;⁷³
- at least 16 of the 21 questionnaire responses submitted by domestic producers;⁷⁴ and
- the sampling data, despite Pernod Ricard directly challenging the accuracy of that data.⁷⁵

29. In addition, the process by which MOFCOM found the accuracy of the information supplied by the sampled companies to be deficient was inconsistent with the requirements of Article 6.6.⁷⁶ This process was not capable of determining the reliability and probity of the information being assessed.⁷⁷

F. MOFCOM FAILED TO PROVIDE INTERESTED PARTIES TIMELY OPPORTUNITIES TO SEE ALL RELEVANT, NON-CONFIDENTIAL INFORMATION

30. MOFCOM acted inconsistently with Article 6.4 of the Anti-Dumping Agreement by failing to provide timely opportunities for interested parties to see all relevant non-confidential information that was used in the investigation. This denied interested parties a full opportunity to prepare presentations on the basis of the information and defend their

⁷⁰ See Australia's first written submission, para. 925; second written submission, paras. 236, 244-245, 248, 796, 799.

⁷¹ Australia's first written submission, paras. 926-929; second written submission, para. 797.

⁷² Australia's first written submission, para. 927, citing Casella Wines Supplementary Questionnaire Response (Exhibit AUS-30), pp. 5-8; second written submission, para. 798.

⁷³ Australia's second written submission, paras. 812-816 (for a discussion of the apparent deficiencies in this information, see Australia's second written submission, paras. 401-409); opening statement at the second meeting of the Panel, paras. 65, 102, 105; first written submission, paras. 941-943.

⁷⁴ Australia's second written submission, paras. 817-827; response to Panel question no. 18, paras. 55-59; opening statement at the second substantive meeting, para. 105; first written submission, paras. 944-948.

⁷⁵ Australia's first written submission, paras. 949-952; second written submission, paras. 828-835; opening statement at the second substantive meeting, para. 105.

⁷⁶ See Australia's first written submission, paras. 953-956; response to Panel question No. 60, paras. 147, 152-153; second written submission paras. 836-838.

⁷⁷ See Australia's first written submission, para. 955; second written submission, paras. 837-838.

interests.⁷⁸

31. 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.⁷⁹

32. While providing "regular and routine access" to the investigation casefile may be sufficient to meet the requirements of Article 6.4,⁸⁰ this requires all relevant information to be disclosed and available to interested parties on that casefile. MOFCOM did not do this.⁸¹

G. MOFCOM FAILED TO DISCLOSE THE ESSENTIAL FACTS UNDER CONSIDERATION

33. MOFCOM failed to disclose essential facts as required under Article 6.9 of the Anti-Dumping Agreement.⁸² It never disclosed multiple essential facts, including the selection of "facts available" for sampled companies, decisions about adjustments to ensure a fair comparison of normal value and export price, differences in price comparability, methodologies and calculations of dumping margins, determination of injury and causation, treatment of other named Australian companies, and treatment of the "All Others" category of Australian companies.⁸³

IV. DUMPING DETERMINATIONS

34. MOFCOM's determination of dumping was inconsistent with China's obligations under Articles 2.4, 6.8, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the Anti-Dumping Agreement.

35. Article 6.8 and the relevant provisions of Annex II establish the framework for the Panel's assessment of MOFCOM's recourse to facts available.⁸⁴ That framework dictates an examination of each deficiency, in order to determine if resort to facts available is justified for the specific missing information.⁸⁵ It does not permit a "holistic" or "overall" analysis of deficiencies⁸⁶, and even if it did, MOFCOM did not undertake a holistic analysis in resorting to

⁷⁸ Australia's arguments concerning MOFCOM's breaches of Article 6.4 are set out in: Australia's first written submission, paras. 958-1009; second written submission, paras. 840-911; responses to Panel question Nos. 50, 53, and 54, paras. 123-130.

⁷⁹ See Australia's first written submission, paras. 959, 972-1003; second written submission, paras. 840, 876-908.

⁸⁰ China's second written submission, para. 1405; Australia's opening statement at the second meeting of the Panel, para. 119.

⁸¹ Australia's second written submission, paras. 852-855; opening statement at the second meeting of the Panel, para. 119.

⁸² See Australia's first written submission, paras. 1010-1069; second written submission paras. 912-964.

⁸³ 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; responses to Panel question Nos. 63, 64, 66, and 68, paras. 155 – 222; and second written submission, paras. 912-964.

⁸⁴ See Australia's second written submission, paras. 72, 78-79.

⁸⁵ Australia's second written submission, para. 72.

⁸⁶ Australia's second written submission, para. 72.

facts available.⁸⁷ Rather, it undertook a form-by-form analysis in its Final Determination⁸⁸ rendering China's arguments regarding a "holistic" analysis entirely *ex post facto*.

A. TREASURY WINES

1. China's recourse to facts available was improper under Article 6.8 and paragraphs 1, 3, 5 and 6 of Annex II of the Anti-Dumping Agreement

36. The data MOFCOM alleges was omitted by Treasury Wines in Forms 6-1-1, 6-1-2, 6-3 and 6-4 was not "necessary information" in the sense of Article 6.8, and therefore could not form the basis for MOFCOM's recourse to facts available.

(a) All "necessary" costs data was provided in Forms 6-3 and 6-4

37. "Necessary information" in Article 6.8 can be characterised as that which is "required to complete a determination" in accordance with the requirements of the Anti-Dumping Agreement.⁸⁹ In the current context, this includes information necessary to ascertain the normal value under Articles 2.1 and 2.2.⁹⁰ While investigating authorities enjoy a level of discretion in this context, the fact that information has been requested from an interested party does not, without more, render it necessary within the meaning of Article 6.8.⁹¹ An assessment of "necessity" must be undertaken "in light of the specific circumstances of each investigation, not in the abstract."⁹²

38. The Panel's assessment of whether MOFCOM properly determined that "necessary information" [REDACTED] must take into account: (i) the purpose of the information, which was to determine normal values for Treasury Wines within the meaning of Article 2, to enable calculation of dumping margins for the company's actual exports to China, including the conduct of the "below cost" test;⁹³ (ii) the approach MOFCOM took to determine margins of dumping for Treasury Wines, which was to match PCNs for normal values and export prices⁹⁴ and for the "below cost" test;⁹⁵ (iii) the language of the Anti-

⁸⁷ Australia's second written submission, paras. 73, 81-86.

⁸⁸ Australia's second written submission, para. 73. For this reason, Australia's submissions follow the structure of MOFCOM's Final Determination.

⁸⁹ Australia's first written submission, para. 53 and fn. 32 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28; citing Appellate Body Report, *US - Carbon Steel (India)*, para. 4.4.16).

⁹⁰ Australia's first written submission, para 55. For application of this principle see: Australia's first written submission, paras. 145 - 146, 153, 159, 161, 171, 178, and 182; opening statement at the first meeting of the Panel, paras. 52 – 55; and second written submission, paras. 146 and 160.

⁹¹ Australia's first written submission, para. 54 and fn. 34: "The Panel in *Egypt – Steel Rebar* drew a distinction between 'necessary information and information that is 'required' or 'requested'. (Panel Report, *Egypt – Steel Rebar*, para. 7.151)."

⁹² Panel Report, *Korea – Certain Paper*, para. 7.43, as cited in Australia's first written submission, para. 54 and fn. 35. See also, Australia's arguments as to the "careful balance between the rights and obligations of an investigating authority and those of interested parties [...]" at para. 762 of Australia's second written submission.

⁹³ Australia's first written submission, para. 55; opening statement at the first meeting of the Panel, para. 55. See also Australia's second written submission, fn. 450.

⁹⁴ See Australia's second written submission, paras. 128-130.

