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In the World Trade Organization
Panel Proceedings

EUROPEAN UNION – MEASURES RELATING TO PRICE COMPARISON METHODOLOGIES
(DS516)

European Union's Responses to the Questions from the Panel after the First Substantive Meeting

Geneva, 19 January 2018

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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018

TABLE OF EXHIBITS

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EU-8 to EU-38	USA-1 to USA-30 (Please refer to the US Third Party Written Submission)

I. SECTION 15(A) OF CHINA'S ACCESSION PROTOCOL

Question 1

(to parties and third parties) Several of the third parties that have made submissions on the meaning of Sections 15(a)(i) and (ii) suggest that these two subparagraphs contain two different rules applicable to the issue of price comparability in investigations involving Chinese imports; and that the key difference between the two rules concerns the burden of proving the existence of market economy conditions.

(a) Please comment on the extent to which the text, and only the text, of the two subparagraphs supports the view that they advance two different rules in terms of the burden of proof.

(b) What are the relevant contextual considerations that support the view that Sections 15(a)(i) and (ii) contain two different rules in terms of the burden of proof.

1. The European Union understands this to be a question, in the first place, about the meaning (that is, the interpretation or clarification) of the **old Section 15**; but also, consequently, about the meaning of the **new Section 15, i.e., as it stands after 11 December 2016**. In this respect, we again recall that questions pertaining to the interpretation of **the new Section 15 are not within the Panel's terms of reference**.

2. Section 15(a) states clearly that Section 15(a)(i) and Section 15(a)(ii) contain "rules" (**in the plural**). It is therefore not possible to affirm that, pursuant to the customary rules of interpretation of public international law, and particularly Articles 31 to 33 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), Section 15(a)(i) and Section 15(a)(ii) contain only one rule (in the singular). Considerations of context cannot alter the actual terms used in the relevant treaty provisions.

3. The terms of the treaty that appear in Section 15(a)(i) and the terms of the treaty that appear in Section 15(a)(ii) are **different**. It is therefore not possible to affirm, based on Vienna Convention rules of interpretation, that the terms of the treaty used in these two provisions are not different, that is, that they are the same. Manifestly, that is not the case.

4. Therefore, Sections 15(a)(i) and (ii) contain **two rules**; and those rules are **different from each other**.

5. According to the terms actually used by the treaty, **in determining price comparability**, until 11 December 2016, the **two different rules** in Section 15(a)(i) and Section 15(a)(ii) **applied**. This is stated expressly in Section 15(a) itself.

6. The phrase "**market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product**" appears in **both** Sections 15(a)(i) and (ii). Therefore, with respect to this phrase (that is, this part of each of the two rules), there is **no difference** between the rule in Section 15(a)(i) and the rule in Section 15(a)(ii). However, as we further explain below, this does not lend any support to China's arguments.

7. The rule in Section 15(a)(i) refers to the use by the investigating authority of **Chinese prices or costs** for the industry under investigation, whilst the rule in Section 15(a)(ii) refers to the use of "**a methodology that is not based on a strict comparison with domestic prices or costs in China**". Thus, these different consequences constitute a **difference** between the rule in Section 15(a)(i) and the rule in Section 15(a)(ii).

8. The rule in Section 15(a)(i) contains a statement about burden of proof ("**can clearly show**") (market economy conditions prevail). The rule in Section 15(a)(ii) also contains a statement about burden of proof ("**cannot clearly show**") (market economy conditions prevail). We understand China's position to be that these statements are the obverse of one another, such that Sections 15(a)(i) and (ii) constitute a single rule. We disagree with China because, as we have recalled above, the terms of the treaty state clearly that there are two rules. However, and in any event, **it makes no difference** how these statements are characterised, that is, whether they are characterised as two rules or as one rule, for the following reasons.

9. The **expiry** of Section 15(a)(ii), on 11 December 2016, means that the rule in Section 15(a)(ii) (including the language regarding burden of proof) **no longer applies**. However, the **non-expiry** of Section 15(a)(i) means that the rule in Section 15(a)(i) (including the language regarding burden of proof) **continues to apply** after 11 December 2016.

10. The European Union has made it clear that it is not arguing that the terms of the rule in Section 15(a)(i) imply, ***a contrario***, the "**resurrection**" of the rule in Section 15(a)(ii) after its expiry. Rather, as we have stated in our submissions to the Panel,[1] we accept that, on 11 December 2016, pursuant to Section 15(d) of China's Accession Protocol, Section 15(a)(ii) (including the language on burden of proof) expired, and this prevails over any such *a contrario* reasoning.

11. However, we point out that Article VI of the GATT 1994 and the Anti-Dumping Agreement **continue to apply throughout**. Accordingly, a treaty interpreter seeking to understand what the burden of proof rule is after 11 December 2016 is required to also have regard to the relevant provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. In this respect, we consider that the burden of proof rule in **Article 2.4** of the Anti-Dumping Agreement is the relevant governing rule: **the investigating authority must not impose an unreasonable burden of proof on any interested party or any sub-set of interested parties**.

12. Therefore, Section 15(a)(i) **implies** that, after 11 December 2016, in order to understand what the legal situation is where the producers under investigation **cannot** clearly show that market economy conditions prevail, it is necessary to consider some **other provision or provisions**. The other provision that it is necessary to consider is **not Section 15(a)(ii)** (which has expired and cannot be resurrected with *a contrario* reasoning). Rather, the other provisions that it is necessary to consider are the relevant provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement, that is, **Article 2.4** of the Anti-Dumping Agreement. China has **no claim** under Article 2.4 of the Anti-Dumping Agreement. This conclusion necessarily follows irrespective of whether Sections 15(a)(i) and (ii) are characterised as containing a single rule on burden of proof, or two rules on burden of proof.

13. This analysis of the legal provisions governing the question of burden of proof under the old Section 15 (until 11 December 2016) and under the new Section 15 (after 11 December 2016) does not alter the fact that, as summarised above, the new Section 15 contains **other relevant treaty language** (apart from language on

[1] For example, EU First Opening Oral Statement, para. 74.

burden of proof). That other treaty language supports the European Union's position both on a "stand-alone" basis (that is, the new Section 15 applies on its own terms, consistent with Article VI of the GATT and the Anti-Dumping Agreement) and on a "contextual" basis (even if the Panel were to agree with China that the new Section 15 serves no purpose). We make these arguments concurrently, independently and in the alternative.

14. *In summary*, referring to the terms actually used in the treaty, Sections 15(a)(i) and (ii) contain **two rules** that are, in certain respects, the **same**, and in certain respects, **different**. Both rules **apply** in **determining price comparability**. Until 11 December 2016, Section 15 placed the burden of proof on Chinese exporters to demonstrate that market economy conditions prevail in the industry under investigation. If China would have challenged that proposition in WTO panel proceedings before 11 December 2016 it would have **lost**. For example (and to put the matter in more concrete terms in order to further assist the Panel), if, in a particular anti-dumping proceeding, the investigating authority would have placed the burden of proof on Chinese exporters to demonstrate that market economy conditions prevail in the industry under investigation, China could have challenged that (on an "**as applied**" basis), by arguing that the measure at issue is inconsistent with the governing rule in Article 2.4 of the Anti-Dumping Agreement. However, China would have lost that case because of the rule in Section 15(a)(ii), without it even being necessary for the panel to examine the question of whether or not allocating the burden of proof in that way would have been reasonable. Similarly, if, in the anti-dumping **legislation** of a particular WTO Member, it would have been provided that the burden of proof is to be placed on Chinese exporters to demonstrate that market economy conditions prevail in the industry under investigation, China could have challenged that (on an "**as such**" basis), by arguing that the measure at issue is inconsistent with the governing rule in Article 2.4 of the Anti-Dumping Agreement. However, once again, China would have lost that case because of the rule in Section 15(a)(ii), without it even being necessary for the panel to examine the question of whether or not allocating the burden of proof in that way would have been reasonable.

15. With the expiry of Section 15(a)(ii) on 11 December 2016, the rule in Section 15(a)(ii), including the rule on burden of proof contained therein, **ceased to apply**. That rule cannot be "**resurrected**" based on *a contrario* reasoning derived from Section 15(a)(i). However, **regard must still be had** to the governing burden of proof rule in the Anti-Dumping Agreement, which is contained in **Article 2.4**. As we have explained to the Panel, we consider that, in all the circumstances, it was reasonable, within the meaning of that obligation, for the European Union to maintain the burden of proof on the Chinese exporters.[2] However, China has brought no claim under that provision, so this is a matter that is not within the Panel's jurisdiction.

