In the World Trade Organization
Panel Proceedings

European Union — Measures Related to Price Comparison Methodologies

(DS516)

First Written Submission
by the European Union

Geneva, 14 November 2017
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1. INTRODUCTION

1. This litigation concerns the way in which importing Members and their investigating authorities are permitted to deal with China, Chinese producers and exporters, and Chinese data, in the context of anti-dumping proceedings. Given the size of China's economy and China's importance as an exporter to the European Union and to many other Members, the issue is central to present and future trade relations between China and those Members. It is also the most important live issue in WTO anti-dumping law: it is the issue that WTO anti-dumping law, as interpreted and applied by the dispute settlement system, must successfully regulate in an effective and balanced manner.

2. At China's accession to the WTO, many Members considered that China as a whole, and therefore many industries in China, as well as most Chinese producers and exporters, were not operating according to market economy rules. Many Members also considered that China was insufficiently transparent with respect to the role of the Chinese government in the market.

3. Faced with this situation, two things are abundantly clear. First, the intention of all Members, including China, was that China should evolve into a market-based and transparent economy commensurate with its Membership of the WTO. Second, the intention of all the existing Members at the time was that they should, in any event, retain all the appropriate and necessary instruments to be responsive to the situation in China, including safeguards, countervailing duties, and anti-dumping measures. Each of these instruments provides for a particular type of response suited to particular situations, and there is not the slightest indication that the Members intended to surrender any of them.

4. The anti-dumping issue was the focus of intense bilateral and subsequently multi-lateral negotiations between existing Members and China leading up to China's accession to the WTO. It is extremely difficult for a treaty interpreter today to re-live, assimilate and fully appreciate the intensity of those negotiations and the entirety of the circumstances surrounding the conclusion of China's accession process. It is vital to get an appropriate perspective. In this highly complex, subtle, refined and high-stakes negotiation, the respective rights and obligations of the negotiating parties were settled through small but significant textual changes and adjustments. For the sake of maintaining that delicate balance of negotiated rights and obligations, and for the sake of future negotiations, this perspective must be respected when interpreting and applying the relevant provisions of the treaties.

5. The existing Members knew that the GATT 1994 and the Anti-Dumping Agreement already permitted them, in certain circumstances, to reject both Chinese prices and Chinese costs when they were tainted by the absence of a market-based and transparent economy in China, such that comparability would be compromised, and have recourse instead to information from elsewhere, duly adjusted when necessary. Nevertheless, they sought, in China's Accession Protocol and Working Party Report, to enhance their right to do that, particularly in circumstances where, because of the lack of transparency in China, it would be impossible to obtain accurate and reliable information about the facts of particular cases and the underlying legal and economic realities. They did so by clarifying that, while the Anti-Dumping Agreement does not
contain rules allocating the burden of proof (it merely prescribes that an investigating authority may not place an unreasonable burden of proof on any interested party), in the case of China, a burden of proof was to be imposed on Chinese exporters by Section 15(a) of China's Accession Protocol. This would mean that, as long as Chinese exporters would be unable to demonstrate that market economy conditions prevail in the industry producing the like product under investigation, the investigating authority would remain free to use information from elsewhere. Furthermore, consistent with Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement, such rule was to operate by reference to the market as a whole. That is, absent market economy conditions, all of the Chinese prices and costs for that industry and its firms would be rejected or adjusted in favour of information from elsewhere. In all the circumstances, we consider that this was a reasonable approach, which is why we imagine that China agreed to it.

6. A key issue in the negotiations was how long such provisions should be in place. This was linked to the situation prevailing in China and China's eventual evolution to a market-based and transparent economy commensurate with its Membership of the WTO. Other Members believed a longer period was necessary, whilst China naturally sought to shorten that period. In the end, a compromise was reached envisaging a staged and conditional approach.

7. First, if China could satisfy other Members that it had achieved the necessary evolution, as a whole or in particular industries, then, pursuant to the first or third sentences of Section 15(d), the entirety of Section 15(a) of China's Accession Protocol would be terminated or cease to apply. Second, in any event, after 15 years, Section 15(a)(ii) would expire, causing the China-specific rule on burden of proof to fall away, but leaving intact the confirmation that, faced with the absence of market economy conditions in certain industries, importing Members could reject Chinese prices and costs and have recourse to information from elsewhere. Importantly, the subtle but significant adjustment of the text during the negotiations on this point was the last move, that is, the final place in which the delicate balance of rights and obligations came to rest. In other words, it was the compromise, and that compromise must be respected and given meaning.

8. As the expiry of the 15 years period provided for in the second sentence of Section 15(d) of China's Accession Protocol approached, a debate began within the European Union about what, if anything, needed to be done with respect to Article 2(7) of the EU Basic Anti-Dumping Regulation. The position of the European Union in this respect is unique compared to other WTO Members given the particular wording of the domestic legislation in place since 1979, and last amended with regard to China in 1998, prior to its accession to the WTO. Some have expressed the view that the change from the old Section 15 to the new Section 15 might be accommodated through changes in the way in which Article 2(7) is interpreted and applied in practice. On another view, a change in the legislation is desirable and even necessary. That debate is still ongoing. Mindful of all the interests of the European Union and of its WTO obligations, the European Commission, after a broad public consultation, proposed the withdrawal of Article 2(7). At the same time, the Commission proposed certain additions to that legislation, which would apply to imports from all WTO Members. The legislator (that is, the European Parliament and the Council of
the European Union) have considered the matter carefully during a complex and inclusive legislative process, and a political agreement between negotiation teams from the different institutions was reached on 3 October 2017. Following further steps in that process, it is anticipated that both chambers of the EU legislator will have formally voted a new legislative act by 4 December 2017, and that it will be signed and published shortly thereafter. Against this background, the European Union very much regrets that China considers it opportune to proceed with the current panel proceedings at this time.

9. Accordingly, in considering this case, we ask that the Panel should exercise particular vigilance with respect to the scope of this dispute. The Panel should not allow China to litigate matters outside the Panel's terms of reference or decide things that do not need to be decided now. In this respect, we respectfully and particularly draw the Panel's attention to our Request for Preliminary Rulings, and to our request that, in the unlikely event that the Panel would agree with China's First Claim, it should exercise judicial economy with respect to China's Second Claim. This is also a particularly compelling proposition in light of the withdrawal by the European Union of Article 2(7).

10. In the sections that follow we first provide an overview of the legal framework, including the relevant provisions of WTO anti-dumping law and WTO subsidies law, as well as the old Section 15 and the new Section 15 of China's Accession Protocol. We do this in particular because we disagree with numerous aspects of China's presentation and explanation of these provisions, but also because it is necessary to understand the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement in order to understand the meaning of the old Section 15. This is in turn necessary in order to fully understand the meaning of the new Section 15, i.e., after 11 December 2016.

11. We then address the foundational question of what are the specific measures at issue identified in the Panel Request. We show that, with respect to China's First Claim, it is Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation, and with respect to China's Second Claim, Article 2(7), and we explain these provisions.

12. Following that, we comment on China's submissions concerning the relationship between Section 15 of China's Accession Protocol and Article 2(7) of the EU Basic Anti-Dumping Regulation, and we recall the precise terms of China's First and Second Claims.

13. We then set out our views on the Panel's terms of reference (including our Request for Preliminary Rulings), the applicable standard of review (permissible interpretation) and the order of analysis.

14. Next, we engage with China's First Claim under Article I:1 of the GATT 1994. We point out that China cannot expand the scope of its claim, that the relevant element of Article 2(7) is not mandatory, and that China's claim is defective because China has failed to cite all the pertinent treaty language. We also argue that China's claim must be rejected because of the terms of the new Section 15. Finally, we submit that, in any event, China has failed to demonstrate that Articles 2(1) to 2(7) are inconsistent with Article I:1 of the GATT 1994. In this respect, we also point out that China has made no claim under Article 2.4 of the Anti-Dumping Agreement.
We then engage with China's Second Claim. We argue that, in the unlikely event that the Panel reaches this point in its analysis, it should exercise judicial economy with respect to this essentially duplicative claim. We then explain that Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement merely contain definitions, as opposed to obligations, and that China has failed to cite any provision of the Anti-Dumping Agreement that contains an obligation pertaining to anti-dumping legislation. We further explain that Articles 2.1 and 2.2 of the Anti-Dumping Agreement do not prohibit the use of information from outside the country of origin in certain circumstances. We then again point out that Article 2(7) is not mandatory, that China's claim is defective because China has failed to cite all the pertinent treaty language, and that in any event China's claim must be rejected because of the terms of the new Section 15. In this respect, we again point out that China has made no claim under Article 2.4 of the Anti-Dumping Agreement.

In the closing section we briefly address the consequences of the expiry of Section 15(a)(ii). We consider the inter-temporal application of WTO law, and explain why the date of application for an anti-dumping investigation must be deemed the relevant operative event. We point out that, in light of Article 70 of the Vienna Convention and Article 18.3 of the Anti-Dumping Agreement, it is self-evident that any anti-dumping proceedings existing prior to 11 December 2016, but concluded afterwards, are unaffected by the expiry of Section 15(a)(ii) of China's Accession Protocol.

Finally, we set out our requests for rulings and findings.

Before proceeding, we wish to make an additional point of great importance. This Panel must objectively adjudicate the matters before it based on the actual terms used in the treaty provisions cited by the Parties, and the actual terms used in the specific measures at issue identified in the Panel Request. China attempts to lead the Panel away from the actual terms used in the treaty and the specific measures at issue by insisting on the use of a different and pejorative terminology. Thus, in China's First Written Submission a number of terms are frequently used in a manner that the European Union cannot subscribe to in the context of these panel proceedings. They are the following: special, exceptional, derogation, methodology, methodologies, standard methodology, analogue country methodology, surrogate, strict, home market, transitional and grandfathering. Often, China takes a term that may be used in one context (correctly) and seeks to transpose it, inappropriately, to another context. The European Union formally objects to China's attempt to skew the Panel's perspective in this way: the matters must be adjudicated on the basis of the actual terms used in the treaty and the measures at issue.

China seeks to justify its attempts to change the terms actually used in the treaty and the measures at issue by referring to certain extraneous documents and to certain past reports. However, it is not because certain documents, which have

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been prepared for specific purposes extraneous to treaty interpretation, might use one term or another, that the matter would fall to be adjudicated other than on the basis of the terms actually used in the treaty and the measures at issue. Furthermore, the matters before this Panel are matters of first impression, in the sense that they have never previously been adjudicated. The fact that other adjudicators may have used abridged language in other contexts is not relevant, because they were not adjudicating the matters arising in this case and could not have pre-judged them. Prior cases only provide guidance as to how the law is to be interpreted and applied to the particular point being adjudicated.

2. **OVERVIEW OF THE LEGAL FRAMEWORK**

2.1. **ANTI-DUMPING LAW**

2.1.1. Article VI of the GATT 1994 (including the Ad Notes)

20. The basic framework of WTO anti-dumping law is set out in Article VI of the GATT 1994 and the accompanying Ad Notes. The Members recognise that injurious dumping is to be condemned. Dumping arises when the product of one country is introduced into the commerce of another country at less than the normal value. Normal value is based on prices (in the ordinary course of trade) in the exporting country; or (absent such domestic prices) prices (in the ordinary course of trade) to any third country or costs of production (including selling, general and administrative (SG&A) costs and profit)\(^2\) in the country of origin. Comparability between normal value and export price must be ensured by making any necessary adjustments.\(^3\) In order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.\(^4\)

21. Contrary to what China asserts,\(^5\) a price to a third country does not preclude the use of information coming from that third country (such as, for example, invoices and payment documents obtained from purchasers in such third country).

22. Article VI of the GATT 1994 is supplemented by five Ad Notes and, with respect to all of these Ad Notes, it is important to properly understand their relationship with the provisions of Article VI. The Ad Note to Article VI:1 has two paragraphs; the Ad Note to Article VI, paragraphs 2 and 3, also has two paragraphs; and the Ad Note to Article VI:6(b) has one paragraph. The Ad Notes are "Notes and Supplementary Provisions" and are integral parts of the GATT 1994.\(^6\)

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\(^2\) The terms "... cost of production ... plus a reasonable addition for selling cost and profit ..." in Article VI:1(b)(ii) of the GATT 1994 and the terms "... cost of production ... plus a reasonable amount for administrative, selling and general costs and for profits" in Article 2.2 of the Anti-Dumping Agreement can and should be interpreted harmoniously. There is no conflict between them.

\(^3\) GATT 1994, Article VI:1, first sub-paragraph (a), first sub-paragraph (b)(i), second sub-paragraph.

\(^4\) GATT 1994, Article VI:2.

\(^5\) China's First Written Submission, para. 153 and footnote 198.

\(^6\) GATT 1994, Article XXXIV, and Annex I, Notes and Supplementary Provisions, Ad Article VI, Paragraph 1, Paragraphs 2 and 3 and Paragraph 6(b).
23. The Ad Note to Article VI:1, first paragraph, concerns 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). In such cases, the margin of dumping (and particularly the export price) may be calculated on the basis of the price at which the goods are resold by the importer.

24. The Ad Note to Article VI:1, second paragraph, concerns 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. It is recognised that special difficulties may arise in determining price comparability, and that 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. This provision allows investigating authorities to disregard domestic prices and costs and resort to prices and costs in a third country.7

25. The Ad Note to Article VI, paragraphs 2 and 3, first paragraph, provides that a contracting party may require reasonable security (bond or cash deposit) for the payment of an anti-dumping or countervailing duty pending final determinations.

26. The Ad Note to Article VI, paragraphs 2 and 3, second paragraph, provides that multiple currency practices (that is, practices by governments or sanctioned by governments) can in certain circumstances constitute a subsidy to exporters which may be countervailed or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by anti-dumping duties.

27. The Ad Note to Article VI:6(b) provides that the waivers provided for in Article VI:6(b) shall be granted only on application by the Member proposing to levy an anti-dumping or countervailing duty.

28. Contrary to China's assertion,8 nowhere does the treaty characterise any of the Ad Notes as an "exception" to Article VI. Rather, by their own terms, Article VI and the Ad Notes together (in conjunction with any other relevant treaty provisions) circumscribe and qualify the obligations by which all Members have agreed to be bound.

29. This is confirmed by the fact that China itself has cited the Ad Note to Article VI:1, second paragraph, in its Panel Request and in its First Written Submission.9 That is, China itself has framed the relevant claim by treating the Ad Note (correctly) as containing language that circumscribes the (qualified) obligations China alleges the European Union to breach.

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7 Appellate Body Report, EC – Fasteners (China), para. 285: (“This provision allows investigating authorities to disregard domestic prices and costs of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country.”) (bold emphasis added).
8 Panel Request, para. 10: ("The only exception to the rule in Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 is found in the Ad Note …") (bold emphasis added). See also: China's First Written Submission, paras. 176-177.
9 Appellate Body Report, US – Shrimp (Thailand)/US – Customs Bond Directive, paras. 220 and following. See also: Thailand's Panel Request (WT/DS343/7) at para. 2(b) (formulating a claim under the Ad Note).
30. This conclusion is also consistent with the Appellate Body's use of the term "derogate" when referring (indiscriminately) to both the Ad Note and Section 15 of China's Accession Protocol. Whilst the task of this Panel is to interpret and apply the terms of the treaty cited by the Parties, not to interpret past Appellate Body reports, it remains the case that "derogate" simply means to detract from or to take away so as to lessen or impair. In other words, it refers to a situation in which the obligation is simply circumscribed and/or qualified and in that sense diminished. Thus, the term "derogate" is not to be equated with the term "exception".

31. In any event, use of such non-treaty language ("exception" or "derogation") would be incapable of justifying a reversal in the burden of proof in these panel proceedings, which rests on the complaining Member (China).

32. Also contrary to China's assertion, the Ad Note to Article VI:1, second paragraph, is not the "only" provision of its kind. Rather, there are many provisions that circumscribe and qualify the obligations by which all Members have agreed to be bound. As we further explain below, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report fall into the same category.

2.1.2. The Anti-Dumping Agreement

33. The Anti-Dumping Agreement implements and applies the relevant provisions of the GATT 1994. The two Agreements must be interpreted and applied together. A treaty interpreter must search for and prefer a harmonious and

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11 Appellate Body Report, US – Section 211 Appropriations Act, para. 172: ("The ordinary meaning of "derogate" is "to detract from" or "to take away [i] so as to lessen or impair").
12 Panel Request, para. 10: ("The only exception to the rule in Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 is found in the Ad Note …"). See also: China's First Written Submission, paras. 134, 155, 156 and 176.
13 See Section 2.3.1 of this Submission.
14 Anti-Dumping Agreement, Title and Article 1.
15 With respect to the Anti-Dumping Agreement and the GATT 1994, see Appellate Body Report, US – Shrimp (Thailand)/US – Customs Bond Directive, para. 233 ("Article VI of the GATT 1994 (including the Ad Note) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines."). With respect to the SCM Agreement and GATT 1994, see Appellate Body Report, Brazil – Desiccated Coconut, p. 14 ("As the Panel has said … the question for consideration is … whether Article VI of the GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction") and p. 16 ("The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the SCM Agreement clearly intended that, under the integrated WTO Agreement, countervailing duties may only be imposed in accordance with the provisions of Part V of the SCM Agreement and Article VI of the GATT 1994, taken together.") (original underline emphasis); and Panel Report, US – FSC, para. 7.82 opining that the above statements of the Appellate Body in Brazil – Desiccated Coconut are “equally applicable to the relationship between Part II of the SCM Agreement and Article XVI of the GATT 1994. Thus, we agree with the United States that ‘the SCM Agreement and Article XVI are not to be construed in isolation from each other’"). With respect to the Agreement on Safeguards and GATT 1994, see Appellate Body Report, Argentina – Footwear (EC), para. 81 ("The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both ‘integral parts’ of the same treaty, the WTO Agreement, that are ‘binding on all Members’. Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. They entered into force as part of that treaty at the same time. They apply equally and are
consistent interpretation of Article VI of the GATT 1994 and the Anti-Dumping Agreement.\textsuperscript{16} It is only in the case of conflict that, in principle, the provisions of the Anti-Dumping Agreement prevail (to the extent of the conflict) over those of the GATT 1994.\textsuperscript{17} Significantly, China agrees with and fully endorses this principle.\textsuperscript{18}

2.1.2.1 Normal value and abnormal situations

34. Consistent with the definition contained in Article VI:1 of the GATT 1994, dumping occurs when a product is introduced into the commerce of another country at less than its normal value. Also consistent with the definition contained in Article VI:1 of the GATT 1994, normal value is to be based on the equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that “Article XIX of GATT and the Safeguards Agreement must a fortiori be read as representing an inseparable package of rights and disciplines which have to be considered in conjunction.” Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. And, an appropriate reading of this “inseparable package of rights and disciplines” must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements.” (footnotes omitted). With respect to the SCM Agreement and the Agreement on Agriculture, see Appellate Body Report, US – Upland Cotton, para. 549 (“We recall that the Agreement on Agriculture and the SCM Agreement “are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”), and, as such, are both ‘integral parts’ of the same treaty, the WTO Agreement, that are ‘binding on all Members’”. Furthermore, as the Appellate Body has explained, “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously”. We agree with the Panel that “Article 3.1(b) of the SCM Agreement can be read together with the Agreement on Agriculture provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms”) (footnotes omitted). With respect to the TBT Agreement and GATT 1994, see Appellate Body Report, US – Clove Cigarettes, para. 91 (“… the TBT Agreement expands on pre-existing GATT disciplines and … the two agreements should be interpreted in a coherent and consistent manner.”), affirmed in Appellate Body Report, US – Tuna II (Mexico), paras. 211-217; Appellate Body Report, US – COOL, paras. 266-272; and Appellate Body Report EC – Seal Products, para. 5.123. With respect to Article VI of the GATT 1994, the SCM Agreement and the Anti-Dumping Agreement, see Appellate Body Reports, US – Anti-Dumping and Countervailing Duties (China), para. 570 (“… the provisions in the WTO covered agreements should be interpreted and applied in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.”). With respect to the WTO Agreement and the Harmonised System, see Appellate Body Report, EC – Chicken Cuts, para. 214.

\textsuperscript{16} Appellate Body Report, Korea – Dairy, para. 81 (“In light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to “read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.”); Appellate Body Report, US – Upland Cotton, paras. 549 and 550 (“a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously”) (quoting Appellate Body Report, Argentina – Footwear (EC), para. 81, in turn referring to: Appellate Body Reports, Korea – Dairy, para. 81; US – Gasoline, p. 23; Japan – Alcoholic Beverages II, p. 12; and India – Patents (US), para. 45); Appellate Body Report, US – Continued Zeroing, para. 268 (“The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective.”); Appellate Body Reports, US – Anti-Dumping and Countervailing Duties (China), para. 570 (“… the provisions in the WTO covered agreements should be interpreted and applied in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.”); Appellate Body Report, EC – Seal Products, para. 5.123 (“Thus, the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.”).

\textsuperscript{17} WTO Agreement, General Interpretative Note to Annex 1A.

\textsuperscript{18} China’s First Written Submission, paras. 147-148 and footnote 194.
comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.\[19\]

35. China seeks to emphasise that the definition contained in Article 2.1 sets out a "normal" or "usual" or "typical" basis for determining normal value.\[20\] This is correct in the sense that the rules for determining normal value set out in Article 2.2 are available only when the conditions specified in Article 2.2 are present. However, it does not mean, for example, that Article 2.1 must necessarily be used more often than Article 2.2. Rather, the situation is that, when the conditions set out in Article 2.2 are present, the rules in Article 2.2 may be used; and if the conditions set out in Article 2.2 are present frequently, then the rules in Article 2.2 may be used frequently. Ultimately, China does not explain why it attaches importance to the alleged "normality" of the definition contained in Article 2.1, and the European Union cannot see how it might support China’s position in this dispute. On the contrary, if anything, China’s submissions support the position of the European Union, because they confirm that if the situation is abnormal or unusual or atypical, then the definition contained in Article 2.1 may well not provide an appropriate basis for the determination of normal value.

36. Also consistent with the definition contained in Article V:1 of the GATT 1994, where 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 sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping must be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided this price is representative, or with the costs of production in the country of origin plus a reasonable amount for SG&A and for profits.\[21\]

37. China asserts that Article 2.2 sets out rules that are "exhaustive" or "exclusive".\[22\] That is incorrect. Most obviously, in making such assertions, China is overlooking the Ad Note to Article VI:1, second paragraph, as well as the Ad Note on multiple currency practices. However, more importantly, China is missing the key point, which is to have a proper and complete understanding of what the rules in Article 2.2 actually mean. Fortunately, the drafters of the treaty have provided ample assistance with this, as set forth in considerable detail in the remainder of Article 2.2 (Articles 2.2.1, 2.2.1.1 and 2.2.2) as well as in the remainder of Article 2 (provisions that China ignores in its presentation of the legal framework). A proper and complete scrutiny of these provisions is essential in order to understand when and why an investigating authority might conclude that it is inappropriate to use domestic sales, but rather appropriate to use the bases for determining normal value set out in Article 2.2.

38. China’s presentation of these legal provisions is also incomplete insofar as it ignores relevant prior Appellate Body guidance and particularly, as we will

\[19\] Anti-Dumping Agreement, Article 2.1.
\[20\] China’s First Written Submission, paras. 133, 138, 154, 161 and 162 and footnotes 179 and 180, referring to Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 569.
\[21\] Anti-Dumping Agreement, Article 2.2.
\[22\] China’s First Written Submission, paras. 141-142 and 162.
shortly recall in detail below, the fact that there are circumstances in which the 
use of data from a third country may be justified; and that such data does not 
need to be adjusted back to data in the country of origin that has been properly 
rejected as unreliable.

39. China emphasises that the rules in Article 2.2 are "alternatives" to Article 2.1. This is correct in the sense that the definition contained in Article 2.1 sets out one basis for determining normal value, whilst Article 2.2 sets out different bases for determining normal value (although nothing prevents these rules from being combined in a single determination). However, China does not explain why this proposition might support China's position in this dispute, and the European Union cannot see how it might do so.

40. China seeks to emphasise that the rules in Article 2.2 are "exceptional". This is the counter-point to China's assertion that Article 2.1 provides for a "normal", "usual" or "typical" basis to determine normal value, a point we have already dealt with above. Ultimately, China does not explain why it attaches importance to the proposition that it advances, and the European Union cannot see how it might support China's position in this dispute. On the contrary, we consider that it supports our position. China implicitly confirms that seeking to label a particular treaty provision as "exceptional" does not somehow magically transform it into an affirmative defence. Thus, the Parties agree that this is true for Article 2.2 of the Anti-Dumping Agreement; and it is equally true with respect to the Ad Note to Article VI:1, second paragraph and Section 15 of China's Accession Protocol.

41. As we have already recalled above, contrary to what China asserts, a price to a third country does not preclude the use of information coming from that third country (such as, for example, invoices and payment documents obtained from purchasers in such third country).

42. China repeatedly states that Articles 2.1 and 2.2 require a "strict comparison" for the purposes of determining a dumping margin. China is correct that Article 2.2 is also concerned with the issue of comparability, as it flows from Article VI of the GATT (that is, that Article 2.4 is not the only provision of Article 2 that is concerned with comparability). On this the Parties are agreed. However, the rule is not that the comparison must be "strict", but that the comparison must be fair.

43. Thus, China confirms one important point: both Article 2.2 and Article 2.4 are expressions (or implementations) of the fundamental principle that flows from Article VI:1 of the GATT 1994: comparability between normal value and export price must be ensured. Comparability is achieved when the comparison between normal value and export price is capable of providing a meaningful answer to the question: is there dumping as defined in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement? Dumping occurs when the export price is less

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23 See Section 2.1.2.3 of this Submission.
24 China's First Written Submission, para. 143 and footnote 184.
25 See para. 35 of this Submission.
26 China's First Written Submission, para. 153 and footnote 198.
27 China's First Written Submission, paras. 133, 135, 145, 155 and 167.
than a normal value *determined in accordance with the provisions of those agreements*.

44. In this respect, whilst the determination of a comparable normal value and a comparable export price is sometimes seen as one step, and the comparison of them as a second step, it is not excluded that there is some overlap between the two steps. This is confirmed by the express references to comparability in Articles 2.1 and 2.2.\(^{28}\) Article 2.4 also refers repeatedly to "comparability". It is also confirmed by the relationship between Article 2.3 (which concerns export price) and Article 2.4 (which concerns the comparison between normal value and export price): the fourth and fifth sentences of Article 2.4 expressly refer back Article 2.3 whilst at the same time addressing the issue of comparability. What is true is that Article 2.4 is concerned, at least in part, with a particular aspect of ensuring comparability, namely the situation in which there is a *difference* affecting comparability. By contrast, as we further explain below,\(^{29}\) Article 2.2 refers to the need to ensure comparability irrespective of whether or not there is a difference. In short, as in the case of other provisions of the Anti-Dumping Agreement, Article 2 foresees a *logical progression of inquiry* leading to the final question: is there dumping, and if so, what is the margin of dumping?\(^{30}\) In fact, even if ensuring comparability and making a fair comparison are sometimes seen as a bifurcated analysis, ultimately it must by definition be a *unitary analysis*, because thinking about comparability necessarily involves a consideration of what may be compared.\(^{31}\)

45. The term "normal value" is *not defined* in the sense of being the subject of treaty terms that are structured as "A means B (generally for the purposes of C)". There are relatively few defined terms in Article VI of the GATT 1994 and the Anti-Dumping Agreement\(^{32}\) and they have a special significance that goes beyond a mere cross-reference.\(^{33}\) Consideration of the preparatory work confirms that the Members were acutely sensitive to the issue of definitions. All the relevant documents refer to and discuss several definitions, and the Members repeatedly and at length discussed the merits of whether or not to define certain concepts.\(^{34}\) Thus, there was at least consensus on the point that it

\(^{28}\) Anti-Dumping Agreement, Articles 2.1 ("comparable price"), 2.2 ("do not permit a proper comparison"), ("comparable price").

\(^{29}\) See Section 2.1.2.2 of this Submission.

\(^{30}\) See (with respect to Article 3 and injury): Appellate Body Report, *China – GOES*, para. 128 and 143.

\(^{31}\) See, in the context of the SCM Agreement and the causing of adverse effects, Appellate Body Report, *EC – Large Civil Aircraft*, para. 1107: ("...The Appellate Body has indicated a preference for the unitary approach, observing that such approach "has a sound conceptual foundation" and explaining that it may be difficult to ascertain the existence of some of the market phenomena in Article 6.3 without considering the effect of the subsidy at issue.") (footnotes omitted); and para. 1109: ("... a unitary approach that uses a counterfactual will generally be the more appropriate approach to undertaking the assessment required under Article 6.3 of the *SCM Agreement*. As we further explain in section C below, it is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies.").

\(^{32}\) Dumping, margin of dumping, injury, domestic industry, like product, interested parties, authorities, initiated, levy (Articles VI:1 and VI:2 of the GATT 1994; Articles 2.6, 4.1, 6.11 and footnotes 1, 3, 9 and 12 of the Anti-Dumping Agreement).


\(^{34}\) For example: MTN.GNG/NG8/W/3, page 1 point A, page 2 point B, page 3 point H; MTN.GNG/NG8/W/7, page 1 points A3 and A4, page 3 point B10; MTN.GNG/NG8/W/10, page 2 point B
matters whether or not something is defined; and the fact that some terms are defined and others not must be respected. This means that the term "normal value", which is not defined, must be interpreted and applied in accordance with the customary rules of interpretation of public international law, and particularly by reference to the relevant context.