⁹⁵ [REDACTED] It also explained that it conducted the below-costs according to "types" or products, with "some types" exceeding 20% (Exhibit

Dumping Questionnaire, which sought data only on the product under investigation exported to China and its like product, as classified by PCN, in Forms 6-3 and 6-4;⁹⁶ and (iv) MOFCOM's failure to identify any [redacted] or to clarify its request during the period between the provision of cost data for [redacted] by Treasury Wines and the Final Determination.⁹⁷ Taking these factors into account, it is clear the information necessary for MOFCOM to determine Treasury Wines' normal value was on the investigation record and alleged missing information was not necessary.

39. Treasury Wines provided MOFCOM with the sales prices and full cost of production and expense data for all [redacted] in a timely manner.⁹⁹ This information: (i) provided MOFCOM with sufficient information to determine Treasury Wines' margins of dumping; and (ii) satisfied the explicit language of MOFCOM's request. Treasury Wines therefore provided all "necessary" cost of production information to MOFCOM. 100

40. As discussed below, in the circumstances of Treasury Wines, the data that was provided for in Forms 6-3 and 6-4 was verifiable. Therefore the [redacted] [redacted] was not, as China argues, necessary to "verify" the cost and expense data that was provided. Moreover, there is no indication on the record that MOFCOM asked for full domestic PCN data, nor that it advised Treasury Wines that it had failed to provide it – rendering China's argument *ex post facto*.¹⁰¹

41. Finally, China and Australia agree that [redacted] [redacted] [redacted] ¹⁰² Thus, it was not "necessary information" for the calculations. Since the data in Forms 6-3 and 6-4 were verifiable through other means, the information in [redacted] was also not "necessary" for verification.¹⁰³

42. Notwithstanding that no "necessary information" was missing from Treasury Wines' data, MOFCOM improperly resorted to facts available under Article 6.8 and dismissed all cost of production data submitted by Treasury Wines. Assuming, *arguendo* that any "necessary information" was in fact missing, it was incumbent upon MOFCOM to "specify" this

AUS-2, p. 61). Finally, China itself explains that "cost of production data by PNC [is necessary] to test whether a domestic sale of a given PCN is above or below cost (as set out in Article 2.2.1...)" (China's first written submission, para. 742).

⁹⁶ Australia's second written submission, paras. 126–128.

⁹⁷ Australia's second written submission, paras 132-133; comments on China's responses to Panel question No. 86, para. 26.

⁹⁸ Australia's first written submission, paras. 172-182; Response to Panel question No. 4, para. 27; second written submission, para. 143; and response to Panel question No. 89, para. 18.

⁹⁹ Australia's second written submission, section III D.5(b).

¹⁰⁰ Australia's first written submission, paras. 141, 182; second written submission, section III D.3.

¹⁰¹ Australia's comments to China's response to Panel question No. 86, para. 26.

¹⁰² See Australia's second written submission, para. 148 (footnotes omitted).

¹⁰³ Data used for verification is not, in itself, *inherently* "necessary" in the sense of Article 6.8. See Australia's response to Panel question No. 88, paras. 12 – 14.

information "in detail". MOFCOM failed to do so, in breach paragraph 1 of Annex II.¹⁰⁴

(b) The "necessary information" was verifiable, timely, could be used without undue difficulty and was provided to the best of Treasury Wines' ability

43. MOFCOM had no basis to upon which to reject Treasury Wines' submitted costs data under paragraph 3 of Annex II.¹⁰⁵ It further failed to explain in what way the information it rejected did not meet the requirements set out in paragraph 3.¹⁰⁶

44. First, Treasury Wines' submission of "necessary" costs data [REDACTED] was timely.¹⁰⁷ An investigating authority is not entitled to reject information for the sole reason that it was submitted after a deadline.¹⁰⁸ MOFCOM received complete cost of production data [REDACTED] some two months before MOFCOM issued its Supplementary Questionnaire.¹⁰⁹ This timeline indicates that MOFCOM had sufficient opportunity to consider additional information submitted during the period, and it was able to do so.¹¹⁰ Further, there is no evidence that MOFCOM considered whether [REDACTED] [REDACTED] were submitted within a "reasonable period" and properly concluded that this information was in fact untimely.¹¹¹

45. Second, there is no evidence on the record supporting any argument that Treasury Wines' costs data could not be used without "undue difficulties" and MOFCOM did not make such a finding in respect to any of Treasury Wines' submitted cost data.¹¹²

46. Finally, MOFCOM made various findings to the effect that Treasury Wines' costs data could not be verified.¹¹³ These bare assertions are also insufficient to satisfy the requirements of paragraph 3 of Annex II. That provision requires an investigating authority to consider objectively whether particular information is *verifiable*, not merely whether it is convenient to verify it.¹¹⁴

47. Information is "verifiable" under paragraph 3 where its accuracy and reliability *can* be assessed by an *objective process of examination*.¹¹⁵ This is determined through a "case by

¹⁰⁴ Australia's first written submission, para. 219.

¹⁰⁵ Appellate Body Report, *US – Hot Rolled Steel*, para. 80 as cited in Australia's first written submission, para. 61.

¹⁰⁶ See Australia's first written submission, paras. 68 and 71; second written submission, para. 156; and Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.343.

¹⁰⁷ Australia's first written submission, para. 184; second written submission, para. 153.

¹⁰⁸ See Appellate Body Report, *US – Hot-Rolled Steel*, para. 89. See also Australia's first written submission, para. 69; second written submission, paras. 162-163.

¹⁰⁹ Australia's second written submission, para. 163.

¹¹⁰ Australia's second written submission, para. 163.

¹¹¹ Appellate Body Report, *US – Hot-Rolled Steel*, paras 81 – 83; Panel Report, *US – Steel Plate*, para 7.76, as cited in Australia's first written submission, para. 162 and fn. 238.

¹¹² See Australia's first written submission, paras. 153, 220.

¹¹³ See Anti-Dumping Final Determination (Exhibit AUS-2), pp. 59 – 60, 63 – 64, 66.

¹¹⁴ Australia's opening statement at the second meeting of the Panel, para. 25.

¹¹⁵ Australia's second written submission, para. 259 (footnote omitted); opening statement at the second meeting of the Panel, para. 25.

case assessment of the particular facts at issue.¹¹⁶ The absence of information which may support *one method* of verification is not determinative of whether information is "verifiable" in the sense of paragraph 3 of Annex II.¹¹⁷ Nor is the fact that certain information might be commonly requested by other investigating authorities relevant to this analysis under the terms of the Anti-Dumping Agreement.¹¹⁸

48. The record shows MOFCOM did not consider, let alone "meaningfully" consider, whether the accuracy of Treasury Wines' data could be assessed through an objective process of examination. This failure is significant given that [REDACTED] [REDACTED] [REDACTED] and identified a reliable, objective and entirely routine [REDACTED] [REDACTED] [REDACTED] process was viable and effective.¹²⁰ Australia has demonstrated that this [REDACTED] [REDACTED] process was viable and effective.¹²¹ For clarity, Australia is not submitting that MOFCOM required to conduct verification through this or any other alternative method, merely that MOFCOM was required to *properly consider* reasonable, effective, readily-available and reliable options for verification under paragraph 3 of Annex II.

49. China failed to rebut Australia's case and failed to establish that MOFCOM undertook the required process to determine whether data was "verifiable" under paragraph 3 of Annex II. An objective and unbiased investigating authority would not have ignored Treasury Wines' [REDACTED] and therefore could not have concluded, as MOFCOM did, that Treasury Wines' cost data was not verifiable under paragraph 3.¹²²

50. Further, information that satisfies the requirements of paragraph 3 of Annex II – even if not "ideal in all respects" – may not be disregarded where the interested party has acted to the *best of its ability*, pursuant to paragraph 5 of Annex II.¹²³ The record shows that Treasury Wines provided an enormous amount of granular and technical costs detail in a timely manner and in the specific format requested by MOFCOM,¹²⁴ evidencing a very high level of effort and cooperation.¹²⁵ [REDACTED]

¹¹⁶ Australia's first written submission, para. 66; second written submission para. 259; and opening statement at the second meeting of the Panel, para. 25 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.360).

