EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

(DS516)

RESPONSES OF THE UNITED STATES TO THE EUROPEAN UNION'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

June 15, 2018

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
China – Raw Materials (Panel)	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / Add. 1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

Question 1. The United States, in its oral statement in the third-party session at the second panel meeting, referred to China's failure to keep its promise to "fully transition to a market economy" following its accession to the WTO. Canada, in its oral response to a panel question at the third-party session of the second panel meeting, further noted that the Working Party Report provides characterizations of the Chinese economy that was supposed to transition to a market economy following its accession to the WTO. Based on your assessment or understanding, has China kept its promise with respect to reforms of its economy under its terms of accession to the WTO? To what extent does Section 15 of China's Accession Protocol reflect China's promise to transition fully to a market economy following its accession to the WTO, particularly in respect of the characterizations of the Chinese economy that appear in the Working Party Report?

1. China promised WTO Members that it would fully transition to a market economy following its accession to the WTO. The negotiations of China's accession to the WTO "were predicated on the conviction that China intended to alter the balance of market and non-market forces within its economy and to give thereby price-based market forces a prominent role in the decisions driving trade. For this reason, a key aspect of the examination in the Working Party had to be the extent to which China's economic reform process had been, or had not been, implemented and what contracting parties could expect in the future."[1]

2. China has not kept its promise. It is demonstrably clear today that China, over 16 years after its accession to the WTO, has not fully transitioned to an economy that operates based on free market principles.[2] China's leading state-run companies acknowledge the stark contrast between China's economic structure and those of free market countries.[3] For example, in a recent corporate disclosure, China's own Sinopec (oil refining and petrochemicals) explained to shareholders that the "Chinese economy differs from the economies of most developed countries in many respects, including the amount of government involvement … and allocation of resources."[4] The material facts that Sinopec disclosed included its view that "the Chinese government continues to play a significant role in regulating industry development by imposing industrial policies" and that it "exercises significant control over China's economic growth

[1] Spec(88)13 (Mar. 29, 1988), para. 2.12 (Exhibit USA-23).

[2] *See, e.g.*, U.S. Third-Party Submission, paras. 23-24; U.S. Responses to Panel Questions Following Second Substantive Meeting, paras. 42-46.

[3] *See* U.S. Third-Party Submission, paras. 23-107; U.S. Responses to Panel Questions Following Second Substantive Meeting, paras. 43-44.

[4] Exhibit USA-4, p. 7 (Sinopec Form 20-F Filing with the U.S. Securities and Exchange Commission (2016)). Sinopec made these statements in the context of a corporate disclosure before the U.S. Securities and Exchange Commission – a disclosure in which misstatements or omissions of material fact are legally actionable and punishable by law.

through allocating resources … and providing preferential treatment to particular industries or companies."[5]

3. China remains today a non-market economy.[6] The Chinese government continues to maintain and exercise broad discretion and control to allocate resources with the goal of achieving specific economic outcomes. As explained in the U.S. third-party submission,[7] this system distorts costs and prices throughout China's economy, such that non-market conditions continue to prevail in the operation of China's economy.

4. Section 15 of China's Accession Protocol captures, in part, Members' concern that China had not transitioned fully to a free market economy and that whether market economy conditions prevailed in China remained a relevant inquiry following accession. The negotiations for China's accession took almost 15 years, and the concerns about whether China could fulfill its WTO obligations remained throughout those negotiations.[8] Indeed, the final Working Party Report on China's Accession stated that "China was continuing the process of transition towards a full market economy" and recognized that, "under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations."[9]

5. Section 15(a)(ii) deferred the examination of market conditions normally required to satisfy the generally applicable rules of evidence until a later date, perhaps anticipating that this question could be rendered moot if China completed its transition within 15 years. But in deferring this question, the continued existence of Section 15(a) following the expiry of Section 15(a)(ii) confirms that Members' concern about whether market economy conditions prevailed in China would not dissipate *before* China completed its transition to a market economy. The continuing viability and practicality of Section 15(a), Section 15(a)(i), and the first and third sentences of Section 15(d) confirm that facts have always mattered, and that WTO Members did not grant China a special right under the anti-dumping rules to engage in government

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[5] Exhibit USA-4, p. 7 (Sinopec Form 20-F Filing with the U.S. Securities and Exchange Commission (2016)).

