EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

(DS516)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

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EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

1. China has fundamentally misunderstood the relevant text of the *Marrakesh Agreement Establishing the World Trade Organization* as it relates to anti-dumping proceedings. There is no basis for China's core assertion that domestic prices or costs that are not market-determined must be used for purposes of anti-dumping comparisons. To the contrary, WTO Members (and GATT Contracting Parties) have long understood that they have the authority to reject and replace such non-market prices or costs because an anti-dumping comparison requires comparable, market-determined prices or costs. Given that China's legal understanding is fundamentally flawed, China's claims that the EU's Basic Regulation is inconsistent with Articles I and VI of GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement must fail.

2. Through this dispute, and the erroneous legal interpretation underlying China's claims, China is seeking to upset the balance of rights and obligations in the WTO Agreement – a balance that was critical to the decision of existing Members to permit China to accede. When China was admitted to the WTO, Members agreed to extend certain benefits to China – for example, to apply duties no higher than their tariff bindings. But Members did not agree to give up their right to impose anti-dumping duties consistent with Article VI of GATT 1994 and the Anti-Dumping Agreement, including by rejecting and replacing prices or costs that are not determined under market economy conditions for purposes of anti-dumping comparisons. Members also admitted China to the WTO with the expectation that China would carry out its stated intention to fully transition to a market economy within 15 years. But 16 years later, it is clear that China has not completed that transition. China now seeks to deprive other Members of their WTO rights in relation to the investigation and application of anti-dumping duties.

3. China remains a non-market economy. The Chinese government continues to maintain and exercise broad discretion and control to allocate resources with the goal of achieving specific economic outcomes. This system distorts costs and prices throughout China's economy, such that non-market conditions continue to prevail in the operation of China's economy. Given the extent of China's non-market economic distortions, China's position in this dispute would expose other Members even more to those economic distortions. This would undermine a fundamental right of all Members of the WTO to address non-market economy distortions.

I. WTO Texts Provide Members the Authority to Reject and Replace Prices and Costs that are Not Market-Determined for Purposes of Anti-Dumping Comparisons

4. As demonstrated through the legal interpretation submitted by the United States on November 13, 2017, the evidence is overwhelming that WTO Members have not surrendered their longstanding rights in the GATT and WTO to reject prices or costs that are not determined under market economy conditions in determining price comparability for purposes of anti-dumping comparisons. 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 are not suitable for anti-dumping comparisons because they are not appropriate to use "in determining price comparability". In an anti-dumping determination, it is necessary to ensure comparability between the normal value and the

export price. 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 GATT 1994 and the Anti-Dumping Agreement.

5. In Section 15(a) of China's Accession Protocol, WTO Members and China adopted this longstanding approach and clarified that, so long as prices and costs in China continued not to be determined under market economy conditions, its domestic prices and costs would be considered distorted in determining price comparability under GATT 1994 Article VI and the Anti-Dumping Agreement and may be rejected. The basic requirement of comparability, which predates Section 15, flows from Article VI of GATT 1994, and is further reflected in the Second Note *Ad* Article VI:1 and in Article 2 of the Anti-Dumping Agreement. Understood correctly, Article VI establishes that the dumping comparison requires comparable, market-determined prices. Without a "comparable price, in the ordinary course of trade", no dumping comparison can be made. This "comparable price, in the ordinary course of trade" is a market-determined price. Accordingly, Section 15(a)(i) 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.

6. This understanding is confirmed by the Second Note *Ad* GATT 1994 Article VI:1. The Second Note also reflects that it is the definition in Article VI:1, together with Article VI:2, that provides for the legal authority to reject non-market prices and costs in anti-dumping comparisons, not the Second Note itself. 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. 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 GATT 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.

7. The GATT Secretariat's review of Contracting Parties' legislation applying Article VI provides further evidence confirming the understanding of Article VI as requiring market-determined prices for determining price comparability. This review of legislation and practice also evidences subsequent practice in the application of Article VI establishing the agreement of the parties regarding its interpretation. The Contracting Parties' legislation confirms their understanding that ensuring price comparability under Article VI requires a market-determined normal value – that is, a comparable price, in the ordinary course of trade. The report acknowledges the core view of Contracting Parties that "a lack of comparable figures" in non-market economies means that normal value must be found on another basis – e.g., on the basis of prices in third countries. The report also observes that the Contracting Parties continued to apply Article VI in a manner that demonstrated they considered they had the legal authority to calculate normal value on the basis of market-determined prices.

8. The practice of GATT Contracting Parties in accessions to the GATT confirms that non-market economy prices and costs may be rejected pursuant to Articles VI:1 and VI:2 of GATT 1994. In the accessions of Poland, Romania, and Hungary to the GATT, the Contracting Parties

did not create any exception to Article VI:1 of GATT 1994 in the accession protocol of the acceding non-market economy. Rather, in each case they re-affirmed their ability to reject and replace non-market prices or costs for anti-dumping comparisons. The subsequent practice of the Contracting Parties supports the interpretation of Articles VI:1 and VI:2 as providing the legal authority to ensure comparability and to reject prices and costs not determined under market economy conditions for purposes of anti-dumping comparisons.

