BEFORE THE WORLD TRADE ORGANIZATION

European Union – Measures Related to Price Comparison Methodologies (WT/DS516)

Australia’s Third Party Executive Summary

3 July 2018
I. INTRODUCTION

1. In Australia's view, the critical interpretative issues underlying China's claims in these proceedings bear directly on the general rights granted to all Members under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the ADA) and the General Agreement on Tariffs and Trade 1994 (the GATT 1994) to remedy injurious dumping.

2. In particular, Australia engages with China's claims that the "generally applicable WTO rules"1: (i) "prohibit" an investigating authority from using any methodology that does not "entail a strict comparison with home market prices or costs";2 and (ii) discipline exclusively the individual "pricing practices" of the producer under investigation, and do not permit taking into account "domestic market conditions".3

II. CHINA'S CLAIMS REGARDING THE METHODOLOGIES PERMITTED BY THE "GENERALLY APPLICABLE WTO RULES"

3. China submits that: Article 2.2 of the ADA "lays down the only two alternative methodologies for determining normal value that an authority is entitled to use";4 these methodologies "involve a strict comparison with home market prices and costs";5 an investigating authority is not permitted under Article 2.2 "to use surrogate prices or costs in an analogue country to determine normal value";6 and the Ad Note to Article VI:1 of the GATT 1994 is the "only exception"7 that permits an authority to depart from a "strict comparison"8 with domestic market prices or costs.9

III. INTERPRETATION OF THE "GENERALLY APPLICABLE WTO RULES"

A. ARTICLE VI:1 OF THE GATT 1994 AND THE Ad NOTE TO ARTICLE VI:1

4. Article VI:1 of the GATT 1994 provides, in relevant part:

… that dumping [occurs when] … products of one country are introduced into the commerce of another country at less than the normal value of the products … For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such a domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

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1 China's first written submission, para. 156.
3 China's opening statement at the second substantive meeting, para. 59; China's response to Panel Question No. 20. (original emphasis omitted)
4 China's first written submission, para. 143. (original emphasis omitted)
6 China's first written submission, para. 167. (original emphasis omitted)
7 China's first written submission, para. 155.
9 China's first written submission, paras. 155-156.
Due allowance shall be made in each case for … differences affecting price comparability.* (emphasis added)

5. The ordinary meaning of the term "comparable" suggests "fit to be compared". The ordinary meaning of the term "fit" suggests "[a]dapted to the requirements of the case; appropriate; suitable". The text of Article VI:1 thus conditions a determination of dumping on a comparison between a product's export price and an appropriate or suitable price for the like product in the relevant domestic market. Article VI:1 expressly contemplates that such a price may not exist.

6. The explicit qualification in Article VI:1 that the "comparable" domestic price must arise "in the ordinary course of trade" informs the determination of what constitutes an appropriate or suitable price. The Appellate Body has indicated that there are "many reasons" why transactions might not be "in the ordinary course of trade", including "where the parties to a transaction have common ownership" such that the relevant sales price "may be lower than the 'ordinary course' price". The Appellate Body explicitly clarified, however, that "even where the parties to a sales transaction are entirely independent, a transaction might not be 'in the ordinary course of trade'".

7. The purpose of excluding sales not made in the "ordinary course of trade" from the calculation of normal value is to "ensure that normal value is, indeed, the 'normal' price of the like product". The Appellate Body has clarified that where the terms and conditions of a sale "are incompatible with 'normal' commercial practice" the sale does not comprise "an appropriate basis for calculating 'normal' value". The appropriateness or suitability of a domestic price thus depends on its compatibility with normal commercial practice.

8. Article VI:1 thus establishes that whether a domestic price is appropriate or suitable to compare with the export price for the purpose of determining dumping depends on whether the domestic price reflects normal commercial practice. Where no such price exists, normal value is calculated on the basis of either the highest comparable third country export price, in the ordinary course of trade; or the cost of production in the country of origin (plus a reasonable addition for selling cost and profit).

9. Australia considers that, rather than comprising an "exception" to Article VI:1, the Ad Note to Article VI:1 elaborates upon the definitions set out in Article VI:1. The first paragraph of the Ad Note recognises that where actual sale prices are distorted by the association between an importer and exporter, "the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer". Substituting the re-sale price of the goods to an independent third party ensures the dumping margin is based on a price determined by normal commercial practice.

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12 Appellate Body Report, US – Hot Rolled Steel, para. 141. (original emphasis omitted)
16 China's first written submission, para. 155.
17 Ad Note to Article VI, Paragraph 1, of the GATT 1994, para. 1. (emphasis added)
10. Similarly, the second paragraph of the Ad Note "recognize[s]" the "special difficulties" that arise in determining price comparability in respect of imports from countries with a "complete or substantially complete monopoly of its trade ... where all domestic prices are fixed by the State". This makes clear that such domestic prices – i.e., prices determined by the State rather than by normal commercial practice – may not be "appropriate"\(^{18}\) for determining the existence or margin of dumping.

