EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

(DS516)

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

January 19, 2018

TABLE OF EXHIBITS

EXHIBIT NUMBER	FULL CITATION
USA-31	Normal Trade Relations for the People's Republic of China, Public L. 106-286, § 103, 114 Stat. 880 (partial document) (Oct. 10, 2000) (originally codified at 19 U.S.C. § 2451)

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Canada – Dairy (Article 21.5 – New Zealand and US II) (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
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
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
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 – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

1 SECTION 15(a) OF CHINA'S ACCESSION PROTOCOL

To parties and third parties

Question 1. Several of the third parties that have made submissions on the meaning of Sections 15(a)(i) and (ii) suggest that these two subparagraphs contain two *different* rules applicable to the issue of price comparability in investigations involving Chinese imports; and that the key difference between the two rules concerns the *burden of proving* the existence of market economy conditions.

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

1. The United States understands the use of the term "burden of proof" in this question to refer to the general exchange of information between the parties and the importing Member that takes place throughout the course of the investigative process. We note that parties and third parties have employed various terms, including "burden of proof,"[1] "standard of evidence,"[2] and "evidentiary burden,"[3] to describe the dynamics of that process. It is in that general sense of the term that we can discuss how the rules in Sections 15(a)(i) and 15(a)(ii) inform the investigative process and the relevant standard of evidence.

2. The Panel's question asks whether Section 15(a) imposes one or two rules relating to the burden of proof. As the following discussion demonstrates, it is possible to describe Section 15(a) as setting out one burden of proof – on the producers under investigation – resulting in two "rules" – in the sense of two logical outcomes for what the producers are able to demonstrate in relation to their burden to show whether "market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product."

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[1] *See, e.g.*, EU Opening Statement, para. 12 ("In short, by asking such questions, the investigating authority places the **burden of proof** with respect to certain matters on certain interested parties, who also bear the consequences of failing to discharge their burden." (emphasis original)).

[2] *See, e.g.*, U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 8.5.4 and 8.5.4.1 (contrasting "the China-specific rule on standard of evidence" with "the standard of evidence rules in the Anti-Dumping Agreement"); *ibid.*, para. 8.5.3 ("Ultimately, the Anti-Dumping Agreement does not contain an express rule regarding the burden of proof."). Mexico, for example describes how Section 15(a)(i) and (ii) affect whether the investigating authority has an obligation to use Chinese prices or costs, discretion to use external prices or costs, or neither. Mexico's Third-Party Submission, paras. 64-66. The United States understands Mexico's reference to the situation where there is neither an obligation nor discretion to mean that the standard of evidence rules in the Anti-Dumping Agreement would apply as in any other case. *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 8.5.4.1 ("This means that an investigating authority will have to consider evidence on comparability, including the existence of market economy conditions, in accordance with the standard of evidence rules in the Anti-Dumping Agreement.").

[3] *See, e.g.*, Canada's Third-Party Submission, para. 21 ("the rules in subparagraphs (i) and (ii) are related only to the producers' evidentiary burden while the rules in the rest of Section 15 are more broadly related to price comparability as determined by the investigating authority of the importing Member.").

The United States and others have referred to Sections 15(a)(i) and 15(a)(ii) as setting out "rules" on the standard of evidence in part because Section 15(a) itself uses the words "based on the following rules."

3. Turning to the text of Sections 15(a)(i) and 15(a)(ii), the text of the first rule identifies one (and only one) scenario, and provides a mandatory rule for that scenario – that Chinese prices or costs "shall" be used. The second rule confirms that, so long as a condition is not satisfied, an investigating authority may use a methodology not based on a strict comparison with domestic prices or costs in China. Under Section 15(a)(ii), as a matter of evidence, the rejection of Chinese prices or costs could be justified simply based on a failure to clearly show that market economy conditions prevail. Without that provision, the rejection of Chinese prices or costs depends on a consideration of the evidence before the investigating authority.

4. The key differences are evident in the application of the rules. The text of the first subparagraph of Section 15(a) provides for a specific party ("the producers under investigation") to make a certain evidentiary showing ("clearly show that market economy conditions prevail in the industry producing the like product"); the second subparagraph in similar terms provides what may happen *unless* that evidentiary showing ("clearly show that …") is made by a specific party.

5. The second subparagraph outlines what the result may be in a given case if the evidentiary showing does not occur. The second subparagraph does not provide any new authority, but rather implements the authority that flows from Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement. Thus, it explains that the authority to reject domestic prices and costs may be invoked as long as the evidentiary showing by producers does not occur. After 15 years, the fact that producers do not make the evidentiary showing may not be sufficient to justify the use of that authority. This means that, when the scenario described in Section 15(a)(ii) occurs, the result must be informed by the default rules, i.e., the generally applicable rules of evidence.

6. Accordingly, after the expiry of Section 15(a)(ii), if the producers can bring forward evidence to clearly show that market economy conditions prevail, then the importing Member *shall* use Chinese prices or costs; but if the evidentiary showing does not occur, then those prices or costs may or may not be used, depending on what is justified by the facts in a given case. Although that outcome is no longer justified as a *per se* matter on the basis of whether the evidentiary showing by producers occurred, the fact that the authority continues to exist through Article VI:1 of GATT 1994 and Article 2 of the Anti-Dumping Agreement does not change. Whereas both rules under Section 15(a)(i) and 15(a)(ii) describe an evidentiary showing, the *authority* to apply an alternative approach is found in the Article VI:1 and Article 2 requirements of price comparability.

7. To illustrate what this looks like in application, consider the following example. In an anti-dumping proceeding prior to the expiry of Section 15(a)(ii), the Chinese producers under investigation do not address the state of market economy conditions in their industry. The administrative record contains "Exhibit X," consisting of evidence demonstrating non-market economy conditions. In rejecting Chinese prices or costs, the investigating authority need not

base its decision to apply, in the words of Section 15(a), "a methodology that is not based on a strict comparison with domestic prices or costs in China" on Exhibit X because the producers under investigation have not made the evidentiary showing. In an anti-dumping proceeding *after* the expiry of Section 15(a)(ii), the evidence in Exhibit X (and any other relevant evidence) would need to be sufficient to justify a conclusion that comparable prices are not available as a result of non-market economy conditions. In other words, the rule in Section 15(a)(ii) meant that no evidence, or some evidence, was sufficient for 15 years if the producers could not produce enough evidence to "clearly show that market economy conditions prevail."

8. Previously, the rules operating together (or, put differently, the "rule" assigning the burden of proof to the producers to "clearly show") described a standard of evidence that covered both when the producers made the evidentiary showing and when producers did not make the evidentiary showing. Now, in contrast, the text describes the standard of evidence that applies in *only one* situation – i.e., where producers make the evidentiary showing. The outcome in cases where the producers do not make the evidentiary showing is no longer provided by Section 15(a)(ii); thus, the outcome in such cases must be guided by reference to the standards for findings by importing Members generally applicable in the GATT 1994 and the Anti-Dumping Agreement.

9. As the Panel's question 7 anticipates, this raises the question of how Section 15 can be read so as not to be redundant. Although we address this issue in our response to Panel question 7, we note here several key observations that arise from the text of Sections 15(a)(i) and 15(a)(ii).

