

***EUROPEAN UNION – MEASURES RELATED TO
PRICE COMPARISON METHODOLOGIES***

(DS516)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE THIRD-PARTY SESSION AT THE
SECOND SUBSTANTIVE MEETING OF THE PANEL**

May 16, 2018

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today. In this statement, we will cover three points: first, we would like to, following comments by China, explain what is at stake in this dispute; second, we turn to the core interpretive issue, and point out that China is avoiding key words in the relevant agreement texts; and third, we explain the consequences for China’s case of its panel request – that is, how China chose to frame its own dispute.

Introduction: China Has Not Kept Its Promises, and Continues to Promote Non-Economic Distortions

2. China’s Ambassador, in his introductory portion of the oral statement, talked about a “solemn promise” that Members supposedly made to China about the “termination” of Section 15 of China’s Accession Protocol. He never mentioned the promise that China made to the WTO Membership that, following its accession to the WTO, China would fully transition to a market economy.

3. China clearly has not kept its promise: As the United States demonstrated extensively in its third party submission,¹ the Chinese government and the Chinese Communist Party direct and channel economic actors to meet the targets of state planning. The Chinese government and the Chinese Communist Party also exercise direct and indirect control over the allocation of resources through government directives, and legal and actual ownership and control over key economic actors and institutions. Such control continues to pervade China’s economy, including

¹ U.S. Third Party Submission, paras. 23-107, U.S. Department of Commerce, “China’s Status as a Non-Market Economy,” Docket A-570-53, p. 7 (Oct. 27, 2017) (Exhibit USA-2), and U.S. Department of Commerce, “Review of China’s Financial System Memorandum,” Docket C-570-054 (August 1, 2017).

the largest financial institutions and leading enterprises in manufacturing, energy, and infrastructure.

4. As a result, this dispute presents an absolutely critical challenge to the WTO. The WTO agreements are based on a balance of rights and obligations, a balance that ultimately relies on the market-orientation of its Members. Through this dispute, and the erroneous legal interpretation underlying China’s claims, China would have the Panel upset this balance, with the result that even if China – now the world’s largest trader and one of its largest economies – continues to promote non-market economic conditions, distorting market outcomes and harming workers and businesses worldwide, WTO Members would have *no instruments* to address the resulting injury. China’s position in this dispute – that Members should be prohibited from rejecting and replacing prices or costs that are not determined under market economy conditions for purposes of anti-dumping comparisons – would expose other Members *even more* to those economic distortions.

5. It is difficult to overstate the consequences that would follow from an erroneous legal interpretation that so undermines Members’ WTO rights. We therefore question *why* China even thought it wise to bring this dispute, rather than work with other Members to understand the market reforms China needed so that it would be *appropriate* to use Chinese prices or costs for anti-dumping comparisons. If the Panel were to issue findings in this dispute, beyond finding that China has mis-framed its complaint and left critical issues outside the Panel’s terms of reference (the third point we will return to), it should find that China has fundamentally misunderstood the relevant WTO text, and should reject China’s request that it be granted special

rights and privileges under the anti-dumping rules that are not accorded any other WTO Member.

China Continues to Avoid the Key Words in the Relevant Texts

6. Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement establish that the dumping comparison requires a “comparable price, in the ordinary course of trade” for purposes of establishing normal value. As the European Union, the United States, and other third parties have explained through an examination of all of the relevant texts, including Article VI, Article 2, the Second Note *Ad Article VI:1*, and Section 15,² this “comparable price, in the ordinary course of trade,” is a market-determined price. This basic requirement excludes prices or costs *not* determined under “market economy conditions”. It is this last phrase that is a key clarification from Section 15. When considering the possible accession of China to the WTO, Members articulated that “in determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement”, it is whether “market economy conditions prevail” in the industry with regard to the manufacture, production, and sale of the product that is key to determining whether “comparable prices, in the ordinary course of trade,” exist and can be used for the dumping comparison.³

² See U.S. Third-Party Submission, Attachment 1: Legal Interpretation.

³ China’s Accession Protocol, Sec. 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 based on the following rules: (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability . . .”

7. When the third parties last spoke with you, the United States pointed out that China had failed to engage in its oral statement with the relevant text of the agreements concerning the definition of dumping, or the key phrase “comparable price, in the ordinary course of trade,” or the key phrase “in determining price comparability”.⁴ We were, therefore, at first pleased to hear China state yesterday that it is *not* rejecting the treaty text but rather is *embracing* it. But listening closely, it is disappointing that China continues to subvert, and in fact fails to embrace, the relevant text. It is difficult to say that one is “embracing” something without even touching it.