¹¹⁷ Australia's response to Panel question No. 88, para. 11.

¹¹⁸ Australia's response to Panel question No. 88, para. 11.

¹¹⁹ See [REDACTED]

[REDACTED] as discussed in Australia's first written submission, paras. 193-194; response to Panel question No. 88, paras. 5-7.

¹²⁰ See [REDACTED]

[REDACTED] See also Australia's response to Panel question No. 88, paras. 5-7, 15.

¹²¹ See Australia's response to Panel question Nos. 72, 88.

¹²² Australia's second written submission, para. 159.

¹²³ Australia's second written submission, para. 79, citing Panel Report, *China – Broiler Products*, para. 7.357.

¹²⁴ Australia's opening statement at the first meeting of the Panel, para. 41

¹²⁵ Australia's first written submission, para. 192; second written submission, paras. 168, 171.

126 These reasons were specific to Treasury Wines and included: (i) restrictions arising from strict COVID-19 lockdowns; (ii) staffing limitations; and (iii) challenges in meeting MOFCOM's comprehensive documentary requirements, many of which were new and "beyond the scope of information available" to Treasury Wines.¹²⁷ Treasury Wines did not "self select" data in order to reach a favourable outcome.¹²⁸ In the circumstances, Treasury Wines' data – including its timely [REDACTED] following the Preliminary Determination – is evidence of its *best efforts* to provide the requested information in light of MOFCOM's decision to refuse its reasonable extension request.¹²⁹ The abilities and actions of other, unrelated, interested parties have no bearing on this issue.¹³⁰

51. MOFCOM was not justified in rejecting Treasury Wines' costs of production data under either paragraphs 3 or 5 of Annex II of the Anti-Dumping Agreement and no unbiased and objective investigating authority would have done so. China has failed to rebut Australia's *prima facie* case.

2. China failed to adequately and "forthwith" explain its reasons for rejection of Treasury Wines' data, or provide an opportunity for explanation

52. MOFCOM failed to adequately inform Treasury Wines "forthwith" that its information and subsequent explanations in response to the Preliminary Determination and Supplementary Questionnaire were not accepted.¹³¹ Any such notice, when finally provided in the Final Disclosure, was untimely and not sufficiently precise in its "reasons".¹³² Treasury Wines was deprived of an opportunity to provide further explanation.¹³³ On these bases, China also acted inconsistently with Article 6.8 and paragraph 6 of Annex II.

3. China's selection of facts was not a reasonable replacement for the missing necessary information

53. Even if MOFCOM's recourse to facts available had been proper, its subsequent selection of replacement facts was inconsistent with Article 6.8 and paragraph 7 of Annex II.¹³⁴

54. An investigating authority must use the "best" or most "appropriate" information available¹³⁵ for replacement facts – in this case, to lead to an accurate dumping

¹²⁶ Australia's first written submission, paras. 223-225; opening statement at the first meeting of the Panel, para. 40.

¹²⁷ Australia's response to Panel question No. 89, para 18, fn. 16 and references thereto.

¹²⁸ Australia's second written submission, para. 145. See also Australia's response to Panel question No. 3, para 23.

¹²⁹ Australia's response to Panel question No. 90, para. 22.

¹³⁰ See in general regarding activities of other interested parties: Australia's comments on China's response to Panel question No. 86, para. 27.

¹³¹ Australia's response to Panel question No. 1, paras. 4-10.

¹³² Australia's second written submission, paras. 178-184.

¹³³ Australia's second written submission, para. 182.

¹³⁴ Australia's first written submission, paras. 232-239; second written submission, section III. D.7; and opening statement at the second meeting of the Panel, para. 27.

¹³⁵ Australia's first written submission, para. 233, citing Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

determination.¹³⁶ Replacement facts must also "reasonably replace" the missing "necessary" information, in that "there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination [...] is based."¹³⁷ MOFCOM breached both of these obligations.

55. In the circumstances of MOFCOM's investigation, domestic PCNs utilised must reflect the makeup of the export PCNs, in order to determine an accurate margin of dumping on a PCN-by-PCN basis (being MOFCOM's selected method of analysis).¹³⁸ The [REDACTED] was clearly inconsistent with the requirements of this methodology. Further, the [REDACTED] selected was demonstrably unrepresentative of Treasury Wines' product under investigation or domestic like product, [REDACTED]

[REDACTED]¹³⁹

56. Second, the obligation to identify the "best information available" as replacement data requires a comparative evaluation or assessment of all the facts on the record.¹⁴⁰ MOFCOM's record does not show any meaningful comparative evaluation or assessment of the facts available to it *at all*, let alone an assessment that could justify a conclusion that the single [REDACTED] was in fact the "best information available".¹⁴¹ MOFCOM also failed to consider all facts on the record, by: (i) arbitrarily and impermissibly excluding [REDACTED] from its considerations;¹⁴² and (ii) by ignoring relevant product characteristics including price and export volume.¹⁴³

4. Even if it was a reasonable replacement, adjustments had to be made to ensure a fair comparison with Treasury Wines' export prices under Article 2.4

57. Even if MOFCOM had been justified in resorting to facts available and its replacement facts were reasonable, it was required to make adjustments for differences that affect price comparability between the normal value it determined and Treasury Wines' export prices. MOFCOM failed to make a fair comparison under Article 2.4 of the Anti-Dumping Agreement by omitting crucial adjustments related to level of trade, timing of sales,¹⁴⁴ and product mix, (e.g. physical characteristics, quality, consumer preference and price)¹⁴⁵ as well as "other

¹³⁶ Australia's second written submission, para. 194.

¹³⁷ Australia's first written submission, para. 51.

¹³⁸ Australia's second written submission, para. 195.

¹³⁹ Australia's first written submission, paras. 236-239 (footnotes omitted). See also opening statement at the first meeting of the Panel, paras. 57-58.

¹⁴⁰ Australia's second written submission, para. 187.

¹⁴¹ Australia's opening statement at the second meeting of the Panel, paras. 28-29.

¹⁴² Australia's second written submission, para. 191.

¹⁴³ Australia's second written submission, para. 195.

¹⁴⁴ Australia's second written submission, para. 206(a)-210.

¹⁴⁵ Australia's first written submission, paras. 271-285; second written submission, paras. 206, 215-216.

discounts and rebates and advertising fees" requested by Treasury Wines.¹⁴⁶ MOFCOM also acted inconsistently with the standard of conduct required of an unbiased and objective investigating authority by failing to disclose relevant information¹⁴⁷ and to engage with Treasury Wines in a two-way dialogue to understand the data and ensure a fair comparison under Article 2.4.¹⁴⁸

B. CASELLA WINES

58. In the underlying investigation, Casella Wines' provided all "necessary information" that MOFCOM required in order to determine dumping margins pursuant to Article 2 of the Anti-Dumping Agreement.¹⁴⁹ Despite this, MOFCOM resorted to facts available contrary to Article 6.8.