16. Finally, there are **other treaty terms** in the new Section 15 (other than those that relate to burden of proof) that support the position of the European Union in these panel proceedings both on a stand-alone basis and on a contextual basis. China's failure to include those treaty terms in China's Consultations Request, Panel Request and First Written Submission means that the Panel must reject China's First and Second Claims on **procedural** grounds. Furthermore, in **substance**, those other treaty terms support and confirm the European Union's position in these panel proceedings and this means that, in any event, the Panel must reject China's First and Second Claims.

Question 2

(to parties and third parties) What is the relationship between Section 15(b) of China's Accession Protocol and the rules governing the establishment of price comparability for the purpose of determining subsidies found in the SCM Agreement? Does this relationship provide any guidance for understanding the relationship between Section 15(a) and (d) of China's Accession Protocol and Article VI of the GATT 1994 and the Anti-Dumping Agreement?

17. Section 15 of China's Accession Protocol provides that Article VI of the GATT 1994, the Anti-Dumping Agreement and the **SCM Agreement** shall apply in proceedings involving imports of Chinese origin into a WTO Member **consistent with** Section 15(a) to Section 15(d). Section 15(b) further provides that, in proceedings under Parts II, III and V of the SCM Agreement, when addressing

[2] For example, EU First Written Submission, paras. 350 and 384 and footnote 283, and the documents referred to therein.

subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply, and that if there are special difficulties in that application, the importing Member may 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. This includes the use of terms and conditions prevailing **outside China**. This is also confirmed, as a general matter, by the case law (that is, with respect to all WTO Members, not just China).[3] Therefore, to the extent that the relationship between Article VI of the GATT 1994 and the SCM Agreement on the one hand and Section 15 on the other hand provides any guidance with respect to the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement on the one hand and Section 15 on the other hand, that guidance supports the position of the European Union in this dispute.

Question 3

(to parties and third parties) In understanding the nature of the relationship between Section 15(a), on the one hand, and Article VI of the GATT 1994 and the Anti-Dumping Agreement, on the other hand, what guidance, if any, can be found from the Appellate Body's findings in China – Publications and Audiovisual Products (paragraph 222) on the meaning of the first sentence of Section 5.1 of China's Accession Protocol – in particular, as regards the meaning attributed to the words "consistent with" that appear in that sentence?.

18. The treaty terms "consistent with" that appear in Section 5.1 of China's Accession Protocol mean that the obligations set out in Section 5.1 are without prejudice to China's "right to regulate trade" in a manner that is consistent with the WTO Agreement, including Article XX of the GATT 1994. The consistency is between the Chinese **measure** on the one hand, and **treaty provisions** (specifically Article XX of the GATT 1994) on the other hand. This is confirmed in paragraph 222 of the Appellate Body Report in *China – Audiovisual Products*. This issue is different to the issue arising in the present case, which is that Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement **apply consistent with** Section 15 of China's Accession Protocol (that is, the issue is about **consistency between different treaty provisions**).

[3] EU First Written Submission, para. 72 and footnote 85.

19. However, this case law, and other case law relating to China's Accession Protocol, confirms that panels must pay **extremely close attention** to the **precise** treaty terms governing the relationship between a particular provision of an accession protocol on the one hand and other provisions of WTO law on the other hand.[4] Those precise treaty terms must be scrupulously respected. In this case, the precise treaty terms are "**apply … consistent with**". The European Union has provided extensive authority in support of its position that a treaty interpreter must search for and prefer a harmonious and consistent interpretation and application of such concurrently applicable provisions.[5] China has strongly and repeatedly supported that position.[6] Therefore, this Panel must search for and prefer a harmonious and consistent interpretation and application of Article VI of the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement on the one hand, and Section 15 on the other hand.

Question 4

(to parties and third parties) The Panel understands Canada and the United States to argue, like the European Union, that the fact that China has not identified Section 15(a)(i) as a legal basis for its claims means that its complaint must fail because, to the extent that Section 15(a)(i) continues to be in force, China was required to demonstrate that Article 2(7) of the Basic AD Regulation is inconsistent with those existing rules in order for there to be a violation of Article VI:1 of the GATT 1994, the Second Supplementary Note Ad Article VI:1 of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement. What are the parties' and third parties' views on this line of argument?

20. The European Union responds to this question and question 16 together.

21. The European Union understands Canada and the United States to argue, like the European Union, that China has not identified any part of the new Section 15(a) **as a whole** as a legal basis for its claims (that is, the point is being made with respect to the new Section 15(a) as a whole, and **not only with respect to Section 15(a)(i)** after 11 December 2016).

22. A consultations request and a panel request must state the "**legal basis** of the complaint". The legal basis of the complaint must be an obligation under one of

[4] EU First Written Submission, para. 76 and footnote 90.
[5] EU First Written Submission, paras. 33 and 80, and footnotes 15, 16 and 95.
[6] China's First Written Submission, paras. 147-148 and footnote 194; EU First Written Submission, paras. 33 and 80, and footnotes 18 and 96.

the covered agreements. It cannot be an obligation contained in some other document. The obligation must be stated **as it appears** in the relevant treaty terms of the covered agreements. **It cannot be modified** at the whim of the complainant by either **adding to or diminishing** the treaty language that frames the obligation in question (that would just be an obligation of the complainant's invention).[7] Furthermore, both the consultations request and the panel request must provide the **reasons** for the request (or a brief summary sufficient to present the problem clearly). These two elements are necessarily related. If the legal basis of the complaint is stated incorrectly (because the relevant treaty terms have been added to or diminished) then, by definition, the reasons for the request (or the brief summary sufficient to present the problem clearly) will **necessarily be defective**. In that case, **for both of these reasons**, the consultations request and panel request will be inconsistent with respectively Articles 4.4 and 6.2 of the DSU. This means that the matter will not be within or properly within the terms of reference of the panel.

23. Further, a first written submission that proceeds on such basis, by definition, will not make a ***prima facie* case**. Presenting an argument by reference to an obligation in some other document (other than a covered agreement) or on the basis of an obligation of the complainant's invention (being one where relevant treaty language framing the obligation has, as here, been added to or diminished) cannot amount to making a *prima facie* case.

24. China has responded with the assertion that the treaty provisions that China has referred to, including those concerning the determination of price comparability contained in Article 2.2 of the Anti-Dumping Agreement, allegedly contain **one obligation**, whilst Section 15 of China's Accession Protocol allegedly contains a **different obligation**,[8] albeit one that China asserts "no longer serves any purpose".[9] Thus, China argues that it was entitled to refer to the first obligation,

[7] DSU, Article 3.2: ("Recommendations and rulings of the DSB **cannot add to or diminish** the rights and **obligations** provided in the covered agreements."); DSU, Article 19: ("… in their findings and recommendations, the panel and Appellate Body **cannot add to or diminish** the rights and **obligations** provided in the covered agreements.").

[8] EU First Closing Oral Statement, para. 14 (referring to the argument developed by China during the First Hearing).

[9] China's First Opening Oral Statement, Section II.D.3 and paras. 163, 164, 165 and 177.

whilst disregarding what China alleges to be the second, independent (and allegedly meaningless), obligation.

25. The European Union disagrees with China's assertion that the provisions of Article 2.2 of the Anti-Dumping Agreement relating to the determination of price comparability in a case involving Chinese products contain one obligation, whilst Section 15 contains a different obligation, that is separate from the relevant obligation in Article 2.2. This is confirmed by the terms of Section 15 itself. These provide that the new Section 15 applies "**in determining price comparability**". Therefore, the new Section 15 is relevant when an investigating authority determines price comparability in compliance with its obligations in Article 2.2. Thus, in a case involving Chinese products, the two provisions **cannot be applied independently from one another**. Rather, there is one **compound** set of treaty terms that, together, constitute an "integrated package", and frame **the relevant obligation**.

26. By disregarding the treaty language in Section 15, China has diminished and **artificially truncated** the actual treaty obligation that governs the question. China is not entitled to do that. In effect, China is complaining that the measure at issue is inconsistent with an obligation of China's invention, a finding that the Panel has no jurisdiction to make.

27. A panel is always permitted to refer to context, and context does not fall to be treated in the same way as treaty language that circumscribes and qualifies the actual obligation, as set out above. However, referring to other (non-cited) treaty provisions as context and opining about their meaning **cannot be used as a technique to cure a defective consultations request, panel request and first written submission**. The Panel does not have the authority to re-characterise treaty language that **circumscribes and qualifies the relevant obligation** as mere **context** (and **only** context).

