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

Third Party Oral Statement of Australia

7 December 2017
1. Mr. Chairman, distinguished Members of the Panel.

2. Australia acknowledges that the Panel has indicated its particular interest in third parties' views on the status of Section 15 of China's Accession Protocol following the expiry of subparagraph 15(a)(ii) on the 11th of December 2016.

3. Australia also understands that the European Union and many of the third parties to this dispute regard the enduring – albeit modified – operation of Section 15 as central to determining the legal merits of China's claims; and have addressed this issue in considerable detail in their submissions.

4. We further recognise that the expiry of subparagraph 15(a)(ii) of China's Accession Protocol has sparked profound – and profuse – academic interest and debate.

5. Australia considers that the profusion of views on the current scope of Section 15 has arisen, in part, because the consequences of the expiry of subparagraph 15(a)(ii) are seen as pivotal for the respective rights of China, on the one hand, and the rest of the Membership, on the other. However, we also attribute this profusion to exploitable ambiguity in the structure and text of Section 15 itself.

6. In addition, we observe that the question of what endures of Section 15 – however resolved – has no application for Members, such as Australia, that have already recognised China as a market economy; or that choose to recognise China as such in the future.

7. In Australia's view, the critical interpretative issues raised by China's claims in this dispute transcend the specific question regarding Section 15. Indeed, as the Panel noted in its invitation to this first substantive meeting, China's first written submission does not rely on any particular part of Section 15 of China's Accession Protocol as the legal basis for its claims.

8. Rather, the interpretative issues underlying China's claims in this dispute bear directly on the general rights granted under the covered agreements to all Members, for use in relation to all Members, to remedy injurious dumping. For Australia, the scope of these general anti-dumping rules is the paramount legal issue before the Panel in this dispute; and is therefore the focus of our brief statement today.

9. In contrast to Section 15 of China's Accession Protocol, the scope of the general anti-dumping rules is clear. The text of Article VI:1 of the GATT 1994\(^1\) together with the Ad Note to Article VI:1, and the text of Article 2.2 of the Anti-Dumping Agreement\(^2\) provide, consistently and unambiguously, that: (i) an assessment of dumping requires a determination of the "normal value" of the relevant product; and (ii) the determination of "normal value" requires a comparable price of the relevant product in the ordinary course of trade in the market of the exporting country.

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\(^1\) General Agreement on Tariffs and Trade 1994.

10. In Australia's view, the clear text of these provisions refutes China's claim that the general anti-dumping rules "prohibit" an investigating authority from using any methodology to determine normal value that does not "entail a strict comparison with home market prices or costs" – such as the "use [of] surrogate prices or costs in an analogue country".5

11. As outlined in further detail in Australia's third party written submission (which we will not restate in full here), the ordinary meaning of the critical qualifying terms "comparable", "in the ordinary course of trade", and (in Article 2.2 of the Anti-Dumping Agreement) "proper comparison" indicates that: (i) dumping must be determined by comparing a product's export price with an appropriate or suitable domestic price of the like product; and (ii) a domestic price will only be appropriate or suitable for this purpose where it is determined by "normal commercial practice".7

12. This interpretation is confirmed by the Ad Note to Article VI:1 of the GATT 1994, which reinforces that prices that are not determined by normal commercial practice – such as prices that are distorted by an association between the relevant importer and exporter or by the State's intervention – are not an appropriate basis for determining the existence or margin of dumping.8

13. The findings of the Appellate Body in EU – Biodiesel (Argentina) similarly confirm that Article 2.2 of the Anti-Dumping Agreement concerns the establishment of "normal value through an appropriate proxy for the price of the like product in the ordinary course of trade" – an endeavour described by the panel in that dispute as the "basic purpose" of constructing normal value.

14. China's claim that the only methodologies for determining normal value that are permitted under the general anti-dumping rules require a "strict comparison with home market prices and costs" fails to give any meaning to the critical qualifying terms "comparable", "ordinary course of trade", or "proper comparison". Indeed, China has not addressed these terms at all in either its extensive first written submission or its lengthy opening statement at this first substantive meeting. China's arguments thus appear to read out entirely of the general anti-dumping rules these critical terms. In so doing, Australia submits that it is China – not the European Union or third parties – that "seek[s] to rewrite the generally applicable rules".12

15. China's presentation of the generally applicable rules also omits entirely any consideration of Article 2.2.1.1 of the Anti-Dumping Agreement. This provision permits an investigating authority to depart from exporter or producer records to calculate the costs of production for the purposes of Article 2.2 where: (i) the relevant

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3 China's first written submission, para. 155. (emphases added)
4 China's first written submission, paras. 134-136, 145, 155-156 and 167. (emphasis added)
5 China's first written submission, para. 167. (original emphasis omitted)
6 Australia's third party written submission, paras. 13-16, 24 and 29.
7 Appellate Body Report, US – Hot Rolled Steel, para. 140. (emphasis added)
8 Australia's third party written submission, paras. 17-21.
9 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.24. (emphasis added)
12 China's opening statement at the first substantive meeting, para. 55.
conditions or circumstances are not "normal" or "ordinary"; and (ii) the investigating authority explains or justifies that departure.\textsuperscript{13} As the European Union illustrated starkly in its first written submission, the general anti-dumping rules in fact set out an extensive inventory of circumstances that are "not 'normal'".\textsuperscript{14}

16. Moreover, the Appellate Body affirmed in \textit{EU – Biodiesel (Argentina)} that the relevant costs in Article 2.2.1.1 "are those costs that … 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".\textsuperscript{15}

17. In summary, in Australia's view, the clear text and context of the relevant provisions do not support China's central contention that the general anti-dumping rules prescribe a "strict comparison"\textsuperscript{16} with home market prices and costs\textsuperscript{17} and proscribe any recourse to third country prices or costs.\textsuperscript{18} The Panel should therefore reject China's claim to this effect.

18. Rather, interpreted in a manner that gives meaning to \textit{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.

19. We thank the Panel for the opportunity to present Australia's views.

\textsuperscript{13} Australia's third party written submission, paras. 33-37.
\textsuperscript{14} European Union's first written submission, para. 46. (original emphasis modified)
\textsuperscript{15} Appellate Body Report, \textit{EU – Biodiesel (Argentina)}, para. 6.24.
\textsuperscript{16} China's first written submission, paras. 134-136, 145, 155-156 and 167. (emphasis added)
\textsuperscript{17} China's first written submission, para. 145. (emphasis added)
\textsuperscript{18} China's first written submission, para. 167. (original emphasis omitted)