EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

(DS516)

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

June 15, 2018

TABLE OF EXHIBITS

EXHIBIT NUMBER	FULL CITATION
USA-32	*Economist*, "What the West got wrong" (March 3, 2018)
USA-33	1995-2001 Non-Market Economy Practice by WTO Members

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
US – Anti-Dumping and Countervailing Duties (China) (AB)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping Methodologies (China) (AB)	Appellate Body Report, *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R, adopted 22 May 2017
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
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
US – OCTG (Kor)	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

ARTICLE VI OF THE GATT 1994 AND ARTICLES 2.1 AND 2.2 OF THE ANTI-DUMPING AGREEMENT

Comparable prices

To the parties and third parties

> **Question 9. Are the parties and the third parties of the view that the notion of "comparable" prices that is found in Article VI of the GATT and Articles 2.1 and 2.2 of the Anti-Dumping Agreement has a meaning of its own that is *independent* from the rules set out in those provisions, or do the parties and third parties consider that what constitutes a "comparable" price is defined by the operation of the specific rules governing the establishment of normal value and export price?**

1. The meaning of the phrase "comparable price, in the ordinary course of trade,"[1] is *neither* completely independent from the provisions of Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, *nor* "defined by the operation of the specific rules" in those provisions. Rather, it is the view of the United States that the meaning of this phrase, which is key to understanding the "normal value" necessary for a proper dumping comparison, is found through its words and placement in Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, to require comparable, market-determined prices or costs.[2]

2. Consistent with Article 3.2 of the DSU, in WTO dispute settlement the text of the covered agreements is to be read "in accordance with customary rules of interpretation of public international law." The meaning of the phrase "comparable price, in the ordinary course of trade," therefore must be interpreted in good faith, in context with the operation of the rules governing the determinations of normal value and export price as set out in the GATT 1994 and the Anti-Dumping Agreement, in light of the object and purpose of the WTO Agreement.[3]

3. As shown in the U.S. legal interpretation document submitted on November 13, 2017, interpreting the meaning of the phrase "comparable price, in the ordinary course of trade," in context with the operation of the rules governing the determinations of normal value and export price as set out in the GATT 1994 and the Anti-Dumping Agreement, in light of the object and

---

[1] The United States understands that the question's reference to "the notion of 'comparable' prices" is directed at the phrase "comparable price, in the ordinary course of trade".

[2] The legal interpretation document submitted by the United States on November 13, 2017, which addresses GATT 1994 Article VI:1, the Second Note *Ad* Article VI:1 of GATT 1994, practice of the Contracting Parties in the application of Article VI, the GATT accessions of Poland, Romania, and Hungary, Article 2 of the Anti-Dumping Agreement, and Section 15 of China's Protocol of Accession, provides extensive support for this view.

[3] Article 31 of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

purpose of these agreements, confirms such a comparable price must be a market-determined price or cost.

- Article VI:1 of the GATT 1994 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."[4]

- Article 2.1 of the Anti-Dumping Agreement accords with Article VI:1: Dumping occurs when the price of an exported product "is less than the *comparable* price, *in the ordinary course of trade*, for the like product" in the home market.[5]

- Article 2.2 of the Anti-Dumping Agreement is linked to the dumping definition found in Article 2.1 and establishes certain alternatives for determining normal value when there are no domestic sales *in the ordinary course of trade* or in enumerated circumstances "such sales do not permit a *proper comparison*."[6]

- The Second Note *Ad* Article VI:1 further recognizes a situation in which "special difficulties may exist *in determining price comparability* for the purposes of paragraph 1 [of Article VI]."[7]

- Section 15 of China's Accession Protocol clarifies that whether "*market economy conditions prevail*" in the industry under investigation is critical "in determining price comparability."[8] Section 15 further clarifies that "market economy conditions" relate to whether functioning markets exist for the "*manufacture, production and sale*" of the product under investigation.[9]

---

[4] GATT 1994 Art. VI:1.

[5] Anti-Dumping Agreement, Art. 2.1 (italics added).

[6] Anti-Dumping Agreement, Art. 2.2 (italics added).

[7] Second Note *Ad* GATT 1994 Article VI:1 ("*It is recognized that*, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist *in determining price comparability* for the purposes of paragraph 1, and in such cases importing contracting parties *may find it necessary* to *take into account* the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.") (italics added).

[8] China's Accession Protocol, Secs. 15(a), 15(a)(i) (italics added).

[9] China's Accession Protocol, Sec. 15(a)(i) ("If the producers under investigation can clearly show that *market economy conditions prevail* in the industry producing the like product with regard to the *manufacture, production and sale of that product*, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability …") (italics added).

From these textual links, one can conclude that "determining price comparability" involves a finding whether a "comparable price, in the ordinary course of trade," exists. Such a price "permit[s] a proper comparison" and makes a comparison with domestic prices "appropriate."

4. These texts also demonstrate that "comparable price, in the ordinary course of trade" has a substantive content – that is, that the price must be a market-determined price. Read in isolation, and according to one sense of the term, a "comparable" price could be any price as price is just a numerical value, and any two values can be compared. But a "comparable" price also suggests a price that is "of equivalent quality,"[10] and the full phrase indicates that these "comparable prices" are those found "in the ordinary course of trade." Numerous provisions of the GATT 1994 and other WTO agreements reflect that the "ordinary course of trade" reflects market transactions – that is, those reflective of interactions between independent entities acting at arm's length.[11] As one prominent set of administrators commented of the GATT: "The emphasis on transactions in the ordinary course of trade in the definition of dumping makes clear that the GATT presumes the existence of free and open markets where prices are determined by supply and demand under normal competitive conditions."[12]

5. Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (prices between input suppliers and the producer under investigation).[13] Prices of an industry in which market economy conditions do not prevail are not "comparable" – that is, similar, or of an equivalent quality – to prices that are market-determined. The use of any third-country export price or costs of production not determined under market-economy conditions thus cannot generate or serve as a proxy for a comparable domestic price, in the ordinary course of trade – that is, a market-determined price.

6. Therefore, as explained in detail in the U.S. legal interpretation document, reading the text of Article VI:1 of GATT 1994, Section 15 of China's Accession Protocol, the Second Note *Ad* Article VI:1, GATT accession documents, and other texts leads to the conclusion that GATT Contracting Parties and WTO Members have always recognized that non-market prices or costs

---

[10] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 3.6.

[11] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 3.4-3.8.7, 7.2-7.3, 7.6-7.8.

[12] J.F. Beseler and A.N. Williams, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES (1986), p. 64. *See* J. Jackson, THE WORLD TRADING SYSTEM, (2d ed. 1997), p. 325 ("The post-World War II international trading system is obviously based on rules and principles that more or less assume free market-oriented economies. The rules of GATT certainly were constructed with that in mind." (footnote omitted)).

[13] Normal value may be based on costs determined in accordance with Article VI and the Anti-Dumping Agreement. Where input prices are not market-determined, and thus are not themselves comparable prices in the ordinary course of trade, those prices (costs) would not be suitable to establish a normal value based on those costs. *See, e.g.*, *EU – Biodiesel (Argentina) (AB)*, para. 6.24 ("In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through 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 on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy.").

are not suitable for anti-dumping comparisons because they are not a "comparable price, in the ordinary course of trade," and thus are not appropriate to use "in determining price comparability."

Question 10. The parties and certain third parties rely on different parts of the Appellate Body's statements in *US – Hot-Rolled Steel* to support their interpretations of the concept of "ordinary course of trade". Given that the issue of State intervention in the market of the exporting country was not at issue in that dispute, to what extent are the Appellate Body's statements relevant to understanding whether or not the notion of "ordinary course of trade" involves market-determined prices that are free of State-interference?

7. Numerous provisions in the GATT 1994 and Antidumping Agreement reflect that comparable prices "in the ordinary course of trade" are market-determined, reflecting arm's-length transactions between buyers and sellers.[14] The Appellate Body's interpretation of the phrase comports with these provisions and reinforces their underlying logic.

8. The Appellate Body's statement in *US – Hot-Rolled Steel* that a sales transaction concluded on terms and conditions incompatible with normal commercial practices is relevant to the issue whether sales transactions subject to State-interference might be considered a sale not made "in the ordinary course of trade." The Appellate Body's examination of the concept of "ordinary course of trade" in *US – Hot-Rolled Steel* focused on sales between affiliated parties. But the Appellate Body's analysis of such sales indicated that for a transaction *generally* to be considered "in the ordinary course of trade," "usual commercial principles" must be respected and the transfer of goods must be "transacted at market prices."[15] Sales transactions subject to conditions resulting from State interventions might be made at a price or cost that does not reflect "normal commercial practice" or "usual commercial principles."

9. State-interference in the marketplace similarly may not respect "usual commercial principles," nor reflect a transfer of goods "transacted at market prices." Like the situation in which parties to a transaction are affiliated, where the State intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own interests, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace"[16]:

---

[14] .S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 3.8.

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

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

> [T]he sales price may be *lower* than the "ordinary course" price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the "ordinary course" price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace.[17]

10. To take one example, suppose the State intervened in the market to require all companies to take ownership shares in all other companies. Through "State-interference," the government would have created the situation of affiliation that was of concern in the *US – Hot-Rolled Steel* dispute. But "the ordinary course of trade" is not restricted to situations of affiliation. Rather, the concept that underlies the concern with affiliated party sales is that these transactions may not reflect market principles – that is, the interactions of buyers and sellers pursuing their own interest through arm's-length transactions.[18] Thus, numerous other forms of "State-interference" could similarly result in transactions not reflecting market principles.

11. As the Appellate Body noted in *US – Hot-Rolled Steel*, "the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade' …."[19] Although "that discretion is not without limits,"[20] a Member nonetheless "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'."[21]

12. Article VI:1 establishes that the dumping comparison requires comparable, market-determined prices or costs.[22] Section 15(a)(i) of China's Accession Protocol further clarifies the view of WTO Members that it is appropriate to use domestic prices or costs in determining price comparability if "market economy conditions prevail" in the industry under investigation. State-interference by an exporting Member in its economy, or in an industry or sector of its economy, 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 the "ordinary course" price to shift resources to the seller. In such a situation, which is not unlike the situation examined in *US – Hot-Rolled Steel*, Article VI of the GATT 1994 and

---

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

[18] *E.g.*, *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, paras 5.70-5.71 (finding that a "commercial resale would be one in which the buyer seeks to maximize his or her own interest. It is an assessment of the relationship between the seller and the buyer in the transaction in question that allows a judgement to be made whether a transaction is made at arm's length."); OECD, "Glossary of Statistical Terms, https://stats.oecd.org/glossary/detail.asp?ID=6264 ("In a free market, buyers and sellers come together voluntarily to decide on what products to produce and sell and buy, and how resources such as labour and capital should be used.") (accessed June 14, 2018).

[19] *US – Hot-Rolled Steel (AB)*, para. 148.

[20] *US – Hot-Rolled Steel (AB)*, para. 148.

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

[22] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 3.

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."

To the European Union and third parties

Question 11. The European Union and certain third parties argue that a "comparable" price for the purpose of determining dumping is one that is "market-determined" in the sense that it is free of distortions caused by certain forms of non-commercial private practices and State intervention.

a. Please explain your conception of prices undistorted by State intervention. What degree of government involvement in the market must there be in order to identify "distorted" or "abnormal" prices?

13. For the United States, the inquiry is not so much whether a price is identified as "distorted" or "abnormal", but whether a price is a "comparable price, in the ordinary course of trade." As explained, this phrase, which is key to understanding what is a "normal value" that permits a proper dumping comparison, has a substantive content. Such a price must be a market-determined price – that is, a price formed under market economic conditions – or as Section 15 expresses it, where market economic conditions prevail in the producing industry with regard to the production, manufacture, and sale of the product.

14. There is no bright-line rule regarding the degree of government involvement in the market for prices or costs to be considered not a comparable price, in the ordinary course of trade (or suitable proxy). Whether an investigating authority concludes that prices or costs are not a comparable price, in the ordinary course of trade, because of State intervention depends on the evidence before the investigating authority.

15. In the circumstance in which the importing Member **has *not* determined** that the economy of the exporting Member is **not** based on market economy principles, the importing Member must disregard domestic prices or costs to the extent they do not reflect a "comparable price, in the ordinary course of trade" (i.e., market-determined prices or costs). In undertaking this examination, an investigating authority may conduct an examination of the conditions in the industry or sector or reported transactions to determine if they are market-determined – that is, reflect a "comparable price, in the ordinary course of trade."[23]

---

[23] *US – OCTG (Korea)*, paras. 7.197-7.198 (finding that if an investigating authority's examination of reported prices for transactions between a supplier and an affiliated purchaser differed significantly from those between the same supplier and an unaffiliated purchaser, it was not unreasonable for the authority to conclude that the reported prices between the affiliated entities were not market-determined); *US – Hot-Rolled Steel (AB)*, paras. 148-150 (discussing the investigating authority examination of reported prices to determine if the sales associated with such prices are "in the ordinary course of trade").

16. If the exporting Member **has determined** that the economy of the exporting Member is **not** based on market economy principles, the importing Member would be entitled to disregard domestic prices or costs unless sufficient evidence demonstrated that such prices or costs reflect a "comparable price, in the ordinary course of trade" (i.e., market-determined prices or costs). For example, if the record demonstrates that market economy conditions prevail in the particular sector or industry under investigation, the investigating authority would normally use domestic prices or costs in determining normal value.

b. What guidance can be found in the relevant legal provisions of the GATT and the Anti-Dumping Agreement for understanding whether a price will be "market-determined" or not?

17. Please see the U.S. response to Questions 9 and the U.S. legal interpretation document submitted on November 13, 2017, which provides an extensive discussion on how GATT 1994 Article VI:1, the Second Note *Ad* Article VI:1 of GATT 1994, practice of the Contracting Parties in the application of Article VI, the GATT accessions of Poland, Romania, and Hungary, Article 2 of the Anti-Dumping Agreement, and Section 15 of China's Protocol of Accession, confirm that a "comparable price, in the ordinary course of trade," must be a market-determined price or cost.

To the European Union

Question 13. The Panel understands the European Union to justify the challenged methodology in Article 2(7) of the Basic AD Regulation partly on the ground that it is consistent with Article 2.4 of the Anti-Dumping Agreement because, according to the European Union, Article 2.4 allows EU authorities to impose a burden of proof that is "not unreasonable" on Chinese producers to show that they operate under market-economy conditions.

a. Does the European Union argue that the rule *in the last sentence* of Article 2.4 applies in relation to all aspects of the establishment of normal value and export price?

b. Does the European Union consider that the last sentence of Article 2.4 allows importing Members to establish normal value by using prices that are not the domestic prices of the investigated producer as the *starting point* of its determination?

