AS DELIVERED

In the World Trade Organization

Panel Proceedings

European Union — Measures Related to Price Comparison Methodologies

(DS516)

First Opening Oral Statement

by the European Union

Geneva, 6 December 2017

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1. Mr. Chairman, distinguished Members of the Panel.

2. In Part I of this Oral Statement we address what we consider are some important issues that we wish to bring to your attention at this oral hearing.

3. Part II of this Oral Statement responds more specifically to the four issues that you indicated, in your communication of 29 November, to be of particular interest to you.

4. As a preliminary and overarching observation, we wish to point out that we do not agree with the way in which China seeks to conduct itself in the context of this oral hearing. We have taken note of the very long opening oral statement, of three hours, covering a lot of issues that we believe should have been covered in China's First Written Submission, making statements and assertions that we believe are problematic, given your Terms of Reference, and the way in which your Terms of Reference are limited by the Consultations Request and the Panel Request. We have 29 Exhibits, to what is supposed to be an *Oral* Statement (I don't believe these Exhibits have been read out).

5. We consider that there is a very substantial issue with due process vis-à-vis the European Union. This is exactly the kind of backloading issue that we were drawing to your attention during the organisational meeting, when you were considering your working procedures. This is a very serious issue because you do not wait until the end of the process before you begin your deliberations. You are deliberating throughout the process: Today over lunch, this evening, tomorrow, and during the rest of the week. Those initial deliberations should be taking place in the light of the way in which the Dispute Settlement Understanding and your Working Procedures envisage these Panel Proceedings should be conducted, in a proper way.

6. It is not proper for China to come to this meeting with what purports to be a so-called Oral Statement, of such length, engaging in a whole range of matters that it has chosen to omit from its First Written Submission, effectively seeking to ambush the European Union. That's not right, and it can't be fixed, because you are deliberating now, and these deliberations China is seeking to adversely affect to China's advantage in the manner in which China seeks to conduct these Panel Proceedings. And we object, we formally object.

7. I have been speaking about due process and the position of the European Union. Now one of the issues that you want to hear about is third parties. I am referring to the case law when I say that this kind of problem and this way of proceeding is particularly unfair to the third parties, obviously. The third parties are going to be given, effectively, overnight, in order to think about whether they need to adjust their oral statements for tomorrow. That's wrong. These issues should have been in China's First Written Submission and then the third parties would have had the time that you afforded them, according to the Working Procedures and in the timetable, to consider, to reflect, to consult with people in the capital, and to take a view. Apparently China is happy to accept that the third parties are going to be deprived of those opportunities. That is not consistent with Article 10 DSU, and it is not consistent with your Working Procedures. I think it demonstrates without any question that the third parties have to be present throughout the second hearing. I cannot see how, at this point, you can reach any other conclusion given what China has done.

8. It also means, logically, that the third parties must have another opportunity, apart from tomorrow morning, to make their views known to you. In this respect we do recall that we have the opportunity to put questions to third parties both orally, and in writing, and we firmly intend to exercise that right in light of the way in which China has delivered a so-called Oral Statement of three hours long. In light of the fact that we do intend to exercise that right, which is ours, I suggest, Mr Chairman that to make the process as orderly as possibly, it would be appropriate for the Panel to decide today, so that the third parties know already where they stand, that the Panel will be allowing the third parties to file an additional brief. That would mean that these things would be done in an orderly way, and I think that would be better. I think would be realistic, and it would be fair. I can imagine that tomorrow morning when the third parties share their views with you, they may have similar views. If that is something that you will not be able to do today, then we will be exercising our right to put questions to the third parties orally, and/or in writing. This will eventually reach the same result, but it would be better if tthis was a process that the Panel would manage. We think that would be preferable.

9. Just before I proceed further with Part I of our Oral Statement, we have outstanding a number of requests for preliminary rulings. We would just like to

draw your attention to the fact that, in our opinion, there is no contest from China regarding our requests for preliminary rulings set out in our First Written Submission. China says simply that according to China it is unnecessary for you to make preliminary rulings on the issues that we have identified, and this is in paragraphs 240, 242, and 243 of China's Oral Statement. In effect that is no contest, and we expect these matters now to be closed. We would not expect China to come back to these issues, for example, in its Second Written Submission. Now is the moment, if China wished to address these issues, for China to have done so. To allow China to come back to these issues later on, would be yet another example of the kind of back-loading that is so problematic. I wanted to begin by making this important point about our requests for preliminary rulings.

10. The second point, and I will come back to that later in the Oral Statement, is about the order of China's claims. You will see that China seeks to reverse the order of China's claims. China's first claim is under Article I:1 of the GATT, China's second claim is under Article 2.2. In its Oral Statement, China seeks to reverse the order of its claims, and it seeks to re-characterise the nature of those claims. This is an issue that I will speak to later on in the Oral Statement. It is extremely striking to us.

11. With these two observations, we think the case before you has been reduced to one-third of its initial size. We can strike out all of the initial preliminary ruling requests, because there is no contest; and we can strike out China's claim under Article I:1 of the GATT. That makes life much simpler for you.

1. PART I

1.1. BURDEN OF PROOF UNDER THE ANTI-DUMPING AGREEMENT

12. Anyone who knows anything about anti-dumping law knows that the entire investigation process is grounded in the issuance of questionnaires to the interested parties requiring them to provide certain information.[1] Furthermore, the investigating authority has no absolute and enforceable right to verify such

[1] Anti-Dumping Agreement, Articles 6.1 and 6.1.1.

information.[2] It merely has the right, in case responses to its questions are incomplete or unreliable, in whole or in part, to reject such unreliable information, and to base its determinations on the information available.[3] In short, by asking such questions, the investigating authority places the **burden of proof** with respect to certain matters on certain interested parties, who also bear the consequences of failing to discharge their burden.

13. With respect to "the methodology used in **the establishment and comparison of the export price and the normal value under Article 2**"[4], the governing obligation is that the investigating authority must indicate to the parties in question what information is necessary to ensure a fair comparison between the normal value and the export price; and **it must not impose an unreasonable burden of proof**.[5] The obligation to make a proper and fair comparison and not to impose an unreasonable burden of proof applies generally with respect to the entirety of Article 2.[6] It also applies with respect to each of the five types of anti-dumping proceeding: original investigations;[7] changed circumstances reviews;[8] sunset reviews;[9] newcomer reviews;[10] and final assessments.[11]

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[2] Anti-Dumping Agreement, Article 6.7 and Annex I: ("Procedures for on-the-spot investigations pursuant to paragraph 7 of Article 6").

[3] Anti-Dumping Agreement, Article 6.8 and Annex II: ("Best information available in terms of paragraph 8 of Article 6".)

[4] Anti-Dumping Agreement, Article 12.2.1(iii).

[5] Anti-Dumping Agreement, Article 2.4: ("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."). See also: Anti-Dumping Agreement, Article 6.1 and Annex II, paragraph 1.

[6] Appellate Body Report, *EC – Bed Linen*, para. 59 ("… Article 2.4 sets forth a **general obligation** to make a "**fair comparison**" between export price and normal value. This is a general obligation that, in our view, informs **all of Article 2**, but **applies, in particular**, to Article 2.4.2 …"); Appellate Body Report, *US – Washing Machines*, para. 5.135: (" … the Appellate Body has explained that "Article 2.4 sets forth a **general obligation** to make a '**fair comparison**' between export price and normal value", adding that "[t]his is a general obligation that … informs **all of Article 2**, but **applies, in particular**, to Article 2.4.2 …"). Compare: Article 6 of the Anti-Dumping Agreement (no general rule on burden of proof); Article 3.1 of the Anti-Dumping Agreement ("A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence …"); Article 3.7 of the Anti-Dumping Agreement ("A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility."); and Articles 5.2 and 5.3 of the Anti-Dumping Agreement: ("An application under paragraph 1 shall include evidence of …").

[7] Anti-Dumping Agreement, Article 5.1; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 125-146.

[8] Anti-Dumping Agreement, Article 11.2; Panel Report, *US – Shrimp II (Vietnam)*, para. 7.396.

