WORLD TRADE ORGANIZATION

WT/DS449/R/Add.1

27 March 2014

(14-1817)

Original: English

UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS449/R.

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WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES FOR THE PANEL

Adopted on 14 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Unless a different procedure is provided for in consultation with the parties, the following procedure shall be followed. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the respondent chooses not to avail itself of that right, the Panel

shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each third party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. Each party shall submit executive summaries of its arguments as presented in each of its written submissions and statements. The total number of pages of the executive summaries to be provided by each party, all four parts combined, shall not exceed 30 pages, and shall be submitted at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. A party may include its responses to questions in the executive summary of its statement. In that case, the executive summary, covering the party's statement and responses to questions, shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit executive summaries of its arguments as presented in its written submission and statement at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. The total number of pages of the summaries to be provided by each third party, the two parts combined, shall not exceed 5 pages. A third party may include its responses to questions in the executive summary of its statement. In that case, the executive summary of the third party's statement and responses to questions shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the third parties' responses to questions.

20. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report before translation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 9 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****.*****@wto.org, with a copy *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org and

*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF CHINA

Executive Summary of China's First Written Submission

I. Introduction and Summary

1. This dispute concerns the basic principles of transparency and due process that are embodied in Article X of the GATT 1994. At the centre of this dispute is an action that is fundamentally inimical to those principles: the retroactive application of a law to events and circumstances that occurred prior to its enactment. The retroactive application of laws is so clearly inconsistent with basic principles of transparency and due process that it is prohibited by Article X:2 of the GATT. The retroactive application of laws is, in addition, self-evidently incompatible with the requirement of Article X:1 to publish measures of general application "promptly" so that governments and traders have an opportunity to become familiar with the laws and regulations that will be applied to their conduct.

2. The measure at issue in this dispute is a measure that violates these requirements on its face. This measure is U.S. Public Law 112-99 (P.L. 112-99), "An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". P.L. 112-99 was passed by the U.S. Congress and then signed into law by President Obama on 13 March 2012. Section 1 of P.L. 112-99 amends section 701 of the U.S. Tariff Act of 1930 (the Tariff Act) to provide the United States Department of Commerce (the USDOC) with the legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies (NMEs) for the purpose of its anti-dumping laws. Congress enacted this law after the United States Court of Appeals for the Federal Circuit reaffirmed an earlier decision holding that the U.S. countervailing duty laws do not apply to imports from NME countries.

3. P.L. 112-99 specifies that section 1 applies retroactively to 20 November 2006, nearly five and a half years before the enactment and publication of the law. As China will demonstrate in Part III of this submission, the publication of a law five and half years after its effective date was plainly inconsistent with the obligation of the United States under Article X:1 to ensure that measures of general application are "published promptly in such a manner as to enable governments and traders to become acquainted with them". In Part IV of this submission, China will demonstrate that the retroactive enforcement of section 1 is inconsistent, on its face, with the prohibition in Article X:2 against the enforcement of a measure "before such measure has been officially published". Finally, in Part V, China will demonstrate that the retroactive enforcement of P.L. 112-99 ensured that the decision of the Federal Circuit was not implemented by the USDOC, and did not govern the practice of the USDOC, in violation of Article X:3(b) of the GATT.

4. In addition to amending the Tariff Act to give the USDOC legal authority to apply countervailing duties to imports from NME countries, section 2 of P.L. 112-99 amended section 777A of the Tariff Act to provide the USDOC with authority to avoid the double remedies that are likely to occur when it applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology. In stark contrast to section 1, the authority conferred by section 2 became effective only upon the enactment of the law, i.e. prospectively.

5. As China will discuss in Part VI of this submission, the retroactive enforcement of section 1 of P.L. 112-99, when juxtaposed with the entirely prospective enforcement of section 2, creates a class of "orphaned" anti-dumping and countervailing duty investigations for which the USDOC has no legal authority to investigate and avoid double remedies. Consistent with this lack of legal authority, the USDOC took no steps in any of those investigations to investigate and avoid the double remedies that were likely to occur. This failure to investigate and avoid double remedies was inconsistent, on its face, with Article 19.3 of the SCM Agreement, as interpreted by the Appellate Body in in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

II. Background

6. China will begin this submission with a review of the history of the U.S. countervailing duty laws in the 25 years leading up to the enactment of P.L. 112-99. This history is bookended by two decisions of the United States Court of Appeals for the Federal Circuit: its 1986 decision holding that the U.S. countervailing duty laws do not apply to imports from non-market economies, and its reaffirmation of that decision in December 2011 after the USDOC had sought to apply countervailing duties to imports from China in contravention of existing U.S. law.

7. In the early 1980s, the USDOC was presented with a set of petitions seeking the imposition of countervailing duties on imports from countries that the United States designated as non-market economies for the purpose of its anti-dumping laws. In responding to these petitions, the USDOC held that, "as a matter of law", the provisions of the Tariff Act that provide for the imposition of countervailing duties were inapplicable to countries that the United States designates as non-market economies. The USDOC found that the concept of subsidization is not meaningful in respect of imports from these countries. The USDOC was also influenced in its determination by its review of the legislative history of the Tariff Act and by the special provisions of the U.S. anti-dumping laws that Congress had enacted to address imports from NME countries. The USDOC considered this history to support its view that Congress had not intended the countervailing duty provisions of the Tariff Act to apply to imports from NME countries.

8. On appeal, the USDOC's interpretation of the Tariff Act was affirmed by the United States Court of Appeals for the Federal Circuit in its 1986 decision in *Georgetown Steel Corp. v. United States*. The Federal Circuit held that "Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of [the U.S.] statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply." The court concluded its decision by noting that if the NME anti-dumping provisions enacted by Congress were "inadequate to protect American industry from … foreign competition" – a question that was not within the court's competence to answer – then it would be "up to Congress to provide any additional remedies it deems appropriate."

9. After the Federal Circuit's decision in *Georgetown Steel*, the U.S. Congress did, on several occasions, consider the enactment of new legislation to permit the application of countervailing duties to imports from non-market economy countries. None of these initiatives ultimately resulted in the enactment of new legislation to give the USDOC this authority, but they did prompt the U.S. Government Accountability Office (GAO) to issue a report in June 2005 entitled *U.S.-China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties.*

10. The first topic that the GAO Report addressed was the question of whether the USDOC had authority under *existing* law to apply countervailing duties to imports from an NME country. The GAO explained that the USDOC had essentially two options, in this regard. First, it could designate China as a market economy and apply normal market economy methodologies in anti-dumping investigations of Chinese products. The second option was for the USDOC to declare, unilaterally, that it was departing from *Georgetown Steel* and begin applying countervailing duties to imports from NME countries. The GAO cautioned, however, that "absent a clear grant of authority from Congress, such a reversal could be challenged in court."

11. The other main topic that the GAO Report addressed was the problem of double remedies. The GAO recognized that, even if the USDOC were given authority to apply countervailing duties to imports from NME countries, the simultaneous application of countervailing duties and anti-dumping duties determined in accordance with the U.S. NME methodology was likely to give rise to "double counting" of the same subsidies. Shortly after the GAO issued its report, the U.S. House of Representatives passed the "United States Trade Rights Enforcement Act", H.R. 3283. The main purpose of this bill was to provide the USDOC with legal authority to apply countervailing duties to imports from NMEs, but it was never enacted into U.S. law.

12. In October 2006, a little over a year after the House of Representatives had passed the United States Trade Rights Enforcement Act, the NewPage Corporation filed anti-dumping and countervailing duty petitions with the USDOC concerning coated free sheet paper from China. Despite its lack of legal authority, and despite the objections raised by parties, the USDOC

conducted a countervailing duty investigation in *CFS Paper* and issued a final affirmative countervailing duty determination in October 2007. The USDOC's actions in *CFS Paper* unleashed a wave of new countervailing duty petitions against Chinese products – all of which raised the same legal problems as *CFS Paper* itself.

13. Chinese respondents appealed many of the USDOC's affirmative countervailing duty determinations to the U.S. Court of International Trade. The first appeal to be decided by the CIT was the appeal of the USDOC's countervailing duty determination concerning Off-the-Road Tires (OTR) from China. In *GPX Int'l Tire Corp. v. United States*, the CIT ruled that it was not reasonable for the USDOC to apply countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology, unless the USDOC could devise appropriate methodologies to ensure that no double remedies would occur.

14. The CIT ultimately concluded that the USDOC was incapable of addressing the problem of double remedies "in the absence of new statutory tools". The case was thereafter appealed to the United States Court of Appeals for the Federal Circuit, which issued its decision on 19 December 2011. The court of appeals sustained the lower court's order to forgo the imposition of countervailing duties, but on the grounds that the Tariff Act did not permit the imposition of countervailing duties on imports from countries that the United States designates as non-market economies. In so ruling, the Federal Circuit reaffirmed its 1986 decision in *Georgetown Steel*. The court held that the U.S. Congress had ratified the Federal Circuit's earlier interpretation of the Tariff Act through its "repeated reenactment of [the U.S.] countervailing duty law" with full knowledge, and explicit approval of, the court's 1986 decision in *Georgetown Steel*. On this basis, the court reaffirmed its prior holding that "[the] countervailing duty law does not apply to NME countries".

15. At the end of its decision in *GPX V*, the Federal Circuit stated that "if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change." This was the same statement that the Federal Circuit had made 25 years earlier in *Georgetown Steel*. The Federal Circuit made note of this fact, and quoted its statement in *Georgetown Steel* that if the existing NME anti-dumping remedy was "inadequate to protect American industry from … foreign competition … it is up to Congress to provide any additional remedies it deems appropriate."

16. The consequence of the Federal Circuit's decision was that <u>all</u> of the USDOC's countervailing duty investigations of Chinese products were *ultra vires.* In the absence of explicitly retroactive legislation giving the USDOC authority for actions it had already taken, all of the USDOC's past actions relating to the imposition of countervailing duties on imports from China would need to be undone. In a letter to the chairman of the House Ways and Means Committee dated 18 January 2012, the U.S. Secretary of Commerce and the U.S. Trade Representative called upon Congress to enact legislation *retroactively* authorizing the USDOC's countervailing duty investigations of Chinese products.

17. Congress complied. On 6 and 7 March 2012 the House and Senate, respectively, passed Public Law 112-99, "An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". The bill was signed by President Obama on 13 March 2012 and officially published on the same date.

18. Section 1 of P.L. 112-99 amends Section 701 of the Tariff Act, the provision of U.S. law governing the imposition of countervailing duties, to add a new subsection (f) entitled "Applicability to Proceedings Involving Nonmarket Economy Countries". This new subsection provides that the countervailing duty provisions of the Tariff Act apply to imports from countries that the United States designates as non-market economies.

19. Consistent with the request of the U.S. administration, section 1 of P.L. 112-99 is expressly retroactive. Under section 1(b) of the law, the new authority relating to the imposition of countervailing duties on imports from NME countries has an "effective date" of 20 November 2006 – nearly five and half years prior to its official publication. The effective date of section 1 retroactively encompasses all countervailing duty investigations initiated on or after 20 November 2006 (including countervailing duty measures resulting from those investigations), as well as any judicial proceedings or actions by U.S. Customs and Border Protection relating to those countervailing duty investigations. It is evident that Congress chose a retroactive effective date of

20 November 2006 because this is the date on which the USDOC had initiated the countervailing duty investigation in *CFS Paper*.

20. Section 2 of P.L. 112-99 provides authority to the USDOC to address the problem of double remedies. In sharp contrast to section 1 of the law, section 2 does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012.

21. After the Federal Circuit issued its decision in *GPX V*, the United States and other appellants had filed what is called a "petition for rehearing". The Federal Circuit had not acted on the petition for rehearing as of 13 March 2012, the date that P.L. 112-99 entered into law. The following day, the Federal Circuit issued a letter to the parties directing them to make submissions "commenting on the impact of this legislation on further proceedings in this case."

22. The Federal Circuit issued its decision on rehearing on 9 May 2012. The court began by restating its prior holding that "in amending and reenacting the trade laws in 1998 and 1994, Congress adopted the position that countervailing duty law does not apply to NME countries, and thus, countervailing duties cannot be applied to goods from NME countries." The court then explained that, subsequent to its decision in *GPX V*, Congress had "enacted legislation to apply countervailing duty law to NME countries." The Federal Circuit observed that section 1 of the legislation enacted by Congress "applies retroactively" to all countervailing duty investigations initiated after 20 November 2006. The Federal Circuit then remanded the case to the CIT to address constitutional issues relating to the retroactive application of the new law.

23. In the remand proceedings before the CIT, the United States argued that the constitutional issues raised by the importing parties were unfounded because the new legislation "did not change the law retroactively". Contrary to the position that it had taken in its submission to the Federal Circuit, in which it had expressly highlighted the "retroactivity" of the new law, the United States now contended that section 1 of P.L. 112-99 was merely a "clarification" of the law that existed *before* the Federal Circuit's decision in *GPX V*. According to the United States, section 1 of P.L. 112-99 did nothing more than "confirm" that the USDOC had always possessed the legal authority to apply countervailing duties to imports from NME countries.