28. For example, if a complainant alleges breach of an alleged obligation which is said to consist of the terms of Article 2.1 of the Anti-Dumping Agreement, but omitting the terms "comparable" and "ordinary course of trade", a panel must reject such

claim as improperly formulated.[10] The panel could not resolve the matter by (erroneously) reclassifying the terms "comparable" and "ordinary course of trade" as merely part of the context, and therefore opining that it does not matter that they are omitted from the consultations request, panel request and first written submission. Those terms are not context: they are treaty language that circumscribes and qualifies the obligation in Article 2.1 of the Anti-Dumping Agreement, and cannot be downgraded by a panel to mere context. They must be correctly and properly addressed in a consultations request and panel request (also for the benefit of any Member that may wish to be a third party). And they must be correctly and properly addressed in a first written submission (in order to ensure that the due process rights of the defendant are respected, and in order to preserve the rights of the third parties).

Question 5

(to parties and third parties) China stated during the substantive meeting that paragraph 151 of the Working Party Report on China's Accession supports its submission that the legal authority for WTO Members to apply a methodology that is not based on a strict comparison with Chinese prices and costs resided only in Section 15(a)(ii), not in Section 15(a)(i). In making this statement, China pointed to the "circumstances" described in that paragraph, and in particular, the confirmation provided by Members that they would take certain specified actions in "implementing subparagraph (a)(ii) of Section 15" in response to China's concerns regarding its treatment as a "non-market economy" in anti-dumping proceedings. Please comment on China's statement.

29. The European Union fundamentally disagrees with China's contention.

30. First of all, the European Union does not share the premise that a **specific** "legal authority" provided for in the WTO treaties is invariably needed in order for WTO Members to pursue and complete anti-dumping investigations in accordance with a particular rule.

31. In this regard, the European Union notes that Article I of the GATT 1994 provides that MFN treatment "shall be afforded"; Article II:1(b) provides for "exemption" from all other duties and charges; Article II:2(b) provides that nothing in Article II shall prevent the imposition of an anti-dumping duty applied consistently with the provisions of Article VI; and Article VI:2 provides that, in order to offset or

[10] EU First Opening Oral Statement, paras. 58-61.

prevent dumping, a Member **may levy an anti-dumping duty**. These provisions together create a balance of rights and obligations, and the European Union understands the term "authority" (which is not treaty language) to be merely a shorthand for referring to the policy space created for Members by Article VI of the GATT 1994 and the Anti-Dumping Agreement.

32. It does not follow from this that, for every imaginable rule of municipal anti-dumping law, it is necessary to locate a term in Article VI of the GATT 1994 or the Anti-Dumping Agreement that **expressly and specifically** authorises that particular provision of municipal anti-dumping law.

33. Rather, it is perfectly possible that the "authority" for a WTO Member to apply a particular rule establishing normal value resides in a more general principle informing Article VI of the GATT 1994 or the Anti-Dumping Agreement, such as the requirement to ensure comparability between the normal value and the export price. In other words, the European Union submits that the "authority" to adopt and maintain certain provisions of municipal anti-dumping law is not always predicated upon specific provisions of Article VI of the GATT 1994, the Anti-Dumping Agreement or Section 15, but may flow from the fundamental requirement to ensure comparability.

34. That is, there may be circumstances in which Article VI of the GATT 1994 and the Anti-Dumping Agreement do not contain treaty language specifically governing the situation that is addressed by a particular rule of municipal anti-dumping law. In such a situation, the particular provision of municipal anti-dumping law is not automatically inconsistent with the Anti-Dumping Agreement on the grounds that there is a lack of **specific** (as opposed to general) "authority".

35. The Anti-Dumping Agreement does not impose an obligation on Members to enact in their municipal anti-dumping law **only** provisions that **specifically track** the provisions of the Anti-Dumping Agreement, and nothing further. Rather, it requires Members to ensure that they act "**in accordance with**" the Anti-Dumping Agreement.[11] Therefore, Members are free to adopt provisions of municipal anti-dumping law that consist of language that is different from the specific language

of the Anti-Dumping Agreement, without that meaning that they automatically act inconsistently with that agreement. For example, Members are free to enact a provision of municipal law that provides, in case cost data is not available or cannot be used, for the use of information from other representative markets, even though such a rule is not expressly and specifically provided for in the Anti-Dumping Agreement.[12]

36. In these cases of so-called "silence", it will be necessary to look to the relevant more general treaty language, and other specific implementing provisions, in order to see whether or not the contested anti-dumping duty (or law) is covered by the above "authorisation", that is, whether or not, in adopting it, the defending Member has breached an obligation that has been imposed upon it (thus, use of the term "silence" is probably misleading). Sometimes that will be the case. Sometimes that will not be the case. It all depends on the particular obligations and facts.

37. An example in which a municipal anti-dumping law of a Member was found to have breached an obligation not specifically governed by a particular provision of the Anti-Dumping Agreement is provided by the so-called "simple zeroing" cases. "Zeroing" (which is not treaty language) is a misnomer because it only describes part of the issue: the real issue being whether the dumping determination is to be based on the exporter's average behaviour during the investigation period, or based on an analysis of individual export transactions. Extended discussion of this issue during the Uruguay Round negotiations resulted in the compromise enshrined in Article 2.4.2 of the Anti-Dumping Agreement: the calculation is to be based on average behaviour, except in the case of targeted dumping, in which case it is to be based on the exporter's entire data-set for that particular purchaser, region or time period.

38. A good example of a situation where the municipal anti-dumping law of a Member was found not to have breached any WTO obligation is to be found in the recent Panel Report in DS488. That panel considered a rule of US municipal anti-dumping law creating a viability test for prices to a third country, which is not

[11] Anti-Dumping Agreement, Articles 1 and 18.1.

provided for in Article 2.2 of the Anti-Dumping Agreement (that is, there is a so-called "silence") and found that there is no **specific authority** in the Anti-Dumping Agreement permitting **this specific rule. However, the panel** did not find that US law is automatically WTO inconsistent for that reason. Instead, the panel found that there is **no specific obligation** that the US breaches in maintaining such a rule. In fact, one can reasonably observe that the US rule aligns with the general authority flowing from Article VI of the GATT 1994 and the Anti-Dumping Agreement because it aims to ensure that any data relied upon are representative and appropriate and permit a proper comparison, that is, the municipal law aims to ensure comparability.[13]

39. The present case before you can also be characterised as involving a so-called "silence" in the Anti-Dumping Agreement.[14] That is the question of what an investigating authority is to do when all the price and cost data from the domestic market of the exporting Member on the record is unreliable. Faced with the absence of specific WTO provisions instructing Members on how to proceed in circumstances in which such data is unreliable, the European Union's position, as explained in our submissions to the Panel,[15] is that an investigating authority may have recourse to data from an international source or from a third country. There is simply no other logical possibility. In making this statement, we do not identify **specific authorising** language in the Anti-Dumping Agreement, and we are not required to so do. Instead, we point to the more general authorising language that permits us – even obliges us - to ensure comparability, as well as other specific implementing provisions. As we have explained, the Appellate Body confirmed this in *EU – Biodiesel (Argentina)*. China's second claim is that we are prohibited from using data from a third country – that assertion is wrong and China's second claim must thus be dismissed.

40. China and the European Union are in dispute about which circumstances require or permit an investigating authority to acknowledge that the price and cost data from the domestic market of the exporting Member on the record is unreliable.

[12] Appellate Body Report, *EU – Biodiesel (Argentina)*, Section 6.2.
[13] Panel Report, *US – OCTG (Korea)* , paras. 7.14-7.20.
[14] Although there is, of course, specific language in the new Section 15 on which the European Union relies.
[15] For example, EU First Written Submission, paras. 56-57.

China construes these circumstances more narrowly, the European Union construes them more broadly. But there is no doubt that such circumstances exist and that there is no provision of WTO law prohibiting investigating authorities from having recourse to data from an international source or from a third country.

41. Turning to Section 15 of China's Accession Protocol, the essence of China's argument is predicated on the erroneous premise that a specific "authority" for having recourse to data from a third country is required. According to China, that "authority" is "only" provided for in either the second Ad Note or Section 15(a)(ii) and Paragraph 151 of the Working Party Report on China's Accession. However, as the preceding paragraphs explain, China is mistaken: recourse to data from a third country is permissible under Article VI of the GATT 1994 and the Anti-Dumping Agreement in certain circumstances, and particularly when this is required to ensure comparability.[16]

42. Moreover, Paragraph 151 of the Working Party Report on China's Accession does not support China's argument. Rather, Paragraph 151 of the Working Party Report on China's Accession simply spells out the specific actions that Members which would have recourse to Section 15(a)(ii) committed to take in order to address the concerns expressed by the representative of China. As indicated in Paragraph 151:

> "In response to these concerns, members of the Working Party confirmed that in implementing sub-paragraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following:".