46. Article VI:1 of the GATT 1994 and the Ad Notes, together with the terms of Article 2 of the Anti-Dumping Agreement, provide immediate and compelling contextual guidance regarding situations that are not "normal". In these situations, the prices or costs of the exporters are, in whole or in part, incapable of forming the basis for the calculation of a normal value, or a value that is normal, in a way that ensures comparability (the following categories may overlap):

- 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;\textsuperscript{35}
- multiple currency practices that constitute a form of dumping by means of a partial depreciation of a country's currency, being practices by governments or sanctioned by governments;\textsuperscript{36}
- an absence of domestic sales;\textsuperscript{37}
- domestic sales not in the ordinary course of trade by reason of price;\textsuperscript{38}
- domestic sales not in the ordinary course of trade other than by reason of price;\textsuperscript{39}
- domestic sales that are otherwise not comparable;\textsuperscript{40}
- a particular market situation;\textsuperscript{41}
- a low volume of domestic sales;\textsuperscript{42}
- a price to a third country that is not appropriate;\textsuperscript{43}
- a price to a third country that is not representative;\textsuperscript{44}

\textsuperscript{35} GATT 1994, Article VI:1, Ad Note to Paragraph 1, second paragraph.
\textsuperscript{36} GATT 1994, Ad Note to Paragraphs 2 and 3, second paragraph.
\textsuperscript{37} GATT 1994, Article VI:1(b); Anti-Dumping Agreement, Article 2.2.
\textsuperscript{38} GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Articles 2.1, 2.2 and 2.2.1.
\textsuperscript{39} GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Articles 2.1 and 2.2.
\textsuperscript{40} GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Article 2.1.
\textsuperscript{41} Anti-Dumping Agreement, Article 2.2.
\textsuperscript{42} Anti-Dumping Agreement, Article 2.2 and footnote 2.
\textsuperscript{43} Anti-Dumping Agreement, Article 2.2.
\textsuperscript{44} Anti-Dumping Agreement, Article 2.2.
- a price to a third country that is not in the ordinary course of trade by reason of price;\(^{45}\)
- a price to a third country that is not in the ordinary course of trade other than by reason of price;\(^{46}\)
- a price to a third country that is otherwise not comparable;\(^{47}\)
- records that are not in accordance with the generally accepted accounting principles of the exporting country;\(^{48}\)
- records that do not reasonably reflect the costs associated with the production and sale of the product under consideration;\(^{49}\)
- records that do not suitably and sufficiently correspond to and reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration;\(^{50}\)
- records that are unreliable or inaccurate, or which do not capture all costs incurred, or which over- or understate the costs incurred, or which are not accurate and faithful within acceptable limits;\(^{51}\)
- non-arms-length transactions that affect the reliability of the reported costs;\(^{52}\)
- other practices that affect the reliability of the reported costs;\(^{53}\)
- cost allocations that have not been historically utilized by the exporter or producer;\(^{54}\)
- the use of inappropriate amortization and depreciation periods and allowances for capital expenditures and other development costs;\(^{55}\)
- non-recurring items of costs which benefit future and/or current production for which appropriate adjustments have not been made;\(^{56}\)
- circumstances in which costs during the period of investigation are affected by start-up operations for which appropriate adjustments have not been made;\(^{57}\)
- any differences affecting comparability for which due allowance has not been made;\(^{58}\)

\(^{45}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.

\(^{46}\) GATT 1994, Article VI:1(b)(i); Anti-Dumping Agreement, Article 2.2.

\(^{47}\) GATT 1994, Article VI:1(b)(i); Anti-Dumping Agreement, Article 2.2.

\(^{48}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.


\(^{50}\) Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

\(^{51}\) Appellate Body Report, paras. 6.56 (the Panel’s interpretation does not conflict with the Appellate Body’s understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400.

\(^{52}\) Appellate Body Report, paras. 6.56 (the Panel’s interpretation does not conflict with the Appellate Body’s understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400. See also: Anti-Dumping Agreement, Article 2.3 (“association or a compensatory arrangement”); Appellate Body Report, *US – Hot-Rolled Steel*, paras. 159-180.

\(^{53}\) Appellate Body Report, paras. 6.56 (the Panel’s interpretation does not conflict with the Appellate Body’s understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400.

\(^{54}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

\(^{55}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

\(^{56}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

\(^{57}\) Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

\(^{58}\) GATT 1994, Article VI:1 and 2; Anti-Dumping Agreement, Article 2.4 and footnote 7.
fluctuations in exchange rates (which must be ignored);\(^{59}\)
- sustained movements in exchange rates during the period of investigation during the preceding 60 days;\(^{60}\)
- any other abnormal situation affecting comparability.\(^{61}\)

47. In each of these abnormal situations it is permissible and may be required that an investigating authority concludes that the data is unreliable and unsuitable for use as the basis for the calculation of a normal value with which the export price can be meaningfully compared. In other words, an investigating authority may be required to reject such data, in whole or in part, and/or to replace the rejected data with information from some other source, and/or to adjust the data in a manner that ensures comparability.

2.1.2.2 The need to ensure comparability, irrespective of whether normal value is based on prices or costs

48. The need to ensure comparability is a fundamental principle that flows from the definition in Article VI:1 of the GATT 1994, and is implemented, applied and/or reflected in many of the provisions of the Anti-Dumping Agreement, particularly those of Article 2. It arises irrespective of whether normal value is based on domestic prices, price to a third country, or costs. In fact, whether a particular transaction is characterised as a price or a cost is essentially just a question of perspective: a buyer might be more likely than a seller to characterise a particular transaction as a cost (in addition to being a price). In essence, these are just two ways of referring to the same transaction. This is particularly clear in the case of an anti-dumping investigation with a product scope that includes one product that is an input for a second product, both products being within the scope of the anti-dumping investigation. With respect to the input, the same invoice could evidence a domestic price (for the input) and a cost (for the second product).

49. As noted above,\(^{62}\) there are a number of situations in which comparability may be an issue. Thus, in a particular market situation (for example), circumstances are such that domestic sales may not permit a proper comparison. The comparison in question is always the comparison between the normal value and the export price. Such comparison must be proper in the sense that the normal value and the export price must be comparable. In order to be comparable, the normal value and the export price must be established in such a way that comparing them will give a meaningful answer to the question: is there dumping as defined by Article VI:1 of the GATT (including the Ad Notes) and the relevant provisions of the Anti-Dumping Agreement. As we have just recalled, the requirement of comparability applies irrespective of how the normal value has been established (price in the exporting country; price to a third country; or

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59 Anti-Dumping Agreement, Article 2.4.1.
60 Anti-Dumping Agreement, Article 2.4.1.
61 GATT 1994, Article VI:1 and 2; Anti-Dumping Agreement, Articles 2.1, 2.2 and 2.4.
62 See Section 2.1.2.1 of this Submission.
costs). Thus, a particular market situation (for example) may include abnormal circumstances that impact on prices and/or costs.

50. Where normal value is based on costs, the abnormal circumstances can have an impact on the costs of production (including SG&A and profit) which may affect both domestic sales and export sales. In normal circumstances, if the normal value (based on prices or costs) is, for example, 100, and the export price is also 100, we may conclude that no dumping is occurring. However, if there is something abnormal – for example, the recorded costs of the exporter are inconsistent with generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration – then the recorded costs may be lower than they ought to be. In a situation where costs are abnormally low and are depressed, for example, to 50, it may be expected that, all things being equal, as a simple matter of economics, domestic and export prices are consequently also reduced to 50. Contrary to China's position, this does not mean that a comparison between the reduced domestic price (50) and the reduced export price (50) would be a proper comparison. In fact, such a comparison would be incapable of providing a meaningful answer to the question: is there dumping as that term has been defined by Article VI:1 of the GATT (including the Ad Notes) and the relevant provisions of the Anti-Dumping Agreement?

51. In sum, a lack of comparability can result from a distortion that affects one side of the comparison, asymmetrically, that is, a difference affecting comparability. That could be the case, for example, if there would be a distorting effect on a domestic price or cost but not on the export price or on the costs underlying the export price, or vice versa. However, a lack of comparability can also result from a distortion that affects both sides of the comparison, symmetrically, that is, a distortion that has as a consequence that the data no longer permit a meaningful comparison between the putative normal value on the one hand and the export price on the other hand.

52. Given that Article 2.2.1.1 of the Anti-Dumping Agreement must be interpreted and applied "[f]or the purpose of paragraph 2" (which is to establish a normal value), and given the term "normally" in that provision, the examples provided in Article 2.2.1.1 do not exhaust the circumstances in which an investigating authority may be required to reject/replace/adjust the records of the investigated firm. Consequently, an investigating authority may also be required to reject/replace/adjust the costs in the records of the investigated firm if they are otherwise rendered unreliable, for example by a particular market situation. In other words, if, in the above example, it would be a particular market situation that would depress costs to 50, and thus both domestic and

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63 Appellate Body Report, EC – Fasteners (Article 21.5 – China), para. 5.205 ("The fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value.") (bold emphasis added).
64 Anti-Dumping Agreement, Article 2.2.1.1.
65 Anti-Dumping Agreement, Article 2.2.1.1.
66 This specific issue was not subject to adjudication in EU – Biodiesel (Argentina). See: Appellate Body Report, EU – Biodiesel (Argentina), footnote 120.
export sales to 50, then such domestic sales would also not permit a proper comparison.

53. This is consistent with the conclusion reached by the Appellate Body in *EU – Biodiesel (Argentina)*. In that case the Appellate Body found that the second condition in the first sentence of Article 2.2.1.1 relates to "whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".67 The Appellate Body also stated that the panel's interpretation in that case did not conflict with the Appellate Body's understanding of that provision.68 The panel's interpretation was that an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs. The panel also considered that the costs recorded in the records must be "accurate and faithful".69 Given that this approach is correct under the second condition it must also be correct when considering whether or not other practices or circumstances render the situation abnormal, and the data consequently unreliable.

54. An analogous line of reasoning would apply where there is an absence of the ordinary course of trade by reason of price, pursuant to Article 2.2.1 of the Anti-Dumping Agreement, or otherwise, because a particular recorded cost does not comply with the rules set out in Article 2.

55. Furthermore, an analogous line of reasoning may arise as a result of a combination of circumstances. Thus, domestic sales might not permit a proper comparison because they are not in the ordinary course of trade by reason of price because when compared to costs properly established (as opposed to costs rendered unreliable by a particular market situation), they do not permit the recovery of all costs within a reasonable period of time.

2.1.2.3 Use of information from outside the country of origin, adjusted where necessary

56. Where, for the above reasons, the relevant data may not be relied upon, for the purposes of establishing normal value in the country of origin, an investigating authority may have recourse to information from outside the country of origin.70 To the extent necessary, such information must be adjusted to reflect

70 Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70 ("… these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country …"); para. 6.71 ("… the determination of the "cost of production in the country of origin" may take account of evidence from outside the country of origin."); and para. 6.73 ("… the authority is not prohibited from relying on information other than contained in the records kept by the exporter or producer, including in-country and out-of-country evidence.") (emphasis added).
normal market conditions in the country of origin. However, by definition, it does not need to be adjusted back to an amount that is the same as the amount that would result from use of the very data rejected as unreliable, for example when the investigating authority determines that there is a particular market situation.

By its own terms, Article 2.2 of the Anti-Dumping Agreement permits the analysis of whether or not there is a particular market situation to be done at the level of the particular market. It does not require a firm-by-firm or a cost-by-cost analysis. The issue identified by the investigating authority may be in the market of the product under investigation and thus also, by extension, in an upstream or downstream market, provided that, directly or indirectly, it manifests itself in the market of the product under investigation.

2.1.2.4 The Ad Notes

The Ad Notes can be related to and are reflected in particular terms in the Anti-Dumping Agreement. This is consistent with the fact that, as we have explained above, the Ad Notes are not exceptions, but simply contain treaty language circumscribing and qualifying the obligations by which the Members have agreed to be bound.

The Ad Note to Article VI:1, first paragraph (hidden dumping by associated houses) is reflected, for example, in Article 2.3 of the Anti-Dumping Agreement (which concerns constructed export price), as well as in Article 2.4 (which concerns fair comparison), and particularly the fourth and fifth sentences of Article 2.4.

The Ad Note to Article VI:1, second paragraph (complete or substantially complete monopoly of trade and all domestic prices are fixed by the State) is reflected, for example, in Article 2 of the Anti-Dumping Agreement, including, in particular, in Articles 2.2 and 2.4. Furthermore, Article 2.7 provides that Article 2 is "without prejudice" to the Ad Note to Article VI:1, second paragraph. This means that, in such a case, the obligation to ensure comparability and make a fair comparison is circumscribed by the rule that it may not be necessary to make a strict comparison. In case of conflict, the latter

71 Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73 ("Compliance with this obligation may require the investigating authority to adapt the information that it collects."); and para. 6.81 ("… and this may require the investigating authority to adapt that information.").
72 Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207: ("In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted."); Appellate Body Reports, China – HP-SSST, para. 5.52 ("… MOFCOM was required, in its determination, to explain why it determined an amount for SG&A costs "based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value". In the absence of such an explanation provided by MOFCOM in its written report, we fail to see how the Panel could have found China to have acted consistently with its obligations under Article 2.2.2 of the Anti-Dumping Agreement.") (footnote omitted).
73 See Section 2.1.1 of this Submission.
75 Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207 ("… Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second Ad Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol.")
rule (that is, the Ad Note to Article VI:1, second paragraph) prevails. The Appellate Body has confirmed that this incorporates the Ad Note into the Anti-Dumping Agreement.

61. The Ad Note to Article VI:2 and 3, first paragraph (reasonable security) is reflected, for example, in Article 7 of the Anti-Dumping Agreement.

62. The Ad Note to Article VI:2 and 3, second paragraph (multiple currency practices practiced or sanctioned by governments) is reflected, for example, in Article 2.4 of the Anti-Dumping Agreement.

63. Article VI:6 of the GATT 1994, together with the associated Ad Note (waiver of the requirement to demonstrate injury in certain cases) is reflected in Article 2.5 of the Anti-Dumping Agreement.

2.1.2.5 "Burden of proof" under the Anti-Dumping Agreement

64. Under the Anti-Dumping Agreement, when it comes to a determination of dumping, and specifically in the context of ensuring comparability, the rule with respect to "burden of proof" is that the "authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."

65. The meaning of the phrase "the parties in question" is not further specified. It must include any interested party having an interest in ensuring that there is a fair comparison. All interested parties, by definition, have such an interest. From this perspective, the "parties in question" includes both a party affirming that an allowance or adjustment is required, as well as a party affirming that an adjustment is not required.

66. In similar vein, Article 6 of the Anti-Dumping Agreement, which is entitled "Evidence", provides that all interested parties shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

67. Thus, even if, as a matter of fact, it may often be the case that the request for an adjustment is made by an exporter, the Anti-Dumping Agreement does not place the "burden of proof" with respect to any determination either on one sub-set of interested parties (the domestic industry) or on another sub-set of interested parties (the exporters). Rather, it requires the investigating authority to give all interested parties an opportunity to present evidence; and it requires the investigating authority to make unbiased and objective determinations based

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76 Thus reversing the rule in the General Interpretative Note to Annex 1A of the WTO Agreement, to the effect that, in the event of conflict between the GATT 1994 and a provision of another agreement in Annex 1A, the provision of the other agreement prevails to the extent of the conflict.


79 Anti-Dumping Agreement, Article 2.4.

80 Article 2.4 refers to "allowances", whilst footnote 7 refers to the need not to duplicate "adjustments".

81 Anti-Dumping Agreement, Article 17(6)(i).
on such evidence. Rather than being described in terms of a bright-line rule on burden of proof, this process has been described as a "dialogue".82

68. Thus, when called upon to determine whether certain data can be used to establish a value that is normal, or whether there is (for example) a particular market situation, an investigating authority must ensure that all interested parties have ample opportunity to present evidence pertaining to such determination, in an even-handed manner. This means that interested parties arguing that there is a particular situation affecting comparability must have ample opportunity to present evidence demonstrating such particularity. At the same time, interested parties asserting that such particularity does not exist must have ample opportunity to present evidence demonstrating comparability is ensured. Having gathered the evidence, the investigating authority must then make an un-biased and objective determination based on that evidence, where necessary weighing and balancing the evidence as a whole to the extent that some evidence may be in counterpoint to other evidence.

69. If there is evidence of normality but no evidence of particularity, the evidence should normally support a determination of normality. On the other hand, if there is no evidence of normality, but there is evidence of particularity, then the evidence should normally support a determination of particularity. As indicated above, if there is evidence that could support either determination, such evidence will have to be weighed. If there is evidence of neither, then the investigating authority may need to indicate to the parties in question what information may be required in order to ensure that it is in a position to make the necessary determinations, whilst not imposing an unreasonable burden of proof on those parties. In this respect, the investigating authority may put questions to the parties and/or otherwise seek information from them, and draw reasonable inferences if the responses are incomplete, in whole or in part.83

70. In short, with respect to the issue of "burden of proof", the Anti-Dumping Agreement does not allocate such burden to a particular sub-set of interested parties. Rather, it prescribes the rules and procedures referred to above, which reflect a balanced approach to the issue of burden of proof, and requires that the investigating authority should have a sufficient evidentiary basis for its determinations. Specifically, the governing rule is that the importing Member shall not impose an unreasonable burden of proof on a particular interested party or on either sub-set of interested parties.

2.2. **Subsidies Law**

71. The basic framework of WTO countervailing duty law is also set out in Article VI of the GATT 1994 and the accompanying Ad Notes (to Articles VI:2 and 3 of the GATT 1994). A countervailing duty may only be levied in an amount equal to the estimated bounty or subsidy determined to have been granted. Exemptions or refunds with respect to duties or taxes are not to result in antidumping or countervailing duties. Products are not to be subject to both anti-

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82 Appellate Body Report, *EC – Fasteners (China)*, para. 489: ("This process has been described as a "dialogue" between the authority and the interested parties.").

83 Anti-Dumping Agreement, Article 6.8.
dumping and countervailing duties to compensate for the same situation of dumping or export subsidization. The significance of this observation is further explained below.\(^{84}\)

72. Part V of the SCM Agreement contains rules regarding the application of the relevant provisions of Article VI of the GATT 1994 (including the Ad Notes). These include Article 14 of the SCM Agreement, which concerns the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient". The provisions of Article 14 specifically and repeatedly confirm that, for this purpose, the benchmark must be a market benchmark. Further, the case law confirms that, absent an undistorted market benchmark, an investigating authority may have recourse to information from a third country, adjusted where necessary.\(^{85}\) The significance of this observation is further explained below.\(^{86}\)

73. Article XVI of the GATT 1994 (including the Ad Notes) contains rules regarding subsidies. Parts II and III of the SCM Agreement, like Article XVI of the GATT 1994, contain rules regarding subsidies. The case law confirms that Article 14 provides essential context for the interpretation and application of Article I of the SCM Agreement,\(^{87}\) which sets out a definition of subsidy for the purposes of the SCM Agreement as a whole. Thus, a panel established pursuant to Parts II and III of the SCM Agreement may be confronted with the same issues as an investigating authority in a countervailing duty case when it comes to the search for an undistorted market benchmark and the use of information from a third country.

2.3. **The Old Section 15**

74. China's Accession Protocol is applicable law with respect to both Parties in this dispute.\(^{88}\) The Protocol, including Section 15 and the commitments referred to in paragraph 342 of the Working Party Report, is an integral part of the WTO Agreement.\(^{89}\)

75. The old Section 15 and Paragraph 150 of the Working Party Report provide as follows (the terms underlined are further discussed below):

15. **Price Comparability in Determining Subsidies and Dumping**

\(^{84}\) See Section 2.5 of this Submission.


\(^{86}\) See Section 2.5 of this Submission.

\(^{87}\) Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 703.

\(^{88}\) Section 1(1) of China's Accession Protocol provides as follows: "Upon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO." Article XII of the WTO Agreement provides as follows: "Any State ... may accede to this Agreement, on terms to be agreed between it and the WTO." The Decision of 10 November 2001 on the Accession of the People's Republic of China (WT/L/432 of 23 November 2001) provides as follows: "The People's Republic of China may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision."

\(^{89}\) China's Accession Protocol, Section 1, para. 2. See also: Appellate Body Reports, *China — Rare Earths*, paras. 5.18-5.74.
Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

* * *

150. Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.
2.3.1. Apply ... consistent with

76. By its own terms, Section 15 provides that Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the terms of Section 15. In past cases the Appellate Body has exercised particular care to adhere to the precise terms used in particular provisions of Accession Protocols, including China's Accession Protocol, when it comes to the relationship between a particular provision of the Accession Protocol and other provisions of WTO law.\(^{90}\) Where such provisions contain differences, even subtle differences, such differences must be respected, particularly where significant legal consequences result therefrom. In this case, the relevant terms that govern the relationship between China's Accession Protocol and the other cited provisions of WTO law are "apply" and "consistent with", and those terms must be respected and given their proper meaning. In this respect, as China puts it, "the plain text" of Section 15 is "clear" and must be given its proper meaning.\(^{91}\)

77. In light of this relationship of consistent application, Section 15 does not constitute an "exception" to Article VI of the GATT 1994 or the Anti-Dumping Agreement and is not in the nature of an "affirmative defence". Nothing in the terms of Section 15 provides that it is an exception to or derogation from Article VI of the GATT or the Anti-Dumping Agreement. Furthermore, nothing in Section 15 indicates that it is for the defending Member in dispute settlement proceedings to invoke or rely on its provisions. In claims brought under Article VI of the GATT and the Anti-Dumping Agreement, the complaining Member carries the burden of proving its assertions. This burden is not shifted to the defendant in the case of a claim brought by China under Section 15 of its Accession Protocol. On the contrary, the terms of Section 15 expressly provide for a different relationship: that of consistent application.\(^{92}\)

78. In this respect, it would be unavailing for China to refer to the term "may" in Section 15(a)(ii), and to argue that this has as a consequence that Section 15 is an exception in the nature of an affirmative defence. In so doing, China is overlooking the fact that Article VI:2 of the GATT 1994 also contains the permissive term "may". Thus, Section 15 is simply applying consistent with Article VI of the GATT 1994, including Article VI:2 (as we have explained above, as a specific expression of the principle that comparability is to be ensured). Thus, the term "may" in Section 15(a)(ii) does not convert Section 15 into an "exception" in the nature of an affirmative defence, any more than the term "may" in Article VI:2 converts Article VI and the Anti-Dumping

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\(^{91}\) China's First Written Submission, para. 13.

Agreement into something in the nature of an affirmative defence to violations of Article I.\textsuperscript{93}

79. One can see this very clearly if one simply asks the following question: if, prior to 11 December 2016, China would have been of the view that the anti-dumping legislation of a particular WTO Member would have been inconsistent with Article VI of the GATT 1994, the Anti-Dumping Agreement and Section 15, who would have borne the burden of proof in any WTO dispute settlement proceedings, with respect to all of these provisions? The answer is, obviously, China. Equally obviously, the expiry of Section 15(a)(ii) did not have the effect of reversing the burden of proof \textit{in WTO panel proceedings} concerning Section 15.\textsuperscript{94}

80. The further consequence of this relationship of consistent application is that, if something is \textit{expressly} permitted under Section 15, that can only mean that such thing must be \textit{capable}, at least in \textit{certain circumstances}, of fitting within the four corners of Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement. That is, it must at least be possible to \textit{interpret and apply} Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement in a manner that permits what is provided for in Section 15. It also means that Section 15 must be understood as \textit{interpreting and applying} the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement. In other words, as we have already recalled above, in applying all the relevant provisions, the treaty interpreter must search for and prefer a \textit{harmonious and consistent interpretation} of Article VI of the GATT 1994 and the Anti-Dumping Agreement and Section 15.\textsuperscript{95} As we have also recalled above, China fully agrees with and endorses this principle.\textsuperscript{96} As China puts it: Section 15 of China's Accession Protocol "builds on" the Anti-Dumping Agreement, just as the Anti-Dumping Agreement "builds on" Article VI of the GATT 1994.\textsuperscript{97}

81. Furthermore, for the purposes of the present discussion, it is pertinent to consider and identify the relevant \textit{specific relationships of consistency}. That is, one can and should be prepared to go further than the banal observation that there must be consistency between the provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement as a whole and the provisions of Section 15 as a whole. Rather, one must be able to identify, for a given provision in Section 15, the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and the SCM Agreement with which it is related and consistent.

\textbf{2.3.2. In determining price comparability}

\textsuperscript{93} On this point, with respect to China's First Claim (under Article I:1 of the GATT 1994), see Section 10.1.7.1 of this Submission.

\textsuperscript{94} This is, of course, an entirely different question to the question of burden of proof in municipal anti-dumping proceedings.

\textsuperscript{95} See footnotes 15 and 16 of this Submission.

\textsuperscript{96} See para. 33 and footnote 18 of this Submission.

\textsuperscript{97} China's First Written Submission, para. 149.
Section 15(a) begins with the phrase: "In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement …". This raises the question of which provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement are concerned with "determining price comparability".

In Article VI of the GATT 1994, clearly the final sub-paragraph of Article VI:1 is concerned with "determining price comparability". This would include comparability between a domestic price and an export price. It would also include comparability between a normal value based on costs and an export price. This is still a problem of "price comparability", because the question is whether or not the export price is "comparable" with the normal value. In other words, in order to be an issue of "price comparability" it is sufficient that only one side of the comparison is a price; it is not necessary that both sides of the comparison are a price.

However, that is not the only provision of Article VI that is concerned with "price comparability". Paragraph 1(a) is also concerned, by its own terms, with "price comparability", because it refers to an export price that is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Paragraph 1(b) is also concerned with "price comparability" because it also refers to "the highest comparable price". For similar reasons, both paragraphs of the Ad Note to Article VI:1 and the second paragraph of the Ad Note to Articles VI:2 and 3 are also concerned with "price comparability".

Turning to the Anti-Dumping Agreement, in line with the preceding observations, and consistent with the same logic, it is clear that all of the paragraphs and sub-paragraphs of Article 2, which implement and apply GATT 1994 Article VI:1, are relevant when "determining price comparability".

Therefore, the initial phrase "In determining price comparability" in Section 15(a) places the reader squarely within the four corners of Article VI:1 of the GATT, including the relevant paragraphs of the Ad Notes, and Article 2 of the Anti-Dumping Agreement. Consequently, in considering what follows, it is necessary to bear in mind that there is consistency between the definition in Article VI:1 of the GATT, including the relevant paragraphs of the Ad Notes and Article 2 of the Anti-Dumping Agreement, and Section 15.

### 2.3.3. Domestic prices or costs in China

Section 15(a) continues with references to "Chinese prices or costs" and "domestic prices or costs in China". This indicates that the focus of the provision is narrowing down to address the concept of normal value. Nevertheless, the provision as a whole remains concerned with the question of "price comparability", irrespective of whether normal value is based on prices or costs.

### 2.3.4. For the industry under investigation

Section 15 then refers to "the industry under investigation". Significantly, the use of these terms shows that Section 15 is not exclusively related to the second paragraph of the Ad Note to Article VI:1. By its own terms, that provision only
applies to the country as a whole. It does not expressly refer to the situation in which the country as a whole does not meet the specified conditions, but "for the industry under investigation" market economy conditions do not prevail. Section 15, on the other hand, refers to the industry under investigation. China does not disagree with these observations. In fact, China asserts that Section 15 "justifies" Article 2(7) of the EU Basic Anti-Dumping Regulation, and argues that these two provisions are "completely different" from the Ad Note.99

89. Therefore, it is appropriate to identify other provisions in Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement to which Section 15 is related, confirming the consistency between the various treaties addressing the treatment of Chinese exporters in anti-dumping investigations.

90. Furthermore, as outlined above, the relevant determinations may be made for the industry as a whole.

2.3.5. Market economy conditions

91. Section 15 continues with a reference to the terms "market economy conditions prevail in the industry", which occur twice in the separate sub-paragraphs of Sections 15(a)(i) and 15(a)(ii). This confirms that these provisions do not relate, or do not relate exclusively, to a country-wide concept, as set out in the Ad Note to Article VI:1, second paragraph. They must therefore also be understood as consistent with the relevant terms of Article 2 of the Anti-Dumping Agreement. The relevant terms in Article 2 of the Anti-Dumping Agreement include the terms "particular market situation" in Article 2.2, as well as references to the "ordinary course of trade" and the need to ensure comparability. A similar concern is also reflected in the reference to "special difficulties" in Paragraph 150 of the Working Party Report.

2.3.6. A methodology not based on a strict comparison

92. Finally, Section 15 identifies one of the routes that can be taken in determining price comparability: the use of "a methodology that is not based on a strict comparison with domestic prices or costs in China". This includes the possibility of using information from a third country, without being required to adjust such data back to the very data that were rejected because of the absence of market economy conditions.100

93. The fact that the second consequence set out in Section 15 is framed in similar language to the consequence indicated in the second paragraph of the Ad Note to Article VI:1, second paragraph, does not mean that there is exclusive consistency between that provision and Section 15, as opposed to other provisions in Article 2.2 of the Anti-Dumping Agreement. Rather, Section 15 is also consistent with the requirement of comparability and the phrase "particular

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98 China's First Written Submission, paras. 74-75.
99 China's First Written Submission, para. 181.
100 See para. 56 of this Submission. See also: Appellate Body Report, EU – Biodiesel (Argentina), para. 6.73 (see above, footnote 71); Appellate Body Report, EC – Fasteners (Article 21.5 – China), para. 5.207 (see above, footnote 72); Appellate Body Reports, China – HP-SSST, para. 5.52 (see above, footnote 72).
market situation”. As we have explained above,\textsuperscript{101} it is significant in this respect that Section 15 refers to the industry under investigation and to the existence or absence of market economy conditions for that particular industry.

2.3.7. Intermediate conclusion

94. Thus, we must reasonably conclude that Section 15 is consistent with Article VI of the GATT 1994, including the relevant Ad Notes, and the relevant provisions of the Anti-Dumping Agreement, which continue to apply. It confirms that if, in an anti-dumping case concerning Chinese products, it is found that, in the industry under investigation, there is an absence of market economy conditions (that is, an abnormal situation affecting comparability, including a particular market situation or other special difficulties), then the investigating authority can reject Chinese prices and costs, and use instead a methodology not based on a strict comparison (including information from a third country, adjusted where necessary).

2.3.8. The value added of the old Section 15

95. This does not mean that the old Section 15 had no value added for the existing WTO Members. The following Table A presents in a deconstructed analytical form the legal positions under the Anti-Dumping Agreement, under the old Section 15 and under the new Section 15.