[6] U.S. Third-Party Submission, paras. 23-107; *see* U.S. Department of Commerce, "China's Status as a Non-Market Economy," Docket A-570-53, p. 7 (Oct. 27, 2017) (Exhibit USA-2); U.S. Department of Commerce, "Review of China's Financial System Memorandum," Docket C-570-054 (August 1, 2017) (Exhibit USA-3). Reports by international institutions such as the Asian Development Bank have pointed to significant price distortions in China's economy, particularly in factor markets. U.S. Department of Commerce, "China's Status as a Non-Market Economy," Docket A-570-53, p. 158 (Oct. 27, 2017)(Exhibit USA-2).

[7] U.S. Third-Party Submission, paras. 23-107.

[8] *See* Working Party on China's Status as a Contracting Party, Spec(88)13 (Mar. 29, 1988) (Exhibit USA-23). "In China's case, these negotiations [for accession] were predicated on the conviction that China intended to alter the balance of market and non-market forces within its economy and to give thereby price-based market forces a prominent role in the decision driving trade." Working Party on China's Status as a Contracting Party, Spec(88)13, para. 2.12.

[9] Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (Oct. 1, 2001), para. 150 (Exhibit USA-30).

interference and intervention in market mechanisms, distorting market outcomes and undermining WTO rules, without consequence.

6. Given the extent of China's non-market economic distortions, China's position in this dispute – that Members would be prohibited from rejecting and replacing prices or costs that are not determined under market economy conditions for purposes of anti-dumping comparisons – would expose other Members even more to those economic distortions. Therefore, that China's economy today continues to operate as one in which market economy conditions do not prevail undermines the reciprocal and mutually advantageous nature of WTO commitments and has particular consequences for anti-dumping comparisons and the application of anti-dumping duties to Chinese imports.

Question 2. Do you agree with China that its Panel Request clearly indicates that China intended to challenge the measure at issue as inconsistent with Section 15 of China's Accession Protocol as required by DSU Article 6.2?

7. China in its Panel Request does **not** indicate that it intended to challenge the measure at issue as inconsistent with Section 15 of China's Accession Protocol, as required by DSU Article 6.2. Indeed, China in its closing argument following the first substantive meeting argues that it "was not required to make a claim under Section 15(a)"[10] and its closing argument following the second substantive meeting acknowledges that Section 15 "does not form the legal basis for China's claim."[11] Therefore, as explained below, the terms of reference in this dispute do not vest the Panel with the authority under DSU Article 7 to consider whether the claims under Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement apply "consistent with" Section 15.

8. The Appellate Body has observed that DSU Article 6.2 has two distinct requirements: (1) identification of the specific measures at issue; and (2) the provision of a brief summary of the legal basis of the complaint.[12] These elements comprise the "matter referred to the DSB,"

[10] China's Closing Statement at the First Substantive Meeting, para. 16.

[11] China's Closing Statement at the Second Substantive Meeting, para. 13.

[12] *Australia – Apples (AB)*, para. 416. *See also China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para 786; *US – Carbon Steel (AB)*, para. 125.

which is the basis for a panel's terms of reference under DSU Article 7.1.[13] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[14]

9. The brief summary of the legal basis provided for in a panel request "must be sufficient to present the problem clearly."[15] It is well settled that "[p]anels are not permitted to address legal claims falling outside their terms of reference."[16] Therefore, "[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[17]

10. An examination of China's Panel Request demonstrates that the Panel's terms of reference in this dispute do not include a claim that the measure at issue is, after December 11, 2016, not "consistent with" Section 15 of China's Accession Protocol.

- The legal claims that China included in its Panel Request assert "that: (i) Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article I:1 of the GATT 1994, and (ii) Article 2(7) is inconsistent with Articles 2.1 and 2.2 of the *Anti-Dumping Agreement*, Article VI:1 of the GATT 1994, and the second paragraph of the Ad Note to Article VI:1 of the GATT 1994 …".[18]

- China did not separately include in its Panel Request a legal claim that, with respect to the measure at issue, the European Union applied Article VI and the Anti-Dumping Agreement in a manner not "consistent with" Section 15 of China's Accession Protocol.[19]

- The lead paragraph of Section 15 and the words "consistent with" do not expire on December 11, 2016, so the requirement that an importing Member

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[13] *Australia – Apples (AB)*, para. 416.