43. China's argument is therefore a *non-sequitur*. **It does not follow** from the expiry of Section 15(a)(ii) (to which Paragraph 151 of the Working Party Report on China's Accession refers) that it is no longer possible to have recourse to data from a third country. It has always been possible, under Article VI of the GATT 1994 and the Anti-Dumping Agreement, to have recourse to data from a third country in certain circumstances, and that does not change as a result of the expiry of Section 15(a)(ii). However, **it does follow** from the expiry of Section 15(a)(ii) that the China-specific rule on burden of proof contained therein no longer applies, and we

[16] Furthermore, in making these assertions, China is completely failing to take into account or even address the treaty terms contained in the new Section 15.

must therefore look to the applicable burden of proof rule in the Anti-Dumping Agreement.

44. Thus, Paragraph 151 of the Working Party Report on China's Accession supports the position of the European Union in this case. This is further confirmed by a careful review of Paragraph 151, which simply re-iterates the procedural safeguards already set out in the Anti-Dumping Agreement and/or in China's Accession Protocol.

45. *First*, Paragraph 151 expresses China's concern **not** by reference to "past measures" taken by certain WTO Members that had treated China as a non-market economy ***per se***. Rather, China's concerns are that (1) the criteria should be identified and published (2) exporters should have a sufficient opportunity to present evidence and defend their interests and (3) the rationale underlying the determinations should be explained. Thus, in focussing on these three concerns, China is **implicitly acknowledging** that, in principle, WTO Members have always been required to ensure comparability, including in cases where data is distorted and unreliable as a result of non-market factors – provided only that they ensure they comply with the three points of concern expressly raised by China.

46. *Second*, this is further confirmed by the first sentence of Paragraph 151 of China's Working Party Report, which once again refers only to the three specific concerns raised by China. It does not refer to the fundamental principle that WTO Members are required to ensure comparability – a principle with respect to which China expresses no concern.

47. *Third*, this is further confirmed by the second sentence of Paragraph 151(a) of China's Working Party Report. That sentence only applies to WTO Members "other than" those that already had an "established practice" of the kind described in that sentence. Therefore, it does not apply to those WTO Members that already had, at the time of China's Accession, such an established practice. Once again, this confirms that China's concern was not about the fundamental principle that WTO Members are required to ensure comparability, and can, where necessary and appropriate, have recourse to data from other representative markets in order to ensure such comparability.

48. *Fourth,* in any event, even the second sentence of Paragraph 151 of China's Working Party Report is **based on the premise** that (1) distorted and unreliable non-market data can be rejected and (2) proxy data can be obtained from other sources, including from a third country. The focus of the language is on a **different point**, namely **the way in which the third country is to be selected** (a level of economic development comparable to that of China or otherwise appropriate in light of the nature of the industry under investigation).

Question 6

(to the European Union and third parties) China maintains (at paragraphs 89-103 of its oral statement) that the European Union's presentation (in paragraphs 71-73 and 119-128 of its first written submission) of the relevance of the disciplines on countervailing duties in the SCM Agreement improperly transposes the price comparability rule from the SCM Agreement to the price comparability rules in the Anti-Dumping Agreement for four reasons. Please comment on China's contention.

49. China did not include the new Section 15 of China's Accession Protocol or Paragraph 150 of China's Working Party Report in the Consultations Request, Panel Request or its First Written Submission. The European Union has made it clear that, in the first step of its staged and conditional arguments, the European Union does not place the new Section 15 (or Paragraph 150 of China's Working Party Report) within the Panel's terms of reference. China is not permitted to revise its claims in its First Opening Oral Statement by referring, for the first time, to the new Section 15 (or Paragraph 150 of China's Working Party Report). The Panel has **no jurisdiction** to rule on a re-formulated Chinese claim that refers, for the first time in China's First Opening Oral Statement, to the new Section 15 (or Paragraph 150 of China's Working Party Report). Therefore, as explained in the EU First Written Submission,[17] the Panel must reject China's First Claim and China's Second Claim.

50. Contrary to what China asserts, the European Union is not seeking to "transpose" an element of subsidies law into anti-dumping law.[18] We are merely arguing that the approach in these two fields should be **coherent**.

[17] EU First Written Submission, Sections 10.1.5 and 10.2.7.
[18] China's First Opening Oral Statement, paras. 89, 94 and 98.

51. With regard to China's *first point*,[19] the European Union notes that China reverts to its habitual (if incomplete and therefore erroneous) refrain that dumping is defined as international price discrimination by exporters.[20] We have explained why this statement is **incomplete**: dumping is defined as an export price that is less than a normal value, established in accordance with the terms of Article VI of the GATT 1994 and the Anti-Dumping Agreement (that is, on the basis of domestic prices, price to a third country or **costs**). Furthermore, as we have also explained, the Anti-Dumping Agreement does not concern itself with **why** dumping may be occurring. Dumping is an objective concept. Thus, if dumping is occurring because of the actions of the Chinese State, this does not mean there is no dumping.[21]

52. China correctly notes the problem of "circularity" in the context of the SCM Agreement.[22] But precisely the same problem arises in this case, in the context of the Anti-Dumping Agreement. In this respect, we have referred, by way of example, to the situation in which the Chinese State artificially distorts (lowers) the input cost of a raw material from 20 to 10 (through the use of a non-arms-length transaction), with the consequence that, all other things being equal, both the domestic price and the export price are reduced from 100 to 90. In this scenario, according to China, a comparison between 90 on the normal value side and 90 on the export price side provides a meaningful answer to the question of whether or not there is dumping, as defined by the Article VI of the GATT 1994 and the Anti-Dumping Agreement. The European Union disagrees. Such a comparison is just as "circular" as the type of comparison that China refers to under the SCM Agreement. All that is happening is that the impact of the Chinese State's intervention on the normal value side is being compared with the same impact of the Chinese State's intervention on the export price side. In other words, the effects of the distortion introduced by the Chinese State are just being compared with themselves, which is circular.

[19] China's First Opening Oral Statement, paras. 91-93.
[20] China's First Opening Oral Statement, paras. 91 and 93.
[21] In this respect, we again refer, by way of example, to the Ad Note on multiple currency practices.
[22] China's First Opening Oral Statement, para. 92.

53. Furthermore, when an adjustment is lawfully made to the normal value side, there is no basis for the argument that an equivalent "un-adjustment" must be made to the export price side in the context of Article 2.4 of the Anti-Dumping Agreement, bringing one back precisely to the point at which one started.[23] That would be equally circular. What China is arguing for here is, in effect, an "adjustment" in order to eliminate dumping that has been unmasked by establishing normal value on the basis of reliable and undistorted costs, in accordance with the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement.

54. Turning to China's *second point*.[24] Contrary to China's assertion, the European Union's reference to the "same situation of dumping and subsidisation" is not a "premise" upon which its arguments rest.[25] It is just one more reason why it would be appropriate to have a coherent approach to the problem of Chinese State intervention across the fields of subsidies law and anti-dumping law.

55. China's presentation of the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* constitutes a gross misrepresentation. The Appellate Body made it clear that when referring to "export subsidy" it was referring to a subsidy that affects **only** the export price but not the domestic price;[26] whilst when referring to a "domestic subsidy" it was referring to a subsidy that affects both the export price and (to the same or a lesser degree) the domestic price.[27] Furthermore, the Appellate Body stated clearly that it **distinguished** between the situation in which normal value is based on domestic prices, and the situation in which normal value is based on costs.[28] It further stated clearly that,

[23] China's First Opening Oral Statement, para. 93.
[24] China's First Opening Oral Statement, paras. 94-98.
[25] China's First Opening Oral Statement, para. 94.
[26] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, footnote 518: ("The potential for double remedies is even greater in the context of **export subsidies**, which benefit **only export goods** …") and 568 ("We recall that, in principle, an **export subsidy** will result in a pro rata reduction in the export price of a product, but **will not affect the price of domestic sales** of that product.")
[27] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 543: ("… a **domestic subsidy**, to the extent that such subsidy has contributed to a lowering of the **export price**.") and 599: ("This depends, rather, on whether and to what extent **domestic subsidies** have **lowered the export price** of a product …").
[28] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, footnote 519: ("However, double remedies are unlikely to result in the context of domestic subsidies granted within market economies if normal value is based on **domestic sales**. In such cases, both the normal value and the export price will be lowered as a result of the domestic subsidy, so that the dumping margin should not be affected.").

even if the issue of double counting should not arise when normal value is based on domestic prices, in the situation where normal value is based on **costs** "the same situation of dumping and export subsidisation" could arise.[29]

56. To further illustrate the position with some (simplified) examples.

- We assume export price is 100 and normal value based on domestic prices is 100 (reflecting underlying costs of 100), so there is no dumping. A subsidy of 10 is granted with respect to **exports**, lowering the export price to 90. The rate of subsidisation (and hence the countervailing duty) would be 10%. At the same time, the dumping margin would be 10%. The rule against double counting precludes the concurrent imposition of a countervailing duty of 10% and an anti-dumping duty of 10%.

