

University of New South Wales Law Research Series

**DEMYSTIFYING AUSTRALIA –
CHINA TRADE TENSIONS**

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[2021] *UNSWLRS* 36

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Demystifying Australia – China Trade Tensions

Weihuan Zhou* & James Laurenceson**

Abstract

In 2020 Australia’s political relations with China plumbed new depths. Trade and other economic ties were also hit with disruption. Contributing to this deterioration, and complicating an accurate assessment of the consequences, has been a raft of misunderstandings. This paper demystifies the bilateral trade tensions by exposing the deeper drivers of political friction, providing a critical assessment of the vulnerability of the Australian economy, and placing the current state of Australia’s relations with China in a comparative regional perspective. These discussions set an important context for a detailed and critical analysis of the legal issues that Chinese trade measures have created under the rules of the World Trade Organization and the China – Australia Free Trade Agreement. We show that these legal issues have been over-simplified or even misunderstood in existing work. Overall, we believe that combined with political leadership, a clear understanding of these issues offers the best prospect for an improved relationship trajectory, serving both countries’ interests.

I. INTRODUCTION

After years of phenomenal development in the trade links between Australia and China, the political relationship hit a historic low in 2020. The slump was not confined to the diplomatic realm with China also launching a series of moves hurting Australian exports. Many reports in Australia were quick to blame China for breaching its international obligations under the World Trade Organization (‘WTO’) and the China – Australia Free Trade Agreement¹ (‘ChAFTA’). There is substance to these accusations. What has also been demonstrated, however, are significant misunderstandings of the deeper political frictions, the economic consequences, whether the state of Australia’s relations with China makes it a regional outlier or just one in a crowd, and complex legal issues generated by China’s trade sanctions.

This paper seeks to demystify these misunderstandings. Section II begins by reviewing the political disputes between Australia and China before and amid the current deterioration. A distinction is drawn between the deeper political frictions and the many disputes that are more symptomatic in nature. The extent to which political disagreements have spilled over to hurt the Australian economy is also critically evaluated, cautioning against overstatement. The state of Australia’s

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All websites cited are current as of 19 February 2021.

¹ China–Australia Free Trade Agreement, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 17.2 <www.dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Pages/official-documents> (‘ChAFTA’).

relations with China is then contextualised by comparing it with that of other countries in the region. This highlights several areas where Australia's relations contrast significantly with regional norms. Section III discusses the Chinese trade measures in three major categories – i.e. anti-dumping, import restrictions and tariffs – in terms of their compatibility with WTO/ChAFTA rules. It argues that although Australia has a claim against most of the measures, it is difficult to determine whether such claims may prevail in the absence of detailed evidence. It also explains why the WTO remains a preferred forum for dispute settlement (despite certain existential challenges) and why WTO litigation offers an important opportunity for the two sides to resume bilateral dialogue that would contribute to the resolution of tensions. Section IV then offers further observations on some broader implications of the tensions for both economies and the possible solutions beyond litigation. Section V concludes this paper.

II. Demystifying the Political Disputes and Economic Realities

1. An Overview of Past Bilateral Political Frictions and Economic Relations

The fear that trade and investment with China is a prominent source of economic and strategic risk, rather than simply being a driver of prosperity, is not new to Australian commentary and policy deliberations. Almost as soon as China overtook Japan to become Australia's largest international customer in 2009, anxiety was evident that China might use this position to exert coercive pressure in response to political disagreements. In 2013, for example, the Sydney-based Lowy Institute commissioned a study to assess the likelihood “that the Chinese government will manipulate its trade and investment to undermine Australian autonomy or security”.² This study concluded that such concerns were mostly “overblown”. In substantial part this was because iron ore exports loomed large – in 2013, iron ore's share of Australia's total exports to China was 56 percent³ – and in this trade China was as dependent on Australia as a supplier as Australia was on China as a customer.

Toward the mid-2010s, however, China was also emerging as a major customer for an expanding range of Australian goods such as beef, wine and milk powder, as well as services, notably education and tourism.⁴ In these categories China had access to a greater number of alternative suppliers, potentially increasing coercive leverage. In 2016, Peter Jennings, the Executive Director of the Canberra-based Australian Strategic Policy Institute (‘ASPI’), warned, “[w]e've never had a greater dependency with any country ... The risk that creates for us is if Beijing wants to adopt coercive policies, it's in a fairly strong position to do so...”.⁵ The following year, Rory Medcalf,

² James Reilly, ‘China's Economic Statecraft: Turning Wealth into Power’, *Lowy Institute for International Policy* (Analysis, 27 November 2013) <<https://www.lowyinstitute.org/publications/chinas-economic-statecraft-turning-wealth-power>>.

³ Australian Government Department of Foreign Affairs and Trade, *Trade Statistical Pivot Tables* (Web Page) <<https://www.dfat.gov.au/about-us/publications/trade-statistical-pivot-tables>>.

⁴ James Laurenceson and Michael Zhou, ‘COVID-19 and the Australia-China Relationship's Zombie Economic Idea’, UTS *Australia-China Relations Institute* (Research Paper, 7 May 2020) <<https://www.australiachinarelations.org/content/covid-19-and-australia-china-relationship%E2%80%99s-zombie-economic-idea>>.

⁵ Jonathan Barrett and Sue-Lin Wong, ‘China Warns ‘Protectionist’ Australia on Investment After Grid Deal Blocked’, *Reuters* (Business News, 17 August 2016) <<https://www.reuters.com/article/us-australia-privatisation-ausgrid/china-warns-protectionist-australia-on-investment-after-grid-deal-blocked-idUSKCN10R2M1>>.

the Director of the National Security College at the Australian National University, contended that Australia needed to be particularly concerned because China's political system "tends to link its commercial and political demands on other countries". That said, this was followed by an acknowledgement that "[e]ven when Canberra has seriously annoyed Beijing ... Beijing hasn't directed economic pressure specifically at Australia".⁶

Nonetheless, there was an expanding literature documenting and analysing China's use of economic statecraft in a broader international context, including coercive applications.⁷ In 2017, for example, Korea was struck by an unofficial ban on Chinese group tourism after Seoul deployed a US-made missile shield that China regarded as a threat to its own security. Korean companies in China were also subject to ad-hoc "safety audits" and ordered to "temporarily" close. Some Korean multinational companies like the Lotte Group judged it necessary to withdraw from the Chinese market entirely.⁸

After celebrating the upgrade of the diplomatic status of the bilateral relationship to that of a "Comprehensive Strategic Partnership" in November 2014, Australia joining the China-led Asia Infrastructure Investment Bank in March 2015 and the enactment of ChAFTA in December 2015, the Australian government's rhetoric and policy decisions toward China began tilting in a different direction.⁹ One such instance was in June 2016 when an international arbitration panel ruled in favour of the Philippines in a dispute it had brought against China over its land reclamation activities in the South China Sea. Having refused to participate in the arbitration claiming the panel lacked legal authority, China dismissed the ruling as "naturally null and void".¹⁰ Australia's reaction was forward-leaning in the region with then-Foreign Minister Julie Bishop issuing a statement the same day calling on China "to abide by the ruling" and declaring it to be "final and binding".¹¹ China's Ministry of Foreign Affairs responded that it was "shocked" by the comments and lodged a formal protest against the "wrong remarks".¹²

Amidst intensifying great power competition between China and the United States ('US'), Minister Bishop again raised eyebrows in Beijing when in January 2017 she told an audience in Los Angeles that "[m]ost nations [in the Indo-Pacific region] wish to see more United States leadership, not

⁶ Rory Medcalf, 'China's Economic Leverage: Perception and Reality', *National Security College* (Policy Option Paper, March 2017) <<https://nsc.crawford.anu.edu.au/publication/9971/chinas-economic-leverage-perception-and-reality>>.

⁷ See, eg, James Reilly, 'Chapter 22: Economic Statecraft' in David S.G. Goodman (ed), *Handbook of the Politics of China* (Edward Elgar Pub, 2016) 381 <<https://www.elgaronline.com/view/edcoll/9781782544364/9781782544364.00033.xml>>.

⁸ Javier C. Hernández, Owen Guo and Ryan Mcmorrow, 'South Korean Stores Feel China's Wrath as U.S. Missile System Is Deployed', *New York Times* (online at 9 March 2017) <<https://www.nytimes.com/2017/03/09/world/asia/china-lotte-thaad-south-korea.html>>.

⁹ Elena Collinson, 'Australia's Tilt on China', UTS *Australia-China Relations Institute* (Fact Sheet, 4 July 2017) <<https://www.australiachinarelations.org/content/australias-tilt-china>>.

¹⁰ Bill Birtles, 'South China Sea Decision a Hollow Victory for the Philippines', *ABC News* (online, 13 July 2016) <<https://www.abc.net.au/news/2016-07-13/south-china-sea-philippines-hollow-victory/7623460?nw=0>>.

¹¹ Julie Bishop, Minister for Foreign Affairs, 'Australia Supports Peaceful Dispute Resolution in the South China Sea' (Media Release, 12 July 2016) <<https://www.foreignminister.gov.au/minister/julie-bishop/media-release/australia-supports-peaceful-dispute-resolution-south-china-sea>>.

¹² Caitlyn Gribbin, 'Malcolm Turnbull Declares He Will 'Stand Up' for Australia in Response to China's Criticism', *ABC News* (online at 9 December 2017) <<https://www.abc.net.au/news/2017-12-09/malcolm-turnbull-says-he-will-stand-up-for-australia/9243274>>.

less, and have no desire to see powers other than the US, calling the shots”.¹³ Delivering an address in Singapore two months later, she also appeared to posit that because China was not a democracy it could not be trusted to resolve disagreements in accordance with international law and rules, nor was it likely to reach its economic potential.¹⁴

At the same time, the topic of foreign interference became a major political issue in Australia. Front and centre of this discourse were allegations that the Chinese government was the principal offender.¹⁵ When introducing new laws designed to address the challenge in December 2017, rather than cleaving to a country agnostic approach, then-Prime Minister Malcolm Turnbull told parliament, “[m]edia reports have suggested that the Chinese Communist Party has been working to covertly interfere with our media, our universities and even the decisions of elected representatives right here in this building. We take these reports very seriously”.¹⁶ Two days later at a media conference Turnbull spoke in Mandarin contending that the Australian people had “stood up”. This was a turn of phrase he attributed to Chinese leader Mao Zedong at the formation of the People’s Republic of China in 1949. In Mao’s case it had followed 100 years of foreign occupation and humiliation, including instances of mass murder inflicted on China’s population. China’s Foreign Ministry spokesperson remarked that it was “astounded by the relevant remarks of the Australian leader”.¹⁷

In the Australian government’s telling, the move to more assertive diplomatic posturing, as well as subsequent legislative and enforcement actions, were a necessary and proportionate response to China’s own behaviour. Richard Maude, a former Department of Foreign Affairs and Trade official and lead drafter of the government’s 2017 foreign policy white paper, later wrote that since Chinese president Xi Jinping had assumed office at the end of 2012 the country had become “more authoritarian, ideological and nationalist”. A consequence was that “[n]o Australian government can ignore the immense clash of interests and values that today’s China creates and the limits this inevitably puts on the relationship”.¹⁸

The above backdrop provided fertile ground for interpreting any and all trade disruptions as Chinese economic coercion directed at Australia. For example, when some Australian wine shipments faced delays at Chinese ports in May 2018, media reports cited anonymous industry

¹³ Julie Bishop, Minister for Foreign Affairs, ‘US – Australia Dialogue on Cooperation in the Indo-Pacific’ (Speech, 26 January 2017) <<https://www.foreignminister.gov.au/minister/julie-bishop/speech/us-australia-dialogue-cooperation-indo-pacific>>.

¹⁴ Julie Bishop, Minister for Foreign Affairs, ‘Change and Uncertainty in the Indo-Pacific: Strategic Challenges and Opportunities’ (Speech, International Institute for Strategic Studies, 13 March 2017) <<https://www.foreignminister.gov.au/minister/julie-bishop/speech/change-and-uncertainty-indo-pacific-strategic-challenges-and-opportunities>>.

¹⁵ Michael Clarke, Jennifer S. Hunt and Matthew Sussex, ‘Shaping the Post-Liberal Order from Within: China’s Influence and Interference Operations in Australia and the United States’ (2020) 64(2) *Orbis* 207 <<https://www.sciencedirect.com/science/article/abs/pii/S0030438720300077>>.

¹⁶ Commonwealth, Parliamentary Debates, House of Representatives, 7 July 2017 (Malcolm Turnbull, Prime Minister) <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/716f5e71-dee3-40a3-9385-653e048de81b/&sid=0193>.

¹⁷ Caitlyn Gribbin, ‘Malcolm Turnbull Declares He Will ‘Stand Up’ for Australia in Response to China’s Criticism’, *ABC News* (online at 9 December 2017) <<https://www.abc.net.au/news/2017-12-09/malcolm-turnbull-says-he-will-stand-up-for-australia/9243274>>.