[14] *Australia – Apples (AB)*, para. 416. The requirements of Article 6.2 "is not a mere formality." *Australia – Apples (AB)*, para. 416. Compliance with Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances." *US – Carbon Steel (AB)*, para. 127.

[15] *EC – Selected Customs Matters (AB)*, para. 130. "A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question." *EC – Selected Customs Matters (AB)*, para. 130 (italics original).

[16] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 152 (citing *EC – Hormones (AB)*, para. 156).

[17] *EC – Bananas III (AB)*, para. 143 (italics original).

[18] Panel Request, para. 7.

[19] The lead paragraph of Section 15 of China's Accession Protocol states, in part, that Article VI of the GATT 1994 and the Anti-Dumping Agreement "shall apply in proceedings involving imports of Chinese origin into a WTO Member *consistent with*" paragraphs (a) through (d) of that section.

"shall apply" Article VI and the Anti-Dumping Agreement in anti-dumping proceedings involving Chinese imports "consistent with" Section 15 remains applicable after December 11, 2016.

- What constitutes the meaning or effect of Section 15 after December 11, 2016, is an interpretive matter that would need to be argued and resolved as part of a challenge under Article VI or the Anti-Dumping Agreement to a Member's treatment of Chinese imports.

- Therefore, as China did not include in the Panel Request for this dispute a legal claim that the measure at issue is, after December 11, 2016, not "consistent with" Section 15 of China's Accession Protocol, the Panel does not have the authority under its terms of reference to consider whether the claims under Article VI:1 and the Anti-Dumping Agreement apply "consistent with" Section 15.

11. China's first written submission moreover contradicts China's argument that its Panel Request indicates that it intended to challenge the measure at issue as inconsistent with Section 15 of China's Accession Protocol. Section IV of China's first written submission "sets out the legal bases for its claims."[20] This section explained why "the current EU anti-dumping regime is inconsistent with" Article I:1 of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement, Article VI:I of the GATT 1994, and the Second *Ad* Note.[21] It did not explain why the measure at issue was inconsistent with Section 15 of China's Accession Protocol. Indeed, nowhere in China's first written submission does it argue that the measure at issue is, after December 11, 2016, inconsistent with Section 15,[22] nor does the submission request that the Panel find that this measure is not consistent with Section 15.[23] China only asks that the Panel find that "Article 2(7) of the Basic Regulation is inconsistent with Article 2.2, read in light of Article 2.1 of the *Anti-Dumping Agreement*, Article VI:1 of the GATT 1994, and *Ad* Note to Article VI:1 of the GATT 1994 to the extent that the *Ad* Note sets forth affirmative obligations, rather than an exception."[24]

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[20] China's First Written Submission, para. 14.

[21] China's First Written Submission, para. 14.

[22] China's First Written Submission, paras. 84-183.

[23] *See* China's First Written Submission, para. 184.

[24] China's First Written Submission, para. 184. China repeats this request – absent a request involving Section 15 – at paragraph 260 of its second written submission, thereby demonstrating further that China did not include in the Panel Request for this dispute a legal claim that the measure at issue is, after December 11, 2016, not "consistent with" Section 15 of China's Accession Protocol.

12. Section 15(a)(ii) expired on December 11, 2016,[25] but the other provisions of Section 15(a) did not. China acknowledges both points.[26] China does not assert that the remaining provisions of Section 15(a) are an affirmative defense,[27] nor that Section 15(a) is an exception to Article VI:1 of the GATT 1994 or the Anti-Dumping Agreement.[28] China concedes that the measure at issue was "consistent with" Section 15(a) *before* December 11, 2016.[29] That said, China did not include in its panel request a legal claim that the measure at issue is not "consistent with" the remaining provisions of Section 15 *after* December 11, 2016. Therefore, if the Panel agrees that only Section 15(a)(ii) expired on December 11, 2016, the Panel should decline to make findings regarding China's claims under Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement, because the Panel does not have the authority under its terms of reference to consider whether the European Union applied these obligations in a manner inconsistent with the remaining provisions of Section 15.