\textsuperscript{101} See Section 2.3.1 of this Submission.
<table>
<thead>
<tr>
<th></th>
<th>A: Anti-Dumping Agreement</th>
<th>B: Old Section 15</th>
<th>C: New Section 15</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>Is the product dumped?</td>
<td>Is the product dumped?</td>
<td>Is the product dumped?</td>
</tr>
<tr>
<td>2</td>
<td>Compare export price with normal value.</td>
<td>Compare export price with normal value.</td>
<td>Compare export price with normal value.</td>
</tr>
<tr>
<td>3</td>
<td>What is the normal value?</td>
<td>What is the normal value?</td>
<td>What is the normal value?</td>
</tr>
<tr>
<td>4</td>
<td>Do market economy conditions prevail in the industry producing the like product?</td>
<td>Do market economy conditions prevail in the industry producing the like product?</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Evidence of market economy conditions + Evidence of non-market economy conditions</td>
<td>Yes: B9 No: next</td>
<td>Evidence of market economy conditions + Evidence of non-market economy conditions</td>
</tr>
<tr>
<td>6</td>
<td>Evidence of market economy conditions + No evidence of non-market economy conditions</td>
<td>Yes: B9 No: next</td>
<td>Evidence of market economy conditions + No evidence of non-market economy conditions</td>
</tr>
<tr>
<td>7</td>
<td>No evidence of market economy conditions + Evidence of non-market economy conditions</td>
<td>Yes: B9 No: next</td>
<td>No evidence of market economy conditions + Evidence of non-market economy conditions</td>
</tr>
<tr>
<td>8</td>
<td>No evidence of market economy conditions + No evidence of non-market economy conditions</td>
<td>B10</td>
<td>No evidence of market economy conditions + No evidence of non-market economy conditions</td>
</tr>
<tr>
<td>9</td>
<td>Weigh the evidence (burden on Chinese exporters) — decide if market economy conditions prevail</td>
<td>Yes: A11 No: B26</td>
<td>Weigh the evidence (no China-specific burden rule) — decide if market economy conditions prevail</td>
</tr>
<tr>
<td>10</td>
<td>No evidence to weigh — decide if market economy conditions prevail – discretion</td>
<td>Yes: A11 No: B26</td>
<td>No evidence to weigh — cannot decide that market economy conditions do not prevail</td>
</tr>
<tr>
<td>11</td>
<td>Are there domestic sales?</td>
<td>Yes: next No: A16/A20</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Are the domestic sales in the ordinary course of trade by reason of price?</td>
<td>Yes: next No: A16/A20</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Are the domestic sales in the ordinary course of trade (other than price)?</td>
<td>Yes: next No: A16/A20</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Is the volume of domestic sales too low to permit a proper comparison?</td>
<td>Yes: A16/A20 No: next</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Is there a particular market situation — so such sales do not permit a proper comparison (or otherwise a lack of comparability)?</td>
<td>Yes: A16/A20 No: A29</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Consider price to a third country.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Is the third country appropriate?</td>
<td>Yes: next No: A20</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>Is the price to the third country representative?</td>
<td>Yes: next No: A20</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>Is the price to the third country comparable (including in the ordinary course of trade by reason of price or otherwise)?</td>
<td>Yes: A29 No: A20/A30</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>Consider costs of production in the country or origin plus reasonable amount for SG&amp;A and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>Consider cost records kept by the exporter or producer under investigation.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>Consider all available evidence on the proper allocation of costs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Are cost records in accordance with local GAAP?</td>
<td>Yes: next No: A27</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>Do cost records reasonably reflect the costs associated with the production and sale of the product under consideration?</td>
<td>Yes: next No: A27</td>
<td></td>
</tr>
<tr>
<td>25</td>
<td>Do cost records otherwise not ensure comparability (but rather reflect an abnormal situation), for example because of a particular market situation?</td>
<td>Yes: A27 No: A29</td>
<td></td>
</tr>
<tr>
<td>26</td>
<td>The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China – A27</td>
<td>The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China – A27</td>
<td></td>
</tr>
<tr>
<td>27</td>
<td>Reject/replace/adjust – also based on information from outside the country of origin</td>
<td></td>
<td></td>
</tr>
<tr>
<td>28</td>
<td>Does such information require adjustment?</td>
<td>Yes: A29-A30 No: A29</td>
<td></td>
</tr>
<tr>
<td>29</td>
<td>Determine normal value</td>
<td></td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>Ensure a fair comparison (comparability) between normal value and export price by making any necessary adjustments.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>Determine whether product is being dumped.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Notes regarding the 15 year shift in the burden of proof under Section 15

1. No evidence of market economy conditions and no evidence of non-market economy conditions. Under the old Section 15, with the burden on the Chinese producers, the authority could decide that the Chinese producers had failed to clearly show that market economy conditions prevail, and then proceed to apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Article VI of the GATT and the Anti-Dumping Agreement continued to be applicable. Under the new Section 15 the authority would not be able to apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Article VI of the GATT and the Anti-Dumping Agreement continue to be applicable.

2. Evidence of market economy conditions and no evidence of non-market economy conditions. Under the old Section 15, with the burden on the Chinese producers, the authority could still weigh the evidence and decide that the Chinese producers had failed to clearly show that market economy conditions prevail, and then proceed to apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Article VI of the GATT and the Anti-Dumping Agreement continued to be applicable. Under the new Section 15 the authority would not be able to apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Article VI of the GATT and the Anti-Dumping Agreement continue to be applicable.

3. Weighing the evidence. Under the old Section 15, with the burden on the Chinese producers, the authority must weigh the evidence, but may decide that the Chinese producers had failed to clearly show that market economy conditions prevail, and then proceed to apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Article VI of the GATT and the Anti-Dumping Agreement continued to be applicable. Under the new Section 15 the authority must still weigh the evidence, but there is no longer a China-specific rule on burden of proof. Whether or not the use of a methodology that is not based on a strict comparison with domestic prices or costs in China will be justified will depend on the evidence. Article VI of the GATT and the Anti-Dumping Agreement continue to be applicable.
96. As demonstrated by Table A, the old Section 15 had value added for the incumbent WTO Members in one very important respect: burden of proof. At the same time, it confirmed that Article VI of the GATT 1994 and the Anti-Dumping Agreement permit, in certain circumstances, the rejection not only of Chinese prices, but also of Chinese costs. It also confirmed that, in this respect, the analysis may be conducted at the level of the market, and not necessarily at the level of a particular firm or a particular cost.

97. With respect to burden of proof, as we have recalled above, the governing rule in the Anti-Dumping Agreement is that the investigating authority of an importing Member must not impose an unreasonable burden of proof on a particular interested party or on either sub-set of interested parties. In that context, investigating authorities may seek information from interested parties and put questions to them, and with respect to certain matters will be required to do so. They will then look at the evidence and consider whether or not it supports the affirmative determinations they are called upon to make. In the context of this particular dispute, there are two affirmative concepts in the Anti-Dumping Agreement that are in counterpoint to each other. One of those concepts is the concept of a normal value, or a value that is normal. The other concept is the concept of an abnormal situation, in which comparability is not ensured, including a "particular market situation".

98. This is where the old Section 15 came into play. It placed the burden of proof squarely on the Chinese exporting producers to demonstrate that market economy conditions prevail in China in the industry under investigation. China agreed to this because, we imagine, it accepted that, in all the circumstances, this was a reasonable approach. In adopting this approach, Section 15 remained consistent with the Anti-Dumping Agreement because it did not conflict with the Anti-Dumping Agreement, which only requires that the investigating authority of an importing Member must not impose an unreasonable burden of proof on a particular interested party or on either sub-set of interested parties. In other words, Section 15 confirmed that, with respect to China and Chinese industries or exporters, in all the circumstances, it was reasonable to place the burden of proof on the Chinese exporters. We further explain below the precise manner in which Section 15 delivered added value to WTO Members other than China, as set forth in Table A.

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102 See Section 2.1.2.5 of this Submission.

103 Appellate Body Report, US – Clove Cigarettes, para. 269: ("We observe that, in its commentaries on the Draft Articles on the Law of Treaties, the ILC states that a subsequent agreement between the parties within the meaning of Article 31(3)(a) "must be read into the treaty for the purposes of its interpretation". As we see it, while the terms of paragraph 5.2 must be "read into" Article 2.12 for the purpose of interpreting that provision, this does not mean that the terms of paragraph 5.2 replace or override the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretative clarification to be taken into account in the interpretation of Article 12.12 of the TBT Agreement.

99. **First,** under the old Section 15, if there would have been no evidence of either market economy conditions or non-market economy conditions, the investigating authority had the discretion to use a methodology that is not based on a strict comparison with domestic prices or costs in China.**104** **Second,** even if there would have been some evidence of market economy conditions (and no evidence of non-market economy conditions), the investigating authority could still consider the evidence and determine that the Chinese producers had not clearly demonstrated market economy conditions, and thus still decide to use a methodology that is not based on a strict comparison with domestic prices or costs in China.**105** **Third,** in considering some evidence of market economy conditions together with some evidence of non-market economy conditions, the burden of proving market economy conditions was on the Chinese producers.**106**

100. With respect to Chinese prices and **costs,** Section 15 confirmed, and **continues to confirm,** that the existence of an abnormal situation can justify rejecting/replacing/adjusting not only Chinese prices but also Chinese costs. This conclusion follows when Section 15 is considered on its own terms, as a stand-alone provision, without regard to Article VI of the GATT 1994 and the Anti-Dumping Agreement. At the same time, as an entirely separate point, Section 15 provides context to confirm that, under the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement, there are circumstances in which it is permissible (as authoritatively decided by the entire Membership**107**) to reject not only Chinese prices but also Chinese costs.

101. Finally, we also note that Section 15 confirmed, and **continues to confirm,** that it is possible to make the determination regarding the existence or absence of market conditions at the level of the industry or sector, as opposed to the level of individual producers or exporters. The question of how specific a determination must be in order to render unreliable the records of a particular firm, or particular costs therein, can only be answered on a case-by-case basis. This conclusion follows when Section 15 is considered on its own terms, as a stand-alone provision, without regard to Article VI of the GATT 1994 and the Anti-Dumping Agreement. At the same time, as an entirely separate point, Section 15 provides context to confirm that, under the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement, there are circumstances in which it is permissible (as authoritatively decided by the entire Membership**108**) to make the determination at the level of the industry or market concerned.

### 2.3.9. Section 15(d)

102. Section 15(d) of China’s Accession Protocol contains three rules, each of which relates to the termination or expiry of Section 15(a), or Section 15(a)(ii).

103. The first sentence of Section 15(d) provides that, once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated (provided that

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**104** Table A, cell B10 and Note 1.
**105** Table A, cells B6 and B9 and Note 2.
**106** Table A, cells B5 and B9 and Note 3.
**107** See Section 8 of this Submission.
**108** See Section 8 of this Submission.
the importing Member’s national law contains market economy criteria as of the date of accession). This is a **country-wide** provision. The reference to the national law of the importing Member specifically embeds the rule in the municipal law of the WTO Members other than China. This reflects a legitimate concern on the part of other Members that, unless and until China becomes a market economy, Section 15(a) as a whole should not be terminated. **China is not seeking to rely on the first sentence of Section 15(d).**

104. The third sentence of Section 15(d) provides that, in addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail **in a particular industry or sector**, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector. Whether this applies to Section 15(a) as a whole or Section 15(a)(ii) is not material to this dispute, since, in any event, **China is not seeking to rely on this third sentence**. Similar observations to those set out in the preceding paragraph apply. The reference to the national law of the importing Member specifically embeds the rule in the municipal law of the WTO Members other than China. This reflects a legitimate concern on the part of other Members that, unless and until market economy conditions would prevail in the relevant sector in China, Section 15(a) as a whole should continue to apply.

105. The second sentence of Section 15(d) provides that, in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. We address the meaning of Section 15 of China’s Accession Protocol and Paragraph 150 of the Working Party Report after 11 December 2016 in the following section.

2.4. **The New Section 15**

106. The new Section 15 and Paragraph 150 of the Working Party Report provide as follows:

**Price Comparability in Determining Subsidies and Dumping**

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member **consistent with** the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of
the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

150. Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.

107. Thus, the new Section 15 continues to contain the following key elements:

- Article VI of the GATT and the Anti-Dumping Agreement are to apply to proceedings concerning China consistent with Section 15 of China's Accession Protocol;
- these provisions are to apply "in determining price comparability";
- they are to apply with respect to the use of domestic prices or costs in China;
- they are to apply with respect to the industry under investigation;
- they are to apply with respect to the issue of market economy conditions and the presence of special difficulties; and
- they permit the use of a methodology not based on a strict comparison with domestic prices or costs in China.

108. Thus, we must reasonably conclude that Section 15 continues to be consistent with Article VI of the GATT 1994, including the relevant Ad Notes, and the relevant provisions of the Anti-Dumping Agreement, which continue to apply. Furthermore, it continues to mean that, if, in an anti-dumping case concerning Chinese products, it is found that, in the industry under investigation, there is
an absence of market economy conditions (that is, an abnormal situation affecting comparability, including a particular market situation or other special difficulties), then the investigating authority can reject Chinese prices and costs, and use instead a methodology not based on a strict comparison with domestic prices or costs in China (including information from a third country, adjusted where necessary).  

109. This does not mean that nothing changed on 11 December 2016. As illustrated in Table A above, the legal position with respect to the burden of proof under Section 15 changed significantly.

110. First, under the new Section 15, if there is no evidence of either market economy conditions or non-market economy conditions, the investigating authority cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Second, if there is some evidence of market economy conditions (and no evidence of non-market economy conditions), the investigating authority also cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Third, in weighing some evidence of market economy conditions against some evidence of non-market economy conditions, there is now no China-specific rule in Section 15 placing the burden of proof on Chinese exporters. In all three cases, Article VI of the GATT 1994 and the Anti-Dumping Agreement continue to be applicable. This means that the rule in the Anti-Dumping Agreement concerning burden of proof continues to apply: the investigating authorities of an importing Member must not impose an unreasonable burden of proof on a particular interested party or on any sub-set of interested parties.

111. As explained above and illustrated in Table A, with respect to Chinese prices and costs, Section 15 confirmed, and continues to confirm, that the existence of an abnormal situation can justify rejecting/replacing/adjusting not only the prices but also the costs of Chinese exporters. This conclusion follows when Section 15 is considered on its own terms, as a stand-alone provision, without regard to Article VI of the GATT 1994 and the Anti-Dumping Agreement. At the same time, as an entirely separate point, Section 15 contextually confirms that, under the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement, there are circumstances in which it is permissible (as authoritatively decided by the entire Membership) to reject not only the prices but also the costs of Chinese exporters.

\[109\) It should also be recalled that similar provisions continue to apply with respect to certain other Members. See, for example: Protocol on the Accession of the Socialist Republic of Viet Nam, WT/L/662, and Report of the Working Party, WT/ACC/VNM/48, paras. 254-255. Para. 254 uses the term "special difficulties" to refer indiscriminately to anti-dumping and countervailing duty investigations. See also: Protocol on the Accession of the Republic of Tajikistan, WT/L/872, and Report of the Working Party, WT/ACC/TJK/30, para. 164. This reinforces the need for a harmonious interpretation and application of all the relevant provisions.

\[110\) Table A, cell C10 and Note 1.

\[111\) Table A, cell C6 and Note 2.

\[112\) Table A, cell C9 and Note 3.

\[113\) See Section 8 of this Submission.
112. Finally, we also note that Section 15 confirmed, **and continues to confirm**, that it is possible to make the determination regarding the existence or absence of market conditions at the level of the industry or sector, as opposed to the level of individual producers or exporters. The question of how **specific** a determination must be in order to render unreliable the records of a particular firm, or particular costs therein, can only be answered on a case-by-case basis. This conclusion follows when Section 15 is considered **on its own terms, as a stand-alone provision**, without regard to Article VI of the GATT 1994 and the Anti-Dumping Agreement. At the same time, **as an entirely separate point**, Section 15 provides context to confirm that, under the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement, there are circumstances in which it is **permissible** (as authoritatively decided by the entire Membership\(^{114}\)) to make the determination at the level of the industry or market concerned.

113. Turning to the second sentence of Section 15(d), the crux of China's case is that it must be read as referring to Section 15(a) as a whole.\(^{115}\) However, that is not what the terms of the treaty provide for. In this respect, the negotiators specifically procured that the text be amended so that the second sentence no longer refers to Section 15(a) as a whole, but instead refers only to Section 15(a)(ii).\(^{116}\) They did this because they knew that the pertinent issues were addressed by **two different provisions**: Section 15(a)(i) and Section 15(a)(ii) — **and that the expiry of the latter would only have the effect of eliminating the China-specific rule in Section 15(a)(ii)**. Further, the negotiators specifically procured that the first sentence refers to Section 15(a) in its entirety, because they knew that once China had established that it is a market economy, it would be appropriate and acceptable for all of Section 15(a) to terminate, not just the China-specific rule on burden of proof.

114. Negotiators for the existing Members were only able to accept the expiry of Section 15(a)(ii) safe in the knowledge that Section 15(a)(i) would continue to apply. They took steps to ensure that the remainder of Section 15(a) would remain applicable because they could not be certain that, after 15 years, China would have completed its transition to a market economy, as the "special difficulties" language of Paragraph 150 of the Working Party Report confirms.\(^{117}\) Subsequent developments have demonstrated their caution to be prescient.

115. In essence, China is trying to assert that the whole of Section 15(a) must be understood to have been terminated on 11 December 2016. However, this is nowhere provided for in the terms of the treaty.

116. This does not mean that the European Union would render the second sentence of Section 15(d) meaningless. The European Union recognises that the

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\(^{114}\) See Section 8 of this Submission.

\(^{115}\) China's First Written Submission, paras. 72-73.

\(^{116}\) Exhibit EU-1 (Agreement on Market Access Between the People's Republic of China and the United States of America, November 15, 1999). Manuscript amendments demonstrate the final change in what is now the second sentence of Section 15, sub-paragraph (d), from referring to what is now Section 15(a), to referring to what is now Section 15(a)(ii). The manuscript amendments have been initialled and agreed by both sides. Exhibit EU-2 (Revised Draft 23/06/2000, Draft Protocol on the Accession of China, informal WTO Secretariat Document, 23 June 2000).

\(^{117}\) Appellate Body Report, EC – Fasteners (China), footnote 464.
consequence of the second sentence of Article 15(d) is that the rule placing the burden of proof on Chinese exporters, as set out in Section 15, changes, as outlined above.

117. China asserts that these matters were already determined in EC – Fasteners (China).\(^{118}\) The European Union disagrees. In that case, the Appellate Body was called upon to adjudicate on the question of whether or not Section 15 is relevant not only to the determination of normal value, but also to the determination of export price. The Appellate Body determined that Section 15 was not relevant to the determination of export price.\(^{119}\) The Appellate Body was not called upon to rule on the issues arising in this dispute; and those issues were not the subject of any exchange of argument between the parties or participants, or involving the third parties or third participants. As a simple matter of common sense, we do not believe that the Appellate Body would have intended to resolve such an important issue en passant. Indeed, the Appellate Body has since expressly confirmed that the reasoning in that report was tailored to the specific circumstances of that dispute.\(^{120}\) Therefore, we respectfully request the Panel to adjudicate the present dispute objectively and on the basis of the merits of the arguments now submitted to it, and the terms actually used in the treaty and the measures at issue, without pre-judging the outcome of that discussion in any way.

118. In any event, even if China would be correct that Section 15(d) can be read as terminating the entirety of Section 15(a) as opposed to what it actually says, which is Section 15(a)(ii) (quod non), we would nevertheless have to conclude that the context of Section 15, both before and after 11 December 2016, confirms the conclusions set out above.\(^{121}\) This is so irrespective of the expiry of Section 15(a)(ii).\(^ {122}\)

2.5. **Section 15(b) and Paragraph 150 of the Working Party Report**

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\(^{118}\) China's First Written Submission, paras. 72-73.

\(^{119}\) Appellate Body Report, EC – Fasteners (China), paras. 283-291, particularly para. 291: ("… China’s claim before the Panel concerned the determination of individual and country-wide dumping margins and duties, not the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China").

\(^{120}\) Appellate Body Report, EU – Biodiesel (Argentina), para. 6.87 ("The reasoning in that report is tailored to the circumstances of that dispute …")

\(^{121}\) Appellate Body Report, EC – Fasteners (China) (Article 21.5 – China), para. 5.207 ("… Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second Ad Note to Article VI:1 of the GATT 1994 and Section 15(a) of China’s Accession Protocol.")

\(^{122}\) See, with respect to the expiry of Article 6(1), Annex IV and Article 8 of the SCM Agreement: Appellate Body Report, EC – Large Civil Aircraft, para. 666: ("We agree with the Panel that, although Article 6.1 and Annex IV have expired, they formed part of the original framework for determining when a Member could be considered to have caused adverse effects, and thus provide an important indication of the intended scope of Article 5."); Appellate Body Report, US – Countervailing Measures (China), footnote 675: ("… We note that Article 8, as part of the original disciplines set out in the SCM Agreement, provides an indication of the intended scope of the term "subsidy programme" …") and para. 4.142 ("This reference also provides further support to our understanding that the term "the subsidy programme", as used in the SCM Agreement, refers to a plan or scheme regarding the subsidy at issue."); Appellate Body Report, US – Washing Machines, para. 5.270 ("Further, paragraph 3 of Annex IV … now lapsed – provided that … In light of the above, we consider that …"); Appellate Body Report, US – Large Civil Aircraft, para. 5.15 and footnote 53 ("Other provisions of the SCM Agreement also refer to the "territory" of a Member, as well as to "domestic producers" or "domestic production". (See e.g. Article 1.1(a)(1); Article 8.2(b), now lapsed …").
119. Section 15(b), which refers expressly to Parts II, III and V of the SCM Agreement, as well as Article 14 of the SCM Agreement, must be read in the light of the title and first paragraph of Section 15. This is the case both before and after 11 December 2016. The title of Section 15 expressly provides that the entire provision is concerned with "Price Comparability in Determining Subsidies and Dumping".

120. Section 15 must also be read in the light of the relationship between WTO anti-dumping and countervailing duty law, and particularly the fact that it is possible to have "the same situation" of dumping and subsidisation.

121. It must also be read in the light of the relationship between Part V of the SCM Agreement, on the one hand, and Parts II and III of the SCM Agreement, on the other hand.\(^\text{123}\)

122. These observations are confirmed by the reasoning of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*:

570. In our view, the references to Article VI of the GATT 1994 in Articles 10 and 32.1 of the *SCM Agreement*, Article VI itself, and the many parallels between the obligations that apply to Members imposing anti-dumping duties and those imposing countervailing duties, suggest that any interpretation of "the appropriate amounts" of countervailing duties within the meaning of Article 19.3 of the *SCM Agreement* must not be based on a refusal to take account of the context offered both by Article VI of the GATT 1994 and by the provisions of the *Anti-Dumping Agreement*. While we agree with the Panel that Articles 19.3 and 19.4 of the *SCM Agreement* are concerned with countervailing duties and not with anti-dumping duties, we are not persuaded that it necessarily follows that these provisions are, as the Panel noted, "oblivious to any potential concurrent imposition of anti-dumping duties". **Such an interpretative approach is difficult to reconcile with the notion that the provisions in the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.** Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another. We are reinforced in this view by the fact that, although the disciplines that apply to a Member's use of anti-dumping duties and its use of countervailing duties are legally distinct, the remedies that result are, from the perspective of producers and exporters, indistinguishable. Both remedial actions increase the amount of duty that must be paid at the border.

571. It follows that a proper understanding of the "appropriate amounts" of countervailing duties in Article 19.3 of the *SCM Agreement* cannot be achieved without due regard to relevant provisions of the *Anti-Dumping Agreement* and recognition of the way in which the two legal regimes that these agreements set out, and the remedies which they authorize Members to impose, operate. To us, the requirement that any amounts be "appropriate" means, at a minimum, that investigating authorities may not, in fixing the appropriate amount of countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization. Each agreement sets out strict conditions that must be satisfied before the authorized remedy may be applied. The purpose of

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\(^{123}\) See, with respect to each of these point, footnotes 15 and 16 of this Submission.
each authorized remedy may be distinct, but the form and effect of both remedies are the same. Both the Anti-Dumping Agreement and the SCM Agreement contain provisions requiring that the amounts of anti-dumping and countervailing duties be "appropriate in each case", as reflected in Articles 9.2 and 19.3 respectively. Both agreements also set ceilings on the maximum amount of duties that can be imposed to remedy dumping and subsidization, respectively. Article 19.4 of the SCM Agreement establishes that countervailing duties shall not exceed the amount of the subsidy found to exist and Article 9.3 of the Anti-Dumping Agreement establishes that anti-dumping duties shall not exceed the margin of dumping.\textsuperscript{124}

123. Section 15(b) refers to "special difficulties". This reference covers both non-market economy conditions and transparency and thus burden of proof issues. It is well known that, in subsidies law, it can be particularly difficult to obtain information about the granting or maintaining of subsidies. One reason for that is because some of the pertinent information will usually be in the possession of the subsidising State. Therefore, in effect, the reference to "special difficulties" in Section 15(b) is at the same time a reference to Sections 15(a)(i) and 15(a)(ii) and the burden of proof rules. \textbf{This is particularly clear from Paragraph 150 of the Working Party Report.}\textsuperscript{125} The fact that the reference to "special difficulties" in Section 15(b) continues after 11 December 2016 supports the view that the treaty interpreter must pay close attention to the carefully calibrated treaty provisions that touch on the issue of burden of proof rules, including under the new Section 15.

124. Section 15(b) also refers to the need to identify and measure benefit by reference to a \textbf{benchmark}. Again, this is an analogue of the need to identify and measure whether exports are dumped by reference to a benchmark (a normal value) under the Anti-Dumping Agreement. Just as, under the SCM Agreement, the "special difficulties" that may arise concern the "benchmark", so, under the Anti-Dumping Agreement, special difficulties may also arise with respect to the determination of normal value.

125. Once again, there is a strong correlation between Section 15(a)(i) and Section 15(b) having regard to circumstances in which there is the "same situation" of dumping and subsidisation. That is because, in general terms, dumping below cost, by definition, and all other things being equal, may be expected to eventually result in a shortfall between income and costs, which shortfall may then need to be addressed through the use of a subsidy. In order to maintain coherence in the application of the Anti-Dumping Agreement and the SCM Agreement, it stands to reason that, in both instances, the benchmark should be based on and reflect normal market conditions. Thus, the benchmark for measuring benefit under the SCM Agreement should reflect normal market

\textsuperscript{124} Appellate Body, US – Anti-Dumping and Countervailing Duties (China), paras. 570-571 (footnotes omitted) (bold emphasis added).

\textsuperscript{125} Paragraph 150 of the Working Party Report is not listed in Paragraph 342 of the Working Party Report (which is referenced in Section 1(2) of China's Accession Protocol). Section 1(2) of China's Accession Protocol provides as follows: ". . . This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." It nevertheless remains relevant to this dispute.
conditions; and the benchmark (normal value) for measuring dumping under the Anti-Dumping Agreement should also reflect normal market conditions.

126. Furthermore, both Section 15(a) and Section 15(b) repeatedly refer to the use of a particular methodology or methodologies as a response to the special difficulties that may arise. It stands to reason that those methodologies might be expected to bear some similarities to each other.

127. Specifically, both Section 15(a) and Section 15(b) may reasonably be understood as referring to the possibility of having regard to information from outside China, adjusted where necessary.\textsuperscript{126} Once again, it stands to reason that there is a strong parallelism between these provisions. \textit{This is particularly clear from Paragraph 150 of the Working Party Report}, which refers expressly to a methodology in which a strict comparison with domestic costs and prices in China might not always be appropriate. Therefore, the continued existence of Section 15(b) after 11 December 2016 lends strong support to the observation that, since Sections 15(a) and 15(a)(i) also continue to exist after 11 December 2016, they must be given a meaning that aligns in a coherent way with the content of Section 15(b) and Paragraph 150 of the Working Party Report.

128. These observations are reinforced by a consideration of Parts II and III of the SCM Agreement. Instead of imposing countervailing duties, an aggrieved Member may request a panel pursuant to Parts II and/or III of the SCM Agreement. \textit{Such a panel may find itself confronted with exactly the same set of problems}. There is no doubt that, in that context, Section 15(b) would apply. Specifically, such a panel may experience "special difficulties" when applying Articles 1 and 14 of the SCM Agreement because of the paucity of evidence available to the complainant and the panel, notwithstanding the existence and use of Annex V of the SCM Agreement and Article 13 of the DSU. In such a case, the panel would be entitled to use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. Furthermore, in applying such methodologies such a panel should consider the use of terms and conditions prevailing outside China, adjusted where necessary. Thus, the need for a coherent approach as between Parts II and III of the SCM Agreement, and Part V of the SCM Agreement also pleads in favour of a coherent reading of Sections 15(a), 15(a)(i) and 15(b) of China's Accession Protocol, together with Paragraph 150 of the Working Party Report.

\textbf{2.6. Closing Remarks}

129. In closing this Section on the Overview of the Legal Framework, the European Union wishes to observe that it is also possible to consider these same legal issues with a particular focus on the consistent practice of Members under the GATT and under the WTO, as set out in Attachment 1 to this Submission. All of the observations and arguments set out in Attachment 1, which support,

complement and supplement the arguments set out in this Submission, constitute an integral part of this Submission and of the arguments of the European Union presented to the Panel. All of these arguments are directed at rebutting the arguments presented in China's First Written Submission.

3. **THE SPECIFIC MEASURES AT ISSUE IDENTIFIED IN THE PANEL REQUEST: WITH RESPECT TO CHINA'S FIRST CLAIM - ARTICLES 2(1) TO 2(7) OF THE EU BASIC ANTI-DUMPING REGULATION; WITH RESPECT TO CHINA'S SECOND CLAIM - ARTICLE 2(7)**

3.1. **THE SPECIFIC MEASURES AT ISSUE IDENTIFIED IN THE PANEL REQUEST**

130. As will also become apparent from the Request for Preliminary Rulings set out further below, the European Union considers that the specific measures at issue identified in the Panel Request are, with respect to China's First Claim, Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation and with respect to China's Second Claim, Article 2(7) (as they relate to China after 11 December 2016). The Request for Preliminary Rulings addresses particular issues arising with respect to the lawful delineation of the specific measures at issue, including the fact that, for the purpose of China's First Claim, Articles 2(1) to 2(6) are not impugned per se, but only referenced to the extent that they are alleged to confer an advantage compared to Article 2(7). For example, the second sub-paragraph of Article 2(5) of the EU Basic Anti-Dumping Regulation contains certain rules. China does not allege that this provision, viewed in isolation, is WTO inconsistent. Indeed, a claim to that effect was explicitly rejected by the Appellate Body in EU – Biodiesel (Argentina).\(^\text{128}\)

131. This Section is concerned with a related but different issue. Specifically, this Section is concerned with establishing the requisite degree of precision concerning what the specific measures at issue identified in the Panel Request actually are, and thus with rejecting the attempts by China, in its First Written Submission, to subtly re-cast and vary, in an erroneous manner, what the specific measures at issue identified in the Panel Request actually are.

