

**Opening Statement by Ambassador Zhang Xiangchen
as a part of the Oral Statement of China at the First
Substantive Meeting of the Panel in the dispute:
*European Union – Measures Related to Price
Comparison Methodologies (DS516)***

(Geneva, 6 December 2017)

Distinguished Chair, members of the Panel, colleagues,

1. Good morning. We are meeting today for a dispute between China and the European Union. As China's Ambassador to the World Trade Organization, normally I do not attend panel hearings in disputes. Also, my friend and colleague, Mr. Chen Fuli, the Director General of the Department of Treaty and Law of China's Ministry of Commerce, normally does not come to Geneva for hearings. He usually sits in his office in Beijing managing multiple cases. But here we are today, both Mr. Chen and myself attend this hearing. This shows China's extraordinary emphasis on the importance of this dispute.

2. At first glance, the title of this dispute, *Price Comparison Methodologies*, seems to suggest that it is a complex and perhaps boring dispute about mathematical technicalities in anti-dumping

cases. Surely, there are some technical issues involved in this case. My colleagues will take the floor to address those issues in a moment. More importantly though, this dispute is really about a fundamental principle in international law: *pacta sunt servanda*, or “agreements must be kept”. China brought this matter to dispute settlement with the objective to establish that promises made must be respected, and treaty terms struck must be honored. Specifically, as promised by the entire membership 15 years ago, the European Union, as well as some other Members, must now end their so-called “analogue country” dumping calculation methodology that has been applied to Chinese exports for decades.

3. When discussing issues related to this case, many would look back at history and the process of China’s accession to the World Trade Organization. About 40 years ago, China began its economic reforms at home, and opened up to the world. Shortly after the reform and opening up started, China applied to resume its status as a GATT contracting party, and later when this organization was created, applied to become a WTO Member.

4. It was a long and difficult journey, spanning a total of 15 years from 1986 to 2001, coinciding with the conclusion of the Uruguay Round negotiations and the founding of the World Trade Organization. I was lucky and proud to be involved in this

amazing undertaking from 1992-2001. As a member of the Chinese delegation to countless meetings, consultations and negotiations with the existing membership, I personally witnessed the arduous struggle and difficult bargaining during the accession process. In the bilateral and multilateral negotiations leading up to the accession, China agreed to a number of “WTO-plus” obligations and “WTO-minus” rights, as eventually recorded in its Accession Protocol. Of particular relevance to this instant dispute is Section 15 of the Protocol, which provides for special rules governing determination of normal value in anti-dumping cases initiated by other WTO Members involving Chinese exports. According to Section 15, for 15 years following China’s accession, when conducting anti-dumping proceedings involving imports from China, other Members may, “use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that *market economy conditions* prevail in the industry producing the like product with regard to manufacture, production and sale of that product”.¹

5. This was a heavy price China paid for its membership in the WTO. In every year since China’s accession in 2001, China was, by far, the biggest target of anti-dumping investigations initiated

¹ Section 15(a)(ii) of China’s Accession Protocol (emphasis added).

by other WTO Members. From 2001 to 2016, there have been more than one thousand anti-dumping investigations initiated against Chinese imports, more than three times the number for the second most targeted country.² Due to the use of the special methodology under Section 15(a) of the Protocol, Chinese imports often have been subject to skyrocketing anti-dumping duties. As estimated by the European Commission, the use of the “standard” methodology results in duties that are 30 % lower than when using the “analogue country” methodology.³ In many cases, Chinese businesses subject to such discriminatory anti-dumping duties went bankrupt, and hundreds of thousands of workers lost their jobs. The price paid by Chinese exporters and Chinese working families as a result of these discriminatory anti-dumping duties has been crippling.

6. As one of the negotiators that participated in China’s accession process, I feel delight for the progressive development achieved by my country after the accession; on the other hand, I feel grief for the costly price China has paid. During the past

² WTO, Anti-dumping initiations: by exporter, 01/01/1995-31/12/2016, available online at: https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf (last viewed 4 December 2017), (**Exhibit CHN-65**).

³ See Commission Staff Working Document, Assessment of the economic impact of changing the methodology for calculating normal value in trade defense investigations against China Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, SWD(2016) 372 final, 9 November 2016, (hereinafter (“SWD(2016) 372 final, 9 November 2016”)), (**Exhibit CHN-63**), pp. 76-77.

fifteen years, I have always felt as though there were a clock ticking by my ear, second by second, day by day, and year by year, counting down to the end of Section 15(a)(ii) of China's Accession Protocol.

7. The moment came on 11 December 2016, the 15th anniversary of China's accession to the WTO, when Section 15(a)(ii) of China's Accession Protocol expired. As a legal consequence, there is no longer any basis under the Protocol to abandon home market prices and costs. WTO Members shall apply general rules under the WTO covered agreements in anti-dumping proceedings involving China. The discriminatory provisions in the anti-dumping laws of the European Union and other Members were required to come to an end. This is dictated by the crystal-clear letters in Section 15: "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession".⁴ China believes that there can be no other plausible reading of this simple and unambiguous treaty language.