- Now we assume that a subsidy of 10 is granted with respect to **both exports and domestic sales**, lowering the export price to 90 and also lowering the domestic sales price to 90. We further assume that the normal value continues to be based on the **domestic sales**. The rate of subsidisation (and hence the countervailing duty) would still be 10%. However, there would be no dumping. An issue of double counting would not arise.

- Now we assume that a subsidy of 10 is granted with respect to **both exports and domestic sales**, lowering the export price to 90 and also lowering the domestic sales price to 90. We further assume that now the normal value is established on the basis of **costs**, and is 100 (the costs themselves not being the vehicle through which the subsidy is delivered – that is, the constructed normal value being unsubsidized). The rate of subsidisation (and hence the countervailing duty) would be 10%. At the same time, the dumping margin would be 10%. The rule against double counting precludes the concurrent imposition of a countervailing duty of 10% and an anti-dumping duty of 10%.

57. China refers extensively to paragraph 568 of the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* and particularly to the situation in which there is a domestic subsidy (impacting both export price and domestic prices) and normal value is based on **domestic prices**.[30] As correctly stated by the Appellate Body and summarised above, in that case no issue of double counting arises. However, China simply **ignores** the extensive and repeated explanations of the Appellate Body to the effect that when **normal value is based on costs** an issue of double counting may arise (that is, the same situation of dumping and

[29] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 543: ("Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidized, **constructed**, or third country normal value is used in the anti-dumping investigation.")
[30] China's First Opening Oral Statement, paras. 95-97.

subsidisation). On that basis, China makes the extraordinary statements that "The Appellate Body's findings confirm China's arguments, and contradict those of the EU" and "the EU misuses the Appellate Body's reasoning on *double remedies*": precisely the opposite is true.

58. The further connection between the two situations becomes even clearer when the subsidy is delivered in the form of an artificially low priced (non-arms-length) raw material (in the above examples, the raw material price/cost is reduced from 20 to 10). In the first and second examples, the conclusions are the same because it makes no difference how the subsidy is delivered. In the third example, the recorded costs would be 90; an adjustment of the recorded raw material price of 10 back to the market price of 20 (thus total costs of 100) would be justified; and the rule against double counting would apply. However, the point to note is that, in all three examples, in the context of the SCM Agreement, the benefit is established by comparing the artificially low price (10) with a **market benchmark** (20); whilst in the third example the adjusted normal value (that is, the benchmark) is also calculated **in exactly the same way**. The point that the European Union is making is that it would obviously be incoherent, in the two different contexts of the SCM Agreement and the Anti-Dumping Agreement, to have two different "market values" for the raw material.

59. We turn now to China's *third point*.[31] The European Union understands China to be arguing that the SCM Agreement is concerned only with certain types of State action; the Anti-Dumping Agreement is concerned only with certain types of private behaviour; and that permitting an adjustment under the Anti-Dumping Agreement in response to a State action would unlawfully "expand the scope" of the Anti-Dumping Agreement and "undermine" and "circumvent" the SCM Agreement.

60. The European Union disagrees. The European Union considers that it is clear that there is an overlap between the SCM Agreement and the Anti-Dumping Agreement, as the discussion about the same situation of dumping and subsidisation and double remedies nicely illustrates. Furthermore, the concept of

[31] China's First Opening Oral Statement, paras. 99-100.

dumping is an objective concept, in the sense that an investigating authority is not concerned with the reason *why* dumping is occurring. Therefore, just because dumping occurs because of the actions of the State, that does not mean there is no dumping. A review of the list provided by the European Union of situations that are not normal and in which comparability may not be ensured[32] reveals that, in principle, nothing precludes the possibility that any one of them might be the result of actions attributable to the State, and indeed in some instances this is expressly stated to be the case.[33] In such circumstances, an anti-dumping duty is just a response to dumping. It has nothing to do with the SCM Agreement and neither "undermines" nor "circumvents" it.

61. Turning finally to China's *fourth point*.[34] The European Union observes that China does not refer to any specific provisions of the SCM Agreement, and in any event China's assertions are dependent upon the previous point. Furthermore, China appears to overlook the fact that "interested parties" under the Anti-Dumping Agreement are defined to include "the government of the exporting Member".[35]

Question 7

(to the European Union / Japan / Mexico / the United States) The Panel understands that the European Union, Japan, Mexico and the United States argue that Section 15(a)(i) confirms what WTO Members (and the GATT Contracting Parties before them) have always been entitled to do: make an affirmative determination of whether Chinese domestic prices and costs may be relied upon in establishing normal value, through an objective and unbiased examination of all relevant evidence pertaining to the existence of market economy conditions, including evidence submitted by Chinese producers, upon whom the investigating authority is entitled to impose a reasonable burden of proof.

Why was it necessary for negotiators to include Section 15(a)(i) in China's Accession Protocol if its sole function is to confirm WTO Members' existing rights?

62. The European Union does not argue that the "**sole** function" of Section 15 was to "confirm" something that Members could already do under Article VI of the GATT 1994 and the Anti-Dumping Agreement. In responding to the question, we deal first with Section 15 other than with respect to burden of proof, and then with Section 15 insofar as it relates to burden of proof.

[32] EU First Written Submission, para. 46.
[33] Notably with respect to the Ad Notes on monopoly of trade and multiple currency practices.
[34] China's First Opening Oral Statement, paras. 101-106.
[35] Anti-Dumping Agreement, Article 6.11(ii).

63. On the first point (Section 15 other than with respect to burden of proof), our position is that Section 15 contained and continues to contain **additional treaty language**, but this treaty language is not expanding the **scope** of Article VI of the GATT 1994 or the Anti-Dumping Agreement, in what one might call a horizontal sense. Rather, we think that it is additional treaty language in the **vertical** sense, meaning that it clarifies, implements or confirms the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement, which continue to apply.[36] Furthermore, we consider that all of these instruments and provisions apply consistent with each other, meaning that they are to be interpreted and applied in a harmonious and consistent way, and we disagree with China's position that there is a conflict between these provisions.[37] In short, we see the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement as of the same nature as the relationship between these agreements on the one hand, and Section 15 on the other hand. This is what we consider a "vertical relationship", in the sense that both the Anti-Dumping Agreement and Section 15 clarify and implement the principles already contained in Article VI of the GATT 1994. This was language that was agreed for the accession protocols of China (and certain other Members) because of the situation prevailing in those countries.

64. There are different terms that one can use to describe or characterise such a relationship and we do not particularly mind which one is used because it makes no difference to our position – as long as the relationship is understood to be vertical rather than horizontal in nature, and one of consistent application rather than conflict. We have chosen to use the actual treaty terms: **apply consistent with**. However, one can also say that Section 15 is **clarifying** or **interpreting** what is set out in Article VI of the GATT 1994 and the Anti-Dumping Agreement. In this sense, Section 15 can also be said to be merely **confirming** the conclusion that would be reached as a result of the proper interpretation and application of Article VI of the GATT 1994 and the Anti-Dumping Agreement. It is also possible to say that Section 15 is an "**implementation**" of Article VI of the GATT 1994 and the Anti-Dumping Agreement (this is the term used, for example, in the title of

[36] As we have put it in our submissions to the Panel, Section 15 fits "within the four corners" of Article VI of the GATT 1994 and the Anti-Dumping Agreement (EU First Written Submission, paras. 80 and 86).
[37] China's First Opening Oral Statement, para. 149.

the Anti-Dumping Agreement). It is also possible to say that Section 15 provides guidance concerning the "**application**" of Article VI of the GATT 1994 and the Anti-Dumping Agreement (this is the term used, for example, in Article 1 of the Anti-Dumping Agreement).

65. Thus, for the European Union, the question is not so much whether or not it was "necessary" to include such language, but rather whether or not there is any **utility** in the additional language. We consider that there is clearly additional utility, because the language enhances security and predictability by eliminating any possible uncertainty. In precisely the same way, many provisions of the Anti-Dumping Agreement might not be "necessary", given the provisions of Article VI of the GATT 1994, but nevertheless there is utility in the fact that they have been negotiated and adopted.