8. This is evident from the hand-out China provided yesterday during its comments on the EU’s oral statement. What is striking about that document is that there is *no agreement text* provided in row 1; China only gives a misleading paraphrase of the agreements. And then in row 3 (the so-called “base 1”), there is again *no agreement text* quoted. It is only when China gets to rows 4 and 5 that China quotes *any* language from the agreements at all. Why did China do this?

9. If we look at row 3, China says the “Home Market NV” is: “Price of like product when destined for consumption in the exporting country (Art. 2.1)(Art.VI:1(a)).”⁵ But compare those words that China used to the *actual text* on normal value from Article VI:1(a) and the *actual text* from Article 2.1 – and we’ve placed in bold the language China omitted:

- Article VI:1(a): “**the comparable price, in the ordinary course of trade, for the like** product when destined for consumption in the exporting country”⁶

⁴ U.S. Opening Oral Statement at the First Panel Meeting, paras. 5-12.

⁵ China hand-out, row 3 (underlining omitted).

⁶ GATT 1994 Art. VI:1(a): “For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one

- Article 2.1: “**the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country**”⁷

10. So, unfortunately, we appear to be right back where we were in December, with China ignoring, obscuring, and trying *not* to engage with, the key agreement text – and therefore not engaging with the interpretation the EU, the United States, Japan, and other third parties have given that a “comparable price, in the ordinary course of trade,” must be a market-determined price.

11. We would also quickly note, and expect we will come back to this issue in our question and answer session, that China also failed to present any text relating to the Second Note *Ad Article VI:1*. Instead, China asserts (in row 1, column 1) that so-called “home market NV must be used, except when *Ad Note* conditions are met”. Similarly, China asserts (in row 1, column 2) that so-called “Third country NV can be used when two conditions met”. But there is *no* text, in Article VI or the Second Note itself, that suggests the Second Note is an *exception*⁸ (in China’s words “except when”) or that the Second Note sets out an *exclusive* situation⁹ (China’s “except when … conditions are met”) in which non-market prices may be rejected and replaced. We anticipated that China would seek to present this erroneous understanding, and the United States and the European Union addressed in the joint legal interpretation the correct reading of the

country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country”

⁷ Anti-dumping Agreement, Art. 2.1: “For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”

⁸ U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.4-4.4.3.

⁹ U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.6-4.7.1.

Second Note – based on the *actual* text, and not on paraphrasing or mere *assertions* as to its meaning.¹⁰ And so China, in its hand-out, once again repeated the error we noted at the first panel meeting of ignoring the vast majority of the words in the Second Note.¹¹

12. In sum, China’s failure to grapple with all of the relevant legal texts, and key words in those texts, underscores that its erroneous interpretations in this dispute must be rejected. The correct interpretation that reads all of the relevant texts, and all of the words of the relevant texts, together, harmoniously and faithfully, is that WTO Members have the right under the GATT 1994 and the Anti-Dumping Agreement to reject prices or costs that are *not* determined under market economy conditions in determining price comparability for purposes of anti-dumping comparisons.

China’s Failure to Include Section 15 as Part of Its Claims Excludes This Issue from the Panel’s Terms of Reference

13. I will now address our last point about China’s failure to include Section 15 as part of its claims. As we previously noted, China overlooks that Section 15(a) refers to and clarifies the core of the dumping comparison – the need for prices established under “market economy conditions” “in determining price comparability.” The lead paragraph of Section 15 of China’s Accession Protocol states, in part, that Article VI of the GATT 1994 and the Anti-Dumping Agreement “shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with” paragraphs (a) through (d) of that section. As China acknowledges, “[t]he

¹⁰ U.S. Third-Party Submission, Attachment 1: Legal Interpretation, para. 4.9 (noting erroneous Appellate Body dicta relating to Second Note).

¹¹ U.S. Opening Oral Statement at the First Panel Meeting, paras. 18-21; id., para. 19 (“In reality, that is not a surprise because China doesn’t really read the Second Note at all. China merely cites to what it calls the “two conditions” in the Note, citing a mere fourteen words out of the eighty that are in that Note. Chair and members of the Panel, it is not possible to arrive at a coherent and correct interpretation of a provision by picking and choosing to cite only certain words.”).

*relationship between the provisions of Section 15(a) and the generally applicable rules [of Article VI and the Anti-Dumping Agreement] is established by this language*¹²

14. China, in fact, goes even further than the European Union and the United States to argue that the “words ‘consistent with’ ... mean that the full application of the generally applicable rules is *constrained by*, and *yields to*, the application of the rules in Section 15, to the extent that they are in conflict.”¹³ According to China, if there is a conflict between Article VI, the Anti-Dumping Agreement, and Section 15, “the rule in the chapeau of Section 15 required that the provisions of Section 15 would prevail.”¹⁴

15. Notwithstanding these arguments, China did not include in its Panel Request a legal claim that the European Union applied Article VI and the Anti-Dumping Agreement, with respect to the measure at issue, in a manner not “consistent with” Section 15 of China’s Accession Protocol.