10. To be clear, the text of Section 15(a) concerns the question of proof not just in terms of a "burden" (to use the Panel's phrasing in its question), but also in the sense that it provides for an *opportunity* to make a particular showing. The particular showing that Section 15(a) invites – a "clear[] show[ing] that market economy conditions prevail" – had not been previously stated in express terms. While it is true that an investigating authority, by its nature, will collect and examine evidence (and Section 15 does not change that), it is significant that Section 15 confirmed that producers themselves can, by the terms of 15(a)(i), require the investigating authority to examine evidence of market conditions and to do so within a proceeding.

11. Prior to that 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. In the GATT context, for example, the state-controlled parties self-identified as non-market economies. Their non-market status did not depend on findings by an investigating authority. Likewise, 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.[4] As can be seen in other WTO accessions, the existence of non-market conditions tends to be self-evident and freely admitted.[5]

12. Thus, from the perspective of a Chinese producer, without the benefit of the clarification in Section 15, it is not obvious 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.

13. 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, e.g., the accessions process.

14. Finally, Section 15 also clarified *how* market economy conditions were to be taken into consideration during the course of a proceeding, that is, upon a proper showing by "the producers under investigation." In the first case (i.e., under Section 15(a)(i)) market economy conditions are considered as sufficient to show the prerequisite price comparability "if" the producers under investigation can "clearly show" that those conditions exist and that those conditions "prevail." If producers make that showing, the investigating authority "shall" use domestic prices or costs. This also implies that the investigating authority "shall" use domestic prices or costs for the industry producing that product notwithstanding that the country may continue to be designated as a non-market economy writ large.

15. In the second case (i.e., under Section 15(a)(ii)), many of the same significant elements are present: e.g., that market economy conditions are relevant in determining price comparability; and that an investigating authority may find itself making reference to a showing by "the producers under investigation." This rule *confirms* that (for 15 years following China's accession) Members "*may*" reject Chinese prices or costs so long as *the producers* cannot "clearly show" that market economy conditions prevail. To be clear, the use of the word "*may*" does not grant any new authority, but rather clarifies the evidentiary threshold for rejecting Chinese prices or costs. The additional language of "clearly show" clarifies that an evidentiary standard exists when it comes to allowing *producers in an investigation* to question an importing Member's decision to designate the exporting country as a non-market economy. After the expiry of Section 15(a)(ii), that standard (of what the producers can clearly show) applies only to the question of when an investigating authority "shall" use Chinese prices or costs. When producers do not make that evidentiary showing, the question of whether an investigating

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[4] *See* Exhibit USA-17 through Exhibit USA-22.

[5] *See generally* WTO Accessions Document: Review of Transition to Market-Based Economies by Acceding Non-Market Economy Countries (Exhibit USA-1).

authority may use or reject Chinese prices or costs depends on the standards for findings by importing Members generally applicable in the GATT 1994 and the Anti-Dumping Agreement.

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

16. Contextual considerations support the interpretation of Sections 15(a)(i) and 15(a)(ii) described in the U.S. response to Panel question 1(a). Among other things, those considerations include the context of China's accession and the text of the other provisions found in Section 15.

17. 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*."[6]

18. 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 on China's Accession stated with respect to anti-dumping and subsidies, for example, 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."[7] 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.

19. 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

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[6] Spec(88)13 (Mar. 29, 1988), para. 2.11 (emphasis added) (Exhibit USA-23). *See also* Canada Third-Party Submission, para. 57 (demonstrating that there are numerous references through China's Accession Protocol and Working Party Report that show that Members considered China to be a non-marked economy and expected China to transition to a full market economy).

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

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.

20. With respect to the context provided by the other provisions of Section 15, 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). As noted above, Section 15(a)(i) is significant in that it clarifies and confirms the right of *producers* and not just the Member state to make a demonstration of market economy conditions.

21. Finally, the evidentiary standards in Sections 15(a)(i) and 15(a)(ii) can be examined by contrast to Section 15(b), which does not speak to an evidentiary showing but rather refers to the "exist[ence]" of special difficulties. Again, this supports the interpretation that Section 15(a)(i) continues to be significant even after the expiry of Section 15(a)(ii).

Question 2. What is the relationship between Section 15(b) of China's Accession Protocol and the rules governing the establishment of price comparability for the purpose of determining subsidies found in the SCM Agreement? Does this relationship provide any guidance for understanding the relationship between Section 15(a) and (d) of China's Accession Protocol and Article VI of the GATT 1994 and the Anti-Dumping Agreement?

22. The relationship between Section 15(b) of China's Accession Protocol and Article VI of GATT 1994 and the SCM Agreement is similar to the relationship between Section 15(a) and Article VI of GATT 1994 and the Anti-Dumping Agreement. Subsidies law relies on the existence of market-determined benchmarks to ascertain whether a subsidy exists. Section 15(b) addresses subsidies described in Articles 14(a) through 14(d) of the SCM Agreement. Article 14 sets outs out agreed "guidelines" to calculate the benefit to the recipient by comparison of a transaction with what appears from the general description to be a market-determined benchmark:

- Article 14(a): a government provision of equity capital confers a benefit to the extent it is inconsistent with the *usual investment practice of private investors*;

- Article 14(b): a government loan confers a benefit to the extent of the difference between the amount paid on the government loan and *the amount that would be paid on a comparable commercial loan that could actually be obtained on the market*;

- Article 14(c): a government loan guarantee confers a benefit to the extent of the difference between the amount of the guarantee and *the amount on a comparable commercial loan absent the government guarantee*; and

- Article 14(d): a government provision of goods/services, or purchase of goods, confers a benefit to the extent the provision is less than adequate remuneration, or the purchase is for more than adequate remuneration, *as determined in relation to prevailing market conditions*.

23. The benchmarks described in the above provisions may not exist where market economy conditions do not prevail. The purpose of the benefit calculation under Article 14 of the SCM Agreement is to determine whether the recipient is "'better off' than it would otherwise have been absent a contribution."[8] Private, in-country market benchmarks are the usual starting point in determining whether the financial contribution made the recipient better off. However, in certain circumstances, such as when the government plays a predominant role in the marketplace, an investigating authority may have to use out-of-country benchmarks to determine whether a benefit has been conferred.[9] Indeed, the use of an in-country benchmark under such a circumstance would result in a circular analysis of the adequacy of remuneration since the analysis would be comparing the government benchmark to itself.[10]

24. For this reason, the chapeau to Article 14 and its subparagraphs envision that different approaches and methods may be used by an investigating authority to determine whether a benefit has been conferred on a recipient. The chapeau of Article 14 refers to "any method" used by an investigating authority.[11] The Appellate Body has explained that this reference "clearly implies that more than one method consistent with Article 14 is available to investigating

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[8] *See Canada – Aircraft (AB)*, para. 157.

[9] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 435-458; *US – Softwood Lumber IV (AB)*, para. 103.

[10] *See US – Softwood Lumber IV (AB)*, para. 100 ("The resulting comparison of prices carried out … would indicate a 'benefit' that is artificially low, or even zero, such that the extent of the subsidy would not be captured …").

[11] SCM Agreement, art. 14 ("For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines …).")

authorities for purposes of calculating the benefit to the recipient."[12] Further, according to the Appellate Body, "the use of the term 'guidelines' in Article 14 suggests that subparagraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'."[13]

25. The plain language of Section 15(b) confirms that WTO Members, including China, recognized the principle set out in Article 14 of the SCM Agreement, which flows from Article VI of GATT 1994, that non-market benchmarks may not be suitable for identifying and measuring the subsidy benefit. Section 15(b) specifically provides that "if there are special difficulties" in the identification and measurement of those subsidies described in Articles 14(a) through 14(d), "the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks."[14] Section 15(b) thus is a specific expression of the principle that the benefit benchmark must be market-determined because it would be impossible otherwise to determine if a producer or exporter is receiving a subsidy.