[9] Anti-Dumping Agreement, Article 11.3; Appellate Body Report, *US – Zeroing (Japan)*, paras. 183-185.

14. Obviously, in order to ensure a fair comparison, the investigating authority requires complete and reliable information about both the normal value and the export price of the product under investigation.

15. To take **export price**, for example. In order to make a fair comparison between normal value and export price, an investigating authority must indicate to the party in question (that is, the exporter) what information it requires with respect to export price. This will include information about export transactions to the importing Member during the investigation period, eventually supported by appropriate documentary evidence, in order to establish the export price within the meaning of Article 2.3 of the Anti-Dumping Agreement. In other words, **the investigating authority will place the burden of proof with respect to this matter on the exporter, and that is reasonable**.

16. Furthermore, if it appears to the investigating authority that the export price is **unreliable**, for example because of an **association or compensatory arrangement**, then the export price may be constructed.[12] In such circumstances, the investigating authority also has the right to put questions to the relevant interested parties, seeking from them full disclosure of all the pertinent circumstances, supported by appropriate evidence, and clarifying the situation. In other words, it also has the right to put the burden of proof with respect to such matters on the exporter, and this is a reasonable approach.

17. Obviously, the position is no different with respect to the other part of the comparison, which is the establishment of a comparable **normal value** pursuant to the provisions of Article 2.2 of the Anti-Dumping Agreement. In this respect, the investigating authority also has the right to seek the necessary information from the relevant interested party (the exporter) regarding both prices and costs. Furthermore, if it appears to the authority that the data is unreliable, for example, because it is not in accordance with generally accepted accounting principles in the

[10] Anti-Dumping Agreement, Article 9.5; Appellate Body Report, *US – Zeroing (Japan)*, paras. 164-166 and 169.

[11] Anti-Dumping Agreement, Article 9.3; Appellate Body Report, *US – Zeroing (EC)*, para 146.

[12] Anti-Dumping Agreement, Article 2.3.

country of origin,[13] or because of an association or compensatory arrangement, or because of a particular market situation,[14] the investigating authority also has the right to put questions to the relevant interested parties, seeking from them full disclosure of all the pertinent circumstances, supported by appropriate evidence, and clarifying the situation. In other words, it also has the right to put the burden of proof with respect to such matters on the exporter, and this is a reasonable approach.

1.2. SECTION 15 OF CHINA'S ACCESSION PROTOCOL

18. Then along came **Section 15** of China's Accession Protocol. By the terms of Section 15 itself, Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement continue to apply, consistent with Section 15. There is no conflict between these provisions (and, incidentally, Section 15 is not in the nature of an affirmative defence, any more than Article VI:2 of the GATT 1994 and the Anti-Dumping Agreement are in the nature of an affirmative defence to a claim under Article I:1 of the GATT 1994).

19. Mr Chairman, members of the Panel, this is obviously a point that we can assist you with by identifying it as a significant point of disagreement between the parties. And one that, no doubt, you will have to consider in your adjudication, and in your deliberations. The EU position is that there is no conflict. We heard, for the first time this morning, and in a tardy fashion, China's position in its Oral Statement at paragraphs 149 and 147. We hear China telling us that there is a conflict between Section 15 on the one hand, and Article VI of the GATT and Article 2 of the Anti-Dumping Agreement on the other hand. This is something that you are going to have to focus on and decide. We think it is clear that there is no conflict. Remember that the rule in the Anti-Dumping Agreement is that the Authority may not place a burden of proof on an interested party that is unreasonable. As we have explained in our First Written Submission very carefully and precisely, we believe that in Section 15 of China's Accession Protocol, when it was originally enacted, the burden of proof was placed on the

[13] Anti-Dumping Agreement, Article 2.2.1.1.

[14] Anti-Dumping Agreement, Article 2.2.

Chinese exporters. We believe that all of the members, including China, agreed that was reasonable. At least they agreed to it in Section 15 of the Accession Protocol. Now, where is the conflict? The obligation in the Anti-Dumping Agreement is not to impose a burden of proof that is unreasonable. That does not stop the Investigating Authority from imposing a burden of proof, which is appropriate in the particular set of circumstances, on interested parties. In Section 15 it is agreed that the burden of proof will be placed on the Chinese exporters. We say that is reasonable. I don't see a conflict. In WTO law if one wants to talk about a conflict, one tends to imagine for example two obligations that cannot be complied with at the same time: 'you shall do this, you shall not do this'. That might be a conflict. Where is the conflict between the Anti-Dumping Agreement and Article VI GATT, and Section 15 of China's Accession Protocol? We don't see it. We are confident of our position on this point, and we draw your close attention to the fact that it is an important point, and a point on which the parties significantly disagree because it has implications for many other parts of their arguments and submissions. There is no conflict between these provisions.

20. The other point I wanted to make here if I can, and this is also very important. One of the reasons we don't see a conflict is because of the point that we made in our First Written Submission that we believe the treaty interpreter must search for and prefer a harmonious and consistent interpretation of these concurrently applicable provisions. That is a point of principle for us. What I wanted to remind you of is that China fully agrees with and endorses this proposition. We find that in China's First Written Submission in paragraphs 147 and 148, and in footnote 194. We have also recalled this in paragraph 33 of the EU's First Written Submission. China does not disagree with us on this point, there is agreement between the parties that we must search for and prefer harmonious and consistent interpretation. How is it possible, given that principle, to see a conflict between Section 15 of China's Accession Protocol on the one hand, and Article VI GATT and the Anti-Dumping Agreement on the other hand? We just cannot see it. There is no conflict between these provisions, and incidentally, Section 15 is not in the nature of an affirmative defence (I will come back to that point later), any more than Article VI.2 GATT and the Anti-Dumping Agreement are in the nature of an affirmative defence to a claim under Article I.1 GATT.

21. Section 15 constitutes a **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provision, within the meaning of Article 31(3)(a) of the Vienna Convention.[15] Section 15 confirmed, as a matter of **authoritative** and **permissible** interpretation, that, in determining comparability, there are circumstances in which an investigating authority may reject not only prices that are unreliable, but also **costs** that are unreliable. It similarly confirmed that the relevant analysis may be conducted at the level of the **market** or industry investigated, and not necessarily only at the level of a particular firm or cost. Finally, it also confirmed that, given the lack of market conditions and transparency in China, it was **reasonable** to place the **burden of proof** with respect to such matters on the **Chinese exporters**.

22. Here, Mr Chairman I just want to make the point that China asserts that the position of the European Union, the position of the United States, and the position of Canada are different. We don't pretend to speak for the positions of the United States or Canada, we speak for the position of the European Union, but our understanding is that the positions of all of the parties and third parties expressing a view on this issue align with our own.

23. Specifically, I want to be crystal clear on one point. When we look at the new Section 15, we have what we call the 'stand-alone argument', meaning that we look at Section 15, separated from, and without regard to Article VI GATT and the Anti-Dumping Agreement. That is what we call the 'stand-alone argument'. We also have what we call the 'contextual argument' where we are looking at the new Section 15 together with Article VI GATT and Article 2 of the Anti-Dumping Agreement.

24. The European Union is putting forward these arguments concurrently, independently, and in the alternative. This is expressly set out in our First Written Submission in paragraphs 100, 101, 111 and 112, where we state this very clearly. I want to be very clear about that.

25. Some third parties emphasise one argument more than the other, but we don't understand there to be any fundamental difference between what we are saying

[15] EU First Written Submission, para. 278 and footnote 212.

and what the United States or Canada are saying. You can find China's statement to the contrary in paragraph 173. We believe it is incorrect.

1.3. THE EXPIRY OF SECTION 15(A)(II)

26. With the **termination of Section 15(a)(ii)** by operation of law on 11 December 2016, the China-specific rule on burden of proof in Section 15 ceased to apply. This means that the governing obligation regarding burden of proof in the Anti-Dumping Agreement, that is, the rule that the investigating authority must not impose an unreasonable burden of proof,[16] continues to apply, without the clarification provided by Section 15(a)(ii). Thus, China is now free to claim, should it wish to do so, that any Member that has imposed a burden of proof on Chinese exporters has done so unreasonably, and has therefore acted inconsistently with the relevant governing obligation in Article 2.4 of the Anti-Dumping Agreement. In that case, China would have to make a *prima facie* case establishing such a claim, which it has failed to do in these proceedings. There is no claim under Article 2.4 in the Consultations Request or the Panel Request or the First Written Submission.

