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

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION

September 7, 2022

Mister Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. We will briefly address three issues related to MOFCOM's antidumping investigation and the relevant provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement): (i) the obligations in initiating an investigation; (ii) the obligations in limiting the examination of each known exporter or producer; and (iii) the obligations regarding public notice and explanation.

I. Initiation

3. The United States first will provide comments on the proper interpretation of the requirements of Article 5.2 – namely, subparagraphs (i) and (iii) – and the degree to which China's arguments misunderstand those requirements.

4. Article 5.2(i) of the AD Agreement requires that an application on behalf of the domestic industry contain certain information reasonably available to the applicant. One of those information requirements is that the application "shall identify the industry on behalf of which the application is made by a list of all known producers of the like product (or associations of domestic producers of the like product) . . . ."[1] The United States understands the prepositional phrase "by a list of all known" to cover both producers of the like product or, for the parenthetical, the associations of domestic producers of the like product. In other words, the

[1] *See* U.S. third-party submission, paras. 68-72.

investigating authority cannot circumvent the requirement simply because it has identified one association of domestic producers, omitting other known producers.

5. Article 5.2(i) also requires a "description of the volume and value of the domestic production of the domestic like product by the applicant." The United States observes that China provides no support for its argument that the requirements of Articles 4.1 and 16.1 of the AD Agreement, and an investigating authority's definition of the domestic industry *following an investigation*, override the requirements of Article 5.2(i) at the *initiation of an investigation* – namely, the requirement that an application on behalf of a domestic industry contains information "reasonably available" to it.

6. We now turn to Article 5.2(iii), the basis for Australia's claim that MOFCOM improperly relied upon an unsubstantiated claim of a "particular market situation" to justify omitting prices in Australia.[2] Australia argues, among other things, that the information used in the place of Australian prices, the prices of Chinese wine imports into Australia, were not an appropriate basis for normal value in the application.[3]

7. For evidence of dumping, Article 5.2(iii) requires that the application contain reasonably available information including: "information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export . . . ."[4]

[2] Australia FWS, paras. 775-777.
[3] Australia FWS, paras. 782, 798.
[4] Emphasis added.

8. Article 5.2(iii) thus covers the various components of the dumping margin calculation – namely, the elements for determining a normal value, export price, and any adjustments necessary for a fair comparison.[5] If the normal value is not substantiated by relevant evidence, it would not satisfy the requirements of Article 5.2.[6]

9. The United States views China's argument that Article 5.2(iii) permits third-country proxy information in the place of prices in the country of origin or export as contrary to the text of Article 5.2. To support its interpretation, China observes that Article 5.2(iii) uses the term "product in question" rather than "like product" and that the prices in question need not be specific to individual producers or exporters.[7] China's interpretation is erroneous for a number of reasons.

10. *First*, neither Article 5.2 nor Article 2, which defines "dumping", indicate that the price of a product produced in a third country is an appropriate proxy for normal value for purposes of initiation.

11. *Second*, the phrase "product in question" is used elsewhere in the text of Article 5.2 where it plainly *does not* encompass products produced in third countries. As one example, Article 5 requires, with respect to the allegedly dumped product from "the country or countries of origin or export in question", "a list of known persons importing *the product in question*".[8]

12. *Third*, whether or not Article 5.2(iii) requires "separate information on the normal [value] for each producer or exporter in the exporting country" (China's position is that it does not), the

[5] *Morocco – School Exercise Books (Panel)*, paras. 7.350-7.351.
[6] *Morocco – School Exercise Books (Panel)*, paras. 7.352.
[7] *See* China FWS, paras. 2094-2096.
[8] Article 5.2(ii) (emphasis added).

"information on prices" must still be provided in one of the three forms specified under Article 5.2(iii).

13. *Fourth*, the prices of "the product in question" cannot be for a product imported from a third country into the country of origin or export because the alternative to domestic market prices includes "the prices at which the product is sold from the country or countries of origin or export to a third country . . . ." The imported product cannot be a product sold from the country of origin or export, so it therefore cannot be "the product in question".

14. *Fifth*, the export price information required under Article 5.2(iii) includes "prices at which the product is first resold . . . in the territory of the importing Member" – that is, "the product" introduced earlier in the same sentence as the "product in question" for domestic market prices. In light of the "resold . . . in the territory of the importing Member" language, "the product" similarly would not include third-country products that were imported into the country of origin or export.

15. China also argues that the applicant provided sufficient evidence for MOFCOM to find that a "particular market situation", a concept described under Article 2, impacted costs and prices in Australia.[9] However, if China's interpretation of "product in question" is incorrect, as we have discussed, then it will have acted inconsistently with Article 5.2(iii) and the Panel need not reach this issue.