18. By its plain terms, Article 2.4 obligates an investigating authority to make a "fair comparison" between export price and normal value when determining the existence of dumping and when calculating a dumping margin. The text of Article 2.4 presupposes that, before the final comparison is made, an investigating authority has identified the appropriate normal value pursuant to Articles 2.1 and 2.2 and the appropriate export price pursuant to Article 2.3. That said, it would be incorrect to read Articles 2.1, 2.2, 2.3, and 2.4 in isolation from each other. While there is a logical progression of inquiry in Article 2 from one paragraph to the next, an

investigating authority may need to consider various paragraphs more than once, or some paragraphs at the same time, before deriving a final dumping margin.

19. Once normal value and export price have then been established, an investigating authority will select pursuant to Article 2.4 the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability). For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price.[24] Therefore, if the alleged adjustment is not a relevant difference between export price and normal value, an investigating authority is not required under Article 2.4 to make an adjustment.

To China

Question 14. Does China agree with the European Union's submission that the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement informs the entirety of the rules governing the establishment of normal value and export price that are found in Article 2 of the Anti-Dumping Agreement?

20. As discussed in the U.S. response to Question 13, it would be incorrect to read Article 2.4 in isolation from Articles 2.1, 2.2, and 2.3 of the Anti-Dumping Agreement. While there is a logical progression of inquiry in Article 2 from one paragraph to the next, an investigating authority may need to consider various paragraphs more than once, or some paragraphs at the same time, before deriving a final dumping margin.

Question 15. China argues that the determination of dumping requires a *symmetrical* comparison between export price and normal value, and that adjustments to either of those values may be necessary (in order to establish "comparable prices") only for matters affecting *one side* of the dumping equation, *not both*. Please explain how China reconciles this submission with the fact that when permissible adjustments are made to a producer's costs of production for the purpose of constructing normal value, no corresponding adjustment is made to that producer's export price?

21. Please see the U.S. response to Question 16.

---

[24] *See EC – Tube or Pipe Fittings (Panel)*, para. 7.157.

To the third parties

Question 16. Do the third parties agree with China's assertion that the determination of dumping requires a *symmetrical* comparison between the normal value and the export price.

22. The United States does not agree with China's general assertion that the determination of dumping requires a symmetrical comparison between normal value and export price. Articles 2.1 and 2.2 require the importing Member to determine normal value based on the "comparable price, *in the ordinary course of trade*." This requirement applies just to the determination of normal value. There is no equivalent requirement in Article VI of the GATT 1994 or Article 2 of the Anti-Dumping Agreement that an importing Member must likewise determine export price based on prices in the ordinary course of trade. These agreements otherwise do not require an importing Member to exclude sales that are *not* in the ordinary course of trade from its determination of export price. Therefore, the plain language of Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement do not require a symmetrical comparison between normal value and export price of sales in the ordinary course of trade, but rather anticipate an asymmetrical comparison under those circumstances in which an importing Member excludes sales not in the ordinary course of trade just from its determination of normal value.

23. For example, as noted in Panel Question 15, under Article 2.2.1 of the Anti-Dumping Agreement, an investigating authority may treat domestic sales or third-country export sales of the like product that are at prices below the costs of production "as not being in the ordinary course of trade by reason of price" and, under certain circumstances, may disregard such prices in determining normal value. An investigating authority is not otherwise required to disregard sales to the importing Member of the product under consideration that are at prices below the costs of production in determining export price. Therefore, disregarding below-cost sales in determining normal value results in an asymmetrical comparison between normal value and export price.[25]

24. As the Appellate Body stated in *US – Hot-Rolled Steel*, it is possible to envision "many reasons for which transactions might not be 'in the ordinary course of trade'."[26] For example, from the Appellate Body's perspective, a liquidation sale to an independent buyer might not be in the ordinary course of trade because it failed to "reflect 'normal' commercial principles."[27]

---

[25] *See US – OCTG (Korea)*, paras. 7.197-7.198 (asymmetrical comparison between normal value and export price based on finding that costs between a supplier and an affiliated purchaser disregarded in determining normal value but not disregarded in determining export price).

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

[27] *US – Hot-Rolled Steel (AB)*, para. 143, n.106.

Other examples of course include sales that reflect a "particular market situation,"[28] or a low volume of sales in the domestic market of the exporting country.[29] Nonetheless, "the duties of the investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, … irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities 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 … would distort what is defined as '*normal* value'."[30] Therefore, since the determination of normal value, by definition, excludes all transactions not made in the ordinary course of trade, the comparison between normal value and export value is, similarly by definition, an **asymmetrical comparison** because the determination of export price does **not** exclude all transactions not made in the ordinary course of trade.

The Second Interpretative *Ad* Note

To the parties and third parties

Question 17. Do you agree that the Second *Ad* Note forms an integral part of Article VI of the GATT?

25. The Second Note *Ad* Article VI:1 is an integral part of the GATT. Article XXXIV of the GATT makes clear that the annexes are "made an integral part of this Agreement." The "Notes and Supplementary Provisions" contained in Annex I include the Second Note *Ad* Article VI:1 and thus it forms an integral part of the Agreement. The United States does not agree, however, that the Second Note is integral to Article VI:1 in the sense of being altogether indistinguishable. As addressed in response to question 34, below, the fact that the subsequent elaboration and implementation of Article VI must be understood to be without prejudice to the Second Note (e.g., per Article 2.7 of the Anti-Dumping Agreement), cautions against interpreting the Anti-Dumping Agreement as having resolved the special difficulties recognized in the Second Note. Thus, while the Second Note is integral to the GATT, it also remains meaningful in its own right.

Question 18. What can be learnt from the fact that the Second Ad Note was adopted by GATT Contracting Parties in 1955 as an *interpretation* to Article VI:1 of the GATT 1947 and not as an *amendment* to that provision as originally proposed by Czechoslovakia?

---

[28] Anti-Dumping Agreement, art. 2.2.

[29] Anti-Dumping Agreement, art. 2.2.

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

26. The fact that the Second Note *Ad* GATT 1994 Article VI:1 is an "interpretative note" and not an amendment to Article VI reflects that the definition in Article VI:1, together with Article VI:2, provides for the legal authority to reject non-market prices and costs in anti-dumping comparisons, not the Second Note itself. As an "interpretative note," the Second Note confirms that, under GATT 1994 Articles VI:1 and VI:2, an importing Member must "determin[e] price comparability for the purposes of paragraph 1" of Article VI – that is, to make a dumping comparison, the importing Member must ensure comparability by finding "comparable prices" to establish normal value.

27. Most critically, 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. That is, the Second Note is not written as an *exception* to Article VI.[31] Rather, the Second Note identifies *one* situation (a state-controlled economy) in which "special difficulties may exist in determining price comparability," but there is no text suggesting this is the *exclusive* situation in which "special difficulties may exist." The recognition by Members of a "case" creating special difficulties does not logically imply that there could be no other "case."

28. 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.[32] The text uses no language expressing that it is an exception or derogation from Article VI (e.g., "notwithstanding", "provided that", "nothing shall prevent").[33] Rather, 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] Thus, the Second Note is not an exception or amendment to Article VI of the GATT 1994. Rather, it elaborates the obligations by which all Members have agreed to be bound and the authority in anti-dumping comparisons they have retained.[35] In particular, the CONTRACTING PARTIES, through an "interpretative note", recognized that the authority to reject domestic prices when these are not "comparable prices, in the ordinary course of trade," lies in Article VI.[36]

29. When Czechoslovakia proposed to amend Article VI:1, it sought to address and resolve the state-trading problem. In particular, Czechoslovakia sought to amend Article VI:1 to address "the fact that *no comparison* of export prices with prices in the domestic market of the exporting country *is possible* when such *domestic prices are not established as a result of fair competition*

---

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

[32] 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).

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

[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. 4.7.1.

[36] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.8.

in the market but are fixed by the State."[37] That is, Czechoslovakia considered that state-determined prices made the price comparison called for in Article VI:1 *impossible*. Czechoslovakia recognized the problem as one arising from the different economic fundamentals operative in state-trading economies versus market-based economies. Czechoslovakia understood that prices resulting from "fair competition in the market" are necessary for the comparison in Article VI.

30. The Working Party Sub-Group that considered the proposal to amend Article VI:1(b) explained that Czechoslovakia sought to "deal with *the special problem of finding comparable prices* for the application of that sub-paragraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly," but the Sub-Group "was *not prepared to recommend the amendment of the Article* in this respect" and instead "agreed to *an interpretive note* to meet the case."[38] In other words, the Sub-Group did *not* consider an amendment to Article VI:1 would be necessary to find that home market prices were not useable for purposes of the dumping comparison.[39] The decision that no amendment to Article VI was necessary to meet "the special problem of finding comparable prices" further confirms that the CONTRACTING PARTIES viewed the authority to reject non-market prices for anti-dumping comparisons as inherent in Article VI:1 (and Article VI:2 with respect to the imposition of anti-dumping measures) as that provision refers to the need to ensure comparability.

Question 19. Are you aware of any document that explains the intended function and purpose of an interpretative *ad* note to the GATT 1947?

31. Several statements by negotiators of the Havana Charter address the intended function and purpose of an interpretative note, but the variety of views expressed are inconclusive and contradictory. For example, the Preparatory Committee of the United Nations Conference on Trade and Employment issued a report in August 1947, which included "a number of notes" that contained "the interpretations of the text which are thought necessary in order to make the exact

---

[37] Proposals by the Czechoslovak Delegation, W.9/86 (9 December 1954) (italics added); *see* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.8.1.

[38] Sub-Group III-A of Review Working Party III to Trade other than Restrictions or Tariffs, W.9/220 (22 February 1955) (emphasis added); *see* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.8.3.

[39] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.8.4. The Working Party adopted the Sub-Group III-A report language and the text for what became the Second Note. *See* Draft Report to the Contracting Parties, W.9/231 (26 February 1955); Report of Review Working Party III to Trade other than Restrictions or Tariffs, L/334 (3 March 1955). The Legal Drafting Committee made non-substantive edits to the text of the Second Note (called "Note 2" in the document). W.9/236/Add.1 (3 March 1955). The Second Note was adopted following the 1954-55 Review Session. L/334, adopted 3 March 1955, Annex I, Section I.B; BISD 3S/222, 223.

intention clear."[40] These notes were attached to a draft of the Havana Charter as footnotes.[41] The Committee considered placing the notes in a separate protocol, but ultimately agreed to adopt certain interpretative notes in an annex to the GATT.[42]

32. As noted in Panel question 20, the General Committee issued a statement on interpretative notes to all Committees on December 2, 1947.[43] The General Committee also issued a statement on December 3, 1947, informing all Committees that "insofar as possible, the text of the Charter *should be made clear*" so that "no interpretative notes will be required," and that if "ultimately…some interpretative notes are unavoidable, such notes should be made an integral part of the text."[44]

33. The terms of the individual interpretative notes in GATT Annex I exhibit wide variation. For example, the Note *Ad* Article III:5 uses prescriptive language: "*shall not be considered*." The Note *Ad* Article III:5 explains that "[t]he expression 'or other charges' *is not to be regarded as* including …." The Second Note *Ad* Article VI:1, in contrast, merely expresses a recognition – "it is recognized that." Given this variation in terms and effect, it is not clear that the understanding of Article VI and the Second Note would be informed by ascribing a generally applicable "intended function and purpose" to the whole universe of interpretative notes.

Question 20. Please indicate the extent to which the following statements recorded in 1947 by the negotiators of the Havana Charter for an International Trade Organization inform the understanding of the purpose of the Second Ad Note adopted by the GATT Contracting Parties in 1955:

> **Throughout the text of the Draft Charter it will be noted that there are a number of generally agreed interpretative notes which were inserted, to use the words of the Introduction to the Report of the Preparatory Committee itself, "in order to make the exact intention clear." An example of these notes**

[40] *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (adopted by the Preparatory Committee 22 August 1947)*, GATT Doc. E/PC/T/186 (Sept. 10, 1947), at 5.

[41] *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (adopted by the Preparatory Committee 22 August 1947)*, GATT Doc. E/PC/T/186 (Sept. 10, 1947), at 5.

[42] *Verbatim Report: Eighteenth Meeting of the Tariff Agreement Committee Held on Friday, 12 September 1947 at 9 P.M. in the Palais Des Nations, Geneva*, GATT Doc. E/PC/T/TAC/PV/18 (Sept. 12, 1947) at 25.

[43] *General Committee: Note by the Executive Secretary Re: Interpretative Notes*, GATT Doc. E/CONF.2/BUR/W.1 (Dec. 2, 1947).

[44] *General Committee: Interpretative Notes Regarding Provisions of the Charter*, GATT Doc. E/CONF.2/BUR.5 (Dec. 3, 1947) (italics added).

> **is that appearing at the foot of page 32 of the Report. It will also be noted that a set of such notes is annexed to the General Agreement on Tariffs and Trade and, made an integral part thereof by Article XXIV.**
>
> **It will probably be of assistance to the work of the principal committees of the Conference for the General Committee to take a decision now as to whether there are to be interpretative notes to the text of the Charter as finally drafted and if so, how they will appear, whether as footnotes or as an annexure or otherwise, and what standing they will have vis-a-vis the text itself.**
>
> **The legal position would appear to be that should these notes be appropriately connected to or identified with the text, whether as footnotes to the articles to which they refer or as an annexure, they will be a part of the text and will qualify it. If they are treated in any other way, they will, it seems, only have the standing of aids to interpretation in the event of a disagreement as to the meaning of the part of the Charter to which they refer.[1]**

34. Please see the U.S. response to Question 19. It is not clear that the foregoing passage can serve to "inform the understanding of the purpose of the Second *Ad* Note." When the General Committee made this statement, the form of the notes had not yet been finalized. While the statement speculates about a number of approaches, it does not suggest any particular understanding will apply. The statement also evinces no intent to define for subsequent efforts to revise the GATT a generally applicable approach for the use of interpretative notes.

Question 21. To what extent does Article 15 of the Tokyo Round Subsidies Code suggest that the Contracting Parties considered that the issue price comparability in relation to non-market economy countries could only be addressed where the circumstances identified in the Second Ad Note were satisfied?

35. Article 15 of the Tokyo Round Subsidies Code does **not** suggest that the Contracting Parties considered that the issue of price comparability in relation to non-market economy countries could only be addressed where the circumstances identified in the Second Note were satisfied.