9. The Anti-Dumping Agreement, through Article 2, implements the principle of comparability set forth in Article VI of GATT 1994. In relation to determining comparability, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price or costs that ensures comparability. Article 2.1 retains the key elements from Article VI for domestic prices to be used to calculate normal value – there must be a "comparable price, in the ordinary course of trade." As under Article VI, the lack of comparable, market-determined prices – that is, determined under market economy conditions for the industry under investigation – requires the use of an alternative source for normal value. Similarly, non-market-determined costs (the prices of production factors) are distorted or unreliable and cannot ensure comparability (as through prices in the ordinary course of trade). Article 2.2 reinforces the proposition that normal value must be based on prices and costs that permit a "proper comparison". The prices or costs of an industry in which market economy conditions do not prevail cannot be considered comparable prices, or capable of ensuring comparability, for purposes of "normal value."

10. Section 15, in turn, is a specific expression of the principle that comparability needs to be ensured. Section 15 is concerned with "determining price comparability *under* Article VI of GATT 1994 and the Anti-Dumping Agreement". The primary "rules" for determining price comparability would be those in the two agreements. The provisions of Section 15 do not cover all situations and do not need to as Article VI of GATT 1994 and the Anti-Dumping Agreement also govern the determination of price comparability. Thus, the expiry of Section 15(a)(ii) does not mean that an importing Member may not ensure comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement for purposes of making a dumping comparison. Rather, expiry of subparagraph (a)(ii) means that the "rule" set out in that provision does not apply beyond 15 years. Nothing in Section 15(d) suggests a lapse in the basic requirement to ensure comparability, which flows from Article VI:1 of GATT 1994, as implemented particularly in Article 2 of the Anti-Dumping Agreement. If market economy conditions do not prevail in China or in the 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.

11. In sum, the expiry of Section 15(a)(ii) does not mean that WTO Members no longer have the ability to reject and replace non-market domestic prices or costs for purposes of anti-dumping comparisons. Rather, the legal authority to reject prices or costs not determined under market economy conditions flows from GATT 1994 Articles VI:1 and VI:2. That this authority exists in Article VI is reflected in legal text and consistent practice spanning decades: the proposal to amend Article VI:1 and eventual adoption of the Second Note *Ad* Article VI:1, confirming the legal authority existed in Article VI; the Secretariat review of Contracting Parties' application of Article VI, demonstrating a subsequent, common practice rejecting non-market prices or costs in determining normal value; the Accessions to the GATT of three non-market economies in which

the CONTRACTING PARTIES affirmed their existing ability to reject non-market prices or costs in situations other than "the case" described in the Second Note; Article 2 of the Anti-Dumping Agreement, bringing forward the key concepts from Article VI:1 and reinforcing (through terms such as "proper comparison") that market-determined prices or costs are necessary for anti-dumping comparisons; and Section 15, which clarifies that domestic prices or costs will be used when "market economy conditions prevail" for the industry under investigation, but domestic prices or costs may be rejected when market economy conditions do not prevail.

II. The Measure at Issue Does Not Breach Article I:1 of GATT 1994

12. Article VI:2 of GATT 1994 states: "In order to offset or prevent dumping, a contracting party *may levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Article 1 of the Anti-Dumping Agreement, which elaborates the application of Article VI, further states: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." In other words, paragraph 2 of Article VI *authorizes* WTO Members to apply anti-dumping duties, and Article 1 clarifies that such anti-dumping measures shall be imposed consistently with Article VI of GATT 1994 and the Anti-Dumping Agreement.

13. An anti-dumping measure that is consistent with Article VI of GATT 1994 and the Anti-Dumping Agreement is thus authorized by both agreements. In that circumstance, a claim that an anti-dumping measure is inconsistent with Article I of GATT 1994 must follow a demonstration that the measure is *not authorized* pursuant to Article VI or the Anti-Dumping Agreement. But China's claim is completely and expressly divorced from any demonstration of an inconsistency with either Article VI or the Anti-Dumping Agreement. In fact, China's panel request limited its claim under Article I:1 of GATT 1994 in precisely this manner, and China cannot expand the legal basis for its claim at this time.

14. Article 2(7) of the EU's Basic Regulation also does not extend an advantage to like imported products originating in market-economy Members on criteria that have a detrimental impact on the competitive opportunities for like imported products from non-market economy Members. Therefore, although the Panel need not reach China's Article I:1 claim, were the Panel to consider China's Article I:1 claim, the Panel should find that the measure at issue is not inconsistent with the European Union's obligations under Article I:1 of GATT 1994.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENTS

15. This dispute presents an absolutely critical challenge to the WTO. The WTO agreements are based on a balance of rights and obligations, a balance that ultimately relies on the market-orientation of its Members. Through this dispute, and the erroneous legal interpretation underlying China's claims, China would have the Panel upset this balance, with the result that even if China continues to promote non-market economic conditions, distorting market outcomes and harming workers and businesses worldwide, WTO Members would have *no instruments* to address the resulting injury. China's position in this dispute – that Members should be prohibited from rejecting and replacing prices or costs that are not determined under market

economy conditions for purposes of anti-dumping comparisons – would expose other Members *even more* to those economic distortions.