8. However, to China's deepest regret, the European Union has failed to change the laws to make them WTO-consistent. Worse still, the European Commission continues to use the "analogue country" methodology for Chinese imports, without taking account of the expiry of Section 15(a)(ii), and to initiate new investigations

⁴ Section 15(d) of China's Accession Protocol.

on the same illegal basis. Apparently for the European Union, the expiry of Section 15(a)(ii) means nothing; the promise it undertook 16 years ago means nothing. The European Union turns a blind eye to the explicit treaty language stating that Section 15(a)(ii) expired after 15 years “in any event”, as well as the Appellate Body’s ruling to that effect in *EC — Fasteners (China)*.⁵ To safeguard the integrity of the multilateral trading rules, China felt compelled to seek justice before the dispute settlement forum.

9. In its submission, the European Union blames China for offering “no explanation as to why it has waited until now”⁶ to raise this dispute. I will explain why – because China honors its promises. Notwithstanding the tremendous trade disadvantages suffered by exporters of Chinese products, China kept its promise and accepted that the “analogue country” methodology could be used for 15 years. During the 15-year transitional period, Chinese industries and enterprises have made sincere efforts requesting non-application of the “analogue country” methodology pursuant to relevant paragraphs of Section 15. Regrettably, such efforts mostly ended up in vain. Now, 15 years have passed. It is the turn of the European Union and other Members to live up to their promise and abide by the WTO rules.

⁵ Appellate Body report, *EC – Fasteners (China)*, para. 289.

⁶ European Union’s first written submission, para. 395.

10. As a third party in this dispute, the United States contends that long before China acceded to the WTO there had been “longstanding rights in the GATT and WTO to reject prices or costs that are not determined under *market economy conditions*”.⁷ I was dumbfounded by this proposition. Section 15 of China’s Accession Protocol was, for the most part, negotiated bilaterally between the United States and China, and it was one of the toughest and most contentious issues between the two sides. I myself participated in almost every round of those bilateral negotiations, including the final round in Beijing when the bilateral Agreement on Market Access was signed. The United States’ contention is beyond the imagination of those, including myself, who actually participated in the negotiations.

11. In the early rounds of the negotiations, the United States insisted that China’s accession would require special rules so that the United States would be able to maintain its then-current antidumping methodology (treating China as a non-market economy). China disagreed initially, but relented in later rounds on the premise that such special rules must end five years after accession.⁸ The United States counter-offered with a “review clause” proposal that entitles importing Members to review

⁷ United States’ third party submission, para.108 (emphasis added).

⁸ Draft Proposal from China, 26 March 1999, (**Exhibit CHN-66**).

whether the methodologies would continue to be appropriate.⁹ The standoff persisted for several rounds, until the United States accepted that the “non-market economy provision” would have a definitive end-point, proposing that “[i]n any event the non-market economy provision will expire twenty years after the date of accession”.¹⁰ Ultimately, the two sides arrived at a “middle ground” of 15 years, as eventually adopted in Section 15 of China’s Accession Protocol.¹¹ In the negotiations, China also sought and obtained provisions requiring “early termination” of the special rules under some circumstances, i.e., under the condition that China has established under the national law of the importing WTO Members that it is a market economy or that market economy conditions prevail in a particular industry or sector. After the negotiations were concluded, numerous public statements by WTO Members including the United States and the European Union confirmed the deal they struck with China. China provided a collection of statements from authoritative EU sources in paragraph 77 of China’s first written submission. China also compiles an illustrative collection of statements from authoritative

⁹ Draft Proposal from the United States, 29 March 1999, (Exhibit CHN-67).

¹⁰ U.S. Response to China’s Proposal, 13 November 1999, (Exhibit CHN-68).

¹¹ Section 15(d) of China’s Accession Protocol.

US sources attached to the written version of this statement. Let me offer a few examples here.¹²

- In a press conference on 15 November 1999, the day when the United States and China signed the bilateral Agreement on Market Access, then United States Trade Representative Charlene Barshefsky stated, “[w]e certainly agree with China at that time, that these provisions should not exist in perpetuity, but we believed that they did need to exist for a reasonable period of time. With respect to the application of the “special anti-dumping” methodology, that provision will exist for 15 years”.¹³
- USTR Barshefsky reiterated this same understanding in subsequent comments. The same understanding was echoed by Representatives and Senators when debating the legislation that granted China “permanent normal trading relations”, in line with membership of the WTO. We will play a short video extracting statements by USTR Ms. Barshefsky, Representative Feinstein and Senator Graham

¹² Statements made by US officials on behalf of US agencies at the time of, and subsequent to, negotiations on the accession of China to the WTO, (**Exhibit CHN-69**); China’s first written submission, para. 77.

¹³ See The Washington Post, “USTR Barshefsky's Press Remarks”, 15 November 1999, (**Exhibit CHN-70**).

from that period.¹⁴ The text of the statements in the video is transcribed in the written version of this statement.