1.4. THE SPECIFIC MEASURES AT ISSUE IDENTIFIED IN THE PANEL REQUEST

27. Now, as we have made clear in our First Written Submission, we attach considerable importance to the point that this adjudication must be made on the basis of the actual terms used in the treaty provisions cited by the parties, and the actual terms used in the specific measures at issue. The **specific measures at issue** in this case, and particularly Article 2(7) of the EU Basic Anti-Dumping Regulation, require Chinese exporters **to show** that market-economy conditions prevail for that producer in respect of the manufacture and sale of the like product, in accordance with the criteria and procedures set out in Article 2(7)(c), in order for normal value to be determined in accordance with Articles 2(1) to (6).

1.5. CHINA'S FIRST CLAIM AND CHINA'S SECOND CLAIM

28. As we have also made clear in our First Written Submission, we attach considerable importance to the point that the adjudication must be made on the

[16] Anti-Dumping Agreement, Article 2.4.

basis of the two claims actually set out by China in the Consultations Request and Panel Request. China's claims cannot be changed at this stage. China's **First Claim** is that Articles 2(1) to (7) of the EU Basic Anti-Dumping Regulation are inconsistent with Article I:1 of the GATT 1994. China's **Second Claim** is that 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 to 2.2 of the Anti-Dumping Agreement.

1.6. CHINA'S "STRAW MAN" – A "TALE OF TWO METHODOLOGIES"

29. Faced with the obvious difficulty of demonstrating these claims, instead of framing the matters before you by using the actual terms of the cited treaty provisions and the specific measures at issue, China's lawyers have sought to set-up what is commonly referred to as a "straw man". This involves:

- using inappropriate labels to frame the issue as something that it is not – this is the "straw man";
- then knocking that "straw man" down (rather than addressing the actual terms of the treaty provisions and the specific measures at issue); and
- then inviting the adjudicator to find that the specific measures at issue (which have never actually been addressed correctly) are inconsistent with the cited treaty provisions (which have also never actually been addressed correctly).

30. One could summarise China's approach as the "tale of two methodologies". It is seriously misconceived for at least four reasons.

31. *First*, China has fundamentally misunderstood the relevant provisions of WTO anti-dumping law, which have always allowed an investigating authority, when ensuring comparability, to reject abnormal and unreliable data and replace it with data from a third country, adjusted when necessary.

32. Here, Mr Chairman, members of the Panel, we can identify another significant point of disagreement between the parties. We wish to be of assistance to you in identifying what we think are the key points of disagreement, and we think this is another one. China has told us in its Oral Statement, for the first time, in a tardy way, that according to China, if there is an exogenous factor (we categorise that as a distortion), which impacts costs symmetrically, so it impacts the costs of the raw material for example, its impacts are expected to be reflected in both domestic prices and in export prices, so it is symmetrical. According to China, this is never

an issue of comparability. That is China's position, and you can see that in paragraph 80 of China's opening Oral Statement, and subsequent paragraphs where it is developed at some length. That is different from our position of course. Our position is that when you have something which is rendering a cost unreliable, even if that occurs in a symmetrical way, in other words, its impacts can be expected to impact both with respect to domestic prices and with respect to the export price, nevertheless there is an issue of comparability. That is what we say. So, this is an important point of difference between the parties that you will have to consider in the adjudication.

33. Now, we have offered you as examples specific instances where we have chosen something uncontroversial. We chose, for example, that the cost associated with the records of the firm is not in accordance with generally accepted local accountancy practice. That was an example that we chose. Why did we choose that example? Because we are isolating, for the purposes of legal analysis, the true nature of the dispute or the disagreement between the parties, by eliminating from the discussion any controversy about the condition in question. This is a condition that is provided for expressly in Article 2.2.1.1 and it is not controversial. Then we provided in our example, our reasoning, which explains why the symmetrical impact on the cost is an issue that affects comparability, and I will explain that again in a moment. Now in its Oral Statement when China comes to this issue, it decides not to engage with our example. It deliberately refuses to engage with the example that we gave, which is non-compliance with local GAAP. Instead China, saying it is engaging with our example, nevertheless replaces it with the concept of distortion, which China then submits is controversial. In doing that, China is leading you away from the core issue, which is whether or not what we all recognise to be a significant distorting impact, here non-compliance with local GAAP, but you could also choose a non-arms-length arrangement, we don't mind – but one impacting symmetrically, the question being, is that an issue of comparability? We say yes, China says no.

34. There are three sub-points here. The first point is, where do you find the issue of comparability? Again, there is a difference between the parties on this issue, which you may want to look at for the purposes of your adjudication. The EU position is that comparability is all the way through Article VI.1. The first subparagraph of

Article VI.1, and the second subparagraph of Article VI.1. China's position is that comparability is in only the second subparagraph of Article VI.1, the one that refers to differences affecting price comparability. Similarly, when we look at Article 2 of the Anti-Dumping Agreement, we say that comparability is present throughout Article 2. We can explain that to you more in the Q&A.

35. China's position is that comparability is only an issue in Article 2.4, which refers to the differences affecting price comparability. That is the second bullet point here. China thinks that comparability is only an issue when there is a difference, but we don't agree with that. We think that you can have a difference that does not affect comparability, so that is for example a red painted good and a blue painted good where the paint is the same cost. But you can also have a situation where there is no difference, but there is an issue of comparability. Why do we say that? This is central to the case, and that is the third bullet point.

36. What does comparability actually mean? We say comparability must mean more than simply comparing two things, because any two things can be compared. We say that comparability means that the two things can be compared for the purposes of giving a meaningful answer to the question, 'is there dumping as defined by the agreement?' We actually don't understand China to disagree with that. If two things cannot be compared in order to generate a meaningful answer to that question, one has not achieved comparability. One has just engaged in a meaningless exercise that will produce a false positive or a false negative. Central to our position is that dumping is defined as an export price which is less than a normal value determined either on the basis of price or on the basis of cost. You will hear as a constant refrain from China that dumping is defined as international price discrimination. China is trying, in making that statement repeatedly, to obfuscate the fundamental truth that dumping is defined as an export price less than a normal value where that normal value is based on domestic prices, prices to a third country, or constructed on the basis of costs in accordance with the terms of the agreement. That is why we say, that when there is a symmetrical impact on the cost of the raw material, you no longer have a meaningful comparison because you are not testing whether or not there is dumping, as that term has been defined by the agreement, which is an export price less than a normal value based on costs properly determined in accordance with the provisions of the agreement. So this is

another core issue that you are going to need to look at for the purposes of your adjudication. It is an important point of difference between the two parties.

37. *Second*, China has failed to understand that the **expiry of Section 15(a)(ii) of China's Accession Protocol did not change this aspect of the law**; it merely terminated the China-specific burden of proof rule set out in Section 15(a)(ii).

38. *Third*, in any event, China has failed to understand that **the live issue is not whether there are circumstances in which particular data might come from a third country (there clearly are, irrespective of whether the investigating authority is considering a market economy or a non-market economy), but rather what the applicable legal rules are with respect to burden of proof**. I would like to direct you to paragraph 107 of China's Oral Statement, where China itself acknowledges quite clearly in our view, that this is indeed what China refers to as the key issue. So on this point there seems to be some convergence between the two parties.