¹⁸ Richard Maude, ‘Looking Ahead: Australia and China After the Pandemic’, *Asia Society Australia* (Web Page, 13 May 2020) <<https://asiasociety.org/australia/looking-ahead-australia-and-china-after-pandemic>>.

sources attributing the problem to “political tensions between the two countries”.¹⁹ Australia’s then-Trade Minister, Steve Ciobo, was more circumspect, describing the development as “not inconsistent with the sporadic nature of issues businesses have raised with me over the past three years and I would stress are not purely confined to China either”.²⁰ Similarly, when it was reported that Australian coal was having problems clearing a port in North-east China in February 2019, ASPI’s Jennings asserted, “[t]his is a deliberate shot across the bows ... It’s designed to keep Australia on edge about our decision concerning Chinese investment or its inclusion in our 5G network.”²¹ In contrast, Andrew Mackenzie, the chief executive of BHP assessed, “I don’t believe for one moment this is linked to some of the higher level issues of relationships between China and the rest of the world, and including with us.”²² Ciobo’s successor as Trade Minister, Simon Birmingham, also cautioned, “I know that there are commentators and analysts who love to try to jump to conclusions that are based upon conspiracy theories. But I think the facts demonstrate that those conclusions are frequently invalid and incorrect”.²³

While the Chinese government also insisted that such trade disruptions were not connected to political disagreements, some scholars noted that the existence of multiple interpretations was consistent with China wanting to maintain “plausible deniability” and avoid running afoul of international trade rules.²⁴ What is clear-cut, however, is that even if China was engaged in economic coercion, trade data confirms that prior to 2020 any disruptions of the goods allegedly being targeted were limited in scale and short-lived in duration.²⁵ At an aggregate level, it is also a fact that the value of Australia’s exports and imports to and from China continued to hit records highs in every year from 2015 to 2019 (Figure 1). Similarly, China’s share of Australia’s total exports and imports also increased (Figure 2).

This is not to say that political tensions were entirely without economic consequence. For example, one casualty was that negotiations to upgrade ChAFTA stalled with the most recent meeting of government officials held in November 2017.²⁶ The volume of Chinese investment to Australia also fell, although evidence from investor surveys suggested this was mostly connected with China imposing tighter capital controls that reduced outbound investment to all countries.²⁷

¹⁹ Michael Smith, ‘Political Tension Blamed on Treasury’s China Customs Headache’, *Australian Financial Review* (online at 17 May 2018) <<https://www.afr.com/companies/retail/political-tension-blamed-on-treasurys-china-customs-headache-20180517-h1068g>>.

²⁰ Ibid.

²¹ Kirsty Needham and Cole Latimer, ‘A big Chinese Port Bans Australian Coal and the Dollar Falls’, *The Sydney Morning Herald* (online at 21 February 2019) <<https://www.smh.com.au/world/asia/a-big-chinese-port-bans-australian-coal-and-the-dollar-falls-20190221-p50zfu.html>>.

²² Ibid.

²³ Interview with Simon Birmingham, Minister for Trade (David Speers, Sky News, 24 February 2019) <<https://www.trademinister.gov.au/minister/simon-birmingham/transcript/interview-sky-news-david-speers-0>>.

²⁴ Reilly (n 2).

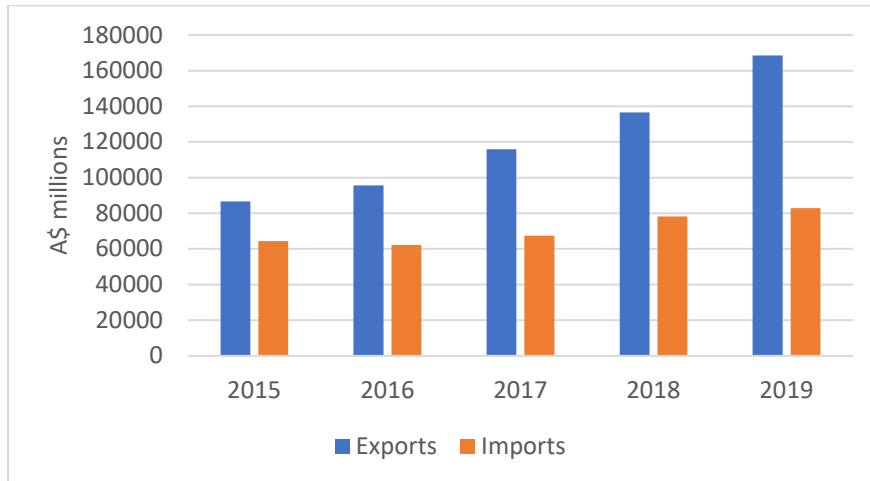
²⁵ James Laurenceson, Michael Zhou and Thomas Pantle, ‘Interrogating Chinese Economic Coercion: the Australian Experience Since 2017’ (2020) 16(4) *Security Challenges* <https://regionalsecurity.org.au/security_challenge/1992/>.

²⁶ ‘ChAFTA Joint Committee Meetings’, *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/agreements/in-force/chafta/news/implementation/Pages/chafta-joint-committee-meetings>>.

²⁷ Doug Ferguson et al, KPMG Australia and University of Sydney Business School, *Demystifying Chinese Investment in Australia* (Report, April 2019) 16, 30, 38

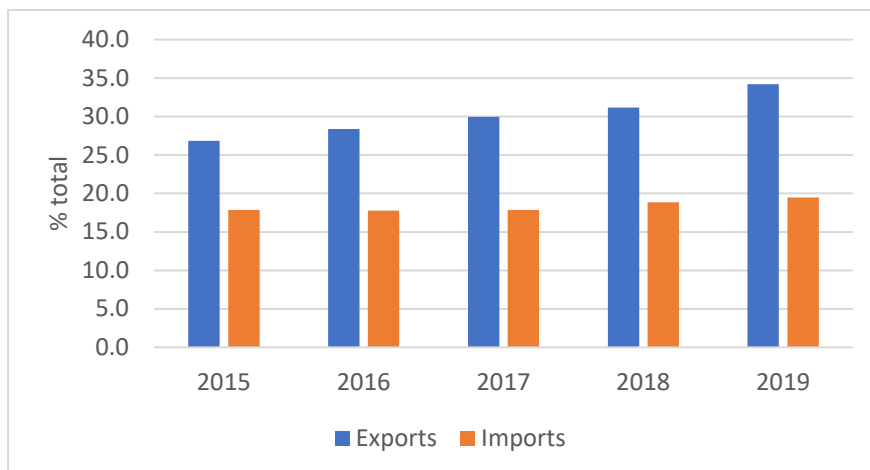
In contrast to the modest spill-overs to trade and investment, China’s displeasure in the diplomatic realm was plainly evident: an Australian Prime Minister has not been invited to China since Turnbull attended an Asia-Pacific Economic Cooperation meeting in Hangzhou in September 2016. Bishop did not visit in the last two and a half years of her tenure, which ended in August 2018, while the incumbent Foreign Minister, Marise Payne, has not set foot there since November 2018.

Figure 1. Australia’s trade with China (A\$)



Source – Department of Foreign Affairs and Trade²⁸

Figure 2. Australia trade with China (% total)



Source – Department of Foreign Affairs and Trade²⁹

<<https://assets.kpmg/content/dam/kpmg/au/pdf/2019/demystifying-chinese-investment-in-australia-april-2019.pdf>>.

²⁸ Australian Government, Department of Foreign Affairs and Trade, ‘Trade Time Series Data’ (Web Page) <<https://www.dfat.gov.au/trade/resources/trade-statistics/Pages/trade-time-series-data>>.

²⁹ Ibid.

2. Understanding Current Challenges

The ground shifted markedly in 2020. By the end of the year the Australian industries either hit or threatened with disruption by China included beef, barley, education, tourism, timber, cotton, coal, wine, lobster and sheep meat.³⁰ The political drivers of the sharp deterioration, the extent to which the Australian economy is affected and how Australia's deteriorating relations with China are similar to, or contrast with, the experience of other countries in the region are, however, poorly understood.

a. Drivers of deterioration: symptoms versus deeper frictions

Many Australian commentators³¹ were quick to attribute worsening relations in 2020 to discreet events, in particular Minister Payne's call on April 19 for an "independent review mechanism to examine the development of this [COVID-19] epidemic".³² Such attributions stemmed from the observation that one week later on April 26 the Chinese Ambassador in Canberra, Cheng Jingye, had raised in an interview the prospect that Chinese consumers might turn away from Australian goods and services.³³ On April 28, Minister Birmingham responded, "Australia is no more going to change our policy position on a major public health issue because of economic coercion, or threats of coercion, than we would change our policy position in matters of national security".³⁴ On May 11, China suspended imports from four Australian beef processors. On May 19, it then imposed anti-dumping tariffs on Australian barley exports.³⁵

Singling out Payne's call is, however, overly simplistic. For starters, it misses that this was bookended by diplomatically provocative interventions from the Minister for Home Affairs, Peter Dutton, and the Prime Minister, Scott Morrison. It also fails to recognise that China's sensitivity toward Australia's COVID-19 inquiry proposal reflected a deeper source of tension. Specifically, it confirmed in Beijing's mind a long-held suspicion that Canberra was strengthening its alignment with Washington to attack China.³⁶ As the virus spread rapidly throughout the US in March, and as his own administration's inept response became increasingly apparent, President Donald Trump had taken to labelling COVID-19 the "Chinese virus" and charging that China had tried to cover

³⁰ Elena Collinson and Thomas Pantle, 'Australia-PRC Trade and Investment Developments: A Timeline', *UTS Australia-China Relations Institute* (Factsheet, 28 January 2021)

<<https://www.australiachinarelations.org/content/australia-prc-trade-and-investment-developments-timeline>>.

³¹ Peter Hartcher, 'China Can't Bully Us into Submission: the PM has Australians' Backing', *The Sydney Morning Herald* (online at 15 May 2020) <<https://www.smh.com.au/politics/federal/china-can-t-bully-us-into-submission-the-pm-has-australians-backing-20200515-p54thb.html>>.

³² Interview with Marise Payne, Minister for Foreign Affairs and Minister for Women (David Speers, ABC Insiders, 19 April 2020) <<https://www.foreignminister.gov.au/minister/marise-payne/transcript/interview-david-speers-abc-insiders>>.

³³ He suggested, "people would think why we should go to such a country while it's not so friendly to China ... maybe the ordinary people will think why they should drink Australian wine or eat Australian beef?": 'Transcript of Chinese Ambassador Cheng Jingye's Interview with Australian Financial Review Political Correspondent Andrew Tillett', *Embassy Highlights/Media Release* (Interview Transcript, 27 April 2020) <http://au.china-embassy.org/eng/sghdxwfb_1/t1773741.htm>.

³⁴ Interview with Simon Birmingham, Minister for Trade, Tourism and Investment and Minister for Finance (Sabra Lane, ABC Radio Canberra AM, 28 April 2020) <<https://www.trademinister.gov.au/minister/simon-birmingham/transcript/interview-abc-radio-canberra-am-sabra-lane-2>>.

³⁵ These measures are discussed in detail in Section III.

³⁶ James Laurenceson, 'No Wonder China is Confused by Us', *Australian Financial Review* (online at 25 November 2020) <<https://www.afr.com/world/asia/no-wonder-china-is-confused-by-us-20201124-p56hlq>>.

up its origins.³⁷ On April 17, and freshly returned from a visit to the US, Dutton declined to acknowledge the shortcomings of the Trump administration's pandemic handling. Instead, he endorsed the view that there would be a "reset in the way the world interacts with China".³⁸ On April 21, Morrison appeared to support empowering the World Health Organization with the ability to enter a country and undertake investigations put by his interlocutor as being akin to "weapons inspectors".³⁹ The same day he tweeted of having spoken to Trump "about the World Health Organisation and working together to improve the transparency ... Australia and the US are the best of mates and we'll continue to align our efforts".⁴⁰ For China, this chain of events constituted a betrayal of a promise made in 1996 by then-Prime Minister John Howard to his Chinese counterpart, Jiang Zemin. To reset relations following an earlier period of bilateral tensions, Howard had assured Jiang that "the alliance between Australia and the United States was ... not in any way directed at China".⁴¹

Earlier episodes meant that China was already predisposed to forming the view that Canberra was in cahoots with Washington, with the manner in which the Australian government had blocked Chinese companies, Huawei and ZTE, from participating in the country's 5G rollout in August 2018 being a particularly prominent example.⁴²

Another deeper irritant from China's perspective are measures used by the Australian government to restrict Chinese imports and inbound investment. The Productivity Commission noted in a 2016 report that anti-dumping tariffs imposed following complaints by Australian industry had risen with goods originating from China emerging as the chief target.⁴³ When China announced in November 2018 that it would begin an anti-dumping investigation against Australian barley, it was, in fact, the first Chinese anti-dumping action against Australia.⁴⁴ When China's Ministry of Commerce ('MOFCOM') concluded in May 2020 that dumping had occurred and imposed tariffs in response, this led some Australian analysts to judge the most proximate explanation was retaliation against Australia's trade policies rather than coercion spurred by political disagreements.⁴⁵ Minister Birmingham rejected these justifications, insisting that such trade

³⁷ Jérôme Viala-Gaufrey and Dana Lindaman, 'Donald Trump's 'Chinese Virus': the Politics of Naming', *the Conversation* (online at 22 April 2020) <<https://theconversation.com/donald-trumps-chinese-virus-the-politics-of-naming-136796>>.

³⁸ Peter Dutton, 'Today Show 17/4/2020' (Facebook, 17 April 2020) <<https://www.facebook.com/watch/?v=661032857793652>>.

³⁹ Interview with Scott Morrison, Prime Minister (Paul Murray, Sky News, 22 April 2020) <<https://www.pm.gov.au/media/interview-paul-murray-sky-news-2>>.

⁴⁰ @ScottMorrisonMP (Scott Morrison) (Twitter, 22 April 2020, 12:29pm AEST) <<https://twitter.com/scottmorrisonmp/status/1252785725549842432?lang=en>>.

⁴¹ See generally John Howard, *Lazarus Rising: A Personal and Political Autobiography* (HarperCollins, 2011) <<https://www.harpercollins.com.au/9780730499640/lazarus-rising/>>.