Question 3. In Paragraph 59 of its oral statement at the second panel meeting, China states the following: "Dumping is not about the regulatory environment in which the producer operates. It is about the 'pricing practices', 'pricing behaviour', or 'pricing strategies' of the investigated producers, encompassing an assessment based on the producer's own prices and/or costs." Do you agree with this characterization of "dumping" by China? Do you agree with China's position that dumping is limited to the concept of "international price discrimination"?

13. The United States does not agree with China's characterization of dumping. The phrase "international price discrimination" does not appear in the text of GATT 1994 or the Anti-Dumping Agreement. Rather than insert concepts into the WTO agreements, the correct understanding of "dumping" is that reflected in the agreements.

14. Article 2.1 of the Anti-Dumping Agreement plainly states that "a product is considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like producer when destined for

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[25] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 15(d).

[26] *See, e.g.*, China's Responses to Panel's Questions following the First Substantive Meeting, paras. 63-66; China's Second Written Submission, paras. 180-186; *see* China's Opening Statement at the First Substantive Meeting, paras. 139-140.

[27] *See* China's Responses to Panel's Questions following the First Substantive Meeting, para. 122 and footnote 95.

[28] China's Responses to Panel's Questions following the First Substantive Meeting, paras. 118-125.

[29] *E.g.*, China's First Written Submission, para. 3.

consumption in the exporting country."[30] Article VI:1 of the GATT 1994 (agreed in 1947) uses nearly identical language.[31]

15. At least two key points emerge from this text. First, that dumping relates to a price difference – where export price is lower than normal value – irrespective of any motivation of the producer or exporter. Second, the value that is "normal" for purposes of ascertaining a price difference is "the comparable price, in the ordinary course of trade." Understood in the context of the agreements, this comparable price, in the ordinary course of trade, is a market-determined price, such that the condition of the market can be relevant for an examination of dumping.

16. Nothing in the text of GATT 1994 Article VI, the Anti-Dumping Agreement, Section 15 of China's Accession Protocol, or other relevant texts, indicates that dumping is solely meant to address discriminatory pricing strategies of individual producers and exporters.

Question 4. Is the Second Ad Note an "exception" to Article VI? What specific language in the Second Note does or does not make it so?

17. The Second *Ad* Note is **not** an exception to Article VI of the GATT 1994.[32] The text of the Second Note does not provide legal *authority* to do something that an importing Member may not already do or is prohibited from doing. Rather, the ordinary meaning of the terms of the Second Note makes clear that it only "recognizes" a factual situation that may pose special difficulties in determining price comparability.[33] This conclusion is evident from the text itself. The text is expressed as a description, or recognition, by Members: "It is *recognized* that, in [the situation described], special difficulties may exist in determining price comparability …."[34] The text uses no language expressing that it is an exception or derogation from Article VI (e.g., "notwithstanding", "provided that", "nothing shall prevent").[35] Thus, the Second Note is not an exception or amendment to Article VI of the GATT 1994, but rather elaborates the obligations

[30] Anti-Dumping Agreement, Art. 2.1.

[31] Article VI: 1 of GATT 1994: By dumping, "products of one country are introduced into the commerce of another country at less than the normal value of the products" and "a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" or, in the absence of such domestic price, either third-country export price or costs of production.

[32] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.6.

[33] Other notes, in contrast, have prescriptive language, e.g., "shall not be considered" (Note Ad Art. III:5) or "The expression 'or other charges' is not to be regarded as including ..." (Note Ad Art. VII:1).

[34] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.6.3.

[35] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.6.2.

by which all Members have agreed to be bound and the authority in anti-dumping comparisons they have retained.[36]

18. We refer further to the U.S. response to Panel Question 18.

Question 5. Do you agree with China's position that there are two categories of methodology for determining normal value – "home market normal value" and "third country normal value"? Please also provide your reactions to the handout distributed by China on the first day of the second panel meeting in which China purports to describe two methodologies and their associated "bases" to determine normal value under the WTO agreements.