24. The CIT issued its decision on the constitutional issues on 7 January 2013. Not surprisingly, the CIT found it difficult to credit the contention by the United States that section 1 of the P.L. 112-99 was not retroactive. The CIT further considered that "the government's view of a simple clarification" of existing law was "not easily extracted from the tangled history of this case." The court observed, for example, that the Federal Circuit had not vacated its prior decision in *GPX V*, despite an explicit request by the United States that it do so. Thus, the Federal Circuit's decision in *GPX V*, which held that prior U.S. law did not permit the application of countervailing duties to imports from NME countries, remained a valid, precedential decision. The only thing that had changed was that Congress had enacted new legislation to change the law retroactively, which the Federal Circuit had duly applied in *GPX VI*. The CIT also noted that, in taking this action, the Federal Circuit had in no way suggested that "its view of the prior law was wrong."

III. Section 1 of P.L. 112-99 Was Not "Published Promptly in Such a Manner as to Enable Governments and Traders to Become Acquainted" with the New Law, as Required by Article X:1 of the GATT 1994

25. Section 1 of P.L. 112-99, which provides the USDOC with legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies, was not "published promptly in such a manner as to enable governments and traders to become acquainted" with it. The fact that section 1 was not "published promptly" is evident from the fact that it was published nearly five and a half years after the date on which section 1 became effective.

26. P.L. 112-99 is a law made effective by the United States pertaining to "rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports". It authorizes the application of countervailing duties (which can be seen as "rates of duty" or "other charges … on imports") to imports from countries that the United States designates as non-market economy

countries. In addition, by making countervailing duties applicable to imports from non-market economy countries, P.L. 112-99 imposes a "requirement" or a type of "restriction" on imports. P.L. 112-99 is a law "of general application" because it is "not limited to a single import or single importer", but instead affects a range of products, producers, importers, and countries.

27. Section 1 of P.L. 112-99 was "made effective" as of 20 November 2006. This is evident from the plain language of section 1(b), which refers to 20 November 2006 as the "*effective* date" of this section. Prior panels interpreting Article X:1 have considered the date on which a measure was "made effective" as the appropriate reference point for determining whether the measure was "published promptly". The basic inquiry is whether the measure was "published promptly" in relation to this effective date. In evaluating whether a measure was "published promptly", the context of Article X:1 requires consideration of whether the measure was published in a sufficiently timely manner to enable "governments and traders to become acquainted" with the content and requirements of the measure. While Article X:1 does not specify a period of time that must elapse between publication of the measure and when it takes effect, in no event can publication be considered "prompt" if it takes place *after* the measure has taken effect.

28. It is self-evident that P.L. 112-99 was not "published promptly" in relation to its effective date of 20 November 2006. P.L. 112-99 was not published until nearly five and half years after the date on which it was made effective. This was not "prompt" by any conceivable standard. This conclusion is underscored by the fact that the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries. This is fundamentally inconsistent with the requirements of due process and transparency that underlie all of Article X, including Article X:1. For these reasons, the Panel should find that the United States acted inconsistently with Article X:1 of the GATT by failing to publish section 1 of P.L. 112-99 "promptly" in relation to its effective date.

IV. The Retroactive Application of Section 1 of P.L. 112-99 Is Inconsistent with Article X:2 of the GATT 1994

29. Article X:2 reflects what the Appellate Body has referred to as a "presumption of prospective effect", a presumption that finds its source in "basic principles of transparency and due process". These principles compel the conclusion that measures of general application affecting the conduct of governments and traders should apply only in respect of actions taken *after* the publication of the measure. This is why "prior publication is required for all measures falling within the scope of Article X:2" – "prior", that is, to the application of the measure to particular conduct or actions. Article X:2 contains no exceptions to this requirement of prior publication. By its terms, Article X:2 "precludes retroactive application of a measure" in all cases.

30. The necessary implication of Article X:2 is that governmental agencies must act within the confines of their authority, as that authority is set forth in measures that have been officially published. This limitation on agency action is central to the principle of legality that underlies all administrative systems. When governmental agencies act outside the confines of their published authority, their actions are *ultra vires* (referred to in some legal systems as *excès de pouvoir*). Article X:2 prohibits actions that are *ultra vires* by requiring governmental agencies to act within the confines of measures that have been officially published. The act of enforcing a measure of general application prior to its official publication is an act that is necessarily *ultra vires* and, as such, inconsistent with Article X:2.

31. As China discussed in Part III above, Section 1 of P.L. 112-99 is a "measure of general application" taken by the United States "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports". Equally important, P.L. 112-99 "impos[es] a new or more burdensome requirement, restriction or prohibition on imports" in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties. For these reasons, section 1 of P.L. 112-99 is plainly within the scope of Article X:2.

32. Section 1(b) of P.L. 112-99 states that section 1 of the law "applies to all proceedings initiated under Subtitle A of title VII [of the Tariff Act] on or after November 20, 2006; (2) all resulting actions by U.S. Customs and Border Protection; and (3) all civil actions, criminal proceedings, and other proceedings before a Federal court relating to [such] proceedings …". By stating that section 1 "applies" to events that occurred prior to 13 March 2012, it is evident on the face of the legislation that section 1 applies on a retroactive basis. Because Article X:2 "precludes retroactive application of a measure", for the reasons stated above, it is clear from the measure itself that the United States has acted inconsistently with Article X:2 by enforcing a measure of general application prior to its official publication.

33. The fact that the United States has applied section 1 of the legislation prior to its official publication is confirmed by the fact that the United States imposed countervailing duty orders on imports from China at a time when existing U.S. law did not permit this action, and then continued to maintain these pre-existing orders subsequent to the official publication of the measure. In the absence of the retroactive application of section 1, the USDOC would have been required under U.S. law to revoke these pre-existing orders. The fact that the United States has continued to maintain these orders subsequent to the official publication of P.L. 112-99 confirms that the United States has applied section 1 of the legislation to events and circumstances that occurred prior to its official publication.

34. For these reasons, the Panel should find that section 1 of P.L. 112-99 is a measure of general application that the United States has enforced prior to its official publication, in violation of Article X:2.

V. The United States Has Failed to Ensure that Decisions of its Courts Are "Implemented by", and "Govern the Practice of", the USDOC, in Violation of Article X:3(b) of the GATT 1994

35. China's claim under Article X:3(b) relates to the requirement that the decisions of reviewing tribunals "shall be implemented by, and shall govern the practice of" the agency whose action is under review. It is clear that the requirement to "implement" the decision of a tribunal means, at a minimum, that the agency under review must apply the decision of the tribunal in the specific case decided. The requirement to ensure that the decision "govern[s] the practice of" the agency goes beyond the specific case decided, and requires the agency to be bound by the decision "with respect to identical factual situations that may arise in the future concerning identical legal issues".

36. In its decision in *GPX V*, issued on 19 December 2011, the Federal Circuit held that "the [U.S.] countervailing duty law does not apply to NME countries". Through this decision, the court established that existing U.S. law did not permit the USDOC to impose countervailing duties on imports from countries that the United States designates as non-market economies. Within the U.S. system of judicial review, there were only two scenarios in which the court's decision in *GPX V* could have been reversed. First, the United States (or another interested party) had the right to petition the court for rehearing of the original panel decision. Second, whether or not a petition for rehearing had been sought, an interested party could seek review of the Federal Circuit's decision by the United States Supreme Court.

37. The original deadline for the United States to file a petition for rehearing was 2 February 2012. The United States sought a 60-day extension of this deadline, which the court cut in half by extending the deadline to 5 March 2012. On that date, the United States filed a petition for rehearing *en banc*, i.e. for review of the Federal Circuit's decision in *GPX V* by the entire court of appeals.

38. The petition for rehearing filed by the United States was pending before the Federal Circuit when President Obama signed P.L. 112-99 into law eight days later. This action prompted the Federal Circuit to issue a notice to the parties, on 14 March, directing them to brief the court on the significance of the new legislation. In its submission, the United States explained to the court that section 1 of P.L. 112-99 "is retroactive to November 20, 2006", which was "prior to the initiation of Commerce's CVD investigation in this case". The United States took the position that the express retroactivity of section 1 required the Federal Circuit to apply the new law to the case under appeal, since the appeal was technically still pending before the court in light of the petition

for rehearing. The Federal Circuit agreed with this position in its decision in *GPX VI*, and applied the new law retroactively to change the outcome of the case.

39. The actions by the U.S. Congress and the U.S. administration foreclosed the two opportunities for further judicial review that were available after the Federal Circuit's decision in *GPX V.* Through its own actions, the administration ensured that the Federal Circuit never had an opportunity to consider the arguments advanced by the United States in support of its contention that the court's decision in *GPX V* was in error. Moreover, these actions obviated the need to petition the Supreme Court for a review of that decision. As a result of these actions, the Federal Circuit's decision in *GPX V* became the final judicial decision on the status of U.S. law prior to the enactment of P.L. 112-99.

40. China considers that it was consistent with Article X:3(b) for the United States to seek rehearing *en banc* of the Federal Circuit's decision in *GPX V.* This was equivalent to an appeal to a court of superior jurisdiction. China also considers that it would have been consistent with Article X:3(b) for the United States to have filed a petition for certiorari with the U.S. Supreme Court, as this, too, would have been an appeal to a higher court. In either event, the USDOC would have been bound by the final decision of its reviewing courts, whether it was the Federal Circuit's decision in *GPX V*, a subsequent *en banc* decision of the Federal Circuit, or a decision of the U.S. Supreme Court.

41. What was not consistent with Article X:3(b) was for the Federal Circuit to issue its decision in *GPX V* and for the United States to then amend the law, retroactively, to change the outcome of that decision. This had the effect of ensuring that the Federal Circuit's decision in *GPX V* would not be implemented by, and would not govern the practice of, the USDOC. In addition, it ensured that the U.S. courts were not able to discharge their required function of reviewing and correcting the actions of the USDOC in relation to the domestic laws in effect at the time those actions were taken. For these reasons, the Panel should find that section 1(b) of P.L. 112-99, by amending U.S. law retroactively and making it applicable to judicial proceedings concerning administrative actions taken prior to its enactment, is inconsistent with the obligations of the United States under Article X:3(b).

VI. The United States Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

42. When the USDOC decided to begin applying countervailing duties to imports from countries that it continued to designate as non-market economies, it was aware that the simultaneous application of countervailing and anti-dumping duties could result in offsetting the same subsidy twice – once through the imposition of the countervailing duty, and then again through the manner in which the United States calculates anti-dumping duties under its NME methodology.

43. In an anti-dumping investigation, the existence and extent of an anti-dumping margin is based on a comparison of the producer's normal value for the product under investigation (determined by reference either to the producer's costs of production or to its home-market prices for the product) to the producer's export price for the product. The producer is said to be "dumping" if its normal value is higher than its export price. The GAO Report had explained that because normal value under the U.S. NME methodology is based on unsubsidized costs of production in countries that the United States considers to be market economies, the resulting comparison of normal value to the producer's export price is likely to reflect not only dumping, but also any subsidization of that product as well.

44. In DS379, the Appellate Body held that the United States has an obligation under Article 19.3 of the SCM Agreement to investigate and avoid the double remedies that are likely to occur when the United States applies countervailing duties in conjunction with anti-dumping duties determined under the U.S. NME methodology. Because the USDOC lacked authority under existing U.S. law to address the problem of double remedies, it was clear that any attempt by the United States to comply with the recommendations and rulings of the DSB would require the U.S. Congress to enact new legislation to give the USDOC this authority.

45. Section 2 of P.L. 112-99 purports to give the USDOC sufficient legal authority to identify and avoid double remedies in the NME context. In sharp contrast to section 1 of the law, the USDOC's

authority to address the problem of double remedies does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012. The contrast between the effective dates for section 1 and section 2 creates an "orphaned" class of countervailing duty investigations for which the USDOC has no authority under U.S. law to investigate and avoid double remedies (See CHI-24). Under the statute, the only scenario in which the USDOC can apply its authority under section 2 in respect of those past investigations is if China challenges those determinations at the WTO.

46. Because section 1 of P.L. 112-99 is plainly inconsistent with Article X of the GATT, for the reasons set forth in Parts III and IV above, it should not be necessary for the United States to address the problem of double remedies in respect of the "orphaned" investigations. The correct course of action is for the United States to acknowledge that the USDOC had no duly published authority to conduct countervailing duty investigations in respect of imports from NME countries at the time those investigations occurred. That being the case, the problem of double remedies simply would not arise in respect of those past investigations. However, to the extent that the United States continues to maintain those countervailing duty measures, whether or not this is action is consistent with Article X, it is nonetheless obligated under the covered agreements to investigate and avoid double remedies in respect of those investigations.

47. The USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the SCM Agreement. This is because the USDOC has failed to ensure that it imposes countervailing duties "in the appropriate amounts in each case", taking into account the simultaneous imposition of anti-dumping duties that are likely to offset the same subsidies. China therefore requests the Panel to find that each of these determinations is inconsistent, as applied, with Article 19.3. As a consequence, and as the Appellate Body did in DS379, the Panel should find that the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the First Meeting of the Panel

Introduction

1. The United States has staked its entire defence of this case on the proposition that the *GPX* legislation did nothing more than "maintain[] the status quo that existed prior to its enactment" and "confirm" the law that already existed. As I will demonstrate, the proposition that the *GPX* legislation effected no substantive change in the law is contradicted by the terms of the statute itself. This proposition is, in addition, based upon a wholesale rewriting of history and obvious mischaracterizations of how the U.S. legal system works.

2. I will begin with the terms of the statute itself. The statute is entitled "an act *to apply* the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries." If the purpose of the act is "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries", it must be the case that those provisions previously did *not* apply to NME countries. Section 1(a) of the statute amends Section 701 of the Tariff Act "by adding" a new subsection (f). The new subsection (f)(1) provides that countervailing duties "shall be imposed" on imports from nonmarket economy countries. It is clear from the amended statute that it is *this* provision of law that imposes countervailing duties on imports from nonmarket economy countries and provides the legal authority for Commerce to take this action.