132. This is a critical threshold issue. The correct delineation of the specific measures at issue identified in the Panel Request is foundational. As will become apparent, once they have been correctly delineated, employing the terms actually used in Articles 2(1) to 2(7), many if not all of China's subsequent assertions about the specific measures at issue identified in the Panel Request will be revealed to be over-simplified and inaccurate.

133. Naturally, the European Union accepts that a complaining Member has a certain discretion when it comes to identifying the specific measures at issue in its panel request (although that discretion is not entirely unfettered). However, having **exercised that discretion**, and having identified the specific measures at issue in the panel request, a complaining Member is not permitted to subsequently change the contours of the specific measures at issue that it has identified in the Panel Request, either directly or indirectly.

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\(^{127}\) See Section 7 of this Submission.

\(^{128}\) Appellate Body Report, *EU – Biodiesel (Argentina)*, Section 7.2.
As an example of a direct change that would be impermissible: having identified the specific measures at issue in the Panel Request as Articles 2(1) to 2(7) (with respect to the First Claim) and 2(7) (with respect to the Second Claim) of the EU Basic Anti-Dumping Regulation, China would not be permitted to assert subsequently that other provisions of the EU Basic Anti-Dumping Regulation (such as, for example, Article 3, which relates to the determination of injury) are specific measures at issue.

As an example of an indirect change that would be impermissible: having identified the specific measures at issue in the Panel Request as Articles 2(1) to 2(7) (with respect to the First Claim) and 2(7) (with respect to the Second Claim), China would not be permitted to assert subsequently that the specific measures at issue are something labelled "the standard methodology" and something labelled "the analogue country methodology" allegedly set out in Articles 2(1) to 2(7) and then subsequently describe such "methodologies" as anything different from Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation.

An examination of China's Panel Request reveals, unequivocally, that the specific measures at issue identified by China in the Panel Request are Articles 2(1) to 2(7) (with respect to the First Claim) and 2(7) (with respect to the Second Claim), as demonstrated by the following highlighted references:


2. Consultations were held on 23 January 2017 with a view to reaching a mutually satisfactory solution. While these consultations assisted in clarifying some of the issues before the parties, they failed to resolve the dispute.

3. Therefore, China requests, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994 and Articles 17.4 and 17.5 of the Anti-Dumping Agreement, that the Dispute Settlement Body ("DSB") establish a panel to examine the matter referred to the DSB by China in this document, with the standard terms of reference described in Article 7.1 of the DSU.

4. In the following sections, China identifies the specific measures at issue and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

A. Measures at issue

5. The measures at issue in this request include Articles 2(1) to 2(7) of Regulation (EU) 2016/1036 ("the Basic Regulation"). Articles 2(1) to 2(6) of the Basic Regulation set out rules in EU law for determining normal value in anti-dumping proceedings. Article 2(7) of the Basic Regulation sets out a different regime that applies to the calculation of normal value for imports from so-called "non-market economy" countries. Article 2(7)(b), which expressly names China, provides that the rules set forth in Articles 2(1) to 2(6) for calculating normal value for a specific producer shall apply only if that producer is able to substantiate that so-called "market economy" conditions prevail in respect of the manufacture and sale by that producer of the like product concerned. To do so, the producer must establish that it meets the criteria set out in Article 2(7)(c). Article 2(7)(b) provides that, for all producers unable to make this showing, the normal value calculation rules set forth in Article 2(7)(a)
shall apply. Under Article 2(7)(a), normal value shall be determined on the basis of prices or constructed value in a surrogate "market-economy" third country.

B. Legal basis of the complaint

6. When China acceded to the WTO, China and other WTO Members agreed that, for a transitional period of fifteen years, China-specific treaty provisions would apply to the determination by other Members of certain elements of "price comparability" in anti-dumping proceedings involving Chinese imports. Specifically, under paragraph 15(a)(ii) of the Protocol on the Accession of the People's Republic of China ("Accession Protocol"), importing WTO Members were, subject to certain conditions, exceptionally permitted to use a methodology not based on a strict comparison with domestic prices or costs in China. Paragraph 15(d) provides that "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession", namely, on 11 December 2016. Accordingly, from that date, the WTO rules that govern the determination by WTO Members of all elements of price comparability now apply to imports from China. However, the European Union continues to determine normal value for Chinese imports on the basis of a special calculation methodology unless the producer establishes that it meets certain criteria, as set forth below. Thus, the European Union is in violation of its international obligations.

7. Specifically, following the expiry of paragraph 15(a)(ii), China is concerned that: (i) Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article 1:1 of the GATT 1994, and (ii) Article 2(7) is inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement, Article VI:1 of the GATT 1994, and the second paragraph of the Ad Note to Article VI:1 of the GATT 1994 (the "Ad Note").

8. Articles 2(1) to 2(7) of the Basic Regulation provide for differential treatment of Chinese imports, as compared to imports from other WTO Members. Specifically, in contrast to the treatment afforded imports from other WTO Members, Chinese imports are denied the advantage, favour, privilege or immunity of the rules set forth in Articles 2(1) to 2(6) regarding the determination of normal value, and instead face the less favourable rules set forth in Article 2(7), unless Chinese producers satisfy a requirement in Article 2(7)(b) to demonstrate that so-called "market economy" conditions prevail. As a result, the European Union fails to accord Chinese imports immediately and unconditionally an advantage, favour, privilege or immunity that is granted to like imports from other WTO Members, contrary to Article I:1 of the GATT 1994. This differential treatment ceased to be justifiable when paragraph 15(a)(ii) of China's Accession Protocol expired on 11 December 2016.

9. Article VI:1 of the GATT 1994 provides that normal value is normally to be determined based on domestic prices of the like product or, in the absence of such prices, prices for export to a third country or prices constructed from the costs of production in the country of origin. Likewise, Article 2.1 of the Anti-Dumping Agreement provides that normal value is normally the price for the like product when sold, in the ordinary course of trade, in the home market of the producer/exporter; Article 2.2 of the Agreement provides for departure from home market prices in certain circumstances. Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 prohibit the determination of normal value on the basis of third country prices and/or costs; doing so is inconsistent with the obligation under these provisions to, inter alia, determine normal value on the basis of domestic prices or on the basis of a producer's costs of production in the country of origin. Article 2(7) of the Basic Regulation is inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because, when a producer does not satisfy the requirement in Article 2(7)(b) to demonstrate that so-called "market economy" conditions prevail pursuant to the criteria in Article 2(7)(c), Article 2(7) improperly requires the EU investigating authority to reject Chinese market prices and costs when calculating normal value in favour of third country prices and costs.

10. The only exception to the rule in Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 is found in the Ad Note, which permits a Member to depart from a strict comparison with domestic prices only if the Member satisfies the two conditions set forth in the Ad Note. Article 2(7) of the Basic Regulation, however, requires the European Union, in defined circumstances, to depart from such a strict comparison without satisfying the relevant conditions in the Ad Note.
In particular, Article 2(7) does so when a producer does not satisfy the requirement in Article 2(7)(b) to demonstrate that so-called "market economy" conditions prevail.

11. The treatment afforded Chinese imports under Article 2(7) of the Basic Regulation ceased to be justifiable when paragraph 15(a)(ii) of China's Accession Protocol expired on 11 December 2016 and is inconsistent with the WTO covered agreements, as described above in this request.

12. This request for panel establishment also concerns any modification, replacement or amendment to the measures identified above, and any closely connected, subsequent measures.2

13. China asks that this request be placed on the agenda for the meeting of the DSB scheduled to take place on 21 March 2017.


2 At present, China is aware of two legislative processes implicating potential changes to relevant provisions of the Basic Regulation: (i) the legislative process initiated by the European Commission’s Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, dated 9 November 2016 (COM(2016) 721 final); and, (ii) the legislative process initiated by the European Commission’s Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Union, and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community (COM(2013) 192 final). This request includes any changes made to the Basic Regulation pursuant to the legislative processes initiated by these proposals.

137. Therefore, the specific measures at issue identified by China in the Panel Request are Article 2(1) to (7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim) (as they relate to China after 11 December 2016). That is, the specific measures at issue consist of the actual terms used in those provisions of the EU Basic Anti-Dumping Regulation: nothing more; nothing less; and nothing different.129

138. Since, as we have just recalled, Articles 2(1) to 2(6) are not impugned per se, but only referenced to the extent that they are alleged to confer an advantage compared to Article 2(7),130 we continue the discussion by focusing on the provisions of Article 2(7). Article 2(7) of the EU Basic Anti-Dumping Regulation provides as follows:

7. (a) In the case of imports from non-market-economy countries(1), the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.

129 Subject to the limitations addressed in our Request for Preliminary Rulings concerning: temporal scope; the role of Articles 2(1) to 2(6); and the limitation to China.

130 As China puts it, it is Article 2(7), as opposed to Articles 2(1) to 2(6), that is of "central importance … to this dispute". See China’s First Written Submission, para. 36.
An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits. Where appropriate, a market-economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market-economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from the People’s Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, the normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in point (c), that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When that is not the case, the rules set out under point (a) shall apply.

(c) A claim under point (b) must be made in writing and contain sufficient evidence that the producer operates under market-economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the criteria referred to under this point shall normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation, after the Union industry has been given an opportunity to comment. That determination shall remain in force throughout the investigation. The Commission shall provide information to the Member States concerning its analysis of claims made pursuant to point (b) normally within 28 weeks of the initiation of the investigation.

(d) When the Commission has limited its investigation in accordance with Article 17, a determination pursuant to points (b) and (c) of this paragraph shall be limited to the parties included in the investigation and any producer that receives individual treatment pursuant to Article 17(3).

(1) Including Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan.

One may engage in the exercise of analysing the content of this provision by highlighting a number of its elements. However, in doing so, one cannot alter the precise contours of the specific measures at issue identified by China in its Panel Request, which consist of all of the terms actually used in the provisions cited by China. The main elements of Article 2(7) are the following:
it refers expressly to China as well as certain other countries (Article 2(7)(b));

- it applies specifically to China as well as certain other countries (Article 2(7)(b));

- it applies in anti-dumping investigations (concerning imports from China and certain other countries) (Article 2(7)(b));

- it provides direct access to the rules in paragraphs 1 to 6 where an investigated (Chinese) exporter shows that market-economy conditions prevail for that (Chinese) producer (otherwise Article 2(7)(a) applies) (Article 2(7)(b));

- in that respect, the relevant showing must be made by the (Chinese) producer (Articles 2(7)(b) and 2(7(c));

- it sets out five criteria on the basis of which it will be determined whether or not market-economy conditions prevail for that (Chinese) exporter (Article 2(7)(c));

- it contains specific procedural rules regarding the determination that the (Chinese) producer operates under market-economy conditions (Article 2(7)(c));

- where Article 2(7)(a) applies, it provides for the determination of normal value on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the European Union, or, where those are not possible, on any other reasonable basis (Article 2(7)(a));

- it provides rules for the selection of an appropriate market-economy third country (Article 2(7)(b)); and

- it contains rules governing the relationship between the use of sampling and Article 2(7) (Article 2(7)(d)).

140. In the Panel Request, China asserts that: "Article 2(7) of the Basic Regulation sets out a different regime that applies to the calculation of normal value for imports from so-called "non-market economy" countries".\(^{131}\) When using the terms "different regime", China is necessarily referring to everything that is contained in Article 2(7), that is, all of the terms actually used in that provision, as detailed above. Similarly, when China asserts that: "However, the European Union continues to determine normal value for Chinese imports on the basis of a special calculation methodology unless the producer establishes that it meets certain criteria, as set forth below".\(^{132}\) China is, once again, necessarily referring to everything that is contained in Article 2(7), as detailed above.

3.2. SECTION II.A OF CHINA'S FIRST WRITTEN SUBMISSION (THE MEASURES AT ISSUE)

\(^{131}\) Panel Request, para. 5.

\(^{132}\) Panel Request, para. 6.
141. Section II of China's First Written Submission purports to describe the specific measures at issue as identified in the Panel Request. However, instead of simply re-stating the fact that the specific measures at issue are Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim) China begins by referring to the legal framework provided by the EU Basic Anti-Dumping Regulation, and then makes the following introductory statement:  

"The measures at issue in this dispute concern methodologies and/or rules relevant to the determination of dumping provided for in Articles 2(1) to 2(7) of the Basic Regulation."

142. The European Union takes issue with this statement.

143. First, the European Union notes that, while the reader would expect at this point a simple re-statement of what the specific measures at issue identified in the Panel Request are, China chooses to make a statement about what the specific measures at issue identified in the Panel Request are supposed to "concern". Making an assertion about what something concerns is not the same thing as making a statement about what something is. Obviously, China avoids making a statement about what the specific measures at issue, as identified in the Panel Request, are. In fact, as we further explain below, China subsequently attempts to change the substantive contours of the specific measures at issue, as identified in the Panel Request. China is not permitted to do that.

144. Second, China attempts to add an additional qualifier, which is the term "relevant to". The same comments apply. The specific measures at issue identified in the Panel Request are simply Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim): not something that "concerns" Articles 2(1) to 2(7) or Article 2(7); nor something that is "relevant to" Articles 2(1) to 2(7) or Article 2(7); nor something that "concerns" something that is "relevant to" Articles 2(1) to 2(7) or Article 2(7). Just Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim).

145. Third, China also attempts to introduce new language, using as general descriptors the terms "methodologies" and "rules"; and compounds the error with the ambiguous use of the term "and/or". These are matters that are further discussed below. At this point it is sufficient to observe that the specific measures at issue identified in the Panel Request are Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim), and China is not permitted to change these at this point.

146. China then proceeds to provide its own statement of what it believes is contained in Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation, divided into two parts, the first relating to Articles 2(1) to 2(6), and the second to Article 2(7).  

147. This is unnecessary and China's presentation is seriously misleading. The Panel has before it the text of Articles 2(1) to 2(7) and can read it for itself. This case

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133 China's First Written Submission, paras. 16-17.
134 China's First Written Submission, paras. 19-42.
must be adjudicated by reference to the terms actually used in the treaties cited by the Parties, and the terms actually used in Articles 2(1) to 2(7).

148. China attempts to characterise Articles 2(1) to 2(6) as containing "a standard methodology" (in the singular), and Article 2(7) as containing a different "analogue country methodology" (also in the singular). However, these terms are not used in Articles 2(1) to 2(7). This approach appears to be the prelude to China's subsequent attempts to make statements that are over-simplified and inaccurate or insufficiently precise.

149. A correct statement would be that Articles 2(1) to 2(7) contain provisions that govern the determination of normal value (as expressly stated in the title); that Articles 2(1) to 2(6) apply to all WTO Members, including China (absent any express provision stating otherwise); and that Article 2(7) applies only to China and certain other countries (as stated expressly in that provision).

150. Nevertheless, China begins the sub-section relating to Articles 2(1) to 2(6) with the assertion that the European Union refers to Articles 2(1) to 2(6) as containing a "methodology", and in particular the "standard methodology". It refers in this respect to a Commission Staff Working Document. China's approach is misconceived and erroneous. The fact that the services of various institutions (but not the institution as such) or persons within the European Union, in documents prepared for policy or general information purposes, may have used certain terms with a degree of precision tailored to the particular context is devoid of relevance or consequence for this dispute.

151. In the context of these panel proceedings, the European Union must insist on the correct and precise use of legal terms, in order to allow for an objective and even-handed adjudication of the dispute. Therefore, the European Union does not refer to Articles 2(1) to 2(6) as containing a "methodology" or a "standard methodology" and we categorically reject those terms for the purposes of these proceedings. In this respect, we insist that the Panel does not adopt the terminology used in China's First Written Submission. Instead, in order to be even-handed and objective, the Panel must use the actual terms in the provisions of the treaties cited by the Parties; and the actual terms contained in Articles 2(1) to 2(7).

152. China's misuse of terminology inevitably leads to over-simplification and error in the presentation of the relevant provisions of EU municipal law. Thus, China makes the assertion that Articles 2(1) to 2(6) do not apply to China, relegating to a footnote the obvious fact that Articles 2(1) to 2(6) do apply to China, when the Chinese exporters demonstrate market economy conditions. Furthermore, the relevant provisions of Articles 2(1) to 2(6) apply concurrently with the provisions of Article 2(7). For example, when normal value is constructed on the basis of data from a third country, as provided for in Article 2(7)(a), the rules in Articles 2(5) and 2(6) apply. In similar vein, China makes the (erroneous) assertion that Articles 2(1) to 2(6), in referring to "other representative markets", whilst permitting the use of information from a third country,

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135 China's First Written Submission, para. 21.
136 China's First Written Submission, para. 21, final sentence, and footnote 8.
country, requires it in all cases to be adjusted back to the distorted data that was originally rejected. Again, China attempts to relegate the point to a footnote. Furthermore, inexplicably, in what is supposed to be a description of the specific measures at issue identified in the Panel Request, China introduces (erroneous) assertions about WTO law.\textsuperscript{137} China also asserts that, when normal value is established based on prices to a third country, this necessarily excludes information emanating from such third country, which is incorrect.\textsuperscript{138} Similar comments apply with respect to China's assertions about Article 2(7): the adjudication must be done on the basis of the terms actually used in the provisions of the treaties cited by the Parties; and the actual terms contained in Articles 2(1) to 2(7).\textsuperscript{139}

153. In fact, if one were to prepare a table listing the bases on which normal value might be determined under Articles 2(1) to 2(6), and under Article 2(7), it would look like this:

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
Basis & Article \\
\hline
\end{tabular}
\end{table}

\textsuperscript{137} China's First Written Submission, para. 24 and footnote 12.
\textsuperscript{138} See paras. 21 and 41 of this Submission.
\textsuperscript{139} China's First Written Submission, paras. 26-35.
Table B: Bases for determining normal value in Articles 2(1) to 2(6) and Article 2(7) of the EU Basic Anti-Dumping Regulation

<table>
<thead>
<tr>
<th>Articles 2(1) to 2(6) (all WTO Members, including China)</th>
<th>Legal Basis</th>
<th>Article 2(7) (China and certain other countries)</th>
<th>Legal Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Exporter’s prices</td>
<td>2(1), first sub-para.</td>
<td>Exporter’s prices</td>
<td>2(7)(b), 2(7)(c) and 2(1), first sub-para.</td>
</tr>
<tr>
<td>2 Other exporter’s prices</td>
<td>2(1), second sub-para.</td>
<td>Other exporter’s prices</td>
<td>2(7)(b), 2(7)(c) and 2(1), second sub-para.</td>
</tr>
<tr>
<td>3 Exporter’s costs in country of origin</td>
<td>2(3)</td>
<td>Exporter’s costs in country of origin</td>
<td>2(7)(b), 2(7)(c) and 2(3)</td>
</tr>
<tr>
<td>4 Other exporter’s costs</td>
<td>2(5), second sub-para., 2(6)(a)</td>
<td>Other exporter’s costs</td>
<td>2(7)(b), 2(7)(c) and 2(5), second sub-para., 2(6)(a)</td>
</tr>
<tr>
<td>5 Costs of same general category of products</td>
<td>2(5), second sub-para., 2(6)(b)</td>
<td>Costs of same general category of products</td>
<td>2(7)(b), 2(7)(c) and 2(5), second sub-para., 2(6)(b)</td>
</tr>
<tr>
<td>6 Prices to a third country</td>
<td>2(3)</td>
<td>Prices to a third country</td>
<td>2(7)(b), 2(7)(c) and 2(3)</td>
</tr>
<tr>
<td>7 Price information from other markets</td>
<td>2(5) second sub-para.</td>
<td>Price information from other markets</td>
<td>2(7)(b), 2(7)(c) and 2(5) second sub-para. or 2(7)(a)</td>
</tr>
<tr>
<td>8 Cost information from other markets</td>
<td>2(5), second sub-para.</td>
<td>Cost information from other markets</td>
<td>2(7)(b), 2(7)(c) and 2(5) second sub-para. or 2(7)(a)</td>
</tr>
<tr>
<td>9 Price from a third country</td>
<td>2(5), second sub-para.</td>
<td>Price from a third country</td>
<td>2(7)(a)</td>
</tr>
<tr>
<td>10 Any other reasonable basis, including, by definition, any of the above, and including</td>
<td>2(5), second sub-para.</td>
<td>Any other reasonable basis, including, by definition, any of the above</td>
<td>2(7)(a)</td>
</tr>
<tr>
<td>11 Price from a third country</td>
<td>2(5), second sub-para.</td>
<td>Price from a third country</td>
<td>2(7)(a)</td>
</tr>
</tbody>
</table>
154. It is important to understand that the bases for determining normal value can be **combined** in any one case or, indeed, in any one determination. As Table B illustrates, there are at least ten different bases for determining normal value under both Articles 2(1) to 2(6) and under Article 2(7), giving rise to many different permutations.

155. Furthermore, as Table B also illustrates, the bases for determining normal value under Articles 2(1) to 2(6) and under Article 2(7) are **the same**. There is only one minor technical difference. Under Articles 2(1) to 2(6), the use of price from a third country is possible to the extent it constitutes "any other reasonable basis" for establishing costs (Article 2(5) second sub-paragraph).\(^{140}\) Under Article 2(7), the use of price from a third country is expressly referenced in Article 2(7)(a).\(^{141}\)

156. Of course the **legal provisions** governing the route to a particular basis for determining normal value are **different**, and this is also illustrated in Table B. This is indeed the essence of China's First Claim, and the European Union will fully address that claim and China's associated arguments. In this respect, it is also important to understand that the way in which normal value will be calculated will depend on the evidence in individual cases, including evidence about the presence or absence of market conditions in the country or industry concerned. However, in considering this matter, it is both unhelpful and **legally erroneous, in the context of these panel proceedings**, for China to attempt to replace the terms actually used in Articles 2(1) to 2(6) with the term "a standard methodology"; and the terms actually used in Article 2(7) with the term "the analogue country methodology".

157. Rather, as we have explained, this objective legal adjudication must be made on the basis of the terms actually used in the treaty provisions cited by the Parties, and the terms actually used in the specific measures at issue identified in the Panel Request. In this respect, whatever terms may or may not have been used in documents prepared for purposes extraneous to these proceedings cannot change the actual terms of either the relevant treaty provisions or the specific measures at issue identified in the Panel Request. Similarly, whatever terms other adjudicators may or may not have used, in **adjudicating different matters**, cannot change the actual terms of either the relevant treaty provisions or the specific measures at issue identified in the Panel Request. Past reports provide conceptual guidance and clarifications on the matters being adjudicated. Words taken out of their context cannot provide support for China's position with respect to the different matters that must be adjudicated in this case.

158. China should refer simply to Articles 2(1) to 2(7) (with respect to the First Claim), Article 2(7) (with respect to the Second Claim) and, where appropriate in the context of the First Claim, to Articles 2(1) to 2(6), as is the case in numerous other parts of its First Written Submission,\(^{142}\) and the Panel should

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\(^{140}\) Table B, Column 2, Item 11 ("Price from a third country").

\(^{141}\) Table B, Column 4, Item 9 ("Price from a third country").

\(^{142}\) For example, China's First Written Submission, headings IV.A, IV.A.2, IV.A.2.b, IV.A.2.c, IV.A.2.d, IV.B, IV.B.2, etc.
and indeed must do likewise. To the extent that China might insist upon attempting to re-frame the alleged measures at issue in terms that are not used in Articles 2(1) to 2(7) of the EU Basic Regulation, then China would appear to be directing its Claims against measures of China's invention, the existence of which is not demonstrated by the terms of Articles 2(1) to 2(7). China cannot have it both ways. Either it is criticising a hypothetical measure of China's invention, in which case its Claims should be rejected. Or it is seeking review of Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim), in which case the Panel's conclusions must be based on a review of the terms actually used in those provisions.

In conclusion, the European Union urges the Panel to proceed on the basis that the specific measures at issue identified in the Panel Request are Articles 2(1) to 2(7) (with respect to the First Claim) and Article 2(7) (with respect to the Second Claim). Accordingly, the Panel can and should disregard the unnecessary, incomplete, selective and misleading presentation of the material contained in Section II.A of China's First Written Submission.

3.3. Article 2(7)(d) of the EU Basic Anti-Dumping Regulation

As we have explained in the preceding sections, the specific measures at issue identified in the Panel Request are Articles 2(1) to 2(7) (First Claim) and Article 2(7) (Second Claim) of the EU Basic Anti-Dumping Regulation.

In its First Written Submission, another way in which China seeks to re-define the specific measures at issue identified in the Panel Request is by presenting its analysis as if Article 2(7)(d) does not exist, with the assertion that it is supposedly "not directly relevant" to this dispute.143

Article 2(7)(d) concerns sampling, which is conducted pursuant to Article 17 of the EU Basic Anti-Dumping Regulation, which in turn reflects Article 6.10 of the Anti-Dumping Agreement.

Pursuant to these provisions, if there is a large number of exporters (for example, 50) it is permissible for the investigating authority to constitute a sample (for example, 10). An individual exporter not initially selected for the sample can nevertheless submit the necessary information within the relevant time limit (that is, receive individual treatment), unless there are so many exporters that this would be unduly burdensome and prevent timely completion of the investigation.144

With respect to the 40 exporters not included in the sample, there will be no dumping calculation based on the data of those exporters. In China's words, for these exporters, the "link" between their data and the dumping margin calculated with respect to them will be "severed".145 Instead, they will receive a dumping margin that must not exceed the weighted average margin of dumping established with respect to the exporters included in the sample.146

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143 China's First Written Submission, para. 28.
144 EU Basic Anti-Dumping Regulation, Article 17(3).
145 China's First Written Submission, paras. 113 and 116.
146 EU Basic Anti-Dumping Regulation, Article 9(6); Anti-Dumping Agreement, Article 9.4.
165. What Article 2(7)(d) of the EU Basic Anti-Dumping Regulation provides is that a determination pursuant to Articles 2(7)(b) and (c) will only be made for the exporters that have been sampled (including any that might receive individual treatment). Thus, in our example, with respect to the 40 exporters not included in the sample, the "link" between the exporter's own data and its dumping margin is "severed" not as a result of Article 2(7), as China erroneously asserts, but as a result of Article 17 (which, to recall, is not a specific measure at issue identified in the Panel Request).

166. In light of these observations, at this stage, we can make the following further comments.

167. *First*, sampling is extremely common and is a technique used by all WTO Members (including China) and with respect to all WTO Members.

168. *Second*, it is in the nature of sampling that many if not most exporters may end up outside the sample (in our example, 40) rather than in the sample (in our example, 10).

169. *Third*, for non-sampled exporters, it is sampling (Articles 17 and 9(6)) that "severs the link" (to use China's terms) between an exporter's data and its dumping margin, not, as China would have it, Article 2(7).

170. *Fourth*, sampling applies in the same way and on an even-handed basis as between Articles 2(1) to 2(6) and Article 2(7).

171. We will return to these points when we address China's First Claim, further below.\(^{147}\)

3.4. **SECTION II.A.2.B OF CHINA’S FIRST WRITTEN SUBMISSION (A "HISTORICAL OVERVIEW" OF ARTICLE 2(7))**

172. In Section II.A.2.b of China's First Written Submission, China sets out what purports to be a "historical overview" of Article 2(7) of the EU Basic Anti-Dumping Regulation. China does not explain what the purpose of this Section is and the European Union fails to see how it might support China's position in this litigation. In any event, we disagree with China's presentation of this material and the associated assertions that China makes.

3.5. **SECTION II.B OF CHINA’S FIRST WRITTEN SUBMISSION (THE 2013 COMMISSION PROPOSAL AND THE 2016 COMMISSION PROPOSAL)**

173. In Section II.B of China's First Written Submission, China makes various assertions about the 2013 Commission proposal and the 2016 Commission proposal.

174. The European Union explains below in the Request for Preliminary Rulings that the 2013 Commission proposal and the 2016 Commission proposal are not measures that are within or properly within the scope of these panel

\(^{147}\) See Section 10.1 of this Submission.
proceedings, and that, in any event, China has not cited any legal basis on which the Panel could determine them to be WTO inconsistent.\textsuperscript{148}

175. Furthermore, as we have explained above, the adjudication in this case will be made on the basis of the provisions of the treaties cited by the Parties, and the terms actually used in the specific measures at issue identified in the Panel Request. The various assertions that China makes are contested by the European Union and in any event irrelevant, and can and should be disregarded by the Panel.

4. **SECTION III OF CHINA'S FIRST WRITTEN SUBMISSION (THE "RELATIONSHIP" BETWEEN SECTION 15 OF CHINA'S ACCESSION PROTOCOL AND ARTICLE 2(7) OF THE EU BASIC ANTI-DUMPING REGULATION)**

176. Before developing its two claims, in Section III of its First Written Submission, China makes certain assertions about what China refers to as the "relationship between the scheme in the Basic Regulation and Section 15 of China's Accession Protocol".

177. As will be apparent from the overview of the legal framework set out above,\textsuperscript{149} the European Union disagrees with China's assertions in that respect. In light of the overview provided above, we have the following additional observations at this stage.

178. **First**, contrary to what China appears to believe, neither WTO law nor EU municipal law prescribe that there should be an identified "relationship" between an element of WTO law on the one hand, and an element of EU municipal law on the other hand.

179. **Second**, contrary to what China asserts,\textsuperscript{150} unlike other provisions of China's Accession Protocol, Section 15 is not referred to as a "transitional" provision.

180. **Third**, the European Union agrees with China that Section 15 provides that Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement **apply consistent with** Section 15.\textsuperscript{151}

181. **Fourth**, contrary to what China asserts, Section 15 does not refer to "two types of methodology".\textsuperscript{152} Rather, it refers to the use of Chinese prices or costs, or to "a methodology that is not based on a strict comparison with domestic prices or costs in China".

182. **Fifth**, contrary to what China asserts,\textsuperscript{153} Section 15(a)(i) simply refers to a situation in which "market economy conditions prevail in the industry producing the like product". It does not refer to the municipal law of the Member concerned.

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\textsuperscript{148} See Section 7 of this Submission.

\textsuperscript{149} See Section 2 of this Submission.

\textsuperscript{150} China's First Written Submission, para. 66.

\textsuperscript{151} China's First Written Submission, para. 68.

\textsuperscript{152} China's First Written Submission, paras. 69, 70.

