BEFORE THE WORLD TRADE ORGANIZATION

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

Third Party Written Submission of Australia

21 November 2017
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I. **INTRODUCTION**

1. Australia considers that these proceedings raise important questions of legal interpretation regarding the scope of key provisions in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (the GATT 1994).

2. In this submission, Australia will focus on the proper legal interpretation of Article VI:1 of the GATT 1994 (together with the Ad Note to Article VI:1); and Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. In particular, Australia will engage with China's claim that the "generally applicable WTO rules"1 "prohibit"2 an investigating authority from using any methodology that does not "entail a strict comparison with home market prices or costs".3

3. Australia reserves the right to raise other issues at the third party hearing before the Panel.

II. **CHINA'S CLAIMS WITH RESPECT TO THE SCOPE OF METHODOLOGIES PERMITTED BY THE "GENERALLY APPLICABLE WTO RULES"**

4. One of China's key claims in these proceedings is that, following the expiry of certain parts of Section 15 of China's Accession Protocol, the European Union can no longer adopt a methodology that departs from a "strict comparison with home market prices or costs"4 when determining the normal value of Chinese exports for the purpose of an anti-dumping investigation.5

5. Central to this claim is China's submission that Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 – i.e., the rules that apply to all WTO Members – do not permit recourse to such a methodology.6

6. To this end, China submits that Article 2.2 of the Anti-Dumping Agreement "lays down the only two alternative methodologies for determining normal value that an authority is entitled to use"7; and these methodologies "involve a strict comparison with home market prices and costs".8 According to China, an investigating authority is not permitted under Article 2.2 "to use surrogate prices or costs in an analogue country to determine normal value, because an analogue country is not the home market of the producer or exporter".9

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1 China's first written submission, para. 156.
2 China's first written submission, para. 155.
4 China's first written submission, 134-136, 145, 155-156 and 167.
5 China's first written submission, paras. 167-169, 170-171 and 174.
6 China's first written submission, paras. 155-156 and 167-169.
7 China's first written submission, para. 143. (original emphasis omitted)
9 China's first written submission, para. 167. (original emphasis omitted)
7. China further submits that Article VI:1 of the GATT 1994 "describes the same universe of normal methodologies" as provided in the Anti-Dumping Agreement. In China's view:

… like Article 2.2. of the Anti-Dumping Agreement, Article VI:1 of the GATT 1994 prohibits the use of any methodology other than one … that entail[s] a strict comparison with home market prices or costs. (emphasis added)

8. China contends that the "only exception" provided under the "generally applicable WTO rules" that permits an investigating authority to depart from a "strict comparison" with domestic market prices or costs is the Ad Note to Article VI:1 of the GATT 1994. According to China, "only [this] one legal provision" allows an investigating authority to determine normal value "on the basis of surrogate prices and costs from an analogue country"; and this is permitted only where the "two cumulative conditions" set out in the Ad Note have first been met.

III. INTERPRETATION OF THE "GENERALLY APPLICABLE WTO RULES"

9. While China's analysis of the "generally applicable WTO rules" begins with Article 2.2 of the Anti-Dumping Agreement, Australia will first consider Article VI:1 of the GATT 1994 (together with the Ad Note to Article VI:1) since this pre-dated – and formed the basis of – the disciplines contained in the Anti-Dumping Agreement.

10. Australia will then turn to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

11. To limit repetition, Australia will confine its consideration of China's arguments – which present similar claims in relation to both Article VI:1 of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement – to the discussion of Article 2.2.

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

12. 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

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10 China's first written submission, para. 154.
11 China's first written submission, para. 155.
12 China's first written submission, para. 155.
13 China's first written submission, para. 156.
15 China's first written submission, paras. 155-156. (emphasis added)
16 China's first written submission, para. 156.
17 China's first written submission, para. 158.
18 China's first written submission, para. 157.
(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.

Due allowance shall be made in each case for ... differences affecting price comparability.* (emphasis added)

13. The ordinary meaning of the term "comparable" suggests "fit to be compared". The ordinary meaning of the term "fit", in turn, 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 an appropriate or suitable domestic price may not exist.

14. 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. While this term is not defined, 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 the nature of the relationship between transacting parties is not determinative. Rather, "even where the parties to a sales transaction are entirely independent, a transaction might not be 'in the ordinary course of trade'".

15. 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". To this end, 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.

16. In Australia's view, therefore, Article VI:1 establishes that whether a domestic price is appropriate or suitable to compare with the export price for the purpose of determining the existence (and margin) of 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).