26. Sections 15(a), 15(b), and 15(d) of China's Accession Protocol thus rest on the same basic requirement of comparability: If market economy conditions do not prevail in in the industry under investigation, then "comparable" prices or costs may not exist for the determination of dumping and "appropriate" benchmarks may not exist for the determination to countervail subsidies.[15] The relationship between Section 15(b) and the SCM Agreement therefore provides additional contextual support that the expiry of one provision of China's Accession Protocol – Section 15(a)(ii) – does not mean that Members no longer have the ability to reject and replace non-market domestic prices or costs for anti-dumping comparisons.

Question 3. In understanding the nature of the relationship between Section 15(a), on the one hand, and Article VI of the GATT 1994 and the Anti-Dumping Agreement, on the other hand, what guidance, if any, can be found from the Appellate Body's findings in *China – Publications and Audiovisual Products* (paragraph 222) on the meaning of the first

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[12] *US – Softwood Lumber IV (AB)*, para. 91.

[13] *US – Softwood Lumber IV (AB)*, para. 92.

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

[15] *See* Canada's Third-Party Submission, paras. 43-48 (The term "special difficulties," which is a synonym for non-market economy conditions, appears both in Section 15(b) of China's Accession Protocol and in the Second Note *Ad* Article VI:1. Therefore, "[t]he recognition that special difficulties may continue to exist in China for the purposes of calculating a subsidy benefit … implies that special difficulties may also continue to exist with respect to price and cost comparability in the context of dumping."). *See also* Report of the Working Party on the Accession of China, WT/ACC/CHN/49 (Oct. 1, 2001), para. 150 (Exhibit USA-30) (confirming that, "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" (italics added), and that these special difficulties would likely persist until China transition into a "full market economy").

sentence of Section 5.1 of China's Accession Protocol – in particular, as regards the meaning attributed to the words "consistent with" that appear in that sentence?

27. The Appellate Body in *China – Publications and Audiovisual Products* indicated that it read the phrase "in a manner consistent with the WTO Agreement," which is set out in the first sentence of Section 5.1 of China's Accession Protocol, "as referring to the *WTO Agreement* as a whole, including its Annexes."[16] According to the Appellate Body, the right that must be exercised in a manner consistent with the WTO Agreement as a whole was the "inherent power" of a Member government to regulate trade (i.e., in its capacity as a sovereign nation).[17] As such, the Appellate Body considered that the WTO Agreement operated, in part, to "discipline" this power by requiring Members to comply with the obligations that they assumed under the WTO Agreement: "When what is being regulated is trade, then the reference in the introductory clause to 'consistent with the WTO Agreement' constrains the exercise of that regulatory power such that China's regulatory measures must be shown to conform to WTO disciplines."[18]

28. The Appellate Body's description in *China – Publications and Audiovisual Products* of the use of "consistent with" in Section 5.1 is subtly different than the use of this phrase in Section 15. In Section 5.1, it is China's exercise of the right to regulate trade that must be in "a manner consistent with" the WTO Agreement. That is, the right is disciplined by the obligations China assumed under the WTO Agreement. In the case of Section 15, the phrase "apply … consistent with" regulates, for anti-dumping purposes, two sets of disciplines on a Member. Article VI of GATT 1994 and the Anti-Dumping Agreement, on the one hand, and Section 15, on the other, both impose disciplines. Therefore, as discussed next, the phrase "apply … consistent with" indicates that both sets of disciplines should apply together and not be read in contradiction to one another.

29. First, the provisions of Section 15(a) necessarily do not cover all situations, nor do they need to, as GATT 1994 Article VI and the Anti-Dumping Agreement govern the determination

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[16] *China – Publications and Audiovisual Products (AB)*, para. 222 (italics original). The first sentence of Section 5.1 of China's Accession Protocol reads in its entirety as follows:

> Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods.

Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 5, para. 1, first sentence.

[17] *China – Publications and Audiovisual Products (AB)*, para. 222. "The phrase 'China's right to regulate trade' is a reference to China's power to subject international commerce to regulation." *China – Publications and Audiovisual Products (AB)*, para. 221.

[18] *China – Publications and Audiovisual Products (AB)*, para. 222.

of price comparability in anti-dumping proceedings generally.[19] For example, nothing in Section 15(a) addresses a situation in which there are no home market sales. Such a situation is dealt with in Article VI:1 and Article 2.2. Section 15(a) instead clearly provides that price comparability shall be determined "*under* Article VI of the GATT 1994 and the Anti-Dumping Agreement,"[20] i.e., the primary "rules" for determining price comparability are set out in those agreements, not Section 15(a).

30. Second, the provisions of Section 15(a) must be read in a manner compatible with existing WTO disciplines for determining price comparability as set out in Article VI of GATT 1994 and the Anti-Dumping Agreement . The two options for determining normal value in Section 15(a) – "shall use either Chinese prices or costs *or* a methodology not based on a strict comparison with domestic prices or costs in China"[21] – do not create options for normal value beyond those set out in Article VI of GATT 1994 and the Anti-Dumping Agreement. For example, the Anti-Dumping Agreement confirms that establishing normal value requires a comparable, market-determined price. The further elaboration of methods for finding normal value set out in the Anti-Dumping Agreement are consistent with, and lend further support to, the interpretation of Article VI as providing authority to reject non-market domestic prices or costs.[22] So in this regard, Section 15(a) serves to further clarify and confirm that, "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement," an investigating authority shall use Chinese prices and costs for the industry under investigation where "market economy conditions prevail," or reject those prices or costs where those conditions do not prevail.

31. Section 15(a) also clarifies the circumstances in which an importing Member might select one option over the other. Section 15(a) indicates that the choice between the options shall be, in part,[23] "based on the following rules."[24] Section 15(a)(i) clarifies the view of WTO Members

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[19] "In light of the interpretative principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.'" *Korea – Dairy (AB)*, para. 81 (italics original)(footnote omitted); *see US – Upland Cotton (AB)*, paras. 549-550; *US – Anti-Dumping and Countervailing Duties – (China) (AB)*, para. 570; *EC – Seal Products (AB)*, para. 5.123.

[20] Italics added.

[21] Italics added.

[22] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 7.2-7.10.

[23] As previously explained, the two rules set out in Section 15(a), subparagraphs (i) and (ii), do not cover all possible situations in which an importing Member may select one option over the other.

[24] Relevant dictionary definitions of "base" or "based on" indicate that the term means "foundation" or "starting point" but not exclusivity. *Shorter Oxford English Dictionary* (5th ed. 2002), pp. 190-191 (Exhibit USA-26, pp. 4-5); *see EC – Hormones (AB)*, paras. 163-166 (finding that the term "base on," unlike the term "conform to," indicates one may adopt some, but not necessarily all, of the elements of an international standard)). Indeed, when the term "based on" is meant to be exclusive in treaty text, it is usually modified by the term "only," "solely," or "exclusively." *See, e.g.*, Customs Valuation Agreement, art. 8 note, para. 3 ("However, if the amount of this royalty is based *only* on the imported goods and can be readily quantified, an additional to the price actually paid or payable

that it is appropriate to use Chinese prices or costs in determining price comparability if "market economy conditions prevail" in the industry under investigation. This "rule" states the expected: comparable prices or costs will normally exist when "market economy conditions prevail," and therefore those prices or costs must be used. This rule also indicates that it is possible for the producers to demonstrate that market economy conditions prevail in the industry under investigation even if China has failed to establish "that it is a market economy" pursuant to the first sentence of Section 15(d).