36. The first paragraph of Article 15[45] contained no language addressing price comparability. The paragraph prohibited the concurrent imposition of anti-dumping and countervailing duties in

[1] United Nations - Conference on Trade and Employment - General Committee - Note by the Executive Secretary - Re: Interpretative Notes, Document E/CONF.2/BUR/W.1, 2 December 1947.

[45] The first paragraph of Article 15 provided as follows:

situations where imports from a country described in the Second Note were alleged to have been causing injury by virtue of both subsidized imports and dumped imports. The importing signatory was required to choose which remedy it would use to address injury caused by those imports. As the Appellate Body has noted, "it prohibits [sic] the concurrent application of anti-dumping and countervailing duties, regardless of whether they offset the same situation of subsidization."[46]

37. The remainder of Article 15[47] conformed with the principles of price comparability reflected in Article VI of the GATT 1994. The second paragraph of Article 15 made express use of the term "comparison" in identifying two broad options – (a) the price at which a like product of a country other than the importing signatory or those described in the Second Note, or (b) the constructed value of a like product in a country other than the importing signatory or those described in the Second Note – available to importing signatories to compare with export price in

---

> 1. In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either
>
> > (a) on this Agreement, or, alternatively
> >
> > (b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

[46] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 581.

[47] The remainder of Article 15 provided as follows:

> 2. It is understood that in both cases (a) and (b) above the calculation of the margin of dumping or of the amount of the estimated subsidy can be made by comparison of the export price with
>
> > (a) the price at which a like product of a country other than the importing signatory or those mentioned above is sold, or
> >
> > (b) the constructed value of a like product in a country other than the importing signatory or those mentioned above.
>
> 3. If neither prices nor constructed value as established under (a) or (b) of paragraph 2 above provide an adequate basis for determination of dumping or subsidization then the price in the importing signatory, if necessary duly adjusted to reflect reasonable profits, may be used.
>
> 4. All calculations under the provisions of paragraphs 2 and 3 above shall be based on prices or costs ruling at the same level of trade, normally at the ex factory level, and in respect of operations made as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for the difference in conditions and terms of sale or in taxation and for the other differences affecting price comparability, so that the method of comparison applied is appropriate and not unreasonable.

Footnotes omitted.

calculating "the margin of dumping" or "the amount of the estimated subsidy".[48] This paragraph started with the phrase "[i]t is understood that", language that is identical in meaning to the "[i]t is recognized that" phrase that appears at the start of the Second Note.

38. Finally, as with the Second Note,[49] the legal authority to apply alternative price comparison methodologies was not provided in the text of Article 15 of the Tokyo Round Subsidies Code; it was merely "*understood* that … the calculation of the margin of dumping or of the amount of the estimated subsidy *can* be made by comparison of the export price" with prices or costs outside the home market. The text of Article 15 was not written as an exception to the generally applicable rules of Article VI of the GATT 1994, but as a reflection and expression of those rules. In sum, there is no language in Article 15 to suggest that the issue of price comparability in relation to non-market economy countries is circumscribed by the Second Note.

The 1957 GATT Secretariat Report

To the parties and third parties

Question 22. The United States maintains that the GATT Secretariat's review of the legislation and practice of Contracting Parties in applying Article VI of the GATT contained in the 1957 GATT Secretariat Report reveals the GATT Contracting Parties' *subsequent practice* in the application of Article VI, which establishes its agreed interpretation within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of the Treaties. To what extent do you agree or disagree with the United States on this point?

39. Please see the U.S. response to Question 26.[50]

Question 23. The 1957 GATT Secretariat Report (Exhibit USA-13, p. 10) identified two types of economies – a "free-trade economy", where prices are based on cost of production; and a "State-trading economy" where prices are not based on

[48] The third paragraph identified an additional option – specifically, the price in the importing signatory – if the neither option in paragraph two provided "an adequate basis for determination of dumping or subsidy." The last paragraph carried forward the "due allowance" provision of Article VI:1 of the GATT 1994 that references "price comparability," modified to clarify that the "method of comparison" be "appropriate and not unreasonable" and to add a requirement that any calculations under the second and third paragraphs of Article 15 be based on prices or costs at the same level of trade.

[49] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 4.2-4.7.

[50] *See also* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 5.

cost of production. How do you understand these two types of economic systems, compared with the economic systems that exist today?

40. GATT commitments, brought forward into the WTO, were crafted by parties that were market economies to provide reciprocal benefits to other parties and their economic actors.[51] Not surprisingly, those commitments presuppose that a party has or is developing a free-market economy.[52] Such benefits can be diminished by an economy in which the government intervenes and influences specific economic outcomes, because if a Member's economy operates pursuant to government directives, as opposed to free market principles, the basic rules on non-discrimination, market access, and fair trading can be easily evaded.[53] For this reason, while "WTO provisions do not prevent Members from maintaining State-owned enterprises[,] … [t]he "basic principles behind the GATT rules are that such enterprises are to **operate solely in accordance with commercial considerations** and that notifications are required to ensure that their operations are transparent.…"[54]

---

[51] "GATT 1947 was based on the assumption that its Members had, by and large, free market economies …." HANDBOOK ON ACCESSION TO THE WTO: CHAPTER 5, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s0p1_e.htm (accessed June 14, 2018). *See also* GATT 1994, Preamble:

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and exchange of goods and services, …
>
> * * *
>
> *Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international relations, ….

[52] *See, e.g.*, W. Zdouc, "Comments," in STATE TRADING IN THE TWENTY-FIRST CENTURY, Ch. 7 (Cottier and Mavroidis eds. 1998), p. 151 ("GATT's legal system presupposes a market economy and may be circumvented in a situation where governments intervene systematically in the market place."); J. Jackson, THE WORLD TRADING SYSTEM, (2d ed. 1997), p. 325 ("The post-World War II international trading system is obviously based on rules and principles that more or less assume free market-oriented economies. The rules of GATT certainly were constructed with that in mind." (footnote omitted)); J.F. Beseler and A.N. Williams, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES (1986), p. 64 ("The emphasis on transactions in the ordinary course of trade in the definition of dumping makes clear that the GATT presumes the existence of free and open markets where prices are determined by supply and demand under normal competitive conditions.").

[53] *See* W. Davey, "Article XVII GATT: An Overview," in STATE TRADING IN THE TWENTY-FIRST CENTURY, Ch. 1 (Cottier and Mavroidis eds. 1998), pp. 21-22 ("In essence, GATT needs special rules on state trading enterprises because GATT rules often assume the existence of a market-based economy where enterprise make decisions on the basis of economic factors, not government directives. If one examines the basic GATT rules on non-discrimination, market access, and fair trade, it is clear that evasion of those rules would be easily possible if there were no controls on state trading enterprises" (footnote omitted)). The author notes that the discussion of the ability of state-trading enterprises to evade basic GATT rules applies equally to countries with non-market economies. *Ibid.*, p. 32.

[54] HANDBOOK ON ACCESSION TO THE WTO: CHAPTER 5, https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s0p1_e.htm (accessed June 14, 2018).

41. The "free-trade economy" identified in the 1957 report describes an economy based on free market principles. In an economy based on free market principles (i.e., a market-economy country), the primary determinant of input flows and price and output levels is the pursuit of private economic interests, which are defined independently of the government. The "State-trading economy" identified in 1957 report describes an economy not based on market principles, or commercial considerations. In such an economy (i.e., a non-market economy), the primary determinant of input flows and price and output levels is the pursuit of government economic interests. Both economic systems identified in the 1957 report continue to exist today, as do variations thereof.

42. During the process of its accession to the WTO, it was recognized "that China was continuing the process of transition towards a full market economy."[55] It has not completed that transition. As one recent analysis concluded, China today "is not a market economy and, on its present course, never will be."[56] The core of an economy not based on market principles is the substantial level of state control and influence over all aspects of a country's economy, which results in fundamentally distorted prices and costs.

43. Formal price controls exist in China today,[57] but more importantly, the Chinese Communist Party exercises control and influence at the firm level, particularly in economically significant entities. Top executives of China's state-owned enterprises are generally members of the Chinese Communist Party, cycle between corporate and government positions, and are subject to evaluation by the Chinese Communist Party Organization Department.[58]

44. State-owned and private enterprises in China also contain Chinese Communist Party committees that actively participate in corporate governance. This arrangement is codified in Chinese law; i.e., under Article 19 of the *Company Law of the People's Republic of China*,[59] an organization of the Chinese Communist Party may be set up in all enterprises, regardless of

---

[55] Report of the Working Party on the Accession of China, WT/ACC/CHN/49, at para. 150.

[56] *The Economist*, "What the West got wrong," p. 11 (Mar. 3, 2018) (Exhibit USA-32).

[57] *DOC NME Report*, p. 158-167 (Exhibit USA-2).

[58] *DOC NME Report*, p. 82-94 (Exhibit USA-2), referencing Richard McGregor, THE CCP: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS, pp. 49-50 (2010) (stating that "the CCP has remained unyielding on a number of fronts. Its control over personnel appointments has been inviolate"); *see* Zheng Yongnian, THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION, pp. 103-104 (2010) ("The CCP's most powerful instrument in structuring its domination over the state is a system called the 'Party management of cadres' …, or more commonly known in the West as the nomenklatura system. The nomenklatura system 'consists of lists of leading positions, over which Party units exercise the power to make appointments and dismissals; lists of reserves or candidates for these positions; and institutions and processes for making the appropriate personnel changes.'").

[59] *DOC NME Report*, p. 86 (Exhibit USA-2) referencing *PRC Company Law* (adopted by the NPC on Dec. 29, 1993, amended Dec. 25, 1999, further amended Aug. 28, 2004 and Oct. 27, 2005 and Dec. 28, 2013).

whether it is a state-owned, private, or foreign-invested enterprise, to carry out activities of the Chinese Communist Party.

45. For example, China Pacific Insurance Group is a major insurance firm with 2017 assets worth RMB 1.1 trillion (USD 182 billion).[60] Article 8 of its Articles of Association states:

> In making decision for material issues of the Company, the Board of Directors shall first seek for the opinion of the Leading [Communist] Party Group of the Company. For significant issues regarding operation and management, such as national macro-control, national development strategies and national security, the Board of Directors shall make decisions by making reference to the conclusion of the study and discussion of the Leading [Communist] Party Group, which is considered to be important evidence for decision-making.[61]

46. Similarly, PetroChina is one of China's leading energy firms with 2017 with assets worth RMB 2.4 trillion (USD 374 billion).[62] Article 105 of its Articles of Association states:

> The board of directors shall take the [Communist] Party organization's advices before it determines the material matters, such as the orientations of the Company's reform and development, key objectives/tasks and major work arrangements. When the board of directors intends to appoint the management personnel, the [Communist] Party organizations shall consider and put forward their advices on the candidates nominated by the board of directors or the president, or nominate candidates to the board of directors and the president.[63]

Both of these corporate disclosures reveal governmental interference and influence over key productive decisions of the enterprise.

47. Recent policy developments suggest that Chinese Communist Party control and influence at the firm level is increasing. At a press conference following the 19th National Congress of the Chinese Communist Party in October 2017, Qi Yu, the vice head of the Chinese Communist Party Organization Department noted: "Since the 18th National Congress of the Communist Party of China, we have *increased our efforts* to establish Party organizations and carry out Party building and Party activities **in enterprises**, and continued promoting the reach of Party

---

[60] China Pacific Insurance Group, 2017 Annual Report, *available at:* https://www.cpic.com.cn/upload/resources/file/2018/04/23/47593.pdf (accessed June 14, 2018).

[61] Exhibit USA-4.

[62] PetroChina Company Limited, 2017 Annual Report, available at: http://www.petrochina.com.cn/ptr/ndbg/201804/de633154d1a1434c9c94070c136be93e/files/46a28bfca49b4757a99ca71b69b517aa.pdf ((accessed June 14, 2018).

[63] Exhibit USA-4.

organizations and Party work. This is our focus."[64] In February 2018, the Central Committee of the Chinese Communist Party released the *Decision on Deepening Institutional Reform of the Party and the State*, which calls for "[a]ccelerating the establishment and improvement of all Party organizations and institutions in new types of economic organizations and social organizations, such that where the Party's work progresses, there is coverage of Party organizations."[65]

48. The power and influence of the Chinese Communist Party to reach into the firm level decisions of companies reflects the fact that the Chinese economy today is not built upon free-market principles as understood from 1957 to the present. While China may not, in some mere formalistic sense, "fix" all domestic prices by regulation, the state and the Communist Party's influence and direct interventions on a variety of enterprises and their productive decisions does determine output and price levels. Because China's economy does not operate on market principles, it is not appropriate to use prices or costs in that country in an anti-dumping proceeding.[66]

Question 24. What can be learnt about the nature of the prices and costs that must be used to determine dumping, within the meaning of Article VI of the GATT, from the observation in the 1957 GATT Secretariat Report (Exhibit USA-13, p. 10) that prices in a "State-trading economy" may not be a reliable basis to determine dumping because they may be higher or lower than prices that would otherwise exist in a "free-trade economy"?

49. As discussed in the U.S. response to Question 23, in a non-market economy, the primary determinant of input flows and price and output levels is the pursuit of government economic interests. As a result, prices or costs in a non-market economy may be higher or lower than prices or costs would be if that economy operated according to free market principles.

50. As discussed in the U.S. response to Question 10, whenever there is State-inference in the marketplace, "there is reason to suppose that the sales price *might* be fixed according to criteria

---

[64] *Press Briefing: Party Building, Self-Governance* (October 19, 2017), *available at* http://www.china.org.cn/china/2017-10/20/content_41765343.htm (bold and italics added) ((accessed June 14, 2018).

[65] *Decision of the Central Committee of the Communist Party of China on Deepening Institutional Reform of the Party and State*, Section III.2 (Central Committee of the Communist Party of China, issued February 28, 2018).

[66] *See, e.g., DOC NME Report*, p. 4 (Exhibit USA-2) ("China is a non-market economy (NME) country because it does not operate sufficiently on market principles to permit the use of Chinese prices and costs for purposes of the Department[] [of Commerce's] antidumping analysis").

which are not those of the marketplace".[67] As in the situation in which parties to a transaction are affiliated, "the sales price may be *lower* than the 'ordinary course' price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the 'ordinary course' price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace".[68] In either situation, as the Appellate Body stated in *US – Hot-Rolled Steel*, 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'."[69] Therefore, the observation in the 1957 report that prices in a State-trading economy may not be a reliable basis to determine dumping because they may be higher or lower than prices that exist in a free-trade economy provides further confirmation that an importing Member may adopt rules to exclude such transactions from the determination of normal value, because to include these transactions in that determination would distort normal value.