⁴² Bob Carr, 'Real Diplomacy Could Have Avoided China's Coal Revenge', *Australian Financial Review* (online at 3 April 2019) <<https://www.afr.com/policy/foreign-affairs/real-diplomacy-could-have-avoided-china-s-coal-revenge-20190403-p51abe>>.

⁴³ Australian Government, Productivity Commission, 'Developments in Anti-Dumping Arrangements' (Research Paper, February 2016) <<https://www.pc.gov.au/research/completed/antidumping-developments/anti-dumping-research-paper.pdf>>.

⁴⁴ Weihuan Zhou, 'Barley is Not a Random Choice – Here's the Real Reason China is Taking on Australia Over Dumping', *the Conversation* (Article, 23 November 2018) <<https://theconversation.com/barley-is-not-a-random-choice-heres-the-real-reason-china-is-taking-on-australia-over-dumping-107271>>. Anti-dumping has been a major legal concern in the bilateral relationship, as will be further discussed in Section III.

⁴⁵ Jessica Irvine, 'Carefully Laid Trap? Why is China Imposing Tariffs on Out Barley (and What's a Tariff)?', *The Sydney Morning Herald* (online at 20 May 2020) <<https://www.smh.com.au/national/carefully-laid-trap-why-is->

measures were “not something that should be done on a scorecard basis” and that if it wished China was “free to challenge Australia’s decision, through the World Trade Organization appeals processes”.⁴⁶

Since 2016, China has also seen its investment access to Australia curtailed. Initially, this was in sectors more sensitive to national security concerns such as critical infrastructure,⁴⁷ but in 2020 it extended to deals involving minerals exploration,⁴⁸ food and beverage manufacturing⁴⁹ and construction.⁵⁰ For China this turn represented an abrogation by Australia of the basic negotiating premise that had allowed for ChAFTA’s completion: China would lower its tariffs on goods imported from Australia, while Australia would bring Chinese investors into line with the way those from the US, Japan and other major sources of foreign capital were treated.⁵¹

b. Economic consequences: perceptions and propaganda versus reality

According to the latest edition of the Lowy Poll, 94% of the Australian public want the government to find other markets to reduce economic dependence on China.⁵² This aligns with considerable elite opinion, cited earlier, that Australia’s large trade relationship with China has made the economy excessively vulnerable to Chinese economic coercion. Chinese state-controlled media has chimed in too, warning that Australia’s political choices might lead to its economy paying an “unbearable price”.⁵³

Yet for all of the growing evidence of political and other tensions spilling over to harm trade since the beginning of last year, the reality is that, at least at an aggregate level, the Australia-China trade relationship continues to exhibit resilience. In 2020, Australia’s total goods exports to China reached \$A145.2 billion. This was just 2% lower than the record high set a year earlier.⁵⁴ In

china-imposing-tariffs-on-our-barley-and-what-s-a-tariff-20200519-p54uf7.html>; Angus Grigg, ‘Australia Not Blameless in China Trade War’, *Australian Financial Review* (online at 12 May 2020) <<https://www.afr.com/companies/agriculture/australia-is-not-blameless-in-china-trade-war-20200512-p54sax>>.

⁴⁶ Interview with Simon Birmingham, Minister for Trade, Tourism and Investment (David Bevan, ABC Radio Adelaide, Mornings with David Bevan, 29 May 2020) <<https://www.trademinister.gov.au/minister/simon-birmingham/transcript/interview-abc-radio-adelaide-mornings-david-bevan-5>>.

⁴⁷ See, eg, John Kehoe, ‘Spies Muscle in on Foreign Takeover Deals’, *Australian Financial Review* (online at 21 October 2019) <<https://www.afr.com/policy/economy/spies-muscle-in-on-foreign-takeover-deals-20191021-p532pd>>.

⁴⁸ See, eg, Brad Thompson, ‘China Group Blames Australia for Barring Stake in African Lithium Mine’, *Australian Financial Review* (online at 27 April 2020) <<https://www.afr.com/companies/mining/china-group-blames-australia-for-barring-stake-in-african-lithium-mine-20200426-p54n8h>>.

⁴⁹ See, eg, John Kehoe, ‘Frydenberg Snubs China Dairy Deal’, *Australian Financial Review* (online at 20 August 2020) <<https://www.afr.com/policy/economy/frydenberg-snubs-china-mengnui-s-600m-dairy-deal-for-lion-20200819-p55n59>>.

⁵⁰ See, eg, ‘UPDATE 1-Australia blocks Chinese buyout of builder over security concerns -media’, *Reuters* (online at 12 January 2021) <<https://www.reuters.com/article/australia-investment-law-idUSL1N2JN07C>>.

⁵¹ David Uren, ‘Why China Thinks It’s been Dudded on Free Trade Deal’, *Australian Financial Review* (online at 16 July 2020) <<https://www.afr.com/policy/foreign-affairs/why-china-thinks-it-s-been-dudded-on-free-trade-deal-20200611-p551hu>>.

⁵² Lowy Institute, ‘Question: Would you Support or Oppose the Following Australian Government Policies Towards China?’, *Lowy Institute Poll 2020* (Poll on Web Page) <<https://poll.lowyinstitute.org/charts/australian-government-policies-towards-china>>.

⁵³ ‘Australia Nervous at Losing Chinese Market’, *Global Times* (online at 4 November 2020) <<https://www.globaltimes.cn/content/1205750.shtml>>.

⁵⁴ See Australian Bureau of Statistics, ‘International Merchandise Trade, Preliminary, Australia’ (Web Page, 25 January 2021) <<https://www.abs.gov.au/statistics/economy/international-trade/international-merchandise-trade-preliminary-australia/dec-2020>>.

comparison, goods exports to all other countries fell by 10%, causing China's share of Australia's total goods exports to reach its highest ever level of 40.0%.

Driving these overall figures was China's unwillingness, or inability, to wean itself off Australian iron ore and other big-ticket trade items like liquefied natural gas. The story at an industry level is more mixed. On the one hand, Australian producers of some of the affected goods like barley,⁵⁵ beef⁵⁶ and coal⁵⁷, on the whole, have been successful in finding alternative buyers, thus limiting the negative impact. In contrast, the fallout suffered by others such as lobster⁵⁸ and wine⁵⁹ have been more pronounced.

In the case of services such as tourism and education, Australia's exports to China fell significantly but this was in common to all countries and the most proximate cause was border closures due to COVID-19, not political disputes. For example, in the year to November 2020, China's share of international students commencing at Australian universities actually rose by five percentage points from a year earlier to reach a record high of 41.8%.⁶⁰

Australia's goods imports from China also hit record highs both in terms of value (A\$84.4 billion) and as a proportion of the total (28.8%).⁶¹

On the investment front, less resilience was apparent with the flow of Chinese investment into Australia falling to its lowest level in 10 years.⁶² This might appear alarming with a recent opinion poll by the US Studies Centre finding that 71% of Australians believed China to be the country's largest source of foreign investment.⁶³ Yet offsetting fears of the Australian economy suffering a capital shortage are multiple data sources that confirm China's importance as an investment source is, in fact, marginal. For example, the latest estimates from the Australian Bureau of Statistics are

⁵⁵ Shannon Beattle, 'Australia Wins with Saudi Barley Tender', *Farm Weekly* (online at 20 November 2020) <<https://www.farmweekly.com.au/story/7018167/australia-wins-with-saudi-barley-tender/>>.

⁵⁶ Shan Goodwin, 'Japan a Solid Rock for Aussie Beef Exports', *FarmOnline National* (online at 3 August 2020) <<https://www.farmonline.com.au/story/6860912/japan-a-solid-rock-for-aussie-beef-exports/>>.

⁵⁷ Ben Millington, 'Coal Exports From Port of Newcastle Strong Despite China's Ban on Australian Coal', *ABC News* (online at 15 January 2021) <<https://www.abc.net.au/news/2021-01-15/newcastle-coal-exports-continue-to-new-markets-amid-china-ban/13060130>>.

⁵⁸ 'Lobster Industry in Crisis as Chinese Export Ban Claws at Profits', *The Australian* (Video on Web Page, 8 February 2021) <<https://www.theaustralian.com.au/news/lobster-industry-in-crisis-as-chinese-export-ban-claws-at-profits/video/023d6233c94bb42b8d807841bf9a2782>>.

⁵⁹ Nikolai Beilharz and Alex Treloar, 'Red Wine Prices Tipped to Plummet as Experts to China Trickle to a Halt', *ABC News* (online at 3 February 2021) <<https://www.abc.net.au/news/rural/2021-02-03/red-wine-prices-tipped-to-plummet-as-exports-to-china-dry-up/13111782>>.

⁶⁰ Australian Government Department of Education, Skills and Employment, 'International Student Data' (Web Page) <<https://internationaleducation.gov.au/research/international-student-data/Pages/default.aspx>>.

⁶¹ Australian Bureau of Statistics, 'International Merchandise Trade, Preliminary Australia' (Web Page, 25 January 2021) <<https://www.abs.gov.au/statistics/economy/international-trade/international-merchandise-trade-preliminary-australia/dec-2020>>.

⁶² Jennifer Duke, 'Chinese Investment in Australia Lowest in 10 Years, Super Funds Urged to Spend', *The Sydney Morning Herald* (online at 9 June 2020) <<https://www.smh.com.au/politics/federal/chinese-investment-in-australia-lowest-in-10-years-super-funds-urged-to-spend-20200608-p550em.html>>.

⁶³ David Uren, 'Enduring Partners: the US-Australia Investment Relationship', *United States Studies Centre* (Online Report, 16 July 2020) <<https://www.ussc.edu.au/analysis/enduring-partners-the-us-australia-investment-relationship>>.

that China only accounts for 2% of total stock of foreign investment in Australia. This compares with the leading source of foreign investment, the US, which holds a 26% share.⁶⁴

c. Australia's relations with China in a regional context: an outlier or just one in a crowd?

Despite Australia's relations with China plumbing new lows in 2020, some Australian commentators have argued that "Australia has never been less alone".⁶⁵ Comfort is drawn from a number of other countries – some from Australia's region (e.g., India and Japan), some outside it (e.g., Canada and the United Kingdom) – also facing growing challenges in managing ties with China.⁶⁶ What this analysis misses, however, is that Australia remains an outlier in at least two significant respects.

First, no other country has experienced anything near the same degree of economic disruption. In 2019, some analysts pointed to China blocking shipments of canola products from Canada as an example of probable economic coercion following Ottawa's decision to act on a US request and detain an executive from Chinese company, Huawei.⁶⁷ Targeting canola was consistent with the narrow scope of previous instances of suspected Chinese economic coercion such as the blocking of bananas from the Philippines in 2012⁶⁸ and salmon from Norway in 2010.⁶⁹ In contrast, the range of Australian industries affected is unprecedented. While the aggregate impact of Chinese economic coercion directed at Australia should not be exaggerated, this is cold comfort for the many small and medium-sized enterprises in those sectors that have been hard hit. Despite some optimistic pronouncements that an "economic alliance" might form and come to Australia's aid, incentives and practicalities work against the proposition. At a most basic level, while Australia and countries like the US might be strategic friends, in the world of international commerce their producers can be the fiercest rivals.⁷⁰ To date, support for Australia from the US, as well as other close strategic partners like Japan, has been limited to rhetoric, while capitals throughout South-east Asia have remained silent.⁷¹

⁶⁴ 'International Investment Position, Australia: Supplementary Statistics', *Australian Bureau of Statistics* (Web Page, 7 May 2020) <<https://www.abs.gov.au/statistics/economy/international-trade/international-investment-position-australia-supplementary-statistics/latest-release#data-download>>.

⁶⁵ Rory Medcalf, 'Five Dangerous Myths in Australia's Relations with China', *Australian Financial Review* (online at 11 September 2020) <<https://www.afr.com/world/asia/five-dangerous-myths-in-australia-s-relations-with-china-20200911-p55umy>>.

⁶⁶ Ibid.

⁶⁷ David Ljunggren, 'Canada Says Third Canola Exporter Has Run into Trouble in China', *Reuters* (online at 3 April 2019) <<https://www.reuters.com/article/us-canada-trade-china-canola/canada-says-third-canola-exporter-has-run-into-trouble-in-china-idUSKCN1RE1QC>>.

⁶⁸ Kesha West, 'Banana Crisis Blamed on Philippines-China Dispute', *ABC News* (online at 29 June 2012) <<https://www.abc.net.au/news/2012-06-29/an-banana-exporters-caught-in-philippines-china-dispute/4100422>>.

⁶⁹ Richard Milne, 'Norway Sees Liu Xiaobo's Nobel Prize Hurt Salmon Exports to China', *Financial Times* (online at 16 August 2013) <<https://www.ft.com/content/ab456776-05b0-11e3-8ed5-00144feab7de>>.

⁷⁰ James Laurenceson, 'No quick fix from Biden for Australia's trade woes', *East Asia Forum* (online at 16 February 2021) <<https://www.eastasiaforum.org/2021/02/16/no-quick-fix-from-biden-for-australias-china-trade-woes/>>.

⁷¹ Amanda Hodge, 'China's Aggression Scares Region into Silence', *The Australian* (online at 3 December 2020) <<https://www.theaustralian.com.au/nation/politics/chinas-aggression-scares-region-into-silence/news-story/16edf142e48d7a95653bdf92759c5f39>>.