32. Finally, Section 15(a)(ii) clarifies the view of WTO Members that, for a 15-year period,[25] it would be appropriate to use a methodology not based on a strict comparison with domestic prices or costs in China if the producers under investigation could not clearly show that market economy conditions prevail in that industry. This "rule" states that the failure of producers under investigation to clearly show that market economy conditions prevail constitutes sufficient evidence for a Member to reject Chinese prices or costs for purposes of price comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement. Following expiry of Section 15(a)(ii), a Member must have sufficient evidence to reject Chinese prices or costs for purposes of price comparability under Article VI of GATT 1994 and the Anti-Dumping Agreement.[26]

33. The Appellate Body's understanding of the phrase "consistent with" in *China – Publications and Audiovisual Products* thus supports a finding that the use of this phrase in Section 15 indicates that Section 15(a) is not an exception, or in contradiction, to the named agreements. Rather, as discussed above, Section 15(a) clarifies the obligations by which all Members have agreed to be bound and provides that Article VI:1 of GATT 1994 and the Anti-Dumping Agreement continue to apply consistent with the terms of Section 15(a).

Question 4. The Panel understands Canada and the United States to argue, like the European Union, that the fact that China has not identified Section 15(a)(i) as a legal basis

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can be made" (emphasis added)); GPA Agreement, art. XV:5 ("Unless a procuring entity determines that it is not in the public interest to award a contract, the entity shall award the contract to the supplier that the entity has determined to be capable of fulfilling the terms of the contract and that, based *solely* on the evaluation criteria specified in the notices and tender documentation, has submitted" (emphasis added)); GATT 1994, art. III:4 ("The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based *exclusively* on the economic operation of the means of transport and not on the nationality of the product" (emphasis added)). *See also* Canada Third-Party Submission, para. 28 (the words "based on" mean that the rules found in subparagraphs (a)(i) and (a)(ii) "are used on top of the foundation of the fundamental rules on price comparability which are found in the Anti-Dumping Agreement and the GATT 1994").

[25] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 15(d), second sentence. The legal consequence of the operation of the second sentence of Section 15(d) is that "the provisions of subparagraph (a)(ii)" expire, nothing more.

[26] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 8.5.2-8.5.6.2 (discussing the standard for sufficiency of evidence and burden of proof rules set out in Article VI of the GATT 1994, the Anti-Dumping Agreement, and Section 15 of China's Accession Protocol).

for its claims means that its complaint must fail because*, to the extent that Section 15(a)(i) continues to be in force*, China was required to demonstrate that Article 2(7) of the Basic AD Regulation is inconsistent with those existing rules in order for there to be a violation of Article VI:1 of the GATT 1994, the Second Supplementary Note *Ad* Article VI:1 of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement. What are the parties' and third parties' views on this line of argument?

34. The United States considers China's failure to identify the provisions of *Section 15(a)*[27] that remain following the expiry of Section 15(a)(ii) is fatal to its claims in this dispute. China's Accession Protocol is an integral part of the WTO Agreement.[28] The burden of proof rests on the party asserting the affirmative of a particular claim or defense.[29] China has pointed to no language in Section 15 that would support an understanding that it is in the nature of a defense for the responding party to raise.[30] Therefore, China's failure to include Section 15 in its affirmative case is fatal to its claims in this dispute, because absent such a claim, the Panel is not in a position to make findings on the overall interaction of Section 15 with Article VI of GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

Question 5. China stated during the substantive meeting that paragraph 151 of the Working Party Report on China's Accession supports its submission that the legal authority for WTO Members to apply a methodology that is not based on a strict comparison with Chinese prices and costs resided only in Section 15(a)(ii), not in Section 15(a)(i). In making this statement, China pointed to the "circumstances" described in that paragraph, and in particular, the confirmation provided by Members that they would take certain specified actions in "implementing subparagraph (a)(ii) of Section 15" in response to China's concerns regarding its treatment as a "non-market economy" in anti-dumping proceedings. Please comment on China's statement?

35. The procedures for conducting anti-dumping proceedings set out in Article VI of GATT 1994 and the Anti-Dumping Agreement obviously did not apply to Chinese imports prior to China's membership in the WTO. Paragraph 151 of the Working Party Report expresses China's concern about pre-WTO anti-dumping proceedings where "certain WTO Members" treated China as a non-market economy and imposed anti-dumping duties on Chinese companies absent procedural safeguards. Members became obligated once China joined the WTO to follow all the procedures set out in Article VI of GATT 1994 and the Anti-Dumping Agreement in anti-

[27] The U.S. argument pertains to both Sections 15(a) and 15(a)(i), not just Section 15(a)(i) as indicated in Panel question 4.

[28] China Accession Protocol, Section 1, para. 2 ("This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement"); *see China – Rare Earths (AB)*, paras. 5.18-5.74

[29] *E.g., US – Wool Shirts and Blouses (AB)*, p. 14; *Canada – Diary (Article 21.5 – New Zealand and US II) (AB)*, para. 66.

[30] See U.S. Responses to the European Union's Questions Following the First Substantive Meeting of the Panel with the Parties, Response to Question 18.

dumping proceedings involving Chinese imports. Nevertheless, to appease China's concerns that a Member pursuant to Section 15(a)(ii) of China's Accession Protocol might summarily reject Chinese prices or costs, Members included paragraph 151 in the Working Party Report to reassure China that the procedural safeguards set out in the WTO Agreements would be applied, even under the circumstance described in Section 15(a)(ii).

36. A review of paragraph 151, subparagraphs (a) through (f), confirm that this paragraph is nothing more than a reiteration of procedural safeguards that apply in all anti-dumping proceedings. All of the subparagraphs of paragraph 151 restate procedural safeguards already set out in the Anti-Dumping Agreement or in China's Accession Protocol:

- Subparagraph 151(a), which reiterates the requirements set out in Article 2.4, Article 6.1, and Annex II, paragraph 1, of the Anti-Dumping Agreement that an investigating authority shall indicate to all interested parties the type of information that it requires to make its determination;

- Subparagraph 151(b), which reiterates the requirement set out in Articles 16.5 and 18.5 of the Anti-Dumping Agreement and Section 15(c) of China's Accession Protocol[31] that WTO Members should notify methodologies used to the Committee on Anti-Dumping Practices;

- Subparagraph 151(c), which reiterates the requirements set out in Articles 6.1.2, 6.2, and 6.4 of the Anti-Dumping Agreement regarding the transparency of anti-dumping proceedings and the ability of interested parties to participate;

- Subparagraph 151(d), which reiterates the requirements of Article 6.1 of the Anti-Dumping Agreement that interested parties be given notice of the information that is required for their participation and ample opportunity to present evidence in writing;

- Subparagraph 151(e), which reiterates the requirements of Article 6.2 of the Anti-Dumping Agreement that interested parties shall have a full opportunity to defend their interests; and

[31] Subparagraph 151(b) states that "[t]he importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability [discussed in subparagraph 151(a)] to the Committee on Anti-Dumping Practices before they were applied." This is the same procedural safeguard set out in Section 15(c) of China's Accession Protocol, except Section 15(c) applies to all of Section 15(a), not just Section 15(a)(ii): "The importing WTO Member shall notify methodologies used in accordance with subparagraph [15](a) to the Committee on Anti-Dumping Practices . . . ." Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 15(c).