59. MOFCOM's flawed approach to the use of facts available began with its unreasonable rejection of Casella Wines' domestic sales data.¹⁵⁰ MOFCOM rejected this data on basis of alleged deficiencies. Yet, when Casella Wines explained these "deficiencies", MOFCOM disregarded the explanations without notifying Casella Wines and without providing any genuine opportunity for Casella Wines to address MOFCOM's concerns. Most egregiously, MOFCOM rejected Casella Wines' Forms 6-3 and 4-2 because the dataset in the WPS version of them was incomplete.¹⁵¹ MOFCOM unreasonably rejected Casella Wines' explanations as to the technical difficulties it encountered with the esoteric spreadsheet format MOFCOM mandated, and refused to accept the resubmitted version in Excel format. MOFCOM determined that there was "necessary information" missing from the record even though it held complete and accurate information in Excel, PDF and hard copy.¹⁵²

60. Australia and China agree that ascertaining the normal value and export price under Article 2 of the Anti-Dumping Agreement was essential to this investigation. However, China conceded that MOFCOM's conclusion that necessary information was missing was based solely on its finding that these data were needed to verify Casella Wines' domestic sales and cost of production data.¹⁵³ Yet, MOFCOM never gave any consideration to whether the data Casella Wines provided was verifiable before rejecting it, contrary to paragraph 3 of Annex II.¹⁵⁴

61. Even to the extent there were deficiencies in the information provided by Casella

¹⁴⁶ Australia's first written submission, paras. 499-500, 516-517; second written submission, paras. 206, 211-214.

¹⁴⁷ Australia's opening statement at the second meeting of the Panel, paras. 49-50.

¹⁴⁸ Australia's second written submission, para. 228; opening statement at the second meeting of the Panel, para. 50.

¹⁴⁹ Australia's first written submission, paras. 319-381; second written submission, paras. 231-266.

¹⁵⁰ Australia's first written submission, paras. 289-314.

¹⁵¹ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 78-79.

¹⁵² Australia's first written submission, paras. 309-314, 334-343; second written submission, paras. 244-248; opening statement at the first meeting of the Panel, para. 62; and opening statement at the second meeting of the Panel, paras. 30-35.

¹⁵³ China's first written submission, paras. 595, 630, 635, 643; second written submission, paras. 191, 213.

¹⁵⁴ Australia's second written submission, paras. 259-261, considering the Panel Reports, *US – Steel Plate*, para. 7.71; and *EC – Salmon (Norway)*, para. 7.360.

necessary to make a determination under Article 2, Article 6.8 and Annex II provide that an investigating authority must use information provided by interested parties unless it determines that the interested party has not acted to the best of its abilities, or that the provided information is unverifiable.¹⁵⁵ Casella Wines fully cooperated throughout the investigation and MOFCOM it was therefore required to use that information.¹⁵⁶

62. Further, assuming *arguendo* that MOFCOM permissibly disregarded information provided by Casella Wines, paragraph 7 of Annex II required MOFCOM to select replacement facts with special circumspection.¹⁵⁷ Special circumspection ensures that anti-dumping investigations are conducted on the basis of information that is reliable,¹⁵⁸ and with respect for due process.¹⁵⁹ MOFCOM breached this obligation by failing to specify which replacement facts it had selected, failing to provide reasons for this selection, selecting facts so as to punish Casella Wines' alleged noncooperation,¹⁶⁰ selecting replacement data that was not representative of Casella Wines' cost of production, and thereby failing to select the best available information by way of replacement data.

63. In relation to the cost of production data for "clean skin" wine and bulk wine, China has conceded that MOFCOM required this data solely for verification. Yet, MOFCOM did not consider whether any other means of verification were available, and hence failed to consider whether that data was in fact necessary to its assessment of dumping. Further, Casella Wines explained that [REDACTED]

[REDACTED] ¹⁶¹ This meant that even if MOFCOM had obtained the allegedly necessary production cost information for these inputs, it would not have allowed MOFCOM to verify the production costs of the product under investigation. MOFCOM gave no consideration to this explanation and had recourse to facts available despite the evidence showing that this information could not have been necessary, contrary to Article 6.8.¹⁶²

64. China asserts *ex post facto* that MOFCOM determined the best available information to replace Casella Wines' domestic sales data was the [REDACTED]

[REDACTED] ¹⁶³ This is not in the Final Determination, nor is any consideration whether this comparison is reasonable and logical, as required under paragraph 7 of Annex II.¹⁶⁴ Had MOFCOM acted in a manner compliant with paragraph 7 it could not have concluded that its

¹⁵⁵ Australia's second written submission, para. 79, citing Panel Report, *China – Broiler Products*, para. 7.357.

¹⁵⁶ Australia's first written submission, para. 343; second written submission, para. 264.

¹⁵⁷ Australia's first written submission, paras. 51 and 233, citing Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289; second written submission, para. 194.

¹⁵⁸ Australia's first written submission, para. 49, citing Panel Report, *Egypt – Steel Rebar*, para. 7.154.

¹⁵⁹ Australia's first written submission, paras. 80-88; second written submission, paras. 295-297.

¹⁶⁰ Australia's second written submission, paras. 379-382, citing China's first written submission, paras. 797-802.

¹⁶¹ Australia's first written submission, para. 321; second written submission, para. 240.

¹⁶² Australia's first written submission, paras. 320-326; second written submission, paras. 240-243.

¹⁶³ Australia's second written submission, paras. 287-289; opening statement at the Second Meeting of the Panel, para. 38.

¹⁶⁴ Australia's first written submission, paras. 394-400, citing Panel Report, *Canada – Welded Pipe*, para. 7.140; second written submission, paras. 295-298.

chosen replacement data was the best information available. Instead, it would have found that [REDACTED] that offered a close approximation of Casella Wines' domestic sales, and one that was clearly a more appropriate replacement than the [REDACTED].¹⁶⁵ MOFCOM thus selected replacement facts that had no sensible connection with the facts to be replaced and did not lead to an accurate determination of dumping.¹⁶⁶

65. Finally, even if MOFCOM's recourse to facts available and selection of replacement facts were found to be consistent with China's obligations, MOFCOM failed to ensure it made a fair comparison between normal value and export price as required by Article 2.4. MOFCOM made no adjustments to account for differences related to level of trade, timing of sales, and product mix. In the circumstances of this case, it was impossible for Casella Wines to have requested any adjustments given it had no knowledge of the facts MOFCOM selected to determine normal value. However, the requirements of Article 2.4 apply to an investigating authority whether or not requests are made. Moreover, contrary to China's flawed interpretive argument, these requirements apply even where an investigating authority has legitimately had recourse to facts available. In the circumstances of this dispute, where MOFCOM failed to take any steps to indicate to Casella Wines the data to be used in its normal value calculation, MOFCOM cannot relieve itself of the obligation to make a fair comparison only because adjustments were not requested.¹⁶⁷

C. SWAN VINTAGE

66. Swan Vintage provided all information necessary for MOFCOM to determine its dumping margin pursuant to Article 2 of the Anti-Dumping Agreement.¹⁶⁸ In particular, it provided complete cost of production information that would have allowed MOFCOM to construct normal value had it sought to do so. Despite this, MOFCOM resorted to facts available, contrary to Article 6.8 of the Anti-Dumping Agreement. It purported to do so on several bases, including that Swan Vintage did not provide cost of production information organised as demanded by MOFCOM,¹⁶⁹ or provide questionnaires from unrelated service providers over which Swan Vintage had no control.¹⁷⁰ In respect of all alleged deficiencies, Swan Vintage provided reasonable and cogent explanations, which MOFCOM rejected without reason. MOFCOM insisted that these alleged deficiencies provided a basis for its recourse to facts available but, it failed to identify how any of the allegedly missing information in fact prevented it from constructing normal value, nor how any of the so-called deficiencies actually impeded its investigations.¹⁷¹ MOFCOM failed to determine the missing

¹⁶⁵ Australia's second written submission, para. 298.

¹⁶⁶ Australia's first written submission, paras. 382-405; second written submission, paras. 295-298.