\textsuperscript{153} China's First Written Submission, para. 70.
Sixth, as we further explain below, contrary to China's assertion, Article 2(7) of the EU Basic Anti-Dumping Regulation does not "require" the EU investigating authorities to have recourse to data from a third country, because the provision is not mandatory.

Seventh, the European Union does not understand what China believes the legal relevance of the material contained in paragraph 77 of China's First Written Submission might be. This case must be adjudicated by comparing the actual terms used in the specific measures at issue identified in the Panel Request with the terms of the treaties cited by the Parties to the dispute. Non-legal assertions of the type contained in paragraph 77 (and with which we disagree) are, in any event, irrelevant.

Eighth, the European Union does not understand what legal relevance China ascribes to the measures listed in paragraphs 79 to 80 of China's First Written Submission might be. The specific measures at issue identified in the Panel Request are Articles 2(1) to 2(7) (First Claim) and Article 2(7) (Second Claim) of the EU Basic Anti-Dumping Regulation. There are no as applied claims. As explained below, the other measures listed by China are not measures at issue. The question before this Panel is whether or not the specific measures at issue identified in the Panel Request are inconsistent with the treaty provisions cited by China. Furthermore, as we explain further below, in light of Article 70 of the Vienna Convention and Article 18.3 of the Anti-Dumping Agreement, it is self-evident that any anti-dumping proceedings existing prior to 11 December 2016, but concluded afterwards, are unaffected by the termination of Section 15(a)(ii) of China's Accession Protocol, pursuant to the second sentence of Section 15(d).

5. **The Two Claims Set Out in China's Consultations Request and Panel Request**

5.1. **China's First Claim: Articles 2(1) to 2(7) Are Inconsistent with Article I:1 of the GATT 1994**

China sets out its First Claim in the Panel Request in the following terms:

"Specifically, following the expiry of paragraph 15(a)(i), China is concerned that: (i) Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article I:1 of the GATT 1994..."

China then sets out a summary of its First Claim in paragraph 8 of the Panel Request.

In its First Written Submission, China recalls that it claims that the specific measures at issue identified in the Panel Request are inconsistent with the
European Union's WTO obligations in "two ways". China then summarises its First Claim by reference to the Most-Favoured-Nation obligation in Article I:1 of the GATT 1994. China elaborates the arguments in support of its First Claim in Section IV.A of its First Written Submission.

Consistent with this, in its request for findings and recommendations, China requests a finding that Articles 2(1) to 2(7) are inconsistent with Article I:1 of the GATT 1994.

5.2. **China's Second Claim: Article 2(7) is inconsistent with Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement**

China sets out its Second Claim in the Panel Request in the following terms:

"Specifically, following the expiry of paragraph 15(a)(ii), China is concerned that: … (ii) Article 2(7) is inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement, Article VI:1 of the GATT 1994, and the second paragraph of the Ad Note to Article VI:1 of the GATT 1994 (the "Ad Note")."

China then sets out a summary of its Second Claim in paragraphs 9 to 11 of the Panel Request.

In its First Written Submission, China recalls that it claims that the specific measures at issue identified in the Panel Request are inconsistent with the European Union's WTO obligations in "two ways". China summarises its Second Claim by reference to Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement. China elaborates the arguments in support of its Second Claim in Section IV.B of its First Written Submission. It seeks a finding that the specific measure at issue is inconsistent with Article 2.2, "read in the light of" the definition in Article 2.1 of the Anti-Dumping Agreement, the definition in Article VI:1 of the GATT 1994 and the Ad Note.

Consistent with this, in its request for findings and recommendations, China requests a finding that the specific measure at issue is inconsistent with Article 2.2, read in the light of Article 2.1, of the Anti-Dumping Agreement, Article VI:1 of the GATT 1994, and the Ad Note.

6. **The Panel must not exceed its terms of reference: it should adjudicate only those matters that are necessary for the purposes of resolving this specific dispute and refrain from adjudicating other matters**

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160 China's First Written Submission, para. 7.
161 China's First Written Submission, paras. 8 and 14, first bullet point.
162 China's First Written Submission, para. 184, first bullet point.
163 Panel Request, para. 7(ii). See also Consultations Request, para. 5(ii).
164 See also Consultations Request, para. 7-9.
165 China's First Written Submission, para. 7.
166 China's First Written Submission, paras. 9 and 14, second bullet point.
167 China's First Written Submission, Heading IV.B.2.
168 China's First Written Submission, para. 184, second bullet point.
194. The European Union has set out above a general overview of the law in this area in order to assist the Panel, because we disagree with numerous aspects of China's presentation, and because it is necessary to understand the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement in order to understand the meaning of the old Section 15, which in turn is necessary in order to understand the meaning of the new Section 15. However, we do not request the Panel to resolve all ambiguities and decide all questions in the field of anti-dumping law. On the contrary, we urge the Panel to resolve only the specific questions put to it in this dispute that need to be resolved, and not any other questions.

195. In particular, the European Union wishes to respectfully remind the Panel that it must not exceed its terms of reference. As we further explain below, it is quite clear that China has engaged in certain misguided "litigation techniques"\(^{169}\) regarding the treaty provisions that it has chosen to cite, and those it has chosen to ignore. In this respect, the European Union declines to remedy the deficiencies in China's case and the Panel must not do so.

196. The European Union also wishes to respectfully remind the Panel that it should only make those determinations that may be necessary to resolve this particular dispute. China has chosen to start with a claim under Article I:1 of the GATT 1994 against Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation. In the unlikely event that the Panel would find in China's favour with respect to that claim, the European Union submits that the Panel can and should exercise judicial economy with respect to China's Second Claim (which, as we explain below,\(^{170}\) is in fact essentially duplicative). This is a particularly compelling proposition in light of the withdrawal by the European Union of Article 2(7) of the EU Basic Anti-Dumping Regulation.

197. Finally, the European Union respectfully draws the Panel's attention to the fact that it sets out below a Request for Preliminary Rulings, particularly regarding China's Consultations Request and Panel Request. At the very least, the issues raised by the European Union very substantially reduce the scope of the issues that the Panel needs to resolve. It is to this Request for Preliminary Rulings that we now turn.

7. **REQUEST FOR PRELIMINARY RULINGS**

7.1. **INTRODUCTION**

198. According to Article 4.4, second sentence of the DSU, "any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of


\(^{170}\) See Section 10.2.2 of this Submission.
the legal basis for the complaint. Consultations serve a critical role in circumscribing the scope of a dispute; their purpose is "to define and delimit the scope of the dispute".\(^{171}\) The decisive element in this regard is the written consultations request, and any exchange of correspondence between the parties relating to the scope of the consultations request,\(^{172}\) not what actually happens during the consultations.\(^{173}\) The consultations request must be sufficiently precise to inform the respondent and the WTO membership of the nature and object of the challenge raised by the complainant, and enable the respondent to prepare for the consultations themselves.\(^{174}\) Ambiguity is to be avoided.\(^{175}\)

199. Article 6.2 DSU requires that a request for the establishment of a panel must, inter alia, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Even more importantly than for the consultations request, it is crucial that the panel request, on which the terms of reference for a panel are based, be sufficiently precise, in order to properly define the scope of the dispute, and in light of the due process objective of notifying the parties, third parties and Members of the nature of a complainant’s case.\(^{176}\) A panel request fails this condition if the description of the measure in the request prejudices the ability of the respondent to defend itself.\(^{177}\)

200. The measure identified as a measure at issue must be a measure that is challengeable in the WTO dispute settlement system, i.e. be an act or omission attributable to the defending Member,\(^{178}\) which affects the operation of any covered agreement (see Article 4.2 of the DSU) and impairs benefits accruing to the complaining Member directly or indirectly under the covered agreements (see Article 3.3 of the DSU).

201. Finally, in the case of claims directed against legislation "as such", the Appellate Body has emphasised the seriousness and far-reaching nature of such claims, ruling that, accordingly, a complainant should be "especially diligent in setting out [such claims] as clearly as possible."\(^{179}\)

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\(^{171}\) Appellate Body Reports, Mexico — Corn Syrup (Article 21.5 — US), para. 54; Mexico — Anti-Dumping Measures on Rice, para. 137.

\(^{172}\) Panel Report, US — Poultry (China), para. 7.36.


\(^{174}\) Appellate Body Report, Argentina — Import Measures, para. 5.12.

\(^{175}\) Appellate Body Report, India — Patents (US), para. 94 ("All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.").


\(^{177}\) Appellate Body Report, EC — Computer Equipment, para. 70.


\(^{179}\) Appellate Body Report, US — Oil Country Tubular Goods Sunset Reviews, para. 172: ("... We would therefore urge complaining parties to be especially diligent in setting out "as such" claims in their panel requests as clearly as possible. In particular, we would expect that "as such" claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements.

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202. In sum, in order to properly place any matter into the jurisdiction of this Panel China was obliged to (1) **identify the specific measure at issue** (2) indicate and briefly summarise the **legal basis of the complaint** (that is, the obligation that the identified specific measure at issue is alleged to be inconsistent with) and (3) give the reasons for the request, that is, provide a **brief summary sufficient to present the problem clearly**.

203. The European Union will show in the following sections that China's Consultations Request and Panel Request, in many instances, do not meet these requirements. For this reason, the European Union requests the Panel to issue a preliminary ruling confirming that the matters identified in this section are not within or not properly within the scope of this dispute (or make the particular ruling specified).

7.2. **ARTICLES 1, 2(8) TO 2(12) AND 3 TO 25 OF THE EU BASIC ANTI-DUMPING REGULATION ARE NOT WITHIN OR PROPERLY WITHIN THE SCOPE OF THIS DISPUTE**

204. China's Panel Request sets out the measures at issue in paragraph 5 (corresponding to paragraph 3 of the Consultations Request\(^{180}\)), which states that the measures at issue are identified as Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation. However, the European Union notes that the reference to Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation is preceded by the term "**include**". This seems to suggest that China is asserting that the measures at issue are Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation, plus one or more additional measures. In other words, China appears to be asserting that the list or category of measures at issue is open. However, China does not identify what other measures might fall within this supposedly open list or category of measures. China appears to believe that at subsequent steps of the process it would be entitled to populate this open category with any measures of China's choice.

205. The European Union considers that this is inconsistent with the requirement in Article 4.4 that the Consultations Request must include identification of the measures at issue, and the requirement in Article 6.2 that the Panel Request must include identification of the specific measures at issue. If China would be correct, these requirements would be rendered meaningless because, whatever would be identified as (specific) measures at issue in the Consultations Request or Panel Request could be supplemented, at a later stage of the dispute, with anything of the complainant's choice. A treaty interpreter is not permitted to adopt an interpretation that would render whole provisions or clauses meaningless. The European Union does not know what this supposedly open category might include, and thus has had no opportunity to exercise its rights of defence, in accordance with the principle of due process.

\(^{180}\) In the following sections, in order to enhance the readability of its submission, the European Union will limit quotations to China's Panel Request. As China's Consultations Request and China's Panel Request have nearly 100% identical content, the references should be understood as referring also to the corresponding paragraphs of the Consultations Request.
Applying the principle of *ejusdem generis*, according to which the additional items in an open list should be similar to the items that are expressly listed, China’s use of the term "include" might be taken as an attempt to refer to other provisions of the EU Basic Anti-Dumping Regulation. However, there are a very large number of such provisions (twenty-five articles in total). The European Union does not accept that, through the device of using the term "include", China should be permitted to bring within the scope of the Consultations Request and/or the Panel Request any other provisions of the EU Basic Anti-Dumping Regulation. Furthermore, consideration of the other parts of China’s Consultations Request and Panel Request (the legal basis for the complaint and the reasons for the request, as set out in Section B) unequivocally confirm that China was not seeking consultations or panel proceedings with respect to such other provisions. That is, in this respect, neither the Consultations Request nor the Panel Request comply with any of the three requirements specified in Articles 4.4 and 6.2 of the DSU, as summarised above.

The Appellate Body has refused to give the effect apparently sought by China to the “including” phrase, stating plainly that "the convenient phrase", "including but not necessarily limited to", is simply not adequate to identify the specific measures at issue", and that this phrase cannot operate to include any and all other claims not specifically included in the request.

The European Union made this point clearly to China from the outset, in its letter accepting to enter into consultations, specifying that it was agreeing to enter into consultations only with respect to what is properly delineated by China’s Consultations Request, in accordance with the applicable provisions of the covered agreements (notably Article 4.4 of the DSU) and any relevant Appellate Body case law:

"The European Union notes that the measures at issue are identified in Section A of the consultations request as Articles 2(1) to 2(7) of Regulation (EU) 2016/1036 ("the Basic Regulation"). We note that the term "include" precedes the reference to Articles 2(1) to 2(7) of the Basic Regulation. This might be taken to suggest that the consultations could be open-ended and could eventually extend to measures that are not identified. The European Union considers that it is impossible to consult about measures that are not identified. Therefore, the European Union understands that the scope of the consultations is limited to what is identified in Section A of the consultations request.

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181 Appellate Body Reports, *US – COOL*, para. 444; *US – Large Civil Aircraft (2nd complaint)*, para. 615.
182 Appellate Body Reports, *India – Patents*, para. 90; *EC – Fasteners*, para. 597. See also Panel Reports, *China – Publications and Audiovisual Products*, para. 7.104 ("Reading the panel request as a whole, we do not find that the mere reference to the legislative instruments in which the disputed requirements were contained identified the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision making criteria applied by the approving agency as specific measures at issue such that China could reasonably conclude that they were included within the US claims. The United States did not inform China that it was challenging every possible discriminatory requirement in its measures, but rather the specific ones described in the narratives."); *Australia – Apples*, para. 7.149; Communication from Panel in *China – Rare Materials (Preliminary Ruling)* of 7 May 2010 (WT/DS/394/9, WT/DS395/9 and WT/DS398/8), paras. 11-13 ("The Panel is of the view that the Complainant cannot be allowed to include additional measures other than those listed and identified by the bullet points in the panel requests. Such an ‘open ended’ list would not contribute to the ‘security and predictability’ of the WTO dispute settlement system as required by Article 3.2 of the DSU").
The European Union furthermore notes that paragraph 11 of the consultations request asserts that it also "concerns" any modification, replacement or amendment to the measure (sic) identified above, and any closely connected, subsequent measure. Similarly, we note that footnote 2 of the consultations request asserts that it "includes" any changes made to the Basic Regulation as a result of the legislative proposals referred to in that footnote. Unfortunately, with respect to future possible measures of indeterminate and substantively different content no meaningful exchange of views can be envisaged. The request for consultations itself does not identify such possible future measures as measures at issue. It states clearly that the measures at issue are identified "above" in Section A.

In light of the preceding observations, the European Union wishes to be clear that, in agreeing to enter into consultations with China, it is accepting to enter into consultations with respect to the identified measures at issue, the legal basis of the complaint (as specified in paragraph 5), and the reasons given for the request, within the meaning of Article 4.4 of the DSU, and in accordance with any relevant Appellate Body case law, but is not agreeing to consultations of otherwise indeterminate scope and content.183

183 Exhibit EU-3 (Communication from the European Union to China dated 21 December 2016 agreeing to enter into consultations with China, and precisely delimiting the scope of that agreement).

209. If China would have had any doubts about this, that would have been the moment for China to properly re-frame its Consultations Request. China chose not to do that, apparently preferring to use "litigation techniques" irrespective of the due process rights of the European Union. Rather, China accepted the EU's acceptance letter and agreed to enter into consultations on that basis. China must therefore accept the consequences of its decision not to amend its Consultations Request.

210. Furthermore, in the first DSB meeting requesting the establishment of the Panel the European Union again expressly and clearly made the same points, in the following terms:185

6.5. The representative of the European Union said his delegation regretted that China had decided to request the establishment of a panel. After China had filed its request for consultations, both parties had held constructive consultations in which the EU had provided extensive explanations. As the EU had previously explained to China, the EU very much regretted that China had chosen to bring panel proceedings with respect to a measure (Article 2(7) of Regulation (EU) 2016/1036, as it related to China) that was currently the subject of a legislative process which could result in its withdrawal. The EU considered that such action was unnecessary and ultimately incapable of being fruitful within the meaning of Article 3.7 of the DSU. As such, the EU considered that it was an inappropriate use of the already strained resources of the WTO dispute settlement system. The EU particularly regretted that, notwithstanding the clarifications provided by the EU, China persisted in attacking the ongoing internal legislative processes of the EU. However, neither the EU, nor China, or the DSB, or any WTO adjudicator, was in a position to predict what the specific outcome of those democratic processes could be. China's request was, in this respect, premature and incapable, as a matter of principle, of being fruitful. That

184 See footnote 169 of this Submission.
185 Minutes of the DSB Meeting on 21 March 2017, WT/DSB/M/394, 17 May 2017 (Exhibit EU-4).
being so, the EU could only conclude that China's objective was, in fact, to attempt to interfere in the internal legislative processes of the EU. This should be a matter of grave concern to all Members.

6.6. Similarly, the EU noted China's thinly veiled and self-serving attempt to create and maintain an unlawful short-cut between the current dispute as it related to Article 2(7) of Regulation (EU) 2016/1036, and an unknown outcome of the EU's internal legislative processes. The EU had already explained to China why this was inconsistent with various provisions of the DSU, and would constitute a serious breach of the EU's due process rights. As and when the EU completes its internal legislative processes, should China wish to seek WTO review of the resulting measure, China would be obliged to follow and fully respect the specific procedures set out in the DSU for that purpose. That was the very essence of due process. It was not amenable to shortcuts. In this respect, upon receipt of the consultations request, at the earliest possible opportunity, the EU had immediately informed China, in writing, of its position with respect to this matter. Specifically, the EU had drawn China's attention to the fact that no consultations could be held with regard to currently inexistent future possible measures of indeterminate and substantively different content. China, which in this context, was under an obligation to accord sympathetic consideration to any representations made by the EU, raised no objection to the clarifications provided by the EU nor to the EU's specific and express delimitation of the scope of the consultations. It was on the basis of this consensus ad idem, and this basis only, that the parties had agreed to proceed to consultations. China had to accept the consequences of its own actions and omissions. Accordingly, the EU called upon China, again, to respect both the letter and the spirit of the DSU, and to withdraw this panel request, or at least to take appropriate steps to eliminate the procedural defects in its consultations request and its panel request. The EU, therefore, did not support the establishment of a panel at the present meeting. In any event, should a panel be established in this dispute, the EU would defend its legislation vigorously.

211. The European Union made the same points at the second DSB meeting requesting the establishment of the Panel, in the following terms: 186

1.4. The representative of the European Union said that his delegation regretted that China had decided to request the establishment of a panel. As the EU had previously explained to China, and reiterated at the 21 March 2017 DSB meeting, the EU very much regretted that China had chosen to bring panel proceedings with respect to a measure (Article 2(7) of Regulation (EU) 2016/1036, related to China) that was currently the subject of a legislative process, which could result in its withdrawal. The EU considered that such action was unnecessary and ultimately not fruitful within the meaning of Article 3.7 of the DSU. Similarly, the EU wished to recall its concerns about China's attempt to create and maintain an unlawful shortcut between this dispute, as it related to Article 2(7) of Regulation (EU) 2016/1036, and the, as yet unknown, outcome of the EU's internal legislative processes for the reasons already explained at the 21 March 2017 DSB meeting. Accordingly, the EU once again called upon China to respect both the letter and the spirit of the DSU, and to withdraw its panel request. In any event, should a panel be established in this dispute, the EU would defend its legislation vigorously.

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186 Minutes of the DSB Meeting on 3 April 2017, WT/DSB/M/395, 19 May 2017 (Exhibit EU-5).
212. Consistent with these comments, the European Union further observes that, with respect to these other provisions of the EU Basic Anti-Dumping Regulation, China's Consultations Request and Panel Request do not indicate what the legal basis of the complaint might be, or provide a brief summary sufficient to present the problem clearly. Furthermore, consistent with this (and leaving aside the fact that a first written submission cannot cure a defective panel request) there is nothing in China's First Written Submission that addresses these provisions.

213. In light of the above observations, the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

**With respect to Articles 1, 2(8) to 2(12) and 3 to 25 of the EU Basic Anti-Dumping Regulation, China's Consultations Request does not comply with Article 4.4 of the DSU and China's Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.**

7.3. **Council Regulation 1225/2009 is not within or properly within the scope of this dispute**

214. We turn now to consider the position with respect to Council Regulation 1225/2009.

215. Both the Consultations Request and the Panel Request include a footnote (footnote 1). Consistent with the general proposition that footnotes are for citations, the first sentence of footnote 1 descriptively sets out the "full title" of the EU Basic Anti-Dumping Regulation, and provides a citation to the Official Journal of the European Union. The fact that the first sentence of footnote 1 describes the full title of the EU Basic Anti-Dumping Regulation, and provides a citation, does not mean that the other provisions of the EU Basic Anti-Dumping Regulation are thereby identified as measures at issue or specific measures at issue, for the reasons set out in the preceding section.

216. Turning to the second sentence of footnote 1, it contains the descriptive observation that the EU Basic Anti-Dumping Regulation was preceded by Council Regulation 1225/2009, and similarly provides a citation to the Official Journal of the European Union. However, neither Council Regulation 1225/2009 nor any provision of it is identified as a measure at issue or a specific measure at issue. Furthermore, consideration of the other parts of China's Consultations Request and Panel Request (the legal basis for the complaint and the reasons for the request, as set out in Section B) unequivocally confirm that China is not challenging Council Regulation 1225/2009. Specifically, they refer explicitly to the date of 11 December 2016 and state clearly that the European Union is alleged to act inconsistently with its WTO obligations *after that date*. Given that throughout the lifetime of Council Regulation 1225/2009, Section 15 of China's Accession Protocol was fully in force, this necessarily confirms that the Consultations Request and Panel Request do not identify Council Regulation 1225/2009 as a measure at issue.

217. These observations are further confirmed by the observation that paragraph 11 of the Consultations Request and paragraph 12 of the Panel Request use the term "subsequent", making it clear that China has not sought to identify as
measures at issue anything prior to the current EU Basic Anti-Dumping Regulation.

218. In short, in this respect, neither the Consultations Request nor the Panel Request comply with any of the three requirements specified in Articles 4.4 and 6.2 of the DSU, as summarised above.

219. As we recall in the previous section, the European Union made this very clear to China from the outset, in its acceptance letter, specifying that it was agreeing to enter into consultations only with respect to what is properly delineated by China's Consultations Request, in accordance with the relevant provisions of the covered agreements and any relevant Appellate Body case law. China accepted the EU's acceptance letter and agreed to enter into consultations on that basis. China must now accept the consequences. We made similar points at the DSB meetings where the request for the establishment of the Panel was tabled. Finally, there is nothing in China's First Written Submission (which in any event could not cure a defective panel request) capable of supporting a different conclusion.

220. In light of the above observations, the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

With respect to Council Regulation 1225/2009, China's Consultations Request does not comply with Article 4.4 of the DSU and China's Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

7.4. **Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation as they existed up to and including 11 December 2016 are not within or properly within the scope of this dispute**

221. China identifies as measures at issue Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation, without any apparent temporal limitation. However, the European Union invites the Panel to consider the Consultations Request and Panel Request as a whole and in light of attendant circumstances. Under such a holistic assessment, the requests must be understood as identifying as measures at issue Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation as from 12 December 2016. It is clear from Section B of the requests that China only takes issue with the continued WTO-consistency of those provisions after the expiry of paragraph 15(a)(ii) of China's Accession Protocol on 11 December 2016, and not before. Only after 11 December 2016, in China's view, would these provisions become WTO-inconsistent, as China indicates throughout Section B: "from that date, the WTO rules (...) now

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188 China acceded to the WTO on 11 December 2001 with the Notification of Acceptance and Entry Into Force of the Protocol of Accession. The "date of accession" within the meaning of the second sentence of Section 15(d) of China's Accession Protocol is therefore 11 December 2001. The period "after" the "date of accession" therefore started to run at midnight on 11 December 2001. The 15 year period therefore ended at midnight on 11 December 2016 and, in accordance with the expiry provision in Section 15(d), second sentence, Section 15(a)(ii) was terminated by operation of law.
apply", "the European Union continues to determine normal value…"
(paragraph 6 of the Panel Request); "Specifically, following the expiry of
paragraph 15(a)(ii), China is concerned that (…)" (paragraph 7); "This
differential treatment ceased to be justifiable when paragraph 15(a)(ii) of
China's Accession Protocol expired on 11 December 2016" (paragraph 8); "The
treatment afforded Chinese imports under Article 2(7) of the EU Basic Anti-
Dumping Regulation ceased to be justifiable when paragraph 15(a)(ii) of
China's Accession Protocol expired on 11 December 2016" (paragraph 11).

222. The situation is somewhat unusual in the present case, as normally a measure
will be challenged as inconsistent with WTO rules without there being any
reason to distinguish between the date on which the measure first came into
existence and a subsequent date (except if the measure is modified in the
meantime). The particularity of the present case is that at a certain point in time,
while the municipal measure remained unchanged, certain WTO rules expired,
and the dispute only arises because of that event. In a nutshell, the complainant
here does not argue WTO-inconsistency of a measure during its whole
existence. The complainant itself considers the measure to be WTO-consistent
before the termination on 11 December 2016. Rather, the complaint merely
alleges that the measure became WTO-inconsistent after 11 December 2016. It
is therefore important to clarify that the alleged inconsistency is limited in its
temporal scope.

223. Consideration of the other parts of China's Consultations Request and Panel
Request confirms this conclusion, because they offer no legal basis, and no
reasons or brief summary sufficient to present the problem clearly, capable of
permitting the European Union to understand why China might consider the
specific measures at issue identified in the Panel Request to be WTO
inconsistent prior to 12 December 2016. That is, in this respect, neither the
Consultations Request nor the Panel Request comply with any of the three
requirements specified in Articles 4.4 and 6.2 of the DSU, as summarised
above. As summarised above, we have repeatedly drawn this to China's
attention. Similar comments apply with respect to China's First Written
Submission (which, in any event, cannot cure a defective panel request).

224. In light of the above observations, the European Union seeks the following
ruling from the Panel, or a ruling to substantially the same effect:

With respect to Articles 2(1) to 2(7) of the EU Basic Anti-Dumping
Regulation as they existed up to and including 11 December 2016, China's
Consultations Request does not comply with Article 4.4 of the DSU and
China's Panel Request does not comply with Article 6.2 of the DSU, and
these matters are therefore not within or properly within the scope of this
dispute.

7.5. **Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation are not
impugned per se, but only referenced to the extent that they are
alleged to confer an advantage compared to Article 2(7).**

225. China (erroneously) describes the European Union's municipal law as
containing two "methodologies", the "standard rules" for determining normal
value in Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation on the
one hand, and the regime for so-called "non-market economy countries" in Article 2(7) on the other hand. In Section B, China explains that it challenges (exclusively) the alleged differential treatment of China; see for instance the references in paragraph 6 to the "special calculation methodology", in paragraph 8 (several times) to the "differential treatment of Chinese imports", and in paragraph 11 to "the treatment afforded Chinese imports under Article 2(7) of the Basic Regulation".

226. The European Union understands why China saw the necessity to mention Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation. Obviously, a claim of unjustified differential treatment must explain what constitutes the allegedly normal treatment from which (and how) the allegedly differential treatment deviates. The comparison will be the basis on which a discrimination claim will be assessed. This is why China only mentions Articles 2(1) to 2(6) in its First Claim (paragraph 7 point (i)), and not in its Second Claim (paragraph 7 point (ii)).

227. However, the rules establishing the allegedly normal treatment are only looked at as a comparator, and not challenged themselves. What is challenged is the alleged deviation from the normal rules, rather than the normal rules themselves. Thus, logically, nothing in the Consultations Request or Panel Request indicates any possible WTO-inconsistency of those normal rules. On the contrary, it is those rules that the complainant considers to be WTO-consistent. Something to which a party refers solely for the purpose of making a comparison in respect of a discrimination claim may serve as a point of reference in the argumentation in support of that claim, but, absent any additional claim or argument, cannot itself be found to be otherwise WTO inconsistent.\(^\text{189}\)

228. Consideration of the other parts of China's Consultations Request and Panel Request confirm this conclusion, because they offer no legal basis, and no reasons or brief summary sufficient to present the problem clearly, capable of permitting the European Union to understand why China might consider Articles 2(1) to 2(6) to be, in themselves, WTO inconsistent. As summarised above, we have repeatedly drawn this to China's attention. Similar comments apply with respect to China's First Written Submission (which could not, in any event, cure a defective panel request).

229. In light of the above observations, the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

In these proceedings, there are no claims concerning Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation per se, and they are only referenced to the extent that they are alleged to confer an advantage compared to Article 2(7).

7.6. **Article 2(7) of the EU Basic Anti-Dumping Regulation insofar as it refers to countries other than China is not within or properly within the scope of this dispute**

230. The European Union notes that Article 2(7)(a) applies to imports from all so-called "non-market economy countries", including in particular those mentioned in footnote 1. Article 2(7)(b) adds a specific rule for imports from "non-market-economy countries which are a Member of the WTO at the date of the initiation of the investigation", mentioning specifically the People's Republic of China, Vietnam and Kazakhstan. However, China's Consultations Request and Panel Request only refer to the treatment of Chinese imports, not to imports of any other country concerned by, or mentioned in, Article 2(7).

231. Nothing in the requests indicates that China would seek review of the European Union's treatment of imports from the other countries concerned by Article 2(7). On the contrary, China makes it clear throughout the requests that the whole dispute is about the treatment of Chinese imports. Consequently, the measures at issue as defined by China are Articles 2(1) to 2(7) (First Claim) and Article 2(7) (Second Claim) insofar as they refer to China. This is clear for instance in paragraph 5 ("which expressly names China"), paragraph 6 ("China-specific treaty provisions would apply", "proceedings involving Chinese imports", followed by a reference to China's Accession Protocol and the assertion that "from that date, the WTO rules (…) now apply to imports from China"), paragraph 8 (several references to "Chinese imports" and "Chinese producers"), paragraph 9 ("Article 2(7) improperly requires the EU investigating authority to reject Chinese market prices and costs"), and paragraph 11 ("the treatment afforded Chinese imports under Article 2(7)").

232. In short, with respect to any country other than China, neither the Consultations Request nor the Panel Request comply with any of the three requirements specified in Articles 4.4 and 6.2 of the DSU, as summarised above. As also summarised above, we have repeatedly drawn this to China's attention. Similar comments apply with respect to China's First Written Submission (which could not, in any event, cure a defective panel request).

