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The Choice of 'Facts Available' in China – Anti-Dumping Duties on Imports of Barley from Australia WT/DS598

Williams Trade Law Newsletter - June 2023

Was China's choice of replacement facts in imposing anti-dumping duties on imports of barley from Australia consistent with WTO rules?

The last Williams Trade Law Newsletter set out the WTO rules and briefly the WTO jurisprudence on one of the significant issues that frequently arises in anti-dumping investigations: once an anti-dumping authority has determined that it can resort to facts available because of the inadequacy of the information submitted by the parties, what are the WTO rules that constrain how the authority can choose what facts available to use.

This newsletter will deal with how that issue arose and was dealt with in the determination by the Trade Remedies Investigation Bureau of the Chinese Ministry of Commerce ('TRIB') in its determination in May 2020 to impose anti-dumping duties on imports of barley from Australia. That issue was among the issues before the Panel in the WTO complaint made by Australia about the PRC's imposition of the anti-dumping duties on barley.[i]

The last newsletter analysed the relevant WTO provisions, in particular, two provisions of the WTO Anti-Dumping Agreement:

ADA Article 6.8:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available. The provisions of Annex II shall be observed in the application of this paragraph."

The first two sentences of paragraph 7 of Annex II of the ADA provide:

> "If authorities do have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from information obtained from other interested parties during the investigation."

The last newsletter summarized the principles drawn from WTO cases as:

(1) in all but exceptional cases, where possible a comparative evaluation of the evidence available is required in order to choose which facts available to use;
(2) the authority must choose facts available that "reasonably replace" the information which the interested party failed to provide;
(3) in order to choose which 'facts available" reasonably replace the missing "necessary information', the authority must engage in a process of reasoning and evaluation;
(4) the process of reasoning and evaluation must take into account all substantiated facts that are on the record including the information the respondent did provide;
(5) the process of reasoning and evaluation must have been done in a way that enables a panel to assess whether the facts available used by the investigating authority are reasonable replacements for the missing "necessary information";
(6) if there is no error of law, the authorities may have made an error on the question of fact if the authorities did not properly establish the facts or if their evaluation of the facts was not unbiased and objective;
(7) those authorities must provide a reasoned and adequate explanation of the process of reasoning and evaluation that led them to their conclusion that particular facts available should be used to replace the missing information.

China's Choice of Facts Available in its 2020 Determination on imports of Barley from Australia

The investigation of imports of barley from Australia involved an Australian industry consisting of thousands of barley producers and about a dozen barley traders. Barley producers do not export barley. In general, they sell all or most of their crop to traders, but some producers sell some quantities direct to domestic end-users. The traders purchase barley from producers, mix the barley purchased from various producers and sell it in Australia or to various export markets but the amount traders sell to export markets is much larger than the amount they sell in Australia.

The Information supplied by Exporters and Producers

In the barley investigation, the Chinese authority, the TRIB issued questionnaires which sought information from exporters as to their export prices and domestic prices during the period of the investigation 1 October 2017 to 30 September 2018. The questionnaire instructed exporters that if they were not the producers of the goods, they should forward the questionnaire to the producer. Twelve traders (CBH, GrainCorp, Glencore, Emerald, COFCO, Cargill, ADM Trading, Bunge, CHS Broadbent, Australian Grain Export, Agracom, and CL Commodities) submitted responses to the Chinese questionnaires by the deadline (and a couple of others responded after the deadline). The traders provided complete listings of transactions exporting barley to China. The traders also provided listings of their transactions purchasing barley from producers in Australia. The response to the questionnaire by CBH included a response from three producers, The Iluka Trust, Kalgan Nominees Pty Ltd and JW & JI McDonald, and the response from Grain Corp included a response from one producer, Haycroft Enterprises. The producers supplied the information that they did not make any export

sales themselves but sold to traders who did make export sales. The four producers (The Iluka Trust, Kalgan Nominees Pty. Ltd., JW & JI McDonald & Sons, and Haycroft Enterprises) also supplied information on their cost of production, though not giving it exactly in the form requested.

TRIB's finding that the inadequacy of information supplied justified resort to Facts Available

With respect to the information submitted by the traders, the TRIB found it unsatisfactory that the traders could not identify, for each export sale and each domestic sale, the purchase transactions for the purchase of the same barley that was subject to their sale transaction. This finding appears to reveal a refusal to accept the fact that exporters pooled all the barley that they purchased from various purchasers and that it was impossible for them to identify, for a given sale transaction, what quantity had been bought from any particular producer in any particular transaction or at any particular price. The TRIB appears to have concluded that since the information about cost was inadequate, then the information submitted by traders was not sufficient to enable the determination of either the normal value or the export prices. On that basis, TRIB decided it was justified in resorting to facts available to determine both normal value and export price for the traders.