11. Both paragraphs of the Ad Note thus confirm – and reinforce the centrality of – the condition in Article VI:1 that domestic prices must be determined by normal commercial practice in order to be appropriate or suitable for determining dumping.

**B. ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT**

12. Before turning to Article 2.2 of the ADA, it is useful to recall that Article 2.1 – which comprises the context for calculating the margin of dumping under Article 2.2\(^ {19}\) – includes the qualifiers "comparable" and "in the ordinary course of trade". Consistent with the analysis of these terms set out above, the text of Article 2.1 therefore: (i) conditions a determination of dumping on a comparison between a product's export price and an appropriate or suitable price for the like product in the relevant domestic market; and (ii) indicates that the appropriateness or suitability of the domestic price depends on whether it is determined by normal commercial practice.\(^ {20}\)

13. Article 2.2 of the ADA provides:

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

14. On its face, Article 2.2 sets out three circumstances in which an investigating authority is permitted to construct normal value: (i) when there are no sales of the like product in the ordinary course of trade in the relevant domestic market or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (emphasis added)

15. In Australia's view, China's claims fail to acknowledge that the normal value constructed under Article 2.2 must be capable of standing-in for the price of sales of the like product in the ordinary course of trade. As outlined above, the key determinant of whether a price is appropriate or suitable to compare to the export price is whether it is compatible with normal commercial practice – not whether it solely (or "strict[ly]"\(^ {21}\)) reflects "home market prices and costs". The Appellate Body has made clear that sales that are incompatible with normal commercial practice do

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\(^{18}\) Ad Note to Article VI, Paragraph 2, of the GATT 1994, para. 2. (emphasis added)

\(^{19}\) Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

\(^{20}\) Appellate Body Report, *US – Hot Rolled Steel*, para. 140. (emphasis added)

\(^{21}\) China's first written submission, paras. 134-136, 145, 155-156 and 167.
not provide an appropriate basis for calculating normal value.22 This is the case even though such sales would nevertheless constitute "home market prices".

16. China's claims also fail to take account of the express purpose of constructing normal value under Article 2.2, which is to enable a "proper comparison" with the export price. The ordinary meaning of the term "proper" suggests, relevantly, "fit, suitable, appropriate, fitting".23 Consistent with the discussion of "comparable" price above,24 the inclusion of the term "proper" indicates that the construction of normal value under Article 2.2 must yield a price that is appropriate or suitable to compare to the relevant export price for the purpose of determining dumping.

17. The findings of the Appellate Body in EU – Biodiesel (Argentina) confirm that Article 2.2 "concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade" in the relevant domestic market.25 The panel in EU – Biodiesel (Argentina) found that this was the "basic purpose" of constructing normal value under Article 2.2.

18. In Australia's view, the text and context of Article 2.2 therefore do not support China's claims that the provision prescribes a "strict comparison" with home market prices and costs28and proscribes any recourse to third country prices or costs.29 Rather, Article 2.2 requires a "proper comparison" with prices and costs "in the ordinary course of trade" – i.e. prices and costs determined by normal commercial practice.

C. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

19. China's discussion of the "generally applicable WTO rules" with respect to determining normal value omits entirely Article 2.2.1.1 of the ADA.

20. Article 2.2.1.1 of the ADA provides, in relevant part:

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

21. The ordinary meaning of the term "normally" suggests "[u]nder normal or ordinary conditions; ordinarily; as a rule".30 The text of Article 2.2.1.1 thus indicates that, under normal or ordinary conditions, an investigating authority should calculate costs for the purpose of Article 2.2 on the basis of the records kept by the relevant exporter or producer, where those records meet the conditions outlined.

22 Appellate Body Report, US – Hot Rolled Steel, para. 140. (emphasis added)
24 See paragraph 13 of this submission.
25 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.24. (emphasis added)
27 China's first written submission, paras. 134-136, 145, 155-156 and 167. (emphasis added)
28 China's first written submission, para. 145. (emphasis added)
29 China's first written submission, para. 167. (original emphasis omitted)
22. However, as the Appellate Body confirmed in *US – Clove Cigarettes*, "the qualification of an obligation with the adverb 'normally' … indicates that the rule … admits of derogation"\(^{31}\) under conditions that are not "normal" or "ordinary". Within the specific context of Article 2.2.1.1, the panel in *China – Broiler Products* also clarified that "the use of the term 'normally' in Article 2.2.1.1 means … an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records".\(^{32}\)

23. The text of Article 2.2.1.1 therefore indicates that an investigating authority may depart "from the norm" of calculating costs on the basis of exporter or producer records where: (i) the relevant conditions or circumstances are not "normal" or "ordinary"; and (ii) the investigating authority explains or justifies that departure.

