INTERNATIONAL DECISIONS

EDITED BY JULIAN ARATO

World Trade Organization—General Agreement on Tariffs and Trade 1994—Anti-Dumping Agreement—particular market situation—constructed normal value—surrogate production cost

AUSTRALIA—ANTI-DUMPING MEASURES ON A4 COPY PAPER, WT/DS529/R. *At* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds529_e.htm.
World Trade Organization Panel, December 4, 2019 (adopted January 27, 2020).

The World Trade Organization (WTO) Panel Report in *Australia – Anti-Dumping Measures on A4 Copy Paper* (*Australia – A4 Copy Paper*) marks a significant development of the multilateral rules on anti-dumping. Under certain circumstances, WTO agreements permit members to impose anti-dumping measures to counteract the injurious effect of dumping on domestic industries, typically through import duties. The Report is the first to examine in detail when an anti-dumping authority may determine that a "particular market situation" exists in the country of exportation under Article 2.2 of the WTO Anti-Dumping Agreement, potentially justifying the imposition of elevated remedial duties. The Report also develops the jurisprudence on how such remedies may be calculated, expounding the use of benchmark costs for the calculation of a constructed normal value (CNV) under Article 2.2.1.1. These doctrinal questions are central to the longstanding debate over how far the Anti-Dumping Agreement allows anti-dumping measures against state intervention and market distortions. On both fronts, the *Australia – A4 Copy Paper* panel created flexibilities for WTO members to respond to government-induced distortions. In doing so, the Report deviates considerably from the course set by the Appellate Body in the landmark *EU – Biodiesel* decision, which seemed to confine anti-dumping measures to responding to private action.[1] At the same time, the panel left open several important issues relating to the adoption of CNVs and the use of benchmarks for their calculation, leaving wide latitude for investigating authorities to inflate dumping margins in practice.

This dispute arose out of Australia's anti-dumping investigation of A4 copy paper exported from Brazil, China, Indonesia, and Thailand, leading to the imposition of anti-dumping duties on a range of exporters from these countries.[2] Australia subjected two major

[1] Appellate Body Report, European Union – Anti-Dumping Measures on Biodiesel from Argentina, WT/DS473/AB/R (adopted Oct. 26, 2016).

[2] 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 (Mar. 17, 2017) [hereinafter Rep. No. 341]. The public record of the investigation is available at:

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Indonesian exporters to the highest duties.[3] These higher rates largely resulted from the finding of Australia's Anti-Dumping Commission (Commission) that a particular market situation existed in Indonesia's A4 copy paper market due to ongoing government support for the pulp industry.[4] The Commission found that Indonesian intervention had artificially lowered the domestic price of paper, and hence relied on a counterfactual normal value for Indonesian A4 copy paper. In doing so, the Commission disregarded the actual cost of the key input incurred by the Indonesian producers or exporters—paper pulp. In its view, this cost did "not reasonably reflect a competitive market cost."[5] Instead, the Commission resorted to external benchmarks based on the prices of pulp exported to China and Korea from several South American countries.[6] This use of surrogate production costs resulted in a higher CNV, and hence a finding of higher dumping margins, justifying higher anti-dumping duties.

Under Article 2 of the Anti-Dumping Agreement, a normal value should be calculated based on the domestic price of the subject goods in the country of exportation unless special circumstances exist. Article 2.2 identifies several such circumstances, and authorizes use of alternative proxies for constructing normal value:

> 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).

Thus, when an investigating authority determines that a country is in a particular market situation, it may disregard the domestic price of those goods and instead construct a normal value (under defined limits) for the determination of dumping margins. However, the Anti-Dumping Agreement does not define particular market situation, leaving substantial discretion in the hands of domestic investigators. Prior to this dispute, this concept was raised in only one General Agreement on Tariffs and Trade (GATT) dispute[7] and has never been interpreted by WTO tribunals.

Among WTO members, Australia was for a time the only major user of the particular market situation method, especially in anti-dumping actions against China. Instead, in relation to

www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/epr-341.

[3] *Id.* at 13.

[4] *Id.* at 165–74.

[5] *Id.* at 230.

[6] *Id.* at 231.

[7] GATT Panel Report, EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, 42S/17 (adopted Oct. 29, 1995). In that dispute, the GATT panel did not consider the meaning and scope of a "particular market situation." In its view, the key issue is not whether a particular market situation exists but whether such a situation has distorted the prices concerned so as to prevent a "proper comparison" between normal values and export prices. In *Australia – A4 Copy Paper*, the WTO Panel offered more detailed interpretations of these issues.