39. *Fourth*, China has presumptively (and erroneously) assumed that: Section 15 is in the nature of a so-called "affirmative defence"; and/or that the whole of Section 15(a), as opposed to 15(a)(ii), has expired; and/or that the new Section 15 has a meaning that supports China's case (or no meaning at all). Now, of course we wrote this before we heard China's opening Oral Statement this morning, in which it appears that China fully accepts that Section 15 is not in the nature of an affirmative defence. There is no representation even at this late stage, no representation made by China at all to that effect, so we will take it as read. Given the extensive treatment of this in our First Written Submission, given your questions, we will take it as read at this point that the parties are of one mind, that Section 15 is not in the nature of an affirmative defence, and/or that the whole of Section 15(a) as opposed to 15(a)(ii) is expired, and/or that the new Section 15 has a meaning that supports China's case or no meaning at all. Now this also is an issue of critical importance Mr Chairman. Here I have to take you to paragraph 22 of China's Oral Statement. I really do need to read specifically from that paragraph. It provides the reason why there is no reference at all, anywhere, in the Consultation Request, in the Panel Request, or in China's First Written Submission, no analysis at all of the new Section 15. It is not because China considers Section 15 to be in the nature of an affirmative defence. There is another

reason, and it's stated clearly in paragraph 2 of China's Oral Statement, the final sentence of which begins, "accordingly, there was no reason for China to seek rulings under Section 15". If we go back to the preceding sentence it says "as China explains as a matter of substance the EU agrees". So this is not a factually accurate sentence by China. I have just read to you the paragraphs in our First Written Submission where we state explicitly that we make both the stand-alone argument and the contextual argument, that is paragraphs 101, 111 and 112. We are grateful to China for explaining to us what China believes our arguments are, but China is mistaken, and China is not reading our First Written Submission apparently. We are the masters of our own arguments, and I will say three times, just for the avoidance of any possible doubt: The European Union does not agree, the European Union does not agree, the European Union does not agree. Therefore, the entire basis on which China has completely neglected to talk about the new Section 15 in its Consultation Request, in its Panel Request, and in any significant way in its First Written Submission is grounded on a totally false statement and the reality is that China has presumptively assumed that these provisions support its case or have no meaning. China is not entitled to do that. The only people who are entitled to clarify these provisions of the treaty, that are clearly applicable law, is this Panel, is you. That's your job, that's not China's job. You can't do that if China has not placed them into your terms of reference. China did not place them into your terms of reference.

40. We have explained to you very clearly in the first of our alternative arguments that we decline to do so, and have not placed them into your terms of reference because we decline to assume China's burden, and this is fatal to China's case. It is carried all the way through China's First Written Submission, to the findings and recommendations and that is reflected in the fourth matter where you have a particular interest. It's not there. How can you possibly imagine adopting a Panel Report that would make no reference at all to the new Section 15? That's not conceivable. But how can you reference it and explain what it means if neither party has put it in your terms of reference? You cannot. I think the conceptual, intellectual error in China's thinking is very clear. Before 11 December 2016 (I don't know because they haven't told us), China may have thought it was in the nature of an affirmative defence because of the word "may" in Section 15(a)(ii). So

they had in mind that it would be for us to plead it. But that expired on 11 December 2016 and what is left is obligations, "shall". This is not in the nature of an affirmative defence and they are not entitled to presumptively assume it supports their case or has no meaning. They have overlooked that point. We decline to assume their burden.

1.7. THE EUROPEAN UNION HAS REPEATEDLY DRAWN THIS TO CHINA'S ATTENTION

41. In light of the preceding observations, the European Union has explained **several times** why these panel proceedings cannot be **fruitful**:

- in our communication dated 21 December 2016 agreeing to enter into consultations with China but precisely delimiting the scope of that agreement;[17]
- at the DSB meeting on 21 March 2017 where China first requested the establishment of the Panel;[18]
- at the DSB meeting on 3 April 2017 where China requested the establishment of the Panel for the second time, and the Panel was established;[19]
- in our Request for a Preliminary Ruling that the Case is Moot;
- in our First Written Submission; and now
- in this Oral Statement.

42. In one way or another, all of the Third Parties so far expressing a view in writing support the position of the European Union.

1.8. WHY CHINA'S FIRST CLAIM MUST FAIL

43. I want to briefly recap why we believe that China's First Claim must fail. This is the claim under Article I.1 GATT 1994. There are three points I'd like to make. First, China is seeking to reverse the agreed order of consideration of the claims. It its First Written Submission it said First Claim, Second Claim, now they have turned them around. We don't think they can do that at this point. Also, in an extraordinary statement China seeks to impute that to us, that's paragraph 210 of China Oral Statement, that's nonsense. We have specifically agreed already to

[17] Exhibit EU-3.

[18] Exhibit EU-4.

[19] Exhibit EU-5.

the proposed order of considering the claims, and we have explained that we believe that the Panel should follow that agreed order. So for China to seek to impute that to the EU is remarkable. China obviously is seeking to reverse the order of the claims because China has understood, having read our First Written Submission, that their First Claim has no merit. Second point, as we have explained in our First Written Submission, one of the reasons why the First Claim has no merit is that there is no reference to Article VI.2. You can't bring a claim under Article I like that without bringing up Article VI.2. I have given you the Appellate Body Report in *Fasteners* that makes that point clear. There is something missing from the First Claim. China tries to brush that aside in paragraph 209 of its Oral Statement, and in footnote 184 where they cite to the Panel in *Fasteners*. We refer to the Appellate Body Report in *Fasteners*, and we think that the Appellate Body is more authoritative than the Panel Report. The third point I want to make here is that when you study paragraph 210 of China's Oral Statement, what China seems to be doing is trying to convert what is a stand-alone claim under Article I.1 GATT in its Consultations Request and in its Panel Request and for the most part in its written submission. Now, in its Oral Statement, apart from reversing the order, China is effectively representing that to you as a consequential claim. They say: deal with us on the Second Claim, and once you've dealt with us on the Second Claim then the First Claim will follow. We say, China can't do that, it's a stand-alone claim in the Consultations Request and in the Panel Request and we say they can't convert it into a consequential claim. In any event, by doing that, what China has actually done is that it has abandoned the stand-alone claim because it recognises it cannot prosper. That is a good thing. In any event, what is abundantly clear now is that the First Claim under Article I.1 GATT can have no value or merit because it's been reduced to a consequential claim in which case you can and should exercise judicial economy, and that it something that we have specifically asked you to do in our First Written Submission, regardless of the order of claims. We can give you the reference later, I don't have it to hand. It's in the section of our First Written Submission that deals with the order of the claims.

44. Now, as we have set out in our First Written Submission, China's First Claim must fail because:

- China is not permitted to change its First Claim by seeking to add, in its First Written Submission, provisions other than Article I:1 of the GATT 1994 (specifically, Article VI:1 of the GATT 1994). [20] China has effectively accepted this in its Oral Statement today, so we are done;
- the relevant aspect of Article 2(7) is not mandatory;
- China has failed to even cite, let alone engage with, all the pertinent treaty language (specifically, the new Section 15), [21] that is the point I have already made;
- China has failed to demonstrate that Articles 2(1) to (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.[22] In this respect I must take you to the final sentence of paragraph 147 of China's Oral Statement which is extraordinary, here China purports to tell us what is contained in the new Section 15(a). I am going to read it to you: in other words, the language in, and what China refers to as the "chapeau" (this is not treaty language, this is language that China has invented), establishes that the generally applicable rules shall apply provided that the China specific special rules set forth in the remainder of Section 15 will prevail to the extent that any inconsistency arises. No it doesn't. It does not contain almost any of those words. It certainly says absolutely no such thing. This is tied in with China's assertion

[20] **Third Party Written Submission of the United States**, Section V.B, particularly para. 174: (" … China cannot expand the legal basis for its claim at this time."). Compare: WT/DS515/1, 15 December 2016, Request for Consultations, page 3, paras. 3 (Article VI:2) and 5 (Article I:1); WT/DS515/1/Add. 1, 8 November 2017, Request for Consultations, *Addendum*, paras. I.c (Article VI:2) and e (Article I:1), and para. II.c (Article I:1, consequentially).

[21] **Third Party Written Submission of Canada**, para. 7: (" … it is incumbent on China to prove the validity of its assertions, including in respect of its claim that the effect of paragraph 15(d) is that the rules of paragraph 15(a) of China's Accession Protocol expired on 11 December 2016. Considering that paragraph 15(d) plainly states that subparagraph 15(a)(ii) expires, and not paragraph 15(a), China bears the burden of proving its affirmative assertion. Canada agrees with the European Union that China has failed to do so."). See also paras. 12-58. **Third Party Written Submission of the United States**, Section V.B and paras. 176-178, particularly para. 178: ("It would have been for China to claim and demonstrate an inconsistency with Section 15 …").