With respect to the information supplied by the four producers, even though the 4 producers had informed the Chinese authorities that they did not export at all, the TRIB found that the 4 producers had not submitted adequate information about their export prices. For that reason, the Chinese authorities decided it was permissible to resort to facts available to determine the producers export prices. With respect to normal value, TRIB found that the information supplied by the four producers about their cost of production was not in the form requested which meant that it could not be used to assess whether their prices in sales for domestic consumption were below cost, and whether the sales were sales in the ordinary course of trade. So the TRIB also found that it was justified in determining normal value on the basis of facts available.

The Chinese Authority's choice of Facts Available to replace the missing information

The TRIB's reports are extremely succinct in the way they explain their choice of which available facts to use to replace the information found to be inadequate in the submissions of the traders and producers. The relevant part of the TRIB Disclosure Statement (the Statement of Essential Facts) said:

> "The Investigation Authority has viewed the websites of the Australian Government Department of Agriculture and related agencies, customs statistics, publicly obtained industrial information, public publications and research reports, and information in the application form, and after comparative analysis, concluded that Australia's export price from the Global Trade Atlas is the best information available."[ii]

The TRIB Final Report confirmed the choice of facts available, saying:

> "The investigation agency consulted the Australian Agriculture Department and related agencies Station, customs statistics, publicly available information, public publications and after studying and comparing the information in the research report and application form, the Australian Customs against Egypt counted by the Global Trade Atlas and the export price is the best information available. The investigating authority decided to use the price as a basis for determining normal value."[iii]

The TRIB Final Report noted that several responses to its Disclosure Statement challenged the choice of the price of exports to Egypt as best information available and responded:

> "The investigation agency believes that when choosing the best information available, the investigation authority checked the information obtained from the investigation and the letter from other independent sources. After considering the sales volume, export market, transportation mode and other factors, the export price to Egypt was selected as the best and appropriate information."

The authorities did not use any of the information about sales transactions, prices and costs that had been submitted by the Australian traders and producers. Instead, the Chinese authorities drew solely upon information published by Global Trade Atlas which was not part of the information submitted by any of the Australian traders or producers. The information published by Global Trade Atlas contained a list of the volumes and average monthly c.i.f. (meaning that the seller is responsible for paying for freight and insurance to the destination) prices in USD of exports of barley from Australia to 23 countries including China and Egypt. The TRIB decided that the best information available to be used to determine the price of domestic sales in Australia by the four producers was the Global Trade Atlas price of export sales to Egypt, which was US$392.82. and that the best information available to be used to determine the export prices of the 4 producers was the Global Trade Atlas price of export sales to China, which was US$216.83. The chosen domestic price was based on the cif prices in sales of 4.71 million tonnes of barley to a destination 8,000 km away and the chosen domestic price was based on cif prices for sales of a mere 54 tonnes to a destination 14,500 km away. By subtracting one from the other, MOFCOM calculated the dumping margin at 73.6% for each of the 4 producers. Then without any further explanation, MOFCOM decided that the best information available to be used to determine the dumping margin for the 12 traders was the dumping margin which had been determined for the 4 producers, that is, 73.6%.

The WTO consistency of the choice of Facts Available in the Barley case

The Chinese authority appears to have calculated the margin of dumping as the difference between the CIF Price of sales from Australia to China and the CIF price of sales from Australia to Egypt, and to have done so without making any adjustment to either the normal value or the export price to remove non-comparable transport costs included in those prices. The TRIB did not indicate that it was departing from basing normal value on the prices of domestic sales or that it had any justification for resorting to a normal value based on constructed price or a normal value based on third country export price, so it appears that the TRIB decided that the export price to Egypt was the best information available for estimating the price of barley in domestic sales in Australia. While there could also be violations of the duty under ADA article 2.2 to base normal value on prices in domestic sales or of the duty under article 2.4 to ensure a fair comparison between normal value and export price, the focus here is on the choice of facts available.

What can we discern from the TRIB's report about whether it engaged in a process of reasoning and evaluation and whether that process of reasoning and evaluation properly led it to choose facts available that "reasonably replace" the information which the interested party failed to provide? One necessary component of an adequate process of reasoning and evaluation is that an anti-dumping authority should use the information that was supplied by the parties to the extent that it can do so. The Report indicates that the TRIB did not use any of the information submitted by the traders and producers. The only information it used was the price information from the Global Trade Atlas statistics.

The Chinese authorities final report says that the authority has taken into "the information obtained from the investigation" but it does not say how it took that information into account. Given that the traders had all supplied complete listings of export transactions, it is quite puzzling how TRIB's process of reasoning and evaluation does not include any explanation of exactly which information about export prices was missing and

why the price from the Global Trade Atlas statistics was a better indication of export price than the actual list of transactions supplied by the traders.