Question 25. How do you understand the observation made in the 1957 GATT Secretariat Report (Exhibit USA-13, p. 9) that Australia, New Zealand, Sweden and the United States had "thus far applied anti-dumping and similar duties only in instances of commercial (price) dumping"?

51. The statement at page 9 of the 1957 Report that "Australia, New Zealand, Sweden and the United States have thus far applied anti-dumping and similar duties only in instances of commercial (price) dumping" simply summarizes the responses provided by these countries to Question 4 of the GATT Secretariat's questionnaire.

52. Question 4 of the GATT Secretariat's questionnaire asked, "What problems of international trade have been dealt with by recourse to these provisions [i.e., the provisions of Article VI] (*commercial dumping, state subsidies, differential exchange rates, imports from state trade countries, etc*.)?"[70] The countries listed in the GATT Secretariat's statement responded to this question as follows:

- Australia – "Commercial dumping only."[71]

---

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

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

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

[70] Italics added.

[71] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 21 (23 October 1957) (Exhibit USA-13).

- New Zealand – "Up to now only cases of commercial dumping have had to be considered. The New Zealand Government has no experience with dumping imports from state trading countries. The matter would have to be considered in the light of circumstances."[72]

- Sweden – "Commercial dumping so far."[73]

- United States – "Commercial dumping."[74]

The responses of Australia, New Zealand, Sweden, and the United States thus indicate that, as of the date of the GATT Secretariat's questionnaire, these countries had not yet used the provisions of Article VI to address state subsidies, differential exchange rates, imports from state trade countries, or similar international trade problems.

53. The 1957 Report continues with the observation that "[i]t seems that these States could apply their provisions to imports from State-trading countries: a fact which is stated by some of them. Canada, Rhodesia and Nyasaland and South Africa have imposed anti-dumping duties also on (dumped) imports from State-trading countries (Question 4)."[75] Indeed, the GATT Secretariat's question, in and of itself, implies that Article VI of the GATT 1947 permitted GATT contracting parties to address imports from state trade countries.

To the European Union and third parties

> **Question 26. China argues that the GATT Secretariat's review of the legislation and practice of Contracting Parties contained in the 1957 GATT Secretariat Report does not evidence the GATT Contracting Parties' subsequent practice in the application of Article VI which establishes its agreed interpretation, within the meaning of Article 31.3(b) of the VCLT. In support of this argument, China emphasizes *inter alia* that the Report examines only a small sample of Contracting Parties, and reveals inconsistent practice. Do the European Union and the third parties agree with China's submission?**

---

[72] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 62 (23 October 1957) (Exhibit USA-13).

[73] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 106 (23 October 1957) (Exhibit USA-13).

[74] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 115 (23 October 1957) (Exhibit USA-13).

[75] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 9 (23 October 1957) (Exhibit USA-13).

54. The United States does not agree with China's characterization of the 1957 Report as examining only a "small sample" of Contracting Parties. The 1957 Report is clear that it covers all countries that had applied anti-dumping duties and had specific legislation governing the application of those duties. The Report was not extended to countries whose legislation "only consists of a general power granted by the government to a special body".[76] However, the "study comprises an extensive analysis of the situation in countries *which do* make use of their anti-dumping and countervailing provisions."[77] Moreover, "the descriptions in the Country Section have had the full approval of the governments concerned."[78] The Contracting Parties' legislation confirms their understanding that determining price comparability under Article VI requires a market-determined normal value – that is, a comparable price, in the ordinary course of trade.[79]

55. The United States also disagrees with China's characterization of the 1957 Report as revealing inconsistent practice. The Report explains that, "[i]n this study an attempt is made to bring out as clearly as possible the situation which now exists after provisions relating to the application of anti-dumping and countervailing duties had been incorporated, as Article VI, in the GATT."[80] The surveyed countries noted that, in their "basic legislation . . . the wording is different from that of Article VI" but "[a]ll governments stress the point, however, that nevertheless their legislation is fundamentally similar or the same."[81] The Report further observes that, "[i]nsofar as the relations of the existing provisions with Article VI are concerned, all governments consider their application of duties to be practically in conformity with the obligations laid down in this Article."[82]

56. As noted in response to question 27, below, the Contracting Parties considered that a market economy structure is a prerequisite for price comparability.[83] The Contracting Parties understood that a price for a sale may be considered not "a comparable price, in the ordinary course of trade," because of the lack of market orientation of the transaction or the entities

---

[76] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 3 (23 October 1957) (Exhibit USA-13).

[77] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 4 (23 October 1957) (Exhibit USA-13).

[78] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 4 (23 October 1957) (Exhibit USA-13).

[79] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.3.

[80] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 5 (23 October 1957) (Exhibit USA-13).

[81] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 6 (23 October 1957) (Exhibit USA-13).

[82] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 6 (23 October 1957) (Exhibit USA-13).

[83] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.5.

engaged in the transaction. In particular, the Contracting Parties, in describing how their domestic legislation defined the Article VI term "normal value," demonstrated their understanding that normal value could only be established through what were referred to as prices from a "free economy", prices for goods "freely offered for sale", prices "in the ordinary course of trade", and other similar formulations.

57. As we have explained,[84] the legislation through which Contracting Parties' applied Article VI in practice consistently reflects the need for market-determined prices or costs as a basis for comparison, using terms such as:

"under fully competitive conditions"
- "normal value is the value in the open market under fully competitive conditions"[85]
- "in the ordinary course of trade under fully competitive conditions"[86]

"freely offered for sale"
- 'the market price at which . . . goods are freely offered for sale.'"[87]
- "the price … at which such or similar merchandise is sold or freely offered for sale … in the ordinary course of trade."[88]
- "the market price at which … such or similar goods are freely offered for sale"[89]

"free economy"
- "fair market values obtaining in the domestic market of a third country having a free economy"[90]
- "values … from third countries having a free economy"[91]

---

[84] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 5.5.1-5.5.9.

[85] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 41 (Belgium) (23 October 1957) (Exhibit USA-13).

[86] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 55 (Canada).

[87] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 71, 84 (Rhodesia and Nyasaland).

[88] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 133-134 (United States).

[89] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 101 (South Africa).

[90] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 49 (Canada) (23 October 1957) (Exhibit USA-13).

[91] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 48 (Canada).

"private enterprise"

- "prices … sold or offered … by manufacturers or exporters belonging to countries where trade is a matter of private enterprise"[92]
- "private enterprise economy"[93]

"open market"

- prices for "a sale in the open market between buyer and seller independent of each other"[94]

"fair market value or . . . a reasonable price"

- "'Fair Market Value' mean[ing] … fair market value of the goods … for home consumption in the usual and ordinary course of trade"[95]
- a "'reasonable price' mean[ing] such a price as represents the cost of production"[96]

"cost"

- "a price sufficient to cover the cost … calculated at not less than world market prices … in any country"[97]
- "prices for like products in a third country" "which could then be interpreted to some degree as an indication on the 'cost of production.'"[98]
- a "price quoted by an efficient producer"[99]

58. Each of these terms reflects the understanding of the Contracting Parties that normal value must be based on prices or costs established under market economy conditions.[100]

---

[92] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 41 (Belgium).

[93] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 146 (Norway).

[94] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 152 (United Kingdom).

[95] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (Australia) (23 October 1957) (Exhibit USA-13).

[96] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (Australia).

[97] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 90-100 (South Africa).

[98] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 109 (Sweden).

[99] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 90-100 (South Africa).

[100] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.6.

59. Further, because information on domestic market value is not always available, the Report notes that "other possibilities" include the option "to base the normal value . . . on prices in third countries."[101] In particular, "in the case of State-trading countries the normal value – ***due to the lack of comparable figures*** – is sometimes calculated on the basis of prices in third countries having a comparable economic structure."[102] The Report does not suggest any of the Contracting Parties disagreed that Article VI could be applied in this manner. Rather, as the evidence of practice demonstrates, determining price comparability – that is, finding comparable, market-determined prices to establish normal value – is an essential prerequisite for making a proper anti-dumping comparison.

To the United States

Question 27. How does the evidence in the 1957 GATT Secretariat Report concerning Australia's and New Zealand's legislation support the United States' assertion that Contracting Parties "universally" relied on market-determined prices or costs to determine normal value, and that they would reject non-market-determined prices and costs and would look, instead, to comparable third countries with market economy conditions to establish normal value?

60. The United States understands the Panel's question to refer to paragraphs 5.2 and 5.2.2. of the Legal Interpretation Document attached to the U.S. Third-Party Submission.[103] Paragraph 5.2 states:

> The Secretariat analysis revealed that, in applying Article VI:1, Contracting Parties universally relied on market-determined prices or costs to determine normal value. The parties likewise rejected non-market prices and costs as a basis for normal value in light of GATT "requirements to base the calculations on a comparable situation."[104]

61. Paragraph 5.2.2 states:

[101] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 11 (23 October 1957) (Exhibit USA-13).

[102] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 11 (23 October 1957) (Exhibit USA-13) (emphasis added).

[103] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.2.

[104] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 5-6 (23 October 1957) (Exhibit USA-13).

> Contracting Parties reported rejecting non-market domestic prices and costs for antidumping comparisons. Instead, "[i]n practice, countries levying anti-dumping or countervailing duties on imports from State-trading economies very often rely on *the price situation in comparable third markets* or on consultations with the exporting country."[105]

62. The United States also explained that "the Contracting Parties applying antidumping regimes considered that 'their legislation is fundamentally similar or the same' in terms of addressing anti-dumping."[106]

63. As explained in response to the Panel's question 26, above, the Contracting Parties' legislation – including the legislation of Australia and New Zealand – confirms their understanding that determining price comparability under Article VI requires a market-determined normal value – that is, a comparable price, in the ordinary course of trade.[107] The Report also observed that, with respect to "Australia, New Zealand, Sweden and the United States . . . it seems that these States *could* apply their provisions to imports from State-trading countries: a fact which is stated by some of them."[108] As noted in the Report: "The descriptions in the Country Section have had the full approval of the governments concerned."[109]

64. The legislation of Australia covered by the 1957 Report indicates that Australia referred to normal value in terms of "*fair market value* or … a reasonable price."[110] In that sense, Australia referred to "'Fair Market Value' mean[ing] … fair market value of the goods … for home consumption *in the usual and ordinary course of trade*."[111] Australia also explained that a "'reasonable price' means such a price as represents the cost of production."[112] Australia explained further that dumping duties are charged on "shipments which come within the scope of

---

[105] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.2.2 (quoting GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 10 (23 October 1957)).

[106] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.2.1 (quoting GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, pp. 5-6 (23 October 1957)).

[107] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 5.6.

[108] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 9 (23 October 1957) (Exhibit USA-13) (emphasis added).

[109] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 4 (23 October 1957) (Exhibit USA-13).

[110] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (23 October 1957) (Exhibit USA-13).

[111] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (23 October 1957) (Exhibit USA-13) (emphasis added).

[112] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (23 October 1957) (Exhibit USA-13).

the definitions of dumping (e.g. selling below the fair market value or at less than a reasonable price) contained in relevant sections of the Australian legislation."[113]

65. For Australia, a "comparable price in the ordinary course of trade" was "defined in Section 3 of the Customs Tariff (Industries Preservation) Act 1921-1956 as follows:" "'The Fair Market Value' of goods means the fair market value of the goods … in the usual and ordinary course of trade".[114]

66. Australia noted that "no calculations are based on prices for like products in a third country."[115] As explained above, some countries noted that their "legislation was designed to deal with trade emanating from countries having a free economy;" but that "ways and means had been found, however, to adapt this legislation to imports from State-trading countries."[116] In this regard, Australia "shared the views expressed by other delegates on the matter of anti-dumping and countervailing duties in relation to State-trading."[117] Australia also confirmed that, under its legislation, "account is taken of all relevant factors affecting price comparability with the object of achieving a fair and common basis," namely, upon "the ordinary market value of the goods."[118] Ultimately, Australia retained broad discretion under its legislation to impose duties on shipments "selling below the fair market value or at less than a reasonable price."[119]

67. With respect to the legislation of New Zealand, it reported that: "Up to now only cases of commercial dumping have had to be considered. The New Zealand Government has no experience with dumped imports from state trading countries. The matter would have to be considered in the light of circumstances."[120] New Zealand reported that it did not refer to prices in a third country, but did report that it could define the "extent of dumping" as "an amount, to be determined by the Minister" or based on "the difference between the actual selling price of the

---

[113] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 21 (23 October 1957) (Exhibit USA-13).

[114] *See* GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 22-23 (23 October 1957) (Exhibit USA-13).

[115] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 24 (23 October 1957) (Exhibit USA-13).

[116] Summary Record of the Fifteenth Meeting, SR.12/15, pp. 113-16 (Nov. 23, 1957) (comments of Rhodesia and Nyasaland) (Exhibit USA-14).

[117] Summary Record of the Fifteenth Meeting, SR.12/15, pp. 115-116 (Nov. 23, 1957) (comments of Australia) (Exhibit USA-14).

[118] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 23 (23 October 1957) (Exhibit USA-13).

[119] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 21 (23 October 1957) (Exhibit USA-13).

[120] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 62 (23 October 1957) (Exhibit USA-13).

goods and the cost of production."[121] New Zealand's legislation, like Australia's, also provided that in making the comparison, "due account is taken of the factors affecting price comparability."[122]

GATT/WTO Accessions including Poland, Romania and Hungary

To the parties and third parties

> **Question 28. In its answer to Panel question 17, the Russian Federation argues that the accessions of Poland, Romania and Hungary do not constitute subsequent practice of the GATT Contracting Parties, within the meaning of Article 31.3(b) of the VCLT, because the Accession Protocols and respective Working Party Reports set out the *specific terms and conditions* agreed by the acceding countries in exchange for becoming Contracting Parties to the GATT 1947; those documents do not evidence an *agreed interpretation* of Article VI. Please explain your views on the merits of the Russian Federation's submission.**

68. The United States disagrees with the explanation given by the Russian Federation. The evidence of practice in relation to the accessions of Poland, Hungary, and Romania as the consistent approach of the GATT Contracting Parties in these accessions establishes a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[123] In particular, the accessions provide evidence that, in practice, in implementing Article VI, the parties understood that no new legal authority needed to be provided to permit an importing Contracting Party to reject domestic prices or costs not determined under market economy conditions. Rather, the CONTRACTING PARTIES considered that the authority to reject those prices already existed in Article VI:1. This practice, in particular, supports the interpretation of Articles VI:1 and VI:2 as providing the legal authority to ensure comparability and hence to reject non-market economy prices and costs for anti-dumping comparisons.