3. Consider the new subsection (f)(2), in this regard. This is a new provision of U.S. law, establishing the terms of an exemption from countervailing duties that never before appeared in any officially published measure of general application. If Congress was of the view that the general countervailing duty authority set forth in subsection 701(a) of the Tariff Act had always applied to imports from NME countries, then Congress could have done nothing more than enact this new exception. Instead, it enacted an entirely new subsection to provide for the imposition of countervailing duties on imports from NMEs, and attached this exception to it. Once again, this demonstrates that it is the new section 701(f), not section 701(a), that creates the legal basis for the imposition of countervailing duties on imports from NMEs.

4. Finally, let us consider the effective date provision set forth in section 1(b) of the statute. This provision states that the new subsection (f) "applies to" all countervailing duty proceedings initiated "on or after November 20, 2006". The only conceivable purpose for making a law retroactive is to *change* the law as it existed in the past. If the statute was merely restating the law that already existed, as the United States contends, then there would have been no need for Congress to make the new law retroactive to a specific date in the past. In short, no reasonable observer could examine this statute on its face and conclude that it did nothing more than restate the law that already existed. This conclusion is underscored by an examination of the facts and circumstances surrounding the enactment of this statute.

5. Under the U.S. narrative, the "status quo" prior to the enactment of the *GPX* legislation was that the Tariff Act already permitted Commerce to apply countervailing duties to imports from NME countries, and that Congress enacted the *GPX* legislation merely to "confirm" this proposition. Within this narrative, the United States treats the Federal Circuit's decision in *GPX V* as a mere aberration from the status quo, rather than as a decision of a United States federal court holding that Commerce's understanding of the Tariff Act was incorrect.

6. This is a complete rewriting of history. The Federal Circuit's decision in *GPX V* held that what the United States tries to characterize as the "status quo" was, in fact, inconsistent with U.S. law as it then existed. When it enacted the *GPX* legislation, Congress sought to change the applicable law, as established by the Federal Circuit, and have the courts apply this new law retroactively to keep the countervailing duty orders in place. That is exactly what happened.

7. In *GPX VI*, the Federal Circuit began its decision by reiterating its prior holding in *GPX V* that the Tariff Act did not permit the application of countervailing duties to imports from nonmarket economy countries. It then observed, however, that Congress had subsequently "enacted legislation to apply countervailing duty law to NME countries". This "new legislation", the court explained, "applies retroactively" to countervailing duty investigations initiated on or after November 20, 2006, including any appeals in federal courts relating to those investigations.

Therefore, without casting any doubt upon its decision in *GPX V* as a valid interpretation of the prior law, the Federal Circuit applied the new law retroactively to alter the outcome of the case.

8. In sum, whether we look at the face of the statute itself or at the facts and circumstances surrounding its enactment, the result is the same: the *GPX* legislation effected a substantive change in U.S. law. The basic premise of the U.S. defence – that the Federal Circuit's decision in *GPX V* never happened, and that Congress was merely restating existing law when it enacted the *GPX* legislation – is transparently false. Once this premise is taken away, the United States has no substantive defence to China's claims under Article X of the GATT.

Article X:1

9. In relation to China's claim under Article X:1, the only real question is whether section 1 of the *GPX* legislation was "published promptly" in relation to when it was "made effective". The United States argues that the date on which a measure is "made effective" is the date on which the measure is formally "adopted" as a matter of municipal law. What the United States fails to confront, however, is that section 1 of the legislation has an "effective date" of November 20, 2006. It is hard to see how the United States can argue that the statute was "made *effective*" on March 13, 2012 when the statute itself has an "*effective* date" of November 20, 2006.

10. The proposition that a measure is only "made effective" when it is formally "adopted" as a matter of municipal law is a proposition that the United States successfully argued *against* in *EC – IT Products.* The EC in that case argued that the term "made effective" refers to the date on which the measure at issue was "adopted", i.e. the date on which it formally entered into force as a matter of municipal law. The United States argued, by contrast, that the term "made effective" refers to the date on which the measure became "applicable", without regard to when it was formally adopted as a matter of municipal law or when it was officially published.

11. The United States was right in *EC – IT Products*, and is wrong in this dispute. As that panel held, the term "made effective" refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." With regard to the *GPX* legislation, that date was November 20, 2006. It is impossible to conclude that the publication of a measure five and half years after it was "made effective" is "prompt" under any understanding of that term. The United States has therefore acted inconsistently with the requirements of Article X:1.

Article X:2

12. The U.S. response to China's claim under Article X:2 can be reduced to two propositions: (1) that the *GPX* legislation did not change U.S. law, and therefore did not "effect[] an advance in a rate of duty or other charge on imports under an established and uniform practice" or "impos[e] a new or more burdensome requirement, restriction or prohibition on imports"; and (2) that China has failed to prove that this expressly retroactive legislation was "enforced before such measure has been officially published". Both of these propositions are incorrect.

13. The *GPX* legislation "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice" not only because it makes imports from NME countries potentially subject to the imposition of countervailing duties, but also because it provides a legal basis for the continued maintenance of 24 countervailing duty orders which, in the absence of this legislation, would have been revoked. It is equally obvious that an act that "applies" countervailing duties to a particular class of imports is, without question, one that "impos[es] a new or more burdensome requirement, restriction or prohibition on imports". Being subject to countervailing duty investigations, as well as the actual imposition of countervailing duties, is a "requirement" or "restriction" on imports.

14. For the reasons that I have already explained, the fact that this requirement or restriction is "new" and "more burdensome" is evident not only from the text of the statute itself, but from the fact that this provision was enacted in direct response to the Federal Circuit's holding in *GPX V*. As the United States explained to the Federal Circuit after the legislation was enacted, it is this new provision of U.S. law that "requires that Commerce apply CVDs to imports from NMEs, including

China." In *GPX VI*, the Federal Circuit held, by the United States' own description, that "the *new legislation* clearly requires that Commerce retroactively apply the CVD statute to NMEs".

15. In China's view, it should be self-evident that a measure of general application with a retroactive effective date is, by definition, a measure that has been enforced prior to its official publication. The term "enforce" is synonymous with the term "apply". Section 1(b) of the *GPX* legislation states that the new section 701(f) of the Tariff Act "applies to" all countervailing duty proceedings initiated on or after November 20, 2006. It follows that the *GPX* legislation enforces the new section 701(f) in respect of events and actions that occurred prior to its official publication on March 13, 2012. It does so by providing the legal foundation for the countervailing duty orders and duties imposed from November 2006 onward that the Federal Circuit had held to be inconsistent with prior U.S. law.

16. As the Appellate Body has explained, the basic principle of due process that underlies Article X:2 is that governments and traders should have a reasonable opportunity to learn about a measure, and to adjust their conduct accordingly, before that measure is enforced in respect of their conduct. That principle is necessarily offended when a statute reaches back in time and changes the law applicable to events and circumstances that have already occurred. Government and traders cannot possibly adjust their conduct in light of such a measure, since the conduct affected by the measure has already occurred. A measure that is expressly retroactive is, for that reason, the paradigmatic example of the type of measure that Article X:2 prohibits.

Article X:3(b)

17. The United States appears to have misstated China's claim under Article X:3(b), or at least misunderstood it. To be perfectly clear, China's claim is <u>not</u> that Commerce was required to implement and give effect to the Federal Circuit's decision in *GPX V* at the moment that decision was issued. Rather, China's claim is that it was inconsistent with Article X:3(b) for the United States Congress to change the applicable law retroactively and direct courts to apply this new rule of law to cases under review. This legislative intervention in ongoing judicial proceedings is not contemplated by Article X:3(b) and, if accepted, would deprive the independent judicial review required by Article X:3(b) of any practical meaning.

18. Consider the facts of this case. Based on their review of published measures of general application, the Government of China and interested Chinese parties understood that the countervailing duty provisions of the Tariff Act did not apply to imports from nonmarket economy countries. When Commerce began to act inconsistently with this understanding of U.S. law in 2006, interested parties challenged Commerce's actions in court and ultimately prevailed in their understanding of U.S. law. In response to that decision, the United States Congress changed the applicable law, retroactively, to make lawful what the court had held was not lawful at the time of the underlying agency action. Based solely on that newly-enacted legislation, the court changed the outcome of the appeal to sustain the legality of imposing countervailing duties on imports from China.

19. These actions make a mockery of independent judicial review, and of Article X as a whole. The entire concept of requiring Members to publish laws of general application in a transparent fashion, to enforce those laws only after their official publication, and to provide for review and correction by independent tribunals of administrative actions taken pursuant to those laws, would be utterly pointless if national legislatures were free to change the law retroactively and direct courts to apply the new law to events that have already occurred.

20. The Federal Circuit's decision in *GPX V* was a "decision" of a U.S. court. Without any apparent sense of irony, the United States asserts that the decision in *GPX V* "was an ideal candidate for both options." But instead of allowing the judicial proceedings to run their course based on the law in effect at the time of the events at issue, the United States Congress intervened in these proceedings to change the applicable law and direct the outcome of the appeal. This disposition of the Federal Circuit's decision in *GPX V* was not one of the two exceptions permitted under Article X:3(b).

Double Remedies

21. Despite having lost on the issue of double remedies in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), and despite having enacted a new provision of U.S. law in order to comply with the recommendations and rulings of the DSB in that dispute, the United States is trying to re-litigate these issues all over again before this Panel. This is not a constructive use of the dispute settlement system.

22. The Appellate Body held in DS379 that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." This includes taking into account "evidence of whether and to what degree the same subsidies are being offset twice", bearing in mind the unappealed finding of the panel in that dispute that double remedies are "likely" when the corresponding anti-dumping duties are determined in accordance with the U.S. non-market economy methodology.

23. The Appellate Body has stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." The United States has presented no such "cogent reasons" in this dispute. The arguments that it advances in its first written submission with regard to the interpretation of Article 19.3 are materially indistinguishable from arguments that the Appellate Body considered and rejected in DS379. Whatever sorts of reasons might constitute "cogent" reasons, it cannot be the case that rehearsing arguments that the Appellate Body has already considered would justify the extraordinary step of departing from its prior interpretation of a provision of the covered agreements. This is particularly true in a dispute, such as this one, that involves the same litigants, the same types of measures, and the same claims that were at issue in the prior dispute.

24. Notwithstanding its arguments regarding the alleged errors in the Appellate Body's report in DS379, the United States also maintains that Commerce "fully addressed any evidence and arguments relating to allegedly overlapping remedies" in the investigations at issue. This is a remarkable assertion in light of the undisputed fact that Commerce had *no legal authority* to do *anything* to address the problem of double remedies in these investigations.

25. Commerce's new legal authority to address double remedies under section 2 of the *GPX* legislation applies on a prospective basis, i.e., only in respect of determinations issued after March 13, 2012. Accordingly, it is preposterous for the United States to suggest that Commerce actually took steps in the investigations at issue in this dispute to identify and avoid double remedies. On what legal basis would it have done so? What specific steps would U.S. law have authorized Commerce to take in order to avoid these double remedies? And if Commerce already had sufficient authority under U.S. law to take these actions, then why did Congress consider it necessary to enact section 2 of the *GPX* legislation?

26. The short answer to these questions is that Commerce had no authority under U.S. law to identify and avoid double remedies in NME investigations until section 2 of the *GPX* legislation was enacted. It is this fact, and this fact alone, that explains why Commerce took no action in any of these investigations to identify and avoid double remedies. Having failed to discharge its affirmative obligation under Article 19.3 to impose countervailing duties "in the appropriate amounts in each case", the countervailing duty determinations that China has identified in CHI-24 were necessarily inconsistent with this provision. It follows that these determinations were also inconsistent with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Second Written Submission of China

I. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Not "Published Promptly" as Required By Article X:1 of the GATT 1994

1. In China's view, there is relatively little left to be said with respect to China's claim under Article X:1 of the GATT 1994. The parties do not appear to dispute that the appropriate reference point for determining whether a measure was "published promptly" is the date on which the measure was "made effective". Because Section 1 of P.L. 112-99 has an "effective date" of 20 November 2006, but was not published until 13 March 2012, China considers it self-evident that the United States did not publish this measure "promptly" as required by Article X:1.

2. Contrary to the positions that it took in *EEC – Apples (US)* and *EC – IT Products*, the United States now appears to argue that the term "made effective" refers to the date on which the measure at issue was formally "adopted" as a matter of municipal law. The United States is trying to convince the Panel that a measure with an "effective date" of 20 November 2006 was actually "made effective" on 13 March 2012. This is, needless to say, an uphill struggle.

3. The United States was right in *EEC – Apples (US)* and *EC – IT Products*, and it is wrong in the present dispute. More importantly, both of those panel reports reflect a proper interpretation and application of the requirements of Article X:1. The term "made effective" under Article X:1 refers to the date on which a measure became operative in practice, not the date on which it was "formally promulgated" or "formally 'entered into force'". This includes, as in *EEC – Apples (US)*, measures that have an expressly retroactive effective date, such as the measure at issue in the present dispute. Were that not the case, the obligation under Article X:1 to publish measures "promptly in such a manner as to enable governments and traders to become acquainted with them" would be "meaningless", as the panel in *EEC – Apples (US)* found in respect of the materially indistinguishable requirement in Article XIII:3(c).