Second, nearly all of these other countries continue to have dialogue with China at the leader and ministerial level, allowing them to press their interests.⁷² For the US, this meant being able to secure a bilateral trade deal with China in January 2020.⁷³ For the European Union ('EU'), it meant signing a bilateral investment agreement in January 2021.⁷⁴ The same month New Zealand struck an upgrade of its free trade agreement with China.⁷⁵ In contrast, the last time Prime Minister Morrison spoke directly to the Chinese leadership was with Premier Li Keqiang in November 2019 on the sidelines of the East Asia Summit in Thailand.⁷⁶ In May 2020, Minister Birmingham, along with Agriculture Minister, David Littleproud, also conceded that attempts to contact their Chinese counterparts had been unsuccessful.⁷⁷

In summary, a comprehensive survey of developments in the Australia-China political and economic space serves to clarify several misunderstandings. It highlights that the scope for an Australia-China rapprochement is further reduced as long as political frictions are attributed to symptoms rather than deeper drivers. However, even without an improved political trajectory, the vulnerability of the Australian economy should not be overstated. Big-ticket items in the trading relationship continue to flow as before, and China's importance as a source of investment capital for Australia remains marginal. This is, of course, little consolation to those sectors that have been unable to easily pivot to alternative markets that offer comparable profit margins. It is also the case that the current state of Australia's relationship with China is an outlier in the region.

III. Demystifying the Legal Challenges

China has taken a series of actions against Australia's exports in the current tensions. From a legal perspective, a major, ongoing debate concerns whether these actions have breached China's international obligations under the WTO and the ChAFTA, and if there is a potential breach, whether it is advisable for Australia to challenge these actions under the WTO or the ChAFTA. This section contributes to this debate by expounding the relevant WTO and ChAFTA rules, their applicability to the Chinese actions, and the prospects of achieving a positive outcome/solution through dispute settlement under the WTO and the ChAFTA.

⁷² Michael Roddan, 'Former Public Service Chief Blasts Australia's China Strategy', *Australian Financial Review* (online at 10 February 2021) <<https://www.afr.com/politics/federal/former-public-service-chief-blasts-australia-s-china-strategy-20210210-p5717z>>.

⁷³ Office of the United States Trade Representative, 'Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China Text' (Web Page) <<https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text>>.

⁷⁴ 'EU – China Comprehensive Agreement on Investment (CAI): List of Sections', *European Commission* (News, 22 January 2021) <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237>>.

⁷⁵ New Zealand Foreign Affairs and Trade, 'NZ-China Free Trade Agreement Upgrade' (Web Page) <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/nz-china-free-trade-agreement-upgrade/>>.

⁷⁶ Matthew Doran, 'Scott Morrison meets Chinese Premier as Australia hopes to emerge from diplomatic freezer', *ABC News* (online at 4 November 2019) <<https://www.abc.net.au/news/2019-11-04/scott-morrison-meets-with-chinese-premier-li-keqiang/11667990>>.

⁷⁷ Bill Birtles et al, 'China Denies Australian Minister's Request to Talk About Barley Amid Coronavirus Investigation Tension', *ABC News* (online at 18 May 2020) <<https://www.abc.net.au/news/2020-05-18/coronavirus-trade-troubles-david-littleproud-china-call/12258274>>.

1. Anti-Dumping on Barley and Wine

It is widely observed that a major Chinese sanction has been two consecutive anti-dumping actions, one on Australia's barley exports commencing on 19 November 2018⁷⁸ (hereinafter 'Barley Investigation') resulting in a final decision to impose a duty of 73.6% on 18 May 2020 (hereinafter 'Barley Tariff'),⁷⁹ and the other on Australia's wine exports on 18 August 2020⁸⁰ (hereinafter 'Wine Investigation') leading to a preliminary determination to impose an anti-dumping duty from 107.1% to 212.1% on 10 December 2020 (hereinafter 'Wine Tariff').⁸¹ While the two actions may well have a bearing on the bilateral tensions, it is important to understand that anti-dumping has been a longstanding issue in the Australia-China relations. Moreover, although anti-dumping actions are subject to WTO rules, whether such actions are WTO-illegal is often difficult to ascertain without a detailed legal assessment.

As noted earlier, China had never used anti-dumping against Australia until the Barley and Wine Investigations. In contrast, Australia has frequently imposed anti-dumping measures, typically in the form of import customs duties, on Chinese goods. Between 2005-2015, one third of Australia's anti-dumping measures were applied to China.⁸² At the time of writing, China is subject to more

⁷⁸ 《关于对原产于澳大利亚的进口大麦进行反倾销立案调查的公告》 [Notice of Ministry of Commerce on the Initiation of an Anti-Dumping Investigation into Barley Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 89, 19 November 2018 <<http://gpj.mofcom.gov.cn/article/cs/201811/20181102807700.shtml>>. China also initiated a concurrent countervailing investigation on Australia's barley. However, as the final countervailing duty was much less significant than the anti-dumping duty, we focus on the anti-dumping action: 《关于对原产于澳大利亚的进口大麦进行反补贴立案调查的公告》 [Notice of Ministry of Commerce on the Initiation of A Countervailing Investigation into Barley Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 99, 21 December 2018 <www.mofcom.gov.cn/article/b/c/201812/20181202818864.shtml>.

⁷⁹ 《关于原产于澳大利亚的进口大麦反倾销调查最终裁定的公告》 [Notice of Ministry of Commerce on the Final Determination of An Anti-Dumping Investigation into Barley Exported from Australia] (People's Republic of China) Ministry of Commerce [hereinafter 'Barley Final Determination'], Notice No 14, 18 May 2020 <<http://trb.mofcom.gov.cn/article/cs/202005/20200502965862.shtml>>. China also decided to impose a countervailing duty of 6.9%: 《关于原产于澳大利亚的进口大麦反补贴调查最终裁定的公告》 [Notice of Ministry of Commerce on the Final Determination of a Countervailing Investigation into Barley Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 15, 18 May 2020 <<http://trb.mofcom.gov.cn/article/cs/202005/20200502965863.shtml>>.

⁸⁰ 《关于对原产于澳大利亚的进口相关葡萄酒进行反倾销立案调查的公告》 [Notice of Ministry of Commerce on the Initiation of An Anti-Dumping Investigation into Wine Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 34, 18 August 2020 <www.mofcom.gov.cn/article/b/e/202008/20200802993244.shtml>. Like the barley investigation, China also initiated a concurrent countervailing investigation. Due to the potentially low countervailing rate, our discussion will focus on the anti-dumping action. See 《关于对原产于澳大利亚的进口相关葡萄酒进行反补贴立案调查的公告》 [Notice of Ministry of Commerce on the Initiation of a Countervailing Investigation into Wine Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 35, 31 August 2020 <<http://www.mofcom.gov.cn/article/b/c/202008/20200802996981.shtml>>.

⁸¹ 《关于对原产于澳大利亚的进口相关葡萄酒反倾销调查初步裁定的公告 (第 59 号)》 [Notice of Ministry of Commerce on the Preliminary Determination of An Anti-Dumping Investigation into Wine Exported from Australia] (People's Republic of China) Ministry of Commerce [hereinafter 'Wine Preliminary Determination'], Notice No 59, 27 November 2020 <www.mofcom.gov.cn/article/b/e/202011/20201103018689.shtml>. The preliminary countervailing duty rates are 6.3% and 6.4%. See 《关于对原产于澳大利亚的进口相关葡萄酒反补贴调查初步裁定的公告 (第 58 号)》 [Notice of Ministry of Commerce on the Preliminary Determination of a Countervailing Investigation into Wine Exported from Australia] (People's Republic of China) Ministry of Commerce, Notice No 58, 10 December 2020 <www.mofcom.gov.cn/article/b/e/202012/20201203021646.shtml>.

⁸² Australian Government, Productivity Commission (n 43).

than half of Australia's ongoing anti-dumping investigations or reviews⁸³ and two thirds of Australia's current anti-dumping measures.⁸⁴

The WTO rules on anti-dumping do not prohibit dumping or require WTO Members to have an anti-dumping regime. Instead, the WTO merely allows the flexibility for Member states to use anti-dumping to counteract the injurious effects of dumping provided that such actions are taken pursuant to the substantive and procedural rules codified in the WTO Anti-Dumping Agreement ('AD Agreement').⁸⁵ By definition, dumping is essentially an international price discrimination whereby individual firms sell identical or 'like' goods in an overseas market at a price (i.e. export price) lower than the price at which the goods are sold in the domestic market of the exporting country (i.e. normal value).⁸⁶ To apply an anti-dumping measure, investigating authorities must also establish that dumping has caused a material injury to the relevant domestic industries.⁸⁷ Both China and Australia maintain an anti-dumping regime that is largely based on WTO anti-dumping rules.⁸⁸ The ChAFTA also incorporates WTO anti-dumping rules without any changes.⁸⁹

While anti-dumping may not have a solid economic justification, it has been commonly regarded as a necessary political tool to protect domestic industries from 'unfair' competition from lower priced imports.⁹⁰ Thus, like many other major users of anti-dumping, Australia has progressively strengthened its anti-dumping regime through several rounds of reforms despite the Productivity Commission's recommendation that anti-dumping measures tend to harm, rather than benefit, Australia's economy as a whole.⁹¹ Australia's anti-dumping actions against China have generated a range of issues relating to the determination of dumping, injury and causation.⁹² The most significant one, which is our focus below, concerns Australia's approach to treating China as a non-market economy ('NME'). This approach is partly responsible for the bilateral tensions and China's reaction in the Barley and Wine Investigations.

Recall that the determination of dumping depends on the extent to which the normal value of the subject goods exceeds their export prices. Under Article 2.2 of the AD Agreement, a normal value is generally determined by reference to the domestic price of the goods in the country of

⁸³ Australian Government, Department of Industry, Science, Energy and Resources, 'Anti-Dumping Commission Current Cases and the Electronic Public Record' (Web Page) <www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-current-cases>.

⁸⁴ Australian Government, Department of Industry, Science, Energy and Resources, 'Anti-Dumping Commission Measures – Dumping Commodity Register' (Web Page) <www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-measures>.

⁸⁵ Agreement on the Implementation of Article VI of GATT 1994, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1868 U.N.T.S. 201. See also Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R (adopted 26 October 2016) para 6.25.

⁸⁶ *Ibid.*, AD Agreement, art 2.1.

⁸⁷ *Ibid.*, AD Agreement, arts 3.1–3.5, 5.2.

⁸⁸ Australia's anti-dumping legislation can be found at <www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system>; China's anti-dumping legislation can be found at <<https://enforcement.trade.gov/trcs/downloads/documents/china/index.html>> (note that some of the legislations have been subsequently amended).

⁸⁹ ChAFTA (n 1), art 7.9.1, ch 7 Trade Remedies.

⁹⁰ For a review of the literature on dumping and anti-dumping, see WTO, *World Trade Report 2009: Trade Policy Commitments and Contingency Measures* (Report, 2009) 65-84 <www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf>.

⁹¹ See generally Australian Government, Productivity Commission (n 43).

⁹² See generally Weihuan Zhou, 'Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China' (2015)49(6) *Journal of World Trade* 975.

exportation unless one of the prescribed circumstances exists. To join the WTO, China however agreed to a special rule set out in Section 15 of the Protocol on the Accession of China to the WTO⁹³ ('Accession Protocol'). This rule allows WTO Members to rely on an assumption, in anti-dumping investigations, that China is an NME and therefore that Chinese domestic prices or costs are artificially lowered and cannot be used for the purpose of determining normal values. This assumption would then enable the application of prices or costs in a market economy third country, which are typically higher, to determine normal values. Many WTO Members have resorted to this special rule to impose inflated and heavy anti-dumping duties against China.⁹⁴

As a pre-condition for the ChAFTA negotiations, Australia agreed to confer China the so-called 'market economy status' in 2005.⁹⁵ This conferral effectively constrained Australia's capacity to rely on the NME assumption contemplated in Section 15 of China's Accession Protocol. To accommodate domestic protectionist interests, Australia affirmed that this conferral would not "impact adversely on Australia's capacity to prove that Chinese imports have been dumped".⁹⁶ This indicated that the recognition of China as a market economy was not intended to make it harder for Australian industries to seek protection through anti-dumping measures. To achieve this objective, Australia took a creative approach. Instead of using the China-specific rule, Australia used one of the circumstances envisaged under Article 2.2 of the AD Agreement, finding that a 'particular market situation' ('PMS') exists in a variety of Chinese sectors in almost all anti-dumping investigations over the past decade. This approach has served as a convenient substitute for the NME assumption, providing the flexibility for Australian authorities to achieve the same outcomes, that is, using external benchmarks to calculate normal values and consequently increase the chances of finding positive and larger dumping margins.⁹⁷

China has consistently and vigorously challenged Australia's PMS approach and findings both within the relevant investigations⁹⁸ and through diplomatic channels including "the regular holding of a High Level Dialogue on Trade Remedies" as envisaged under the ChAFTA.⁹⁹ However, for

⁹³ *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001). There has been a rigorous debate about whether this special rule expired after fifteen years of China's accession to the WTO, that is, 11 December 2016, according to Section 15(d). This issue led to a WTO dispute between China and the European Union commencing on 12 December 2016, which was however suspended by China on 14 June 2019. As China did not request the WTO panel to resume its work within the maximum time of suspension (i.e. 12 months), this dispute effectively remains unresolved. See WTO, *European Union – Measures Related to Price Comparison Methodologies*, Lapse of Authority for the Establishment of the Panel, WT/DS516/14 (15 June 2020). For a discussion of this dispute, see Weihuan Zhou and Delei Peng, 'EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol', (2018)52(3) *Journal of World Trade* 505.

⁹⁴ See generally James Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Singapore: Springer, 2018).

⁹⁵ Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People's Republic of China, agreed on 18 April 2005.