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China, other members mostly relied on Section 15 of China's WTO Accession Protocol to achieve similar results—by allowing WTO members to treat China as a non-market economy in anti-dumping investigations and to use benchmark prices (as opposed to Chinese prices) in determining normal values.[8] While the continued invocation of Section 15 for this purpose is controversial,[9] frequent users like the United States and the European Union have increasingly turned to the particular market situation approach.[10] In almost all anti-dumping investigations over the past decade, the Australian authority has found China to be in a particular market situation in a variety of sectors.[11] The Chinese government has consistently challenged these conclusions, both within these investigations and through diplomatic channels. But it has never resorted to WTO proceedings.[12] Australia's A4 copy paper investigation was one of the few cases where the Australian authority found that a particular market situation did not exist in China.[13] While China had no incentive to challenge Australia's methodology in this investigation, Indonesia's WTO proceedings addressed China's longstanding concern.

In considering Indonesia's claim that the Australian authority had erred in finding the existence of a particular market situation in Indonesia's A4 copy paper market, the panel started by observing that the term was deliberately left undefined by the drafters and must thus be analyzed case by case (para. 7.21). The panel found that the term "cannot be interpreted in a way that comprehensively identifies the circumstances or affairs constituting the situation that an investigating authority may have to consider" (*id.*). Furthermore, the panel ruled that the phrase "do not permit a proper comparison" in Article 2.2 sets a separate condition that should not be considered in the determination of what may constitute a particular market situation (para. 7.27). Finally, the panel rejected Indonesia's argument that government action is, in principle, excluded from the coverage of anti-dumping remedies and should be addressed under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) (para. 7.53). In its view, "a situation arising from government action in whole or in part" may constitute a particular market situation (para. 7.55). Based on the above

[8] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001). *See also* NON-MARKET ECONOMIES IN THE GLOBAL TRADING SYSTEM: THE SPECIAL CASE OF CHINA (James Nedumpara & Weihuan Zhou eds., 2018).

[9] Paragraph (d) of Section 15 stipulates that certain parts of this section shall remain in force for fifteen years only until December 11, 2016. For China, the expiration of the relevant part has removed the basis for other countries to treat it as a non-market economy in anti-dumping actions. The United States and the European Union have maintained a different position. *See, e.g.*, Weihuan Zhou & 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*, 52 J. WORLD TRADE 505 (2018).

[10] Weihuan Zhou & Andrew Percival, *Debunking the Myth of "Particular Market Situation" in WTO Antidumping Law*, 19 J. INT'L ECON. L. 863 (2016).

[11] Weihuan Zhou, *Australia's Anti-Dumping and Countervailing Law and Practice: An Analysis of Current Issues Incompatible with Free Trade with China*, 49 J. WORLD TRADE 975 (2015).

[12] To the authors' knowledge, there were at least two related reasons why China did not initiate WTO proceedings against Australia. Australia's anti-dumping duties had limited economic impacts, as they were predominantly targeted at certain sectors and generally applied at moderate rates (compared to such duties imposed by the United States and the European Union). Therefore, China allocated most of its legal resources and capacity to addressing anti-dumping and/or countervailing actions by the United States and the European Union and hence had limited resources and capacity to deal with Australia.

[13] *See* Rep. No. 341, *supra* note 2, at 154–61. Central to this finding were the facts that the Chinese paper industry had predominantly relied on imported pulp and that the Chinese pulp price was typically higher than regional benchmarks.

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interpretation, the panel found that Australia's general approach to determining that Indonesia had a particular market situation was permissible (para. 7.57).

However, the panel found that the Australian authority did not assess whether the particular market situation identified had precluded a "proper comparison" between domestic and export prices. This assessment is necessary to "determine whether the domestic price can or cannot be used as a basis for comparison with the export price to identify the existence of dumping" (para. 7.74). The panel elaborated that artificially lowered input costs of the sort at issue can affect domestic and export prices to varying degrees, and a determination of the extent may involve consideration of various factors including "the prevailing conditions of competition in each market," "the existing relationship between price and cost," and the private commercial decisions of producers and exporters (paras. 7.76, 7.80). Australia did not go beyond determining the *existence* of a particular market situation to assess whether the distorted pulp cost would in fact make any comparison between domestic paper price and export price misleading (paras. 7.86–7.89). Therefore, Australia's substitution of a CNV for the domestic prices of the two Indonesian exporters failed to satisfy the requirements of Article 2.2 of the Anti-Dumping Agreement (para. 7.90).