¹⁶⁷ Australia's first written submission, paras. 407-410; second written submission, paras. 45-50.

¹⁶⁸ Australia's first written submission, paras. 424-470, 477; second written submission, paras. 321-347.

¹⁶⁹ Australia's first written submission, paras. 430-443; second written submission, paras. 328-334.

¹⁷⁰ Australia's first written submission, paras. 444-460; second written submission, paras. 335-343.

¹⁷¹ Australia's first written submission, paras. 444-460; second written submission, paras. 348-359.

information was essential, and therefore rejected it and had recourse to facts available contrary to Article 6.8.

67. There is no dispute between the parties that Swan Vintage provided comprehensive cost of production data. MOFCOM rejected Swan Vintage's cost of production data for the sole reason that it was not organised as MOFCOM requested. It did not consider whether the data could have been used as it was. There is no evidence nor reasoning on the record that indicates it was essential to the investigation for Swan Vintage to organise its cost of production data as MOFCOM demanded. There was no basis for MOFCOM to conclude that Swan Vintage's cost of production data, organised in the specified manner, was "necessary information" for the purpose of Article 6.8, but that the very same data, organised differently, could not meet MOFCOM's needs.¹⁷²

68. Swan Vintage submitted all information that MOFCOM required to construct normal value in accordance with paragraphs 3 and 5 of Annex II. Had MOFCOM considered this information, as it was required to do, it would have experienced no undue difficulty using it. Nevertheless, MOFCOM disregarded this information in its entirety, contrary to Article 6.8.¹⁷³

69. Even assuming *arguendo* that organising the data per MOFCOM's requirements was necessary to make a determination under Article 2, Article 6.8 and Annex II provide that an investigating authority must use information provided by interested parties unless it determines that the interested parties have not acted to the best of their abilities, or that the provided information is unverifiable.¹⁷⁴ It is clear that MOFCOM was obliged to have regard to Swan Vintage's cost of production data even though it may have been structured in a different manner than that requested by MOFCOM, and to consider whether it was verifiable. Had MOFCOM done so, it would have had regard to other means of verification available, including those suggested by Swan Vintage itself. MOFCOM's failure to take even these preliminary steps in its consideration of the evidence before it is contrary to paragraphs 3 and 5 of Annex II of the Anti-Dumping Agreement.¹⁷⁵

70. Pursuant to paragraph 6 of Annex II, an investigating authority must inform interested parties "forthwith" if their information is rejected, provide an opportunity for explanation, and consider those explanations, providing reasons if appropriate.¹⁷⁶ To the contrary, MOFCOM simply ignored the explanations provided by Swan Vintage. It gave no notice "forthwith" and instead waited until the Final Disclosure or Final Determination to indicate that it had rejected them. In order to satisfy the requirements of paragraph 6 of Annex II, MOFCOM was required to notify interested parties that their information was rejected at a point in time when additional explanation or evidence could meaningfully impact

¹⁷² Australia's first written submission, paras. 430-443; second written submission, paras. 328-334.

¹⁷³ Australia's first written submission, paras. 425-470, 477; second written submission, paras. 348-353.

¹⁷⁴ See Panel Report, *US – Steel Plate*, para. 7.65.

¹⁷⁵ Australia's first written submission, paras. 430-439; second written submission, paras. 348-350.

¹⁷⁶ Panel Report, *Korea – Certain Paper*, para. 7.85.

the course of the investigation.¹⁷⁷ MOFCOM failed to do so.

71. Further, assuming *arguendo* that MOFCOM's recourse to facts available was permissible, paragraph 7 of Annex II required MOFCOM to select replacement facts with special circumspection.¹⁷⁸ MOFCOM breached this obligation, by selecting information that had no logical connection to the facts on the record and providing no due process for interested parties.

72. First, MOFCOM did not disclose what information it had selected. China indicated *ex post facto* during this dispute that MOFCOM had selected the same replacement data for Swan Vintage as it had for Casella Wines, and it became clear that this selection of facts was subject to the same flaws as in relation to Casella Wines. As a result, MOFCOM's selection of wholly inappropriate replacement data, led it to a determination without basis in record evidence and inconsistent with China's obligations under the Anti-Dumping Agreement.

73. Finally, even if MOFCOM's recourse to facts available and selection of replacement facts were found to be consistent with China's obligations, MOFCOM failed to ensure fair comparison between Swan Vintage's normal value and export price as Article 2.4 requires. In this respect MOFCOM repeated the errors it made in its determination for Casella. Once again, MOFCOM used the same [REDACTED] to calculate Swan Vintage's normal value, but made no adjustments to account for differences related to level of trade, timing of sales, and product mix contrary to China's obligations under Article 2.4 with respect to Swan Vintage.

D. OTHER NAMED EXPORTERS

74. No clear explanation has been provided as to how MOFCOM identified a dumping margin of 167.1% for "Other named Australian exporters",¹⁷⁹ "based on the weighted average margin of the selected exporters and producers".¹⁸⁰ At no stage has China identified the weighting or weightings used, nor the precise source of the data used to arrive at the identified dumping margin. Nor has China 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. Accordingly, any errors identified in relation to the sampled exporters will necessarily apply to the identification of margins for the "Other named Australian exporters".¹⁸¹

E. ALL OTHERS

75. MOFCOM identified a dumping margin of 218.4% for the category of producers

¹⁷⁷ Australia's first written submission, paras. 441, 456-459 and 467-470; second written submission, paras. 354-359.

¹⁷⁸ Australia's first written submission, paras. 471-476; second written submission, para. 360.

¹⁷⁹ Anti-Dumping Final Determination (Exhibit AUS-2), p. 1.

¹⁸⁰ Anti-Dumping Final Determination (Exhibit AUS-2), p. 97.

¹⁸¹ Australia's first written submission, paras. 483-485; second written submission, paras. 377-378.

described as "All Others". These were the companies that MOFCOM deemed to have been uncooperative because they did not complete the registration form issued by MOFCOM within 20 days of the initiation of the investigation, and did not respond to any other questionnaires.¹⁸² MOFCOM explained that the dumping margins for these producers were determined on the basis of "best information available" by a comparison of "the weighted average normal value with the weighted average export price to obtain the dumping margin".¹⁸³

76. No explanation was provided about the weighting(s) used, nor why the margin calculated significantly exceeded not only the weighted average margin determined for the producers classified as "other cooperative in the investigation," but also the highest margin determined for any individual company.

77. As confirmed by China, MOFCOM sought to punish uncooperative exporters by imposing this margin.¹⁸⁴ Imposition of such a margin without a transparent explanation of the reasoning behind it breached its obligations under the Agreement. China's arguments to the contrary are unsupported by the text or prior reports.¹⁸⁵

78. MOFCOM's determination in relation to "All Others" relies on, and is equally infected by, erroneous findings in relation to named exporters and is contrary to China's obligations.

V. DEFINITION OF DOMESTIC INDUSTRY

79. The definition of the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement is a "keystone" of an investigation.¹⁸⁶ In this case, MOFCOM defined the domestic industry as the 21 CADA members that submitted questionnaire responses (out of "hundreds" of domestic producers), on the basis that they represented a major proportion of the total domestic production of the like product. However, MOFCOM failed to establish "a major proportion of total domestic production" of the like product in accordance with Article 4.1 of the Anti-Dumping Agreement.¹⁸⁷ MOFCOM's process of defining 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. This undermined MOFCOM's subsequent injury and causation analysis.¹⁸⁸

80. With respect to the quantitative element of this definition, the [REDACTED]

¹⁸² Anti-Dumping Final Determination (Exhibit AUS-2), p. 97.

¹⁸³ Anti-Dumping Final Determination (Exhibit AUS-2), p. 100.