4. The panel in *EEC – Apples (US)* found that publication of a measure two months after it was made effective was not consistent with Article X:1, while the panel in *EC – IT Products* found that publication of a measure eight months after it was made effective was not consistent with Article X:1. It follows, *a fortiori*, that the publication of Section 1 of P.L. 112-99 nearly six years after it was made effective cannot be considered "prompt" within the meaning of Article X:1. For this reason, the Panel should find that the United States has acted inconsistently with its obligations under this provision.

II. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Enforced Prior to its Official Publication in Violation of Article X:2 of the GATT 1994

A. Section 1 of P.L. 112-99 Is the Relevant Measure at Issue, and It Is a "Measure of General Application"

5. The first interpretative issue relating to Article X:2 need not detain the Panel for long. While the United States concedes, as it must, that Section 1 of P.L. 112-99 is a "measure of general application" within the meaning of Article X:2, it is now trying to suggest that Section 1 is simultaneously *not* a "measure of general application" in relation to countervailing duty proceedings initiated prior to its official publication on 13 March 2012. The United States asserts that because those prior proceedings "were limited and known as of the date of enactment of the measure", it is "difficult to see" how Section 1 is a measure of general application "in relation to" those proceedings.

6. Aside from being factually inaccurate, this is a frivolous suggestion. Section 1 of P.L. 112-99 is the relevant measure of general application. It does not need to be a measure of general application "in relation to" a particular set of proceedings or imports. Section 1(b) of P.L. 112-99 is not a distinct "measure", but rather evidence on the face of the statute that the new Section 701(f) of the Tariff Act was enforced before its official publication. It cannot be the case that Section 1 of P.L. 112-99 is a measure of general application for some purposes, but not for other purposes.

7. In any event, even if Section 1(b) of P.L. 112-99 were deemed to apply to a known set of investigations and products, the *exporters* subject to the resulting countervailing duty orders constitute "an unidentified number of economic operators". This is because any exporter – past, present, or future – that exports the goods subject to the countervailing duty orders will be liable for the assessment of countervailing duties. Accordingly, even if it were possible to view Section 1(b) as a distinct "measure", it would still constitute a "measure of general application".

B. Section 1 of P.L. 112-99 Effects an Advance in a Rate of Duty and Imposes a New or More Burdensome Requirement or Restriction on Imports

8. The next interpretative question before the Panel is whether Section 1 of P.L. 112-99 "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[es] a new or more burdensome requirement, restriction or prohibition on imports".

9. As suggested by question 54 from the Panel, Article X:2 requires some baseline of comparison to determine if a measure "advance[s]" a rate of duty or charge, or imposes a requirement, restriction or prohibition on imports that is "new or more burdensome". These are, necessarily, relative concepts.

10. The United States does not appear to dispute, at least not with credible legal arguments, that Section 1 of P.L. 112-99 could be considered to have had one or more of the effects described by Article X:2 *if* the relevant baseline of comparison under Article X:2 is prior municipal law, and *if* prior municipal law is understood to have prohibited the imposition of countervailing duties on imports from nonmarket economy countries. Its principal defence is, instead, that Section 1 of P.L. 112-99 did not have these effects because the USDOC's "approach previous to P.L. 112-99 [had] been to apply the U.S. CVD law to China." This is the "existing approach" baseline advocated by the United States under Article X:2.

11. The U.S. "existing approach" baseline, if accepted, would render Article X:2 a nullity. This is because the act of enforcing a measure of general application before its official publication – the very thing that is prohibited by Article X:2 – would itself be an "approach". In *EC – IT Products*, for example, various EC customs authorities had the "approach" of classifying certain types of goods so that they were no longer eligible for duty-free treatment. By the U.S. logic, there would have been no violation of Article X:2 when the EC later published a measure of general application providing for this classification, since the measure did not advance a rate of duty in relation to the "approach" that was already in place. This would amount to relying on a violation of Article X:2 in order to claim that no violation of Article X:2 occurred – an obviously absurd result.

12. Moreover, the context of Article X:2 plainly supports the conclusion that the relevant baseline for comparison is the prior municipal law of the importing Member, as reflected in its previously published measures of general application. Under Article X:1, Members are required to publish promptly measures of general application affecting the conduct of international trade. It is these previously published laws and regulations, including judicial decisions interpreting those laws and regulations, that form the body of municipal law that governments and traders rely upon to determine the consequences of their actions. These are the laws and regulations that governments and traders expect the importing Member to apply in a uniform, impartial, and reasonable manner, as required by Article X:3(a), and to be enforced by the importing Member's domestic courts, as required by Article X:3(b).

13. Within this context, the relevant inquiry under Article X:2 is whether a measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports in relation to the prior municipal law that governments and traders could have ascertained from their review of published measures of general application. A measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports when it has these effects in relation to the rates of duty, requirements, or restrictions that were ascertainable from prior published law. Article X:2 prohibits the enforcement of these types of measures before their official publication precisely because they constitute a material deviation from the municipal law that governments and traders expect the importing Member to apply in respect of their conduct, and that they expect to be enforced by the importing Member's domestic courts.

14. Prior municipal law is, moreover, the only baseline under Article X:2 that can be objectively determined by a panel and that is properly attributable to the importing Member as a unitary subject of international law. Municipal law is an objective fact that can be adduced by evidence demonstrating the scope and meaning of the law. As the Appellate Body has repeatedly observed,

> Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.

These are the sources of evidence that will allow a panel reviewing a claim under Article X:2 to determine the meaning of prior municipal law and the meaning of municipal law subsequent to the publication of the measure at issue, to the extent that those meanings are contested. In contrast, "Commerce's understanding" of the prior municipal law does not establish what that law was, especially in light of the fact that this "understanding" of the law was not shared by the highest court of the United States specifically charged with interpreting the meaning of the Tariff Act. Under these circumstances, "Commerce's understanding" does not provide an objective basis to determine what the law *of the United States* was prior to the enactment of P.L. 112-99. This can only be determined by reference to valid sources of evidence of municipal law.

15. Despite the U.S. contention that the text of the measure at issue in this dispute is "irrelevant" to whether that measure had any of the effects described by Article X:2, it is axiomatic that any determination of the meaning of municipal law must begin with the "text of the relevant legislation or legal instruments". China explained in detail in its oral statement at the first meeting why it is evident on the face of Section 1 that it advances a rate of duty and imposes a new or more burdensome requirement or restriction on imports in relation to the Tariff Act as it previously existed.

16. In China's view, the Panel's evaluation of whether Section 1 of P.L. 112-99 is within the scope of Article X:2 could end at this juncture. However, because the United States has continued to make assertions about the meaning of prior municipal law (despite its apparent irrelevance under the U.S. interpretation of Article X:2), and because the Appellate Body has observed that proof of municipal law "may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars", China will proceed to examine these other sources of evidence.

17. China will begin with the repeated U.S. assertion that Section 1 of P.L. 112-99 was "a clarification of U.S. law". For the reasons explained in response to question 52 from the Panel, China does not consider the "change" versus "clarification" issue to be determinative of the issue before the Panel under Article X:2. Furthermore, as the party seeking to establish that Section 1 of P.L. 112-99 was "clarifying" legislation, as that concept is sometimes understood as a matter of municipal U.S. law, it is incumbent upon the United States to provide proof of this assertion. The United States has provided no such evidence.

18. Notwithstanding the fact that the United States has failed to meet its burden of proof, and notwithstanding the ultimate irrelevance of the "change" vs. "clarification" issue, China has included as an exhibit to this rebuttal submission the expert report of Professor Richard H. Fallon, the Ralph S. Tyler Professor of Constitutional Law at Harvard Law School. Whatever the relevance of this issue, China has demonstrated, and Professor Fallon's expert report confirms, that Section 1 of P.L. 112-99 was not a "clarification" of the Tariff Act, as this concept is sometimes understood as a matter of U.S. law.

19. China will now turn to the attempt by the United States to have the Panel disregard the decisions of the Federal Circuit in the *Georgetown Steel* and *GPX* cases as definitive interpretations of the meaning of U.S. law. The United States has gone to extraordinary lengths in this dispute to convince the Panel that those decisions of the highest U.S. court specifically tasked with interpreting the Tariff Act somehow do not constitute evidence of what the Tariff Act meant prior to the enactment of Section 1 of P.L. 112-99.

20. For the reasons that China has already indicated, it is unclear why the United States has bothered to engage in this effort. The U.S. position appears to be that, even if it were beyond all doubt or cavil that prior municipal law had been interpreted by domestic courts to prohibit the application of countervailing duties to imports from nonmarket economy countries, it still would have been consistent with Article X:2 for the United States to enforce Section 1 of P.L. 112-99 in respect of imports that occurred prior to its official publication. This is not only because of its absurd interpretation of what it means to enforce a measure of general application prior to its official publication, which China will address in Part C below. It is also because the United States considers the relevant baseline under Article X:2 to be whatever "existing approach" was in place prior to the official publication of the measure, without regard to whether this "approach" had any basis in existing municipal law.

21. It is understandable why the United States has been forced to take such an extreme and untenable position. The United States has presented no relevant evidence – literally none – to demonstrate that prior municipal law permitted or required the application of countervailing duties to imports from nonmarket economy countries. Separate and apart from its "clarification" theory, the "evidence" advanced by the United States consists entirely of assertions about the meaning of prior municipal law that the U.S. administration presented to its own domestic courts, which those courts considered and found to be unpersuasive. The United States has offered no reason why this Panel should accept these assertions as evidence of prior municipal law, and there is no conceivable reason why it should.

22. China has demonstrated by reference to the Federal Circuit's decisions in the *Georgetown Steel* and *GPX* cases that, prior to the enactment of Section 1 of P.L. 112-99, the Tariff Act was consistently interpreted by the Federal Circuit – the highest U.S. court specifically charged with its interpretation – as prohibiting the imposition of countervailing duties on imports from nonmarket economy countries. China has thoroughly rebutted the U.S. mischaracterizations of these decisions in response to question 51(a) from the Panel, but will respond here to one additional mischaracterization put forward by the United States in its own responses to the Panel's questions.

23. In response to question 16 from the Panel, the United States repeats its mantra that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", but it then goes on to assert that "[t]he U.S. Federal Circuit's legally binding decision in *GPX VI* confirms this fact." This is a remarkable assertion.

24. As China has previously explained, the Federal Circuit's decision in *GPX VI* begins by reiterating its prior holding in *GPX V*, and then takes that prior holding as its baseline for evaluating the implications of the subsequent enactment of P.L. 112-99. Despite multiple requests by the United States, the Federal Circuit declined to vacate its prior decision in *GPX V*, thereby signalling that it considered its interpretation of prior U.S. law to be authoritative and precedential. It is ludicrous for the United States to claim that the Federal Circuit's decision in *GPX VI* "confirms" that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", when in fact it confirms just the opposite.

25. But there is no need to belabour these points further. In his expert report, Professor Fallon explains why "*GPX VI*, through its reliance on the holding of *GPX V* and otherwise, reflects a judicial determination that P.L.112-99 substantively changed the meaning of Section 701(a) of the Tariff Act to make it retroactively applicable to nonmarket economies and to goods from nonmarket economies." Professor Fallon lays out in detail why the Federal Circuit's decisions in *GPX V* and *GPX VI*, taken together, establish the meaning of the Tariff Act both before and after the enactment of P.L. 112-99. Professor Fallon's detailed examination of the legal status and significance of the Federal Circuit's decisions in *GPX V* and *GPX VI* should be sufficient to lay this matter to rest.

C. The United States Enforced Section 1 of P.L. 112-99 Prior to its Official Publication on 13 March 2012

26. The final interpretative issue before the Panel in respect of China's claim under Article X:2 is whether the United States enforced Section 1 of P.L. 112-99 before its official publication on 12 March 2012. For the reasons that China has explained, China considers it self-evident from Section 1(b) of P.L. 112-99 that the United States enforced the new Section 701(f) of the Tariff Act

before its official publication. This is because Section 1(b), by its express terms, applies the new Section 701(f) to all countervailing duty proceedings initiated on or after 20 November 2006, nearly five and a half years before its official publication.

27. The U.S. submissions to date establish that the United States has no credible response to this aspect of China's claim under Article X:2. Aside from its half-hearted and baseless attempt to draw a distinction between what it means to "apply" a measure and to "enforce" a measure, the United States has no basis for refuting China's demonstration that P.L. 112-99 was enforced prior to its official publication. This has forced the United States to defend its conduct by offering interpretations of Article X:2 that bear no resemblance to the actual text of the treaty, properly interpreted in light of its context and object and purpose. Most notable in this regard are its assertion that Article X:2 is only designed to ensure that measures are "not kept secret from foreign governments and traders" and its assertion that "Article X:2 neither prohibits nor permits measures of general application from applying to events that occurred prior to the date of publication".

28. While the U.S. position remains unclear, it appears to be its position that Article X:2 applies only in the circumstance in which a Member formulates a measure of general application (*e.g.* in "secret" form), and then begins to apply this measure to imports before it is officially published. It is not a problem, apparently, when governments *flagrantly and openly* produce the identical result by applying a measure to events or conduct that had already occurred at the time of its official publication. Article X:2 is, apparently, a provision of the GATT that is violated only by governments with bad trade lawyers.

