

The U.S. Fights Back at the WTO on China's NME Status

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Last week, the United States filed its first legal analysis of the China non-market economy issue in a dispute at the World Trade Organization brought by China against the European Union.

As we have reported [here](#) and [here](#), the question of whether the United States would continue to treat China as a non-market economy ("NME") for purposes of the Department of Commerce's antidumping duty analysis was recently decided by the Administration. In a 200-page memorandum issued at the end of October, Commerce announced that it would continue to apply alternative dumping methodologies with respect to China given the substantial evidence that China continues to be an NME.

That has not stopped China from initiating dispute settlement proceedings at the World Trade Organization ("WTO") against the European Union (DS516) and the United States (DS515). In each dispute, China is challenging the WTO member's applied antidumping duty methodology with respect to imports from China, which China believes are prohibited under a provision of its 2001 Protocol of Accession to the WTO and inconsistent with provisions of the WTO Antidumping Duty Agreement and the General Agreement on Trade and Tariffs ("GATT 1994").

In the United States dispute, China requested additional consultations with the United States in early November in light of the October memo announcing the United States' ongoing treatment of China as an NME.

In the EU dispute, a dispute settlement panel was composed in July 2017, and the parties have been filing legal briefs. The United States, as a third party to the EU proceeding, filed its brief last week that presents the United States' first legal analysis of this issue with respect to WTO law.

The United States' argument rests on the interpretation of the GATT 1994 and WTO Antidumping Duty Agreement as recognizing that NME prices are distorted and unreliable, and, thus, unsuitable for the price comparability determination required in an antidumping price comparison. According to the United States, this basic principle – and the authority to reject and replace NME prices for purposes of antidumping comparisons – predates and is not extinguished by China's Protocol of Accession. In support of this argument, the United States cites to the WTO accession documents of Poland, Romania, and Hungary (NMEs at the time of their accession in the 1960s and 1970s) that affirmed WTO members' ability to adopt alternative antidumping methodologies unless market economy conditions prevail.

This briefing and argument phase, prior to the dispute settlement panel's final report to the parties, will take at least six months, and likely longer. The panel's findings will be subject to appeal, and, if appealed, the entire dispute process may take 18 months to two years. In addition to the United States, Australia, Bahrain, Brazil, Canada, Colombia, Ecuador, India, Indonesia, Japan, Kazakhstan, South Korea, Mexico, Norway, Russia, Taiwan, Turkey, and the United Arab Emirates have joined as third parties in the EU dispute.