16. China continues to avoid the key words in the relevant texts. Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement establish that the dumping comparison requires a "comparable price, in the ordinary course of trade" for purposes of establishing normal value. As the European Union, the United States, and other third parties have explained through an examination of all of the relevant texts, including Article VI, Article 2, the Second Note *Ad* Article VI:1, and Section 15, this "comparable price, in the ordinary course of trade," is a market-determined price. This basic requirement excludes prices or costs *not* determined under "market economy conditions". It is this last phrase that is a key clarification from Section 15. When considering the possible accession of China to the WTO, Members articulated that "in determining price comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement", it is whether "market economy conditions prevail" in the industry with regard to the manufacture, production, and sale of the product that is key to determining whether "comparable prices, in the ordinary course of trade," exist and can be used for the dumping comparison.

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

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

18. Section 15(a) confirms and clarifies the existing rights of WTO Members under Article VI:1 of GATT 1994 and Article 2 of the Anti-Dumping Agreement. Section 15(a) also states in express terms how certain considerations will be made and taken into account in implementing those existing rights with regard to China and its producers. While the text of Section 15(a) states that Chinese prices and costs may be rejected, it is Article VI:1 and Article 2 of the Anti-Dumping Agreement that *authorize* that approach by requiring comparable, market-determined prices or costs to be used as the basis for comparison.

19. Under Article VI:1 and Article 2, an investigating authority may reject Chinese prices and costs when the evidence so justifies and the investigating authority may make that determination at the level of the industry or sector or country as a whole. The text of Section 15(a) provides, in express terms, that such an approach will not be justified when producers show that market economy conditions prevail, but does not authorize anything that would be otherwise impermissible under Article VI:1 and Article 2 of the Anti-Dumping Agreement.

20. Further, this understanding does not suggest that the provisions of Section 15(a) that confirm and clarify these rights are without significance. The evidentiary considerations detailed in Section 15(a)(i) confirm that price comparability is a question of fact, one that depends on market economy conditions, and – contrary to China's assertion – one that can be answered *definitively* upon a proper showing by Chinese producers with respect to the relevant industry under investigation. The certainty that comes with Section 15(a), from the perspective of individual producers under investigation and for China as a trading partner, is meaningful.

21. Contextual considerations support the interpretation of Sections 15(a)(i) and 15(a)(ii). With respect to China's accession, the Working Party Report and Accession Protocol reflect a clear recognition that non-market economy conditions prevailed in China during its accession. The concerns expressed first by GATT Contracting Parties and later by WTO Members confirm that a China-specific standard of evidence was warranted, at least for the time immediately following China's accession. For example, in considering the probable course of China's transition to a market economy, one member observed that "[i]t was not known … at what pace these changes would actually take place or how effective they would be in creating a more market-oriented system. These were important questions for the GATT since, to a large extent, *the contracting parties' confidence that China could accept and fulfil its GATT obligations depended upon the success of China's economic reforms*."

22. The negotiations for China's accession to the WTO took almost 15 years, and the concerns about whether China could fulfill its GATT obligations remained throughout those negotiations. The final WTO Working Party Report stated with respect to anti-dumping and subsidies that "China was continuing the process of transition towards a full market economy" and recognized that, "under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations." From the consensus view that China remained a non-market economy and that its transition would be slow and uncertain, it follows that a special rule providing a lower standard of evidence would be appropriate, at least for the time immediately following China's accession. The lower evidentiary standard relieved WTO Members of the immediate need to re-examine China's economic conditions when it would be premature to do so.

23. Section 15(a)(ii) thus essentially deferred the rigorous 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. However, in deferring that ultimate question, the drafters also provided 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) therefore provides an alternative standard of evidence that served to counterbalance the lower threshold that existed for 15 years and, 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.

24. Finally, the language in Section 15(d) most obviously affects the operation of Section 15(a) by setting a 15-year time limit on the lower standard of evidence reflected in Section 15(a)(ii). This difference is critical. After the expiry of Section 15(a)(ii), Section 15(d) continues to be relevant to the standard of evidence by making termination of Section 15(a)(i) contingent on actions by China (i.e., when China establishes that China "is" a market economy or when China establishes that market economy conditions prevail in an industry or sector). This right of China is significant because it could relieve a producer under investigation of the need to demonstrate that market economy conditions prevail in the industry. If China were successful, the industry or sector would not be subject to the non-market economy provisions of subparagraph (a). This too informs the evidentiary standard that is relevant to the producers under investigation contemplated by Section 15(a)(i).