29. The United States offers no interpretative support whatsoever for its nonsensical interpretation of Article X:2. Instead, its argument is based entirely on an outlandish mischaracterization of the Appellate Body report in *US – Underwear*. Contrary to the U.S. assertion, the Appellate Body in *US – Underwear* did not remotely suggest that the panel had misinterpreted Article X:2 when it had found that Article X:2 precluded the application of a measure to actions or events that occurred prior to its official publication. On the contrary, the Appellate Body went out of its way to affirm that this understanding of Article X:2 was correct, and one that was "appropriately protective" of the purposes that Article X:2 is meant to serve.

D. Conclusion to Part II

30. For the reasons set forth in this Part II, China has demonstrated that Section 1 of P.L. 112-99 is a measure of general application effecting an advance in a rate of duty or other charge on imports, and imposing a new or more burdensome requirement or restriction on imports, which the United States enforced before its official publication on 13 March 2012. Accordingly, the Panel should find that the United States has acted inconsistently with its obligations under Article X:2 of the GATT 1994.

III. The United States Has Failed to Rebut China's Demonstration that the United States Acted Inconsistently with Article X:3(b) of the GATT 1994

31. China has demonstrated that the United States acted inconsistently with Article X:3(b) by changing the law applicable to countervailing duty proceedings initiated prior to 13 March 2012 and directing domestic courts to apply this new rule of law to cases under review. As with its response to China's other claims under Article X, the United States has been forced to advance wholly unsustainable interpretations of Article X:3(b) in order to mount any sort of defence. The proposed U.S. interpretations, if accepted, would deprive Article X:3(b) of any practical meaning and gut the obligation of Members to ensure that the decisions of its courts and tribunals are enforced.

32. According to the United States, Article X:3(b) imposes nothing more than what it calls an obligation of "structure". Once a Member has put in place a "structure" of independent tribunals to review and correct agency action, it has no obligation at all to ensure that *specific* court decisions are actually "implemented by" and "govern the practice of" the government agency whose action is subject to review.

33. Needless to say, this is not a credible interpretation of the obligations under Article X:3(b). To begin with, the U.S. "structural" interpretation is based exclusively on the first sentence of Article X:3(b), but it is the *next* sentence of Article X:3(b) that establishes the relevant obligation in this dispute. That sentence provides that:

> Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions *shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers.

34. As is clear from the use of the word "shall" in the second sentence of Article X:3(b), this is a separate and mandatory obligation. This sentence has moved beyond the establishment and maintenance of independent tribunals and is now discussing what effects must be given to the decisions of those tribunals in order for a Member to comply with Article X:3(b). This obligation relates to the "decisions" of independent tribunals, i.e. their *actual* decisions, not just their decisions in some abstract legal "framework". This is obvious from the first part of the sentence, but it is fully confirmed by the proviso that follows: "*[p]rovided* that the central administration of such agency may take steps to obtain a review of *the* matter in another proceeding if there is good cause to believe that *the* decision is inconsistent with established principles of law or the actual facts." The use of the word "the" in this proviso confirms that the obligation in this sentence refers to *specific* "decisions", not just "decisions" in the abstract.

35. Notwithstanding its "structural" interpretation of Article X:3(b), the United States continued to argue in its responses to Panel questions that the Federal Circuit's decision in *GPX V* was not a "decision" in the sense of Article X:3(b). The United States contends that "[a] 'decision' requires that a judicial opinion must put an end to or conclude the tribunal's consideration of the proceeding and result in a final judgment that is conclusive. In order to be conclusive, a decision must have legal effect to end the proceeding." The United States does not reconcile this interpretation with the fact that Article X:3(b) recognizes that a "decision" may not be "final" in the sense that it suggests. The United States argues that a contrary understanding of what a "decision" means would require Members to implement *any* decision of a court or tribunal "immediately", but Article X:3(b) already holds open the possibility that a decision of a court of first instance or an intermediate court of appeal can be subject to further appeal, in which case the Member's obligation to implement the decision would remain contingent upon the outcome of that appeal.

36. The Federal Circuit's decision in *GPX V* was a decision that was subject to the obligations of the United States under Article X:3(b). Under Article X:3(b), the United States was required to ensure that the USDOC implemented and was governed in its practice by this decision, unless one of the two exceptions set forth in Article X:3(b) occurred. In this case, however, the event that prevented the implementation of the decision in *GPX V* was the intervention of the national legislature to change the law applicable to the underlying agency action, retroactively, and thereby direct the outcome of the appeal. As China has previously explained, this is not one of the exceptions to the obligation set forth in Article X:3(b) with respect to the implementation of the decisions of courts or tribunals.

37. The U.S. response to China's argument appears to be limited to its assertion that Article X:3(b) "does not define the relationship between legislatures and the judicial branch". It appears to be the U.S. position that because Article X:3(b) does not expressly proscribe or otherwise address the possibility of legislative intervention in ongoing judicial proceedings, it must be the case that such intervention is permitted under Article X:3(b).

38. This position has no basis in the text of Article X:3(b). It is an accepted canon of legal construction that "to express or include one thing implies the exclusion of the other or of the alternative". Because Article X:3(b) states that the decisions of courts or tribunals "*shall* be implemented by, and *shall* govern the practice of, such agencies *unless* an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers", it is evident under this canon of construction that there are no other exceptions to this requirement. Article X:3(b) does not contemplate the intervention by a national legislature to change the outcome of a judicial proceeding and thereby prevent the implementation of a decision. This action is therefore prohibited.

39. The Government of China and interested Chinese parties strongly and consistently objected when the USDOC began to apply countervailing duties to imports from China in 2006, on the grounds that this action was not in accordance with U.S. municipal law. They availed themselves of their right to judicial review of the USDOC's actions and ultimately prevailed in their understanding of U.S. law as it then existed. Consistent with Article X:3(b), and consistent with the principles of fairness and due process inherent in Article X, they had every expectation that a judicial decision in their favour would be implemented by the USDOC and would govern the practice of the USDOC in other proceedings that raised the same issue. It is of no solace that, as the United States notes, the U.S. Congress does not "routinely" go about depriving foreign parties of their litigation victories in U.S. courts. It happened here, and it is inconsistent with Article X:3(b), properly interpreted.

IV. The United States Has Failed to Rebut China's Demonstration that the USDOC Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

A. The Panel Can and Should Adopt the Panel's Factual Finding in DS379

40. While the Appellate Body has said that "factual findings made in prior disputes do not determine facts in another dispute", it also has recognized that "if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings." For the reasons China explained in response to Panel question 78, the situation the Appellate Body described in *US – Continued Zeroing* is precisely what the Panel confronts in this case. The factual question facing the Panel in this dispute is the exact question that was confronted by the panel in DS379, the underlying NME methodology that is the subject of that factual inquiry is identical, and the dispute is between the same parties.

41. The panel in DS379 concluded that "the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once", and provided a detailed account of its reasoning in paragraphs 14.67 to 14.75 of its report.

42. The United States elected not to appeal the panel's factual finding regarding the likelihood of the double remedy. As China demonstrated in its response to Panel question 78, the USDOC itself has since confirmed the accuracy of that finding through its measures taken to comply with the recommendations and rulings of the DSB in relation to the dispute in DS379. Nonetheless, in response to question 78 from the Panel, the United States argues that the Panel should not rely on the panel's factual finding in DS379 because it rests upon "a flawed premise that domestic subsidies are 'likely' to lower export prices to some degree".

43. China notes that the arguments presented by the United States in support of its contention that domestic subsidies may not result in a reduction in export price are exactly the same arguments that the United States presented to the panel in DS379. The panel properly concluded that "[t]aking both sides of the dumping margin equation into consideration" – i.e. looking at normal value and export price together – did not alter the panel's prior conclusion that a double remedy is likely to arise from the replacement of the producer's actual, subsidized costs with unsubsidized costs of production. Using the wholly reasonable assumption that it would be "the rare case" when domestic subsidies did not have some effect on export prices, the resulting dumping margin would "once again" reflect not only "price discrimination (dumping), but also … subsidies that were granted to the investigated producer."

44. For all of these reasons, the panel's conclusion that "at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology" is unassailable.

B. The United States Has Presented No "Cogent Reasons" for the Panel to Disregard the Appellate Body's Finding Under Article 19.3

45. China has described the Appellate Body's interpretation of Article 19.3 of the SCM Agreement in DS379 at length in both its first written submission and its oral statement at the first

substantive meeting of the parties. In brief, the Appellate Body in DS379 held that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record."

46. The Appellate Body has made clear that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Nonetheless, the United States argues that the Panel should disregard the Appellate Body's findings in DS379 in light of the arguments that it has presented in this dispute that were "not considered" by the Appellate Body.

47. The allegedly "new" arguments that the United States has presented in Sections VI(B)(1) and (2) of its first written submission relate to the ordinary meaning of the relevant terms in Article 19.3, when read in the context of both Article 19.3 as a whole and the remaining Article 19 provisions. The problem with these "new" arguments is that the United States ignores that the Appellate Body engaged in precisely the same ordinary meaning and contextual analysis in its interpretation of Article 19.3, and arrived at an understanding of that provision diametrically opposed to that advocated by the United States. It is the Appellate Body's legal interpretation, and not the contrasting view of a single Member, that the Panel is expected to follow in this dispute.

C. China Has Demonstrated that the USDOC Acted in Violation of Article 19.3 in the Investigations at Issue in this Dispute

48. The parties' interventions at the first meeting of the Panel and their answers to the Panel's questions establish their agreement that the *Kitchen Shelving* determinations in Exhibits USA-99 and USA-100 are representative of how the USDOC addressed the issue of overlapping remedies in all of the challenged determinations. Accordingly, if the USDOC's approach in the *Kitchen Shelving* determinations is the same as the approach that it took in the investigations at issue in DS379, then all of the determinations at issue are inconsistent with Article 19.3. This conclusion necessarily follows from the Appellate Body's finding that in the investigations at issue in DS379, the USDOC acted in violation of Article 19.3 by failing to investigate and avoid double remedies.

49. In point of fact, the USDOC's determinations in the *Kitchen Shelving* investigation are carbon copies of its determinations in the DS379 investigations, as China laid out in detail in response to question 79(b) from the Panel. The United States could not, and does not, contend otherwise. Instead, the United States argues in response to question 79(b) from the Panel that "by fully considering the factual evidence and arguments made by respondent parties, as illustrated by Exhibits USA-99 and USA-100, Commerce discharged any alleged burden to determine whether overlapping remedies would arise." The United States further argues that Chinese respondents "never presented, or attempted to present, any evidence concerning the actual extent to which the remedies may have overlapped".

50. These are the same arguments that the United States made in DS379, and that were rejected by the Appellate Body in that dispute. In DS379, the Appellate Body agreed with China that the investigating authority has an affirmative obligation to investigate and make its own determination about the existence of any double remedy. In paragraph 602 of its report, the Appellate Body explained that in order to make such a determination, an investigating authority would need to "solicit[]" relevant facts and "base its determination on positive evidence in the record".

51. The obligation on the investigating authority to solicit relevant facts and make a determination based on positive evidence is not contingent on the respondent's presentation of "evidence concerning the actual extent to which the remedies may have overlapped". Rather, it stems from the panel's finding, endorsed by the Appellate Body, that double remedies are "likely" when the concurrent anti-dumping duties are calculated on the basis of an NME methodology. It is not enough for the investigating authority to "fully consider[] the factual evidence and arguments made by respondent parties" if the investigating authority never solicits relevant evidence in the first place.

52. The United States has not attempted to argue that the USDOC actually engaged in the kind of investigation that the Appellate Body has said is required under Article 19.3 in any of the determinations at issue. China submits that the uncontested failure of the USDOC to investigate and avoid double remedies in the investigations at issue establishes a clear violation of Article 19.3 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the Second Meeting of the Panel

Article X:1

1. The U.S. defence of China's claim under Article X:1 is based on an interpretation that is contrary to its ordinary meaning, contrary to the manner in which this provision has been interpreted by prior panels, and contrary to interpretations that the United States has advocated in other disputes – including another dispute presently underway.

2. In *EC – IT Products,* the United States argued, and the panel agreed, that the term "made effective" in Article X:1 refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." Consistent with this holding, the United States is currently advocating in another dispute that the term "made effective" refers to the date on which a measure "is first rendered operative or applied in practice, or formally promulgated, *whichever is earlier*."

3. By its express terms, section 1 of the GPX legislation was made effective on 20 November 2006. This is the date on which the new section 701(f) of the Tariff Act had legal effect in practice, by supplying a statutory basis for countervailing duty investigations initiated on or after that date. As the United States successfully argued in *EEC – Dessert Apples,* a measure of general application is not "published promptly" under Article X:1 when it is backdated to apply to events that have already occurred.

4. In the present dispute, by contrast, the United States has taken the position that "Article X:1 requires that measures be published promptly *upon their adoption*". It is clear why the United States has been forced to take this position – it has no other option but to depart from the interpretation of Article X:1 that it has correctly advocated in other disputes. Under a proper interpretation of Article X:1, there simply is no justification for publishing a measure of general application nearly six years after it was made effective.

Article X:2

5. There are two key issues in dispute with respect to the proper interpretation and application of Article X:2. The first is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge on imports, or imposed a new or more burdensome requirement on imports. The second is what it means to enforce a measure before its official publication.

6. With regard to the first issue, the U.S. second written submission continues to be confused and internally contradictory. Most importantly, it remains unclear to China whether the United States considers the meaning of its own municipal law to be relevant to the Panel's analysis under Article X:2. The United States continues to assert that the meaning of U.S. law prior to the enactment of the GPX legislation is irrelevant to the Panel's analysis because Commerce was already imposing countervailing duties on imports from China. Therefore, according to the United States, the enactment of the GPX legislation did not result in any change in Commerce's treatment of these imports. At the same time, however, the United States is still trying to convince the Panel that U.S. law permitted the application of countervailing duties to imports from China prior to the enactment of the GPX legislation.