19. China's characterization of normal value is misleading and inaccurate. Normal value is a singular concept informed by the full range of rules contained in the relevant texts, i.e., Article VI of the GATT 1994, the Second Note, the Antidumping Agreement, and Section 15 of China's Accession Protocol.[37] Understood correctly, Article VI:1 establishes that the dumping comparison requires comparable, market-determined prices or costs. Article VI:1 sets out that "dumping" occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products." More specifically, Article VI:1(a) and (b) provide that the normal value is a "comparable price, in the ordinary course of trade."[38] In turn, Article 2 of the Anti-Dumping Agreement implements the principle of price comparability set forth in Article VI:1 and confirms that establishing normal value requires a comparable, market-determined price.[39]

20. The further elaboration of alternative methods to use for finding normal value does not, as China suggests, introduce two different kinds of normal value. A variety of circumstances

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[36] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.7.1.

[37] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Sections 3-4 and 7-8.

[38] GATT 1994 Art. VI:1(a), (b): "For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the *comparable price, in the ordinary course of trade*, for the like product when destined for consumption in the exporting country, or, (b) in the absence of such domestic price, is less than either (i) the highest *comparable price* for the like product for export to any third country *in the ordinary course of trade*, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." (italics added)

[39] Article 2.1 establishes that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." This text is nearly identical to Article VI:1 – in particular, the second sentence and subparagraph (a). Article 2.1 thus retains the key elements from Article VI:1 for domestic prices to be used to calculate normal value: there must be a "comparable price, in the ordinary course of trade."

could generally lead to the conclusion that a price is not in the ordinary course of trade.[40] For example:

- a price for a sale may not reflect the criteria of the marketplace;[41]
- a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale;[42]
- a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect market principles;[43] or
- a sale for an input into the product under investigation may similarly reflect non-arms-length transactions and thus not be in the ordinary course of trade.[44]

21. These examples suggest that a price for a sale may be considered not "in the ordinary course of trade" because of the lack of market orientation of the transaction or the entities engaged in the transaction. As previously explained,[45] this reinforces that where market economy conditions do not prevail for an industry, it will not generate comparable prices, in the ordinary course of trade, and those prices need not be used to find normal value.

22. China has sought to characterize normal value as a choice simply between domestic or third-country prices or costs. But that characterization is not supported by the text. Article 2.2, for example, specifies that alternatives to domestic market prices may be used to find normal

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[40] *See, e.g.*, U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 7.3.2.1-7.3.2.4.

[41] *See US – Hot-Rolled Steel (AB)*, para. 142.

[42] *See US – Hot-Rolled Steel (AB)*, paras. 141, 143 n. 106 (noting a liquidation sale is one example of a sale between independent parties that might be considered not in the ordinary course of trade, because it "may not reflect 'normal' commercial principles.").

[43] *US – Hot-Rolled Steel (AB)*, para. 141, 143 (noting that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price" (italics original)).

[44] *See EU – Biodiesel (AB)*, para. 6.41 (finding that in applying the second condition of the first sentence of Article 2.2.1.1., "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine . . . whether non-arms-length transactions or other practices affect the reliability of the reported costs").

[45] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 7.3-7.4.

value when, because of a "particular market situation" or a "low volume of … sales in the domestic market of the exporting country," the prices "do not permit a proper comparison."[46] This text reinforces that normal value must be based on prices that *permit a "proper comparison*." Each of these situations further supports the conclusion that normal value must be based on prices determined under market economy conditions.

23. Alternative data sources must provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value, specifically: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits.[47] Neither of these provisions supports China's emphasis on a binary geographical distinction. Rather, this language emphasizes that normal value must be based on market-determined prices or costs to arrive at a "comparable price, in the ordinary course of trade." As it is used in Article 2.2, the definition of "appropriate" suggests that the appropriateness of a third country may be assessed by reference to market principles with the aim of identifying a "comparable price" found in a "suitable" comparison market.

24. The Appellate Body in *EU – Biodiesel* confirmed this understanding, finding that Article 2.2.1.1 does not limit an investigating authority to examining just the costs reflected in the records of the exporter or producer under investigation. The Appellate Body has understood that the costs calculated pursuant to Article 2.2.1.1 must generate "an appropriate proxy" for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined based on domestic sales.[48]

25. In sum, the prices or costs of an industry in which market economy conditions do not prevail cannot be considered comparable prices for purposes of "normal value," regardless of whether those prices or costs are domestic or based on third-country data. The distinction that China emphasizes is simply not supported by the text.

Question 6. Section 15 refers to whether "market economy conditions prevail" in the industry. Is this a relevant consideration for determining normal value under Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement? What specific language in Section 15(a) does, or does not, make it so?