The other major issue in this dispute concerned the construction of a normal value. A finding that a particular market situation has precluded a "proper comparison" between domestic and export prices merely justifies the *adoption* of a CNV. However, it is the *calculation* of the CNV that determines the magnitude of dumping margins. The level of a CNV typically hinges on the cost of production used for the calculation. Here too, the panel found that Australia's use of benchmark costs for the determination of a CNV fell short of WTO standards. The relevant standards are set out in Article 2.2.1.1 of the Anti-Dumping Agreement which provides:

> 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).

Thus, there are two conditions for the determination of whether costs recorded by producers and exporters should be used for the calculation of a CNV. The first condition merely requires that costs be recorded in accordance with generally accepted accounting principles and hence provides no flexibility for consideration of whether recorded costs are distorted by state intervention. The second condition, according to the Appellate Body in *EU – Biodiesel*, requires that the cost records suitably and sufficiently reflect the actual costs incurred and does not allow for consideration of the reasonableness of the costs themselves.[14] Therefore, the "reasonably reflecting test" also provides no flexibility for considering whether state intervention distorts recorded costs. In *Australia – A4 Copy Paper*, however, the panel distinguished the *EU – Biodiesel* decision, finding that Australia's application of surrogate production costs was not based on the reasonably reflecting test, but was rather based on an assessment of the *reasonableness* of the recorded costs, that is, whether the costs were "*competitive* market costs

[14] Weihuan Zhou, *Appellate Body Report on* EU – Biodiesel*: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement*, 17 World Trade Rev. 603 (2018).

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associated with the production" (para. 7.102) (emphasis added). In other words, as the reasonably reflecting test does not provide room for consideration of the reasonableness of recorded costs, the panel believed that Australia was not applying that test so that the *EU – Biodiesel* decision does not apply (paras. 7.103–7.107). Instead, the panel held that the term "normally" may provide some flexibility for investigating authorities to consider the reasonableness of costs and to replace distorted production costs with a competitive benchmark. It ruled that there may be circumstances in which benchmark costs may be employed even though the two conditions of Article 2.2.1.1 are fulfilled (paras. 7.110–7.115). However, the panel found it unnecessary to determine the exact scope of these circumstances in this dispute (para. 7.116). The panel merely emphasized that authorities cannot utilize the flexibility provided by "normally" unless they have found that the two conditions under Article 2.2.1.1 are satisfied (para. 7.117). The panel held that Australia did not conduct a sufficient assessment of the two conditions and hence was not entitled to disregard the recorded costs based on the term "normally" (paras. 7.119–7.124).

* * * *

The panel addressed two important issues relating to the use of the particular market situation approach to justify the *application* of CNVs. First and foremost, the panel's ruling suggests that government intervention in a market may constitute a particular market situation. This is significant because it arguably expands the scope of the WTO anti-dumping rules for addressing market distortions caused by government actions. Prior to this decision, there was some controversy as to whether the use of CNVs to deal with non-market economies was confined to the extreme situations involving complete or substantial state monopoly of trade and price controls[15] and to circumstances permitted under the WTO accession instruments of certain new members. For example, as discussed above, Section 15 of China's WTO Accession Protocol sets out China-specific rules that go beyond the Anti-Dumping Agreement allowing WTO members to treat China as a non-market economy in anti-dumping investigations. The panel's decision reads the Anti-Dumping Agreement more broadly to allow targeting all types and levels of government-caused market distortions. This scope would thus legitimate the use of the particular market situation approach by all WTO members against any economies. Lately, China itself used this approach to find that the U.S. energy and petrochemical sector had a particular market situation,[16] and is investigating whether a particular market situation exists in Australia's wine industry in an ongoing anti-dumping action.[17]

[15] The second Supplementary Provision to GATT Article VI:1 states: "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."

[16] Ministry of Commerce of China Pres Release, Preliminary Determination on an Anti-Dumping Investigation into N-Propanol Exported from the United States, Notice No. 25 (July 17, 2020), *at* www.mofcom.gov.cn/article/b/c/202007/20200702983873.shtml.