16. It does not assist China to argue that the relationship of Section 15 to Article VI and the Anti-Dumping Agreement expired on December 11, 2016, along with Section 15(a)(ii).

17. The lead paragraph of Section 15 and the words “consistent with” do not expire on December 11, 2016, so the requirement that an importing Member “shall apply” Article VI and the Anti-Dumping Agreement in anti-dumping proceedings involving Chinese imports “consistent with” Section 15 remains applicable **after** December 11, 2016. What constitutes the

¹² China’s Responses to Panel’s Questions following the First Substantive Meeting, para. 6 (emphasis added).

¹³ China’s Responses to Panel’s Questions following the First Substantive Meeting, paras. 9 (italics original); *see, e.g.*, China’s Responses to Panel’s Questions following the First Substantive Meeting, paras. 12, 89, 101-102, 121, and China’s Second Written Submission, para. 182.

¹⁴ China’s Responses to Panel’s Questions following the First Substantive Meeting, para. 120.

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

18. The Dispute Settlement Body (DSB) establishes a panel under DSU Article 6, with terms of reference as set out in Article 7.1, to examine the precise matter set out in the complainant’s panel request so as to assist the DSB in making findings of WTO-inconsistency and recommendations to bring an inconsistent measure into conformity with WTO rules.¹⁵

19. Section 15(a)(ii) expired on December 11, 2016.¹⁶ The other provisions of Section 15(a) did not. China now acknowledges both of these points.¹⁷ China does not otherwise assert that the remaining provisions of Section 15(a) are an affirmative defense,¹⁸ nor does it assert that Section 15(a) is an exception to Article VI or the Anti-Dumping Agreement.¹⁹ And China concedes that the measure at issue was “consistent with” Section 15(a) before December 11, 2016.²⁰

20. China did not include in the Panel Request for this dispute a legal claim that the measure at issue is, after December 11, 2016, not “consistent with” Section 15 of China’s Accession Protocol.

¹⁵ DSU Art. 19.1.

¹⁶ Protocol on the Accession of the People’s Republic of China, WT/L/432 (Nov. 23, 2001), Section 15(d).

¹⁷ See, e.g., China’s Responses to Panel’s Questions following the First Substantive Meeting, paras. 63-66; China’s Second Written Submission, paras. 180-186; see China’s Opening Statement at the First Substantive Meeting, paras. 139-140

¹⁸ See China’s Responses to Panel’s Questions following the First Substantive Meeting, para. 122 and footnote 95.

¹⁹ China’s Responses to Panel’s Questions following the First Substantive Meeting, paras. 118-125.

²⁰ E.g., China’s First Written Submission, para. 3.

21. For this reason, if the Panel agrees that only Section 15(a)(ii) expired on December 11, 2016, and that the other provisions of Section 15 remain, we do not see how the Panel could make findings whether the European Union acted inconsistently with Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement with respect to the measure at issue as those WTO agreements apply “consistent with” the remaining provisions of Section 15. Because of the way China framed its panel request, the Panel does not have the authority under its terms of reference to consider the claims under Article VI:1 and the Anti-Dumping Agreement apply “consistent with” Section 15, and a “panel cannot assume jurisdiction that it does not have.”²¹

22. For similar reasons, the Panel should also reject China’s claims that the measure at issue is not consistent with Article I:1 of the GATT 1994. A claim that an anti-dumping measure is inconsistent with Article I:1 must follow a demonstration that the measure is not authorized pursuant to Article VI of the GATT 1994 or the Anti-Dumping Agreement.²² But as just explained, the Panel’s terms of reference do not extend to whether the European Union applied the terms of Article VI:1 or the Anti-Dumping Agreement “consistent with” the remaining provisions of Section 15. The Panel thus cannot consider China’s Article I claim, which depends upon an examination of consistency with Article VI.

Conclusion

23. Mr. Chairperson, Members of the Panel: The United States appreciates the Panel’s invitation for third parties to observe the second substantive meeting of the Panel and participate

²¹ *India – Patents (US) (AB)*, para. 92.

²² U.S. Third Party Submission, paras. 172-178 (*referencing EC – Fasteners (China) (AB)*, para. 392, and *US – 1916 Act (Panel)*, para. 6.220).

in this third-party session. We hope this statement, our prior submissions, and our answers to any questions you may have will assist you in producing a report that neither adds to, nor diminishes, but rather upholds, WTO Members' rights or obligations.