[22] **Third Party Written Submission of Canada**, para. 7: (" … it is incumbent on China to prove the validity of its assertions, including in respect of its claim that the effect of paragraph 15(d) is that the rules of paragraph 15(a) of China's Accession Protocol expired on 11 December 2016. Considering that paragraph 15(d) plainly states that subparagraph 15(a)(ii) expires, and not paragraph 15(a), China bears the burden of proving its affirmative assertion. Canada agrees with the European Union that China has failed to do so."). See also paras. 12-58. **Third Party Written Submission of Japan**, particularly paras. 61-73. **Third Party Written Submission of Mexico,** Sections II.1 and II.1 (e.g., para. 27: "Ahora bien, toda vez que la interpretación de China es totalmente contraria al sentido corriente de los términos del PAC, México considera que era indispensable que China presentara une explicación sobre el apartado d) de la sección 15 del PAC es válida, a pesar de ser contraria al propio texto de esa sección, cosa que evidentemente, China no presentó. Ante esta omisión, en opinión de México, la interpretación de China constituye une desviación injustificada de la regla general de interpretación de los tratados prevista en el párrafo 1 del artículo 31 de la Convención de Viena, …"; para. 38: "China no habría satisfecho su carga de probar prima facie la validez de su reclamación y, en consecuencia, sus reclamos carecerían totalmente de sustento."). **Third Party Written Submission of the United States**, Section V.B and paras. 176-178, particularly para. 178: ("It would have been for China to claim and demonstrate an inconsistency with Section 15 …").

that there is some conflict. There is no conflict, it's just amazing to us that this is the way China wants to deal with the terms of the treaty. It bears no relation to the terms of the treaty. The new Section 15 says nothing like that at all. It says that it applies consistent with Article VI, the Anti-Dumping Agreement, and the SCM;

- China has failed to include in its First Claim any reference to Article VI of the GATT 1994. As we have explained, we think this is now essentially acquis;[23]
- China has failed to establish that Articles 2(1) to (7) lay down "rules or formalities in connection with importation";[24]
- China has failed to establish that Articles 2(1) to (7) confer an advantage on a "product" compared to a "like product";[25]
- China has failed to establish that Articles 2(1) to (6) confer an "advantage" compared to Article 2(7)[26] and there is an important point here, Mr Chairman, that we feel compelled to mention again. China has this puff that allegedly its 30% different. So, according to China if you apply Articles 2(1) to (6), and compare that to what happens if you compare what happens when you apply Article 2(7) what you are saying is that because of the approach we use, the dumping margins we use for China are 30% higher than they otherwise would be. This is China's puff. China takes this number out of one of our documents, the impact assessment. An impact assessment is something we do for the purposes of our internal democratic legislative practices. It is a particular kind of document. It is expressly stated in that document necessarily takes no account of Article 2(1) to (6), of using information, for example, from a third country or international prices or any other reasonable method. It is expressly stated because the people making that assessment did not have the data. That document is a document that is prepared for our internal legislative processes. It's got nothing to do with China, thanks very much. The point is this, that number (30%), is an extraordinary misrepresentation. In our First Written Submission we specifically drew China's attention to this point. I will give you the paragraph citation later. We specifically directed them to the statement in the impact assessment that makes it crystal clear that that number has nothing to do with the possibility of going out of country under Article 2(2). It is therefore totally useless for the purposes China is trying to use it for. We have explained it to them. It is a matter of regret that twice again this number comes up. We have already explained that it does not mean what China thinks it means;

[23] **Third Party Written Submission of the United States**, paras. 172-174, particularly para. 175: (" … to demonstrate a breach of Article I, a complaining party must first demonstrate an inconsistency with Article VI … ").

[24] **Third Party Written Submission of Mexico,** paras. 84-93.

[25] **Third Party Written Submission of Mexico,** paras. 94-100.

[26] **Third Party Written Submission of the United States**, paras. 179-184.

- China has failed to engage with the pertinent governing obligation, which is that an investigating authority must not impose an unreasonable burden of proof on any interested party or sub-category of interested parties, having failed to make any claim under Article 2.4 of the Anti-Dumping Agreement.

1.9. WHY CHINA'S SECOND CLAIM MUST FAIL

45. Similarly, as we have also set out in our First Written Submission, China's Second Claim must fail because:

- Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement merely contain definitions, not obligations;
- 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;[27]
- Article VI:1 of the GATT 1994, the second paragraph of the Ad Note to Article VI:1 and Articles 2.1 to 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.[28] In this respect, we specifically note that China's own anti-dumping legislation expressly provides that, for the purposes of establishing normal value, applicants may rely on data from **other producers** (this is a dumping case by China against the European Union, China's own legislation states that Chinese applicants, for the purposes of establishing normal value of EU producers, who are exporting to China, can rely on data from other EU producers, thus "severing the link" between the producer and its data), or data from **outside the country of origin** (outside the EU in our example), including data from **China** or data from "**the international market**".[29] Now there are a couple of important points of

[27] Compare: WT/DS515/1, 15 December 2016, Request for Consultations, page 3, para. 7 (Article 18.4); WT/DS515/1/Add. 1, 8 November 2017, Request for Consultations, *Addendum*, page 5, fourth paragraph from end (Article 18.4).

[28] **Third Party Written Submission of Australia**, paras. 9-31, particularly para. 31: ("In Australia's view, the text and context of Article 2.2 therefore do not support China's claims that the provision prescribes a "*strict* comparison" with home market prices and costs and proscribes any recourse to third country prices or costs. Rather, Article 2.2 requires a "*proper* comparison" with prices and costs "in the ordinary course of trade" – i.e. prices and costs determined by normal commercial practice."); and paras. 32-40, particularly para. 40: (" … the absence of any qualifying language means there is no basis for reading into Article 2.2.1.1 a "prohibition" on the use of "surrogate prices or costs in an analogue country to determine normal value" (as China's claims imply).") - (footnotes omitted). **Third Party Written Submission of Brazil**, paras. 5-12, particularly para 7: (" … Brazil agrees with the European Union that Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement do not prohibit the use of prices and costs from outside the country of origin in certain circumstances."). **Third Party Written Submission of Ecuador**, page 8, final paragraph. **Third Party Written Submission of Japan**, particularly para. 46: (" .. comparison with a third country price will be a reasonable methodology if the third country is appropriately chosen …").

[29] G/ADP/N/1.CHN/2/Suppl. 1, 18 February 2003, Provisional Rules of Ministry of Foreign Trade and Economic Cooperation on Initiation of Antidumping Investigations, Article 16: ("The supporting documents provided by the applicant for the constructed value of the allegedly dumped import shall include evidence of cost of production and reasonable expenses for the product in question. When the actual constructed value

disagreement between the parties also here that we would like to draw your attention to in order to facilitate the adjudication. The first one is the way that you look at the Appellate Body *Biodiesel* Report. This very clearly, in paragraph 130 of China's Oral Statement, that is the paragraph that contains an express statement by China that there are sometimes circumstances in which evidence can come from a third country for the purposes of establishing normal value. We find that a remarkable statement given that in the Consultations Request, the Panel Request, and most of the First Written Submission, China's proposition is that that is prohibited, and yet here they recognise that this is possible. We think that is of course right. In paragraph 130 China offers us an example, a raw material invoice from a supplier in the third country, that is an obvious one. In our view however China is completely missing the point. The point is the following: what do you do if you are an investigating authority and you are looking at the data in front of you to establish normal value? And if you look at domestic prices and you reject them (correctly) because they are unreliable? And if you don't use prices to a third country? And the costs are not reliable? What we do, is that we say we fall into a silence, and we say that in that circumstance the investigating authority is allowed to look at data from a third country or an international benchmark. We say that is what the Appellate Body Report in Biodiesel stands for, that proposition. China disagrees with us because they say there is a difference between getting the data and getting the evidence. According to China the normal value can't be a third country normal value, only the evidence is admissible potentially and that is why they limit their evidence to a supplier from a third country. We disagree; So, this is a point that you are going to have to look at for the purposes of your adjudication. And we think that the Appellate Body Report in *Biodiesel* is very clear on this point. And what is the alternative? There is nowhere else to get it from. Related to that, is the reading of *Fasteners*. Here, there is a significant point of disagreement between the Parties. I think we both recognise that in *Fasteners*, one finds the principle that if you take data from a third country, it has to be adjusted, so that it serves as a proxy for what the normal value would be in the country of origin. We accept that. What we do not accept, is that if an item of data has been lawfully rejected as unreliable (let's say the number ten), in the costs in the records of the firm, and you end up going to a third country and you find the number twenty, which you think is a proxy for what the data would be, absent the distortion; you take that number twenty and you need to adjust it if necessary, so that it reflects what is going on in the country of origin. But: You do *not* have to adjust it back to the number ten. That is what the Appellate Body has said in the *Fasteners* compliance proceedings. You do *not* have to adjust it back to a number, a data point, that you have lawfully rejected as unreliable. And China's response to this is that the principle in *Fasteners* does not apply. We disagree with that. And that is a point that you have to focus on in your adjudication.