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[46] Anti-Dumping Agreement, Art. 2.2 (footnote omitted).

[47] The text of Article 2.2 permits an investigating authority to determine which of the two alternatives is appropriate in a particular proceeding. The provision's use of the term "or" makes clear that an investigating authority may choose to use either of the two available data sources. *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2012 (defining "or," in part, as "Introducing the second of two, or all but the first or only the last of several, alternatives").

[48] *EU – Biodiesel (AB)*, para. 6.24.

26. Section 15(a) confirms and clarifies that whether "market economy conditions prevail in the industry producing the like product" is critical "in determining price comparability" under Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement. Section 15(a) states that a Member uses either of two alternatives "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement." The first alternative is Chinese prices or costs. Under this alternative, use of domestic prices, for example, would mean that, in determining price comparability, the importing Member has found a "comparable price, in the ordinary course of trade" (Article VI:1; Article 2.1) or "sales [that] do … permit a proper comparison" (Article 2.2). The second alternative is a methodology not based on a strict comparison with domestic prices or costs in China. Under this alternative, the domestic prices or costs normally would not be comparable or would not permit a proper or appropriate comparison. Section 15 is therefore an elaboration of "determining price comparability" and a specific expression of the principle that comparability needs to be ensured.

27. Section 15 clarified and confirmed that, in determining price comparability, an investigating authority will use Chinese prices and costs for the industry under investigation where "market economy conditions prevail" (first alternative) and may reject those prices or costs where market economy conditions do not prevail (second alternative). Therefore, the resulting text of Section 15 clearly reflects the understanding of WTO Members that no dumping comparison can be made in the absence of a "comparable price, in the ordinary course of trade," and that domestic prices or costs would not be suitable in determining price comparability where market economy conditions do not prevail.

Question 7. Can an importing Member in its determination of normal value take into account government action that might influence the pricing behaviour of private entities?

28. Yes, an importing Member in its determination of normal value can take into account government interference in the pricing behavior of private entities. State-interference in the marketplace may not respect "usual commercial principles," nor reflect a transfer of goods "transacted at market prices."[49] Like the situation in which parties to a transaction are affiliated, whenever there is State-inference in the marketplace, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace."[50] An importing Member "must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation, whether the price is high or low, would distort … '*normal* value'."[51] State-interference may generate domestic prices or costs that are not "in the ordinary course of trade," because the sales price or cost may lower the "ordinary course" price so as to shift resources to the buyer, or it may raise

[49] *US – Hot-Rolled Steel (AB)*, para. 141.

[50] *US – Hot-Rolled Steel (AB)*, para. 141 (italics original).

[51] *US – Hot-Rolled Steel (AB)*, para. 145 (italics original).

the "ordinary course" price to shift resources to the seller. In such a situation, Article VI of the GATT 1994 and the Anti-Dumping Agreement afford an importing Member the discretion to exclude such prices or costs from the calculation of "normal value" as outside "the ordinary course of trade."

29. The Working Party Report on Russia's accession to the WTO provides further support for the conclusion that an importing Member in its determination of normal value can take into account government interference in the pricing behavior of private entities. In that Report, Members expressed concerns that pricing practices of Russia's natural gas industry "could not be regarded as being based on commercial considerations . . . [and that] [a]rtificially low domestic energy prices could … lead to … exports of value-added intermediate and finished goods at prices below their normal value."[52] Members specifically "noted that the cost of producing natural gas for … [the majority State-owned company] was significantly higher than the regulated domestic price."[53] Members further noted that "exports of 'downstream' intermediate or finished goods of the Russian Federation, particularly, of products that were energy-intensive, such as fertilizers or metals, could take place at prices below their normal value or at subsidized prices, leading to the possibility of facing anti-dumping or countervailing actions in export markets."[54] Therefore, just as a price between affiliated entities may be artificial because it does not reflect an arm's-length price, so too a price that results from State interference may be artificial because the seller is similarly not free to sell at a price derived pursuant to "usual commercial principles."