The final report also says that the authorities engaged in a comparative analysis of several named sources of information but the report does not offer any explanation of why the source of information that they chose is better than the other possible sources of information, or why it is a reasonable replacement for the allegedly missing information.

Perhaps the Chinese authorities have engaged in a comparative analysis of different facts available but they have failed to offer a reasoned and adequate explanation of any such comparative evaluation and the reasoning upon which they based their conclusions. Even though the Report says that the TRIB considered "websites of the Australian Government Department of Agriculture and related agencies, customs statistics, publicly obtained industrial information, public publications and research reports, and information in the application form", the report does not indicate what it found out from those sources, nor does it contain any analysis of why the prices obtained from the Global Trade Atlas statistics were better indications of export prices and domestic prices than all of the information which the TRIB said it had found by examining all of the other sources it named.

Did the TRIB properly establish the facts and was its evaluation of those facts unbiased and objective? There are some features of the Global Trade Atlas statistics which would attract careful scrutiny by an unbiased and objective decision-maker. The prices contain freight over different distances and the prices arise from transactions of substantially different volumes. The GT Atlas prices includes prices in export sales to 23 export markets. Of those prices to 23 markets, the price in exports to Egypt was the 2nd highest price. The Final report does not offer any explanation of why it chose the price of sales to Egypt over the price of sales to any other country as the most appropriate information to be used. It is noteworthy that the volume of the sales to Egypt was very small. If one considered the 9 export markets which accounted for 99% of the volume of Australian exports to countries other than China, the weighted export price was USD 233.10 which is much lower than the USD392.82 normal value that was based on the prices in sales to Egypt.

Finally, has the TRIB decision given a reasonable and adequate explanation of its evaluation and its conclusions sufficient to enable a WTO Panel to assess whether the TRIB properly established the facts and whether the TRIB's evaluation of the facts was unbiased and objective. The report falls short of constituting a reasonable and adequate explanation in several ways. It does not examine any of the characteristics or the peculiarities of the Global Trade Atlas data. It does not give any detail about the information other than the Global Trade Atlas data which the TRIB says it compared with the Global Trade Atlas data. It does not use any of the information submitted even though it appears that large parts of the information received in the investigation would have been relevant to properly establishing the facts, particularly the comprehensive listings of sales and purchase transactions. In short it gives no explanation of why the information drawn from the Global Trade Atlas is the best available information to use.

At minimum, a WTO Panel would have to find that the Chinese Authority's Final Report does not contain a reasoned and adequate explanation of their conclusions that GTA price to Egypt was the best available information about normal value or that the GTA Price to China was the best available information about export prices. Given the ease with which a panel would reach that finding, a panel could well say that it is unnecessary for it to decide whether the Chinese authorities did not properly establish the facts or whether their evaluation of the facts was unbiased and objective.

Post-Script: On 11 April 2023, Australia suspended WTO Complaint WT/DS598

On 1 December 2022, the Panel advised that it expected to issue its "final report" to the parties in the first quarter of 2023.[iv] On 11 April 2023, the Australian Ministers for Foreign Affairs, for Trade and for Agriculture jointly issued a media release announcing that the governments of China and Australia had reached an agreement under which the Chinese government would conduct an expedited review of the duties over a three to four month period and the Australian government would temporarily suspend WTO complaint number 598.[v] On that same day, 11 April 2023, the Chair of the panel in complaint 598 filed a communication to the WTO Dispute Settlement Body advising that on 11 April 2023, China and Australia had requested the Panel to suspend its work until 11 July 2023.

Given that the panel had estimated it would issue its final report to the parties by 31 March 2023, and that it had not issued any further advice about the expected date for release of the final report, it seems very likely that by the time the Australian and Chinese governments agreed on the suspension of the panel's work, both governments had already seen the report and knew what the panel findings would be.

The reason I say that is because of the usual procedure of dispute settlement under Article 15 of the WTO Understanding on Dispute Settlement ('DSU') and the usual time frame for the steps in the process specified under Article 12. The procedure under the DSU is that panels issue an interim report, the parties then have a week to submit a written request asking the panel to review any aspect of the interim report and, if any such request is received, the Panel considers the submission and adds a discussion of the arguments made to the interim report which then becomes the final report. The final panel report is then issued to the parties and soon after that to all the WTO Members at which stage it becomes a public report. That interim review stage should take about 5 to 8 weeks, though the Panel can adjust the time frame. One reason the duration of the process could be extended could be that it takes longer to complete the translation of the final report into the three WTO working languages.