- Subparagraph 151(f), which reiterates the requirements of Articles 6.9 and 12 of the Anti-Dumping Agreement that an investigating authority must provide detailed reasoning in its preliminary and final determinations.

37. To interpret paragraph 151 as China suggests would require the Panel to ignore the introductory phrase of Section 15(a), which plainly indicates that price comparability shall be determined "*under* Article VI of the GATT 1994 and the Anti-Dumping Agreement,"[32] including the procedural safeguards set out in the Anti-Dumping Agreement. It would also require the Panel to ignore the plain language of Section 15(c), which requires importing Members to notify methodologies used in accordance with Section 15(a) – not just Section 15(a)(ii) – to the Committee on Anti-Dumping Practices. Finally, it would require the Panel to ignore Section 1.2 of China's Accession Protocol, which indicates that only "the commitments referred to in paragraph 342 of the Working Party Report … shall be an integral part of the WTO Agreement." Paragraph 342 of the Working Party Report does not list paragraph 151 as a commitment, so it cannot be considered an integral part of the WTO Agreement[33] and "therefore cannot be understood to impose a legally binding obligation on any WTO Member."[34]

38. China thus is wrong to suggest that paragraph 151 of the Working Party Report supports its arguments regarding Section 15(a)(ii) of the Accession Protocol. Paragraph 151 is nothing more than a statement of reassurance, meant to comfort China's concerns that WTO Members, under the Anti-Dumping Agreement, would no longer impose "anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determination."

To the European Union and third parties

Question 6. China maintains (at paragraphs 89-103 of its oral statement) that the European Union's presentation (in paragraphs 71-73 and 119-128 of its first written submission) of the relevance of the disciplines on countervailing duties in the SCM Agreement improperly transposes the price comparability rule from the SCM Agreement to the price comparability rules in the Anti-Dumping Agreement for four reasons. Please comment on China's contention.

39. China mischaracterizes the European Union's arguments concerning the relevance of the disciplines on countervailing duties in the SCM Agreement with regard to price comparability. The European Union observes that determining a benefit under the rules of the SCM Agreement

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[32] Italics added.

[33] *EU – Footwear (China) (Panel)*, para. 7.181.

[34] *EU – Footwear (China) (Panel)*, para. 7.181.

often involves a price or cost comparison using a market benchmark similar to the comparison for determining dumping contemplated by Article VI:1 of GATT 1994 and Article 2 of the Anti-Dumping Agreement using a market-based normal value.[35] The European Union additionally highlights how the concept of price comparability with respect to countervailing duties is reflected in Section 15(b) of China's Accession Protocol and paragraph 150 of the Working Party Report, which expressly envisions that "special circumstances could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations."[36] As the European Union emphasizes, the title of Section 15 specifically refers to "Price Comparability in Determining Subsidies *and* Dumping."[37]

40. Instead of transposing the price comparability rule from the SCM Agreement to the price comparability rules in the Anti-Dumping Agreement, as argued by China, the United States sees the European Union as making a much more basic point: that price comparability under the SCM Agreement can provide important and relevant context for understanding price comparability under the Anti-Dumping Agreement. Although the provisions governing price comparability between the two agreements are different – Article 14 of the SCM Agreement and Article 2.1 of the Anti-Dumping Agreement – the nature of the inquiry bears enough similarities to warrant examination as part of a contextual analysis. Please see the U.S. response to Panel question 2 for a further explanation.

To the European Union / Japan / Mexico / the United States

Question 7. The Panel understands that the European Union, Japan, Mexico and the United States argue that Section 15(a)(i) *confirms* what WTO Members (and the GATT Contracting Parties before them) have always been entitled to do: make an affirmative determination of whether Chinese domestic prices and costs may be relied upon in establishing normal value, through an objective and unbiased examination of all relevant evidence pertaining to the existence of market economy conditions, including evidence submitted by Chinese producers, upon whom the investigating authority is entitled to impose a reasonable burden of proof.

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

41. The inclusion of Section 15(a)(i) served and serves a number of purposes. These considerations are largely addressed in our response to Panel question 1. We emphasize here the key points for the Panel's consideration.

42. First, Section 15(a)(i) confirmed and clarified that notwithstanding China's status as a non-market economy country, evidence of market economy conditions in the industry under

[35] See European Union's First Written Submission, paras. 72-73 and 124.

[36] *See* European Union's First Written Submission, paras. 123-127.

[37] *See* European Union's First Written Submission, paras. 119 (emphasis supplied by the European Union).

investigation is a core inquiry "in determining price comparability." The authority to reject prices or costs not determined under market economy conditions flows from Articles VI:1 and VI:2 of GATT 1994 and the Anti-Dumping Agreement. The materials reviewed in the legal interpretation document annexed to the U.S. third-party submission detail how, in the GATT and the WTO, market economy conditions have been understood to be necessary for a valid and meaningful dumping comparison. But Section 15(a)(i) clarifies that a foreign producer may require an importing Member to utilize domestic prices or costs if the producer clearly shows that market economy conditions prevail in the industry under investigation. This clear statement of the relevance of market economy conditions benefits Members and interested parties, and confirmed that the rejection of domestic prices or costs because of non-market economy conditions would be challengeable based on the facts.

43. It was significant for negotiators to include Section 15(a)(i) in China's Accession Protocol to provide China with certainty regarding how its imports would be treated if producers could "clearly show" the relevant conditions. As explained in response to Panel question 1, the term "clearly show" identifies a specific standard. Further, it is significant that the issue is one that may be examined by an investigating authority in the context of an administrative proceeding. These clarifications and confirmations provide detailed explanations regarding how Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement are to be implemented with respect to China's accession.

44. Second, Section 15(a)(i) confirmed and clarified 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 failed to establish that it is a market economy. In addition, the text confirmed and clarified that the determination to begin using domestic prices or costs could be made at the industry level and that industry did not need to wait for China to act. 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 the country as a whole to complete its transition. In other words, the question of whether market economy conditions prevail can, under these provisions, be determined on an industry-by-industry basis as a country's transition continues to develop.

45. Third, Section 15(a)(i) confirmed and clarified the consequences of making the evidentiary showing. Without this rule, the consequence of showing that market economy conditions prevail in a given industry is not clear or predetermined. It is therefore significant that Section 15(a)(i) explains the approach for selecting a basis for determining normal value that "shall" be used under the specific circumstances identified in the text.

46. Ultimately, Section 15(a)(i) was necessary to confirm and clarify the role of certain factual considerations, the right of producers on the industry level to act without waiting for China, and the consequences of that showing at the investigation level.

To the European Union, Canada and the United States

Question 8. The European Union emphasized during the substantive meeting that its submissions with respect to the meaning of Section 15(a) of China's Accession Protocol and

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

47. The United States agrees with the European Union that 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.[38] As discussed in response to Panel questions 1 and 7, the United States also recognizes that Section 15(a) 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,[39] 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.

48. Under Article VI:1 and Article 2 of the Anti-Dumping Agreement, an investigating authority may reject Chinese prices and costs when the evidence so justifies – i.e., when the investigating authority determines that comparable prices are not available as a result of non-market economy conditions – 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. The European Union's arguments are consistent with this understanding.