Question 8. China relies on the Appellate Body Report in *EC – Fasteners (China)* as support for its argument that the Section 15(a) in its entirety, or Section 15(a)(ii) specifically, ceased to provide a justification for the use of a methodology not based on a strict comparison with China's prices or costs on 11 December 2016. Do you agree with China that *EC – Fasteners (China)* provides support for China's arguments in this dispute, especially given that paragraph 291 of the report indicates that the claim "before the Panel concerned the determination of individual and country-wide dumping margins and duties, *not* the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China" (italics added)?

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[52] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2, para. 90 (17 Nov. 2011).

[53] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2, para. 90 (17 Nov. 2011).

[54] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, (WT/ACC/RUS/70, WT/MIN(11)/2, para. 120 (17 Nov. 2011).

30. The United States does not agree with China that *EC – Fasteners (China*) provides support for China's argument in this dispute. The Appellate Body report in *EC – Fasteners (China)* does not interpret the legal text of Section 15(d) – in particular, the reference to expiry of "the provisions of subparagraph (a)(ii)" in the second sentence – to support its statement that "[p]aragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016)."[55] Nor does the report consider the different text referring to "the provisions of subparagraph (a)" in the first sentence of Section15(d), nor the text referring to the "non-market economy provisions of subparagraph (a)" in the third sentence of Section 15(d).[56]

31. Further, the interpretation of Section 15, and subparagraph (d) in particular, was not contentious among the parties, was not the object of a legal interpretation by the panel, and was not at issue in the appeal before the Appellate Body. The interpretation of Section 15(d) therefore was not and could not have been the object of any legal interpretation, finding, or conclusion by the Appellate Body.[57]

32. Indeed, paragraph 291 of the Appellate Body report in *EC – Fasteners (China)* specifically indicates that the claim "before the Panel concerned the determination of individual and country-wide dumping margins and duties, ***not*** the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China."[58] The Appellate Body's statement in *EC – Fasteners* was therefore, in addition to being erroneous, obiter dicta. The DSU does not establish a system of precedent, reserving instead the "exclusive authority" to give "authoritative interpretations" to WTO Members in the Ministerial Conference.[59] Instead, the DSU explicitly charges WTO adjudicators to apply customary rules of interpretation of public international law to the text of the covered agreements.[60] In this endeavor, the Panel should take note of the Appellate Body's dicta, but find that statement without basis in the text of Section 15(d), and therefore unpersuasive.

Question 9. China stated in response to a question from the Panel that it considers the reference in paragraph 15(d) to "the non-market economy provisions of subparagraph (a)" to refer only to subparagraph 15(a)(ii). What are your views on this statement?

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[55] *EC – Fasteners (AB)*, para. 289.

[56] *EC – Fasteners (AB)*, para. 289.

[57] *See EC – Fasteners (AB)*, para. 291 ("Finally, we note that China's claim before the Panel concerned the determination of individual and country-wide dumping margins and duties, not the possibility of resorting to alternative methodologies in the calculation of normal value in anti-dumping investigations involving China.").

[58] Bold and italics added.

[59] DSU, art. 3.9; WTO Agreement, art. IX:2.

[60] DSU, art. 3.2.

33. The United States disagrees with China's position. The three sentences of Section 15(d) describe different outcomes resulting from different circumstances. In the first sentence, if China establishes under a Member's national law that it is a market economy, "the provisions of subparagraph (a) shall be terminated." This means the rules of Section 15(a)(i) and 15(a)(ii), within the framework of Section 15(a), no longer apply. In the second sentence, just "the provisions of subparagraph (a)(ii)" expire 15 years after the date of China's accession to the WTO. This means the rule of Section 15(a)(ii) no longer applies. The second sentence is introduced by the phrase "[i]n any event," which signifies that as of that 15-year mark, China may not have become a "market economy," the situation contemplated in the first sentence. In the third sentence, "the non-market economy provisions of subparagraph (a) shall no longer apply." This suggests that subparagraph (a)(ii) is not the only non-market economy provision of subparagraph (a). Another such provision is subparagraph (a) with its reference to "a methodology that is not based on a strict comparison with domestic prices or costs."

34. Also, if, as China suggests, the "non-market economy provisions of subparagraph (a)" were limited to subparagraph (a)(ii), the third sentence of paragraph 15(d) would have referenced just that subparagraph. In other words, if subparagraph 15(a)(ii) incorporated all of the "non-market economy provisions" of paragraph 15(a), then the drafters of paragraph 15(d) would have used the identical reference in the second and third sentences of paragraph 15(d). The fact that the drafters did not use the identical reference suggests that the reference in the third sentence to "the non-market economy provisions of subparagraph (a)" concerns more that the provisions of Section 15(a)(ii).