⁹⁶ Parliament of Australia, Foreign Affairs, Defence and Trade References Committee, 'Chapter 11 – The Proposed Australia-China Free Trade Agreement', *Opportunities and Challenges: Australia's Relationship with China* (Web Page, 10 November 2005) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/2004-07/china_report01/index>.

⁹⁷ See Zhou (n 92), 980-90.

⁹⁸ Ibid.

⁹⁹ ChAFTA (n 1), art 7.9.2, Chapter 7 Trade Remedies.

undisclosed reasons, China has never resorted to WTO proceedings. One possible reason is that China chose to focus on tackling anti-dumping actions by the US and the EU, which have generally led to much higher duties compared with Australia's anti-dumping duties. Another reason may be that China was uncertain about whether it could win because the PMS approach has never been considered by WTO tribunals until a recent dispute brought by Indonesia against Australia's anti-dumping investigation on A4 copy paper.¹⁰⁰ China could not afford a failure and the reputation cost associated with it.

After years of unsuccessful efforts to push Australia to change practice, China initiated its first anti-dumping action against Australia, that is, the Barley Investigation. While the initiation of this investigation in 2018 had nothing to do with the more recent events that provoked the bilateral tensions, the fact that the final decision was made immediately after Australia's call for an international probe into the origin of COVID-19 suggests a connection between the levy of the Barley Tariff and Australia's deteriorating political relationship with China, exemplified by Canberra's position on the pandemic. Nevertheless, one needs to recognise that anti-dumping is a popular policy tool used by many WTO Members for protectionist and other purposes including retaliation.¹⁰¹

The Barley and Wine Investigations have triggered many legal issues including China's approach to determining the existence of dumping particularly the findings of significant dumping margins, and the existence of a material injury caused by dumping to the domestic industries. On 16 December 2020, Australia initiated WTO proceedings against the Barley Tariff, challenging China's failure to comply with a range of WTO substantive and procedural requirements.¹⁰² Similar challenges may well be raised against the Wine Tariff.

The most interesting and controversial issue concerns China's approach to determining normal values. It is interesting because MOFCOM has yet to employ the PMS approach in retaliation for Australia's frequent use of this approach against China. In both investigations, the Chinese industry applicants requested for a finding that the Australian barley or wine market has a PMS so that Australia's domestic barley or wine prices are unsuitable for use to determine normal values.¹⁰³ In the Barley Investigation, MOFCOM did not set out its consideration of the relevant claims and

¹⁰⁰ For the final report of Australia's Anti-Dumping Commission, see Anti-Dumping Commission, *Alleged Dumping of A4 Copy Paper Exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand, and Alleged Subsidisation of A4 Copy Paper Exported from the People's Republic of China and the Republic of Indonesia*, Report No 341 (March 17, 2017). The public record of the investigation is available at <www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/epr-341>. For the WTO Panel decision, see Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R (adopted 27 January 2020). For a discussion of this decision, see Weihuan Zhou and Delei Peng, 'Australia – Anti-Dumping Measures on A4 Copy Paper' (2021)115(1) *American Journal of International Law* 94.

¹⁰¹ For an analysis of the possible reasons behind China's anti-dumping actions, see generally Weihuan Zhou and Shu Zhang, 'Anti-Dumping and China's Implementation of WTO Rulings' (2017)230 *China Quarterly* 512.

¹⁰² WTO, *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, Request for Consultations by Australia, WT/DS598/1, G/L1382, G/ADP/D135/1, G/SCM/D130/1 (21 December 2020).

¹⁰³ 《中华人民共和国大麦产业反倾销调查申请书》 [Application for an Anti-Dumping Investigation into Barley Exported from Australia] China Chamber of International Commerce, 9 October 2018 <<http://images.mofcom.gov.cn/trb/201811/20181119081757833.pdf>>; 《中华人民共和国葡萄酒产业反倾销调查申请书》 [Application for an Anti-Dumping Investigation into Wine Exported from Australia] China Alcoholic Drinks Association, 6 July 2020, <<http://images.mofcom.gov.cn/trb/202008/20200818082654381.pdf>>.

decided not to make a finding on whether a PMS existed in Australia's barley industry.¹⁰⁴ In the Wine Investigation, MOFCOM did conduct a preliminary assessment of the claims and evidence advanced by China Alcoholic Drinks Association but decided not to make a finding yet and to further investigate this issue.¹⁰⁵ Given China's longstanding concerns about Australia's anti-dumping practices, it would likely be a matter of time before MOFCOM formally treats Australia as having a PMS.¹⁰⁶ Indeed, in another recent investigation, MOFCOM found that a PMS existed in the US energy and petrochemical sector,¹⁰⁷ apparently in retaliation for the US's constant treatment of China as an NME in anti-dumping actions.

Instead of employing the PMS approach, MOFCOM used the so-called "best information available" method for the calculation of normal values. MOFCOM sought to justify this method on the ground that Australian barley/wine producers and exporters failed to provide sufficient information on domestic sales and cost of production as requested.¹⁰⁸ This method, which has been adopted by many countries including Australia, typically results in (much) higher normal values.¹⁰⁹ Through this method, MOFCOM was able to avoid a finding of PMS but still to use external benchmarks to inflate normal values and hence dumping margins.

Article 6.8 of the AD Agreement permits the use of best information available typically in cases where an interested party is uncooperative by refusing or failing to provide "necessary information within a reasonable period or significantly imped[ing] the investigation". However, to constrain abuse, Annex II of the AD Agreement sets out a range of conditions that must be satisfied before best information available may be applied.¹¹⁰ The WTO jurisprudence on the interpretation and application of these conditions is still evolving. Nevertheless, China was found to have failed to comply with some of the conditions in several past disputes. In *China – GOES*, MOFCOM calculated dumping margins for unknown exporters based on facts available. The panel found that MOFCOM acted inconsistently with paragraph 1 of Annex II which requires investigating authorities to seek information from interested parties and inform them of the consequences of failing to provide requested information on time. In that dispute, MOFCOM placed a notice of initiation of the investigations on its website and public record, and provided the notice to two known US exporters. The panel ruled that MOFCOM had not notified other producers/exporters of the subject goods in accordance with paragraph 1 of Annex II and hence was not entitled to use best information available.¹¹¹ Subsequently in *China – Autos (US)*, the panel made further clarifications on the obligations of authorities under paragraph 1. It ruled that facts available may be applied if authorities have taken "all reasonable steps that might be expected from an objective and unbiased [investigating authority] to specify in detail the information requested from unknown

¹⁰⁴ See Barley Final Determination (n 79), 12.

¹⁰⁵ See Wine Preliminary Determination (n 81), 13-28.

¹⁰⁶ For more discussions of the possibility of China using the PMS approach, see Zhou (n 44).

¹⁰⁷ Ministry of Commerce of China, 'Preliminary Determination on an Anti-Dumping Investigation into N-Propanol Exported from the United States', Notice No 25 (17 July 2020) <www.mofcom.gov.cn/article/b/c/202007/20200702983873.shtml>.

¹⁰⁸ See, eg, Barley Final Determination (n 79), 13-17; Wine Preliminary Determination (n 81), 29-31.

¹⁰⁹ See, eg, Ragan Updegraff, 'Striking a Balance between Necessity and Fairness: The Use of Adverse Facts Available in Dumping and Subsidies Investigations' (2018)49 *Georgetown Journal of International Law* 709.

¹¹⁰ The last sentence of Article 6.8 states: "The provisions of Annex II shall be observed in the application of this paragraph" (emphasis added). See also Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (adopted 1 October 2020) paras 7.152-7.153.

¹¹¹ Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R (adopted 16 November 2012) paras 7.368-7.394.

producers.”¹¹² While a mere public notice of initiation would not be sufficient, in this dispute MOFCOM did take additional steps by communicating the petition of the Chinese industry applicant and a form to register to participate in the investigation to the US Embassy in Beijing requesting the US government to provide these documents to any interested parties.¹¹³ The panel found these steps to be reasonable.¹¹⁴ However, the panel held that the information requested in the registration form was insufficient for a determination of dumping. While MOFCOM used the information provided in the petition to determine normal values, export prices and necessary adjustments, such information was not requested in the registration form, leading to a failure to “specify in detail the information required from” interested parties under paragraph 1.¹¹⁵ This decision led to a change of practice in *China – HP-SSST* in which MOFCOM published exporter questionnaires on its website and included the web link to the questionnaires in the notice of initiation. For the panel, this practice had put unknown exporters “on notice of what information was required of them”.¹¹⁶

MOFCOM’s use of best information available in the Barley and Wine Investigations was key to the findings of the hefty anti-dumping duties and therefore will be a major issue in the WTO dispute over the Barley Tariff. In addition to the reasonable notification of unknown exporters discussed above, Australia has invoked the other major conditions to challenge MOFCOM’s approach.¹¹⁷ These include whether an interested party had been given an adequate opportunity to provide the relevant information,¹¹⁸ whether the information was provided within a reasonable time, was verifiable and may be used without undue difficulties,¹¹⁹ whether an interested party had “acted to the best of its ability” to provide the information (even though it may not be ideal in all aspects),¹²⁰ and whether MOFCOM had ensured the information used was reliable and accurate and constituted the “best information” available, and had treated data obtained from secondary sources “with special circumspection”.¹²¹ Notably, the *China – GOEs* panel stressed that the requirement of “special circumspection” is intended to prevent authorities from abusing best information available to impose excessive anti-dumping duties.¹²² A determination of these issues would require a careful examination of the information and evidence provided by Australian producers and exporters in the Barley Investigation. Such information, however, is generally confidential business information that is not publicly accessible. Without such information, it is hard to determine whether MOFCOM’s use of best information available has breached the WTO rules in the Barley and Wine Investigations.

¹¹² Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R (18 June 2014) para 7.130.

¹¹³ *Ibid.*, para 7.125.

¹¹⁴ *Ibid.*, para 7.133.

¹¹⁵ *Ibid.*, paras 7.136, 7.139.

¹¹⁶ Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from Japan and the European Union*, WT/DS454/R, WT/DS460/R (adopted 28 October 2015) para 7.218.

¹¹⁷ WTO, *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, Request for Consultations by Australia (n 102).

¹¹⁸ AD Agreement (n 85), annex II paras 1, 6.

¹¹⁹ AD Agreement (n 85), annex II para 3. See also Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (adopted 23 August 2001) paras 81-86.

¹²⁰ AD Agreement (n 85), annex II para 5.

¹²¹ AD Agreement (n 85), annex II para 7. See also Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WTO Doc WT/DS295/AB/R (adopted 20 December 2005) para 289.

¹²² Panel Report (n 111), para 7.391.

2. Import Restrictions on Beef, Coal, Wheat, Lobster and Timber

Another major type of Chinese sanctions has been import restrictions. It is widely reported that China has taken measures to ban the imports of certain Australian goods that are significant to the Australian economy and are dependent on the Chinese market. These measures started with a suspension of imports of beef from four Australian abattoirs in May 2020 for alleged failures to meet Chinese labelling and health certificate requirements.¹²³ Similar restrictions were subsequently applied to another four abattoirs,¹²⁴ tons of lobsters due to the identification of metal elements,¹²⁵ and timber logs in order to prevent the entry of certain pests that may harm China's forestry and ecological safety.¹²⁶ Besides agricultural goods, China has also, allegedly, blocked Australian coal imports for environmental reasons and through an informal order mandating state-owned importers to purchase coal from other foreign suppliers.¹²⁷ Meanwhile, China entered into an agreement with Indonesia to buy US\$1.5 billion worth of Indonesian thermal coal between 2021 and 2023.¹²⁸

To assess China's import restrictions in light of its international obligations, there are three major issues: (1) how to identify the Chinese measures that impose these restrictions; (2) whether these measures have breached WTO rules; and if there is a breach, (3) whether it may be justified as one of the WTO-permitted exceptions, e.g. for the protection of public health or the environment. No media reports or any other work has examined these issues in an adequate manner.

Articles I:1 and XI:1 of the General Agreement on Tariffs and Trade¹²⁹ ('GATT') set out two fundamental principles of the WTO: the most-favoured nation ('MFN') rule and a general prohibition of import and export restrictions. Both principles are applicable to China's import restrictions. In addition, some of these restrictions may be subject to more specific rules codified in the Agreement on Technical Barriers to Trade¹³⁰ ('TBT Agreement') and the Agreement on the

¹²³ Kath Sullivan and Jodie Gunders, 'Red-Meat Processors Have Beef Sales to China Suspended as Trade Barriers Escalate', *ABC Rural* (online at 12 May 2020) <www.abc.net.au/news/rural/2020-05-12/china-trade-escalation-as-beef-farmers-are-targeted/12237468>.

¹²⁴ Kath Sullivan, 'China's Ban on Australian Beef Costing Hundreds of Millions and Putting People Out of Work', *ABC Rural* (online at 9 December 2020) <www.abc.net.au/news/2020-12-09/china-bans-cost-meat-industry-hundreds-of-millions/12961538>.

¹²⁵ Stephanie Balzell et al, 'Tonnes of Australian Lobsters Stuck in Chinese Airports Amid Trade Tensions', *ABC News* (online at 2 November 2020) <www.abc.net.au/news/2020-11-02/australian-lobster-exports-caught-in-china-trade-tensions/12837700>.

¹²⁶ Kath Sullivan et al, 'More Australian Timber Exports to China Blocked as Pressure Grows to Take Trade Dispute to World Trade Organization', *ABC News* (online at 9 December 2020) <www.abc.net.au/news/2020-12-09/farmers-want-australia-china-tariffs-trade-dispute-to-wto/12964248>.

¹²⁷ Su-Lin Tan, 'China-Australia Relations: Canberra 'Very Concerned' over Reports of 'Discriminatory' Coal Ban', *South China Morning Post* (online at 16 December 2020) <www.scmp.com/economy/china-economy/article/3114066/china-australia-relations-canberra-very-concerned-over>.