21 Appellate Body Report, US – Hot Rolled Steel, para. 141. (original emphasis omitted)
17. The *Ad* Note to Article VI:1 provides the following clarification:

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

18. In Australia’s view, rather than comprising an "exception" to Article VI:1, the *Ad* Note *elaborates upon* the definitions set out in Article VI:1.

19. 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 (rather than reflecting the distortion resulting from the association between the importer and exporter).

20. 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 paragraph makes clear that such domestic prices – i.e., prices determined by the State rather than by normal commercial practice – may not be "appropriate" for determining the existence or margin of dumping.

21. In Australia's view, 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 the existence (or margin) of dumping.

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

22. Before turning to Article 2.2 of the Anti-Dumping Agreement, it is useful to recall the definition of dumping provided in Article 2.1 – as this comprises the context for calculating the margin of dumping under Article 2.2.

23. Article 2.1 of the Anti-Dumping Agreement provides:

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25 China's first written submission, para. 155.
26 *Ad* Note to Article VI, Paragraph 1, of the GATT 1994, para. 1. (emphasis added)
27 *Ad* Note to Article VI, Paragraph 2, of the GATT 1994, para. 2. (emphasis added)
For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

24. Like Article VI:1 of the GATT 1994, Article 2.1 of the Anti-Dumping Agreement includes the qualifying terms "comparable" and "in the ordinary course of trade". Consistent with the analysis of these terms set out above,29 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.30

25. Article 2.2 of the Anti-Dumping Agreement 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)

26. 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; (ii) when the particular market situation in the relevant domestic market does not permit a proper comparison; and (iii) when the low volume of sales in the relevant domestic market does not permit a proper comparison. Australia therefore does not disagree with China's characterisation of what the "first element" of Article 2.2 provides.31

27. However, Australia does not agree with China's characterisation of the "second element" of Article 2.2.32 In particular, Australia does not agree with China's claims that Article 2.2 prescribes a "strict comparison with home market prices and costs";33 and "prohibits"34 an investigating authority from having recourse to "surrogate prices or costs in an analogue country to determine normal value".35

28. In making such claims, China fails 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,36 contrary to China's claims, the key determinant of whether a price is appropriate or suitable to compare to

29 See paragraphs 13-15 of this submission.
30 Appellate Body Report, US – Hot Rolled Steel, para. 140. (emphasis added)
31 China's first written submission, para. 141. (original emphasis omitted)
32 China's first written submission, paras. 143-145. (original emphasis omitted)
33 China's first written submission, paras. 134-136, 145, 155-156 and 167. (emphasis added)
34 China's first written submission, para. 155. (emphasis added)
35 China's first written submission, para. 167. (original emphasis omitted)
36 See paragraphs 13-15 of this submission.
the export price is whether it is compatible with normal commercial practice – not whether it solely (or "strict[ly]"\textsuperscript{37}) reflects "home market prices and costs". The Appellate Body has made clear that sales that are incompatible with normal commercial practice do not provide an appropriate basis for calculating normal value.\textsuperscript{38} This is the case even though such sales would nevertheless constitute "home market prices".

29. Similarly, China's claims 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".\textsuperscript{39} Consistent with the discussion of "comparable" price above,\textsuperscript{40} the inclusion of the qualifying term "proper" thus 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 the existence (and margin) of dumping.

30. 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.\textsuperscript{41} The panel in EU – Biodiesel (Argentina) similarly found that this was the "basic purpose"\textsuperscript{42} of constructing normal value under Article 2.2.

31. 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"\textsuperscript{43} with home market prices and costs\textsuperscript{44} and proscribes any recourse to third country prices or costs.\textsuperscript{45} 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

32. Australia observes that China's discussion of the "generally applicable WTO rules" with respect to determining normal value omits entirely Article 2.2.1.1 of the Anti-Dumping Agreement.