233. In light of the above observations, the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

With respect to references in Article 2(7) of the EU Basic Anti-Dumping Regulation to countries other than China, China's Consultations Request does not comply with Article 4.4 of the DSU and China's Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

7.7. THE 2013 COMMISSION PROPOSAL IS NOT WITHIN OR PROPERLY WITHIN THE SCOPE OF THIS DISPUTE

234. We turn now to the 2013 Commission proposal, which is indirectly referred to in passing in footnote 2 of China's Consultations Request and Panel Request. The European Union has made it clear throughout the proceedings so far, in particular in its reply to the Consultations Request\textsuperscript{190} and in its statements at the

\textsuperscript{190} Exhibit EU-3 (Communication from the European Union to China dated 21 December 2016 agreeing to enter into consultations with China, and precisely delimiting the scope of that agreement).
DSB on 21 March and 3 April 2017,\(^1\) that the 2013 Commission proposal is
not within or properly within the scope of this dispute.

**7.7.1. Neither China's Consultations Request nor China's Panel Request identifies the 2013 Commission proposal as, respectively, a measure at issue or a specific measure at issue**

235. It is clear that the 2013 Commission proposal is not a measure at issue. Nowhere in the Consultations Request or in the Panel Request does China identify it as a measure at issue or a specific measure at issue, as required by Articles 4.4 and 6.2 of the DSU. On the contrary, at the place where the measures at issue are described (Section A, entitled "Measures at issue"), the 2013 Commission proposal is not mentioned. Also, throughout the following Section B, entitled "Legal basis of the complaint", China only refers to Articles 2(1) to 2(7) or Article 2(7) of the EU Basic Anti-Dumping Regulation, and not to any part of the 2013 Commission proposal. China's whole argumentation is built around the content of Articles 2(1) to 2(7), and there is no single argument or even reference to any part of the 2013 Commission proposal.

236. In footnote 2, in the first sentence, China merely states that it is "aware of" the legislative process "initiated" by the 2013 Commission proposal. Stating that one is "aware" of something is not sufficient to identify it as a measure at issue or a specific measure at issue. Furthermore, in the second sentence of footnote 2 China does not seek to identify the 2013 Commission proposal as a measure at issue or a specific measure at issue. Instead, China seeks to make a statement about "any" possible future "changes" made to the Basic Regulation pursuant to the legislative processes initiated by the 2013 Commission proposal. This is a different matter, that we deal with below.\(^2\)

237. The 2013 Commission proposal is not covered by the attempted "catch-all" language in, respectively, paragraphs 11 and 12 of China's Consultations Request and Panel Request. As a matter of principle, such language cannot extend to measures existing prior to the date of the relevant request. If such a measure would exist, then it can and should be expressly identified as a measure at issue or a specific measure at issue. Instead, China seeks to make a statement about "any" possible future "changes" made to the Basic Regulation pursuant to the legislative processes initiated by the 2013 Commission proposal. Such an attempted "catch-all" clause is no substitute for the requirement that a complainant must diligently identify the measures at issue or the specific measures at issue.

238. This is particularly clear in this case since China expressly confirms, in footnote 2 of the Consultations Request and Panel Request, that China was "aware of" the 2013 Commission proposal. Nonetheless, China did not identify the 2013 Commission proposal as a measure at issue.

239. For similar reasons the 2013 Commission proposal cannot be considered as caught by the use of the term "include" in respectively paragraphs 4 and 5 of China's Consultations Request and Panel Request. Insofar as this would be China's position, China would be attempting, by the use of such language, to

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\(^1\) Exhibit EU-4 (Minutes of the DSB Meeting on 21 March 2017, WT/DSB/M/394, 17 May 2017) and Exhibit EU-5 (Minutes of the DSB Meeting on 3 April 2017, WT/DSB/M/395, 19 May 2017).

\(^2\) See Section 7.8 of this Submission.
create an open category, subsequently to be populated unilaterally by China at will. This is simply not compatible with the obligations on a complainant to identify the measures at issue and the specific measures at issue in, respectively, the Consultations Request and the Panel Request.

240. China's decision not to identify the 2013 Commission proposal as a measure at issue or a specific measure at issue is not surprising. The content of the 2013 Commission proposal has nothing to do with China's claims, which relate exclusively to the alleged differential treatment of Chinese imports in the context of the calculation of normal value; see for instance paragraph 6 ("continues to determine normal value on the basis of a special calculation methodology"), paragraph 8 ("provide for differential treatment of Chinese imports, as compared to imports from other WTO Members"); "in contrast to the treatment afforded imports from other WTO Members, Chinese imports are denied the advantage..."; "the European Union fails to accord Chinese imports immediately and unconditionally an advantage,..."; "this differential treatment"), paragraphs 9 and 10 (describing the rules for determining normal value), paragraph 11 ("treatment afforded Chinese imports").

The 2013 Commission proposal does not relate to any alleged differential treatment of Chinese imports in the context of the calculation of normal value. The main elements of the Commission's 2013 proposal were the following: improve the predictability for businesses by informing them about any provisional anti-dumping or anti-subsidy measures two weeks before the duties are imposed; offer importers reimbursement of duties collected during an expiry review in case the investigating authority concludes that there is no need to maintain the trade defence measures in place after five years; protect the EU industry by initiating investigations on its own ("ex officio"), without an official request from industry, when a threat of retaliation exists; and adapt its general ‘lesser duty’ rule in case of imports from countries which use unfair subsidies and create structural distortions in their raw material markets. Nothing in the proposal relates to China's claims and China has not explained, in the Consultations Request or the Panel Request, how such matters could be covered by its claims.

241. Therefore, with respect to the 2013 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to identify the measures at issue or the specific measures at issue. For this reason, considered in isolation or together with any other reason set out in this submission, the 2013 Commission proposal must be considered not within the scope or properly within the scope of this dispute.

7.7.2. With respect to the 2013 Commission proposal, neither China's Consultations Request nor China's Panel Request indicate what the legal basis of China's complaint might be

242. As we have already noted above, with respect to the 2013 Commission proposal, neither China's Consultations Request nor China's Panel Request indicate what the legal basis of China's complaint might be. Section B of China's Consultations Request and Panel Request (entitled "Legal basis of the complaint") makes no reference to the 2013 Commission proposal. Furthermore, Section B simply provides no indication whatsoever as to why anything in the
2013 Commission proposal might be inconsistent with any obligation contained in Article VI of the GATT 1994 or the Anti-Dumping Agreement cited by China.

244. Therefore, with respect to the 2013 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must indicate the legal basis of the complaint. For this reason also, considered in isolation or together with any other reason set out in this submission, the 2013 Commission proposal must be considered not within the scope or properly within the scope of this dispute.

7.7.3. With respect to the 2013 Commission proposal, neither China's Consultations Request nor China's Panel Request gives reasons or provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly

245. As we have already noted above, with respect to the 2013 Commission proposal, neither China's Consultations Request nor China's Panel Request give reasons or provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Section B of China's Consultations Request and Panel Request (entitled "Legal basis of the complaint") makes no reference to the 2013 Commission proposal. Furthermore, Section B simply provides no indication whatsoever as to why anything in the 2013 Commission proposal might be inconsistent with any obligation contained in Article VI of the GATT 1994 or the Anti-Dumping Agreement cited by China.

246. Therefore, with respect to the 2013 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must give reasons and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. For this reason also, considered in isolation or together with any other reason set out in this submission, the 2013 Commission proposal must be considered not within the scope or properly within the scope of this dispute.

7.7.4. The 2013 Commission proposal, which is merely preparatory conduct, cannot constitute a measure at issue

247. The fact that, with respect to the 2013 Commission proposal, China's Consultations Request and Panel Request do not comply with any of the three basic obligations in Articles 4.4 and 6.2 of the DSU (identification of the measures at issue or specific measures at issue, legal basis of the complaint, and reasons or a brief summary sufficient to present the problem clearly) is not the only reason why the Panel must conclude that the 2013 Commission proposal is not within the scope or properly within the scope of this dispute. The Panel must reach that conclusion in any event because the 2013 Commission proposal cannot even be a measure at issue, given that it is merely preparatory conduct. Such preparatory conduct does not in principle amount to a "measure" for the purposes of Articles 3.3, 4.2 and 6.2 of the DSU.
While the category of what can be challenged in WTO dispute settlement proceedings is – rightly – broad, it is not unlimited. According to the Appellate Body, only acts or omissions attributable to a WTO Member can be challengeable measures.\textsuperscript{193} This means that only existing measures can be challenged in dispute settlement. In United States - Corrosion-Resistant Steel Sunset Review, the Appellate Body indicated (with reference to Article 18.4 of the Anti-Dumping Agreement) that the measures subject to review "encompass the entire body of generally applicable rules, norms and standards, for purposes of WTO law, adopted by Members".\textsuperscript{194} (emphasis added). This quotation perfectly shows that something can only be attributed to a Member and characterised as an "act" if it has been duly adopted by that Member so that the "act" is "born", that is, comes into existence – and not before. In the same vein, Article 3.3 of the DSU refers to measures "taken" by another Member.

Internal preparatory conduct, such as the 2013 Commission proposal, cannot be a measure in that sense, because it simply does not fall into the category of acts adopted by (and thus attributable to) the Member.

This is confirmed by Articles 3.3 and 4.2 of the DSU which require that, through the measure at issue, "benefits (…) are being impaired" and that measures must "affect the operation of any covered agreement", i.e. have ‘an effect on’, or a present impact on, the operation of a covered agreement. In principle, preparatory conduct does not have such effects and cannot be considered to affect the operation of a covered agreement.

As a matter of fact, in this instance, following the 2013 Commission proposal, there have been dozens of further documents emanating from the Commission, the Parliament, its competent Committee and its negotiation team, the Council or the Council Presidency. These documents differ significantly in terms of their content. Most of them pre-date the Panel Request. None of them are covered by the Consultations Request or the Panel Request. Their existence renders the 2013 Commission proposal essentially moot. Therefore, China's attempt to seek review in WTO dispute settlement of preparatory conduct, as opposed to measures, is misconceived and must be rejected.\textsuperscript{195}

7.7.5. In any event, preparatory conduct is not subject to the definitions or obligations cited by China

In any event, the European Union submits that nothing in the definitions or obligations in Article VI of the GATT 1994 or the Anti-Dumping Agreement cited by China supports the view that they apply to preparatory conduct. A review of the relevant provisions reveals that, on the contrary, there are no obligations pertaining to preparatory conduct.

\textsuperscript{193} Appellate Body Reports, US - Corrosion-Resistant Steel Sunset Review, para. 81.
\textsuperscript{194} Appellate Body Report, US - Corrosion-Resistant Steel Sunset Review, para. 87.
\textsuperscript{195} To be clear, the European Union need not and does not seek to rely on the existence of these documents as a necessary element in support of its request for a preliminary ruling that the 2013 Commission proposal is not within or properly within the scope of these panel proceedings. We refer to their existence merely to illustrate the point we are making.
With respect to specific anti-dumping measures, Article 17.4 of the Anti-Dumping Agreement makes it clear that proceedings can only be brought if final action has been taken. Furthermore, a provisional measure, as specified in Article 7, which may only be subject to review if certain conditions are met, is still an act (that is, a measure), as opposed to preparatory conduct. Thus, what is clear is that if, in the municipal law of a particular Member, such as the European Union, one institution merely proposes to another institution that it adopt a measure, that proposal is not an act or measure that can, in itself, be the subject of panel proceedings.

For example, until relatively recently, specific anti-dumping measures in the EU legal order involved a proposal by the Commission to the Council, which would then be responsible for considering adoption of the final act. The European Union is not aware of any instance in which another WTO Member has sought review of such Commission proposal. Furthermore, we would strongly take the view that any such review is not provided for in the Anti-Dumping Agreement and is in fact precluded by the terms of that Agreement.

Important considerations underlie the fact that the types of measures that can be subject to dispute settlement are specifically described and do not include preparatory conduct. Otherwise, there would be a real risk that a responding Member might be harassed and/or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small or preliminary, taken in the course of a particular process, even before any concrete measure has been adopted.196 Furthermore, an unrestricted right to have recourse to dispute settlement during any such process would allow a multiplicity of dispute settlement proceedings arising out of one and the same process, leading to repeated disruption of that process, and indeed serious disruption of the dispute settlement system.197

Turning to anti-dumping legislation, it comes as no surprise to discover that the relevant provisions of the Anti-Dumping Agreement reflect a similar approach. Thus, Article 18.4 of the Anti-Dumping Agreement refers to "laws, regulations and administrative procedures". It does not refer to proposals or preparatory conduct. Furthermore, Article 18.5 requires Members to notify "changes", not proposals or preparatory conduct. The position is thus the same: under the Anti-Dumping Agreement there are no obligations pertaining to proposals or

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196 Appellate Body Report, US – 1916 Act, para. 73: ("Important considerations underlie the restriction contained in Article 17.4. In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted. In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure, Article 17.4 strikes a balance between these competing considerations.") (footnotes omitted, emphasis added).

197 Appellate Body Report, US – 1916 Act, footnote 38: ("An unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation.")
preparatory conduct and such matters may not therefore be the subject of dispute settlement proceedings.\textsuperscript{198}

257. This approach is fully supported by the case law. In \textit{US – Upland Cotton}, Brazil attempted to include in its panel request as a measure at issue the "Agricultural Assistance Act of 2003". However, on the date of the panel request, such act did not exist, had never existed and might not subsequently have ever come into existence. Brazil had simply anticipated adoption of that Act in its panel request. The Panel found Brazil’s claim in that respect was entirely speculative and that such matter was not within the Panel’s terms of reference.\textsuperscript{199}

258. Furthermore, such a conclusion is also fully supported and indeed compelled by general \textbf{public international law}. In particular, in the International Law Commission Commentaries on the Articles on the Responsibility of States for Internationally Wrongful Acts, with respect to Article 14, at paragraph 13,\textsuperscript{200} it is clearly stated that the question is to be answered by reference to the specific primary rule. Where the wrongful act is the occurrence of some event, \textbf{preparatory conduct will not be wrongful absent a specific obligation to that effect}. In this respect, the ICJ has clearly distinguished between the actual commission of a wrongful act and conduct of a preparatory character.\textsuperscript{201} \textbf{Preparatory conduct does not itself amount to a breach if it does not predetermine the final decision to be taken}, as is the case here. The same observation applies with respect to the Commentaries on the Draft Articles on the Responsibility of International Organizations.\textsuperscript{202} These documents have been extensively referenced and relied upon in the case law,\textsuperscript{203} and they can and must guide this Panel in its deliberations.

259. In light of the above observations, which are fully confirmed by a consideration of China’s First Written Submission (which could not, in any event, cure a defective panel request), the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

\textbf{The 2013 Commission proposal is not within or properly within the scope of this dispute, and in any event China has not cited any legal basis on}
which the Panel could determine the 2013 Commission proposal to be WTO inconsistent.

7.8. "ANY CHANGES" TO THE EU BASIC ANTI-DUMPING REGULATION THAT MIGHT (OR MIGHT NOT) OCCUR "PURSUANT TO THE LEGISLATIVE PROCESS INITIATED BY" THE 2013 COMMISSION PROPOSAL ARE NOT WITHIN OR PROPERLY WITHIN THE SCOPE OF THIS DISPUTE

260. We turn now to consider China's bare assertion in the final sentence of footnote 2 of China's Consultations Request and Panel Request that "any changes" to the EU Basic Anti-Dumping Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2013 Commission proposal, during an indeterminate period of time stretching away indefinitely into the future, are "included" in the requests. China here purports, in effect, to point at an empty space, or in other words, thin air. Self-evidently, "nothing" cannot be lawfully included in a Consultations Request or Panel Request as a (specific) measure at issue, most obviously because, with respect to "nothing", it is impossible to comply with any one of the three requirements detailed in Articles 4.4 and 6.2 of the DSU, as set out above.

261. The question of what can be properly "included" in a consultations request or a panel request is not in the hands of the complaining Member. Rather, it is an objective question. That objective question can only be answered by carefully examining the consultations request and panel request, in order to ascertain whether or not it complies with the obligations in Articles 4.4 and 6.2 of the Anti-Dumping Agreement.

262. Thus, the first question is whether or not China has, in this respect, identified a measure at issue or a specific measure at issue. Evidently, in the second sentence of footnote 2, China has not identified any measure that existed at the date of either request or at the date of the establishment of the Panel. Instead, China's position is that it can identify a measure at issue or a specific measure at issue by referring to the future. In this sense, it is clear that China is not actually identifying a measure or a specific measure at issue, but rather attempting to refer to a set of possible measures within a particular category, any one of which might or might not be adopted in the future.

263. However, because the 2013 Commission proposal is merely preparatory conduct, pursuant to the legislative process initiated by that proposal it is possible that any act could be adopted. In other words, the act that might (or might not) be adopted is not circumscribed by the proposal. Thus, the category to which China is attempting to refer is in fact open. This means that, in effect, China is attempting to refer to any act among an unlimited set of future possibilities, which may or may not occur. In this respect, China's Consultations Request and Panel Request are so abstract and intangible that they cannot be said to comply with the obligations in Articles 4.4 and 6.2 of the DSU to identify the measures at issue or the specific measures at issue.

264. The second question is whether or not China has complied with its obligations to indicate the legal basis of the complaint, as required by Articles 4.4 and 6.2 of the DSU. We have already made the point that, with respect to the 2013 Commission proposal, the Consultations Request and Panel Request are
entirely devoid of substance on the question of what the legal basis of the complaint might be. This being so, it is inevitably the case that this is also the situation with respect to the unspecified possible future measure. Therefore, the only possible conclusion is that, in this respect, China's Consultations Request and Panel Request cannot be said to comply with the obligations in Articles 4.4 and 6.2 of the DSU to indicate the legal basis of the complaint.

265. The third question is whether or not China has complied with its obligations to give reasons and to provide a brief summary sufficient to present the problem clearly. Similar comments apply. Therefore, the only possible conclusion is that, in this respect, China's Consultations Request and Panel Request cannot be said to comply with the obligations in Articles 4.4 and 6.2 of the DSU to give reasons and to provide a brief summary sufficient to present the problem clearly.

266. It is precisely for these reasons that no panel, nor the Appellate Body has ever even attempted to scrutinise future measures of uncertain content before they were even adopted. Consistent with this, as indicated in the European Union's acceptance letter of 21 December 2016, and in our statements at the first and second DSB meetings at which the establishment of the Panel was requested, with respect to future possible measures of indeterminate and substantively different content no meaningful exchange of views can be envisaged, and the European Union has made it very clear, on several occasions, that is has not agreed to consult on those. China agreed to enter into consultations on that basis, and it must now accept the consequences.

267. China now appears to agree, having recently stated: "It is premature – and, necessarily, speculative – for the Panel to consider the potential implications of a possible amendment that lies in the future and whose final terms are, by definition, unknown." In light of the above observations, which are fully confirmed by a consideration of China's First Written Submission (which could not, in any event, cure a defective panel request), the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

"Any changes" to the EU Basic Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2013 Commission proposal are not within or properly within the scope of this dispute.

7.9. **The 2016 Commission Proposal is Not Within or Properly Within the Scope of This Dispute**

269. For the same reasons that we have already set out above with respect to the 2013 Commission proposal, mutatis mutandis, the 2016 Commission proposal is not within or properly within the scope of this dispute. In particular:

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204 Exhibit EU-3 (Communication from the European Union to China dated 21 December 2016 agreeing to enter into consultations with China, and precisely delimiting the scope of that agreement).

205 Exhibit EU-4 (Minutes of the DSB Meeting on 21 March 2017, WT/DSB/M/394, 17 May 2017) and Exhibit EU-5 (Minutes of the DSB Meeting on 3 April 2017, WT/DSB/M/395, 19 May 2017).

206 China's communication to the Panel of 13 October 2017, para. 13.
• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to identify the measures at issue or the specific measures at issue;

• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must indicate the legal basis of the complaint;

• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must give reasons and provide a brief summary sufficient to present the problem clearly;

• the 2016 Commission proposal, which is merely preparatory conduct, cannot constitute a measure at issue; and

• in any event, preparatory conduct is not subject to the obligations in Article VI of the GATT 1994 or the Anti-Dumping Agreement cited by China.

270. In light of the above observations, which are fully confirmed by a consideration of China's First Written Submission (which could not, in any event, cure a defective panel request), the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

The 2016 Commission proposal is not within or properly within the scope of this dispute, and in any event China has not cited any legal basis on which the Panel could determine the 2016 Commission proposal to be WTO inconsistent.

7.10. "ANY CHANGES" TO THE EU BASIC ANTI-DUMPING REGULATION THAT MIGHT (OR MIGHT NOT) OCCUR "PURSUANT TO THE LEGISLATIVE PROCESS INITIATED BY" THE 2016 COMMISSION PROPOSAL ARE NOT WITHIN OR PROPERLY WITHIN THE SCOPE OF THIS DISPUTE

271. For the same reasons that we have already set out above with respect to the 2013 Commission proposal, mutatis mutandis, "any changes" to the EU Basic Anti-Dumping Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2016 Commission proposal, during an indeterminate period of time stretching away indefinitely into the future, are not within or properly within the scope of this dispute. In particular:

• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to identify the measures at issue or the specific measures at issue;

• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must indicate the legal basis of the complaint; and
• with respect to the 2016 Commission proposal, China's Consultations Request and Panel Request do not comply with the obligations in respectively Article 4.4 and 6.2 of the DSU, to the effect that the complainant must **give reasons and provide a brief summary sufficient to present the problem clearly.**

272. In light of the above observations, which are fully confirmed by a consideration of China's First Written Submission (which could not, in any event, cure a defective panel request), the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

"Any changes" to the EU Basic Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2016 Commission proposal are not within or properly within the scope of this dispute.

7.11. **The measures listed in paragraphs 79 and 80 of China's First Written Submission are not within or properly within the scope of this dispute.**

273. The European Union submits that the measures listed in paragraphs 79 and 80 of China's First Written Submission are not within or properly within the scope of this dispute. None of these measures are identified as measures at issue or specific measures at issue in the Consultations Request or the Panel Request. With respect to these measures, neither China's Consultations Request nor China's Panel Request indicates what the legal basis of the claim might be. Furthermore, with respect to these measures, neither China's Consultations Request nor China's Panel Request give reasons or provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

274. In light of the above observations, the European Union seeks the following ruling from the Panel, or a ruling to substantially the same effect:

**With respect to the measures listed in paragraphs 79 and 80 of China's First Written Submission, China's Consultations Request does not comply with Article 4.4 of the DSU and China's Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.**

8. **Standard of Review: Permissible Interpretation**

275. The European Union submits that the special standard of review in Article 17(6)(ii) of the Anti-Dumping Agreement applies in this case. That special standard of review refers to "the Agreement", meaning the Anti-Dumping Agreement. However, in this particular case the Panel is called upon to interpret the relevant provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement and Section 15 of China's Accession Protocol in such a way that they "apply" and are "consistent". A pre-requisite for interpreting two applicable documents in a manner that renders them "consistent" with each other is that one is using the same tools and standards of interpretation:

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207 Exhibits CHN-40 to CHN-62.
208 See footnotes 15 and 16 of this Submission.
otherwise the requirement that the two interpretations be "consistent" would be meaningless.

276. The European Union is familiar with the case law concerning Article 17.6(ii) of the Anti-Dumping Agreement according to which one first applies the customary rules of interpretation of public international law, which in turn implies that normally there may be but one correct interpretation that ultimately prevails.\textsuperscript{209}

277. However, without entering into that particular debate, the European Union would like to point out that the DSU is without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision making under the WTO Agreement.\textsuperscript{210} In this particular case, through "decision making under the WTO Agreement", and specifically through a decision to conclude the Accession Protocol with China pursuant to Article XII:2 of the WTO Agreement,\textsuperscript{211} all of the Members have agreed to the interpretations of the relevant provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement reflected in China's Accession Protocol, both before and after 11 December 2016 (in addition to the China-specific rules contained therein). Those interpretations must certainly be considered to be authoritative, emanating as they do from the entire Membership, acting by consensus. They must therefore also be considered to be permissible within the meaning of Article 17(6)(ii) of the Anti-Dumping Agreement.

278. This observation is further confirmed by Article 31(3)(a) of the Vienna Convention, which provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.\textsuperscript{212}

279. The European Union concludes that it is permissible to interpret the relevant provisions of the Anti-Dumping Agreement as meaning that, in the event of a lack of comparability, including, for example, a market situation that is not normal, but rather particular, an investigating authority may reject affected prices and costs and use instead information from a third country, adjusted where necessary. As the final sentence of Article 17(6)(ii) of the Anti-Dumping Agreement:

\textsuperscript{209} Appellate Body Report, \textit{US – Continued Zeroing}, paras. 267-313, and the other cases there cited.

\textsuperscript{210} DSU, Article 3.9.

\textsuperscript{211} See: Decision of 10 November 2001, Accession of the People's Republic of China, WT/L/432, 23 November 2001, first and second preambles: ("The Ministerial Conference ... Having regard to ... the Decision-making Procedures under Articles IX and XII of the Marrakesh Agreement Establishing the World Trade Organization ...”).

\textsuperscript{212} See, for example: Appellate Body Report, US – Clove Cigarettes, paras. 265-275, referring to the Appellate Body Reports in \textit{EC-Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US} and to the Commentaries on the ILC Draft Articles on the Law of Treaties) (and finding a Doha Ministerial Decision to "bear specifically" on the interpretation of Article 12.12 of the TBT Agreement and therefore to be "a further authentic element of interpretation to be taken into account together with the context” pursuant to Article 31(3)(a) of the Vienna Convention, and interpreting Article 12.12 of the TBT Agreement in a manner consistent with the Doha Ministerial Decision); and Appellate Body Report, \textit{US – Tuna II (Mexico)}, paras. 371-378 (finding a TBT Committee Decision to be a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the Vienna Convention, and interpreting the TBT Agreement in a manner consistent with the clarifications provided by the TBT Committee Decision).
Agreement provides, a panel must uphold a measure if it rests upon such a permissible interpretation. 213

9. ORDER OF ANALYSIS

280. In this particular case, the European Union does not object to China's approach of seeking to have the Panel first address its claim under Article I:1 of the GATT 1994, and only then its Second Claim. Although the Panel has some discretion with respect to this matter, given the agreement between the Parties, the Panel should exercise that discretion by following the sequence agreed by the Parties.

10. CHINA'S CLAIMS CONCERNING ARTICLES 2(1) TO 2(7) AND ARTICLE 2(7) OF THE EU BASIC ANTI-DUMPING REGULATION

10.1. CHINA'S FIRST CLAIM: CHINA HAS FAILED TO DEMONSTRATE THAT ARTICLES 2(1) TO 2(7) OF THE EU BASIC ANTI-DUMPING REGULATION ARE INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994

10.1.1. The First Claim set out in China's Panel Request

281. The First Claim set out in China's Panel Request is that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation, 214 insofar as Article 2(7) relates to China, 215 are inconsistent with Article I:1 of the GATT 1994. 216 Specifically, China claims that Articles 2(1) to 2(7), insofar as they relate to China, "provide for" differential treatment of Chinese imports, as compared to imports from other WTO Members. According to China, in contrast to the treatment afforded imports from other WTO Members, Chinese imports "are denied" the advantage, favour, privilege or immunity of the rules set forth in paragraphs 1 to 6 of Article 2 regarding the determination of normal value, and instead "face" the less favourable rules set forth in Article 2(7), unless Chinese producers satisfy a requirement in Article 2(7)(b) to demonstrate that market economy conditions prevail for the producer or producers in question. China claims that, as a result, the European Union fails to accord to Chinese imports immediately and unconditionally an advantage, favour, privilege or immunity that is granted to like imports from other WTO Members, contrary to Article I:1 of the GATT 1994. 217

213 See, for example: Appellate Body Report, US – Hot-Rolled Steel, para. 172: ("In these circumstances, we find that the reliance by USDOC on downstream sales to calculate normal value rested upon an interpretation of Article 2.1 of the Anti-Dumping Agreement that is, in principle, "permissible" following application of the rules of treaty interpretation in the Vienna Convention.").
214 As we have explained above in our Request for Preliminary Rulings, China clearly refers to Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation as a comparator for the purposes of its MFN claim, developing no claims or arguments with respect to the comparator per se. Consequently, the European Union focuses its submissions on Article 2(7).
215 As we have explained above in our Request for Preliminary Rulings, China does not seek review, or does not properly seek review, of Article 2(7) insofar as it relates to any other country.
216 Panel Request, paras. 6-8, and specifically para. 7(i): ("Specifically … China is concerned that: (i) Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article I:1 of the GATT 1994 …").
217 Panel Request, para. 8.
10.1.2. Section IV.A of China’s First Written Submission

282. In its First Written Submission, China begins by attempting to re-state and expand the scope of the First Claim by adding to it Article VI:1 of the GATT 1994.\(^{218}\) Thus, according to China, the First Claim is now that Articles 2(1) to 2(7) are inconsistent with Articles I:1 and VI:1 of the GATT 1994 considered together.