¹²⁸ Aaron Clark and David Stringer, 'China's \$1.5 Billion Indonesia Coal Deal May Hit Australia', *Bloomberg* (27 November 2020) <www.bloomberg.com/news/articles/2020-11-27/china-s-1-5-billion-coal-deal-with-indonesia-may-hit-australia>.

¹²⁹ General Agreement on Tariffs and Trade, signed 30 October 1947, 61 Stat. A-11, 55 UNTS 194 (entered into force 1 January 1948. The GATT 1947 was the predecessor of the WTO and became one of the multilateral agreements when the WTO was created in 1994. See General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 (1994).

¹³⁰ Agreement on Technical Barriers to Trade, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, annex 1A, 1868 UNTS 120.

Application of Sanitary and Phytosanitary Measures¹³¹ ('SPS Agreement'). The ChAFTA incorporates these WTO rules without major substantive changes.¹³²

As outlined above, a threshold issue in applying these rules concerns whether a Chinese measure that imposes the import restrictions can be identified. Generally speaking, the relevant Chinese regulations mandate the competent authorities, mainly China's General Administration of Customs ('Customs'), to undertake inspections of imports to ensure compliance with labelling, packaging, safety, health, environmental and other standards and requirements.¹³³ For imports that do not satisfy these standards and requirements, the Customs is required to issue a notice of non-compliance including a decision on how the goods at issue should be treated (known as 'Treatment Notice').¹³⁴ Imports that cause safety, health and environmental issues will not be allowed to enter China and will be either returned or destroyed. A Treatment Notice may constitute a measure that restricts the importation of goods, although it typically applies to certain shipments only and does not amount to a general import restriction. Where the Customs finds that imports from a particular region or country do not comply with the quarantine requirements, it may decide to suspend importation of the goods from that region or country. In both circumstances, the Customs will issue a notice to the exporters or government concerned. However, the Customs seems to have the discretion to decide whether to publish the Treatment Notice or the decision to impose a region-wide or country-wide import restriction. Thus, only some of the reported Chinese restrictions have been published. In particular, the Customs published its decision to suspend importation of beef from one Australian abattoir¹³⁵ and timber logs from six Australian states (i.e. Queensland, Victoria, Tasmania, South Australia, New South Wales and Western Australia).¹³⁶ Such a decision constitutes a government measure under WTO laws, even if it is not published and is communicated only to certain interested parties. Compared to the restrictions on the agricultural imports, it would be more difficult to challenge the coal restriction. The main difficulty lies in the identification of a Chinese measure if, as reported, the restriction was effectuated through informal instructions of the Chinese government to state-owned importers without a formal measure or decision of the Customs or any other authorities. Assuming a measure is identified, then the coal restriction would be subject to the same WTO rules.

¹³¹ Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1867 UNTS 493.

¹³² ChAFTA (n 1), Article 1.2.2, Article 2.7 (Non-Tariff Measures), Chapter 5 (Sanitary and Phytosanitary Measures), and Chapter 6 (Technical Barriers to Trade), Chapter 16 (General Provisions and Exceptions).

¹³³ See, eg, Law of the People's Republic of China on the Quarantine of Imported and Exported Animal and Plant, promulgated by Order No. 53 of the President of China on 30 October 1991, effective on 1 April 1992, as amended on 27 August 2009; Measures for the Supervision and Administration of the Inspection and Quarantine of Imported and Exported Meat Products, issued by the General Administration of Customs of China, Order No 243, on 23 November 2018, effective on the same date; Measures for the Supervision and Administration of the Inspection and Quarantine of Imported and Exported Aquatic Products, issued by the General Administration of Customs of China, Order No 243, on 23 November 2018, effective on the same date; Measures for the Administration of the Inspection of Imported and Exported Coal Products, issued by the General Administration of Customs of China, Order No 248, on 28 April 2018, effective on 1 May 2018.

¹³⁴ *Ibid.* See also Measures for the Administration of Import and Export Quarantine Treatment, issued by the General Administration of Quality Supervision, Inspection and Quarantine of China, Order No 30, on 29 December 2017, effective on 1 March 2018.

¹³⁵ See General Administration of Customs of China, 'Customs Suspends Exports to China by One Australian Abattoir', (Notice, 27 August 2020) <www.customs.gov.cn/customs/xwfb34/302425/3260606/index.html>.

¹³⁶ See General Administration of Customs of China, Notice on Suspending Imports of Timber from Australian State of New South Wales and State of Western Australia, issued by Notice No 98 of the Animal and Plant Quarantine Department (23 December 2020) <<http://gkml.customs.gov.cn/tabid/1165/InfoID/46567/Default.aspx>>.

The restrictions on Australian imports would violate the MFN rule if imports of ‘like’ goods from other sources are not so restricted. The lack of similar restrictions would confer “an advantage, favour, privilege or immunity”¹³⁷ to non-Australian imports, which is required to be extended to Australian imports “unconditionally” under the MFN rule. Although the test of “unconditionality” does not prevent a Member from attaching a condition to the granting of “an advantage, favour, privilege or immunity”, it “prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member.”¹³⁸ (original emphasis) In any case, the application of any condition must not lead to discrimination “with respect to the origin of imported goods.”¹³⁹ For example, some media has reported that in relation to beef, similar restrictions were not applied to imports from New Zealand despite the fact that similar issues of non-compliance were detected.¹⁴⁰ Thus, evidence relating to whether the Chinese restrictions target Australian imports only or are based on conditions unrelated to origin is key to determining whether there is a breach of the MFN rule. Given China’s reliance on the quarantine requirements, it would be difficult to establish ostensibly origin-based discrimination. Rather, it is likely that Australia would need to adduce evidence to substantiate a case of *de facto* discrimination. That is, although the quarantine requirements are origin-neutral, they have an asymmetric effect on Australian imports *vis-à-vis* other imports.¹⁴¹ If such an effect cannot be established either (e.g. due to the lack of evidence) so that the relevant Chinese law does not breach the MFN rule “as such”, then Australia’s legal claim would have to be based on an “as applied” breach – i.e. the law has been applied in a discriminatory manner in individual cases.¹⁴²

WTO Members must not maintain import or export restrictions through quotas, import or export licences or any other measures under GATT Article XI:1. WTO tribunals have interpreted and applied this provision very broadly to encompass “prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported”.¹⁴³ It is evident that the Chinese measures have an effect of limiting the importation of the Australian goods. Moreover, Article XI:1 applies to *de facto* restrictions whereby a measure that does not explicitly restrict imports may actually have such a limiting effect by, for example, disincentivising private entities from importation. The coal restriction may constitute a *de facto* restriction, if a measure could be identified. In such circumstances, Australia would need to show that the Chinese government has exerted sufficient influence on the state-owned importers and that the measure has the potential

¹³⁷ These terms have been interpreted very broadly by WTO tribunals. See, eg, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (adopted 19 June 2000) para 79.

¹³⁸ See Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (adopted 18 June 2014) para 5.88.

¹³⁹ See Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (adopted 19 June 2000) para 10.23.

¹⁴⁰ Su-Lin Tan, ‘Australian Beef Exporters Banned by China are Repeat Offenders, But New Zealand Firms Escape Sanctions, Customs Data Shows’, *South China Morning Post* (online at 19 May 2020) <www.scmp.com/economy/china-economy/article/3084911/australian-beef-exporters-banned-china-are-repeat-offenders>.

¹⁴¹ For an example of how *de facto* discrimination may be established, see Panel Report (n 139), paras 10.14-10.50; Appellate Body Report (n 137), paras 78-86.

¹⁴² For further explanations and analysis of “as such” vs. “as applied” claims, see generally Alan Sykes, ‘An Economic Perspective on As Such/Facial versus As Applied Challenges in the WTO and U.S. Constitutional Systems’, (2014)6(1) *Journal of Legal Analysis* 1.

¹⁴³ See Appellate Body Report, *China – Measures Relating to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted 22 February 2012) para 320.

to adversely affect importation of Australian coals and/or has actually caused or contributed to a low level of imports.¹⁴⁴

GATT Article XX provides a list of exceptions that may be invoked to justify a breach of WTO rules. The Chinese restrictions may fall within the ambit of Articles XX(b), (d) and (g) which cover measures, respectively, necessary to protect human, animal or plant life or health, necessary to secure compliance with laws or regulations which are not inconsistent with WTO rules (e.g. the Chinese laws on import and export quarantine), and/or relating to the conservation of exhaustible natural resources (e.g. clean air¹⁴⁵). There is a significant body of case law on the interpretation and application of these provisions which cannot be discussed in detail here. In essence, if the breaches above are established, it will be China's responsibility to show that (1) the import restrictions make a material contribution to the claimed objectives, (2) no less-trade-restrictive alternative means is reasonably available or could achieve the same level of protection, and (3) the restrictions are not unjustifiable in light of the objectives.¹⁴⁶ While all these issues are controversial and need to be assessed based on evidence, the whole debate would likely boil down to the second and third issues, that is, whether an alternative means may be adopted, and if not, whether the discriminatory application of the restrictions has a rational connection with, or can be reasonably explained by, China's pursuit of the legitimate regulatory goals.¹⁴⁷ Using the coal restriction as an example, the 'necessity' test would require Australia to put forward possible alternative measures that are less trade restrictive than the import restriction. China would then need to show that the proposed measures are not as effective as the import restriction in achieving the desired objective or are not reasonably available due to the financial and/or administrative burdens and costs associated with the application of the alternative measures. If Australia fails to challenge the necessity of the restriction, the next question would be why the restriction is only imposed on Australian coal if other coal imports may cause similar or comparable environmental issues. In other words, for the restriction to be justifiable under Article XX, China will need to prove that coal imports from Australia carry distinct or larger environmental risks compared with the risks posed by coal imports from other sources such as Indonesia.

The TBT Agreement and the SPS Agreement create additional and more detailed rules on certain measures.¹⁴⁸ Generally speaking, the SPS Agreement applies to measures that seek to prevent the entry of imported goods that may harm animal or plant life or health, whereas the TBT Agreement

¹⁴⁴ See Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (adopted 16 February 2001) paras 11.15-11.21; WTO Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R (adopted 20 May 2009) paras 7.252-7.256; Panel Report, *China – Measures Relating to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, (22 February 2012) paras 7.1004-7.1082 (finding that China maintained a minimum export price regime that had a limiting or restricting effect on trade).

¹⁴⁵ See generally Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996).

¹⁴⁶ See generally Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (17 December 2007).

¹⁴⁷ For a more detailed discussion of this issue in light of WTO case law, see Weihuan Zhou, 'US – Clove Cigarettes and US – Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III:4 of the GATT', (2012)15(4) *Journal of International Economic Law* 1075, 1092-1100.

¹⁴⁸ For an overview and discussion of these rules, see generally Gabrielle Marceau and Joel Trachtman, 'A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade' (2014)48(2) *Journal of World Trade* 351.

focuses on measures that lay down product characteristics or their related processes and production methods and are not captured under the SPS Agreement.¹⁴⁹ Thus, for example, the beef restriction based on non-compliance with labelling requirements would be a TBT measure¹⁵⁰ while the timber restriction to prevent the entry of pests would be a SPS measure.¹⁵¹ Both agreements incorporate and elaborate the relevant GATT principles and exceptions discussed above such as non-discrimination and the requirement that a measure must be applied only to the extent “necessary” to achieve the chosen objectives.¹⁵² Thus, our discussions above are applicable such that the key issues remain to be whether a less-trade-restrictive alternative means may be employed to achieve the chosen objectives and whether the (apparently discriminative) Chinese restrictions on Australian imports only are rationally connected to the objectives.¹⁵³ Under the SPS Agreement, the restrictions would be subject to additional inquiries about, *inter alia*, whether they are based on scientific principles and evidence including the relevant international standards or an assessment of the risks concerned.¹⁵⁴ Such inquiries would be heavily dependent on evidence and expert opinions due to the involvement of scientific questions. As far as the timber restriction is concerned, it is interesting to note that Australia seems to have confirmed that the pest issues identified by China do exist.¹⁵⁵ This lends support to our observation that whether the Chinese measures contravene WTO rules cannot be determined without a detailed legal analysis based on evidence.

In addition, in relation to the coal restriction, GATT Article XVII:1 requires governments to ensure that the purchase and sale decisions of state trading enterprises in importation and exportation do not go against the non-discrimination principles.¹⁵⁶ To the extent that the coal restriction is applied through state-owned importers and discriminates against Australia in violation of the MFN rule, it would also contravene Article XVII:1. Moreover, China has undertaken some broad obligations that go beyond the general WTO rules under its WTO accession instruments.¹⁵⁷ The most relevant to the coal restriction is the obligation that has

¹⁴⁹ See SPS Agreement (n 131), annex A; TBT Agreement (n 130), art 1.5 and annex 1.

¹⁵⁰ For a WTO case that examined labelling requirements under the TBT Agreement, see Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (adopted 13 June 2012).

¹⁵¹ Recently, China lodged a notification of this measure to the WTO Committee on Sanitary and Phytosanitary Measures, see WTO, Committee on Sanitary and Phytosanitary Measures, Notification of Emergency Measures, 6/SPS/N/CHN/1194 (12 January 2021).

¹⁵² See SPS Agreement (n 131), arts 2.2, 2.3, 5.6; TBT Agreement (n 130), arts 2.1–2.3.

¹⁵³ The legal tests on discrimination and necessity under the SPS Agreement and the TBT Agreement are not fundamentally different from the tests under the GATT despite some necessary variations due to the different legal texts and contexts. See generally Zhou (n 147); Gabrielle Marceau and Joel Trachtman (n 148) 358–382.