7. It seems to China that the United States lacks the courage of its convictions. If the only relevant fact under Article X:2 is that Commerce was already applying countervailing duties to imports from China, then the United States should be completely indifferent to the meaning of its prior municipal law. It is altogether unclear, then, why the United States continues to argue in its second written submission that imports from China "were already subject to the U.S. CVD law" prior to the enactment of the GPX legislation. The United States has devoted a great deal of effort to trying to convince the Panel of this assertion, for no apparent reason.

8. It is clear, though, why the United States has been forced to tack back and forth between these contradictory positions. If the relevant baseline under Article X:2 is prior municipal law,

properly determined as a question of fact, the United States must realize that it has no evidence to support its assertion that U.S. law previously provided for the imposition of countervailing duties on imports from NME countries. This explains, for example, why the United States has taken the position that the text of the GPX legislation is "irrelevant" to the Panel's analysis under Article X:2 – it knows that any objective examination of the statute leads to the conclusion that the statute amended the Tariff Act to provide for the application of countervailing duties to imports from NME countries. The United States does not want prior municipal law to be the baseline under Article X:2, and it does not want the Panel to examine the text of the measure at issue in this dispute, because it is obvious that the GPX legislation had the types of effects that place it squarely within the scope of this provision.

9. At the same time, the United States must realize that its proposed interpretation of Article X:2 – that the relevant baseline is whatever Commerce's "existing approach" happened to be – is not viable as a matter of treaty interpretation. This is why the United States continues to argue about the meaning of U.S. law prior to the enactment of the GPX legislation. The problem for the United States, however, is that it has no evidence whatsoever to support its assertions about the meaning of prior U.S. law. Its "evidence" seems to amount to nothing more than an implicit assertion that U.S. law is synonymous with whatever Commerce happens to be doing in practice at any given point in time.

10. The United States asserts, for example, that "the record is clear that the GPX legislation did not change or otherwise affect *Commerce's existing and well-known treatment* of the imports subject to the 27 proceedings at issue in this dispute. That is, *the U.S. CVD* law has always applied to these imports." The second sentence in this statement is an obvious non-sequitur. As subsequent events confirmed, "Commerce's existing and well-known treatment" of imports from China was not the same as "the U.S. CVD law" as it then existed. The fact that Commerce was applying countervailing duties to imports from China does not mean that "the U.S. CVD law … applied to these imports". U.S. law is not synonymous with Commerce's "treatment" of imports.

11. What this non-sequitur illustrates, however, is the importance of evaluating the issues under Article X:2 from the standpoint of the United States as a Member of the WTO, not from the standpoint of the United States Department of Commerce as a single agency of the United States government. Here at the WTO, what matters for the purposes of Article X:2 is not what Commerce was doing in practice, or how the members of the U.S. delegation believe that U.S. law should have been interpreted. What matters is what the law of the United States was prior to the enactment of section 1 of the GPX legislation, as reflected in published measures of general application. For the reasons that China set forth in its second submission, this is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge, or imposed a new or more burdensome requirement on imports. This baseline must be determined by reference to valid sources of municipal law, not the mere assertions of the United States before this Panel.

12. On one side of this dispute, China has demonstrated by reference to the text of the measure at issue that it effected an advance in a rate of duty or other charge, and imposed a new or more burdensome requirement on imports. China has further demonstrated by reference to authoritative decisions of the United States Court of Appeals for the Federal Circuit that U.S. law did not previously provide for the application of countervailing duties to imports from NME countries. On top of that, China has thoroughly rebutted the unsubstantiated U.S. assertion that the GPX legislation was merely a "clarification" or "confirmation" of U.S. law as it always existed. On the other side of this dispute, by contrast, the United States has refused to engage with the text of the measure at issue, and has offered no factual evidence to support its assertions about the meaning of prior U.S. law. There is no factual support at all for its assertion that U.S. law provided for the application of countervailing duties to imports from NME countries prior to the enactment of section 1 of the GPX legislation. For these reasons, it is clear that section 1 of the GPX legislation is a measure of the type described by Article X:2.

13. The second major issue in dispute in relation to Article X:2 is whether the United States enforced this measure before it was officially published on 13 March 2012. This should not be a hard question to answer – it is obvious from basic principles of treaty interpretation that Article X:2 precludes the application of measures falling within its scope to events that occurred prior to its official publication. The panel and Appellate Body easily recognized this point in *US – Underwear*. For the reasons that China has explained, the fact that Article X:2 precludes the

application of a measure to events that occurred prior to its official publication follows from the undisputed ordinary meaning of what it means to "enforce" a measure, from the interpretation of Article X:2 within the broader context of Article X, and from a proper consideration of the object and purpose of the GATT 1994.

14. Not having any meaningful response to these points, the United States has been forced to concoct an elaborate and confusing interpretation of Article X:2 that has something to do with what the United States calls "secret measures". To the extent that China can even figure out what the United States is talking about, the proposed U.S. interpretation of Article X:2 appears to elevate form over substance, and would appear to render Article X:2 entirely redundant of the prompt publication requirement under Article X:1. With no interpretative support for this result, the United States has based its interpretation of Article X:2 on a clear mischaracterization of the Appellate Body's holdings in *US – Underwear,* a mischaracterization that China has now thoroughly debunked in its second submission. The panel and Appellate Body holdings in *US – Underwear* are fully consistent with China's interpretation of Article X:2, not the "secret measures" interpretation advocated by the United States.

15. In sum, it is clear on the face of the GPX legislation itself that it advanced a rate of duty or other charge on imports and imposed a new or more burdensome requirement on imports, and that the United States enforced this measure before its official publication in violation of Article X:2. As China has explained throughout this dispute, section 1 of the GPX legislation is a paradigmatic example of what Article X:2 precludes – the application of a measure to events that occurred prior to its official publication. The application of section 1 to countervailing duty investigations initiated prior to its official publication was plainly inconsistent with this provision.

Article X:3(b)

16. China has already responded in detail to the assertion by the United States that Article X:3(b) does not require a Member to ensure that the decisions of its courts or tribunals are actually enforced. The contention by the United States that it would not be inconsistent with Article X:3(b) for Commerce "to flout a final decision of the U.S. federal courts" is truly one of the more remarkable positions that the United States has taken in this dispute. China has demonstrated that the "structural" interpretation of Article X:3(b) that underlies this contention is incorrect, and will not discuss it further here.

17. What the United States has failed to come to terms with is the fact that Article X:3(b) prescribes exactly what may happen to a decision of a court or tribunal. As is evident from the requirement that such decisions "*shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction", there are no other exceptions to this requirement, other than the collateral challenge proviso. The United States has failed to explain how the intervention of the United States Congress to change the outcome of an ongoing judicial proceeding was consistent with this requirement. Nor has the United States explained how it can possibly be consistent with the purpose of independent judicial review to allow this to occur.

18. As with its other proposed interpretations of Article X, the United States is effectively trying to read Article X:3(b) out of the GATT by reducing it to a nullity. The Panel must reject this interpretation.

Article 19.3 of the SCM Agreement

19. China has demonstrated that the 26 countervailing duty determinations at issue in this dispute are indistinguishable from those that the Appellate Body found to be inconsistent with Article 19.3 of the SCM Agreement in DS379. In each of the determinations at issue, Commerce declined to take any steps to investigate and avoid the double remedies that were likely to result from the application of countervailing duties in conjunction with anti-dumping duties determined under the U.S. nonmarket economy methodology. Likewise, in the parallel anti-dumping determinations, Commerce made no effort to investigate the problem of double remedies and declined to take any steps to avoid double remedies for precisely the same reasons that it had cited in the parallel anti-dumping determinations in DS379.

20. The United States does not seriously contend that there is any material difference between the determinations at issue in DS379 and those at issue here. In fact, at the last meeting of the Panel, the United States submitted the CVD and AD determinations in the *Kitchen Shelving* investigations, which are identical to those at issue in DS379, and conceded that the other determinations at issue in this dispute are the same. Thus, there should be no disagreement between the parties that the determinations at issue in the present dispute are on all fours with the determinations that were found to be inconsistent with Article 19.3 in DS379.

21. The U.S. defence of these determinations comes down to two propositions, one factual, and the other legal. The factual proposition is that the Panel should decline to find that double remedies were likely to occur in the investigations at issue, even though the methodologies that Commerce used in these investigations were identical in all respects to those at issue in DS379. The United States has tried to dress this up as a series of speculations about why a double remedy might not occur under certain circumstances. As China has demonstrated, however, the panel in DS379 addressed these same speculations and found that they did not detract from its finding that double remedies were likely to occur.

22. In DS379, the panel's bottom-line conclusion, even after taking the U.S. speculations into account, was that "at least some double remedy will likely arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology." The United States opted not to challenge these factual findings before the Appellate Body.

23. The United States has presented the Panel with no reason whatsoever to reach a different factual conclusion than the panel in DS379. It has presented no reason for the Panel to believe, for example, that double remedies were any less likely to occur on the facts of these investigations than on the facts of those at issue in DS379. And since the panel in DS379 made those findings, the United States has subsequently concluded in its compliance determinations in that dispute that 63 per cent of the input subsidies at issue had been remedied twice. Notably, the United States found the same amount of double remedy across four different investigations involving four different products. The United States has offered no reason to believe that a similar factual conclusion would not be warranted with regard to the investigations and products at issue here. In this way, the United States has fully confirmed the factual accuracy of the panel's conclusion that "at least some double remedy will likely arise" from the concurrent application of countervailing duties and anti-dumping duties determined under the U.S. NME methodology.

24. This factual finding – that at least some double remedy is likely to occur – is what formed the basis for the Appellate Body's legal conclusion that the United States has an affirmative obligation under Article 19.3 to investigate and avoid these likely double remedies. As it did in DS379, the United States has tried to argue in the present dispute that the burden fell upon the Chinese respondents to demonstrate the existence and extent of a double remedy. However, as China explained in its second submission, the Appellate Body expressly considered and rejected this argument, holding that the United States has an affirmative obligation under Article 19.3 to solicit relevant facts pertaining to the issue of double remedies and reach a conclusion with regard to this issue that is based on positive evidence in the record. As I explained a moment ago, there is absolutely no indication in any of the determinations at issue in this dispute that Commerce discharged this affirmative obligation.

25. This brings me to the legal proposition on which the United States has based its defence – that the Panel should decline to follow the interpretation of Article 19.3 that the Appellate Body adopted in its report in DS379. For the reasons that China has explained at length, the United States has failed to present any cogent reasons for this Panel to adopt a contrary interpretation of Article 19.3. All of the so-called "new arguments" that the United States has put forward concerning the interpretation of Article 19.3 amount to nothing more than taking issue with the Appellate Body's detailed interpretative analysis of this provision. The Appellate Body engaged in a thorough textual and contextual analysis of Article 19.3 and concluded that it imposes an affirmative obligation upon the United States to investigate and avoid the double remedies that are likely to occur in the NME context. It is this interpretation of Article 19.3 that the Panel is expected to follow, and it should do so here.

ANNEX B-2

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF THE UNITED STATES

Executive Summary of the First Written Submission of the United States of America

I. INTRODUCTION

1. The legislation of the U.S. Congress ("Congress") reaffirming the existing application of U.S. countervailing duty ("CVD") laws to imports from nonmarket economy countries ("NMEs"), or what is commonly known as the "*GPX* legislation," is fully consistent with U.S. obligations under Article X of the *General Agreement on Tariffs and Trade 1994* ("the GATT 1994"). China's claims under Article X of the GATT 1994 fail as a matter of fact and law. China's claims are based on a fundamental misunderstanding of U.S. CVD law and the effect of the *GPX* legislation. The law affirmed the U.S. Department of Commerce's ("Commerce") pre-existing approach to the application of the U.S. CVD law to NME countries such as China. It did not change or otherwise affect the approach that Commerce had been using in the challenged CVD proceedings. Rather, it maintained the *status quo* that existed prior to its enactment.

2. China also claims that 31 sets of determinations by the United States Department of Commerce are inconsistent with Article 19.3 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). China's claim that the United States acted inconsistently with Article 19.3 is baseless.

II. FACTUAL AND PROCEDURAL BACKGROUND

3. Despite its length, China's discussion of Commerce's application of the U.S. CVD law to imports from China is incomplete. The United States provides a summary of those facts which may be relevant to the claims that China has raised under the WTO Agreement.

4. First, any discussion of the U.S. CVD law must begin with the plain text of the law, which China fails to provide in its background section. The plain text of the law requires that Commerce must apply countervailing duties to any country where it can identify a countervailable subsidy. Second, a 1986 decision by a U.S. appellate court, *Georgetown Steel v. United States*, did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the U.S. appellate court in *Georgetown Steel* deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. In other words, the U.S. appellate court simply affirmed Commerce's broad discretion to find the existence of a countervailable subsidy. Third, China's assertion that following the *Georgetown Steel* decision, the existing U.S. law prohibited the application of the U.S. CVD law to NME countries fails as a matter of fact. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies. Fourth, in 2006, based on a petition from a U.S. domestic industry, Commerce initiated a CVD investigation on certain Chinese imports in which it determined that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s that it was no longer impossible to identify subsidies there. Fifth, the so-called *GPX* litigation is an on-going challenge to Commerce's approach in the U.S. domestic court system. One of the opinions issued in the middle of a string of judicial opinions in this litigation raised a differing view of what Congress intended in the U.S. CVD law. This view differed from previous court decisions and Commerce's existing application of the U.S. CVD law. The opinion, *GPX V*, however, is legally insignificant as it never became final. Finally, while the opinion was pending on appeal, Congress enacted the *GPX* legislation, which affirmed that the U.S. CVD law is applicable to all countries, including NME countries.