69. The Russian Federation's argument misses the point that "the specific terms and conditions" in the accessions of Poland, Romania, and Hungary, *do not contain* legally operative language that would create any exception to Article VI:1 of GATT 1994 in the accession protocol of the acceding non-market economy. Rather, in each case the Contracting Parties re-

---

[121] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 63 (23 October 1957) (Exhibit USA-13).

[122] GATT, Anti-dumping and Countervailing Duties: Secretariat Analysis of Legislation, L/712, p. 64 (23 October 1957) (Exhibit USA-13).

[123] Vienna Convention on the Law of Treaties, art. 31(3)(b); *see also* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.6 *et seq*.

affirmed their ability to reject and replace non-market prices or costs for anti-dumping comparisons in situations other than "the case" described in the Second Note. Each of these accessions to the GATT demonstrates the understanding of the Contracting Parties and the acceding party that no new legal authority was needed because Article VI provided the necessary legal authority.[124]

70. We further refer the Panel to the U.S. response to Question 32, below.

Question 29. What evidence from the record of Hungary's accession or subsequent membership to the GATT helps to understand whether or not the Contracting Parties considered that the trading and economic situation in Hungary satisfied the conditions described in the Second *Ad* Note?

71. As the United States has explained, the elimination of any language in the Working Party Report evoking, even in part, the Second Note provides yet further confirmation that this provision was not understood by the CONTRACTING PARTIES as providing the legal authority for rejecting domestic prices or costs or as constituting the only "case" in which Contracting Parties could do so.[125] In Hungary's case, the Working Party eliminated *any* reference to a "complete or substantial monopoly on trade"[126] or "foreign trade operations were carried out by State and cooperative trading enterprises."[127] The Working Party also eliminated any reference to "all domestic prices are fixed by the State" [128] or "some domestic prices were fixed by the law." [129]

72. In other words, the Working Party appears not to have considered it necessary to identify whether the non-market conditions in Hungary mirrored the conditions in the Second Note or reflected some variation of the same. Rather, it appears the CONTRACTING PARTIES and Hungary understood the conditions in Hungary were such that "[f]o*r the purpose of implementing Article VI* of the General Agreement, a contracting party *may use as the normal value* for a product imported from Hungary" a surrogate value. That is, *it was "implementing*

[124] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.2.1-6.2.5 (Poland); 6.3.1-6.3.9 (Romania); 6.4.1-6.4.6 (Hungary).

[125] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 6.4.5.

[126] Second Note; Poland's Working Party Report, para. 13.

[127] Romania's Working Party Report, para. 13.

[128] Second Note; Poland's Working Party Report, para. 13.

[129] Romania's Working Party Report, para. 13.

Article VI" in the context of an economy like Hungary's that would permit domestic prices or costs to be rejected and surrogate values to be used.[130]

Question 30. Unlike the Working Party Reports for Poland and Romania, the language in Hungary's Working Party Report refers only to Article VI of the GATT, not the Second Ad Note. To the extent that the Second *Ad* Note is an integral part of Article VI, would it be accurate to understand Hungary's Working Party Report to refer to Article VI, *including the Second Ad Note*?

73. Please see the U.S. response to Question 17.

To the European Union and third parties

Question 31. China argues that the reference in Romania's Working Party Report to countries where "*some* domestic prices were fixed by the law" *does not* suggest that the Contracting Parties considered that the economic and trading situation in Romania was such that Romania fell outside the scope of the Second *Ad* Note. According to China, two documents (Exhibits USA-1 and CHN-85) subsequent to Romania's accession to the GATT reveal that all prices were fixed by the State. What are your views on the relevance of the language used in Romania's Working Party Report, and the evidence referred to by China?

74. Exhibit USA-1 is a collection of hundreds of documents largely related to WTO accessions.[131] The U.S. arguments relating to the accession of Romania to the GATT in 1971 refer to the Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (Exhibit USA-19) and the Protocol for the Accession of Romania to the GATT, BISD 18S/7 (Exhibit USA-20).

75. China's Exhibit CHN-85, a Communication from Romania, L/6838, 12 April 1991, simply confirms that Romania had begun a transition to a market economy as of November 1, 1990. The United States noted as much in its third participant submission.[132] Romania's

---

[130] The Hungary Working Party Report was considered and approved by the GATT Council. GATT Council, Minutes of the Meeting Held on 30 July 1973, C/M/89, at 1-2 (17 August 1973) ("The Council … adopted the Report of the Working Party.").

[131] *See* U.S. Third-Party Submission, para. 17; WTO Accessions Document: Review of Transition to Market-Based Economies by Acceding Non-Market Economy Countries (Exhibit USA-1).

[132] *See* U.S. Third-Party Submission, para. 17 (discussing Romania's request to renegotiate the terms of its accession to reflect its transition away from a centrally-planned economy).

transition to a market economy in the 1990s, however, is not the relevant point of focus with respect to the role Romania played in acceding to the GATT as a non-market economy in 1971.[133]

76. As the United States explained at the second panel meeting, China has misunderstood which documents are relevant to the analysis here. China, in its response to Panel question 17 following the first substantive meeting (which asks about accession to the GATT), argued that documents in Exhibit USA-1 (which largely reviews the historical record of WTO accession) "simply do not contain information pertinent to the legal questions before the Panel."[134] China did not address the relevant documents, but rather relied on a series of unsupported statements presented as if to give the impression of quoting the United States submissions, but providing no citation or source for China's representations.[135]

77. The relevance of the language actually used in Romania's Working Party Report is addressed at paragraphs 6.3-6.3.9 of the Legal Interpretation Document attached to the U.S. Third Participant Submission.[136] In particular, the Romania Working Party Report contains two important changes from the language used in the Poland Working Party Report – and both of which changes further support the understanding of Article VI:1 and the Second Note *Ad* Article VI:1.

78. First, the Romania Working Party Report changed the language on "imports from a country which has a complete or substantially complete monopoly of its trade" to "imports from a country *in which foreign trade operations were carried out by State and cooperative trading enterprises*".[137] Given that the Poland Working Party Report language tracks the language in the Second Note, this different language in Romania's accession confirms that the situation described in the Second Note was *not* viewed as the exclusive situation in which it could be appropriate to reject domestic prices and costs. Rather, the Working Party recognized that difficulties in determining price comparability could extend to a situation like Romania's in which "cooperative trading enterprises" operated.

---

[133] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.3.1-6.3.9 (addressing Romania's accession to the GATT in 1971); Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (Exhibit USA-19); and Protocol for the Accession of Romania to the GATT, BISD 18S/7 (Exhibit USA-20).

[134] China's Responses to Panel Questions following First Substantive Meeting, para. 186.

[135] *See, e.g.*, China's Responses to Panel Questions, para. 184 (referring to "the documents that the United States has dubbed 'historical context'") [no cite provided]; para. 190 (asserting it is "clear from the 'historical context' on which the United States relies" [citing Exhibit USA-1, not the relevant 1971 documents].

[136] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.3.1-6.3.9 (addressing Romania's accession to the GATT in 1971).

[137] Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (Exhibit USA-19).

79. Second, the Romania Working Party Report changed the language on "imports from a country … where all domestic prices are fixed by the State" to "imports from a country … where *some* domestic prices *were fixed by the law*."[138] Again, this change confirms that the situation described in the Second Note was *not* viewed as providing the legal authority for rejecting domestic prices or costs. Nor was the Second Note viewed as the exclusive situation in which it could be appropriate to reject domestic prices or costs. Rather, the Working Party recognized that difficulties in determining price comparability could extend to a situation like Romania's in which "some" domestic prices were "fixed by the law". This different language reflects the CONTRACTING PARTIES' recognition that the Second Note, which refers to "*all* domestic prices … fixed by the State," is not the *only* situation in which it is appropriate to reject non-market domestic prices or costs.

80. China's reference to Romania's subsequent transition to a market economy are irrelevant.

Question 32. China argues that the Accession Protocols and Working Party Reports relating to the accessions of Poland, Romania and Hungary do not reveal the GATT Contracting Parties' subsequent practice in the application of Article VI which establishes its agreed interpretation, within the meaning of Article 31.3(b) of the VCLT, because they do not show the existence of *a common, concordant and consistent practice* of the Contracting Parties. Do the European Union and the third parties agree with China's assertion?

81. The United States disagrees with China's assertion. As we explained at the second panel meeting, China's assertion is based on arguing about a set of documents upon which the United States did not rely to show the GATT Contracting Parties' subsequent practice.[139] Namely, instead of addressing the Working Party Reports and Accession Protocols of Poland (1967),[140] Romania (1971),[141] and Hungary (1973),[142] China based its argument on various WTO documents or documents from the 1990s.[143]

---

[138] Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (Exhibit USA-19).

[139] *See* China's Responses to Panel Questions, paras. 179-86, 190.

[140] Working Party Report on the Accession of Poland, L/2806, para. 13 (June 23, 1967) (Exhibit USA-17); Protocol for the Accession of Poland to the GATT, BISD 15S/46 (Exhibit USA-18).

[141] Working Party Report on the Accession of Romania, L/3557, para. 13 (Aug. 5, 1971) (Exhibit USA-19); Protocol for the Accession of Romania to the GATT, BISD 18S/7 (Exhibit USA-20).

[142] Working Party Report on the Accession of Hungary, L/3889, para. 18 (July 20, 1973) (Exhibit USA-21); Protocol for the Accession of Hungary to the GATT, BISD 20S/3 (Exhibit USA-22).

[143] *See, e.g.*, China's Responses to Panel Questions, para. 179, 184-86, 190.

82. The relevant subsequent practice of the GATT Contracting Parties in implementing Article VI is evident in that in each instance, i.e., the accession of Poland in 1967, the accession of Romania in 1971, and the accession of Hungary in 1973, the terms and conditions of accession (found in each respective Accession Protocol) *do not include* any legally operative language that would authorize Contracting Parties to reject non-market prices or costs for purposes of anti-dumping comparisons.[144] That no such language was considered necessary to include in the Accession Protocol establishes the agreement of the Contracting Parties to interpret Article VI as having already provided such authority.[145]

83. With regard to establishing a common, concordant and consistent practice, the Appellate Body in *Japan — Alcoholic Beverages II* noted that:

> Generally, in international law, the essence of subsequent practice in interpreting a treaty had been recognized as a "'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.[146]

84. Here, the pattern is readily discernible. In each instance, the Contracting Parties recognized that the acceding country was a non-market economy and were concerned with ensuring price comparability. In each instance, these concerns are evident in the Working Party Report, but do not result in any related commitments being made. In each instance, the Accession Protocol does not include any legally operative language that would authorize Contracting Parties to reject non-market prices or costs for purposes of anti-dumping comparisons.[147] In each instance the Contracting Parties understood that Article VI – irrespective of whether the conditions in the Second Note were present – provided the authority to do so. This is a sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding the interpretation of Article VI. This is not an isolated act. This is evidence of a common, consistent, and concordant practice of the GATT Contracting Parties.

---

[144] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 6.2; *see generally ibid.*, Section 6.

[145] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.2.1-6.2.5 (Poland); 6.3.1-6.3.9 (Romania); 6.4.1-6.4.6 (Hungary).

[146] *Japan — Alcoholic Beverages II (AB)*, p. 13, DSR 1996:I, p. 97 at 106 (defining 'subsequent practice' as: ". . . a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation."); *see also Chile – Price Band System (AB)*, paras. 213-14.

[147] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 6.2; *see generally ibid.*, Section 6.

To the parties and third parties

Question 33. What can be learnt for the purpose of the Panel's consideration of the matters at issue in this dispute, from the fact that the non-market economy nature of a country has been taken into account in establishing the terms of that country's accession to the GATT or the WTO?

85. That the non-market economy nature of an acceding country is addressed during the negotiation of accession provides objective evidence confirming the system of free market principles upon which the WTO Agreements are founded and the expectation of current Members that the acceding country will abide by those principles following accession. That a country's accession protocol may take into account the non-market economy nature of the acceding country does not grant it a right to then engage subsequently in government interference and intervention in market mechanisms without consequence. The dumping comparison under Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement requires comparable prices or costs, in the ordinary course of trade – that is, market-determined prices or costs. The fact that the non-market economy nature of an acceding country may have been taken into account in its terms of accession does not mean that prices or costs in that country must be deemed to have been determined under market economy conditions, especially when the actual facts clearly demonstrate that they are not.

Article 2.7 of the Anti-Dumping Agreement

To the parties and the third parties

Question 34. What can be learnt about the purpose and function of Article 2.7 of the Anti-Dumping Agreement from the fact that the Anti-Dumping Agreement is explicitly intended to *implement* Article VI of the GATT, *which includes the Second Ad Note*? In your answer, please also discuss this same issue from the perspective of the same provisions in the Kennedy and Tokyo Round Anti-Dumping Codes?

86. As demonstrated by the U.S. legal interpretation, Article 2.7 recognizes – just like its predecessor provisions in the Kennedy and Tokyo Round Anti-Dumping Codes – that Article 2 does not change the fundamental concept drawn from Article VI:1 of the GATT 1994 that a dumping comparison requires comparable, market-determined prices to establish normal value. The basic text of what is now Article 2.7 of the Anti-Dumping Agreement originated as Article 2(g) of the Kennedy Round Anti-Dumping Code. The text of Article 2(g) of the Kennedy Round Anti-Dumping Code is identical to the text of Article 2.7 of the Anti-Dumping Agreement.[148] So

[148] Kennedy Round Anti-Dumping Code, art. 2(g): "This Article is without prejudice to the second Supplementary Provision on paragraph 1 of Article VI in Annex I of the General Agreement."

is Article 2.7 of the Tokyo Round Anti-Dumping Code.[149] However, the Kennedy and Tokyo Codes applied just to the parties to the codes. It was possible that a country could be a party to the GATT 1947 but not the code[150]; a party to the code but not the GATT 1947[151]; or a party to both the GATT 1947 and the code. Article 2(g) of the Kennedy Round Code and Article 2.7 of the Tokyo Round Code therefore simply confirmed that Article 2 of each code was not meant to limit the ability of a party to the code, in circumstances where there may be difficulties in determining price comparability as recognized in the Second *Ad* Note, to account for the possibility that a strict comparison with domestic prices or costs may not always be appropriate.