16. With these considerations in mind, the Panel should evaluate whether an unbiased and objective authority could have concluded that the application contained the required information,

[9] China FWS, para. 2085.

including, first, a list of all Chinese wine producers known to the applicant, and second, information on prices at which the product in question is sold in Australia.[10]

II. Determination of Individual Dumping Margins for Each Known Exporter or Producer

17. We now turn to Australia's claim that MOFCOM acted inconsistently with Article 6.10 of the AD Agreement by ignoring record evidence that its "sample" of Australian exporters did not constitute the largest volume that could reasonably be investigated.[11]

18. The first sentence of Article 6.10 of the AD Agreement establishes that "as a rule" an authority "shall determine an individual margin of dumping for each known exporter or producer." The second sentence of Article 6.10 permits the authority to limit the examination where the number of exporters or producers is so large as to make a determination of individual margins of dumping for all exporters or producers "impracticable".

19. The investigating authority may limit examination using "either" of two methods: (i) "using samples which are statistically valid on the basis of information available to the authorities at the time of the selection" or (ii) "the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." So if the authority uses the first method, sampling, the sample must be "statistically valid on the basis of information available to the authorities at the time of the selection." And if it instead uses the second, export volume, it must then cover "the largest percentage of the volume of exports . . . which can reasonably be investigated."

[10] *See* Australia FWS, para. 754.
[11] Australia FWS, para. 348.

20. China conflates the distinct requirements of the two distinct methods to limit examination – that is, "using samples" or "the largest percentage volume of the exports". In this regard, its arguments on this claim rely upon an incorrect understanding of the second sentence of Article 6.10. Specifically, China represents that MOFCOM employed the former method, sampling.[12] In seeking to address Australia's claim that MOFCOM breached the examination limitation provisions of Article 6.10, however, China argues that MOFCOM satisfied the conditions of *the other method* – namely, that MOFCOM selected "the three companies with the most exports to China."[13]

21. Whether or not China's assertion about export volume is accurate, the Panel should assess whether the sample MOFCOM constructed was "statistically valid on the basis of information available to the authorities at the time of the selection." Those are the relevant obligations when "using samples", and if MOFCOM did not satisfy them, then it will have breached Article 6.10. In this regard, the United States notes that China has dismissed as "irrelevant" Australia's arguments about the representativeness of the sample, and indeed does not indicate where in MOFCOM's determinations it demonstrated that its sample was statistically valid.[14]

III. Public Notice and Explanation of Determinations

22. We now turn to the public notice and explanation requirements under Article 12 of the AD Agreement. Australia's claims under these provisions highlight certain inadequacies that appear to pervade MOFCOM's determinations and the manner in which it conducted the

[12] *See*, *e.g.*, China FWS para. 2336.
[13] *See* China FWS, para. 2336.
[14] *See* China FWS, para. 2336.

dumping investigation. In particular, Australia argues that MOFCOM acted inconsistently with the obligations contained in these articles by omitting from its public notices or reports certain relevant information on matters of fact, law, and reasons concerning MOFCOM's dumping, injury, and causation determinations.[15]

23. Articles 12.2 and 12.2.2 of the AD Agreement set forth the overarching obligations for authorities to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" by the investigating authority, and "all relevant information on matters of fact and law and reasons" leading to the imposition of definitive measures.

24. To this end, Article 12.2.2 provides that the investigating authority's public notice or separate report on a final affirmative determination "shall" contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters and importers."

25. In this dispute, the United States observes that the analyses contained in the final antidumping determination appear to be very brief and often appear to be lacking in evidentiary support concerning key elements of the dumping, injury, and causation determinations.[16]

26. In its first written submission, Australia catalogued many ways in which MOFCOM's dumping and injury determinations lacked evidentiary support or, in some cases, lacked a comprehensible explanation of MOFCOM's conclusions or how it considered the record

[15] *See* Australia FWS, paras. 1076, 1086-1128.
[16] U.S. third-party submission, para. 71 (citing Australia FWS, paras. 1076-1129 and Exhibit AUS-2).

evidence, if at all.[17] Australia's catalogue of these deficiencies is lengthy and concerns fundamental aspects of MOFCOM's determination to impose an antidumping measure. As noted in the U.S. third-party submission, in some instances it is difficult even to discern the basis for MOFCOM's conclusions.[18]

27. As an example, as described in paragraphs 35 through 38 of the U.S. third party submission, MOFCOM did not clearly specify which of the two bases under Article 6.10 of the AD Agreement it was using to limit its examination. That lack of clarity carried through to China's first written submission, where it mixes the different requirements of those two different bases.[19]

28. MOFCOM's dumping determination provides other examples. Australia has described the absence of explanations by MOFCOM as to how it established normal value, ensured a fair comparison to export price, and calculated the Australian respondents' dumping margins.[20]

29. The Panel will need to determine whether MOFCOM could have satisfied its obligations under Articles 12.2 and 12.2.2 of the AD Agreement based on the content of such abbreviated, unsubstantiated, or indecipherable analyses.[21]

IV. Conclusion

30. This concludes the U.S. oral statement. The United States thanks the Panel for its consideration of our views and looks forward to responding to the Panel's questions.

[17] *See* Australia FWS, paras. 1076, 1086-1128.
[18] U.S. third-party submission, para. 71 (citing Australia FWS, paras. 1076-1129).
[19] *See* U.S. third-party submission, paras. 36-38 (citing China FWS, para. 2336).
[20] *See*, *e.g.*, Australia FWS, paras. 948-951.
[21] *See* U.S. third-party submission, paras. 71-72.