If China does not revoke the measures, then presumably Australia would ask the panel to continue its work. It would be likely that the panel report would find several breaches of the WTO Anti-Dumping Agreement. The WTO would rule that China should bring its measures into conformity with the ADA. China would likely advise the WTO that TRIB will reinvestigate the alleged dumping China in a manner that conforms to the rules. The WTO sometimes allows an implementation period of up to 15 months for Members to go through their domestic processes so as to comply with a panel ruling. Before the end of the implementation period, it is likely that China would revoke the anti-dumping duties. Otherwise, the WTO would assent to an Australian request to impose import barriers to reduce imports from China by a value equivalent to the reduction in China's imports of barley from Australia.

It is likely that the Chinese government's expedited review of the duties will find that the duties should be revoked. The Review might find that the dumping margins are zero or negative or might find that any dumped imports are not causing injury to the domestic industry. Whatever the reason, the outcome could be that the duties are removed and the report is buried so that we will never find out whether the Panel found that TRIB's selection of facts available was inconsistent with Article 6.8. In that event, nor would we find out whether the Panel ruled that several other aspects of the TRIB decision were inconsistent with the WTO Anti-Dumping Agreement. The net outcome would be that China breached the rules for 3 years between May 2020 and July 2023 and the Australian government let it off without incurring any consequences, not even reputational damage. In its favour, the decision to do so would have reduced the time it took to achieve the lifting of the

duties. However, in some future situation, the Chinese government would have learned from this episode that it can break the rules for a considerable period without suffering any adverse consequences.

Only time will tell whether acting in the short-term interest of the Australian barley sector results in a bigger cost to the long-term interest of the country as a whole. My personal view is that the long-term interest of all Australian citizens is best served by drawing China as fully as possible into the multilateral system under the WTO, including the system of utilizing public WTO legal rulings to settle disagreements. The interest of a single section of the Australian community should be subordinated to that larger public interest. Any failure to ensure that the report is released publicly will be an error of judgement by the Australian government.

A future newsletter will explore whether the way that Australia imposes anti-dumping duties on imports from China may have been a factor that led the Chinese government to initiate the anti-dumping investigation on imports of barley from Australia.

Questions and consultations welcome

If you wish to discuss these issues of resort to facts available in anti-dumping investigations, or indeed any other aspect of international regulation of trade, please do not hesitate to contact us by:

Using the Contact Box at: www.williamstradelaw.com/contact.html

Using Email: williams [at] williamstradelaw [dot] com

Next month's (July 2023) Williams Trade Law Newsletter:

The Choice of Facts Available in *China - Anti-Dumping Duties on imports of Bottled Wine from Australia* WT/DS598

This newsletter "The Choice of Facts Available in China – Anti-Dumping Duties on Imports of Barley from Australia" was originally published on 16 June 2023 on the website of Williams Trade law at: Williams Trade Law

Endnotes

[i] *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, *Request for Establishment of a Panel by Australia*, WT/DS598/4, 16 March 2021.
[ii] Quoting from an English translation of Letter of Ministry of Commerce (Bureau) of the Peoples Republic of China, Letter on Disclosure of Facts behind Final Decision of Barley Antidumping, 8 May 2020, (on file with the author).
[iii] A google translation of "Annex: The Ministry of Commerce of the People's Republic of China Final ruling on anti-dumping investigation of imported barley" under section 3. (1) 1. Normal Value, being the Attachment to "Ministry of Commerce Announcement No. 14 of 2020 on the Final Ruling of the Anti-dumping Investigation on Imported Barley Originating in Australia" 18 May 2020 available from MOFCOM Announcement No. 14 of 2020 Notice on the Final Ruling of Anti-dumping Investigations into Imported Barley Originating in Australia which has a link to the Attachment in Chinese.
[iv] *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia, Communication from the Panel*, WT/DS598/8, 5 December 2022 available at Results list (wto.org) .
[v] Media release by Senator the Hon Penny Wong, Minister for Foreign Affairs, "Step forward to resolve barley dispute with China", joint media release with Senator the Hon Don Farrell, Minister for Trade and Tourism, Special Minister of State, and Senator the Hon Murray Watt, Minister for Agriculture, Fisheries and Forestry, Minister for Emergency Management, 11

April 2023, viewed on 4 June 2023 on the webpage of media releases of the Minister for Foreign Affairs at Media releases | Australian Minister for Foreign Affairs (foreignminister.gov.au).

Previous Newsletters:

No.1 Choosing Facts Available to replace missing facts in Anti-Dumping determinations: What are the WTO rules?

No.2 The Choice of Facts Available in *China - Anti-Dumping Duties on imports of Barley from Australia* WT/DS598