49. 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[40] – one that can be answered *definitively* upon a proper showing by Chinese producers with respect to the relevant industry

[38] The United States understands the Panel's question to refer to paragraphs 21-25 and 39 of the EU's Opening Statement and paragraphs 100, 101, 111, and 112 of the EU's First Written Submission.

[39] China's Accession Protocol, Section 15(a): "In determining price comparability … , the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China …."

[40] *See* China's Opening Statement, para. 177 ("Following the expiry of Section 15(a)(ii), the shield serves no present purpose.").

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.

To the United States

Question 9. Please respond to China's assertion that the statements identified in Exhibit CHN-69 supports China's interpretation of the legal consequences of the expiry of Section 15(a)(ii) of China's Accession Protocol.

50. Paragraph 11 of China's Opening Statement asserts that "numerous public statements" by the United States (and other WTO Members, including the European Union) support China's view that "the United States accepted that the 'non-market economy provision' would have a definitive end-point …."[41] China is wrong: The statements of U.S. government officials and subsequent U.S. legislative actions confirm that the United States did not acquiesce to the abandonment of its right under Article VI of GATT 1994 and the Anti-Dumping Agreement to reject and replace non-market prices or costs in anti-dumping proceedings involving Chinese imports after 15 years.

51. To place the statements of U.S. government officials in perspective, it is helpful to understand the legislative actions taken by the United States with respect to those provisions of the Agreement on Market Access between the People's Republic of China and the United States of America that served as the basis for Sections 15 and 16 of China's Accession Protocol. Section 16 established a China-specific safeguard mechanism.[42] Section 16.9 indicated that the China-specific safeguard mechanism "terminated 12 years after the date of accession."[43] The United States implemented Section 16 as part of a package of provisions addressing issues arising from the accession of China to the WTO.[44] The legislation doing so indicated that, consistent with Section 16.9, the China-specific safeguard mechanism "shall cease to be effective 12 years after the date of entry into force of the Protocol of Accession of the People's Republic of China to the WTO."[45]

52. In contrast, the United States took no legislative steps to implement the second sentence of Section 15(d), which indicated that Section 15(a)(ii) "shall expire 15 years after the date of accession." It was not necessary for the United States to do so because, as discussed, the expiration of Section 15(a)(ii) had no impact on the legal authority of the United States to reject

[41] China's Opening Statement at the First Substantive Meeting, para. 11.

[42] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 16.

[43] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001), Section 16, para. 9.

[44] Normal Trade Relations for the People's Republic of China, Public L. 106-286, § 103, 114 Stat. 880, 882-891 (Oct. 10, 2000) (originally codified at 19 U.S.C. § 2451) (Exhibit USA-31).

[45] Normal Trade Relations for the People's Republic of China, Public L. 106-286, § 103, 114 Stat. 880, 890 (Oct. 10, 2000) (originally codified at 19 U.S.C. § 2451b(c)) (Exhibit USA-31).

and replace non-market prices or costs in anti-dumping proceedings involving Chinese imports.[46] Therefore, that the United States amended its law to terminate the China-specific safeguard mechanism, but did not likewise amend its law to terminate its right to reject and replace non-market Chinese prices or costs, demonstrates that the United States understood that the expiry of Section 15(a)(ii) did not mean that market economy conditions would automatically be deemed to exist in China after 15 years no matter what the facts in China revealed.

53. The statements of U.S. government officials that China attaches to its Opening Statement reflect this understanding. For example, China quotes in its Opening Statement remarks by Ambassador Barshefsky on November 15, 1999, the date on which the United States and China signed the Agreement on Market Access between the People's Republic of China and the United States of America. China says the Ambassador's statement supports its position,[47] but a review of the complete statement demonstrates otherwise:

> Two of the most important unresolved issues from last spring had to do with special rules on import surges and on the application of a particular anti-dumping methodology called the 'non-market economy' methodology. Last spring, China took the view that there must be a very restrictive phase-out of these provisions. We certainly agreed with China at that time, that these provisions should not exist in perpetuity, but we believe that they did need to exist for a reasonable period of time. With respect to what was called the 'special safeguard rule'[,] which is an anti-import surge rule into the United States, that provision will exist for 12 years. With respect to the application of the 'special anti-dumping' methodology, that provision will exist for 15 years. With respect to the anti-dumping methodology, our laws and regulations do provide for the graduation of sectors or an economy as a whole, from these rules *if it can demonstrate that it has become market-oriented*. And as we've indicated to the Chinese of course, to the extent that they request review of individual sectors, or the economy as a whole, we will do that under the bounds of our law.[48]

54. Ambassador Barshefsky's remarks clearly distinguish between the "special anti-dumping methodology" set out in Section 15(a)(ii) and U.S. "anti-dumping methodology" generally, which provides "for the graduation of sectors or an economy as a whole … *if it can demonstrate that it has become market-oriented*."[49] As the Ambassador notes, the second sentence of Section

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[46] Section 15(a), Section 15(a)(i), and the first and third sentences of 15(d) clarify and confirm, 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. U.S. Third-Party Submission, para. 146 and Attachment 1: Legal Interpretation, paras. 8.2.4-8.2.5. The legal authority to reject prices or costs not determined under market economy conditions flows from Articles VI:1 and VI:2 of the GATT 1994 and the need to ensure comparability of prices and costs when establishing normal value. U.S. Third Party Submission, para. 146.

[47] China's Opening Statement at the First Substantive Meeting, para. 11, first burgher point.

[48] Exhibit CHN-70, pp. 4-5 (italics added).

[49] Italics added.

15(d) provides that the "special anti-dumping methodology" (i.e., the particular standard of evidence rule set out in Section 15(a)(ii)) expires after 15 years. As for the continuing right of the United States to reject and replace non-market prices or costs in anti-dumping proceedings involving Chinese imports, the Ambassador is clear that the United States will graduate individual sectors, or the economy as a whole, "under the bounds of [U.S.] law" (as set out in the first and third sentences of Section 15(d)). Nothing in Ambassador Barshefsky's remarks suggest that the United States agreed to graduate sectors of China's economy, or China's economy as a whole, even when the facts demonstrate they have not become market oriented.

55. The distinction between Section 15(a)(ii) and overarching right of Members to reject and replace non-market prices or costs in anti-dumping proceedings is apparent in other statements made by U.S. government officials. As discussed in response to Panel question 1, Section 15(a)(ii) introduced a particular standard of evidence that effectively guaranteed that China could not dispute a decision by a Member to reject and replace non-market prices or costs in anti-dumping proceedings whenever Chinese producers do not clearly show that market economy conditions prevailed in the industry under investigation. Statements by Ambassador Barshefsky[50] and U.S. Secretary of Commerce William M. Daley[51] before committees of the U.S. Congress all reference this "guarantee." In contrast, none of the statements by U.S. government officials that appear in the exhibits attached to China's Opening Statement indicate that the right of the United States to reject and replace non-market prices or costs in anti-dumping proceedings generally terminates after 15 years.