87. The purpose and function of Article 2.7 of the Anti-Dumping Agreement does not differ from the purpose and function of Article 2(g) of the Kennedy Round Code and Article 2.7 of the Tokyo Round Code. During the Uruguay Round negotiations, Article 2(g) of the Kennedy Round Code was again carried over by the Informal Group on Anti-Dumping as proposed Article 2.7 of the Anti-Dumping Agreement.[152] Subsequently, the Legal Drafting Group discussed revising the text of GATT 1947 as part of the new multilateral trade organization then being discussed. When it became apparent that it would be difficult to agree on possible revisions to the GATT before the end of the round, the Institutions Group in 1993 decided instead to include the GATT 1947 'as is' through an incorporation clause, which now appears in Annex 1A of the WTO Agreement under the heading 'GATT 1994'. As a result, unlike the GATT 1947 and the Kennedy/Tokyo Round Anti-Dumping Codes, which were distinct agreements, the GATT 1994 (including Article VI) and the Anti-Dumping Agreement constitute integral parts of the same agreement, the Marrakesh Agreement Establishing the World Trade Organization.[153]

88. Therefore, from the perspective of the Kennedy and Tokyo Round Anti-Dumping Codes, Article 2.7 of the Anti-Dumping Agreement serves as a reminder to Members of the relevance to the Anti-Dumping Agreement of the Second Note *Ad* Article VI:1 of GATT 1994. Like the Kennedy and Tokyo Round Anti-Dumping Codes, the Anti-Dumping Agreement elaborates specific rules to be followed in implementing Article VI. Article 2.7 states that the Anti-Dumping Agreement is without prejudice to the Second Note, which means that the Anti-Dumping Agreement – just like the Kennedy and Tokyo Round Anti-Dumping Codes – must not be interpreted as having resolved the special difficulties recognized in the Second Note, or as limiting the ability of an importing Member, in circumstances where there may be difficulties in determining price comparability other than those described in the Second Note, to account for

---

[149] Tokyo Round Ant-Dumping Code, art. 2.7: "This Article is without prejudice to the second Supplementary Provision on paragraph 1 of Article VI in Annex I of the General Agreement."

[150] For example, Poland and Romania were parties to the GATT 1947 but were not signatories of the Kennedy Round Anti-Dumping Code.

[151] For example, the EEC was a signatory of the Kennedy Round Anti-Dumping Code but was not a party to the GATT 1947 as of the date the Kennedy Round Anti-Dumping Code entered into force.

[152] Report of the Acting Chairman of the Informal Group on Anti-Dumping, MTN.GNG/NG8/W/83/Add.5 (23 July 1990).

[153] WTO Agreement, art. II.2.

the possibility that a strict comparison with domestic prices or costs may not always be appropriate.

Article 2.2 of the Anti-Dumping Agreement

To the European Union and third parties

Question 37. The European Union and certain third parties have argued that it is possible, under Article VI:1 of the GATT and Article 2 of the Anti-Dumping Agreement, to reject domestic prices or costs when they are set on the basis of transactions not concluded at "arm's length", suggesting that this implies that the normal value must be a market-determined price. Please explain:

a. how the Panel should understand your conception of an "arm's length" sale; and

b. how this necessarily implies that normal value should be market-determined in the sense that it must be set in a marketplace free of State intervention?

To the parties and third parties

Question 38. The European Union and certain third parties have argued that the word "normally" in the first clause of Article 2.2.1.1 of the Anti-Dumping Agreement should be understood to mean that the conditions explicitly provided for in Article 2.2.1.1 *do not* exhaust the circumstances in which an investigating authority may be required to reject/replace/adjust the records of an investigated firm. Please explain the extent to which you agree or disagree with this proposition. In doing so, please articulate your own understanding of the meaning of this term in the context of Article 2.2.1.1.

89. For a response to Questions 37 and 38, please see the U.S. response to Question 39.

To the European Union and third parties

Question 39. The European Union and certain third parties rely upon findings made by the panel and Appellate Body in *EU – Biodiesel (Argentina)* concerning the unreliability of non-arm's length transactions to support its view that an importing Member may disregard properly recorded costs when they are not set on the basis of *market-determined prices*. However, in the same dispute, the Appellate Body also found that the second condition in Article 2.2.1.1 did not allow EU authorities "to consider which costs would pertain to the production and sale of biodiesel in *normal circumstances*, i.e. *in the absence of the alleged distortion caused by Argentina's export*

***tax system*" (para. 6.30). Doesn't this finding suggest that the Appellate Body considers that the relevant costs *do not* have to be determined on the basis of an objective, market-based price standard that is free of government interference?**

90. The Appellate Body's statement in *EU – Biodiesel (Argentina)* that is the focus of this question does not suggest or imply that the Appellate Body considers that the relevant costs do not have to be determined on the basis of market-determined prices. To the contrary, as the Appellate Body indicated in footnote 120 of that report, the Appellate Body specifically declined to address the question whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not preclude the rejection or adjustment of data found to relate to an abnormal situation and declined to decide that issue.[154] The Appellate Body's – and the underlying panel's – analysis in *EU – Biodiesel (Argentina)* was limited to whether an investigating authority is permitted to depart from a producer's cost records under the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement,[155] based on the specific factual circumstances considered in that dispute.[156]

91. The United States does not otherwise believe that the question's characterization of Article 2.2.1.1 is in harmony with Article 2. First, although the term "normally" in Article 2.2.1.1 indicates that an investigating authority should under ordinary conditions calculate costs on the basis of the producer's or exporter's records (provided the two conditions in the first sentence are satisfied), it also indicates that there may be situations in which costs should not be calculated based on such records (even when the two conditions outlined in the first sentence are satisfied).[157] To depart from the "norm … to use a respondent's books and records," an investigating authority would need "to explain why it departed from the norm" and "to justify its decision on the record of the investigation and/or in the published determinations."[158]

92. Second, the Appellate Body in *EU – Biodiesel (Argentina)* did not consider whether other types of government intervention beyond the effects of the export tax system in Argentina – such as direct government intervention in setting or influencing the price in a material way for sourced inputs – may provide a sufficient factual basis for an investigating authority to disregard a firm's

---

[154] *EU — Biodiesel (Argentina) (AB)*, fn. 120.

[155] *See, e.g., EU – Biodiesel (Argentina) (AB)*, paras. 6.11, 6.16, 6.18 n.120, 6.21, 6.56; *EU – Biodiesel (Argentina) (Panel)*, para. 7.247.

[156] *EU – Biodiesel (Argentina) (AB)*, para. 6.55 ("the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system *was not, in itself, a sufficient basis* under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel") (italics added); *see EU – Biodiesel (Argentina) (Panel)*, para. 7.248.

[157] *See* US Third Party Submission at Attachment 1: Legal Interpretation, para. 7.9.1.2.

[158] *See China – Broiler Products*, paras. 7.161, 7.164, 7.175.

recorded costs and instead rely on other information to construct normal value. The findings in *EU – Biodiesel (Argentina)* thus indicated a case-by-case basis, in light of the facts before the investigating authority.

93. Third, turning to the treaty provision scrutinized in *EU – Biodiesel (Argentina)*, the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement states, in relevant part:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records … reasonably reflect the costs associated with the production and sale of the product under consideration.[159]

The phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should not be read in isolation from Articles 2.1 and 2.2. As such, the costs calculated pursuant to Articles 2.2 and 2.2.1.1 must be capable of generating a 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 on the basis of domestic sales"[160] and the records of the producer must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."[161]

94. Elsewhere in its report, the Appellate Body in *EU – Biodiesel (Argentina)* explicitly rejected the argument that "'no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do.'"[162] As the Appellate Body further explained, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured; whether the costs incurred have been over- or under-stated; *and whether non-arms-length transactions or other practices affect the reliability of the reported costs*."[163] A non-arm's-length transaction provides a key example of where an investigating authority may look beyond the four corners of a respondent's records and determine that a transaction does not "reasonably reflect" the real cost associated with the production and sale of the product because it is not reflective of interactions between independent buyers and sellers.[164] It is an artificial figure. The authority under Article 2.2.1.1 to

---

[159] Article 2.2.1.1 of the AD Agreement.

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

[161] *EU – Biodiesel (Argentina) (AB)*, paras. 6.22, 6.26, 6.56.

[162] *EU – Biodiesel (Argentina) (AB)*, para. 6.40 (citation omitted).

[163] *EU – Biodiesel (Argentina) (AB)*, para. 6.41 (quoting *EU – Biodiesel (Argentina) (Panel)*, para. 7.242 n.400) (italics added).

[164] *See US – OCTG (Korea)*, para. 7.197 ("when the transactions between the exporter or producer and an associated or non-independent entity are found not to be at arm's length, the costs reflected in the exporter's or producer's

reject a non-arm's-length transaction from a respondent's records thus makes clear that "costs" that are "associated with" the production and sale of product must be understood as real economic costs and not necessarily what a respondent *actually paid*.[165]

95. In sum, given the understanding that "costs" "associated with" the production and sale of the merchandise are appropriately understood as real economic costs reflective of independent interactions between buyers and sellers, *EU – Biodiesel (Argentina)* should not be read as precluding an investigating authority from rejecting or adjusting recorded costs under Article 2.2.1.1 in other circumstances where the recorded costs are not based on independent interactions between buyers and sellers. An investigating authority's ability to reject non-arm's-length transactions as part of a respondent's recorded costs reinforces the salient theme that costs must be market-determined. And given that a lack of independence between buyer and seller to negotiate over prices can arise where a government intervenes in a significant way by setting or influencing the price for a particular input, such intervention can aptly be considered "other practices"[166] that undercut the reliability of the recorded costs.

To the parties and third parties

Question 40. Given that the question of how to establish normal value in non-market economies *was not* at issue in *EU – Biodiesel (Argentina)*, to what extent are the panel and Appellate Body findings in that dispute about the reliability of cost information relevant to understanding whether an importing Member may disregard domestic prices or costs in anti-dumping investigations involving countries considered to operate non-market economies?

96. Please see the U.S. response to Question 39.

---

records cannot be said to be 'accurate or reliable' or 'suitably and sufficiently correspond' to, i.e. reasonably reflect, the costs associated with production and sale of the product under consideration").

[165] *See also* US Third Party Submission at Attachment: Legal Interpretation, para. 7.9.2.2 ("The use of the general term 'costs,' as opposed to the term 'amounts actually incurred,' likewise must be interpreted as meaning real economic costs involved in producing the product in the exporting country and not simply the amount reflected, for example, in an invoice price. Otherwise, investigating authorities would be obliged to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.").

[166] *EU – Biodiesel (Argentina) (AB)*, para. 6.41. The Appellate Body in *EU – Biodiesel (Argentina)* did not elaborate on what types of "other practices" might affect "the reliability of the reported costs."

Object and purpose considerations

To the parties and third parties

Question 41. In EU – Biodiesel (Argentina), the Appellate Body supported its interpretation of the second condition in Article 2.2.1.1, in the context of resolving Argentina's complaint about the EU Commission's decision to reject soya bean costs on the grounds of *the existence of an alleged distortion created by the government of Argentina*, by recalling its view that the concept of dumping is focused on "the pricing behaviour of individual exporters and producers". Doesn't this statement suggest that the Appellate Body wanted to signal that differences between export price and normal value resulting from government intervention in the marketplace do not give rise to "dumping", as it is defined in the Anti-Dumping Agreement?

97. For the reasons set out in the U.S. response to Question 39, the Appellate Body's findings in *EU – Biodiesel (Argentina)* do not signal, suggest, or otherwise indicate that differences between export price and normal value resulting from government intervention in the marketplace do not give rise to "dumping". As explained in the U.S. response to Question 39, the Appellate Body clearly recognized in that report that there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not preclude the rejection or adjustment of data found to relate to an abnormal situation.

Question 43. The fifth preambular paragraph of the Marrakesh Ministerial Declaration states that Ministers were "determined to build upon the success of the Uruguay Round through the participation of their economies in the world trading system, based upon open, market-oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions". To what extent do the parties consider this statement by the Ministers at the conclusion of the Uruguay Round may or may not be relevant to the Panel's consideration of the legal issues in this dispute?

98. The fifth preambular paragraph of the Marrakesh Declaration embodies what should be considered incontrovertible: The WTO agreements, like the GATT, were crafted by parties that were market economies to provide reciprocal benefits to other parties that were, or were in the process of fully transitioning to, market economies. The Declaration was adopted upon signature of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.[167] Generally considered a political statement, the Declaration nonetheless reflects the understanding of the signatories to the WTO agreements as to the object and purpose of those agreements, i.e., to promote a "world trading system, based upon open, market-oriented policies." That object and purpose is clearly reflected in "the commitments set out in the Uruguay Round Agreements and Decisions." The fifth preambular paragraph of the Marrakesh

[167] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, para. 2(b).

Declaration thus further serves to confirm that the provisions of the WTO agreements were based on Members operating pursuant to open, market-oriented policies.

Question 44. What, if anything, can be learnt from Article 29 of the Agreement on Subsidies and Countervailing Measures about the nature of the economic systems of WTO Members subject to the rules and disciplines of that Agreement?

99. Article 29 of the SCM Agreement serves to confirm the expectation that an acceding party, in circumstances in which it did not already have a free market economy, would continue "the process of transforming from a centrally-planned into a market, free-enterprise economy" following accession.[168] Article 29 further indicates that this process of transforming would be expected to take place over a relatively short period of time and that any departure from the transformation would be provided only if "exceptional circumstances" was demonstrated.[169] Therefore, like the fifth preambular paragraph of the Marrakesh Declaration, Article 29 of the SCM Agreement embodies in the text of a covered agreement what should be considered incontrovertible; i.e., the WTO agreements were crafted by parties that were market economies to provide reciprocal benefits to other parties that were, or were in the process of fully transitioning to, market economies.

[168] SCM Agreement, art. 29.1.

[169] SCM Agreement, arts. 29.2-29.4.

SECTION 15 OF CHINA'S ACCESSION PROTOCOL

To the European Union

Question 47. The European Union argues in its answer to Panel question 1 (para. 12) that it is not necessary to consider Section 15(a)(ii) in order to understand the meaning of Section 15(a)(i) *after 11 December 2016*. Does the European Union consider that it was necessary to consider Section 15(a)(ii) in order to understand the meaning of Section 15(a)(i) *prior to 11 December 2016*?

100. The United States understands the EU's response to Question 1, paragraph 12, as consistent with the U.S. position that it is **not** necessary to consider Section 15(a)(ii) in order to understand the meaning and function of Section 15(a)(i) before, or after, December 11, 2016.