[*Video plays:*

- *USTR Barshefsky: “... Fourth, guarantees of our right to use a special non-market economy dumping methodology for fifteen years, to ensure fair trade from China ...”.*
- *Representative Feinstein: “... also preserves safeguards against dumping and other unfair trade practices, specifically, the special safeguard rule to prevent import surges into the United States will remain in force for twelve years, and the special anti-dumping methodology will remain in effect for fifteen years...”.*
- *Senator Graham: “The agreement includes a provision recognizing the United States may employ special methods designed for non-market economies to counteract dumping for fifteen years after China’s accession to the World Trade Organization”.*

Video ends]

¹⁴ Video statements of USTR Barshefsky, Representative Feinstein, and Senator Graham are submitted as (Exhibit CHN-71).

- In its September 2001 Proposal for a Council Decision establishing the Community position within the Ministerial Conference set up by the Agreement establishing the World Trade Organization on the accession of the People’s Republic of China to the World Trade Organization, the European Commission stated, “[t]he EU’s present legislation which provides specific procedures for dealing with cases of alleged dumping by Chinese exporters, which may not yet be operating in normal market economy conditions, will remain available for up to fifteen years after China enters the WTO”.¹⁵
- In 2004, the European Commission, in a press release, said that “[t]he possibility to treat China as an economy in transition in trade defence investigations for up to 15 years was agreed and enshrined in the Chinese WTO accession protocol”.¹⁶

12. Returning to the US argument, it was neither party’s understanding that the United States already had the right under the covered agreements to use the “analogue country” methodology

¹⁵ See Proposal for a Council Decision establishing the Community position within the Ministerial Conference set up by the Agreement establishing the World Trade Organization on the accession of the People's Republic of China to the World Trade Organization, COM/2001/0517 final, 26 February 2002, **(Exhibit CHN-29)**.

¹⁶ European Commission, “China - Market economy status in trade defence investigations”, MEMO/04/163, 28 June 2004, **(Exhibit CHN-31)**.

against Chinese exports. Were that the case, we would not have negotiated for days and nights, in Beijing and in Washington D.C., debating whether the special rules permitting such a methodology against Chinese exports should be included, and how long such special rules should endure. Now, 18 years later, the United States is claiming that Section 15 was unnecessary, and the United States has been entitled to use the “analogue country” methodology without Section 15. It is effectively suggesting that all those negotiating efforts on both sides were so much ado about nothing, and that the United States is entitled to the “review mechanism” that was rejected during the negotiation process. The United States’ position is, to put it in the mildest terms, disingenuous. Any Member would feel as though it was a set-up. The European Union and the United States’ contention that the general WTO rules permit an “analogue country” methodology to be used for China is a severe distortion of the general rules, which can cause substantial adverse effects on the entire membership.

13. This dispute brought by China has nothing to do with so-called “market economy” status or conditions. The logic is simple. Section 15 does not impose any condition upon the expiry of the “analogue country” methodology under Section 15(a)(ii). For expiry to occur 15 years after the date of accession, there was no need for China to meet any so-called “market economy” criteria

formulated by the European Union, the United States or any other WTO Member. The end of the “analogue country” methodology under Section 15 was just a matter of time – China had to bear with the “analogue country” methodology for no longer than 15 years. Fifteen years after accession, China enjoys the same rights as other WTO Members in anti-dumping proceedings.

14. Whether China is considered by some Members as a “market economy” is irrelevant to the matter before this Panel. Nevertheless, the United States in its third party submission spends dozens of pages accusing China for not transitioning into a “free market economy”.¹⁷ This raises the conceptual question, what is a market? I think everyone can agree that a market is a place where supply and demand interplays. Beyond this, there can be no pre-defined, one-size-fits-all standard or criteria, as the European Union and the United States have mandated in their municipal law. What these two Members are advocating here before you is to take international rules into their own hands and to ask other Members to conform to their own definitions. We are deeply concerned about the systemic implications this will have for the rules-based multilateral trading system.

15. Mr. Chairman, members of the Panel, colleagues:

¹⁷ United States’ third party submission, Section III.C.

16. China agrees with the European Union that this dispute concerns “the most important live issue in WTO anti-dumping law”.¹⁸ This dispute is especially important to China, not only legally, but also economically and politically. As I recalled just now, China had made a long journey in its quest to join the multilateral trading system. China joined this organization in the belief that the WTO is rule-based, non-discriminatory, and promotes free trade. However, the European Union’s measures at issue defy every single one of those principles: it is rule-bending, discriminatory, and protectionist. Whether or not the European Union can be brought into compliance with its obligations under the covered agreements concerns the credibility of the dispute settlement mechanism, the integrity of the World Trade Organization, and the membership’s faith in the multilateral trading system.

17. I thank you and the secretariat for your service in this very important dispute. I will now give the floor to my colleagues to deliver the rest of China’s opening statement.

¹⁸ European Union’s first written submission, para.1.