24. As the European Union elucidates in its first written submission, Article 2.2.1.1 and the other "generally applicable WTO rules" that Australia has considered above set out an extensive inventory of circumstances that are "not 'normal'".\(^{33}\)

25. As confirmed by the Appellate Body in *EU – Biodiesel (Argentina)*, the relevant costs in Article 2.2.1.1 "are those costs that, together with other elements, would otherwise form the basis for the price of the like product *if it were sold in the ordinary course of trade* in the domestic market".\(^{34}\)

26. Furthermore, the text of Article 2.2.1.1 does not qualify or otherwise specify the alternative bases that an investigating authority may have recourse to when departing "from the norm" of using the costs reflected in exporter or producer records. In Australia's view, the absence of any qualifying language means there is no basis for reading into Article 2.2.1.1 a "prohibition" on the use of "surrogate prices or costs in an analogue country to determine normal value"\(^{35}\) (as China's claims imply).

IV. CHINA'S CLAIMS REGARDING THE EXCLUSIVE FOCUS OF ARTICLE 2.2 ON INDIVIDUAL PRICING PRACTICES

27. China further contends that the general anti-dumping rules discipline exclusively the individual "pricing practices", "pricing behaviour", or "pricing strategies" of the producer under investigation",\(^{36}\) and do not permit taking into account "domestic market conditions"\(^{37}\) – such as distortions within the domestic market that affect the producer's prices or costs.\(^{38}\)

28. In making this claim, China fails to explain why Article 2.2 of the ADA provides explicitly that a "particular market situation" may preclude a proper comparison between the domestic price and the export price for the purposes of determining dumping. China itself acknowledges that "Article 2.2 contemplates that a 'particular market situation' … may not permit a 'proper comparison' between the export price

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\(^{31}\) Appellate Body Report, *US – Clove Cigarettes*, para. 273. (emphasis added)


\(^{33}\) European Union's first written submission, para. 46. (original emphasis modified)


\(^{35}\) China's first written submission, para. 167. (original emphasis omitted)

\(^{36}\) China's opening statement at the second substantive meeting, para. 59. See also China's response to Panel Question No. 20. (emphasis added)

\(^{37}\) China's response to Panel Question No. 20. (original emphasis)

\(^{38}\) China's opening statement at the second substantive meeting, paras. 59-62.
and the price of the like product in the home market of the producer;"39 and that this text "contemplates that there are circumstances in which a comparison between the export price and home market sales of the like product cannot identify 'dumping'."40

29. However, China provides no explanation of how this acknowledgment can be reconciled with China's claim that "domestic market conditions" are irrelevant to determining dumping; nor any indication of the kind of "particular market situation" that China considers could render domestic prices unsuitable for this purpose. Nor does China explain what factors an investigating authority legitimately could consider when determining the existence of a "particular market situation" if not market distortions that affect a producer's domestic prices or costs in a manner that renders these unsuitable or inappropriate for a proper comparison with the export price.41

30. Rather, China simply asserts that the only inquiry permitted by the Anti-Dumping Agreement is one focused narrowly on the "conduct of the producer"42 or the producer's own "pricing behaviour"43 – regardless of whether the particular market situation has distorted that conduct or pricing. In Australia's view, the very terms used in the general anti-dumping rules again refute China's assertion.

V. CONCLUSION

31. For the reasons discussed above, in Australia's view, China's claims that the generally applicable WTO rules prescribe a "strict comparison with home market prices and costs"44 and "prohibit"45 the use of "surrogate prices or costs in an analogue country to determine normal value"46 are not supported by the plain text of Article VI:1 of the GATT 1994 (or the Ad Note to Article VI:1) or Articles 2.2 or 2.2.1.1 of the ADA.

32. The very terms used in the general anti-dumping rules also refute China's assertion that the only inquiry permitted by the ADA is one focused narrowly on the producer's own "pricing behaviour"47 – regardless of whether the particular market situation has distorted that conduct or pricing.

33. The Panel should therefore reject China's claims to this effect. Rather, interpreted in a manner that gives meaning to all of the crucial terms used, the general anti-dumping rules require a "proper comparison" with a comparable price "in the ordinary course of trade" – that is, with prices and costs determined by normal commercial practice.

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39 China's response to Panel Question No. 20, para. 222.
40 China's response to Panel Question No. 20, para. 222.
41 See China's response to Panel Question No. 20, para. 222; China's second written submission, paras. 147-152.
42 China's response to Panel Question No. 20, para. 228.
43 China's response to Panel Question No. 20.
45 China's first written submission, para. 155.
46 China's first written submission, para. 167. (original emphasis omitted)
47 China's response to Panel Question No. 20.