¹⁸⁴ Australia's second written submission, paras. 379-382.

¹⁸⁵ Australia's first written submission, paras. 486-492, citing Panel Reports, *China – GOES*, para. 7.302; and *China – Broiler Products*, para. 7.312.

¹⁸⁶ Australia's first written submission, paras. 526, 543; second written submission, paras. 928, 983.

¹⁸⁷ Australia's first written submission, paras. 526-527; opening statement at the first meeting of the Panel fn. 1; second written submission, paras. 392-398, 423; and opening statement at the second meeting of the Panel, para. 63. As to MOFCOM's approach to defining "domestic industry", see Australia's first written submission, paras. 531-532.

¹⁸⁸ Australia's first written submission, paras 9, 526; second written submission, paras. 392-393, 410, and 423.

██ was incapable of constituting positive evidence or providing a reliable factual basis for defining the domestic industry as those producers whose collective output represented "a major proportion of total domestic production" of the like product.¹⁸⁹ The estimate was a simplistic calculation without basis in real data. It was vague, and failed to identify sources for the underlying data, assumptions, and adjustments.¹⁹⁰ It was at odds with other record evidence.¹⁹¹ MOFCOM's reliance on this estimate undermined its definition of the domestic industry.¹⁹²

81. Further, MOFCOM did not undertake any qualitative assessment. It did not examine whether the 21 domestic producers that submitted questionnaire responses were representative of the domestic industry, including geographic spread, product mix, scale of operations, economic indicators or any other relevant factors.¹⁹³ This failure to undertake any qualitative assessment in circumstances where: the (i) definition of domestic industry had been limited to the 21 producers who submitted questionnaires, all of whom were CADA members, and (ii) MOFCOM took no steps to satisfy itself of the accuracy of a majority of the questionnaire responses, introduced a "material risk of distortion".¹⁹⁴

VI. INJURY AND CAUSATION

82. MOFCOM's analysis of injury and causation was inconsistent with China's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

A. MOFCOM'S FLAWED PRICE EFFECTS ANALYSIS

83. An investigating authority's price effects analysis must comply with Article 3.1 and the second sentence of Article 3.2. These provisions require an investigating authority to objectively examine all positive evidence and consider whether the effect of subject imports is to bring about one or more of the three price effects listed in Article 3.2. In this case, MOFCOM considered that subject imports had suppressed the price of domestic like products over the Injury POI.¹⁹⁵ MOFCOM's finding of price suppression was inconsistent with China's obligations under Articles 3.1 and 3.2 in four key respects.

84. First, MOFCOM compared average unit values of subject imports and domestic like

¹⁸⁹ Australia's second written submission, paras. 399-409; opening statement at the second meeting of the Panel, para. 65.

¹⁹⁰ For a discussion of these issues, see Australia's second written submission, paras. 399-409.

¹⁹¹ Specifically, the adjustment to deduct the production of wine products outside the scope of the investigation, for which no explanation is given, is inconsistent and irreconcilable with the data from the National Bureau of Statistics concerning total wine production for all producers above a certain income threshold: Australia's second written submission, paras. 404-406.

¹⁹² Australia's first written submission, paras. 537-542; second written submission, paras. 399-409; and opening statement at the second meeting of the Panel, para. 65.

¹⁹³ Australia's first written submission, para. 541; second written submission, paras. 412-417; opening statement at the first meeting of the Panel, paras. 26-28; and opening statement at the second meeting of the Panel, para. 66. (footnotes omitted)

¹⁹⁴ Australia's first written submission, paras. 67, 522-536 (footnotes omitted); second written submission, paras. 410-421.

¹⁹⁵ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120-123. See also pp. 132, 136, 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 [...]."), 142 and 145.

products that were not comparable.¹⁹⁶ MOFCOM failed to ensure price comparability between the average unit values for subject imports and domestic like products because its calculation methodology did not account for differences in levels of trade,¹⁹⁷ conditions of sale,¹⁹⁸ or product mix.¹⁹⁹ It is well-established that an investigating authority must ensure price comparability whenever it makes a price comparison during a price effects analysis.²⁰⁰ A failure to do so results in a violation of Articles 3.1 and 3.2.²⁰¹

85. Second, MOFCOM considered that the increasing volume (including increasing market share) and declining price of subject imports served to suppress the price of domestic like products by just 658 RMB/kl over the course of the five-year Injury POI.²⁰² This amounts to just 2% of the domestic sale price in 2015 (i.e. the base year of the Injury POI). Article 3.2 requires an investigating authority to consider whether prices have been suppressed to a "significant" degree. There is no evidence on the record to suggest MOFCOM considered whether this suppression was significant.²⁰³

86. Third, MOFCOM failed to consider whether subject imports had "explanatory force" for the alleged suppression of the price of domestic like products.²⁰⁴ Rather, MOFCOM simply assumed that subject imports had caused this price effect that it observed.²⁰⁵ In this regard, MOFCOM's errors in calculation and comparison of the average unit values critically undermined its examination.²⁰⁶ Further, MOFCOM failed to properly consider evidence on the record calling into question the relationship between subject imports and the suppression of domestic like product prices. Specifically, MOFCOM did not consider or rationalise how subject imports had explanatory force for the price suppression in circumstances where:

- a significant price gap between subject imports and domestic like products

¹⁹⁶ Australia's first written submission, paras. 563-599; second written submission, paras. 432-438, 450-453; Anti-Dumping Final Determination (Exhibit AUS-2), pp. 113-114, 117-118, 120-121, 132, 139.

¹⁹⁷ Australia's first written submission, paras. 587-590; second written submission, paras. 438-443.

¹⁹⁸ Australia's first written submission, paras. 591-599; second written submission, paras. 444-448.

¹⁹⁹ Australia's first written submission, paras. 563-586; second written submission, paras. 449-460, 461-474.

²⁰⁰ Australia's first written submission, para. 563; second written submission, para. 436; 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; and *China – Autos (US)*, para. 7.277.

²⁰¹ 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; and *China – Autos (US)*, para. 7.277.

²⁰² MOFCOM found the average price of domestic like products was suppressed because it did not increase at the same rate that the average unit cost increased over the Injury POI "leading to a downward trend of the difference between the sales price and cost of domestic like products from 3,296 RMB/kl in 2015 to 2,638 RMB/kl in 2019" (i.e., 658 RMB/kl). As such, this constitutes the degree of the price suppression of domestic like products that MOFCOM considered in its analysis: see Anti-Dumping Final Determination (Exhibit AUS-2), pp. 120-123; Final Determination (Exhibit CHN-1), pp. 58-60; Australia's first written submission, paras. 551, 600, 602; second written submission, paras. 424-425, 477-480; and opening statement at the second substantive meeting, paras. 73, 83; China's first written submission, paras. 1377, 1380, 1332, 1650 and 1667.

²⁰³ Australia's first written submission, paras. 600, 602; second written submission, para. 478; Panel Reports, *China – Cellulose Pulp*, para. 7.40; *Thailand – H-Beams*, para. 7.163.

²⁰⁴ Australia's first written submission, paras. 600-612; second written submission, paras. 481-503.

²⁰⁵ It is well-established that Articles 3.1 and 3.2 require an evaluation of "explanatory force": see Australia's first written submission, paras. 555-556; China's first written submission, paras. 1316-1320, 1341 and second written submission, paras. 694-714; and Appellate Body Reports, *China – GOES*, paras. 136, 141; *Russia – Commercial Vehicles*, paras. 5.53, 5.96.