III. CHINA'S CLAIMS UNDER ARTICLE X:1 OF THE GATT 1994 ARE WITHOUT MERIT

5. China's claims under Article X:1 of the GATT 1994 rest not on a proper interpretation of the text of that provision, but on an implausible reading that would require publication before the

existence of a measure and substantive requirements governing the content of a measure. Such a reading is unfounded.

6. As an initial matter, China fails to state which of the categories listed in Article X:1 of the GATT 1994 is applicable to the *GPX* legislation. Without satisfying this threshold issue, China's claims under Article X:1 of the GATT 1994 must fail.

7. Even if China comes forward to meet its burden of proving that the *GPX* legislation falls within the scope of Article X:1 of the GATT 1994, China's claim must fail. Contrary to China's argument, the *GPX* legislation was published promptly, in full accord with the obligations under Article X:1 of the GATT 1994. Indeed, the law was published on the date of its adoption; the law could not have been published any sooner.

8. China's argument is based on an unsupportable reading of Article X:1. In particular, China argues that "the United States acted inconsistently with Article X:1 of the GATT by failing to publish section 1 of [the *GPX* legislation] 'promptly' in relation to its effective date of 20 November 2006." This argument departs from the plain text – nowhere does Article X:1 of the GATT 1994 mention an "effective date" of the measure. Article X:1 does not, as China proposes, impose substantive obligations about how a measure may apply to particular situations that occurred in the past.

9. A number of elements of Article X:1 of the GATT 1994 makes this clear. First, the starting point of Article X:1 of the GATT 1994 is that it applies to "laws, regulations, judicial decisions, and administrative rulings of general application" pertaining to certain enumerated subjects. At the risk of stating the obvious, these law, regulations, etc. must be in existence for Article X:1 of the GATT 1994 to apply. In addition, Article X:1 of the GATT 1994 only applies if these types of measures have been "made effective by any [Member]." This "made effective" clause is a limitation on Article X:1 of the GATT 1994 – that is, it excludes from the scope measures that may be in existence, but have not been made effective by a Member. Also, the past tense of the term "made effective" shows that the obligation in Article X:1 of the GATT 1994 applies to measures that have been adopted at some point in the past. The "made effective" clause cannot be read, as China implies, as some sort of additional, substantive obligation to the effect that measures of general application must not apply to past factual situations.

10. Once a measure of general obligation falls within the scope of Article X:1, the article imposes two obligations on the Member that has adopted the measure: the measure must be published (i) "promptly" and (ii) "in such a manner as to enable governments and traders to become acquainted with [it]."

11. The plain meaning of "promptly" is "[i]n a prompt manner; without delay." Because the starting point of Article X:1 of the GATT 1994 is the existence of a measure of general application, the timing issue of "promptness" or "delay" must be considered in relation to the time when the measure has come into existence and been made effective. Therefore, under the plain text of Article X:1 of the GATT 1994, a measure cannot be found to be inconsistent with the prompt publication obligation if the Member publishes the measure as soon as the measure comes into existence. It would not be possible to publish the measure with any less delay.

12. China proposes to reinterpret Article X:1 of the GATT 1994 not as a procedural requirement on publication, but instead as a substantive obligation. China's argument, however, cannot be squared with the plain text of Article X:1 of the GATT 1994. On the undisputed facts of this dispute, China presents no basis for a finding that the *GPX* legislation was not published promptly. Indeed, China itself states that "[t]he bill was signed by President Obama on 13 March 2012 and officially published on the same date." Given that, as China agrees, the *GPX* legislation was published on the same day that it came into existence, China has no basis for any claim that the measure was not published "promptly" under Article X:1 of the GATT 1994.

13. China argues that "the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries." The plain meaning of "manner" is "the way in which something is done, the mode or procedure." China has presented no basis for a claim that the U.S. publication of the *GPX* legislation was inconsistent with the obligation in Article X:1 of the

GATT 1994 regarding the manner of publication. In fact, the *GPX* legislation was published in the *United States Statutes at Large,* on the same day it was enacted. The *United States Statutes at Large* is readily available to China, Chinese traders and other members of the public. Accordingly, the publication of the *GPX* legislation met the Article X:1 of the GATT 1994 obligation regarding the manner of publication.

14. Notwithstanding a lack of any textual basis, China is apparently arguing that Article X:1 of the GATT 1994 acts as a substantive obligation on the content of a measure. In particular, China argues that Article X:1 must be read so as to prohibit a measure from touching on events that have occurred prior to the publication of the measure. China argument skips over any textual support, and instead relies on the theory that the panel must recognize some sort of general proposition that Members cannot adopt measures that relate to situations that occurred in the past.

15. This argument is flawed on several levels. As a starting point, China's argument is not in accord with customary rules of interpretation of public international law. Under Article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. One cannot, as China suggests, start with some supposed principle regarding "retroactivity," and then use that supposed principle as a basis for reaching an untenable interpretation.

16. Although China's failure to follow the correct rules of treaty interpretation could end this discussion, the United States also notes a fundamental disagreement with China's proposition that there exists some general principle of public international law that a measure may not affect events that may have occurred prior to a measure's publication.

17. In fact, Article X:1 of the GATT 1994 itself recognizes that measures may affect events that occurred prior to the publication of a measure. Looking further afield than the text of Article X:1 of the GATT 1994, the application of legal obligations to previous actions is embodied in international law and the parties' own legal systems.

IV. CHINA'S CLAIM UNDER ARTICLE X:2 OF THE GATT 1994 IS WITHOUT MERIT

18. For three separate reasons, China has presented no valid basis for its claim under Article X:2 of the GATT 1994. The first two reasons involve China's failure to prove that the *GPX* legislation falls within the scope of Article X:2 of the GATT 1994. The third reason is that China fails to prove that the *GPX* legislation, even if found to be within the scope of Article X:2 of the GATT 1994, is somehow inconsistent with the Article X:2 obligation.

19. Before turning to the substance of China's Article X:2 claim, it is useful to provide a general comment on the relationship between this dispute under the WTO Agreement and litigation in U.S. courts. In its first submission, China essentially repeats the arguments on "retroactivity" as presented in the *GPX* domestic litigation – in particular, the exporters in domestic litigation have argued that Commerce acted *ultra vires* pursuant to U.S. domestic law in applying the U.S. countervailing duty laws to NME imports. These arguments are matters of U.S. domestic law; China has not and cannot show that they are somehow relevant or transferable to questions concerning obligations under Article X:2 of the GATT 1994.

20. In addition, the United States would emphasize – as noted in the statement of facts – that to the extent there has been any change in Commerce's approach to CVDs as applied to China, that change occurred in 2006. At that time, the United States published an official notice regarding Commerce's approach; in particular, on November 27, 2006, Commerce published in the U.S. Federal Register the notice of the initiation of the first CVD investigation on certain imports from China, an NME country. Nothing in the *GPX* legislation – which served to affirm Commerce's interpretation of U.S. CVD law with respect to subsidized Chinese imports – modified the approach announced in 2006.

21. The requirements for a measure to be covered by Article X:2 of the GATT 1994 can be separated into two parts: the general type of measure, and the requirement that the measure represents a certain type of change from a prior measure. The general types of measures covered by Article X:2 of the GATT 1994 are either a measure of general application effecting a duty rate

or other charge on imports under an established and uniform practice, or a measure of general application imposing a requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either category. As such, China has failed to present *a prima facie* case.

22. Although it is China's burden to present its case in the first instance, the United States notes that it is difficult to understand how China would intend to try to fit the *GPX* legislation within the scope of Article X:2 of the GATT 1994. First, laws involving CVDs do not "effect a an advance in a rate of duty or other charge on imports under an established and uniform practice." Unlike, for example, an ordinary customs duty, countervailing duties do not "effect" (which means to "bring about" or "produce") any particular "rate" or level of a CVD duty under established or uniform practice, unlike a customs tariff which sets out rates of duty. In contrast, CVD laws describe a process for determining a special CVD duty, and CVD laws themselves do not bring about or produce any particular duty rate.

23. Second, China fails to establish that the *GPX* legislation imposes a "requirement, restriction or prohibition" under Article X:2 of the GATT 1994. Rather, China asserts that the *GPX* legislation "'impos[es] a new or more burdensome requirement, restriction or prohibition on imports' in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties." China's argument assumes the conclusion, and fails to explain how the *GPX* legislation imposes a requirement, restriction, or prohibition.

24. China argument – that *GPX* legislation falls within the scope of Article X:2 of the GATT 1994 "in so far as it makes certain categories of imports potentially subject to the imposition of countervailing duties" – is without merit. First, legislation relating to the application of the CVD law does not itself change or effect the "rate" of duty or other import charge, much less an "advance in a rate" of duty. Second, contrary to China's theory that the GPX legislation could effect an advance in the rate of duty because it *changed* the applicability of CVDs, as discussed above in Part II, the *GPX* legislation maintains the *status quo* on procedures relating to the application of CVDs to NME countries. Thus, the *GPX* legislation did not, as China puts it, make imports from NME countries *potentially* subject to the imposition of countervailing duties; these imports were *already* subject to the imposition of countervailing duties well prior to the adoption of the *GPX* legislation.

25. Because there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports, Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty. The Oxford English Dictionary defines "rate" as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation." Section 1 of the *GPX* legislation imposes no such change, advance or decrease, in the total quantity, amount or sum of CVDs. The rate remains the same as previous to the enactment of the *GPX* legislation.

26. Further, China's argument ignores the requirement under Article X:2 of the GATT 1994 that the initial duty rate (that is, prior to the "advance" in the rate, there must have been "an established and uniform practice."). Even if the *GPX* legislation could be considered as modifying U.S. law (which it did not), it could never be said that the situation prior to the *GPX* legislation could be described as an "established and uniform practice" not to apply CVDs to imports of China. To the contrary, as explained above, the established and uniform practice since at least 2006 was to apply CVDs to China. Moreover, even before that time, Commerce maintained procedures for applying the U.S. CVD law to any country where a countervailable subsidy (or bounty or grant) could be determined.

27. Even if for purposes of argument one assumes the *GPX* legislation could be found as the general type of measure under Article X:2 of the GATT 1994 that imposes a requirement, restriction, or prohibition, China cannot show that the *GPX* legislation is *"new" or "more burdensome"* as compared to the situation faced by imports from China prior to the adoption of the measure.

28. Section 1 of the *GPX* legislation was neither a change in the law, nor did it result in any change in the treatment of imports from China. Rather, the legislation reaffirmed Commerce's interpretation of existing law for the purposes of resolving confusion in ongoing litigation. Prior to the law's enactment, Commerce acted pursuant its reasonable interpretation of the Tariff Act of

1930 to apply the U.S. CVD law to China when it could identify a countervailable subsidy in China. For the past seven years, the U.S. CVD laws have applied to imports from China.

29. Though challenged on a number of occasions as being *ultra vires*, Commerce's decision was upheld by a number of U.S. courts. China relies on the fact that five years following its initial judicial challenge of Commerce's decision and numerous CVD proceedings later, the U.S. Federal Circuit issued a contradictory opinion based on legislative silence. The only effect of this opinion, which was not final, was to provide China notice that the state of the relevant U.S. CVD law was unsettled. Section 1 of the *GPX* legislation does not impose any "new or more burdensome" requirements, restrictions or prohibitions. Rather, it maintains Commerce's existing approach.

30. Given that the *GPX* legislation resulted in no change in the treatment of imports from China, and no change in U.S. law, the United States submits that the *GPX* legislation is not a measure covered by Article X:2 of the GATT 1994. Nonetheless, the United States also notes that China has failed to show that the *GPX* legislation is inconsistent with the obligation set out in Article X:2 of the GATT 1994. Although the United States is not in a position to respond to an argument that China has not made, the United States notes that the facts in this case do not support a contention that the *GPX* legislation is inconsistent with this obligation. In particular, the *GPX* legislation was officially published on its date of adoption, March 13, 2012. And Commerce took no action prior to that date to enforce the measure.

31. Instead of addressing the specific language of the WTO provision and the facts of this dispute, China primarily relies on the Appellate Body's findings in *US – Underwear* to support a general proposition that Article X:2 of the GATT 1994 "precludes retroactivity." China's approach fails for a number of reasons. First, citation to a prior Appellate Body report does not substitute for the application of the specific language in Article X:2 of the GATT 1994 to the specific facts in this dispute. Second, a discussion focused on the general concept of "retroactivity" does not lead to any conclusion with respect any specific issue under the WTO Agreement. "Retroactivity" is not a term used anywhere in the GATT 1994.

32. Third, and finally, China misrepresents the Appellate Body findings in *US -Underwear.* What China fails to point out is that, although the Appellate Body discussed both the relevant ATC provisions and Article X:2 of the GATT 1994, the Appellate Body's ruling in favor of Costa Rica was based on the ATC provision (and not Article X:2 of the GATT 1994). In fact, the Appellate Body rejected the argument that Article X:2 precluded the application of the safeguard to imports that entered prior to the June 1995 adoption of the measure.