33. Article 2.2.1.1 of the Anti-Dumping Agreement provides, in relevant part:

\textit{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)

\textsuperscript{37} China's first written submission, paras. 134-136, 145, 155-156 and 167.
\textsuperscript{38} Appellate Body Report, US – Hot Rolled Steel, para. 140. (emphasis added)
\textsuperscript{40} See paragraph 13 of this submission.
\textsuperscript{41} Appellate Body Report, EU – Biodiesel (Argentina), para. 6.24. (emphasis added)
\textsuperscript{42} Panel Report, EU – Biodiesel (Argentina), para. 7.233.
\textsuperscript{43} China's first written submission, paras. 134-136, 145, 155-156 and 167. (emphasis added)
\textsuperscript{44} China's first written submission, para. 145. (emphasis added)
\textsuperscript{45} China's first written submission, para. 167. (original emphasis omitted)
34. The plain text of Article 2.2.1.1 makes clear that this provision informs the manner in which costs should be calculated "for the purpose of" establishing normal value under Article 2.2.46

35. The ordinary meaning of the term "normally" suggests "[u]nder normal or ordinary conditions; ordinarily; as a rule".47 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.

36. 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"48 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 that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records.49

37. 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.

38. To this end, 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".50 These "abnormal"51 circumstances include:

- imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State;
- an absence of domestic sales;
- domestic sales not in the ordinary course of trade by reason of price;
- domestic sales not in the ordinary course of trade other than by reason of price;
- domestic sales that are otherwise not comparable;
- a particular market situation;
- a low volume of domestic sales;
- a price to a third country that is not appropriate;
- a price to a third country that is not representative;
- a price to a third country that is not in the ordinary course of trade by reason of price;

46 See also Appellate Body Report, EU – Biodiesel (Argentina), para. 6.17.
48 Appellate Body Report, US – Clove Cigarettes, para. 273. (emphasis added)
49 Panel Report, China – Broiler Products, para. 7.161.
50 European Union's first written submission, para. 46. (original emphasis modified)
51 European Union's first written submission, para. 47.
• a price to a third country that is not in the ordinary course of trade other than by reason of price;
• a price to a third country that is otherwise not comparable;
• records that are not in accordance with the generally accepted accounting principles of the exporting country;
• records that do not reasonably reflect the costs associated with the production and sale of the product under consideration;
…
• cost allocations that have not been historically utilized by the exporter or producer;
• the use of inappropriate amortization and depreciation periods and allowances for capital expenditures and other development costs;
• non-recurring items of costs which benefit future and/or current production for which appropriate adjustments have not been made;
…
• any differences affecting comparability for which due allowance has not been made;
…
• any other abnormal situation affecting comparability.  

39. 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".  

40. Furthermore, Australia observes that 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" (as China’s claims imply).  

IV. CONCLUSION  

41. 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" and "prohibit" the use of "surrogate prices or costs in an analogue country to determine normal value" are not supported by the 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 Anti-Dumping Agreement.

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52 European Union's first written submission, para. 46. (footnotes omitted)  
54 China's first written submission, para. 167. (original emphasis omitted)  
55 Since China's first written submission does not discuss Article 2.2.1.1 of the Anti-Dumping Agreement, China does not directly claim that this provision prohibits the use of "surrogate prices or costs in an analogue country to determine normal value".  
57 China's first written submission, para. 155.  
58 China's first written submission, para. 167. (original emphasis omitted)
42. In making these claims, China fails to acknowledge that the text of Article VI:1 of the GATT 1994 conditions a determination of dumping on a comparison between the export price and an *appropriate* or *suitable* domestic price for the like product *in the ordinary course of trade*. The text of Article VI:1 (together with the *Ad* Note to Article VI:1) establishes that whether a domestic price is appropriate or suitable to compare with the export price depends on whether it reflects "normal commercial practice".

43. Similarly, China's claims fail to acknowledge that the normal value constructed under Article 2.2 of the Anti-Dumping Agreement must be capable of standing-in for the price of sales of the like product *in the ordinary course of trade*. Contrary to China's claims, the key determinant of whether a price is appropriate or suitable for this purpose is whether it is compatible with "normal commercial practice" – *not* whether it "strictly" reflects "home market prices and costs".

44. Furthermore, the flexibilities provided in Article 2.2.1.1 of the Anti-Dumping Agreement – a provision China's submission does not discuss – refute China's claims that the *Ad* Note to Article VI:1 of the GATT 1994 is the "*only exception*" that would permit an investigating authority's recourse to "surrogate prices or costs in an analogue country to determine normal value".

45. Australia thanks the Panel for the opportunity to submit these views.

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60 Appellate Body Report, *US – Hot Rolled Steel*, para. 140.
62 China's first written submission, para.
63 China's first written submission, para. 155. (emphasis added) As above at paragraph 18 of this submission, Australia does not consider that the *Ad* Note to Article VI:1 of the GATT1994 comprises an "exception".
64 China's first written submission, para. 155. (emphasis added)