66. Turning to the second point (Section 15 insofar as it relates to burden of proof). What Section 15(a)(ii) did was to deem that, in the case of China, it was reasonable to place the burden of proof to demonstrate market economy conditions on the Chinese exporters. On this point, Section 15(a)(ii) could therefore be characterised as a China-specific implementation or application of the general rule in Article 2.4 of the Anti-Dumping Agreement (an investigating authority must not place an unreasonable burden of proof on any interested party or sub-set of interested parties). Contrary to what China asserts, there is no conflict between these provisions. As we have explained above, if China had sought to challenge this proposition before 11 December 2016 it would certainly have lost the case, because of the existence of Section 15(a)(ii).

67. With the expiry of Section 15(a)(ii) on 11 December 2016, Section 15 no longer contains a provision placing the burden of proving the existence of market conditions on Chinese exporters. Instead, China now has the possibility to challenge a Member that places the burden of proof on the Chinese exporters on the grounds that this is unreasonable and therefore inconsistent with Article 2.4 of the Anti-Dumping Agreement, either on an "as applied" basis or on an "as such" basis. The outcome of such a case would depend upon whether or not the adjudicator would consider the actions of the importing Member with respect to

the burden of proof issue to be reasonable or unreasonable, in light of all the relevant facts. As we have explained in our submissions to the Panel, we consider that, in all the circumstances, in this respect, the measures at issue continued to be reasonable even after 11 December 2016.[38] However, China has made no claim under Article 2.4 of the Anti-Dumping Agreement.

Question 8

(to the European Union, Canada and the United States) The European Union emphasized during the substantive meeting that its submissions with respect to the meaning of Section 15(a) of China's Accession Protocol and its relevance to China's claims should be understood on both a "stand-alone" and "contextual" basis. The Panel understands the "stand-alone" argument to be similar to the position advanced by Canada, namely, that Section 15(a) contains rules on price comparability that are additional to the rules contained in Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement. The Panel understands the "contextual" argument to be similar to the position advanced by the United States, namely, that the rules on price comparability set out in Section 15(a)(i) confirm WTO Members existing rights under Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement. Please comment on the Panel's understanding.

68. The European Union refers to its response to question 7. The "stand-alone" argument refers to the treaty language other than with respect to burden of proof. With respect to burden of proof, we do not make a "stand-alone" argument – we accept that on 11 December 2016 Section 15(a)(ii) expired and that the China-specific rule on burden of proof in Section 15 therefore no longer applies. As we have just explained, we do not mind how the additional treaty language is characterised, although we prefer to use the actual treaty terms: apply consistent with.

69. The "contextual" argument is that, even if the Panel were to find that, after 11 December 2016, Section 15 serves no purpose, it would remain the case that, other than with respect to the burden of proof point, Section 15, both before and after 11 December 2016, constitutes an interpretation of Article VI of the GATT 1994 and the Anti-Dumping Agreement. That interpretation continues to be valid today. It is both an authoritative and a permissible interpretation of Article VI of the GATT

[38] For example, EU First Written Submission, paras. 350 and 384 and footnote 283, and the documents referred to therein.

1994 and of the Anti-Dumping Agreement. On those grounds, as explained in the EU First Written Submission,[39] the Panel must reject China's claims.

70. Obviously, it is up to Canada and the United States to explain their own positions to the Panel. The European Union does not understand either of them to disagree with either argument mentioned in the Panel's question. Whilst Canada may place more emphasis on the "stand-alone" argument, we do not understand that Canada is arguing for the *a contrario* resurrection of Section 15(a)(ii). Rather, we understand that Canada is agreeing with the European Union that Section 15(a)(i) implies that one must necessarily have regard to Article 2.4 of the Anti-Dumping Agreement (although China has brought no claim under that provision). Similarly, whilst the United States may certainly be making the "contextual" argument, we understand that the United States also agrees with the European Union with respect to the "stand-alone" argument.

Question 9

(to the United States) Please respond to China's assertion that the statements identified in Exhibit CHN-69 supports China's interpretation of the legal consequences of the expiry of Section 15(a)(ii) of China's Accession Protocol.

Question 10

(to Japan) Please clarify the statements made at paragraph 29 of Japan's oral statement. What does Japan mean when it states that it agrees with the European Union that Section 15 is "applicable law"? If Japan considers Section 15 to be "applicable law", please explain the basis for arguing that China's claims under "the other provisions … would not lose their merits" only because of China's failure to identify Section 15 as a legal basis for its claims.

Question 11

(to China) The Panel understands that China does not argue that Section 15(a) is an "exception" to Article VI of the GATT 1994 and the Anti-Dumping Agreement, but rather that, prior to 11 December 2016, Section 15(a) modified those rules, all of which continued to apply in investigations involving Chinese imports. In other words, China's position is that Article VI GATT, the Anti-Dumping Agreement and Section 15 were all equally applicable in investigations involving Chinese imports up until 11 December 2016. Please explain the extent to which this understanding is correct.

Question 12

[39] EU First Written Submission, Section 8.

(to China) Does China consider the Appellate Body statements at paragraph 289 of EC – Fasteners on the expiry of Section 15(a) of China's Accession Protocol to constitute Appellate Body findings on the meaning of the second sentence of Section 15(d)? If so, does China accept that the meaning of the second sentence of Section 15(d) was not at issue in EC – Fasteners? Also, how does China reconcile its reliance on those statements with the Appellate Body's observation in paragraph 291 of the same report, where it noted that China's claim did not concern "the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China"?

Question 13

(to China) The Panel understands that China accepts that the second sentence of Section 15(d) resulted in the termination of only Section 15(a)(ii), leaving Section 15(a)(i) in full legal force. However, for China, Section 15(a)(i) has no "present purpose" without the continued existence of Section 15(a)(i). Wouldn't this interpretation ultimately result in rendering the terms of Section 15(a)(i) redundant? If so, wouldn't that be contrary to the principle of effective treaty interpretation?

Question 14

(to China) At least two of the negotiating texts that preceded the final version of Section 15 of China's Accession Protocol (Exhibits EU-1 and CHN-68) show that the entirety of Section 15(a) was to expire after a certain number of years. However, in the final version adopted into China's Accession Protocol, this text was changed, limiting the termination to only Section 15(a)(ii). How does China reconcile this final change with its view that the expiry of Section 15(a)(ii) means that Section 15(a)(i) – despite continuing to be in force – has no "present purpose"?

Question 15

(to China) The Panel understands China to argue that the fact it has not identified Section 15(a)(i) of China's Accession Protocol as a legal basis for its claims has no legal significance for the merits of its claims, because (even according to the European Union's own submission) the rules set out in Section 15(a)(i) confirm the rules for determining price comparability that are prescribed in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement. Please comment on the Panel's understanding of China's position, and please also elaborate China's position on this issue.

Question 16

(to the European Union) What is the European Union's authority for asserting that because China has not identified Section 15(a) as a legal basis for its claims, the Panel is not entitled to "opine on the meaning of 'new Section 15(a)'" for the purpose of determining the merits of China's claims under Article VI:1 of the GATT 1994, the Second Supplementary Note Ad Article VI:1, and Article 2.2 of the Anti-Dumping Agreement?

71. Please see our response to question 4.

II. ARTICLE VI OF THE GATT 1994

Question 17

(to parties and third parties) The United States has submitted evidence of the practice of the GATT Contracting Parties in relation to the Accessions of Poland, Hungary and Romania to support its view that "non-market economy prices and costs may be rejected" under Article VI:1 of the GATT. Please explain your views on the extent to which the Panel may and should consider this evidence in its deliberations on this question at issue in this dispute?

72. The Panel can and must consider this evidence. The European Union notes that many or all of these documents are referenced in Attachment 1 to the EU First Written Submission. Many are official GATT or WTO documents for which references are already provided, and it is standard practice that it is unnecessary to exhibit such documents. In any event, for the avoidance of any possible doubt on this matter the European Union hereby formally incorporates by reference and submits Exhibits USA-1 to USA-30 as Exhibits EU-8 to 38. In order to avoid overburdening the Panel, China and the third parties, the EU refrains at this point from attaching copies to these replies, but will provide copies to the Panel, China or any third party upon request.

Question 18

(to parties and third parties) A number of third parties have relied upon the Appellate Body's finding in US – Hot-Rolled Steel (Japan) (paragraph 140) that domestic sales "in the ordinary course of trade" are sales "incompatible with 'normal' commercial practice", to support their views that "normal value" is a market-based or market-determined price or a price that is free of State intervention. Is there anything in US – Hot-Rolled Steel (Japan) or any other WTO Panel and Appellate Body report that helps to understand what the Appellate Body meant when it referred to "'normal' commercial practice"?