²⁰⁶ Australia's first written submission, paras. 600-602; second written submission, paras. 481 – 488.

existed, such that subject imports were always significantly more expensive;²⁰⁷

- significantly larger volumes of like product imports from third countries existed, with average unit values both: (i) much lower than subject imports; and (ii) much closer to, or significantly cheaper than, domestic like products;²⁰⁸ and
- record evidence established that the Chinese wine market was significantly more complex than simply Australian imports taking volume and market share from domestic like products.²⁰⁹

87. MOFCOM further failed to consider whether the price of domestic like products would have increased at a different rate, absent the impact of subject imports.²¹⁰ As a result, MOFCOM's analysis did not provide any basis for concluding that subject imports prevented price increases that "otherwise would have occurred". MOFCOM also failed to consider evidence relating to price undercutting and depression,²¹¹ and year-to-year price fluctuations.²¹²

88. Fourth, MOFCOM relied on annual average unit values that were not based on positive evidence. This is because: (i) MOFCOM's apparent consumption figures, which form the basis of its market share calculations, were based on the defective "total domestic production" estimate;²¹³ (ii) the underlying HS code data MOFCOM used as the basis to calculate the average unit value for subject imports, likely included non-subject products;²¹⁴ and (iii) the explanation of the price calculation methodology contained on the investigation record was so poor, it was not positive in the sense of "admitting no question" and being "definite, precise", "affirmative, objective, verifiable, and credible".²¹⁵

B. MOFCOM'S FLAWED IMPACT ANALYSIS

89. An investigating authority must consider the impact that subject imports have on the state observed in the domestic industry, in accordance with the requirements of Articles 3.1 and 3.4. Articles 3.1 and 3.4 require an investigating authority to objectively evaluate, based on positive evidence, all relevant economic factors and indices having a bearing on the state of the industry, including each of the mandatory factors listed in Article 3.4, in the examination of the relationship between subject imports and the state observed in in the domestic industry

²⁰⁷ Australia's first written submission, paras. 600-602, 608; second written submission, para. 494.

²⁰⁸ Australia's first written submission, paras. 602, 696-704; second written submission, paras. 497-500.

²⁰⁹ Australia's first written submission, paras. 600-602; second written submission, paras. 494, 501-503.

²¹⁰ Australia's first written submission, paras. 602-604; second written submission, paras. 489-491.

²¹¹ Australia's first written submission, paras. 605-609; second written submission, paras. 495-496.

²¹² Australia's first written submission, paras. 610-612; second written submission, paras. 501-503.

²¹³ Australia's second written submission, para. 509. See also first written submission, para. 683.

²¹⁴ Australia's second written submission, paras. 507-508; response to Panel question No. 21.

²¹⁵ Australia's first written submission, paras. 588-562; second written submission, paras. 510-512; Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.257; Appellate Body Reports, *China – GOES*, para. 126; *US – Hot-Rolled Steel*, para. 192; and *Mexico – Anti-Dumping Measures on Rice*, para. 192. See also Australia's response to Panel question No. 23.

(i.e. the "explanatory force"). MOFCOM's impact analysis was inconsistent with China's obligations under Articles 3.1 and 3.4 in four ways.

90. First, MOFCOM made fundamental errors in defining the Chinese domestic wine industry. These errors, in turn, undermined its examination of the impact that subject imports had on that industry, including with respect to the evaluation of "all relevant economic factors and indices having a bearing on the state of the industry".²¹⁶

91. Second, MOFCOM's evaluation of the domestic industry was a mechanical exercise that did not properly evaluate the "explanatory force" that subject imports were said to have for the state of the industry observed by MOFCOM.²¹⁷ MOFCOM merely assumed that subject imports were responsible for the state observed in the domestic industry.²¹⁸ In doing so, MOFCOM did not properly examine evidence that called such a relationship into question.²¹⁹

92. Third, MOFCOM did not properly evaluate "factors affecting domestic prices", which are among the mandatory economic factors and indices listed in Article 3.4.²²⁰ In their questionnaire responses, the 21 domestic producers making up the domestic industry unanimously advised MOFCOM that the three key factors affecting domestic prices were market supply and demand, raw material costs and subject imports.²²¹ In these circumstances, MOFCOM was not entitled to limit its consideration to just one of these factors, let alone the single factor that would make an affirmative injury finding more likely. Rather, MOFCOM was obligated to objectively examine all three of the factors identified by the domestic producers.²²²

93. MOFCOM did not consider the impact of raw materials costs on domestic prices at all, despite apparently collecting relevant evidence from the domestic industry regarding this factor.²²³ Further, the evidence before MOFCOM relating to demand established that there was a significant increase and then contraction in apparent consumption volumes during the Injury POI.²²⁴ With respect to supply, evidence before MOFCOM showed (i) significant excess production capacity in the domestic industry; and (ii) that third-country imports of like products played a significant role in the Chinese market (in larger volumes and lower prices

²¹⁶ Australia's first written submission, paras. 616-618; second written submission, para. 516.

²¹⁷ The parties agree that Articles 3.1 and 3.4 require an evaluation of explanatory force: China's first written submission, paras. 1463, 1466, 1488-1489; second written submission, para. 825; Australia's second written submission, para. 517.

²¹⁸ Australia's first written submission, paras. 639 - 645; Australia's second written submission, paras. 517-524, 525-530.

²¹⁹ Australia's first written submission, paras. 624, 626-638; Australia's second written submission, paras. 517-530.

²²⁰ Australia's first written submission, paras. 641-644, 652-654; second written submission, paras. 531-543; 553.

²²¹ Australia's first written submission, para. 639-640; second written submission, para. 533; and response to Panel question Nos. 36 and 37.

²²² Australia's first written submission, paras. 639-645; second written submission, paras. 531-543; and response to Panel question Nos. 36 and 37.

²²³ Australia's first written submission, para. 643; second written submission, para. 542; China's second written submission, paras. 858-859.

²²⁴ Australia's first written submission, paras. 641-642; second written submission, paras. 540-541, 548-549; and response to Panel question Nos. 38 and 41.

than subject imports).²²⁵

94. Fourth, MOFCOM's evaluation of the impact of subject imports on the domestic industry was also critically undermined by other errors in its analysis,²²⁶ including, *inter alia*: (i) MOFCOM's unsubstantiated assertion that the "domestic industry capacity expansion plan" was suspended due to the impact of subject imports;²²⁷ (ii) MOFCOM's failure to properly examine evidence relating to capacity utilisation before asserting that "capacity utilization could not be released effectively" due to subject imports;²²⁸ (iii) MOFCOM's failure to properly evaluate the impact of subject imports on production and operation of the domestic industry, in circumstances where there was an apparent collapse in domestic industry's production volumes of non-like wine products outside the investigation.²²⁹

C. MOFCOM'S FLAWED CAUSATION AND NON-ATTRIBUTION ANALYSIS

95. An investigating authority must determine whether subject imports have caused material injury to the domestic industry. Such a determination must be made in accordance with the obligations in Articles 3.1 and 3.5. The determination must be objective and based on positive evidence, must be informed by the investigating authority's examinations under Articles 3.2 and 3.4, and must not attribute to subject imports the injury being caused to the domestic industry by factors other than dumped imports. MOFCOM's determination that subject imports caused material injury to the domestic industry was inconsistent with China's obligations under Articles 3.1 and 3.5 for four reasons.

96. First, as outlined above, MOFCOM's examinations under Articles 3.2 and 3.4 were fundamentally flawed. MOFCOM relied on the outcomes of these examinations for the purposes of demonstrating that subject imports caused material injury to the domestic industry. The errors in MOFCOM's Article 3.2 and 3.4 examinations also undermined its injury and causation determination under Article 3.5.²³⁰

97. Second, MOFCOM failed to establish a causal link between the subject imports and the material injury alleged to have been suffered by the domestic industry.²³¹ MOFCOM's analysis under Article 3.5 merely asserted that there was a "causal relationship", without establishing the existence of a genuine relationship of cause and effect between subject imports and material injury to the domestic industry. This is because MOFCOM's causation analysis was based on:

- a mere correlation said to exist between the increasing volume and declining

²²⁵ Australia's first written submission, paras. 641-642; second written submission, paras. 540-541, 548-549; and response to Panel question Nos. 38 and 41.