[17] Ministry of Commerce of China Press Release, Notice on the Initiation of an Anti-Dumping Investigation into Wine Exported from Australia, Notice No. 34 (Aug. 18, 2020), *at* www.mofcom.gov.cn/article/b/e/202008/20200802993244.shtml.

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Second, the panel's decision confirms that the existence of a particular market situation does not automatically justify the use of CNVs (in lieu of actual domestic price) to calculate dumping margins. Rather, authorities must take the further step of assessing whether the market situation has precluded a "proper comparison" between domestic and export prices. The panel's decision suggests a test of even-handedness. That is, if the situation concerned has lowered the two prices to the same degree, then the comparability of the domestic price would not be affected, which therefore must be used for the determination of dumping margins. However, if the situation has had a larger or exclusive impact on the domestic price, then a "proper comparison" between the two prices would be precluded, and the use of a CNV would be justified. This even-handedness approach should be welcomed. It would be unnecessary to resort to CNVs if a market situation causes the same level of distortions in domestic and export prices such that the two prices remain comparable. However, the panel has left uncertainties as to how authorities should apply the even-handedness test in determining whether a market situation has had an asymmetric impact on domestic and export prices. WTO tribunals will need to develop more specific rules for the "proper comparison" test to restrain the discretion of domestic authorities so as to avoid abuse of the particular market situation method.

In dealing with how a CNV should be calculated under Article 2.2.1.1, the panel's interpretation of the term "normally" has further developed the jurisprudence established by the Appellate Body in *EU – Biodiesel*. As noted above, the *EU – Biodiesel* decision has arguably sought to limit the application of anti-dumping measures to private activities as opposed to government actions, while pushing the latter to be addressed under the SCM Agreement instead.[18] In *Australia – A4 Copy Paper*, the panel's interpretation of "normally" has created the flexibility for the use of surrogate costs in the presence of government-induced price distortions and consequently for the use of anti-dumping measures in a way that deviates from the spirit of the *EU – Biodiesel* decision. While the panel did not clarify exactly what circumstances may fall within the scope of "normally," it does not impose any substantive limitation either. The satisfaction of the two conditions under Article 2.2.1.1 as a precondition for utilizing the flexibility of "normally" is not a hurdle. In practice, authorities may simply accept the two conditions, i.e., that producers' records are in compliance with general accounting standards and reasonably reflect the costs actually incurred, to trigger an assessment of whether the costs are competitive prices.

The final major issue arising from the panel's decision concerns the adjustments that would need to be made to any competitive benchmark to ensure that it reflects "the cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement. In *EU – Biodiesel*, the Appellate Body established that benchmarks that do not incorporate distortions in the market of the exporting country cannot reflect "the cost of production in the country of origin" and therefore must be adjusted.[19] Here too, the panel seems to deviate from this approach. Rather, it ruled that Article 2.2 "requires the investigating authority to consider available alternatives for replacing recorded costs *so as to use the costs that are unaffected by*

[18] Meredith Crowley & Jennifer Hillman, *Slamming the Door on Trade Policy Discretion? The WTO Appellate Body's Ruling on Market Distortions and Production Costs in* EU – Biodiesel (Argentina), 17 World Trade Rev. 195, 208 (2018). *See also* Zhou, *supra* note 14.

[19] *See* Zhou, *supra* note 14, at 620–24.

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the distortion to the extent possible" (para. 7.162, emphasis added). This suggests that the required adjustments to benchmarks are limited to the components of producers' costs unaffected by government-caused distortions (para. 7.164), whereas the *EU – Biodiesel* decision has arguably required such adjustments to include all conditions in the relevant market including distortions caused by state intervention.[20] The panel's approach invites an improper comparison between CNV and export prices. Where a particular market situation exists in an upstream market, it typically affects the cost of production for domestic and export sales in the same way. In contrast, a benchmark cost used for the purpose of addressing the market situation would not include the distortion concerned. Therefore, an adjustment to the benchmark that also excludes the distortion would lead to a comparison between an *undistorted* CNV (which is typically a higher normal value) and a *distorted* export price. This would in turn result in a higher dumping margin. To avoid such inflation of dumping margins, a better approach would require an adjustment to the benchmark to ensure the cost used for the construction of normal value permits a "proper comparison" between the CNV and the export price. This approach would be needed not only in the typical cases where the distortion concerned has had the same effect on the production cost for both domestic and export sales, as illustrated above. It would also be needed in the unusual cases where a particular market situation does affect the cost of production of domestic goods to a larger extent than the cost of production of export goods. In such circumstances, the different degrees of impact on cost may respectively flow through to domestic and export prices of the end goods. When a benchmark is employed, an adjustment to the benchmark is needed to ensure the cost used for the construction of normal value accurately reflects the difference in the degree of absorption of the cost distortion into domestic and export prices. This would in turn require authorities to determine the exact difference in the degree of impact of the distortion on the two prices.