56. Finally, one of China's exhibits reflects the 2007 views of certain private U.S. citizens.[52] The Panel should accord no significance to statements by private U.S. citizens about China's Accession Protocol. That said, even if the Panel should decide to take note of these statements, it should recognize that the views expressed do not support China's position that the ability of the United States to reject and replace non-market prices or costs in anti-dumping proceedings involving Chinese imports fully lapses after 15 years. Rather, the views expressed confirm that China must satisfy explicit U.S. statutory requirements before it can graduate from its non-market economy status.[53] The views expressed also cast doubt as to China's ability as of the date of the submission to be recognized as a market economy given that, according to a recent study by the U.S. Department of Commerce, "there are a number of significant *economy-wide* market

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[50] Exhibit CHN-69.02, pp. 41, 51 ("China's WTO entry . . . *guarantee[d]* our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's accession to the WTO" (italics added)); *see* Exhibit CHN-69.09, p. 8; Exhibit CHN-69.10, p. 8; Exhibit CHN-70, p. 5; Exhibit CHN-71 (transcription at China's Opening Statement at the First Substantive Meeting, para. 11).

[51] Exhibit CHN-69.02, p. 36 ("China has agreed to *guarantee* our right to continue using our current methodology (treating China as a non-market economy) in antidumping cases for fifteen years after China's accession to the WTO"(italics added)); *see* Exhibit CHN-69.03, p. 3; Exhibit CHN-69.04, p. 2; Exhibit CHN-69.05, p. 3.

[52] Exhibits CHN-69.01, 69.08, 69.11 (China attached the same exhibit three times).

[53] Exhibit CHN-69.01, p. 4. Same exhibit at CHN-69.08 and CHN-69.11.

distortions in China that preclude a finding that China's economy operates on 'market principles of cost and pricing structures' within the meaning of the [U.S.] NME statute."[54]

2 ARTICLE VI OF THE GATT 1994

To the parties and third parties

Question 17. The United States has submitted evidence of the practice of the GATT Contracting Parties in relation to the Accessions of Poland, Hungary and Romania to support its view that "non-market economy prices and costs may be rejected" under Article VI:1 of the GATT. Please explain your views on the extent to which the Panel may and should consider this evidence in its deliberations on this question at issue in this dispute?

57. The Panel must consider 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."[55] Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, "[t]here *shall* be taken into account … *any* subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation …").[56] As subsequent practice, this "shall" be taken into account together with the context of an agreement.

58. 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. The evidence of practice likewise confirms the agreement of the CONTRACTING PARTIES that no amendment or exception to the GATT 1947 was necessary to authorize Contracting Parties to reject non-market prices or costs for purposes of anti-dumping comparisons. Rather, the CONTRACTING PARTIES considered that the authority to reject those prices already existed in Article VI:1. The accessions provide evidence that, in practice, in implementing Article VI, the parties understood that no new legal authority was needed to be provided to permit an importing Contracting Party to reject domestic prices or costs not determined under market economy conditions.

59. Given this consistent understanding, manifested through the Accession Protocols and Working Party Reports in each accession, it would be appropriate to consider this "subsequent

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[54] Exhibit CHN-69.01, p. 8 (emphasis original) (footnote omitted). Same exhibit at CHN-69.08 and CHN-69.11.

[55] 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*.

[56] Italics added.

practice" in the application that establishes agreement on the interpretation, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

60. As explained in the shared legal interpretation, a comparison of the language in the Poland Working Party Report, which tracks the language in the Second Note *Ad* Article VI:1, with the different language that appears 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.[57] In the latter case, the Working Party recognized that difficulties in determining price comparability could extend to a situation like Romania's in which "cooperative trading enterprises" operated.[58] 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*."[59]

61. The Romania Working Party Report also 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*."[60] 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."[61] 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.

62. In Hungary's case, the Working Party eliminated *any* reference to a "complete or substantial monopoly on trade"[62] or "foreign trade operations were carried out by State and

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[57] *See, e.g.*, U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 6.3.1-6.3.9.

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

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

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

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

[62] See Second Note *Ad* GATT 1994 Article VI:1 and Working Party Report on the Accession of Poland, L/2806, para. 13 (June 23, 1967) (Exhibit USA-17).

cooperative trading enterprises."[63] The Working Party also eliminated any reference to "all domestic prices are fixed by the State" [64] or "some domestic prices were fixed by the law. "[65]

63. Rather, it stated:

> "*For 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 the prices which prevail generally in its market for the same or like product, or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable."[66]

64. The elimination of any language 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.

65. 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.[67] That is, *it was "implementing 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.[68]

66. Looking to the practice employed in these accessions confirms that the rejection of non-comparable domestic prices or costs and the use of a surrogate value is permitted in *implementing* Article VI.[69]

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

[64] See Second Note *Ad* GATT 1994 Article VI:1 and Working Party Report on the Accession of Poland, L/2806, para. 13 (June 23, 1967) (Exhibit USA-17).

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

[66] Working Party Report on the Accession of Hungary, L/3889, para. 18 (July 20, 1973) (italics added) (Exhibit USA-21).

[67] Working Party Report on the Accession of Hungary, L/3889, para. 18 (July 20, 1973) (italics added) (Exhibit USA-21).

[68] The Working Party Report on the Accession of Hungary 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.").

[69] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 6.4.6.

67. This practice also provides a counterfactual example: that is, how would the situation look if China's accession had not included the language of Section 15? In that situation, as in the case of Poland, Romania, and Hungary, importing Members would have been permitted to reject domestic prices or costs in China and instead use surrogate values in light of China's non-market economy conditions. In that situation, China and its producers would not have the benefit of the certainty provided by Section 15 regarding the applicable standard of evidence; and, for their part, importing Members would not have had, for a 15-year period, the certainty of rejecting domestic prices or costs should foreign producers fail to "clearly show" that market economy conditions prevailed (that is, without a further examination of the economic conditions sufficient to meet the generally applicable standard of evidence).

68. The implication of China's position – that "determining price comparability" and the alternatives for normal value set out in Section 15(a)[70] are meaningless due to an alleged requirement to use domestic prices or costs – cannot be reconciled with the practice and history relating to the Contracting Parties' application of Article VI. As the evidence of practice demonstrates, however, 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, not a requirement that is subordinate to China's Accession Protocol.

Question 18. A number of third parties have relied upon the Appellate Body's finding in *US – Hot-Rolled Steel (Japan)* (paragraph 140) that domestic sales "in the ordinary course of trade" are sales "incompatible with 'normal' commercial practice", to support their views that "normal value" is a market-based or market-determined price or a price that is free of State intervention. Is there anything in *US – Hot-Rolled Steel (Japan)* or any other WTO Panel and Appellate Body report that helps to understand what the Appellate Body meant when it referred to "'normal' commercial practice"?

69. The Appellate Body in *US – Hot Rolled Steel* found that Article 2.1 of the Anti-Dumping Agreement establishes four conditions before a sales transaction may be used to calculate normal value, including the condition that the sale must be "in the ordinary course of trade."[71] The Appellate Body in *US – Hot Rolled Steel* considered that an investigating authority may find a sale not "in the ordinary course of trade," and thereby exclude it from the calculation of normal

[70] China's Accession Protocol, Section 15(a): "In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China …."