101. As explained in our response to Question 51, Section 15(a)(i) requires an importing Member to "use Chinese prices or costs for the industry under investigation in determining price comparability" when the producers under investigation "can clearly show that market economy conditions prevail in the industry producing the like product." This meaning and function is not linked by interpretation to Section 15(a)(ii), which until its expiry, separately and apart from Section 15(a)(i), lowered the standard of evidence required for a Member to decide to use a methodology that is not based on a strict comparison with domestic prices or costs in China in determining price comparability in anti-dumping investigations involving Chinese imports.

Question 48. The European Union characterizes Section 15(a)(ii) as containing a China-specific burden of proof rule. Does the European Union consider that Section 15(a)(i) does *not* contain a China-specific burden of proof rule? Please explain your answer.

102. Under Article VI of the GATT 1994 and the Anti-Dumping Agreement, an investigating authority makes determinations that are grounded in a sufficient evidentiary basis. The Anti-Dumping Agreement makes one express reference to the term "burden of proof," which is contained in the final sentence of Article 2.4 of the Anti-Dumping Agreement. This final sentence provides that "authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." Without more, Members must ensure that any burden of proof rules they provide for or use, insofar as these are not otherwise provided for in Article VI of the GATT 1994 or in the Anti-Dumping Agreement, are not unreasonable in the context of Article 2.4.

103. Section 15(a)(ii) deferred the examination of market conditions that would normally be required to satisfy the generally applicable rules of evidence until a later date – anticipating, perhaps, that the question could be rendered moot if China completed its transition within that timeframe. In deferring that question, the drafters also set out in Section 15(a)(i) an express route to ensure market economy treatment for individual producers under investigation in industries that completed their transition ahead of the country as a whole. The text of Section 15(a)(i) thus provided an alternative standard of evidence that served to counterbalance the lower

threshold that existed for 15 years. Now that Section 15(a)(ii) has expired *before* China completed its transition, Section 15(a)(i) *remains* an available alternative for producers under investigation that can demonstrate market economy conditions.

Question 50. To what extent do Section 15(a) and Section (d) inform the meaning of Article VI of the GATT and the Anti-Dumping Agreement even if those provisions are not considered to amount to an authoritative interpretation?

104. Please see the U.S. response to Questions 57 and 58, which explain how Sections 15(a) and 15(d) inform the meaning of Article VI of the GATT and the Anti-Dumping Agreement.

To the European Union and third parties

Question 51. Please explain your understanding of how Section 15(a)(i) was intended to operate before 11 December 2016. In your view, did Section 15(a)(i) have a different meaning and function before 11 December 2016 compared with after this date, or has Section 15(a)(i) always had the same meaning and function?

105. Section 15(a)(i) has the same meaning and function after 11 December 2016 as it had before 11 December 2016.

106. Section 15 before December 11, 2016 (i.e., 'old' Section 15), was significant because it introduced a particular standard of evidence. According to this standard of evidence, if China or the Chinese producers under investigation did not clearly show that market economy conditions prevailed in the industry or sector producing the like product, the importing Member could use a methodology that was not based on a strict comparison with domestic prices or costs in China. This particular standard of evidence expired on December 11, 2016. As a result, after December 11, 2016, an importing Member had to have a sufficient evidentiary basis for its determinations, including any determination to reject, or to accept, Chinese prices and costs.

107. Section 15 after December 11, 2016 (i.e., 'new' Section 15), otherwise continues to contain the same basic elements as old Section 15 (apply consistent with, in determining price comparability, domestic prices or costs in China, for the industry under investigation, market economy conditions, a methodology not based on a strict comparison). As such, Section 15(a)(i), both before and after December 11, 2016, has the same meaning and function: It requires an importing Member to "use Chinese prices or costs for the industry under investigation in determining price comparability" when the producers under investigation "can clearly show that market economy conditions prevail in the industry producing the like product."

108. But while the meaning and function of Section 15(a)(i) did not change after December 11, 2016, the standard of evidence did following the expiry of Section 15(a)(ii):

- Under **old Section 15**, when producers did not clearly show that market economy conditions prevailed in the relevant industry, an importing Member **could rely on this failure as the sole basis** for a determination to reject domestic prices or costs in China.

- Under **new Section 15**, when producers do not clearly show that market economy conditions prevail in the relevant industry, an importing Member **cannot rely on this failure as the sole basis** for a determination to reject domestic prices or costs in China.

Therefore, after December 11, 2016, an importing Member must base its determination to reject Chinese prices and costs on positive evidence.

109. In sum, the right of WTO Members to reject and replace non-market prices or costs in anti-dumping proceedings involving Chinese imports is not time limited. The legal authority that permits an importing Member to reject and replace non-market prices or costs is set out in the basic requirement of determining price comparability, which flows from Article VI of the GATT 1994, as implemented in Article 2 of the Anti-Dumping Agreement. Sections 15(a) and 15(a)(i), whose meaning and function remain the same both before and after December 11, 2016, serve as further confirmation of this fact.

To the parties and third parties

Question 52. The final hand-written changes made by Chinese and United States' negotiators to the text of the bilateral agreement that would become Section 15 of China's Accession Protocol show that the *scope* of the termination rule in the second sentence of Section 15(d) was *restricted* to Section 15(a)(ii) at the same time that the *duration* of Section 15(a)(ii) was *reduced* from 20 years to 15 years. Do the parties and third parties see any connection between these two final changes made by the negotiators that sheds any light into what was intended by these changes?

110. The United States is reluctant to draw a connection between the two changes referenced in the Panel's question. The United States urges the Panel to exercise caution in conferring significance in this dispute to the negotiating text of the Agreement on Market Access Between the People's Republic of China and the United States of America, which is not a covered agreement subject to dispute settlement under DSU Article 1. Further, as the European Union correctly noted, documents or statements pertaining to a bilateral agreement between the United States and China do not bind the European Union or other WTO Members.[170]

111. That said, in an effort to assist the Panel generally in its effort to understand the complexities of this matter, the United States is providing the following abbreviated responses to

---

[170] EU Second Written Submission, para. 322.

questions about paragraph (4) of the section entitled "Price Comparability in Determining Dumping and Subsidization" as it appears in the Agreement on Market Access Between the People's Republic of China and the United States of America:

- The United States recalls that the decision to reduce the number of years in which expiry would take place reflects a compromise between China's suggestion of five years and the U.S. suggestion of 20 years.

- The United States recalls that the decision to alter the reference from subparagraph (1) to subparagraph (1)(b) reflects the decision to label the third subparagraph under subparagraph (1) as subparagraph (1)(b), which subsequently permitted the parties to clarify in paragraph (4) that just the third paragraph in paragraph (1) expired after 15 years (i.e., subparagraph (1)(b)) and that the first two paragraphs did not.

Question 53. Canada and Mexico have emphasized that Section 15 must be interpreted in accordance with the principle of effective treaty interpretation, which requires that all provisions of a treaty be given their full meaning and effect. To what extent does this principle allow for the possibility that redundancy may itself be the outcome of the proper interpretation of a particular provision?

112. The principle of effectiveness cautions against reducing a provision to redundancy or inutility through interpretation. But this "principle" is merely a guide for an interpreter to consider. What must remain at the heart of the interpretive exercise is the text of the agreement – which best represents the common intention of the parties. And that text may mean that a particular provision is redundant – if the text indicates this is so, this merely reflects the agreement of the parties.

113. In its first report, the Appellate Body recalled the principle of effectiveness, stating, "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[171] The principle of effectiveness thus assumes that treaty text is a carefully crafted product of negotiations between the parties; that the text is there for a reason.[172] Further, a WTO panel (and the Appellate Body) cannot otherwise "add to or diminish the rights and obligations provided in the covered agreements."[173] Therefore, the principle of effectiveness would mean that, as appropriate, every term of the agreement should

[171] *US – Gasoline (AB)*, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[172] *See Argentina – Footwear (EC) (AB)*, p. 88 ("[I]f they had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Agreement on Safeguards").

[173] DSU, art. 3.2.

be given effect and an interpreter normally prefers a meaning that would least deprive a term of significance.

Question 54. To what extent should Section 15(a)(i) have the same meaning and function before and after the expiry of Section 15(a)(ii)?

114. Section 15(a)(i) should be interpreted as having the same meaning and function both before and after the expiry of Section 15(a)(ii). As discussed in the U.S. response to Question 51, Section 15(a)(i) – both before and after December 11, 2016 – requires an importing Member to "use Chinese prices or costs for the industry under investigation in determining price comparability" when the producers under investigation "can clearly show that market economy conditions prevail in the industry producing the like product." This meaning and function did not change after December 11, 2016; however, the standard of evidence did following the expiry of Section 15(a)(ii):

- Under **old Section 15**, when producers did not clearly show that market economy conditions prevailed in the relevant industry, an importing Member **could rely on this failure as the sole basis** for a determination to reject domestic prices or costs in China.

- Under **new Section 15**, when producers do not clearly show that market economy conditions prevail in the relevant industry, an importing Member **cannot rely on this failure as the sole basis** for a determination to reject domestic prices or costs in China.

115. Therefore, before December 11, 2016, an importing Member could rely on negative evidence – the failure of producers to clearly show that market economy conditions prevail in the relevant industry – to reject Chinese prices or costs in determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement. After December 11, 2016, an importing Member has to rely on positive evidence before it can reject Chinese prices and costs on positive evidence in determining price comparability; i.e., the failure of producers to make the requisite showing is unlikely to constitute a sufficient evidentiary basis, in and of itself, to support a finding that Chinese prices or costs are not market-determined.

Question 55. Please explain your views with respect to the relevance of Section 15(a), Section (a)(i) and Section (d) to understanding the obligations in Article VI of the GATT and Article 2 of the Anti-Dumping Agreement, after the expiry of Section 15(a)(ii) of China's Accession Protocol.

116. Please see the U.S. responses to Questions 57 and 58, as well as Section 8 of the legal interpretation document annexed to the U.S. third-party submission, which explain the relevance of Sections 15(a), 15(a)(i), and 15(d) to understanding the obligations in Article VI of the GATT

and Article 2 of the Anti-Dumping Agreement, after the expiry of Section 15(a)(ii) of China's Accession Protocol.

To the United States

> **Question 56. In its answer to Panel questions 1 and 7, the United States asserts that Section 15 clarified a number of matters in relation to the treatment of countries considered to operate non-market economies in anti-dumping proceedings. Among the matters the United States maintains were clarified by Section 15 was that the treatment of Chinese producers as non-market economy exporters would be a *question of evidence* to be *raised by individual producers* in relation to their *specific industries* during the course of an *investigation*. According to the United States, prior to this clarification, the non-market economy status of GATT contracting parties and WTO Members was freely admitted in relation to the country-as-a-whole, at the time of accession. It did not depend on findings of an investigating authority. Please elaborate this submission, in particular by explaining the relevant practice of GATT Contracting Parties and WTO Members prior to Section 15, and the relevant legal bases authorizing that practice.**

117. Exhibit USA-33 is a compilation of the relevant anti-dumping legislation of those WTO Members that, in the year 2000, instituted approximately 86 percent of all anti-dumping proceedings. A review of this legislation indicates that it was not obvious, without the benefit of the clarification in Section 15 of China's Accession Protocol, that a producer under investigation could raise whether "market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product" as an issue for the investigating authority to consider in the course of determining price comparability in an anti-dumping proceeding.[174]

118. Further, as explained in the U.S. response to Panel Question 1 following the first substantive meeting (and in the U.S. response to Question 57 below), prior to the clarification set out in Section 15(a) of China's Accession Protocol, it was not clear under GATT[175] or WTO disciplines that a country's non-market economy treatment would be considered in the nature of

---

[174] In 1992, the U.S. investigating authority exercised its administrative discretion under U.S. legislation to develop criteria for determining whether a market-oriented industry might otherwise exist in a non-market economy country. *Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid From the People's Republic of China,* 57 Fed. Reg. 9,409 (March 18, 1992). To the best of our knowledge, the U.S. investigating authority is the only investigating authority that developed such criteria prior to China's accession to the WTO.

[175] Just six GATT 1947 contracting parties self-identified as non-market economy countries (Czech Republic, Hungary, Poland, Romania, Slovak Republic, Slovenia), so the legal provisions of Article VI of the GATT 1947 did not apply to most countries that self-identified as non-market economy countries.

an evidentiary question, much less one that was susceptible to challenge by private parties in the course of an investigation. For example, after the EC adopted its first anti-dumping duty legislation in 1968,[176] it enacted a series of regulations concerning imports from state-trading countries that it simply applied to Bulgaria, Hungary, Poland, Romania, Czechoslovakia, and the USSR.[177] The EC continued the practice of designating a country as a non-market economy by regulation after it joined the WTO.[178] Similarly, as of December 2001, the U.S. investigating authority had designated the following countries as non-market economies under the U.S. anti-dumping law: Armenia, Azerbaijan, Belarus, People's Republic of China, Estonia, Georgia, Kazakhstan, Kyrgyz Republic, Lithuania, Moldova, Romania, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine, and Vietnam.[179]

119. Past practice of GATT contracting parties and WTO Members thus confirms that, prior to December 2001, it was not obvious under GATT or WTO disciplines that a producer under investigation could raise whether "market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product" as an issue for an investigating authority to consider in the course of determining price comparability in an anti-dumping proceeding. Section 15 clarified that the market economy conditions prevailing (or not) in an industry might be susceptible to examination, in the course of a proceeding, as an evidentiary question, in determining price comparability. With respect to the content of that evidentiary question, Section 15 also clarified that "market economy conditions" were to be considered, and that an appropriate time to make that consideration was "in determining price comparability."

To the European Union and the United States

> **Question 57. The European Union and the United States maintain that, following the expiry of Section 15(a)(ii), Section 15(a)(i) should be understood to impose an obligation on importing Members to use Chinese prices or costs if a Chinese producer demonstrates that it operates under market economy conditions. The Panel understands that, according to the European Union and the United States, precisely**

---

[176] Council Regulation 459/68, OJ 17.4.68 L93/1.

[177] Council Regulation (EEC) No. 109-70, OJ26.1.70 L19/1 (applicable countries were listed in an annex).

[178] Council Regulation (EC) No 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries Not Members of the European Community, WTO Doc. G/ADP/N/1/EEC/2 (July 2, 1996). The list of countries included Armenia, Albania, Azerbaijan, Belarus, People's Republic of China, Estonia, Georgia, Kazakhstan, North Korea, Russia, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam. Council Regulation (EC) No 519/94 (March 7, 1994), Annex 1.