In sum, the *Australia – A4 Copy Paper* decision has developed the WTO's anti-dumping jurisprudence in significant ways while also leaving ambiguities around certain highly complex and controversial issues that will be ripe for consideration in future disputes. More specifically, the decision has created flexibilities for WTO members to tackle state intervention and market distortions by recourse to the particular market situation method as a pathway to the adoption of a CNV and subsequently competitive benchmark costs for the calculation of the CNV. In this sense, the decision has extended the scope of the Anti-Dumping Agreement in a way that the *EU – Biodiesel* decision sought to restrain. Notably, the panel's ruling that an adjustment to selected benchmarks (to reflect the cost of production in the country of origin) should exclude the market distortion concerned cannot be reconciled with the *EU – Biodiesel* decision. Having created the flexibilities above, the panel's decision leaves uncertainties on issues critical to constraining the flexibilities including how to determine whether a particular market situation has actually precluded a "proper comparison" between domestic and export prices (especially where the situation is in an upstream market), and the circumstances covered by the term "normally." In the absence of a functional Appellate Body, it is unclear how future panels will address these outstanding issues. In the meantime, these flexibilities and uncertainties will leave considerable discretion to investigating authorities, leading to increasing application of the particular market situation method among WTO members. This will in

[20] *Id.*

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turn lead to tit-for-tat anti-dumping measures, adding fuel to the current crisis in globalization and international cooperation on trade regulation.

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Subject-matter jurisdiction—European Union law—admission to international organizations—territorial disputes—arbitration

REPUBLIC OF SLOVENIA v. REPUBLIC OF CROATIA. No. C-457/18. *At* https://curia.europa.eu. Court of Justice of the European Union, January 31, 2020.

The Judgment of the Court of Justice of the European Union (CJEU) in *Slovenia v. Croatia* marks the anticlimax of a long-running territorial dispute. It is also only the sixth time the CJEU has issued a judgment in a case instituted by one European Union member against another. Among these cases, it is the first to consider an arbitral award in a dispute between members, the first to consider a boundary dispute between members, and the first to be dismissed for lack of jurisdiction. The Court found that it cannot rule on alleged infringements of European Union law when these arise from the breach of a treaty falling outside of the Union's subject-matter competence. Most directly, the Judgment may pose significant consequences for European Union internal affairs in the near term, such as Croatia's ambitions to join the Schengen Area and the Eurozone.[1] More broadly, several of the Court's findings will be relevant beyond the European legal order, particular those concerning the meaning and effect of "ancillary" legal questions, and the bilateral or multilateral character of a dispute involving admission to an international organization.

Croatia and Slovenia achieved independence as successor states to the Socialist Federal Republic of Yugoslavia in 1991. A year later, they entered into bilateral negotiations concerning their shared land and maritime boundaries.[2] In 2008, Slovenia—by then a member of the European Union—raised formal objections to accession negotiations between Croatia and the Union and their potential prejudicial effect on the boundary dispute.[3] The European Union began an initiative to facilitate the resolution of the dispute in January 2009, and

[1] *See* Thomas Bickl, *CJEU Judgment on* Slovenia v. Croatia*: What Role for International Law in EU-Accession Dispute Settlement?*, NCLOS BLOG, pt. IV(1) (Feb. 18, 2020), *at* https://site.uit.no/nclos/2020/02/18/cjeu-judgement-on-slovenia-v-croatia-what-role-for-international-law-in-eu-accession-dispute-settlement.

[2] Arbitration Between the Republic of Croatia and the Republic of Slovenia, Partial Award, para. 10, PCA No. 2012-04 (June 30, 2016), *at* https://pca-cpa.org/en/cases/3 [hereinafter Partial Award].

[3] *Id.*, para. 13 (recalling that "Slovenia raised reservations to seven of the negotiating chapters at the Intergovernmental Accession Conference of the European Union with Croatia . . .").