73. The European Union likewise relies upon the Appellate Body Report in *US – Hot-Rolled Steel* for exactly the same reasons.

74. The precise quotation (that is, what the Appellate Body actually stated) is as follows:

> 140. In terms of the above definition, Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant

> time, the transaction is not an appropriate basis for calculating "normal" value.

75. As the Appellate Body went on to observe repeatedly in that case, there may be many reasons why transactions might not be "in the ordinary course of trade".[40]

76. In this respect, the European Union respectfully refers the Panel to the list contained in the EU First Written Submission,[41] which refers to situations that are not normal and in which adjustments may be necessary in order to ensure comparability.

Question 19

(to parties and third parties) Article 2.7 of the Anti-Dumping Agreement states that Article 2 is "without prejudice to the second Supplementary Provision to Section 1 of Article VI".

> *(a) What is the purpose of this provision (i.e., Article 2.7)?*
>
> *(b) What does the "without prejudice" language suggest about the relationship between the Second Interpretative Note Ad Article VI:1 and Article 2 of the Anti-Dumping Agreement, given the particular relationship between the Anti-Dumping Agreement and Article VI of the GATT 1994 that is described in Article 1 of the Anti-Dumping Agreement?*

77. The European Union respectfully refers the Panel to the relevant parts of the EU First Written Submission.[42]

78. The purpose of Article 2.7 of the Anti-Dumping Agreement is to ensure that Article 2 of the Anti-Dumping Agreement is "without prejudice" to the Ad Note to Article VI:1, second paragraph, of the GATT 1994.

79. According to Article 2.7, **if** there is a conflict between Article 2 on the one hand and the Ad Note on the other hand, then the Ad Note will prevail to the extent of the conflict. Article 2.7 therefore reverses, in this specific instance, the rule in the General Interpretative Note to Annex 1A of the WTO Agreement. However, Article 2.7 does not suggest that there is such a conflict, any more than the General Interpretative Note suggests the existence of conflicts.

[40] Appellate Body Report, *US – Hot-Rolled Steel*, para. 141.
[41] EU First Written Submission, para. 46.
[42] EU First Written Submission, para. 60 and footnotes 75-77.

80. This is confirmed by a consideration of Article 1 of the Anti-Dumping Agreement. All of the Ad Notes are integral parts of Article VI of the GATT 1994.

Question 20

(to China) Please respond to Australia's assertion (at paragraph 14 of its oral statement) that China's position concerning the methodologies for determining normal value fails to give any meaning to the "critical qualifying terms 'comparable', 'ordinary course of trade' or 'proper comparison'".

III. THE CHALLENGED MEASURE

Question 21

(to China) In paragraph 9 of its first written submission, China asserts that the "EU law defaults to an approach in which it determines Chinese normal values using methodologies based on surrogate prices and costs". Is there any case law from the courts of the European Union that support this assertion?

Question 22

(to the European Union) Does the European Union agree with China's characterization of the operation of Article 2(7) of the Basic AD Regulation that is set out in paragraphs 26 to 35 of China's first written submission? In your answer, please explain the processes for:

(a) selecting the "appropriate market-economy third country" that is referred to in the second sentence of Article 2(7)(a) of the Basic AD Regulation, including: (i) the kinds of reasons and supporting evidence used to make the selection; (ii) whether the domestic industry provides any input into the decision; and (iii) when the final selection is made, given that the third sentence of Article 2(7)(a) provides that interested parties shall be informed of the "envisaged" third country market economy "shortly after" initiation.

(b) determining whether a "market-economy conditions" prevail for a Chinese producer pursuant to the criteria set out in Article 2(7)(c): (i) how the process is initiated; (ii) whether the process operates in parallel with or suspends the selection of the "appropriate market-economy third country" referred to in Article 2(7)(a); and (iii) whether the domestic industry provides any input into the determination.

81. As explained by the European Union at length in the EU First Written Submission, the EU **strongly disagrees** with the content of paragraphs 26 to 35 of China's First Written Submission. For the further assistance of the Panel, Attachment 1 to these replies further details the terms with which we disagree. A review of that

document shows that paragraphs 26 to 35 of China's First Written Submission are so replete with misstatements and errors as to be entirely un-usable.

82. This is a point of critical importance. One thing is the presentation of the facts; another thing is the presentation of legal argument. It is not objective to insert into the presentation of the facts pejorative characterisations and misstatements designed to skew the subsequent legal analysis. Considered individually and in isolation such inaccurate statements might not appear to be significant; but taken as a whole they can significantly skew the legal analysis. Furthermore, buried within many apparently trivial changes, significant errors may be inserted, such as China's erroneous assertion that Article 2(7)(b) contains the term "only". Fortunately, the antidote for this kind of "litigation technique" is straightforward: in the legal analysis, stick to the terms actually used in the treaty and in the measures at issue.

83. The right question is: why would China seek to depart from the actual terms used in the treaty and the measures at issue? To which the answer is: China is attempting to compensate for the weakness of its legal arguments by skewing what is supposed to be a neutral presentation of the law and the facts. And a further appropriate question is: why would the Panel accede to China's approach? To which the answer is: it must not, because it is obliged to make an **objective** assessment of the matter before it, and that requires it to adhere to the **actual terms of the treaty and the measures at issue**.

84. Turning to the other parts of the question, Article 2(7)(a) of the EU Basic Anti-Dumping Regulation (to which the question refers) no longer exists. Under that provision, the process for selecting an appropriate market-economy third country was something that had to be done in a not unreasonable manner. The particular reasons would be considered on a case-by-case basis in light of the countries with respect to which the investigation would be initiated, and also in light of the product or products under investigation or consideration. Similarly, the kind of supporting evidence that might be taken into consideration would also depend on the particular circumstances of individual cases. Due account had to be taken of any reliable information that might have been available at the time when the

selection would have been made. This would have included any relevant information provided by the domestic industry. Where appropriate, a market-economy third country subject to the same investigation would have to be used. There was no hard-and-fast rule about when the selection would be made and this is something that would have been done on a case-by-case basis. Where necessary, the selection would have been made after the operation of the rules in Articles 2(7)(b) and (c). The only rule was that account must have been taken of any applicable time limits.

85. Article 2(7)(c) of the EU Basic Anti-Dumping Regulation (to which the question refers) also no longer exists. As regards the relevant processes, these would be initiated by a claim made under Article 2(7)(b). Such claim would have had to be made in writing. It would have had to contain sufficient evidence that the producer making the claim operates under market-economy conditions. The evidence would have to relate to the criteria set out in Article 2(7)(c). A determination as to whether or not the producer would have met the criteria referred to in Article 2(7)(c) would normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation. The EU domestic industry would first have been given the opportunity to comment. Thus, any input provided by the EU domestic industry would normally have been taken into consideration. In principle, the determination made would then remain in force throughout the investigation. The European Commission would provide information to the EU Member States concerning its analysis of claims made pursuant to Article 2(7)(b) normally within 28 weeks of the initiation of the investigation.

86. It is important to note that, when the Commission would have limited its investigation in accordance with Article 17 of the EU Basic Anti-Dumping Regulation (which concerns sampling), a determination pursuant to Articles 2(7)(b) and (c) would have been limited to the parties included in the investigation and to any producer that would have received individual treatment pursuant to Article 17(3) of the EU Basic Anti-Dumping Regulation.

87. There would have been no hard-and-fast rule concerning the relationship between the processes under Articles 2(7)(a) and 2(7)(c), this being rather something that would be managed on a case-by-case basis, taking into account all the relevant time limits. Where appropriate, relevant data would have been collected in parallel.

Question 23

(to the European Union) Footnote 1 of the Basic AD Regulation identifies 12 countries as "non-market-economies". Six of these are WTO Members, namely, Albania, Armenia, Georgia, Moldova, Mongolia and Tajikistan. Please explain how Article 2(7)(a) and (b) apply to these six countries. Will they be subject to Article 2(7)(a) only if the conditions for resorting to Articles 2(1)-(6) in Article 2(7)(b) are not satisfied; or will they be subject to Article 2(7)(a) without first testing whether the conditions in Article 2(7)(b) are satisfied.