¹⁵⁴ See SPS Agreement (n 131), arts 3.1, 3.3, 5.1. The basic WTO jurisprudence on these rules can be found in Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998); Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (adopted 17 December 2010).

¹⁵⁵ See Deborah Knight, ‘Agriculture Minister Reveals Truth behind Rumours of China’s Latest Import Ban’, *4BC News Talk* (11 December 2020) <www.4bc.com.au/agriculture-minister-reveals-truth-behind-rumours-of-chinas-latest-import-ban/>.

¹⁵⁶ The WTO jurisprudence on this provision is mainly developed by Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004. For a detailed analysis of this provision and the relevant case law, see Weihuan Zhou, Henry Gao and Xue Bai, ‘China’s SOE Reform: Using WTO Rules to Build a Market Economy’ (2019)68(4) *International & Comparative Law Quarterly* 977, 997–1001.

¹⁵⁷ For a comprehensive review of these obligations, see generally Julia Qin, ‘“WTO-Plus” Obligations and Their Implications for the World Trade Organisation Legal System’ (2003)37(3) *Journal of World Trade* 483.

arguably expanded beyond GATT Article XVII:1 (which is limited to non-discrimination) by mandating the Chinese government to ensure that “all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations”.¹⁵⁸ This obligation may be applied to challenge the influence of the Chinese government on the state-owned importers in their decisions to purchase coals from foreign suppliers.

Finally, China’s failure to publish the relevant measures or notify to the WTO may breach the WTO transparency rules set out in a range of provisions or agreements (such as GATT Article X, Article 7 of the SPS Agreement, and Article 10 of the TBT Agreement) as well as China’s extensive WTO-plus obligations on transparency.¹⁵⁹ For example, China is obliged to publish “all laws, regulations and other measures pertaining to or affecting trade in goods” (amongst other areas of trade) and when requested, to make these laws, regulations or measures available to other WTO Members before they are implemented or enforced.¹⁶⁰ This obligation, coupled with many other China-specific transparency rules, is designed precisely to address the difficulties in finding Chinese measures or challenging hidden rules applied through administrative bodies.¹⁶¹ Had China complied with this obligation, the difficulty in identifying the Chinese measures that impose the import restrictions should have not arisen in the first place.

3. Tariff and Tariff-Rate Quota

The WTO does not ban tariffs but provides a forum for countries to negotiate tariff reductions and then “binds” the tariffs at the reduced rates (known as ‘tariff bindings’). Tariff bindings are set out in the WTO tariff schedule of each Member who is then required to not apply tariffs at a rate higher than the corresponding bound rates.¹⁶² This obligation is subject to some exceptions including tariffs imposed out of an anti-dumping or countervailing investigation or in pursuit of the legitimate objectives envisaged in GATT Article XX. Moreover, Members maintain certain tariff-rate quotas (“TRQs”) under their WTO schedules especially on the importation of agricultural goods.¹⁶³ Where a TRQ exists, a low tariff typically applies to imports up to the quota while out-of-quota imports are subject to a much higher tariff. Both Australia and China have used TRQs for certain agricultural goods. In addition, agricultural goods may also be subject to a special safeguard mechanism (“SSG”) under which higher tariffs may be imposed if the volume of imports exceeds, or their price falls below, a trigger level.¹⁶⁴

The ChAFTA incorporates the WTO rules above and further reduces tariff levels in both countries. Australian media has reported two instances of tariff increase by China, i.e. on cotton and beef

¹⁵⁸ Accession Protocol (n 93), Section 9.1; Report of the Working Party on the Accession of China (*Working Party Report*), WT/ACC/CHN/49 (1 October 2001), para 46. For an analysis of this obligation, see Zhou et al (n 156), 1011-14.

¹⁵⁹ For a discussion of these transparency rules, see generally Henry Gao, ‘The WTO’s Transparency Obligations and China’ (2017)12(2) *Journal of Comparative Law Quarterly* 329.

¹⁶⁰ Accession Protocol (n 93), s 2(C)1.

¹⁶¹ Working Party Report (n 158), para 324; Gao (n 159), 333-34.

¹⁶² GATT (n 129), art II.1.

¹⁶³ For a detailed overview of agricultural TRQs of WTO Members, see WTO, Committee on Agriculture Special Session, ‘Tariff and Other Quotas: Background Paper by the Secretariat’, TN/AG/S/5 (21 March 2002).

¹⁶⁴ See Agreement on Agriculture, 15 April 1994, *Marrakesh Agreement Establishing the World Trade Organization*, annex 1A, 1867 UNTS 410, art 5. For a detailed overview of WTO Members’ use of SSG, see WTO, Committee on Agriculture Special Session, ‘Special Agricultural Safeguard: Note by the Secretariat’, TN/AG/S/29/Rev.1 (11 January 2017).

exported from Australia respectively. The report on the beef tariff rightly pointed out that the tariff increase from a preferential rate of 4.8% to an MFN rate of 12% came out of the application of the SSG under the ChAFTA which sets the volume trigger level of 2020 at 179,687 tonnes.¹⁶⁵ This trigger level was reached in early July so that the higher tariff was applied for the rest of the year. For 2021, the preferential rate is further reduced to 3.6% which will apply until the annual trigger level of 185,078 tonnes is reached. China's import tariff on Australian beef will be progressively reduced to zero by 1 January 2024 whereas the SSG will continue to apply until 2031 (or longer essentially subject to further negotiations by the parties).¹⁶⁶ Apart from beef, the only other product subject to SSG is milk powder to which a preferential tariff rate of 4.2% and a SSG trigger level of 23,452 tons apply in 2021. If the trigger level is reached, the tariff may increase up to 10%. Like beef, the Chinese tariff on Australian milk powder will be progressively reduced to zero by 1 January 2026 whereas the SSG will continue to apply until 2029 or longer.

Reports on the cotton tariff seem to have labelled the tariff increase on Australian cotton from 1% to 40% as a retaliatory action of China.¹⁶⁷ This is misleading. The ChAFTA does not further enhance the market access for Australian cotton to China beyond China's WTO commitment. Under the WTO, China agreed to a TRQ for cotton imports under which imports up to 894,000 tons in a calendar year are subject to a tariff of 1% whereas a 40% tariff applies to out-of-quota imports.¹⁶⁸ In the past, China allocated more TRQs setting out the extra quantity of imports and applicable tariff rates in some years when its domestic cotton supply did not satisfy the domestic needs.¹⁶⁹ The 40% out-of-quota tariff rate on Australian cotton remains unchanged under the ChAFTA.¹⁷⁰ Thus, China retains the right to apply the tariff to any cotton imports beyond the quota. The only claim Australia may raise pertains to whether China has allocated the TRQs in a "transparent, predictable, uniform, fair and non-discriminatory" manner in accordance with China's WTO accession commitments.¹⁷¹ Indeed, in a recent dispute the WTO panel found China's administration of TRQs for wheat, rice and corn has breached these commitments.¹⁷² However, like the other Chinese measures discussed above, a separate legal assessment based on evidence will be needed to determine whether China's allocation of cotton TRQs also fell short of its WTO obligations.

¹⁶⁵ See, eg, Kath Sullivan, 'China Raises the Cost of Australian Beef as ChAFTA Safeguard is Triggered', *ABC Rural* (2 July 2020) <www.abc.net.au/news/2020-07-02/china-increases-tariffs-australian-beef-milk-powder/12412612>. See also ChAFTA (n 1), Article 2.14 and Annex 2-B, Chapter 2 Trade in Goods; Schedule of the People's Republic of China, ChAFTA, available at: <www.dfat.gov.au/sites/default/files/chafta-explanatory-schedule-of-chinese-tariff-commitments-non-official.pdf>.

¹⁶⁶ See ChAFTA (n 1), arts 2.14(8), 2.15, ch 2 Trade in Goods.

¹⁶⁷ See, eg, Kath Sullivan and Lucy Barbour, 'Australian Cotton the Latest Casualty in Trade Tensions with China', *ABC Rural* (16 October 2020) <www.abc.net.au/news/2020-10-16/china-disrupts-australian-cotton-trade/12771114>; Andrew Marshall, 'China Cotton Boycott Favours US Traders but Aussie Price Holds Ground', *Farmonline National* (20 October 2020) <www.farmonline.com.au/story/6977670/cotton-price-surprise-after-china-boycott-but-exporters-brace-for-pain/>.

¹⁶⁸ See China's WTO Goods Schedule, available at: <www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm>.

¹⁶⁹ See United States, Department of Agriculture, Foreign Agricultural Service, *China: China Announces Additional Cotton Import Quotas* (GAIN Report No CH 18033, 15 June 2018) <<https://www.fas.usda.gov/data/china-china-announces-additional-cotton-import-quotas>>.

¹⁷⁰ See Schedule of the People's Republic of China, ChAFTA (n 165).

¹⁷¹ Working Party Report (n 158), para 116.

¹⁷² See generally WTO Panel Report, *China – Tariff Rate Quotas for Certain Agricultural Products*, WT/DS517/R (adopted 28 May 2019).

4. Dispute Settlement under the WTO and the ChAFTA

WTO or ChAFTA rules would be ineffective if they cannot be enforced. The legal claims that Australia may have against the various Chinese measures would need to be adjudicated through a system that clarifies and applies these rules and ensures implementation of adverse rulings. The WTO's dispute settlement mechanism ('DSM'), in serving this function, has long been regarded as the 'jewel in the crown' of the multilateral trading system. Since its operation in 1995, the DSM has managed almost 600 disputes and issued over 350 rulings.¹⁷³ Overall, the system has been effective in inducing compliance with unfavourable rulings especially in the case of China.¹⁷⁴ In contrast, dispute resolution mechanisms under free trade agreements are strikingly under-utilised.¹⁷⁵ Although the ChAFTA's mechanism is based on arbitration and similar rules to induce compliance as those of the WTO, it has never been used.¹⁷⁶ In reality, Australia has resorted to the WTO to challenge some of the Chinese measures (i.e. the Barley Tariff) showing a preference to the DSM. Even if Australia initiates an arbitration under the ChAFTA, the arbitrators are required to apply similar principles of treaty interpretation and consider the relevant WTO case law.¹⁷⁷ Therefore, it is reasonable to anticipate that the DSM will remain a preferred forum for settling the disputes between the two parties.

Despite the success of the DSM, it is facing an unprecedented crisis. The US's continued blockage of appointment of new members to the Appellate Body has caused the WTO's appellate review system dysfunctional creating a major loophole for a losing party to abuse the right of appeal (i.e. by 'appealing into the void') and block adverse rulings.¹⁷⁸ To fill this loophole, the 27 EU nations and 23 other WTO Members – including both China and Australia – have reached an agreement to establish a 'multi-party interim appeal arbitration arrangement' ('MPIA') as a temporary appeal process.¹⁷⁹ However, given its limited membership, the MPIA has proven to be unhelpful in disputes between a MPIA member and a non-MPIA member. In such disputes, the parties may and do 'appeal into the void'.¹⁸⁰ However, given that both Australia and China are MPIA parties and supporters of the DSM, it would be much less likely for either of them to abuse the right to appeal unfavourable panel rulings.

¹⁷³ See WTO, Dispute Settlement, undated, available at: www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

¹⁷⁴ See generally Weihuan Zhou, *China's Implementation of the Rulings of the World Trade Organization* (Oxford and Portland, Oregon: Hart Publishing, 2019).

¹⁷⁵ See Porges Trade Law PLLC, 'Regional Trade Agreement Dispute Settlement', (Web Page, 16 December 2020) <www.porgeslaw.com/rta-disputes/>.

¹⁷⁶ See ChAFTA (n 1), ch 15 Dispute Settlement.

¹⁷⁷ See ChAFTA (n 1), art 15.9.

¹⁷⁸ For a discussion of the Appellate Body crisis and its implications, see generally Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019)22(3) *Journal of International Economic Law* 297; Weihuan Zhou, 'WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US-China Trade Deal' (2020)9(2) *Journal of International Trade and Arbitration Law* 443.

¹⁷⁹ See European Commission, 'The WTO Multi-Party Interim Appeal Arrangement Gets Operational', *News Archive* (News, 3 August 2020) <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176>>.

¹⁸⁰ For some recent examples, see WTO, *United States – Countervailing Measures on Softwood Lumber from Canada*, Notification of An Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS533/5 (29 September 2020); WTO, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*, Notification of An Appeal by the European Union under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS494/7 (1 September 2020).

Nevertheless, there are at least three major challenges for Australia to use the DSM.¹⁸¹ First, WTO litigation takes time and does not guarantee a win. Starting with compulsory consultations between disputing parties, the entire process may take many years for a losing party to implement WTO rulings.¹⁸² For example, past cases involving China's anti-dumping actions have seen China taking five or more years to remove an anti-dumping duty.¹⁸³ This means that WTO litigation and enforcement may take even longer than the life of an anti-dumping duty which is lifted typically after five years unless a review is initiated and decides that a continuation of the duty is necessary.¹⁸⁴ Second, the WTO does not allow for retrospective remedies so that a winning party would not be compensated for any damages that have been caused by the measures of a losing party. The lack of retrospective remedies is regarded by some as a systematic defect of the DSM as it leaves a gap for and tends to incentivise temporary breaches.¹⁸⁵ Third, although the DSM is designed to push Members to modify or remove WTO-inconsistent laws and practices, all the Chinese measures discussed above are apparently administrative decisions that apply a particular law. This means that a WTO claim would likely be confined to the application of the law (i.e. an "as applied" claim) rather than the law itself (i.e. an "as such" claim). Consequently, even if WTO tribunals rule in favour of Australia in a dispute, the rulings may not require China to change laws or prevent it from taking similar actions in the future, such as initiating another anti-dumping investigation or imposing an import restriction on other Australian goods. In fact, China has repeatedly resorted to anti-dumping and export restrictions in cases subsequent to the ones in which the WTO had ruled against similar measures,¹⁸⁶ although other WTO Members have also done so. Given these challenges, the WTO would not provide a timely or satisfactory solution to the bilateral tensions. Nevertheless, commencing a formal WTO dispute is an important step that would provide a rules-based forum with structured processes for dialogue that would contribute to the resolution of the tensions.