35. Finally, the third sentence of Section 15(d) begins with the introductory phrase "[i]n addition." This introductory phrase establishes that the subject matter of this sentence is "in addition" to the subject matter of the first and second sentence. The fact that the drafters introduced the third sentence with the phrase "in addition" suggests that the third sentence remains applicable following the expiry of Section 15(a)(ii), providing further support for the conclusion that the reference in the third sentence to "the non-market economy provisions of subparagraph (a)" concerns more that the provisions of Section 15(a)(ii).

Question 10. Mexico stated in paragraph 18 of its statement at the second meeting of the Panel that while it was not making an *a contrario* argument, a *contrario sensu* is a perfectly valid method of interpretation provided that it does not result in inconsistencies ("la interpretación a contrario sensu es un método interpretativo perfectamente adecuado, en tanto no produzca resultados incompatibles con la normatividad"). What are your views on this statement? Explain in what ways non-market economy conditions could impact prices or costs for an industry such that they could affect the proper calculation of a normal value?

36. The United States understands Mexico's argument to mean that market economy conditions continue to be relevant regardless of the expiry of Section 15(a)(ii) and that simply discarding the reference to market economy conditions in Section 15(a)(i) as effectuating an *a contrario* interpretation would be incorrect. That market economy conditions continue to be

relevant does not require an interpretative approach that would render the expiry of Section 15(a)(ii) meaningless. Rather, it is entirely appropriate to see the reference to market economy conditions in Section 15 as continuing to have relevance in determining price comparability.

Question 11. China alludes to how the architecture of Section 15 supports its view that paragraph 15(a) and subparagraph 15(a)(i) serve no present purpose. Do you agree? If not, comment on how the architecture of Section 15 supports your view of Section 15.

37. The "architecture" of Section 15 supports the view that the remaining provisions of Section 15(a) serve a purpose following the expiry of Section 15(a)(ii).

38. Section 15 is concerned with "determining price comparability *under* Article VI of the GATT 1994 and the Anti-Dumping Agreement,"[61] so the primary "rules" for determining price comparability would be the rules in those agreements. Section 15(a)(i) meanwhile sets out one specific circumstance for determining price comparability in anti-dumping proceedings involving Chinese imports: It requires an importing Member to "use Chinese prices or costs … in determining price comparability" when the producers under investigation "can clearly show that market economy conditions prevail in the industry producing the like product." Needless to say, producers would not need to make this showing if China has already established that it is a market economy (Section 15(d), first sentence), or if China has already established that market economy conditions prevail in the particular industry or sector subject to investigation (Section 15(d), third sentence). But if China has not already established that it is a market economy, or that market economy conditions prevail in the relevant industry or sector, "comparable" prices or costs, in the ordinary course of trade, may not exist for purposes of the dumping comparison. As such, Section 15(a)(i) confirms that producers may raise whether "market economy conditions prevail in the industry producing the like product" as an issue for the investigating authority to consider in the course of determining price comparability in an anti-dumping proceeding whenever China has failed to make such a showing.

39. Following the expiry of Section 15(a)(ii) on December 11, 2016, an investigating authority will have to consider evidence on comparability, including the existence of market economy conditions, in accordance with the standard of evidence rules in the Anti-Dumping Agreement. Section 15(a)(i) provided an alternative standard of evidence that served to counterbalance the lower threshold that existed for 15 years under Section 15(a)(ii). Now, Section 15(a)(i) *remains* an available alternative for producers under investigation that can demonstrate market economy conditions where China still has failed to establish that it is a

[61] Italics added.

market economy,[62] or still has failed to establish that market economy conditions prevail in the relevant industry or sector.[63]

[62] The second sentence of Section 15(d) is introduced by the phrase "[i]n any event," which signifies that China may not have become a "market economy" 15 years after the date of China's accession to the WTO.

[63] The third sentence of Section 15(d) begins with the introductory phrase "[i]n addition," which signifies that market economy conditions may not prevail in Chinese industries or sectors 15 years after the date of China's accession to the WTO.