283. China then sets out, in part, Article I:1 of the GATT 1994. According to China, Article I:1 of the GATT 1994 articulates a legal standard with four elements: the measure at issue must qualify as one falling within the scope of Article I:1;\(^{219}\) the products of the complaining Member and of some other source must be "like" within the meaning of the provision;\(^ {220}\) there must be an "advantage, favour, privilege or immunity" granted to "any product" originating in any other country;\(^{221}\) and any advantage must be extended "immediately and unconditionally".\(^{222}\)

284. China then purports to apply the legal standard it has advanced. After making certain assertions about what it describes as "relevant features of the measure".\(^ {223}\) China argues that Articles 2(1) to 2(7) contain "rules and formalities in connection with importation";\(^{224}\) that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation may be presumed to apply to "like products" because they create distinctions solely on the basis of origin;\(^{225}\) and that Articles 2(1) to 2(6) confer an "advantage" on products from other countries that is not conferred on products from China.\(^{226}\)

285. With respect to this latter assertion, China develops three arguments.

286. First, China compares Articles 2(1) to 2(6) on the one hand, with Article 2(7) on the other hand. According to China, Article 2(7) is, on its own terms, disadvantageous, compared to Articles 2(1) to 2(6). China bases this proposition on the assertion that Articles 2(1) to 2(6) provide for the use of "home market" prices and costs, whilst Article 2(7) provides for the use of "surrogate" prices or costs from an "analogue" country. China also argues that the Anti-Dumping Agreement contains a preference for the use of a producer's own data.\(^ {227}\)

287. Second, China argues that the manner in which Article 2(7) has been applied "confirms" the disadvantage to Chinese imports. In support of this assertion China refers to a Commission Staff Working Document setting out, for ten anti-dumping measures, the duty level based on Article 2(7), and a hypothetical duty level based (subject to certain qualifications) on Articles 2(1) to 2(6).\(^ {228}\)

\(^{218}\) China’s First Written Submission, footnote 119.
\(^{219}\) China’s First Written Submission, paras. 90-92.
\(^{220}\) China’s First Written Submission, paras. 93-94.
\(^{221}\) China’s First Written Submission, paras. 95-97.
\(^{222}\) China’s First Written Submission, paras. 98-101.
\(^{223}\) China’s First Written Submission, paras. 103-104.
\(^{224}\) China’s First Written Submission, para. 105.
\(^{225}\) China’s First Written Submission, paras. 106-108.
\(^{226}\) China’s First Written Submission, paras. 109-112.
\(^{227}\) China’s First Written Submission, paras. 113-117.
\(^{228}\) China’s First Written Submission, paras. 118-123.
Third, China argues that Articles 2(1) to 2(6) only apply to Chinese imports if Chinese producers demonstrate that market economy conditions prevail, pursuant to Articles 2(7)(b) and (c). According to China, the fact that this hurdle is not imposed on producers from countries that are not deemed "non-market economy" countries under EU law demonstrates the advantage.\(^\text{229}\)

Finally, China argues that the "advantages" conferred under Articles 2(1) to 2(6) are not extended "immediately" and "unconditionally" to products from China, because, in order to be assessed pursuant to Articles 2(1) to 2(6), Chinese producers would have to demonstrate market economy conditions, pursuant to Articles 2(7)(b) and (c).\(^\text{230}\)

On this basis, China asserts that it has demonstrated that Articles 2(1) to 2(7) are inconsistent with Article I:1 of the GATT 1994.\(^\text{231}\)

10.1.3. China is not permitted, in its First Written Submission, to change the First Claim set out in the Panel Request

The European Union submits that China is not permitted, in its First Written Submission, to change the First Claim, as set out in the Panel Request. As summarised above, the First Claim is that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994.\(^\text{232}\) The Panel Request does not contain a claim that Articles 2(1) to 2(7) are inconsistent with Articles I:1 and VI:1 of the GATT 1994 considered together. Therefore, no such claim is within this Panel's terms of reference and this Panel has no authority to adjudicate on such a claim.

10.1.4. The relevant aspect of Article 2(7) is not mandatory

We begin with the actual terms of the treaty provision cited by China, and the actual terms of the specific measure at issue identified in the Panel Request (focusing on Article 2(7) of the EU Basic Anti-Dumping Regulation).

Article I:1 of the GATT 1994 provides in relevant part:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article 2(7) of the EU Basic Anti-Dumping Regulation provides as follows:

7. (a) In the case of imports from non-market-economy countries\(^{1}\), the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other

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\(^\text{229}\) China's First Written Submission, paras. 124-126.

\(^\text{230}\) China's First Written Submission, paras. 128-131.

\(^\text{231}\) China's First Written Submission, para. 132.

\(^\text{232}\) Panel Request, paras. 7(i) and 8.
reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits. Where appropriate, a market-economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market-economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from the People’s Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, the normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in point (c), that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When that is not the case, the rules set out under point (a) shall apply.

(c) A claim under point (b) must be made in writing and contain sufficient evidence that the producer operates under market-economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the criteria referred to under this point shall normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation, after the Union industry has been given an opportunity to comment. That determination shall remain in force throughout the investigation. The Commission shall provide information to the Member States concerning its analysis of claims made pursuant to point (b) normally within 28 weeks of the initiation of the investigation.

(d) When the Commission has limited its investigation in accordance with Article 17, a determination pursuant to points (b) and (c) of this paragraph shall be limited to the parties included in the investigation and any producer that receives individual treatment pursuant to Article 17(3).

(1) Including Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan.
In WTO law, if a measure is not mandatory but rather discretionary, a panel can and should conclude that it is not "as such" inconsistent with the covered agreements.\textsuperscript{233}

China's claim must be rejected because the relevant aspect of Article 2(7) of the EU Basic Anti-Dumping Regulation (insofar as it relates to China) is not mandatory.

In this respect, China appears to refer to the first occurrence of the term "shall" in Article 2(7)(b). However, that term directs the investigating authority to apply paragraphs 1 to 6 of Article 2 of the EU Basic Anti-Dumping Regulation. Those are the provisions that China is arguing should be applied to China (apparently overlooking the fact that they already apply to China). Therefore, insofar as China refers to the first occurrence of the term "shall" in Article 2(7)(b) it is not referring to any mandatory aspect of Article 2(7)(b) that is capable of demonstrating the inconsistency alleged by China.

China also appears to refer to the term "shall" in the final sentence of Article 2(7)(b), which refers to the rules in Article 2(7)(a); and hence to the first sentence of Article 2(7)(a), which also contains the term "shall". However, China overlooks the significance of the express terms of Article 2(7)(a), which contains the qualifying words: "or, where those are not possible, on any other reasonable basis". The phrase "on any other reasonable basis" does not exclude the application of paragraphs 1 to 6 of Article 2, which, as recalled above, are precisely the provisions that China is arguing should be applied to China.

Therefore, contrary to what China asserts, Article 2(7)(b) and Article 2(7)(a) together permit the application of paragraphs 1 to 6 of Article 2 to China (in certain circumstances). A provision that expressly permits the application of paragraphs 1 to 6 of Article 2 to China cannot, at the same time, be construed as mandating the non-application of paragraphs 1 to 6 of Article 2 to China. China's claim must therefore necessarily fail, because, contrary to what China asserts, Article 2(7)(a)-(b) of the EU Basic Anti-Dumping Regulation does not mandate the investigating authority to dis-apply paragraphs 1 to 6 of Article 2 in all cases concerning China.

For this reason, the Panel must reject China's claim without it being necessary to consider any of the arguments set out in the remaining part of this section.

\textbf{10.1.5. China has failed to cite all the pertinent treaty language}

In any event, China's claim must be rejected because China has not complied with the requirement that, in order to formulate a \textit{prima facie} case, China, as the complainant, was required to cite all pertinent treaty language pertaining to the matter raised by China, including Section 15 and the Working Party Report.

For the purposes of this argument, the European Union submits that the Panel can and should rule in favour of the European Union with respect to this matter without it being necessary or appropriate for the Panel to enter into a substantive analysis of Section 15 and the Working Party Report, which neither China nor the European Union have placed within the Panel's terms of reference.

303. The European Union does not know why China has taken the extraordinary decision to completely ignore Section 15 of China's Accession Protocol and the Working Party Report, apparently preferring instead to artificially truncate – and thus fundamentally change – the applicable treaty terms. Perhaps China imagines that, by proceeding in this way, it will presumptively throw onto the European Union the burden of identifying and explaining the meaning of the applicable treaty terms and how they apply to the measure at issue. China is mistaken. That burden falls on China and is an essential part of China making a *prima facie* case. The European Union declines to assume China's burden.

304. Furthermore, for the purposes of making this argument, the European Union wishes to be clear that it does not place the issue of the substantive meaning of these treaty provisions within the Panel's terms of reference. Since neither China nor the European Union has done that, the Panel has no jurisdiction to rule on such matters and must refrain from doing so. Consequently, the only conclusion that the Panel can reach is that China has failed to make a *prima facie* case, and therefore China's claim must be rejected. The Panel may not make the case for either party; and it is too late at this stage for China to belatedly inject references and argument with respect to the missing treaty provisions.

305. The European Union notes that China describes Section 15 and the Working Party Report as a "justification" or an "exception". It can be inferred from this language that China assumes that Section 15 and the Working Party Report are in the nature of a so-called "affirmative defence", akin to one of the general exceptions in Article XX of the GATT 1994. Hence, China appears to be of the view that it would be for the European Union to place the applicable treaty provisions before the Panel. China is mistaken: and this constitutes a serious legal error by China, which is fatal to its claim.235

306. The conclusion is fully supported by the existing case law.

307. Thus, in *US – Wool Shirts and Blouses* the Appellate Body observed that it is a generally accepted canon of evidence in civil law, common law, and, in fact, most jurisdictions, that the burden of proof rests upon the party asserting the affirmative.236 In this case, it is China that affirms that the measure at issue is inconsistent with Article I:1 of the GATT 1994 and China that has the burden of affirming a breach of Article VI and the Anti-Dumping Agreement, including the new Section 15 and Paragraph 150 of the Working Party Report. But China has not even placed those latter provisions before the Panel, let alone attempted to demonstrate that the measure at issue is inconsistent with them. China has therefore failed to discharge its burden of proof, having failed to even cite the relevant treaty provisions necessary to make a *prima facie* case.

308. Similarly, in *EC – Hormones*, the Appellate Body found that the relationship between Articles 3.1 and 3.3 of the SPS Agreement is not one of general rule and exception, but rather that Article 3.3 set outs an autonomous legal right.237 In other words, the two provisions simply circumscribe and qualify the

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235 See Section 2.3.1 of this Submission.
obligations by which all Members have agreed to be bound. In these circumstances, the Appellate Body found that the Member adopting an SPS measure, as foreseen by Article 3.3, is not penalized by exemption of a complaining Member from the normal burden of showing a prima facie case of inconsistency with Article 3.1 or any other relevant article of the SPS Agreement.\footnote{Appellate Body Report, EC – Hormones, para. 171.} Consequently, the Appellate Body found that the Panel committed a legal error in purporting to absolve the complainants from the necessity of establishing a prima facie case of the failure of the European Union to comply with the requirements of Article 3.3.\footnote{Appellate Body Report, EC – Hormones, paras. 104-109, particularly at para. 108.} A necessary pre-requisite to even attempting to make a prima facie case is that the relevant claim is set out in the consultations request and panel request by reference to the relevant provisions, a requirement that China has failed to comply with in this case.

309. A similar issue has arisen concerning the relationship between Articles 5.1 and 5.7 of the SPS Agreement. The Panel in \textit{EC – Biotech} confirmed that the relationship between these provisions is not one of general rule and exception, but rather that Article 5.7 qualifies the obligation set out in Article 5.1. It concluded that: "when a complaining party presents a claim of violation under Article 5.1, the burden is on the complaining party to establish a prima facie case of inconsistency with both Articles \textit{5.1 and 5.7}."\footnote{Panel Report, EC – Biotech, paras. 7.2984-7.3002, particularly 7.2997 and 7.3000.} The same conclusion was reached by the Appellate Body in \textit{EC – Hormones},\footnote{Appellate Body Report, EC – Hormones, para. 171 ("... or any other relevant article of the SPS Agreement ...").} and in effect affirmed by the Appellate Body in the \textit{Continued Suspension} case.\footnote{Appellate Body Report, US – Continued Suspension, paras. 576-584 and 713-718.} Thus where, as here, the relevant treaty provisions are not even in the Consultations Request or the Panel Request, the claim must necessarily fail.

310. Similarly, in \textit{Brazil – Aircraft} a question arose about the relationship between Articles 3.1(a) and 27.4 of the SCM Agreement. Once again, the Appellate Body confirmed that, since Article 27.4 simply contains treaty terms that circumscribe or qualify (that is, condition) the obligation in Article 3.1(a), the burden is on the complaining Member to demonstrate an alleged inconsistency by reference to both Article 3.1(a) and Article 27.4.\footnote{Appellate Body Report, Brazil – Aircraft, paras. 139-141.} Thus, once again, where, as here, the relevant treaty provisions are not even in the Consultations Request or the Panel Request, the claim must necessarily fail.

311. Similarly, in \textit{EC – Sardines} a question arose about the relationship between the first and second parts of Article 2.4 of the TBT Agreement. The Appellate Body again found that these were not in the nature of a general rule and exception. It therefore considered that it was for the complainant to bear the burden of proving is claim, having regard to all of the provisions of Article 2.4. Furthermore, that burden extended to the burden of engaging with the international standard and the question of how it should be interpreted and applied in that case.\footnote{Appellate Body Report, EC – Sardines, para. 275.} Thus, once again, where, as here, the relevant treaty
provisions are not even in the Consultations Request or the Panel Request, the claim must necessarily fail.

312. Finally, in EC – Tariff Preferences, an issue arose about the relationship between Article I:1 of the GATT 1994 and the Enabling Clause. It is particularly striking that, in that case, even though the Appellate Body upheld the panel's findings that the Enabling Clause was an "exception" and that it did not "exclude the applicability" of Article I (which is not the case here), it nevertheless found that the relevant provisions of the Enabling Clause "form critical components of the "legal basis of the complaint" and therefore, of the "matter" in dispute. Accordingly, a complainant cannot ignore these provisions but must identify them in its request for the establishment of a panel.

313. As we have already indicated, this analysis is actually confirmed by China's own submissions. China itself has cited the Ad Note to Article VI:1, second paragraph, in its Panel Request and in its First Written Submission. That is, China itself has framed the relevant claim by treating the Ad Note (correctly) as containing language that circumscribes the (qualified) obligation China alleges the European Union to breach. The Appellate Body has already indicated that it categorises the Ad Note and Section 15 in the same way. China should therefore have treated Section 15 as it treated the Ad Note. Its failure to do so vitiates its case, and the European Union declines to remedy the defect.

10.1.6. China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report

314. In the unlikely event that the Panel rejects the preceding arguments, then the European Union submits, in the alternative, that China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994 and Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report, whether considered on a stand-alone basis or as context.

315. Specifically, China appears to claim and argue that, in effect, the mere fact that Article 2(7) of the EU Basic Anti-Dumping Regulation expressly refers to anti-dumping investigations concerning imports from China demonstrates inconsistency with Article I:1 of the GATT 1994.

316. The European Union disagrees.

317. As outlined above, China has apparently chosen to ignore Section 15 of China's Accession Protocol and the Working Party Report completely, and for this reason alone, as also outlined above, its claim suffers from a fundamental defect of a procedural nature and must be rejected. Thus, to be clear, in the unlikely event that the Panel would reach this point of analysis, the Panel would be

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248 See Section 2.1.1 of this Submission.
assessing legal provisions that neither China nor the European Union would have placed before it.

318. That said, even if one would come to the point of examining the *substance* of Section 15 and the Working Party Report, one would have to conclude that they also *expressly refer to anti-dumping investigations concerning imports from China*.\(^{249}\) **Absent any argument from China** (and it is at this point too late for China to modify its claim or develop any such argument), the comparison of the two documents, shows only that both documents *expressly refer to anti-dumping investigations concerning imports from China*. The logical conclusion is that, absent other arguments, the complainant has failed to present a *prima facie* case demonstrating any inconsistency. In particular, when the claim is framed as an alleged inconsistency with an MFN obligation that (as here) would be entirely dependent on the complainant engaging with all the treaty provisions that *expressly refer to anti-dumping investigations concerning imports from China*, it is clear that the complainant has foregone the possibility of presenting a successful claim.

319. Similarly, China appears to claim and argue that, in effect, the mere fact that Article 2(7) of the EU Basic Anti-Dumping Regulation *permits* Chinese producers to demonstrate that *market economy conditions prevail* for the producer or producers under investigation demonstrates inconsistency with Article I:1 of the GATT 1994.

320. Once again, for similar reasons, the European Union disagrees.

321. By their own terms, Section 15 and the Working Party Report also provide that Chinese producers are to be *permitted* to demonstrate that *market economy conditions prevail in the industry producing the like product*.\(^{250}\) **Absent any argument from China** (and it is at this point too late for China to modify its claim or develop any such argument), the comparison of the two documents, shows only that both documents *expressly permit producers to demonstrate that market economy conditions prevail for them or the industry under investigation*. The logical conclusion is that, absent other arguments, the complainant has failed to present a *prima facie* case demonstrating any inconsistency. In particular, when the claim is framed as an alleged inconsistency with an MFN obligation that (as here) would be entirely dependent on the complainant engaging with the treaty provisions that *expressly permit producers to demonstrate that market economy conditions prevail for them or the industry under investigation*, it is clear that the complainant, by its own choices and by the terms of its own case, has foreclosed any possibility of a successful claim.

322. Similarly, China appears to claim and argue that, in effect, the mere fact that Article 2(7) of the EU Basic Anti-Dumping Regulation *permits* the investigating authority either to have recourse to paragraphs 1 to 6 of Article 2 or to a

\(^{249}\) See, in particular, Section 15 of China's Accession Protocol, first paragraph: "… in proceedings involving imports of Chinese origin …".

\(^{250}\) See, in particular, Section 15 of China's Accession Protocol, paragraph (a) and sub-paragraph (a)(i): "… for the industry under investigation …", "… if the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product …", "… for the industry under investigation …".
methodology involving information from a third country demonstrates the inconsistency with Article I:1 of the GATT 1994.

323. Once again, for similar reasons, the European Union disagrees.

324. By their own terms, Section 15 and the Working Party Report also provide that, in certain circumstances, an investigating authority may use either Chinese prices or costs for the industry under investigation, or may have recourse to a methodology that is not based on a strict comparison with domestic prices or costs in China (that is, may be based on information from a third country). Absent any argument from China (and it is at this point too late for China to modify its claim or develop any such argument), the comparison of the two documents, shows only that both documents expressly permit an investigating authority to have recourse to a methodology that involves information from a third country. The logical conclusion is that, absent other arguments, the complainant has failed to present a prima facie case demonstrating any inconsistency. In particular, when the claim is framed as an alleged inconsistency with an MFN obligation that (as here) would be entirely dependent on the complainant engaging with the treaty provisions that expressly permit an investigating authority to have recourse to a methodology that involves information from a third country, it is clear that the complainant, by its own choices and by the terms of its own case, has foreclosed any possibility of a successful claim.

325. Consequently, for these reasons also, the European Union respectfully submits that the Panel must reject China's claim.

326. In sum, as outlined above, even if one would reach the point of examining the substance of the new Section 15 and Paragraph 150 of the Working Party Report, the conclusion would be that:

- Article VI of the GATT and the Anti-Dumping Agreement are to apply to proceedings concerning China consistent with Section 15 of China's Accession Protocol and the Working Party Report;
- these provisions are to apply "in determining price comparability";
- they are to apply with respect to the use of domestic prices or costs in China;
- they are to apply with respect to the industry under investigation;
- they are to apply with respect to the issue of market economy conditions and the presence of special difficulties;
- they permit the use of a methodology not based on a strict comparison; and
- China has failed to establish that, taking into account all the attendant circumstances, Article 2(7) imposes an unreasonable burden of proof on

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251 See, in particular, Section 15, paragraph (a) : "… a methodology that is not based on a strict comparison with domestic prices or costs in China …".
Chinese exporters, and in any event has made no claim under Article 2.4 of the Anti-Dumping Agreement.  

327. In choosing to completely ignore these provisions both procedurally and substantively, China has *presumptively considered* them meaningless, and has decided to frame its claims and arguments accordingly. Consistent with that, China has not included in its first written submission any arguments whatsoever about the meaning of these provisions, and it is now too late for China to modify its claim and develop such arguments. In these circumstances, the only course of action open to the Panel is to reject China’s claim.

10.1.7. In any event, China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994

328. In any event, China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994.

10.1.7.1 China’s First Claim must be rejected because it "lacks an essential step" and does not include Article VI:2 of the GATT 1994

329. China’s First Claim under Article I:1 of the GATT 1994 is based on a fundamental analytical error. That error is the attempt to bring a claim under Article I:1 of the GATT 1994 against anti-dumping legislation whilst not including, in such claim, Article VI:2 of the GATT 1994. That is an error because Articles I:1 and VI:2 must be considered together. Article I:1 contains an affirmative obligation ("shall be accorded"), whilst Article VI:2 contains a qualified permission ("may levy"). The two provisions are thus in counterpoint to each other, in the sense that a measure that is consistent with Article VI:2, as implemented in the Anti-Dumping Agreement, would not breach Article I:1 of the GATT 1994. Accordingly, the relationship between the two provisions must necessarily be resolved in any particular case in which a complainant invokes Article I:1 of the GATT 1994 on its own terms (rather than as a consequential claim). This means that such a complainant and such a claim must necessarily include both provisions. If a complainant fails to include both provisions, its claim is simply lacking an essential element. Thus, as the Appellate Body has put it, China’s First Claim, as set out in the Consultations Request and Panel Request, as well as in its First Written Submission, "lacks an essential step".

330. In its First Written Submission, China attempts to change the First Claim set out in the Consultations Request and Panel Request by adding Article VI:1. China is not permitted to do that; and the Panel is not permitted to allow China to do that. Furthermore, the Panel must not seek to make the case for China.

331. In any event, China's attempt to change its First Claim from a claim under Article I:1 to a claim under Articles I:1 and VI:1 is unavailing. As we further

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252 See para. 350 of this Submission.
254 See above, Section 10.1.3 of this Submission.
explain below, Article VI:1 of the GATT 1994 simply contains a definition: it does not contain either an obligation or the pertinent permissive language. Rather, as we have just observed, the pertinent permissive language is contained in Article VI:2 of the GATT 1994. Therefore, if China would have wished to bring a claim based on Article I:1 of the GATT 1994, it should have included in that claim Article VI:2 of the GATT 1994. There is no reference to Article VI:2 of the GATT 1994 in China's Consultations Request or Panel Request, or in China's First Written Submission.

332. The substantive legal position is confirmed by the principle expressed in Article II:2(b) of the GATT 1994, to the effect that Article II cannot prevent the imposition of an anti-dumping duty applied consistently with the provisions of Article VI. This statement finds its natural place in Article II because, absent an agreed undertaking, the consequence of an anti-dumping proceeding (if there is injurious dumping) is an anti-dumping duty.

333. This is further confirmed by the substantive nature of the relevant provisions. Article I:1 contains an affirmative obligation (“shall be accorded”) that must be complied with unconditionally, irrespective of origin. Thus, under Article I:1 viewed in isolation, an objective difference between two Members (such as that one is the source of injuriously dumped products whilst the other is not) is incapable of justifying different treatment.

334. By contrast, under the Anti-Dumping Agreement, the rule is that, when an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports from those sources found to be dumped and causing injury.

335. Consequently, if one seeks to apply Article I:1 of the GATT 1994, without more, in the field of anti-dumping (as China does in its First Claim) the result would simply be that anti-dumping measures could never be applied, unless they would be applied to all Members at the same rate. That conclusion would be inconsistent with the principle that it is not permissible to interpret a treaty in a way that renders entire provisions meaningless, and is obviously legally erroneous. Article VI:2 of the GATT 1994, insofar as it refers to anti-dumping law, is lex specialis compared to Article I:1 (which is titled "General Most-Favoured-Nation Treatment"), and must accordingly prevail.

336. If China would be correct in the proposition that the First Claim can properly refer to Article I:1 of the GATT 1994 on its own, the consequence would be

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255 See below, Section 10.2.3 of this Submission.
256 Anti-Dumping Agreement, Article 9.2.
257 Panel Report, US – 1916 Act (Japan), para. 6.269 ("[W]e view the Appellate Body statement as applying the general principle of international law lex specialis derogat legi generali"); Panel Report, US – Zeroing (Japan), para. 7.202 ("Only if the underlying anti-dumping measure is WTO-inconsistent will the safe harbour provided for in Article II:2(b) become unavailable"); Panel Report, Brazil – Measures Affecting Desiccated Coconut, para. 280 ("We recognize that Articles I, II and VI of GATT 1994 are interrelated, and that Article VI allows measures which might otherwise be inconsistent with Articles I and II of GATT 1994"); and Appellate Body Report, Brazil – Measures Affecting Desiccated Coconut, p. 21 ("We find, therefore, that the Panel did not err in concluding at paragraphs 280 and 281 of the Panel Report that the applicability of Article VI of the GATT 1994 to the countervailing duty investigation which is the subject of this dispute, also determines the applicability of Articles I and II of the GATT 1994 to that investigation").
that, in all cases involving anti-dumping measures, whether legislation or measures applying such legislation, a complainant need only file a claim under Article I:1 of the GATT 1994. According to this logic, it would then be for the responding party to cite Article VI of the GATT 1994 and the Anti-Dumping Agreement, and to affirm that the measure at issue is consistent with all of the obligations contained therein, and in doing so (according to China) assume the burden of proof. We disagree with these propositions, which we consider are not consistent with the case law or the way in which the Members have approached this issue in the past.

337. For these reasons, China's First Claim must be rejected.

10.1.7.2 China has failed to establish that Articles 2(1) to 2(7) lay down "rules or formalities in connection with importation"

338. China has failed to establish that Articles 2(1) to 2(7) of the EU Basic Regulation lay down "rules or formalities in connection with importation". Rather, as we have explained above, Articles 2(1) to 2(7) of the EU Basic Regulation contain provisions that govern the determination of normal value, which, as China agrees, is distinct from the export price (that is, the imports to the European Union). In other words, Articles 2(1) to 2(7) of the EU Basic Regulation lay down "rules" in connection with normal value, not importation. The determination of a normal value with respect to a Chinese producer does not require or involve any consideration of imports to the European Union.

339. Furthermore, contrary to what China asserts, there is no necessary or logical connection between the determination of a normal value and possible future importation, the two things being clearly dissociated. First, the determination of a normal value does not necessarily entail the determination of a dumping margin. On the contrary, where the export price is above normal value, no dumping margin will be determined. Second, even the determination of a dumping margin does not necessarily entail the imposition of a duty, if no injury has been caused. Third, because of the application in the European Union of rules regarding the Union Interest, even a determination of injurious dumping

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258 Panel Report, *US – DRAMS*, paras. 4.75-4.79 (summarising the argument that Article VI is not an "exception" to Article I, and is not in the nature of an "affirmative defence", and that the burden of proof rests with the complainant) and paras. 6.69 and 6.80 (rejecting Korean claims because of the absence of a *prima facie* case); Appellate Body Report, *Thailand – H-Beams*, para. 79: ("We are conscious that, in our assessment of the facts of the matter, we may not relieve Poland of its task of establishing the inconsistency of Thailand’s AD investigation and resulting measure with the relevant provisions of the AD Agreement."); Panel Report, *US – 1916 Act*, para. 6.220: ("The fact that Article VI provides for a carve-out to Articles I and II … merely confirms that duties may be imposed under Article VI without violating Articles I and II of the GATT 1994."); Appellate Body Report, *EC – Fasteners (China)*, para. 392: ("We observe that Article VI of the GATT 1994 permits the imposition of anti-dumping duties, which may otherwise be inconsistent with other provisions of the GATT 1994, such as Article I:1. Therefore, in our view, a preliminary question to be addressed before determining whether an anti-dumping duty has been imposed inconsistently with Article VI of the GATT 1994 is whether the anti-dumping duty had been imposed consistently with Article VI of the GATT 1994."). See also: Appellate Body Report, *Brazil – Desiccated Coconut*, page 21 (Section V) (agreeing with the panel in that case that determining the applicability of Article VI determines the applicability of Articles I and II).

259 China's First Written Submission, para. 105.

260 EU Basic Anti-Dumping Regulation, Article 21.
will not necessarily result in the imposition of a duty on imports. Fourth, in any event, whatever the results of an investigation, whether or not imports subsequently take place is a matter for particular producers, not the European Union. Therefore, there are at least four degrees of disconnectedness between Articles 2(1) to 2(7) and future imports.

10.1.7.3 China has failed to establish that Articles 2(1) to 2(7) confer an advantage on a "product" compared to a "like product"

340. The reasoning that China attempts to employ with respect to the issue of "like products" is based on an erroneous presentation of Articles 2(1) to 2(7). Specifically, China asserts that Articles 2(1) to 2(6) apply to all countries "except" those deemed to be non-market economy countries. However, China is incorrect. As shown in Table B above, Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation apply to all countries, including those deemed to be non-market economy countries. Since China's conclusion is based on an erroneous statement about Articles 2(1) to 2(7), China's conclusion is flawed and should be rejected. Furthermore, China appears to overlook the fact that Article I:1 of the GATT 1994 refers to products and like products, whereas Article 2(7) of the EU Basic Anti-Dumping Regulation pertains to the treatment of producers. China is not permitted to simply assume that this amounts in effect to the same thing.

10.1.7.4 China has failed to establish that Articles 2(1) to 2(6) confer an "advantage" compared to Article 2(7)

341. China has failed to establish that Articles 2(1) to 2(6) confer an "advantage" on products from other countries that is not conferred on products from China.

342. In this respect, the first argument advanced by China seeks to compare the use of prices or costs from a third country with the use of "home market" prices or costs. However, China's argument necessarily fails because China is obviously not comparing like with like. If China wants to include, in the comparison it seeks to make, information about prices or costs from a third country, then obviously China must also include that aspect on both sides of the comparison. And if China wants to include, in the comparison it seeks to make, information about what China calls "home market" prices and costs, then obviously China must also include that aspect on both sides of the comparison.

261 China's First Written Submission, paras. 106-108.
262 China's First Written Submission, para. 106.
263 China's First Written Submission, paras. 106-108.
264 China's First Written Submission, para. 113.
265 As shown in Table B, Column 4, Items 7 and 8. Column 4 of Table B is titled: "Article 2(7) (China and certain other countries)".
266 As shown in Table B, Column 2, Items 1 to 6. Column 2 of Table B is titled: "Articles 2(1) to 2(6) (all WTO Members, including China)."
267 That is, not just Table B, Column 4, Items 7 and 8, but also Table B, Column 2, Items 7 and 8.
268 That is, not just Table B, Column 2, Items 1 to 6, but also Table B, Column 4, Items 1 to 6.
343. When the comparison is set up correctly in this way, China's argument is revealed as insufficient. As we explained above, the bases for determining normal value under Articles 2(1) to 2(6) and Article 2(7) are the same; it is the legal provisions leading to those various bases that are different – and what China is really pointing to is an alleged condition, not a relative disadvantage. In this respect, it is well understood that, where the sole difference in a single legal regime is that an additional requirement is imposed with respect to imported products, because an examination of whether imported products are treated less favourably "cannot rest on simple assertion", close scrutiny of the measure will require further identification or elaboration of its implications for the conditions of competition in order to properly support a finding of discrimination. In other words, a formal difference will not be sufficient to demonstrate a violation. In this respect, the burden rests on China, and mere assertion is not enough.