[179] Since December 2001, the U.S. investigating authority has determined that the following countries have established under U.S. anti-dumping law that their economies operate pursuant to market principles: Estonia, Lithuania, Kazakhstan, Romania, Russia, and Ukraine.

the same obligation would exist under Article VI:1 of the GATT and Articles 2.1 and 2.2 of the Anti-Dumping Agreement following the expiry of Section 15(a)(ii), if Chinese producers made the same demonstration. Assuming this understanding is correct, please explain what additional purpose is served by Section 15(a)(i) relative to the generally applicable rules. If the Panel has misunderstood the arguments of the European Union and the United States in this regard, please clarify your submissions on this issue.

120. As discussed in the legal interpretation document annexed to the U.S. third-party submission, the basic requirement of price comparability flows from Articles VI:1 and VI:2 of the GATT 1994,[180] as further reflected in the Second Note *Ad* Article VI:1[181] and in Article 2 of the Anti-Dumping Agreement,[182] and the need to ensure comparability of prices and costs when establishing normal value. Section 15(a) further confirms and clarifies the generally applicable rules set out in Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement. In doing so, Sections 15(a) and 15(d) serve the additional purpose of providing greater precision as to the applicability of these rules in anti-dumping proceedings involving Chinese imports.

121. First, 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) further confirms and clarifies that market economy conditions relate to whether functioning markets exist for the "*manufacture, production and sale*" of that product.

122. Second, Section 15(a)(i) confirms and clarifies for the first time the right of producers under investigation to make an evidentiary showing that would require an importing Member to use domestic prices or costs, even if China has otherwise failed to establish that it is a market economy, or that market economy conditions exist in the particular industry under investigation or the sector that includes the industry under investigation. These provisions function to ensure that an investigating authority can take into account the factual circumstances in a given case for a given industry rather than being required to wait for China to fully complete its transition to a market economy. In other words, the question of whether an importing Member can determine that market economy conditions prevail in the industry producing the like product can be determined based on evidence provided by the producers under investigation, notwithstanding that China has not established that it is a market economy. Absent this rule, the consequence of showing that market economy conditions prevail in a given industry is not clear or predetermined.

123. Next, the third sentence of Section 15(d) confirms and clarifies for the first time the right of China to make an evidentiary showing that would require an importing Member to use domestic prices or costs should China establish that market economy conditions prevail in a

---

[180] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Sections 1 and 3.

[181] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 4.

[182] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 7.

particular industry or sector, even if China has failed to establish that it has fully transitioned to a market economy. Like Section 15(a)(i), absent this rule, the consequence of showing that market economy conditions prevail in a given industry or sector is not clear or predetermined, especially under the circumstances in which China had failed to establish that the country as a whole has not completed a similar transition. Indeed, the accessions of other non-market economy countries (e.g., Poland, Romania, and Hungary) did not provide for a situation in which a country could demonstrate that market economy conditions prevailed in a particular industry or sector within that country.

124. Finally, the first sentence of Section 15(d) confirmed and clarified for the first time the right of China to make an evidentiary showing that would require an importing Member to use domestic prices or costs once China established that it is a market economy. The accessions to the GATT of the non-market economies of Poland, Romania, and Hungary did not provide a specific rule by which these countries could established that they had transitioned to a market economy. As a result, Poland,[183] Romania,[184] and Hungary[185] – once they believed they had completed such a transition – each considered it necessary to request that the terms of their accession be renegotiated. Absent a rule like the first sentence of Section 15(d), these non-market economy countries sought to engage in a multilateral renegotiation of their accessions to establish that they had transitioned to market economy countries. In contrast, the rule set out in the first sentence of Section 15(d) significantly simplified this process for China, allowing China to establish pursuant to a bilateral process, under the national law of the importing WTO Member, that it is a market economy.

125. In sum, Section 15 clarified that the market economy conditions prevailing (or not) in an industry might be susceptible to examination, in the course of a proceeding, as an *evidentiary question*, in determining price comparability. With respect to the *content* of that evidentiary question, Section 15 also clarified that "market economy conditions" were to be considered, and that an appropriate time to make that consideration was "in determining price comparability" and not just in the multilateral context of an accession process. Prior to this clarification, it was not clear under WTO disciplines that China's non-market economy treatment would be considered in the nature of an evidentiary question, much less one that was susceptible to challenge by private parties in the course of an investigation.[186] Therefore, from the perspective of China and Chinese producers under investigation, without the benefit of the clarification in Section 15, it is not obvious that they could raise whether market economy conditions prevail in a particular industry or sector as an issue for an importing Member to consider in the course of determining price comparability in an anti-dumping proceeding involving Chinese imports.

---

[183] Poland, L/6714 (07/08/1990); *see* WTO Accessions Document, p. 42 (Exhibit USA-1).

[184] Romania, L/6981 (06/02/1992); *see* WTO Accessions Document, p. 43 (Exhibit USA-1).

[185] Hungary, L/6909 (26/09/1991); *see* WTO Accessions Document, p. 30 (Exhibit USA-1).

[186] For example, in the accessions of Poland, Hungary, and Romania, the non-market nature of those countries was acknowledged and addressed in the respective working party reports and accession protocols without mention of how to evaluate that status in an administrative proceeding. *See* Exhibit USA-17 through Exhibit USA-22.

Question 58. The Panel would like the European Union and the United States to clarify their views concerning the continued relevance of Sections 15(a), 15(a)(i) and 15(d), following the expiry of Section 15(a)(ii), as context for interpreting Article VI:1 of the GATT and Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

Is it the submission of the European Union and the United States that, following the expiry of Section 15(a)(ii), Article VI of the GATT and Articles 2.1 and 2.2 of the Anti-Dumping Agreement, *on their own*, permit an importing Member to reject Chinese domestic prices or costs when the evidence before an investigating authority demonstrates that an investigated Chinese producer does not operate under market economy conditions (on an industry, sector or country-wide basis); or is it your contention that, following the expiry of Section 15(a)(ii), Article VI of the GATT and Articles 2.1 and 2.2 of the Anti-Dumping Agreement permit this course of action only when those provisions are *applied together with Sections 15(a), 15(a)(i) and 15(d) of China's Accession Protocol*? In either case, please explain how the above-mentioned market economy standard and the right to reject domestic prices or costs when market economy conditions do not prevail, is established through the operation of the relevant legal provisions.

126. As discussed in the legal interpretation document annexed to the U.S. third-party submission, the text of Article VI:1 of the GATT 1994,[187] the Second Note *Ad* Article VI:1,[188] Article 2 of the Anti-Dumping Agreement,[189] GATT accession documents,[190] and other texts,[191] including Section 15 of China's Accession Protocol,[192] confirm that GATT Contracting Parties and WTO Members have always recognized that non-market prices or costs are not suitable for anti-dumping comparisons because they are not appropriate to use "in determining price comparability." As such, Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, *on their own*, permit an importing Member to reject domestic prices or costs when sufficient evidence before an investigating authority demonstrates that a country, or a sector or industry within a country, do not operate under market economy conditions. Similarly, Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, *on their own*, permit an importing Member to reject the domestic prices or costs of an individual producer when sufficient evidence before an investigating authority demonstrates that a producer's or exporter's prices or costs do not reflect market principles because of the lack of market orientation of the transaction or the entities engaged in the transaction. That said, as further discussed below,

[187] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 3.

[188] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 4.

[189] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 7.

[190] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 6.

[191] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 5.

[192] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, Section 8.

Sections 15(a), 15(a)(i), and 15(d) of China's Accession Protocol provide greater precision, beneficial to China, about the applicability of Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement in anti-dumping proceedings involving Chinese imports.

127. It is necessary to ensure comparability between the normal value and the export price in every anti-dumping determination. Comparability is only ensured when the comparison between the normal value and the export price is capable of producing a meaningful answer to the question of whether or not there is dumping as defined by Article VI of the GATT 1994 and the Anti-Dumping Agreement. Non-market prices and costs do not constitute or give rise to "comparable prices, in the ordinary course of trade," and therefore they are not appropriate to use "in determining price comparability." Members have always recognized that non-market prices and costs are not suitable for anti-dumping comparisons.

128. Section 15 of China's Accession Protocol is a specific expression of the principle that price comparability needs to be ensured in every anti-dumping determination. Section 15 is concerned with "determining price comparability *under* Article VI of the GATT 1994 and the Anti-Dumping Agreement"; thus, the primary "rules" for determining price comparability are set out in these two agreements. Indeed, the provisions of Section 15 do not cover all situations, nor do they need to as Article VI of the GATT 1994 and the Anti-Dumping Agreement govern the determination of price comparability.

129. The expiry of Section 15(a)(ii) thus does alter the requirement that an importing Member must ensure comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement for purposes of making a dumping comparison. Rather, the expiry of Section 15(a)(ii) means that the "rule" set out in that provision no longer applies after 15 years. Nothing in Section 15 of China's Accession Protocol suggests a lapse in the basic requirement to ensure comparability, which flows from Article VI:1 of the GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement. If sufficient evidence before an investigating authority demonstrates that market economy conditions do not prevail in China, or in the Chinese industry or sector under investigation, then "comparable" prices or costs do not exist for purposes of the dumping comparison. In that situation, an importing Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China.

130. At the same time, Sections 15(a), 15(a)(i), and 15(d) of China's Accession Protocol set out additional provisions that govern the application of Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement in anti-dumping proceedings involving Chinese imports:

- Section 15(d), first sentence – This sentence gives to China the right to seek to demonstrate to an importing Member pursuant to its national law that market economy conditions prevail in China generally.

- Section 15(d), third sentence[193] – This sentence gives to China the right to seek to demonstrate to an importing Member pursuant to its national law that market economy conditions prevail in a particular industry or sector.

- Section 15(a)(i) – This subparagraph gives to Chinese producers under investigation the right to seek to demonstrate to an importing Member that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production, and sale of that product.

The enunciation of these rules in Section 15 of China's Accession Protocol is beneficial to China, because it was not clear under Article VI of the GATT 1994 or Article 2 of the Anti-Dumping Agreement that China's status as a non-market economy country could be altered on a bilateral basis as opposed to a multilateral basis, or that Chinese producers under investigation could challenge such treatment during the course of a particular anti-dumping investigation.

131. In sum, the legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2 and the need to ensure comparability of prices and costs when establishing normal value. Section 15(a) – which is compatible and in agreement with the GATT 1994 and Anti-Dumping Agreement – can be understood as a confirmation that the determination under those agreements of price comparability relates to whether there are comparable, market-determined prices. The first and third sentences of Section 15(d) further confirm that "market economy conditions" are highly relevant in determining price comparability, while at the same time providing beneficial guidance in respect of China's right to seek to demonstrate to an importing Member that market economy conditions exist in China.

[193] The third sentence of Section 15(d) is introduced with the phrase "in addition." The United States would like to remind the Panel that this introductory phrase establishes that the subject matter of this sentence is "in addition" to the subject matter of the first and second sentence, which suggests the third sentence remains applicable after the expiry of subparagraph (a)(ii).

Miscellaneous

To the United States

Question 61. Please explain how the principles found in Article VII:2(b) of the GATT and the second Ad Note to Article VII:2 that are referred to in the United States' answer to the European Union's question 4 apply in the context of customs valuation. Please also explain how what is provided for in these provisions is relevant to the determination of price comparability under Article VI of the GATT and the Anti-Dumping Agreement.

132. Article VII:2(b), and the accompanying Second Note *Ad* Article VII:2, provide further support for the basic requirement of Article VI:1 of the GATT 1994 that normal value be a "comparable price, in the ordinary course of trade," means a market-determined price or cost. One part of the treaty can "add colour, texture and shading to … interpretation of the agreements annexed to the *WTO Agreement*."[194] Article VII:2(b) of the GATT 1994 defines "actual value" for purposes of customs valuation as "the price at which … such or like merchandise is sold or offered for sale *in the ordinary course of trade under fully competitive conditions*."[195] The Second Note *Ad* Article VII:2 elaborates on the meaning of this phrase by indicating that a contracting party could construe it so as to exclude "any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration."[196] Therefore, the Panel should look to Article VII:2(b) and Second Note *Ad* Article VII:2 as supportive of the conclusion that in determining price comparability under Article VI:1 of the GATT 1994 and Anti-Dumping Agreement, similar text in respect of a "comparable price, in the ordinary course of trade," likewise presumes the existence of free markets where prices are determined by supply and demand under competitive conditions.

133. The principles found in Article VII:2(b) of the GATT 1994 and Second *Ad* Note to Article VII:2 apply in the context of customs valuation according to rules set forth in Part I of the Agreement on Implementation of Article VII of the GATT 1994.

Question 62. The United States has submitted evidence of the historical record of the negotiations on the accessions of 29 countries (other than China) in the process of accession to the GATT or WTO to support its view that GATT/WTO commitments "presuppose that {the party assuming them} has or is developing a free-market economy". Please explain the precise relevance

[194] *US – Shrimp (AB)*, para. 153.

[195] GATT 1994 Art. VII:2(b) (italics added).

[196] Second Note *Ad* GATT 1994 Article VII:2. *See also* Customs Valuation Agreement, Art. 2.1 (transaction value between related buyer and seller shall be accepted provided the relationship did not influence the price).

of this evidence to the Panel's consideration of the specific interpretative issues at stake in this dispute.

134. The record of the negotiations on the accessions of 29 countries, as well as the record of China's accession, provides objective evidence that further confirms Members' recognition of the free market principles upon which the WTO Agreements are based. The United States has explained in its submissions that the commitments and rules of the WTO are written from a presumption that WTO Members have market economies. China in its most recent closing statement argues essentially the opposite: that "this dispute has nothing to do with so-called 'market economy' status or conditions"[197]; that under the provisions of Article VI of the GATT 1994, Articles 2.1 and 2.2 of the Anti-Dumping Agreement, and the Second *Ad* Note, "home market prices and costs cannot be rejected on the basis of 'market economy conditions'."[198] It would appear that it is China's perspective that the Panel should ignore the fact that the WTO Agreements are based on free market principles and consider such principles, along with the actual economic conditions in China, as not relevant to the 'as such' claims that it may address in this dispute. The record of the negotiations by non-market economies for accession to the WTO – how it was understood that a non-market economy country, before it could accede to the WTO, would need to demonstrate that it had transitioned, or planned to transition, from a non-market to a free market economy – demonstrates the utmost importance of free market principles to the effective implementation of WTO obligations.

---

[197] China Closing Statement at the Second Substantive Meeting, para. 9 (bold omitted).

[198] China Closing Statement at the Second Substantive Meeting, para. 15.