IV. Broader Implications

The bilateral tensions have broader implications for both countries. For Australia, the current debate has focused on two major issues: (1) how Australia may diversify exports and become less dependent on China; and in the meantime, (2) what actions Australia may take to reinvigorate the economic relations.

On the latter, the default position of the Morrison government is that nothing is required because "Australia has done nothing to injure that partnership [with China], nothing at all".¹⁸⁷ Instead, it

¹⁸¹ Some of these challenges have been discussed in Weihuan Zhou and Lisa Toohey, 'Taking China to the World Trade Organization Plants a Seed. It Won't be a Quick or Easy Win', *The Conversation* (17 December 2020) <<https://theconversation.com/taking-china-to-the-world-trade-organisation-plants-a-seed-it-wont-be-a-quick-or-easy-win-152173>>.

¹⁸² Data on the length of WTO proceedings is available at: <www.worldtradelaw.net/>.

¹⁸³ For a discussion of China's implementation of WTO rulings in cases involving anti-dumping actions and the major issues in China's implementation, see Zhou (n 174), 152-182.

¹⁸⁴ AD Agreement (n 85), art 11.3.

¹⁸⁵ See, eg, Mark Wu, 'China's Export Restrictions and the Limits of WTO Law' (2017)16(4) *World Trade Review* 673.

¹⁸⁶ See Zhou (n 174), 70-90, 152-182.

¹⁸⁷ Scott Morrison, 'Press Conference' (Press Conference, Prime Minister, 12 June 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-18>>.

now claims to be adhering to a doctrine of “strategic patience”¹⁸⁸ in the expectation a new “settling point”¹⁸⁹ will be reached where there is a “happy coexistence”.¹⁹⁰ In the short to medium-term, with public opinion swinging in firmly behind it, and even voices within Australia’s business community remaining relatively quiet,¹⁹¹ “strategic patience” appears a viable approach. Canberra would also take comfort from the limited scale of economic damage China has been willing or able to inflict in aggregate.

There is greater longer run uncertainty, however. Public opinion may shift if and when it becomes apparent that the profitable markets Australian producers have worked hard to develop in China are being snapped up by other countries, including strategic friends. There is preliminary evidence that this has already begun.¹⁹² Greater trade diversification is widely seen as the path to reduced economic vulnerability over time. While a worthy goal, the likelihood of success must also be tempered with a dose of reality. Trade flows are principally determined by buyers and sellers interacting in decentralised markets. They are also mostly private sector agents incentivised by profits: the preferences of Canberra-based bureaucrats are peripheral. As long as Australia remains a medium-sized, open economy, for the most part it does not get to choose where the demand for its goods and services comes from. Rather, this is determined by exogenous factors, notably economic complementarities in production across countries and the geographical distribution of global purchasing power. This point was made to visiting US Secretary of State, Hillary Clinton, in 2014 after she had warned Australia about putting “all your eggs in the one basket’ and becoming too dependent on China.¹⁹³ Malcolm Turnbull, then-Communications Minister, responded, “I’m sure that we’d love to export vast quantities of iron ore to the United States but they’ve never shown any enthusiasm in buying them”.¹⁹⁴ Punctuating the point is that trade diversification is a long-standing theme of Australia’s trade policy and has led to the channelling of significant bureaucratic resources into completing free trade agreements with a host of countries, including the US, Japan, Korea and Indonesia. It is also seen in the activities of government agencies like Austrade, which regularly organise roadshows for Australian businesses to alternative markets such as India.¹⁹⁵ Yet despite this, China’s share of Australia’s trade has only continued to grow. In March last year at the onset of the COVID-19 pandemic, the National Security College’s Rory Medcalf

¹⁸⁸ Scott Morrison, ‘Interview on Channel 7 Sunrise’ (Media Release, Prime Minister, 28 June 2019) <<https://www.pm.gov.au/media/interview-channel-7-sunrise>>.

¹⁸⁹ Jason Scott and James Mayger, ‘Australia’s China Ties Fray Even as Two-Way Trade Boom’, *Bloomberg Businessweek* (online at 17 July 2020) <<https://www.bloomberg.com/news/articles/2020-07-16/australia-takes-tougher-stance-on-china-as-trade-booms>>.

¹⁹⁰ Latika Bourke, ‘Happy coexistence:’ Scott Morrison Offers China An Olive Branch in London Speech’, *The Sydney Morning Herald* (online at 24 November 2020 <<https://www.smh.com.au/world/europe/happy-coexistence-scott-morrison-offers-china-an-olive-branch-in-london-speech-20201123-p56hae.html>>).

¹⁹¹ John Power ‘As China Tensions Mount, Australia’s Dovish Voices Calling for Engagement are Fading Away’, *South China Morning Post* (online at 12 June 2020) <<https://www.scmp.com/week-asia/politics/article/3088611/china-tensions-mount-australias-dovish-voices-calling-engagement>>.

¹⁹² James Laurenceson, ‘Why Australia Is On Its Own In Its Trade Conflict With China’, *South China Morning Post* (online at 2 December 2020) <<https://www.scmp.com/comment/opinion/article/3112060/why-australia-its-own-its-trade-conflict-china>>.

¹⁹³ Paul McGeough, ‘Hillary Clinton Criticises Australia for Two-timing America with China’, *The Sydney Morning Herald* (online at 27 June 2014) <<https://www.smh.com.au/world/hillary-clinton-criticises-australia-for-two-timing-america-with-china-20140627-zso6c.html>>.

¹⁹⁴ ‘Crawford School Forum Transcript: ‘Global Realities and Domestic Choices’ (Transcript, 2 July 2014) <<https://www.malcolmtturnbull.com.au/media/crawford-school-forum-transcript-global-realities-and-domestic-choices>>.

¹⁹⁵ See generally Laurenceson and Zhou (n 4).

said: “Diversification is now a necessity, not just strategic aspiration”.¹⁹⁶ However, as the trade data reviewed above attests, Australia’s exposure to China for both exports and imports finished 2020 at record highs. In the longer term there is also greater scope for China to develop alternative sources of supply for big-ticket Australian export items like iron ore, potentially increasing its coercive leverage compared with today.¹⁹⁷

For China, the reputational cost associated with the use of trade sanctions may be significantly higher than anticipated. While criticising the US of abusing unilateral actions and confrontational approaches (particularly in the US-China trade war), China is effectively deviating from its own commitments to international cooperation in taking the actions against Australia.¹⁹⁸ This is so despite the fact that China seems to have attempted to avoid actions that explicitly violate WTO rules by using the flexibilities in the rules (as discussed in Section III). More importantly, China’s use of informal measures goes to the heart of the systemic concerns that China remains an NME in which the Chinese government has the ability to control or significantly influence business activities. For years, China has endeavoured to persuade WTO Members that the Chinese economy has undergone unparalleled market-oriented transformation and now operates solely based on market forces.¹⁹⁹ Yet, the informal coal restriction would only reinforce the longstanding perception that China’s unique economic model is fundamentally incompatible with the multilateral trading system,²⁰⁰ which would in turn cause a loss of trust in China’s role and behaviour, and undermine its political pursuit of being recognised as a full market economy, in the international trade community.

Both governments need to be reminded that the trade tensions have proven to be mutually destructive causing growing damages to businesses and people of their own. Despite the relatively stable bilateral trade flows so far, the longer-term impact as a result of continued or even escalated tensions will be extensive and significant. There is, therefore, a pressing need for the two sides to resolve political disagreements for mutual economic benefits and prosperity that only cooperation may generate.

V. CONCLUSION

The Australia – China economic relationship has come a long way since the normalisation of the bilateral relations in 1972.²⁰¹ While there have been political disagreements and economic spillovers on occasion, the current rupture since 2020 is of a different order in terms of its breadth, intensity, continuity and potential impact. Although a resolution may ultimately rely on new

¹⁹⁶ Rory Medcalf, ‘Coronavirus Shock Will Cascade Through the Indo-Pacific Region’, ASPI The Strategist (online at 1 March 2020) <<https://www.aspistrategist.org.au/coronavirus-shock-will-cascade-through-the-indo-pacific-region/>>.

¹⁹⁷ Ben Butler, ‘Could China Replace Australian Iron Ore with Metal from Africa?’, *The Guardian* (online at 3 December 2020) <<https://www.theguardian.com/business/2020/dec/02/could-china-replace-australian-iron-ore-with-metal-from-africa>>.

¹⁹⁸ See WTO, General Council, China’s Proposal on WTO Reform, WT/GC/W/773 (13 May 2019) 5.

¹⁹⁹ See, eg, Zhou and Peng (n 93).

²⁰⁰ See, eg, Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016)57(2) *Harvard International Law Journal* 261.

²⁰¹ See generally Wilson Au-Yeung et al., ‘Australia-China: Not Just 40 Years’ in The Treasury Economic Roundup Issue 4 2012, *Special Edition: China* 7-41, <<https://treasury.gov.au/publication/economic-roundup-issue-4-2012>>.

political shared understandings, this is made harder if the deeper drivers of the political dispute are not recognised, economic realities are not grasped, bilateral tensions are not placed in a regional context and possible legal challenges against China's economic sanctions are not understood.

China's foreign policy has become more assertive and its proclivity for engaging in economic statecraft, including coercive applications, has grown. While idiosyncratic factors may play a role,²⁰² China is not particularly unique in this regard. As countries grow in economic power and influence, they are inclined to use economic tools to achieve their broader objectives. A 2019 report by the Washington-based Center for New American Security begins matter-of-factly, observing that "[c]oercive economic measures have been a longstanding tool of American foreign policy" and that "sanctions, investment restrictions, trade controls, and tariffs, have become an increasingly important tool of U.S. foreign policy in recent years".²⁰³ Particularly since 2018, China has been the main target of US coercive actions in the trade, investment and technology spheres.²⁰⁴ A wider lens would also note that China's track-record in adhering to international trade rules compares favourably with that of other major powers such as the US and EU.²⁰⁵

From an Australian perspective, at the very least, the fact that the state of its relationship with China is an outlier in the region might raise questions about whether the Australian government's approach has been optimal. This is not to contend that Canberra is to blame for Beijing's trade behaviour. Rather, it is to emphasise the importance of not doubling down on an inferior strategy for addressing the challenge.

While Australia's central foreign policy challenge – i.e. how to balance a strong economic relationship with China while maintaining a strong security and strategic relationship with the US – is regularly described as being akin to walking a tightrope, it is, in fact, unremarkable. Veteran Singaporean diplomat, Bilahari Kausikan observed last October that "almost everybody" in the region faces the same challenge.²⁰⁶ This is what makes the current status of Australia's relations with China so stark. Combined with political leadership, the analysis undertaken in this paper, which serves to demystify misunderstandings, offers the potential to assist in charting a different trajectory in the bilateral relationship in the years ahead.

Despite the ongoing tensions and economic sanctions, China remains Australia's largest trading partner. Attempts to diversify Australia's exports are unlikely to reduce Australia's reliance on the Chinese market to a significant degree. Limiting Australia's economic ties with China will also

²⁰² Richard McGregor, 'Xi Jinping: The Backlash', Lowy Institute (Paper, 16 July 2019) <<https://www.lowyinstitute.org/publications/xi-jinping-backlash>>.

²⁰³ Peter Harrell and Elizabeth Rosenberg, 'Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion', *CNAS* (Report, 29 April 2019) <<https://www.cnas.org/publications/reports/economic-dominance-financial-technology-and-the-future-of-u-s-economic-coercion>>.

²⁰⁴ One proof of this is China's agreement to the extremely one-sided obligations in the US-China Phase One Deal. See Office of the United States Trade Representative, 'Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China' (15 January 2020) <<https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republicchina/phase-one-trade-agreement/text>>. For a summary of this deal, see Weihuan Zhou and Henry Gao, 'US-China Phase One Deal: A Brief Account', Kluwer Blog on Regulating for Globalisation (online at 22 January 2020) <<http://regulatingforglobalization.com/2020/01/22/us-china-phase-one-deal-a-brief-account/>>.

²⁰⁵ See generally Zhou (n 174).

²⁰⁶ Will Glasgow, 'Australia High on China Import List', *The Australian* (online at 12 October 2020) <<https://www.theaustralian.com.au/nation/politics/australia-high-on-china-import-list/news-story/1291a1ae1a7d31aa331e3f46e236d1e7>>.

reduce prosperity, cutting available resources to spend on health, education and even defence. An economic decoupling between Australia and China would shrink the habit and incentives for cooperation, leaving Australia not only poorer, but less secure and potentially more strategically vulnerable.

While Australia's potential legal claims against China's economic sanctions have merit, they do not guarantee a win. Even if Australian wins, China's international obligations under the WTO or ChAFTA do not require it to compensate for Australia's losses already caused. Nor does a successful claim prevent China from taking similar actions on the same or other Australian exports in the future. Despite the uncertainties and potentially limited effects of WTO litigation, it does provide a rules-based forum for the two governments to engage formally while the deeper political challenges can be confronted, and hopefully addressed.