344. China argues that it is necessarily an advantage for an exporter to use its own data compared to having that link severed. However, China's argument fails for at least four reasons.

- First, one simply never knows – it might well be that the other data is more advantageous.

- Second, as Table B, Column 2 illustrates, in the context of Articles 2(1) to 2(6), 9 of the 11 bases for determining normal value "sever the link" with the exporter (the exceptions being Items 1 and 3). Furthermore, an equal number of Items in Column 4 do not sever the link (Items 1 and 3). Therefore, it is insufficient to assert that, because Column 4, Items 7 and 8 "sever the link", Articles 2(1) to 2(6) confer an advantage that is unavailable under Article 2(7).

- Third, there is an important advantage associated with the use of other data: provided that the exporter has co-operated facts available will never be used against that exporter, because the information used by definition originates from co-operating producers in the third country.

- Fourth, and significantly, as we have explained above, contrary to what China asserts, for the "vast majority" of exporters, the "link is severed" as a result of the operation of the sampling rules contained in Article 17 of the EU Basic Anti-Dumping Regulation, not as a result of Article 2(7). Article 17, which is not identified in the Panel Request as specific measure at issue, applies equally in the context of Articles 2(1) to 2(6)). In effect, China is attempting to impute the consequences of Article 17 to Article 2(7), and that fundamental error vitiates its entire analysis. China is not permitted to pick and choose which bits of the specific measure at issue identified in the Panel Request fall to be analysed, any more than China is permitted to pick and

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269 See Section 3.2, and particularly paras. 154-156 of this Submission.
270 Appellate Body Report, Thailand Cigarettes (Philippines), para. 130.
271 Appellate Body Report, Korea – Various Measures on Beef, para. 137.
273 China's First Written Submission, paras. 113 and 116.
274 See Section 3.3 of this Submission.
choose which bits of the law framing the obligation fall to be analysed (by ignoring the new Section 15).

345. China argues that the Anti-Dumping Agreement indicates a preference for using an exporter's own data. However, this argument is a *non sequitur*. Whether or not the Anti-Dumping Agreement indicates any such preference, it does not follow that the use of one's own data is always an advantage, still less that Articles 2(1) to 2(6) are advantageous compared to Article 2(7).

346. Thus, when China's argument is properly illuminated, based on the actual terms used in the specific measure at issue identified in the Panel Request, the error in China's reasoning becomes apparent. In effect China is arguing that, because Article 2(7) (allegedly) contains a condition that applies only to China (and certain other third countries), Articles 2(1) to 2(6) must be necessarily understood as conferring an advantage. In other words, China is trying to collapse two distinct elements of the obligation (advantage and conditionality) into one, and in effect dispense with its obligation to demonstrate an advantage. China is not permitted to do that.

347. The second argument advanced by China is that the way in which Article 2(7) has been applied "confirms" the disadvantage demonstrated in the preceding section of China's First Written Submission. However, since, as we have just explained, China's first argument does not demonstrate an advantage, there is nothing to confirm, and it therefore becomes unnecessary to consider China's second argument.

348. In any event, as China acknowledges, making unfounded assertions about alleged trade effects is no substitute for explaining exactly what it is about the design and architecture of the relevant part of the measure at issue (Article 2(7)) that is supposed to be disadvantageous relative to the comparator (Articles 2(1) to 2(6)), over and above any condition that might or might not be part of the measure. China's argument also fails because it refers to hypothetical considerations embedded in a policy document incapable of forming a reliable or lawful basis for the objective assessment that this Panel is required to make. Specifically, it is stated expressly that the analysis did not take into account the possibility to use alternative data, should a "particular market situation" have been found. Since this is one of the possibilities under Articles 2(1) to 2(6), it follows that the hypotheticals contained in this document are entirely useless for the purposes of evidencing China's claim.

349. Finally, the document refers to only ten measures, all of which were adopted on the basis of the law prior to 11 December 2016. In this respect, China itself acknowledges that, during the relevant period "the vast majority" of Chinese producers did not even submit a request. That is, the Chinese producers chose not to take advantage of the opportunity afforded to them to access Articles 2(1) to 2(6). Thus, what China actually shows is not a relative advantage or

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275 China's First Written Submission, para. 115.
276 China's First Written Submission, paras. 118-123.
277 China's First Written Submission, para. 118.
278 Such as the unfounded assertion that Article 2(7) increases dumping margins by, on average, [[SCI]]%.
279 SWD(2016) 372 final, 9 November 2016 (Exhibit CHN-63), page 34.
280 China's First Written Submission, para. 31 and footnote 16.
disadvantage in Articles 2(1) to 2(7), but simply the indolence of the relevant Chinese exporters on this issue. That is not a matter for which the European Union is responsible, nor an assertion capable of grounding China's claim.

350. The third and final argument advanced by China is that Chinese producers must "clear the hurdle" of proving that market economy conditions prevail before Articles 2(1) to 2(6) are applied. Here, China explicitly confirms the nature of its argument, which is that the (alleged) existence of a condition necessarily demonstrates a disadvantage. As we have already explained above, that is insufficient for the purposes of establishing a claim under Article I:1 of the GATT 1994. Furthermore, in light of the governing burden of proof rule under the Anti-Dumping Agreement, which is that the importing Member must not impose an unreasonable burden of proof, in order to bring a successful claim, China would have to establish that Article 2(7) is, in this respect, unreasonable. China has completely failed to engage with this standard, let alone demonstrated, in light of all the attendant circumstances, that it is breached by Article 2(7). And in any event, neither the Consultations Request nor the Panel Request contain a claim under Article 2.4 of the Anti-Dumping Agreement. For these reasons, China's claim must be rejected.

10.2. **China's Second Claim: China has failed to demonstrate that Article 2(7) of the EU Basic Anti-Dumping Regulation is inconsistent with Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement**

10.2.1. Summary of China's Second Claim and arguments

351. China claims that Article 2(7) of the EU Basic Anti-Dumping Regulation insofar as it relates to China is inconsistent with Article VI:1 of the GATT 1994 and the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement. Specifically, according to China, these WTO provisions allegedly "prohibit" the determination of normal value on the basis of third country prices and/or costs. In other words, determining normal value on the basis of third country prices and/or costs is allegedly inconsistent with "the obligation" under these

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281 China's First Written Submission, paras. 124-126.
282 See Section 2.1.2.5 of this Submission.
284 Panel Request, para. 7(ii): ("… China is concerned that … (ii) Article 2(7) is inconsistent with Articles 2.1 and 2.2 of the Anti-Dumping Agreement, Article VI:1 of the GATT 1994, and the second paragraph of the Ad Note to Article VI:1 of the GATT 1994 (the "Ad Note")").
provisions to "inter alia" determine normal value on the basis of domestic prices or on the basis of a producer's costs of production in the country of origin. According to China, Article 2(7) of the EU Basic Anti-Dumping Regulation is inconsistent with these provisions because, allegedly, it "requires" the EU investigating authority to reject Chinese market prices and costs when calculating normal value in favour of third country prices and costs.

Also according to China, the "only exception" to this "rule" (the alleged prohibition on having recourse to information from a third country for the purposes of determining normal value) is found in the Ad Note to Article VI:1, second paragraph, which permits a Member to depart from a strict comparison with domestic prices only if the Member satisfies the two conditions set forth in the Ad Note. China submits that Article 2(7) requires the European Union, in certain defined circumstances, to depart from such a strict comparison without satisfying the relevant conditions in the Ad Note. In particular, according to China, with respect to China, Article 2(7) requires the European Union to depart from such a strict comparison when a producer does not satisfy the requirement in Article 2(7)(b) to demonstrate that market economy conditions prevail.

In Section IV.B of its First Written Submission, China begins by setting out what it describes as an "overview of the legal standards", making various assertions about the definition in Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement. The European Union disagrees with China's presentation, because it departs significantly from the terms actually used in the treaty provisions to which China is referring, and because it is selective and partial. We refer instead to our own summary of the legal framework set out in Section 2 of this submission.

However, we do agree with China that all of the applicable provisions represent an inseparable package of rights and obligations and that they must be interpreted and applied in a coherent and consistent manner.

China then turns to the application of these legal provisions to the measure at issue (Article 2(7) of the EU Basic Anti-Dumping Regulation). China first sets out what it presents as "relevant features of the measure". However, for the reasons that we have already explained, the European Union disagrees with China's presentation, particularly because it is not based on the actual terms used in the specific measure at issue identified in the Panel Request.

Next, China claims that Article 2(7) is inconsistent with Article 2.2 of the Anti-Dumping Agreement, "read in the light of Article 2.1". According to China, Article 2.2 "permits an authority to depart from home market prices" solely in cases where certain conditions are satisfied. China submits that Article 2(7)

285 Panel Request, para. 9.
286 Panel Request, para. 9.
287 Panel Request, para. 10.
288 China's First Written Submission, Section IV.B.1.
289 China's First Written Submission, paras. 147, 148 and footnote 194.
290 China's First Written Submission, paras. 159-160.
violates Article 2.2 because it "provides for" the "rejection" of "home market prices" "without meeting the conditions" in Article 2.2. Specifically, China alleges that, under Article 2(7), the EU investigating authority must determine normal value "using surrogate prices or costs in an analogue country", unless the Chinese producer demonstrates that market economy conditions prevail. China concludes that the "default setting" under Article 2(7) is not to use "home market prices", and that this is inconsistent with Article 2.2, read in the light of Article 2.1.291

359. China then argues, somewhat repetitively, that Article 2(7) provides for the use of a "methodology" for determining normal value that is not one of what China refers to as "the permissible alternative methodologies" in Article 2.2 of the Anti-Dumping Agreement.292 China then repeats the same arguments with respect to Article VI:1 of the GATT 1994.293 Finally, China argues that Article 2(7) is inconsistent with the Ad Note to Article VI:1, second paragraph, because, according to China, the Ad Note is the "only" provision that provides "exceptional authority" for the use of a methodology not based on a strict comparison with domestic prices and costs, and Article 2(7) is "completely different" from the Ad Note.294

10.2.2. In the unlikely event that the Panel accepts China's First claim it should exercise judicial economy with respect to China's Second Claim

360. In the unlikely event that the Panel accepts China's First Claim, the European Union respectfully requests the Panel to exercise judicial economy with respect to China's Second Claim.

361. In this respect, the Appellate Body has repeatedly considered that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."295 The principle of judicial economy296 stems from the general principle enshrined in Article 3.7 of the DSU, namely, that the objective of the WTO dispute settlement system is to resolve the matter at issue in order "to secure a positive solution to a dispute".297

362. In the unlikely event that the Panel finds that Articles 2(1) to 2(7) breach the MFN obligation because Article 2(7) refers to China, then evidently, in order to comply, the European Union would be called upon to withdraw Article 2(7), which, as we have explained is something that has already been effectively achieved.

363. In this respect, the European Union would like to draw the Panel's very close attention to the precise language used in China's Consultations Request and

291 China's First Written Submission, paras. 161-165.
292 China's First Written Submission, paras. 166-169.
293 China's First Written Submission, paras. 170-175.
294 China's First Written Submission, paras. 176-181.
297 Appellate Body Report, Australia – Salmon, para. 223.
Panel Request, which determines what China's claim actually is and, in turn, the Panel's terms of reference.

364. China sets out the Second Claim (stated in paragraph 7(ii) of the Panel request) in paragraphs 9 to 11 of the Panel Request. The first two sentences of paragraph 9 are descriptive. The third sentence asserts the existence of a prohibition that does not in fact exist (a point we address below). The fourth sentence then contains the actual claim, that is, the reason advanced by China ("because") as to why it asserts that the measure at issue is inconsistent with the referenced obligation(s). The Panel Request states expressly and unequivocally that this is "because" the measure at issue allegedly requires the EU investigating authority to reject "Chinese market prices and costs". Paragraph 10 simply contains certain assertions about what China considers to be the "only exception"; and paragraph 11 then re-affirms the terms of China's Second Claim by reference to the "treatment afforded Chinese imports". In other words, China's Second Claim is firmly grounded on and limited to the specific treatment of China. Thus, in fact, China's Second Claim is, for all practical purposes, entirely duplicative of China's First Claim. In these circumstances, the Panel can and should exercise judicial economy with respect to China's Second Claim. This is a particularly compelling proposition in light of the withdrawal by the European Union of the measure at issue.

10.2.3. Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement merely contain definitions as opposed to obligations

365. Insofar as China asserts that Article 2(7) of the EU Basic Anti-Dumping Regulation is inconsistent with obligations allegedly contained Articles VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, the European Union observes that it is well-established in the case law that those provisions merely contain definitions, as opposed to obligations. It is also clear that a Member cannot breach a definition in isolation. For this reason, to the extent

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298 See Section 10.2.5 of this Submission.
299 Similarly, in the unlikely event that the Panel would reverse the order of analysis agreed between the Parties, and accept China's Second Claim, it should exercise judicial economy with respect to China's First Claim.
300 Appellate Body Report, US – Zeroing (Japan), para. 140: ("… Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the Anti-Dumping Agreement and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the Anti-Dumping Agreement, such as the obligations relating to, inter alia, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations. …"). (footnote omitted, bold emphasis added).
301 See, for example, Appellate Body Report, US – FSC (Article 21.5 - EC), para. 85: ("… Article 1.1 of the SCM Agreement sets out a definition of a "subsidy" for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the SCM Agreement which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1."). (bold emphasis added).
that China attempts to present an argument that refers only to one or other of these definitional provisions, such argument should be rejected by the Panel.

10.2.4. China has failed to cite to any operative obligation pertaining to anti-dumping legislation or law, such as Article 18.4 of the Anti-Dumping Agreement

The European Union notes that both of China's claims are directed against a provision of the EU's anti-dumping legislation (that is, the EU's anti-dumping law, as opposed to any application of that law pertaining to a particular product and country). However, China has failed to cite any provision of the Anti-Dumping Agreement that specifically imposes an obligation with respect to such law or legislation. For example, Article 18.4 of the Anti-Dumping Agreement (which is in Part III of the Anti-Dumping Agreement) contains an obligation requiring Members to take all necessary steps of a general or particular character to ensure the conformity of their anti-dumping laws with the provisions of the Anti-Dumping Agreement. However, China has made no claim under Article 18.4 of the Anti-Dumping Agreement, so any such claim is outside this Panel's terms of reference.

China's Second Claim refers to Article 2.2 of the Anti-Dumping Agreement (which is in Part I of the Anti-Dumping Agreement). However, as expressly stated in Article 1 of the Anti-Dumping Agreement, that provision, considered in isolation, governs action taken under anti-dumping legislation, that is, it governs anti-dumping legislation as applied. This is clear from the terms of Article 2 itself, which begins by referring to "a product" (that is, the product subject to a particular anti-dumping proceeding) being exported from "one country" (that is, the country that is subject to a particular anti-dumping proceeding) to "another country" (that is, the country conducting the particular anti-dumping investigation). The remainder of the provision continues in the same terms.

Accordingly, to the extent that China may have wished to seek review of Article 2(7) of the EU Basic Anti-Dumping Regulation in light of Article 2.2 of the Anti-Dumping Agreement, China was obliged to cite, as a legal basis for its complaint, not only Article 2.2, but also some other provision containing an operative obligation pertaining to anti-dumping legislation or law, such as Article 18.4. China failed to do that, and China's claim must therefore be dismissed.

To be clear, the European Union is not arguing that anti-dumping legislation cannot be reviewed "as such" under the Anti-Dumping Agreement; nor that it must first be applied before it can be reviewed "as such". Rather, we are arguing that, in seeking review of the EU anti-dumping legislation, China was required to make a claim pursuant to an obligation, such as Article 18.4 of the Anti-Dumping Agreement, which governs such matters, and which makes the obligations in Article 2.2 operative with respect to such legislation. Since China has failed to that, China's Second Claim cannot succeed.

302 For example, China's First Written Submission, paras. 170-175.
10.2.5. Contrary to what China asserts, Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement do not "prohibit" the determination of normal value on the basis of third country prices and/or costs.

370. Article VI:1 of the GATT 1994 and the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement potentially contain multiple and numerous obligations (Articles VI:1 and 2.1 contain definitions) and other statements. A word count reveals that there are in total 1,281 terms in these provisions. China recites (in part) and/or attempts to paraphrase some of these terms. However, ultimately, China does not state which of these 1,281 terms, considered alone or in combination with others, allegedly contains or constitutes a "prohibition" on the determination of normal value on the basis of information about prices or costs in a third country.

371. Such a severe level of ambiguity is unacceptable for the purposes of presenting a prima facie case. The presentation of a prima facie case requires the complainant to properly identify the treaty terms that it alleges frame the obligation asserted to have been breached, such that the defendant (and the adjudicator) are able to clearly understand what they are supposed to be. China's failure to do so breaches the European Union's due process rights: we are not in a position to properly and fully exercise our rights as a defendant in our first written submission because the content of China's first written submission is so vague and mercurial that we are unable to understand what precisely we stand accused of. For this reason alone the Panel should reject China's claim.

372. Even if the European Union were to embark on a guessing game in order to try to understand what China might be arguing (which we decline to do), and even if the Panel were to consider doing the same (which it must not do), we would both rapidly come to the conclusion that China's claim must be rejected, because the 1,281 terms referenced by China obviously contain no such prohibition. Indeed, China itself must be aware that no such prohibition exists. In these circumstances, the simple invocation of various treaty terms is not sufficient for China to make a prima facie case. China's manner of proceeding falls far below the required standard. It actually makes it impossible for the Panel to make an objective assessment and find in favour of China, because China has completely failed to provide the Panel with any basic rationale capable of supporting China's arbitrary assertions.

373. Furthermore, China's assertions flatly contradict the manner in which these provisions have been interpreted and applied in past cases. Notably, in EU – Biodiesel (Argentina) the Appellate Body repeatedly and expressly confirmed that there are circumstances in which an investigating authority may have recourse to information about prices or costs from a third country.\footnote{Appellate Body Report, EU – Biodiesel (Argentina), para. 6.70 ("… these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country …"); para. 6.71 ("… the determination of the "cost of production in the country of origin" may take account of evidence from outside the country of origin."); and para. 6.73 ("… the authority is not}
In these circumstances, given that China's Second Claim is, by its own terms, predicated on a legal proposition that is obviously incorrect, the Panel can and should reject China's Second Claim without it being necessary to consider any other aspect of China's arguments, and in particular without it being necessary to consider any aspect of Article 2(7).

10.2.6. The relevant aspect of Article 2(7) is not mandatory

As explained above, in WTO law, if a measure is not mandatory but rather discretionary, a panel can and should conclude that it is not "as such" inconsistent with the covered agreements.

For the same reasons that we have already set out above with respect to China's First Claim, China's Second Claim must be rejected because the relevant aspect of Article 2(7) of the EU Basic Anti-Dumping Regulation (insofar as it relates to China), is not mandatory.

10.2.7. China has failed to cite all the pertinent treaty language

In any event, and referring to the explanations already provided, the European Union submits that China's Second Claim must be rejected because China has not complied with the requirement that, in order to formulate a prima facie case, China, as the complainant, was required to cite all pertinent treaty language pertaining to the matter raised by China, including Section 15 and the Working Party Report.

Specifically, as we have already explained above, the European Union rejects China's apparent attempt to throw its burden onto the European Union. In particular, we reject China's apparent assumption that Section 15 is in the nature of an affirmative defence. Furthermore, for the purposes of this argument, the European Union submits that the Panel can and should rule in favour of the European Union with respect to this matter without it being necessary or appropriate for the Panel to enter into a substantive analysis of Section 15 and the Working Party Report, which neither China nor the European Union have placed within the Panel's terms of reference.

10.2.8. China has failed to demonstrate that Article 2(7) of the EU Basic Anti-Dumping Regulation is inconsistent with Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1, Articles 2.1 and 2.2 of the Anti-Dumping Agreement, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report

In the unlikely event that the Panel rejects the preceding arguments, then the European Union submits, in the alternative, that China has failed to demonstrate that Article 2(7) of the EU Basic Anti-Dumping Regulation is inconsistent with

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prohibited from relying on information other than contained in the records kept by the exporter or producer, including in-country and out-of-country evidence." (emphasis added).

See Section 10.1.4.


See Section 10.1.5 of this Submission.
Specifically, China appears to claim and argue that, to the extent that Article 2(7) of the EU Basic Anti-Dumping Regulation allegedly "requires" the use of a "methodology" not based on a strict comparison with domestic prices or costs, an inconsistency is thereby demonstrated.\textsuperscript{307}

The European Union disagrees.

As outlined above, China has apparently chosen to ignore the new Section 15 and the Working Party Report completely, and for this reason alone, as also outlined above, its claim suffers from a fundamental defect of a procedural nature and must be rejected. As also stated above, the Panel would not be able to reach this point of analysis without committing legal error.

That said, even if one would come to the point of examining the substance of Section 15 and the Working Party Report, whether on a stand-alone basis or as context, one would have to conclude that they also expressly permit the use of a methodology not based on a strict comparison with domestic prices in China.\textsuperscript{308}

Absence any argument from China (and it is at this point too late for China to modify its Second Claim or develop any such argument), the comparison of the two documents shows only that, even if Article 2(7) requires the use of such a methodology (\textit{quod non}), Section 15 and the Working Party Report permit the use of such a methodology. The logical conclusion is that, absent other arguments, the complainant has failed to present a \textit{prima facie} case demonstrating any inconsistency. When the claim is framed as an asserted inconsistency with treaty provisions allegedly prohibiting the use of a particular "methodology" (as here) resolution of such a claim would be entirely dependent on the complainant engaging with the treaty provisions that expressly permit the use of such a "methodology". To the extent that China has failed to do this, China has foreclosed any possibility of presenting a successful claim.

Furthermore, in light of the governing burden of proof rule under the Anti-Dumping Agreement, which is that the importing Member must not impose an unreasonable burden of proof,\textsuperscript{309} in order to succeed with its claim, China would have to establish that Article 2(7) is, in this respect, unreasonable. China has completely failed to engage with this standard, let alone demonstrated, in light of all the attendant circumstances,\textsuperscript{310} that it is breached by Article 2(7). And in any event, neither the Consultations Request nor the Panel Request contain a claim under Article 2.4 of the Anti-Dumping Agreement. For these reasons, China's claim must be rejected.

\textsuperscript{307} China's First Written Submission, para. 163.

\textsuperscript{308} See, in particular, Section 15, paragraph (a) : "... the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China ...".

\textsuperscript{309} See Section 2.1.2.5 of this Submission.

\textsuperscript{310} See footnote 283 of this Submission.
In sum, as outlined above, even if one would reach the point of examining the substance of the new Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report, together with Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement, the conclusion would be that:

- Article VI of the GATT and the Anti-Dumping Agreement are to apply to proceedings concerning China consistent with Section 15 of China's Accession Protocol and the Working Party Report;
- these provisions are to apply "in determining price comparability";
- they are to apply with respect to the use of domestic prices or costs in China;
- they are to apply with respect to the industry under investigation;
- they are to apply with respect to the issue of market economy conditions and the presence of special difficulties;
- they permit the use of a methodology not based on a strict comparison; and
- China has failed to establish that, taking into account all the attendant circumstances, Article 2(7) imposes an unreasonable burden of proof on Chinese exporters, and in any event has made no claim under Article 2.4 of the Anti-Dumping Agreement.

In choosing to completely ignore these provisions both procedurally and substantively, China has presumptively considered them meaningless, and has decided to frame its claims and arguments accordingly. Consistent with that, China has not included in its first written submission any arguments whatsoever about the meaning of these provisions, and it is now too late for China to modify its Second Claim and develop such arguments. In these circumstances, the only course of action open to the Panel is to reject China's Second Claim.

Finally, with respect to the Ad Note to Article VI:1, second paragraph, China is incorrect to assert that Article 2(7) of the EU Basic Anti-Dumping Regulation "requires resort the methodology set forth in the Ad Note". Rather, the actual terms used in Article 2(7) are set out above, and have been carefully explained by the European Union, without any reference to the Ad Note.


In this section the European Union briefly addresses the consequences of the expiry of Section 15(a)(ii), the inter-temporal application of WTO law, and the reasons why the date of application should be deemed the relevant operative event. We address these issues separately in this section because we see them as...
distinct from the substantive questions raised by China's First and Second Claims regarding the specific measures at issue.

389. These are not questions that one can simply seek to ignore, as China would apparently have it. Any termination of a provision of WTO law, whether agreed by the Membership today, or agreed by the Membership in 2001 upon China's Accession to the WTO (but only taking effect subsequently by operation of law following the expiry of a 15 year period), necessarily raises the question of what the consequences of termination are. This is particularly obvious in this case because the regulated municipal proceedings (anti-dumping proceedings), by the very terms of WTO law, span a particular period of time (typically, 18 months), as do anti-dumping measures themselves (typically, five years).

390. In this respect, at the risk of stating the obvious, the European Union would like to point out that Section 15 of China's Accession Protocol does not contain any provision to the effect that the termination of Section 15(a)(ii) should affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Consequently, it is self-evident that any anti-dumping proceedings existing prior to 11 December 2016, but concluded afterwards, are unaffected by the termination of Section 15(a)(ii).

391. Furthermore, it is equally self-evident that it is permissible to refer to the date of application for anti-dumping measures as the relevant operative event for this purpose. This is very clear from Article 18.3 of the Anti-Dumping Agreement, which reflects the fact that the expiring (pre-WTO) regime was to continue to be applicable to all pending anti-dumping proceedings. In effect, on 11 December 2016, a new legal regime, consisting of Article VI of the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement and the new Section 15 entered into force for China for the first time, and the same principles must therefore apply.

392. Consequently, in the unlikely event that the Panel were to find in China's favour, for example with respect to China's First Claim, the Panel must find, at

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313 Anti-Dumping Agreement, Article 5.10.
314 See: Vienna Convention on the Law of Treaties, Article 70(1), which provides in relevant part:

Article 70
Consequences of the termination of a treaty

1. Unless the treaty provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

…

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

315 Article 18.3 of the Anti-Dumping Agreement provides as follows: "Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

316 See also, in this respect, the principle reflected in Article I:3 of China's Accession Protocol, which provides as follows: "Except as otherwise provided for in the Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force."
that China has demonstrated its claim with respect to the specific measure at issue insofar as it applies to measures adopted pursuant to applications made on or after 11 December 2016, and subject to paragraphs 3.1 and 3.2 of Article 18 of the Anti-Dumping Agreement. Certainly, there is nothing in China’s Panel Request capable of supporting a contrary determination.

12. **REQUESTS FOR RULINGS AND FINDINGS**

393. In light of the preceding observations, the European Union respectfully requests the Panel to make the following Preliminary Rulings, and in any event to find that:

i. With respect to Articles 1, 2(8) to 2(12) and 3 to 25 of the EU Basic Anti-Dumping Regulation, China’s Consultations Request does not comply with Article 4.4 of the DSU and China’s Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

ii. With respect to Council Regulation 1225/2009, China’s Consultations Request does not comply with Article 4.4 of the DSU and China’s Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

iii. With respect to Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation as they existed up to and including 11 December 2016, China’s Consultations Request does not comply with Article 4.4 of the DSU and China’s Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

iv. In these proceedings, there are no claims concerning Articles 2(1) to 2(6) of the EU Basic Anti-Dumping Regulation *per se*, and they are only referenced to the extent that they are alleged to confer an advantage compared to Article 2(7).

v. With respect to references in Article 2(7) of the EU Basic Anti-Dumping Regulation to countries other than China, China’s Consultations Request does not comply with Article 4.4 of the DSU and China’s Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

vi. The 2013 Commission proposal is not within or properly within the scope of this dispute, and in any event China has not cited any legal basis on which the Panel could determine the 2013 Commission proposal to be WTO inconsistent.

vii. "Any changes" to the EU Basic Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2013
Commission proposal are not within or properly within the scope of this dispute.

viii. The 2016 Commission proposal is not within or properly within the scope of this dispute, and in any event China has not cited any legal basis on which the Panel could determine the 2016 Commission proposal to be WTO inconsistent.

ix. "Any changes" to the EU Basic Regulation that might (or might not) occur "pursuant to the legislative process initiated by" the 2016 Commission proposal are not within or properly within the scope of this dispute.

x. With respect to the measures listed in paragraphs 79 and 80 of China's First Written Submission, China's Consultations Request does not comply with Article 4.4 of the DSU and China's Panel Request does not comply with Article 6.2 of the DSU, and these matters are therefore not within or properly within the scope of this dispute.

394. In addition, subject to our submissions concerning the scope of China's claims and arguments, and our requests concerning judicial economy, the European respectfully requests the panel to find that:

i. China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation insofar as they relate to China are inconsistent with Article I:1 of the GATT 1994; or China has failed to demonstrate that Articles 2(1) to 2(7) of the EU Basic Anti-Dumping Regulation insofar as they relate to China are inconsistent with Article I:1 of the GATT 1994, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report.

ii. China has failed to demonstrate that Article 2(7) of the EU Basic Anti-Dumping Regulation insofar as it relates to China is inconsistent with Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement; or China has failed to demonstrate that Article 2(7) of the EU Basic Anti-Dumping Regulation insofar as it relates to China is inconsistent with Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1, Articles 2.1 and 2.2 of the Anti-Dumping Agreement, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report.

395. In any event, in light of the imminent withdrawal of Article 2(7) of the EU Basic Anti-Dumping Regulation, we consider these proceeding moot, and any findings or recommendations inapposite. This might well be an issue to which, to use China's words, China attaches "great political significance" – that does not and should not make it an appropriate or fruitful use of the dispute settlement mechanism. Furthermore, China's stated position is that the European Union should have amended Article 2(7) of the EU Basic Anti-Dumping

317 China's First Written Submission, para. 39.
Regulation in 2001, when China acceded to the WTO, in order to limit its term of application to 15 years\(^{318}\) – but China offers no explanation as to why it has waited until now to raise this issue, and continues to press it, on the eve of the withdrawal of Article 2(7). As indicated in our Request for a Preliminary Ruling that the Case is Moot, we stand ready to discuss with China a more pragmatic way forward. We note, in this respect, recent developments in Case DS515,\(^{319}\) and we consider that it is now abundantly clear that this would also be the only sensible way forward in this case.

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\(^{318}\) China's First Written Submission, para. 42.
\(^{319}\) United States – Measures Related to Price Comparison Methodologies, Request for Consultations by China, Addendum, WT/DS515/1/Add.1, G/L/1169/Add.1, G/ADP/D115/1/Add.1, 8 November 2017.