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cannot be obtained, the applicant may calculate it on the basis of **its own factors of production**, the **prevailing prices of these factors in the exporting countries** (regions) or in **the international market**.")

- the relevant aspect of Article 2(7) is not mandatory;
- China has failed to even cite, let alone engage with, all the pertinent treaty language (specifically, the new Section 15);[30]
- 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 to 2.2 of the Anti-Dumping Agreement, Section 15 of China's Accession Protocol and Paragraph 150 of the Working Party Report;[31] and
- China has failed to engage with the pertinent governing obligation, which is that an investigating authority must not impose an unreasonable burden of proof on any interested party or sub-category of interested parties, having failed to make any claim under Article 2.4 of the Anti-Dumping Agreement. And here, could we please draw your attention to the deafening silence in China's Oral Statement on this point? It is often the dog that does not bark in the night that is the thing that you have to pay attention to. China only reacts on this issue with respect to the first claim under I:1 of the GATT. With respect to the second claim, China is completely silent. We don't think that one can prosper in legal argument by simply passing in silence over points that demonstrate the weakness and inaccuracy of the legal arguments that one is attempting to advance. So this is highly significant.

1.10. OTHER REASONS WHY CHINA'S LITIGATION STRATEGY IS FUNDAMENTALLY MISCONCEIVED

46. As we have also already explained, there are other reasons why China's strategy in these proceedings is fundamentally misconceived and cannot be fruitful, but will rather lead, by its own terms, to a dead-end:

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[30] **Third Party Written Submission of Canada**, para. 7: (" … it is incumbent on China to prove the validity of its assertions, including in respect of its claim that the effect of paragraph 15(d) is that the rules of paragraph 15(a) of China's Accession Protocol expired on 11 December 2016. Considering that paragraph 15(d) plainly states that subparagraph 15(a)(ii) expires, and not paragraph 15(a), China bears the burden of proving its affirmative assertion. Canada agrees with the European Union that China has failed to do so."). See also paras. 12-58. **Third Party Written Submission of the United States**, para. 145.

[31] **Third Party Written Submission of Canada**, para. 7: (" … it is incumbent on China to prove the validity of its assertions, including in respect of its claim that the effect of paragraph 15(d) is that the rules of paragraph 15(a) of China's Accession Protocol expired on 11 December 2016. Considering that paragraph 15(d) plainly states that subparagraph 15(a)(ii) expires, and not paragraph 15(a), China bears the burden of proving its affirmative assertion. Canada agrees with the European Union that China has failed to do so."). See also paras. 12-58. **Third Party Written Submission of Japan**, particularly paras. 61-73. **Third Party Written Submission of Mexico,** Sections II.1 and II.1 (e.g., para. 27: "Ahora bien, toda vez que la interpretación de China es totalmente contraria al sentido corriente de los términos del PAC, México considera que era indispensable que China presentara une explicación sobre el apartado d) de la sección 15 del PAC es válida, a pesar de ser contraria al propio texto de esa sección, cosa que evidentemente, China no presentó. Ante esta omisión, en opinión de México, la interpretación de China constituye une desviación injustificada de la regla general de interpretación de los tratados prevista en el párrafo 1 del artículo 31 de la Convención de Viena, …"; para. 38: "China no habría satisfecho su carga de probar prima facie la validez de su reclamación y, en consecuencia, sus reclamos carecerían totalmente de sustento.") **Third Party Written Submission of the United States**, Section V.A.

- the specific measure at issue, as identified in the Panel Request, that is, the current Article 2(7) of the EU Basic Anti-Dumping Regulation, will shortly be withdrawn;
- the European Union's envisaged new legislative act is not within the scope of these panel proceedings. This is an issue that we will address if and when that becomes necessary, that is when such act becomes final and publically available, and if and when China seeks to place it before the Panel. In any event, the European Union will ensure that such act fully complies with its WTO obligations. Now here, we take note of the fact that China has exhibited to its Oral Statement, and we have an issue with that – exhibiting in an Oral Statement -, a document. This is a document that is embedded within a legislative process within the European Union, that has not yet been completed. There are still a number of steps that have to be completed: That document has to be correctly finalised, signed, and it has to be put in its appropriate form; it has to be published in our Official Journal, it has to enter into force. None of these things has happened yet. And I have to say, this is another perfect example of an inappropriate approach by China to these procedural issues. May I point out that in our Request for Preliminary Rulings we have been very clear that the proposal is not within the scope of the proceedings, neither is the empty space placeholder. China contests neither of these. That is now *acquis* between the Parties. This document is not within your Terms of Reference;
- the Panel has a discretion not to make findings and, in any event, in the circumstances of this case, should refrain from doing so;
- the Panel may not make a recommendation with respect to a measure that no longer exists; and
- in any event, a finding without a recommendation cannot ground any eventual recourse to Article 21.5 of the DSU that China might (erroneously) have in mind – and in any event the close nexus test precludes any such approach.

1.11. WHAT WE SHOULD DO NEXT

47. We believe that common sense, respect for the democratic legislative processes of WTO Members, and the need to adopt a responsible long-term approach to dispute settlement, demands that the Parties sit together to discuss pragmatically what should be the appropriate way forward at this point.[32] Whilst the European Union would have no objection were the Panel to offer further guidance on this matter, this is obviously not a conversation that it would be appropriate to have in open court. However, it would be possible to briefly suspend the hearing so that representatives of the Parties could sit together in order to find a sensible

[32] See: WT/DS515/1/Add. 1, 8 November 2017, United States – Measure Related to Price Comparison Methodologies, Request for Consultations by China, *Addendum*.

way forward. We have everyone with us necessary to reach a provisional understanding on this matter, and we imagine that is also true for China. Each side could then rapidly seek instructions from capital, and that would be that. This is of course something that would require the co-operation of both Parties, so we are, in this respect, also in China's hands.

2. PART II

48. We turn now to the four issues of particular interest to the Panel. However, we would like to re-iterate the three fundamental points that we have made previously: China's Consultations Request was required to comply with Article 4.4 of the DSU; China's Panel Request was required to comply with Article 6.2 of the DSU; and China's First Written Submission was required to set out a *prima facie* case capable of supporting its First Claim and China's Second Claim, and was also required to be consistent with the DSU and the Panel's Working Procedures. **We consider that China has failed to comply with all of these requirements.**

49. We do appreciate the Panel's questions, but the Panel cannot, through such questions, make good the defects in China's Consultations Request, in China's Panel Request, and in China's First Written Submission. The Panel is not permitted to make the case for either party. Therefore, to the extent that China might seek, in its Oral Statement, to introduce further claims or arguments that are not reflected in its Consultations Request, Panel Request and First Written Submission, whether or not this is done, ostensibly, in response to the Panel's questions, **the European Union formally objects**, and as I said earlier, we believe that this is, *en effet*, what actually happened.