[71] *US – Hot-Rolled Steel (AB)*, para. 165. The other three conditions are: "it must be of the 'like product'; … the product must be 'destined for consumption in the exporting country'; and, … the price must be 'comparable'." *US – Hot-Rolled Steel (AB)*, para. 165.

value, whenever the sale of a like product, destined for consumption in the exporting country, does not reflect normal commercial practices.[72]

70. Although the Appellate Body in *US – Hot Rolled Steel* did not define exactly what it meant by "normal commercial practices," it did provide guidance as what such practices may be. First, the Appellate Body indicated that "determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices."[73] Further, "even where the parties to a sales transaction are entirely independent, a transaction might not be 'in the ordinary course of trade'."[74]

71. The Appellate Body also has provided examples of practices that it considers reflective of "normal commercial practices." According to the Appellate Body, a liquidation sale is an example of a sale between independent parties that might be considered not in the ordinary course of trade.[75] An affiliated-party sale is another example of a sale that may not reflect normal commercial practices, "either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price."[76] Finally, in *EU – Biodiesel* the Appellate Body held that in applying the second condition of the first sentence of Article 2.2.1.1., "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine … whether non-arms-length transactions or other practices affect the reliability of the reported costs."[77] The common theme in the examples provided by the Appellate Body is that normal commercial practice means that "comparable" prices "in the ordinary course of trade" must be market-determined, reflecting arm's-length transactions between buyers and sellers.

72. Additional support for the understanding that normal commercial practice means market-determined prices can be found in Article VII:2(b) of GATT 1994. According to Article VII:2(b) of GATT 1994, "'[a]ctual value' should be the price at which … such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions." In this regard, the Second Note *Ad* Article VII:2 further indicates that "[i]t would be in conformity with Article VII, paragraph 2 *(b)*, for a contracting party to construe the phrase 'in the ordinary course of trade … under fully competitive conditions', as excluding any transaction

[72] *US – Hot-Rolled Steel (AB)*, para. 140.

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

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

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

[76] *US – Hot-Rolled Steel (AB)*, paras. 141, 143.

[77] *EU – Biodiesel (AB)*, para. 6.41.

wherein the buyer and seller are not independent of each other and price is not the sole consideration."[78]

73. The GATT Secretariat's 1957 review of parties' legislation applying Article VI similarly indicates that the GATT Contracting Parties understood that a price for a sale may be considered not "in the ordinary course of trade" because of the lack of market orientation of the transaction or the entities engaged in the transaction:

- Canada described "fair market values obtaining [sic] in the domestic market of a third country *having a free economy*."[79] In terms of comparable prices, Canada referred to the price "*in the ordinary course of trade under fully competitive conditions*."[80] In terms of third-country prices, Canada referred to "values … from third countries *having a free economy*."[81]

- South Africa described normal value in terms of "the *market price* at which … such or similar goods are *freely offered for sale*."[82] South Africa's response alternatively referred to a "price quoted by an efficient producer"[83] or "a price sufficient to cover the cost … calculated at not less than world market prices … in any country."[84]

- Rhodesia and Nyasaland described normal value in terms of "the *market price* at which … goods are *freely offered for sale*."[85]

- Belgium referred to normal value as "the value *in the open market under fully competitive conditions*."[86] Belgium's response referred, alternatively, to "prices … sold or offered … by manufacturers or exporters belonging to *countries where trade is a matter of private enterprise*."[87]

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[78] *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).

[79] L/712, p. 49 (Canada) (emphasis added).

[80] L/712, p. 55 (Canada) (emphasis added).

[81] L/712, p. 48 (Canada) (emphasis added).

[82] L/712, p. 101 (South Africa) (emphasis added).

[83] L/712, pp. 90-100 (South Africa).

[84] L/712, pp. 90-100 (South Africa).

[85] L/712, pp. 71, 84 (Rhodesia and Nyasaland) (emphasis added).

[86] L/712, p. 41 (Belgium) (emphasis added).

[87] L/712, p. 41 (Belgium) (emphasis added).

- Norway referred to prices in a "*private enterprise economy*."[88]

- The United Kingdom referred to prices for "a sale *in the open market* between buyer and seller *independent of each other*."[89]

74. In sum, even though the Appellate Body has not defined "normal commercial practices," it is evident that the phrase means that "comparable" prices "in the ordinary course of trade" must be market-determined, reflecting arm's-length transactions between buyers and sellers, and that it excludes prices or costs determined under non-market economy conditions.

Question 19. Article 2.7 of the Anti-Dumping Agreement states that Article 2 is "without prejudice to the second Supplementary Provision to Section 1 of Article VI".

a. What is the purpose of this provision (i.e., Article 2.7)?

75. It is important to recall that the Second Note *Ad* Article VI:1 does not provide legal authority to do something that Article VI:1 does not already authorize. It is not written as an exception to, or derogation from, Article VI, nor does it obligate an action in response to the situation described therein.[90] It simply describes one situation in which difficulties exist "in determining price comparability for the purposes of paragraph 1" of Article VI and recognizes that an importing party, pursuant to the authority of Article VI:1, "may find it necessary to take into account the possibility" in that situation not to use domestic prices for purposes of the dumping comparison.[91]

76. The Anti-Dumping Agreement implements Article VI of GATT 1994. In this regard (and as explained further in the U.S. answer to Panel question 19(b)), 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. As explained above, the Second Note reflects Members' identification of one situation in which an importing Member may reject and replace domestic prices or costs. The purpose of Article 2.7 then is to make sure that Article 2 of the Anti-Dumping Agreement (i.e., the agreement implementing Article VI of GATT 1994) is not misinterpreted so as to weaken the basic requirement of Article VI:1, as reflected in the Second Note, that the dumping comparison requires comparable, market-determined prices to establish normal value. In fact, as explained in the shared legal interpretation annexed to the U.S. third-party submission, Article 2 carries forward the language of Article VI, and its

[88] L/712, p. 146 (Norway) (emphasis added).

[89] L/712, p. 152 (United Kingdom) (emphasis added).

[90] U.S. Third-Party Submission, Attachment 1: Legal Interpretation, paras. 4.3-4.7.1.

[91] *See* U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.4.

provisions reflect that any source for normal value must reflect a comparable price, in the ordinary course of trade – that is, a market-determined price.

b. What does the "without prejudice" language suggest about the relationship between the Second Interpretative Note *Ad* Article VI:1 and Article 2 of the Anti-Dumping Agreement, given the particular relationship between the Anti-Dumping Agreement and Article VI of the GATT 1994 that is described in Article 1 of the Anti-Dumping Agreement?

77. The ordinary meaning of the term "without prejudice" is "without detriment to any existing right or claim; spec. in Law, without damage to one's own rights or claims."[92] As such, Article 2.7 should be read to mean:

> Article 2 of the Anti-Dumping Agreement is *without detriment or damage to the existing right* of an importing Member, 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, where it is recognized that special difficulties may exist in determining price comparability for purposes of Article VI of GATT 1994, to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Therefore, the "without prejudice" language suggests that Article 2.7 does not limit the ability of an importing Member under Article 2 of the Anti-Dumping Agreement to account for the possibility that a strict comparison with domestic prices or costs may not always be appropriate.

78. This understanding also reflects the relationship of Article VI and the Anti-Dumping Agreement as described in Article 1 of the Anti-Dumping Agreement. As set out in Article 1, the Anti-Dumping Agreement "governs the application" of Article VI, and as the title of the Anti-Dumping Agreement suggests, it is an agreement interpreting and applying Article VI. As explained, the core concept of "determining price comparability" for purposes of making a dumping comparison was brought forward from Article VI into the Anti-Dumping Agreement. The very definition of dumping in Article 2.1 incorporates the key concept of a "comparable price, in the ordinary course of trade." Therefore, Article 2 of the Anti-Dumping Agreement is indeed without prejudice to the situation described in the Second Note.

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[92] *New Shorter Oxford English Dictionary*, 4th ed., L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 2333 (Exhibit USA-26); *see China - Publications and Audiovisual Products (Panel)*, para. 7.253.