²²⁶ Australia's first written submission, paras. 646-657; second written submission, paras. 548-556.

²²⁷ Australia's first written submission, paras. 649-650; second written submission, paras. 550-551; and response to Panel question No. 43.

²²⁸ Australia's first written submission, para. 651; second written submission, para. 552.

²²⁹ Australia's first written submission, paras. 655-656; second written submission, paras. 554-556.

²³⁰ Australia's first written submission, paras. 664 – 666; second written submission, paras. 559-560.

²³¹ Australia's first written submission, paras. 667 – 669; second written submission, paras. 566-580, 578-580.

average unit price of subject imports, and the decreasing sales volume of domestic like products along with the failure of their prices to increase in line with rising unit costs.²³² A correlation, without more, is insufficient to establish causation.²³³

- an analysis of volume and market share that was: (i) not based on positive evidence; and (ii) overly simplistic, as it failed to include consideration of the broader market dynamics between the domestic industry, the hundreds of other Chinese producers of domestic like products, and third country imports of like products.²³⁴
- assumptions that subject imports and domestic like products were highly competitive and mutually substitutable,²³⁵ such that there was "direct competition" and "price competition between them".²³⁶ Record evidence regarding differences in product mix and consumer perceptions did not support this assumption.²³⁷ Even if these assumptions are accepted, this further highlights the flaws in MOFCOM's analysis of market share, indicating that the impact of like products produced by the "hundreds" of other domestic producers and the impact of third-country imports of like products needed to be considered.²³⁸

98. Third, MOFCOM's injury and causation determination failed to engage with record evidence that weighed against a finding that subject imports caused material injury to the domestic industry.²³⁹

99. Fourth, MOFCOM failed to identify, separate and distinguish injury being caused by four other known factors to ensure that it was not being improperly attributed to the injury alleged to be caused by the subject imports.²⁴⁰ These "other known factors" were: (i) the progressive elimination of the 14% customs tariff on subject imports pursuant to the ChAFTA;²⁴¹ (ii) imports of like products from third countries;²⁴² (iii) exchange rates;²⁴³ and (iv) consumer perceptions and preference for subject imports.²⁴⁴

²³² Australia's first written submission, para. 669; second written submission, paras. 566–574.

²³³ Australia's first written submission, para. 669; Panel Report, *China – X-Ray Equipment*, 7.247.

²³⁴ Australia's first written submission, para. 669; second written submission, paras. 569–574.

²³⁵ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 103, 105 and 108.

²³⁶ Anti-Dumping Final Determination (Exhibit AUS-2), pp. 106, 117 and 118.

²³⁷ Australia's first written submission, paras. 674–679; second written submission, paras. 575–577.

²³⁸ Australia's second written submission, para. 577.

²³⁹ Australia's first written submission, paras. 670–673. This evidence included: (i) subject imports were always significantly more expensive than domestic like products; (ii) third country imports of like products accounted for significant market share, at substantially lower prices than subject imports; (iii) the domestic industry always accounted for significantly more market share than subject imports; and (iv) despite experiencing declines, the domestic industry remained profitable throughout the Injury POI.

²⁴⁰ Australia's first written submission, paras. 685–710; second written submission, paras. 581–605.

²⁴¹ Australia's first written submission, paras. 690–695; second written submission, paras. 583–588.

²⁴² Australia's first written submission, paras. 696–704; second written submission, paras. 589–596.

²⁴³ Australia's first written submission, paras. 705–707; second written submission, paras. 597–599.

²⁴⁴ Australia's first written submission, paras. 708–710; second written submission, paras. 600–605.

100. The inadequacy of MOFCOM's non-attribution analysis is most striking in relation to its treatment of the ChAFTA tariff reductions and third country imports. This is because:

- over the Injury POI, import tariffs on subject products reduced from 14% to 0%. The average unit value for subject imports, which included an adjustment reflecting this tariff reduction, declined by 15.91% over the same period. MOFCOM did not properly consider the impact that these tariff reductions had on the price of subject imports and the material injury to the domestic industry at all during its injury analysis. MOFCOM's dismissal of this factor was wholly inadequate in light of clear and persuasive evidence.²⁴⁵
- the evidence before MOFCOM established that throughout the Injury POI, third country imports: (i) accounted for significant volume and market share; (ii) were significantly cheaper than subject imports; and (iii) were either much closer in price or significantly cheaper than domestic like products. MOFCOM's mere assertion that third country imports did not "break the causal link" was wholly inadequate to address this evidence.²⁴⁶

VII. PUBLIC NOTICE

101. MOFCOM was obliged to provide sufficiently detailed reasons for its determinations pursuant to Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.²⁴⁷ MOFCOM's determinations failed to contain all relevant information on the matters of fact, law and reasons which led to the imposition of final measures,²⁴⁸ including: (i) its estimate of the volume of total domestic production (output);²⁴⁹ (ii) its recourse to "facts available" to determine normal value; (iii) 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) methodology for calculating dumping margins; and (vii) determination of injury and causation.²⁵⁰

102. China's argument that the scope of certain provisions does not cover investigating authority methodology is contrary to the text of Article 12.2.2 and must be rejected.²⁵¹

²⁴⁵ Australia's first written submission, paras. 690-695; second written submission, paras. 583-588.

²⁴⁶ Australia's first written submission, paras. 696-704; second written submission, paras. 589-596.

²⁴⁷ See Panel Reports, *China – X-Ray Equipment*, para. 7.472; *EU – Footwear (China)*, para. 7.844; Australia's first written submission, para. 1082.

²⁴⁸ Panel Reports, *China – Broiler Products*, para. 7.317; *China – Broiler Products (Article 21.5 – US)*, paras. 7.368; 7.401. See also, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.115.

²⁴⁹ MOFCOM's Final Determination did not disclose the source or methodology used to calculate overall output of domestic relevant wines in China, which was relevant to MOFCOM's assessment of injury: see Anti-Dumping Final Determination (Exhibit-AUS-2), p. 109. MOFCOM's flawed calculation of total domestic output was used to determine whether the identified 21 domestic producers accounted for a major proportion of total production of like products: see Anti-Dumping Final Determination (Exhibit-AUS-2), p. 108-109.

²⁵⁰ See Australia's first written submission, section I.

²⁵¹ Article 12.2.2 explicitly requires the public notice or report to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures". It is entirely inconsistent with the text and purpose of this provision to interpret "matters of fact and law and reasons" in a manner that would exclude "methodologies".

VIII. IMPOSITION OF DUTIES

103. China's imposition of anti-dumping duties was inconsistent with its obligations 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, because it *inter alia*:

- imposed anti-dumping duties where all requirements for their imposition had not been fulfilled;²⁵² and
- imposed anti-dumping duties in excess of the margins of dumping that could have been established (if any) under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, thereby failing to impose anti-dumping duties in "appropriate amounts".²⁵³

IX. CONCLUSION

104. For the reasons set out above, and in Australia's submissions to date, Australia respectfully requests that the Panel find that China's measures are inconsistent with China's obligations under the following provisions:

- 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.

105. 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.

²⁵² See Australia's first written submission, paras. 713, 716-721. (footnotes omitted)

²⁵³ In breach of Articles 9.2 and 9.3 of the Anti-Dumping Agreement. See Australia's first written submission, paras. 713, 722-729, 730-737; second written submission, paras. 383-388.