2.1. THE RELATIONSHIP BETWEEN SECTION 15 OF CHINA'S ACCESSION PROTOCOL AND THE PROVISIONS CONCERNING PRICE COMPARABILITY THAT ARE SET OUT IN ARTICLE VI OF THE GATT 1994, THE ANTI-DUMPING AGREEMENT AND THE SCM AGREEMENT

50. We turn now to the first issue of particular interest to the Panel, which is the **relationship** between Section 15 of China's Accession Protocol and the provisions concerning **price comparability** in Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement.

51. In its Consultations Request, Panel Request and First Written Submission China has essentially said nothing about this issue. That is because, and I have made this point already:

- China has presumptively assumed, erroneously, that Section 15 is in the nature of a "justification" or an "exception" or a so-called "**affirmative defence**". Actually, now that we have heard their first Oral Statement, apparently this is *not* the case;[33]
- China has presumptively assumed, also erroneously, that on 11 December 2016, pursuant to the second sentence of Section 15(d), the entirety of **Section 15(a) expired**, as opposed to what the second sentence of Section 15(d) actually says, which is that Section 15(a)(ii) expired;[34] and/or, and this is apparently the case, if we read China's Oral Statement,
- China has presumptively assumed, also erroneously, that the new Section 15 has a meaning that supports China's case, or is meaningless. However, in making this assumption, China has failed to understand that it does not have the right to **unilaterally** assume that an extensive tract of WTO treaty language has a particular meaning, or no meaning at all. The correct position as a matter of law is that, leaving aside the possibility of an authoritative interpretation,[35] the WTO dispute settlement system has a monopoly when it comes to **multilaterally** clarifying the meaning of the WTO treaties[36] (and Members are not permitted to engage in unilateral self-help).[37] Consequently, if one does not actually place particular treaty language within the terms of reference of a panel (as China has failed to do with respect to the new Section 15), there is no basis upon which any such multilateral interpretation can be made, because the relevant treaty terms are simply outside the Panel's **jurisdiction**.

52. The only thing that we do know about China's position before its Oral Statement is that:

- China acknowledges (as it is bound to do) that the terms of the treaty expressly provide that Article VI of the GATT and the Anti-Dumping Agreement and the SCM Agreement **apply consistent with** the provisions of Section 15;[38] and, as I have already mentioned,

[33] China's Consultations Request, paras. 4, 6 and 9; China's Panel Request, paras. 6, 8 and 11; China's First Written Submission, paras. 66, 73, 74 and 165.

[34] China's First Written Submission, paras. 69-73.

[35] DSU, Article 3.9.

[36] DSU, Article 3.2: ("The dispute settlement system … serves … to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").

[37] DSU, Article 23.

[38] China's First Written Submission, para. 68.

- China acknowledges the principle that, with respect to concurrently applicable provisions, a treaty interpreter must search for and prefer a **harmonious and consistent interpretation**, there being a presumption against conflict;[39] and (we have made this point);
- China agrees that **Article 2.2** of the Anti-Dumping Agreement (and not just Article 2.4) contains provisions that are concerned with price comparability; and we have given you the citations to its First Written Submission where it makes those statements, apparently before realising the significance that they would have.[40]

53. Since, in preparing this Oral Statement, we do not yet have any further information about China's position we reserve the right to comment further.

54. The European Union, on the other hand, has already explained its position on this issue in considerable detail.

55. *First*, we have explained that the treaty term "price comparability" refers to the comparability of the **normal value** and the **export price**.[41]

56. *Second*, we have explained that the term "price comparability" refers to the comparability of the normal value and the export price, **irrespective of how the normal value has been determined** (domestic prices, price to a third country, or costs of production). We don't hear any contest from China on these points.[42]

57. *Third*, we have explained very precisely which provisions **concern price comparability**.[43] They are:

- Article VI:1 of the GATT 1994, including both the first sub-paragraph and the second sub-paragraph (that is, not just limited to the second sub-paragraph, which is China's position) and specifically including the first sub-paragraph (a), the first sub-paragraph (b)(i) and the second sub-paragraph. (So, the significance of that is that all of these provisions refer to comparability without referring to a difference affecting comparability);
- the Ad Note to Article VI:1, first paragraph (hidden dumping by associated houses) and second paragraph (a country with a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by

[39] China's First Written Submission, paras. 147-148 and footnote 194.

[40] China's First Written Submission, paras. 133, 135, 145, 155 and 167.

[41] EU First Written Submission, para. 49.

[42] EU First Written Submission, paras. 48 and 83.

[43] EU First Written Submission, paras. 82-86; paras. 71-73.

the State) and the Ad Note to Article VI, paragraphs 2 and 3, second paragraph (that's the one on multiple currency practices);

- also, all paragraphs of Article 2 of the Anti-Dumping Agreement (not just Article 2.4, again, that seems to be China's position); and
- Articles VI and XVI of the GATT 1994 and Articles 1 and 14 of the SCM Agreement (which concern the definition of subsidy, and particularly benefit).

58. *Fourth*, we have explained the relationship between Section 15 of China's Accession Protocol and these provisions concerning price comparability: these provisions concerning price comparability **apply consistent with** Section 15 of China's Accession Protocol. In light of this relationship, we have further explained that Section 15 is not in the nature of an affirmative defence. (That now seems to be agreed.) And we have also explained that a treaty interpreter must search for and prefer a harmonious and consistent interpretation of these provisions, which means that, contextually, Section 15 can only be describing something that fits within the four corners of these provisions concerning price comparability.[44]

59. *Fifth*, we have carefully **traced the precise relationship of consistent application** between Section 15 on the one hand, and these provisions concerning price comparability on the other hand.[45]

60. *Sixth*, and finally, we have explained that Section 15 of China's Accession Protocol is a **subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions, and must therefore be taken into account together with the context.[46] It also constitutes "decision making under the WTO Agreement", agreed to by consensus, and therefore represents an **authoritative** interpretation of the provisions concerning price comparability. It must therefore be, by definition, a **permissible** interpretation, as provided for in Article 17(6)(ii) of the Anti-Dumping Agreement. A panel must uphold a Member's measure if it rests upon a permissible interpretation of the relevant provisions of the Anti-Dumping

[44] EU First Written Submission, paras. 76-81.

[45] EU First Written Submission, paras. 82-86.

[46] EU First Written Submission, para. 278 and footnote 212.

Agreement.[47] And we note that there is no response from China in its Oral Statement to these points.

2.2. THE LEGAL CONSEQUENCE OF THE OPERATION OF THE SECOND SENTENCE OF SECTION 15(D) OF CHINA'S ACCESSION PROTOCOL, WHICH PROVIDES THAT "[I]N ANY EVENT, THE PROVISIONS OF SUBPARAGRAPH (A)(II) SHALL EXPIRE 15 YEARS AFTER THE DATE OF ACCESSION"

61. Next, we turn to the second issue of particular interest to the Panel, which is the **legal consequence** of the operation of the second sentence of Section 15(d) of China's Accession Protocol, which provides that "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession".

62. Once again, this is an issue that the European Union has addressed in detail in its First Written Submission.[48] At the risk of stating the obvious, the consequence is that, on 11 December 2016, Section 15(a)(ii) expired. That is, by operation of law, under the terms of the treaty itself, that provision ceased to apply. On the other hand, no other part of Section 15 has expired, and the remainder of Section 15 therefore remains applicable law.

63. Given that the new Section 15 is not in the nature of a so-called "affirmative defence" and given that it is not addressed at all in China's Consultations Request or in China's Panel Request, the legal consequences of the application of the new Section 15 is not a matter that is within this Panel's **terms of reference**.[49]

64. In any event, on the substance, with respect to the new Section 15, China has **failed to make a *prima facie* case** in its First Written Submission, and it is now too late for China to modify its claims or develop entirely new lines of argument.[50] And neither do we find any kind of *prima facie* case in China's Oral Statement.

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[47] EU First Written Submission, paras. 275-279.

[48] EU First Written Submission, Sections 2.3 and 2.4.

[49] EU First Written Submission, paras. 301-313; and paras. 377-378. See also: Appellate Body Reports, *Canada – Renewable Energy/Feed-In Tariff Program*, paras. 5.56 and 5.54: (" … [Article III:8(a) is] a derogation limiting the scope of the national treatment obligation and it is not a justification for measures that would otherwise be inconsistent with that obligation.").