88. Footnote 1 of the EU Basic Anti-Dumping Regulation (to which the question refers) no longer exists. Articles 2(7)(a) and 2(7)(b) (which no longer exist) would have applied to these seven[43] countries in the same way, but Article 2(7)(b) would not have applied to the other five countries in footnote 1. In any event, the application of the measure at issue with respect to these countries is not a matter within or properly within this Panel's terms of reference.[44] China has not contested that,[45] and the Panel has made it clear that the matter is now closed.[46]

Question 24

(to the European Union) The European Union asserts at paragraphs 298-299 of its first written submission that the phrase "on any other reasonable basis" in Article 2(7)(a) of the Basic AD Regulation "does not exclude" the application of Articles 2(1) to 2(6). According to the European Union, this implies that Articles 2(7)(a) and 2(7)(b) permit, in certain circumstances, the application of Articles 2(1) to 2(6). Please reconcile these assertions with the fact that Article 2(7)(b) states that the normal value of a relevant producer shall be based on Articles 2(1) to 2(6) only when the criteria in Article 2(7)(c) is satisfied.

89. Article 2(7)(b) did not state that the normal value of a relevant producer shall be based on Articles 2(1) to 2(6) "only" when the criteria in Article 2(7)(c) were

[43] The EU notes that, according to the WTO website, the Kyrgyz Republic has been a member of WTO since 20 December 1998.
[44] EU First Written Submission, paras. 230-233.
[45] China's First Opening Oral Statement, paras. 238-243.
[46] Communication from the Panel to the Parties and Third Parties dated 8 December 2017.

satisfied (the term "only" did not appear in Article 2(7)(b)). China has invented that term and inserted it into the measures at issue. On the contrary, Article 2(7)(b) stated clearly that, if it would not have been 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 prevailed for this producer or producers in respect of the manufacture and sale of the like product concerned, then the rules set out under point (a) shall apply. The rules set out in Article 2(7)(a) did not preclude the application of the rules set out in Articles 2(1) to 2(6) where the other bases for establishing normal value set out in Article 2(7)(a) were not possible.

90. In any event, the rules set out in Articles 2(1) to 2(6) applied concurrently with the rules set out in Article 2(7), as explained in the EU First Written Submission.[47]

Question 25

(to the European Union) Under the terms of Article 2(7)(b), the Panel understands that the rules in Articles 2(1) to 2(6) will not be applied to determine the normal value of Chinese producers, if Chinese producers provide no evidence at all that market economy conditions prevail in respect of the manufacture and sale of the relevant product. In such a situation, Article 2(7)(b) envisages that the investigating authority shall apply the rules in Article 2(7)(a), without performing any further analysis or examination of its own of the extent to which market economy conditions prevail. Please confirm and comment on the Panel's understanding of the operation of Article 2(7)(b).

91. If a Chinese producer would have provided no evidence at all in order to show or substantiate that market economy conditions prevail in respect of the manufacture and sale of the relevant product, then Article 2(7)(b) provided that the investigating authority shall apply the rules in Article 2(7)(a). The investigating authority was not obliged by Article 2(7)(b) to perform any further analysis or examination of its own of the extent to which market economy conditions prevailed.

92. The rules in Articles 2(1) to 2(6) applied concurrently with the rules in Article 2(7).

Question 26

[47] EU First Written Submission, para. 152.

(to the European Union) As already explained, the Panel understands the European Union to argue that Section 15(a)(i) confirms what WTO Members (and the GATT Contracting Parties before them) have always been entitled to do: make an affirmative determination of whether Chinese domestic prices and costs may be relied upon in establishing normal value, through an objective and unbiased examination of all relevant evidence of the existence of market economy conditions, including evidence submitted by Chinese producers, upon whom the investigating authority is entitled to impose a reasonable burden of proof.

Please explain how Article 2(7) of the Basic AD Regulation envisages an affirmative determination of whether Chinese domestic prices and costs may be relied upon in establishing normal value through an objective and unbiased examination of all relevant evidence

93. With respect to the term "confirms" the European Union refers to its response to question 7. The European Union explains that it does not argue that this is the "sole" function of Section 15.

94. With respect to the issue of burden of proof, the European Union considers that, in all the circumstances, it was reasonable for the European Union, after 11 December 2016, and pursuant to Article 2(7) of the EU Basic Anti-Dumping Regulation (which no longer exists) to place the burden of proof on the Chinese exporters to demonstrate that they were operating under market economy conditions.[48] The Chinese exporters thus had a full opportunity to present all the evidence they might have wished to present on that issue. The investigating authority would then have been in a position to make an affirmative determination of whether Chinese domestic prices and costs could have been relied upon in establishing normal value through an objective and unbiased examination of all relevant evidence.

95. However, the European Union notes that China has made no claim under Article 2.4 of the Anti-Dumping Agreement.

Question 27

(to the European Union) Please respond to China's assertion that the 16 statements made by European Union officials on behalf of European Union agencies (paragraph 77 of China's first written submission) supports China's interpretation of the legal consequences of the expiry of Section 15(a)(ii) of China's Accession Protocol.

[48] EU First Written Submission, para. 350 and footnote 283.

96. China does not explain what legal relevance is ascribes to these statements, other than by referring to the alleged "understanding" of the European Union agencies. To the extent that China might be trying to assert that the EU does not contest China's claims and arguments in these panel proceedings, China is mistaken. Furthermore, China has not demonstrated that any of these statements, expressing the political views of certain individuals in different contexts, preclude the European Union from articulating its official legal position in the context of these panel proceedings.

97. In any event, it has always been clear to the European Union (and to China) that on 11 December 2016 **something** would change, as the various statements referenced by China indicate. That something was the burden of proof, as explained by the European Union in its submissions to the Panel. Thus, until 11 December 2016, Section 15 deemed it reasonable for the European Union to place the burden of demonstrating market economy conditions on the Chinese producers, and thus, absent any contrary showing, **treat China as a non-market economy**. That ceased to be the case after 11 December 2016. After 11 December 2016, it became necessary for the investigating authorities of the European Union to consider all relevant evidence before determining whether or not data about Chinese prices and costs was capable of being used for the purposes of establishing normal value. In other words, it could no longer automatically treat China as a non-market economy in the manner that it had done before. Instead, it applied the general rule in Article 2.4 of the Anti-Dumping Agreement, which prohibits investigating authorities from placing an unreasonable burden of proof on any interested party or sub-set of interested parties. However, in view of the existing circumstances, the European Union considered that it was reasonable to place the burden of proof on the Chinese exporters, pursuant to Article 2(7) of the EU Basic Anti-Dumping Regulation (which no longer exists). China has made no claim under Article 2.4 of the Anti-Dumping Agreement.

98. Finally, as long as China fails to explain the legal relevance that China attaches to these documents they are simply irrelevant and must be disregarded by the Panel.

IV. MOOTNESS

Question 28

(to China) Is it China's submission that Article 2(7) of the Basic AD Regulation will have continuing legal effects, notwithstanding the expected repeal and replacement of Regulation 2016/1036 with a new Basic AD Regulation? Please explain your answer.

Question 29

(to China) Do WTO Panels have authority to make recommendations with respect to a challenged measure that has been repealed and replaced but continues to have legal effects?

Question 30

(to China) How is it possible for a responding Member to bring the continuing legal effects of a repealed and replaced measure into conformity with its obligations under the WTO Covered Agreements?

Question 31

(to the European Union) Please respond to China's characterization of the alleged "grandfathering" rules that China asserts will be included in the amended Basic AD Regulation and their legal consequences?

99. Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017[49] was published in the Official Journal of the European Union on 19 December 2017 and entered into force the following day, with the consequence that the measures at issue in these panel proceedings no longer exist. It does not include the term "grandfathering" and in any event none of the provisions contained in Regulation 2017/2321 is a measure at issue within or properly within the scope of these panel proceedings.

Question 32

(to the European Union) Does the European Union agree with China that the methodology provided for in Article 2(7) of the Basic AD Regulation was applied in the determinations identified at Sections 79-80 of China's first written submission?

100. The measures referred to in paragraphs 79-80 of China's First Written Submission are not within or properly within this Panel's terms of reference.[50] China has not contested that,[51] and the Panel has made it clear that this matter is now closed.[52]

[49] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R2321
[50] EU First Written Submission, paras. 273-274.

101. The European Union does not agree with China that it has demonstrated the application of "the methodology" provided for in Article 2(7) of the EU Basic Anti-Dumping Regulation in any determinations. As the European Union has explained, the European Union does not understand what China means by the phrase "the methodology provided for in Article 2(7) of the EU Basic Anti-Dumping Regulation". Article 2(7) did not use the term "methodology" and furthermore it did not refer to a single "methodology". Rather, it set out legal provisions that governed, together with other legal provisions, the establishment of the normal value with respect to China and certain other countries.

[51] China's First Opening Oral Statement, paras. 238-243.
[52] Communication from the Panel to the Parties and Third Parties dated 8 December 2017.