[50] EU First Written Submission, paras. 314-327; and paras. 379-387.

65. Furthermore, as we have also explained, the new Section 15 continues to confirm the WTO consistency of Article 2(7) of the EU Basic Anti-Dumping Regulation (which is also confirmed by the terms of the Anti-Dumping Agreement itself).

66. In so far as Article 2(7) of the EU Basic Anti-Dumping Regulation contains a rule regarding burden of proof, its operation continues to be covered by the obligation in Article 2.4 of the Anti-Dumping Agreement (which is that an investigating authority shall not impose an unreasonable burden of proof). **China has made no claim under Article 2.4**.[51]

67. Since, once again, this is, at the time of writing, an issue on which we have not yet heard anything from China, we reserve the right to comment further once we have heard China's Oral Statement.

2.3. THE SCOPE OF OPERATION AND, THE DIFFERENCES AND SIMILARITIES BETWEEN, THE RULES SET OUT IN SECTION 15(A)(I) AND SECTION 15(A)(II) OF CHINA'S ACCESSION PROTOCOL IN THE LIGHT OF THE PARTICULAR TERMS OF THESE PROVISIONS

68. We turn now to the third issue of particular interest to the Panel, which is the **scope of operation** and the **differences and similarities** between the rules set out in Section 15(a)(i) and Section 15(a)(ii) of China's Accession Protocol in the light of the particular terms of these provisions.

69. Once again, we observe that this is a matter on which we have not previously heard anything from China, and that the meaning of the new Section 15 is not something that is within your **terms of reference**. Therefore, we again reserve the right to comment further. This is also a matter that we have already addressed extensively in our First Written Submission.[52]

70. With respect to the "scope of operation" of **Section 15(a)(i)**, as we see it, that provision operates in any anti-dumping investigation concerning a product from China. It operates with respect to the "producers under investigation". And it operates when "determining price comparability", that is, throughout the process

[51] EU First Written Submission, paras. 326, final bullet point, 350, 384 and 385, final bullet point.

[52] EU First Written Submission, Sections 2.3 and 2.4.

of determining whether or not the data under consideration permit a proper and fair comparison between the normal value and the export price. It provides that, if the producers 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. As such it affirms, and does not conflict with, the provisions concerning price comparability in Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement. That is, it affirms the view of all WTO Members that, in determining price comparability, it is appropriate to use domestic prices and costs if they are reliable and undistorted, in light of the market economy conditions prevailing in the industry under investigation.

71. With respect to the "scope of operation" of **Section 15(a)(ii)**, as we see it, until 11 December 2016, that provision operated in any anti-dumping investigation concerning a product from China. It operated with respect to the "producers under investigation". It also operated when "determining price comparability". It provided that, if the producers could not 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 could use a methodology that is not based on a strict comparison with domestic prices or costs in China.

72. Thus, as we see it, the "differences and similarities" between the rules set out in Section 15(a)(i) and Section 15(a)(ii) are simply those reflected in the texts of those provisions, no more and no less. Accordingly, as we have explained in our First Written Submission,[53] when we look at the new Section 15 we note that it 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**";

[53] EU First Written Submission, paras. 107-108.

- 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.**

73. Thus, we 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**).

74. In this respect, the European Union would like to point out that it is not arguing that the terms of Section 15(a)(i) can be read so as to imply or infer, using *a contrario* reasoning, the **resurrection** of the burden of proof rule set out in Section 15(a)(ii). And we would like to add that we don't believe that Canada is making that argument either. That is an assertion that China makes at paragraphs 178-179 of China's Oral Statement. Certainly we are not making that resurrection argument. And just to add, neither are we making an argument that China attributes to us in paragraph 40 of China's Oral Statement, to the effect that we would require China to demonstrate market economy conditions under the municipal law of the European Union. We are not making that argument. On the contrary, we acknowledge that, on 11 December 2016, the China-specific burden of proof rule in Section 15(a)(ii) expired. We do point out that there was never any conflict between that rule on the one hand, and the general burden of proof rule in Article 2.4 of the Anti-Dumping Agreement, on the other hand.[54]

[54] EU First Written Submission, para. 98.

And we further point out that the general burden of proof rule in Article 2.4 of the Anti-Dumping Agreement continues to apply after 11 December 2016 (although China has no claim under that provision).

2.4. THE POTENTIAL CONSEQUENCES FOR THE MERITS OF CHINA'S COMPLAINT OF THE FACT THAT CHINA'S REQUEST FOR FINDINGS AND RECOMMENDATIONS IN ITS FIRST WRITTEN SUBMISSION DOES NOT IDENTIFY ANY PART OF SECTION 15 OF CHINA'S ACCESSION PROTOCOL AS A LEGAL BASIS FOR ITS CLAIMS

75. Finally, we turn to the fourth issue of particular interest to the Panel: the potential consequences for the merits of China's complaint of the fact that China's request for **findings and recommendations** in its First Written Submission does not identify any part of Section 15 of China's Accession Protocol as a legal basis for its claims. This is a matter that we have already touched on.

76. As we have explained in our First Written Submission, we consider that Section 15 of China's Accession Protocol is not in the nature of a so-called affirmative defence. (China seems to agree.) We have further explained that the new Section 15 is not mentioned in China's Consultations Request or in China's Panel Request and is not therefore within the Panel's terms of reference. Nevertheless, it remains applicable law between the Parties – just applicable law that neither Party has placed before the Panel. We only argue in the alternative and conditionally that, in any event, China has failed to demonstrate any inconsistency of the measures at issue with the new Section 15.

77. As a necessary and logical consequence of its approach to this issue, China has not included any reference to the new Section 15 in its requests for findings and recommendations. Had it done so, this would have immediately brought into the light the deficient nature of its Consultations Request and Panel Request. This confirms that the Panel is precluded from making any finding to the effect that the specific measures at issue identified in the Panel Request are inconsistent with the new Section 15.

78. At the same time, the Panel cannot make the findings sought by China in the First Claim and the Second Claim, because China has **artificially truncated** the governing treaty terms by completely omitting any reference to Section 15. It is not possible to frame a valid legal claim by artificially truncating the terms of

the applicable treaty provisions. If a complainant does that, it has simply failed to make a *prima facie* case. One does not have to look very far to find similar examples.

79. Consider, for example, a complainant that wishes to seek review of an "as applied" anti-dumping measure and frames the following claim in its consultations request, panel request, and first written submission – **including in its request for findings and recommendations**:

> "The measure is inconsistent with the Anti-Dumping Agreement because the dumping margin was not calculated by considering whether or not the product was exported at less than the domestic price for the like product destined for consumption in the exporting country."

80. The defendant, perplexed, points out that the complainant appears to have replaced the obligation in Article 2.1 of the Anti-Dumping Agreement with an obligation of the complainant's own invention, by simply omitting any reference to the terms "**comparable**" and "**in the ordinary course of trade**". And the defendant further points out that the absence of the ordinary course of trade is the very reason for which the investigating authority, when adopting the measure at issue, considered that the domestic prices were unreliable, and rejected them in favour of a normal value based on costs of production.

81. Just like the new Section 15, the terms "comparable" and "in the ordinary course of trade" are not in the nature of a so-called "affirmative defence". Accordingly, the only conclusion that it would be possible to reach would be that such matters are not within the terms of reference of the panel; that the complainant has in any event failed to make a *prima facie* case; and that in any event **the panel would necessarily be precluded from making any finding of inconsistency with Article 2.1 of the Anti-Dumping Agreement**, or with **a truncated version of Article 2.1**, which would simply constitute an obligation of the complainant's own invention.

82. Precisely the same reasoning applies here.

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Mr. Chairman, distinguished Members of the Panel, this is your court room, so part of the puzzle is what you want to preside over: an academic discussion about an expired treaty term and an expired measure, of historical interest to professors of law and financial interest to the legal profession; or a rapid, efficient and appropriate disposal of China's "straw man". The choice is up to you. In the meantime, we thank you for your attention and look forward to answering any questions that you might have.