V. CHINA HAS NO BASIS FOR A CLAIM UNDER ARTICLE X:3(B) OF THE GATT 1994

33. China's claim under Article X:3(b) of the GATT 1994 has no basis either in the text of the WTO Agreement, or in the facts in this dispute. China apparently would interpret Article X:3(b) of the GATT 1994 to require an administrative agency to change its practice each and every time a judicial body issues some sort of statement on the meaning of domestic law. Although Article X:3(b) of the GATT 1994 is generally addressed to the interaction between administrative agencies and judicial, arbitral and administrative tribunals, Article X:3(b) of the GATT 1994 does not contain such a requirement. Rather, it contains specific language with specific obligations; China has not shown, and cannot show, any breach of Article X:3(b) of the GATT 1994.

34. Article X:3(b) of the GATT 1994 expressly recognizes that an agency need not implement a judicial decision that is under appeal: it states that judicial decisions be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period." Further, this language recognizes the fact that Members may want to provide for an appeal from the decisions of first instance tribunals.

35. China's claim fails as a matter of fact. The *GPX V* opinion was not finalized under the U.S. judicial appeals process, and was under appeal, and therefore there was no final decision to implement. Such non-binding opinions are not "decisions" under Article X:3(b) of the GATT 1994. A decision of a U.S. appeals court is not final until the court issues what is known as a "mandate." If an appeal is timely filed, the mandate is stayed. In *GPX V*, the United States filed a timely petition for rehearing before all of the judges of the U.S. Federal Circuit, or *en banc*. Prior to the issuance of a mandate, U.S. federal appellate tribunals have broad discretion to alter their

judgments. Importantly, it is the issuance of the mandate that, if appropriate, transfers jurisdiction from the appellate court to the first instance tribunal.

VI. CHINA'S CLAIM THAT THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLE 19.3 OF THE SCM AGREEMENT MUST BE REJECTED

36. China has not made a *prima facie* case for its claim under the SCM Agreement; and it erroneously interprets Article 19.3 of the SCM Agreement. As a result, its claim that the United States acted inconsistently with Article 19.3 of the SCM Agreement is baseless.

37. China fails to put forward legal arguments to make out a *prima facie* case. Instead, China merely argues that the findings of the Appellate Body in DS379 should be applied to the investigations and reviews at issue in the instant dispute. Rather than present the evidence necessary to support its legal claims, China makes conclusory and generalized allegations as to what Commerce found across 31 sets of determinations without even a cursory citation to a single piece of evidence. To make out a *prima facie* case, China must establish the facts of each determination to demonstrate evidence adequate to make out its case under the legal theory that it advances. However, China makes no mention of Commerce's determinations at all except to cite the list of challenged determinations in CHI-24.

38. Even had China actually presented the Panel with evidence and analysis in its first written submission, an examination of the 31 challenged sets of determinations would reveal that respondent parties had the opportunity to present Commerce with evidence and arguments demonstrating the existence of overlapping remedies and that Commerce fully addressed such evidence, or lack thereof. At the time of the determinations, Commerce was willing to consider any evidence of overlapping remedies. But in none of the 31 challenged sets of determinations did parties present such evidence. To the extent that parties submitted any information at all on the issue of overlapping remedies, it was in the form of theoretical economic arguments unsubstantiated with any evidence. China's submission contains absolutely no discussion of the facts at issue in the determinations made by Commerce. Therefore, China has failed to make a *prima facie* case.

39. China's failure to make a *prima facie* case is especially striking given that China's legal claim under the SCM Agreement is limited in scope. China, in its first written submission, purports to argue that the United States acted inconsistently with Article 19.3 of the SCM Agreement, and as a consequence, Articles 10 and 32.1. China, however, makes no effort to interpret Article 19.3 of the SCM Agreement, or apply this provision to the facts of this dispute. Rather than engage in an analysis of the text of Article 19.3 of the SCM Agreement pursuant to customary rules of interpretation, China relies exclusively statements made in the Appellate Body report in DS379. Statements of the Appellate Body, however, are not a source of WTO obligations, but instead constitute an interpretation of WTO obligations for the purpose of resolving that particular dispute.

40. Article 19.3 is essentially a non-discrimination provision. Article 19.3 first requires that a "countervailing duty" be levied "on imports of such product from all sources found to be subsidized and causing injury." That is, the CVD must be levied on "all" such sources, and not just some of them. Second, the text directs a Member to apply CVDs "on a non-discriminatory basis" on those imports. That is, when CVDs are levied on imports from all such sources, the Member is not to discriminate between those sources. Rather, a Member will impose a CVD on all imports of a product from each Member where the importing Member finds the product to be subsidized and causing injury. Third, Article 19.3 sets out that CVDs levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case."

41. Moreover, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. In other words, the amount of CVDs imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

42. Furthermore, the United States notes that nothing on the face of the phrase "levied in the appropriate amounts in each case" (nor any other language in the SCM Agreement) has any tie to the question of whether or not other measures, such as *anti-dumping* duties, have been applied,

nor any relation to rules outside the SCM Agreement. To read "in the appropriate amounts" as permitting consideration of the application of other measures or other, non-SCM Agreement rules, would convert "in the appropriate amounts" into a subjective standard, with bounds only set by the eyes of the particular interpreter.

43. The context provided by the SCM Agreement and its structure support this understanding of Article 19.3. Articles 1 and 2 of the SCM Agreement define what a subsidy is. Part V of the SCM Agreement addresses "Countervailing Measures" and, through its various articles in sequential order, traces each phase of a countervailing duty proceeding. Article 11 of the SCM Agreement, for instance, concerns the initiation and subsequent conduct of a CVD investigation. Article 12 imposes certain evidentiary, due process, and transparency requirements on Members in the conduct of a CVD investigation. Article 14 provides guidelines when calculating the amount of a countervailable subsidy in terms of the benefit to the recipient. Article 19, by its terms, is limited only to the "Imposition and Collection of Countervailing Duties."

44. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement. This context shows that the phrase in Article 19.3 – which requires that a Member levy CVD duties in "the appropriate amounts in each case" is not a general rule – unconnected to the nondiscrimination context of 19.3 – that applies to all aspects of the CVD duty.

45. There is one provision in the WTO agreement that disciplines the concurrent use of antidumping and countervailing duties on the same product, and it is not Article 19.3 of the SCM Agreement. Rather, it is Article VI:5 of the GATT 1994, and that article only applies to export subsidies. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping and export subsidization."

46. Further, Article 15 of the Tokyo Round Subsidies Code, specifically prohibiting the concurrent application of AD and CVD measures to certain countries, and the absence of a similar provision in the WTO agreements, provides additional evidence that the WTO Agreements do not concern the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994.

47. China's legal argument under Article 19.3 relies entirely on the understanding of that provision expressed by the Appellate Body in its report in DS379. However, a WTO panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. The rights and obligations of the Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements. The Appellate Body itself has stated that its reports are not binding on panels.

48. In DS379, the Appellate Body disagreed with the legal interpretation set out by the panel and reached certain findings with respect to Article 19.3 of the SCM Agreement. The United States respectfully disagrees with these Appellate Body findings. In particular, we consider that the Appellate Body in DS379 erred in its interpretation of Article 19.3 and consider that the interpretation set out above is a correct understanding of Article 19.3 pursuant to customary rules of interpretation. Notably, China did not argue for the interpretation of Article 19.3 that the Appellate Body in DS379 adopted. In fact, China largely based it claims on Article 19.4.

49. The Appellate Body's reasoning in DS379, and its consequent assigning of an indeterminate and subjective meaning to the phrase "in the appropriate amounts", is problematic in several ways. First, despite the fact that Article 19 of the SCM Agreement is entitled "Imposition and Collection of Countervailing Duties," the Appellate Body rejected an interpretation of Article 19 of the SCM Agreement as concerned with the "[i]mposition and [c]ollection" of countervailing duties. Instead, the Appellate Body considered that Article 19 of the SCM Agreement also relates to the existence or calculation of countervailing duties. That understanding does not derive from the text.

50. Second, contrary to other panel findings regarding the context surrounding the Article 19.3 text, the Appellate Body relied heavily on the non-binding "lesser duty" provision of Article 19.2, which expresses that it would be "desirable" if a "duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry." The Appellate Body used the *non-mandatory* lesser duty concept embodied in Article 19.2 as context for informing its interpretation of Article 19.3, which is a binding obligation. However, the permissive nature of Article 19.2 does not support a reading that the mandatory requirement in 19.3 to levy CVD duties "in the appropriate amounts in each case" was intended to be a general obligation regarding all aspects of a CVD duty.

51. Third, the Appellate Body observed that the Panel's interpretation of "appropriate" amount under Article 19.3 of the SCM Agreement, based on Article 19.4 of the SCM Agreement, would render Article 19.3 redundant. But this is incorrect. Article 19.4 of the SCM Agreement requires that CVDs not exceed the amount of subsidization found to exist; Article 19.4 does not provide instructions on how this obligation applies to specific exporters. Article 19.3 specifies that Members must apply CVDs on a non-discriminatory basis, and "in the appropriate amounts", for all sources found to be subsidized and causing injury. These are distinct obligations different from the obligation established in Article 19.4.

52. Fourth, in reaching its findings in DS379, the Appellate Body did not identify any limiting principle to provide some bounds for its interpretation of the term "in the appropriate amounts". Rather than clarify the meaning of "the appropriate amounts," the Appellate Body infused that term with an indeterminate, subjective meaning reliant upon how it interpreted provisions of covered agreements other than the SCM Agreement, which could have unknown or unintended consequences. One consequence of the Appellate Body report in DS379 is that an exporting Member, contrary to other situations, need not demonstrate that CVDs duties are not levied in appropriate amounts in each case in the case of simultaneous AD and CVD investigations. Instead, under the Appellate Body's rationale, the burden would appear to fall on the importing Member to prove that CVDs are levied in the appropriate amounts in each case, regardless of whether the exporting Member presented evidence to indicate otherwise.

53. Fifth, the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative. This Panel should not assume the same findings of the panel in DS379 but rather should make its own objective assessment. Further, neither the Panel nor the Appellate Body in DS379, in considering the impact of domestic subsidies upon export prices, recognized that the form of the subsidy is important because some domestic subsidies give domestic producers a greater incentive to increase production than others. Nor did the Appellate Body in DS379 consider that, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase will result in lower export prices. If the world market price is going up, it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy

54. Finally, even where the producer or producers in question supplies a substantial share of the world market, so that the additional production will likely drive down prices in that market, this will take time and will not occur if other producers in the market reduce production to avoid a price war. Market forces determine prices, and as a result, the Appellate Body's pronouncements in DS379 on the relationship of domestic subsidies to export prices are speculative.

55. For all of these reasons, the Panel should reject China's legal arguments and find that the United States did not act inconsistently with Article 19.3 in any of the 31 challenged sets of determinations.

VII. THE UNITED STATES ACTED CONSISTENTLY WITH ARTICLES 10 AND 32.1 OF THE SCM AGREEMENT

56. China argues that, because the United States acted inconsistently with Article 19.3 of the SCM Agreement, it has also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. China provides no other basis for its claims under Articles 10 and 32.1 of the SCM Agreement. Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement must also fail.

Executive Summary of the Opening Statement of the United States at the First Substantive Meeting of the Panel

1. It may be useful to begin by taking a step back and considering why are we here? The provisions of Article X:1 and X:2 are directed to the publication of trade regulations to provide notice and transparency to traders. China cannot seriously contend that the U.S. CVD regime, and its application to China, has suffered from a lack of transparency. Similarly, the provisions of Article X:3(b) are directed to ensuring that Members set up an appropriate structure so that tribunals or procedures may review administrative action and that administrative agencies will then implement those decisions. And again, China cannot seriously contend that the United States has failed to set up such a structure for review or that the U.S. Department of Commerce is not bound by or does not implement such review decisions.

2. In relation to China's claim under Article 19.3 of the SCM Agreement, you may also be asking yourself why we are here. As noted, the U.S. Congress has acted already to require the Department of Commerce to investigate the extent of any so-called double remedy and to adjust the amount of antidumping duty imposed if necessary. Therefore, the U.S. argument in this dispute is not directed to changing the U.S. approach to this issue in the future. But there are two reasons we bring this issue of interpretation to the Panel.

3. First, we consider the Appellate Body's approach in interpretation to be erroneous, and the more one reads its rationale the less appropriate its interpretation of Article 19.3 appears. The Appellate Body report starts with the identification of a supposed problem and then seeks to find an interpretive solution to that problem. But this interpretive approach has it backwards: if the provision claimed to be breached is properly interpreted and then not found to be applicable to the situation the complaining party has brought forward, there is no "problem" under the covered agreements. Second, the Appellate Body's reading of the phrase "in the appropriate amounts" gives a meaning to that phrase which is not connected to its context in Article 19 or the rules for determining "appropriate amounts" in the SCM Agreement

4. Both sets of claims raised by China are flawed and should be rejected. In this statement we proceed to further detail some of those many flaws.

I. CHINA HAS CONFLATED THE LEGAL REQUIREMENTS AND CONCEPTS OF DOMESTIC LAW WITH THE REQUIREMENTS OF ARTICLE X

5. In this dispute, China has failed to provide a *prima facie* case that the *GPX* legislation is inconsistent with a plain reading of Articles X:1 and X:2, and that the U.S. actions with regard to the *GPX V* opinion is inconsistent with a plain reading of Article X:3(b).

6. As the United States will explain further below, the *GPX* legislation did not change or otherwise affect Commerce's existing approach of applying the U.S. CVD law to China. Specifically, the orders for the CVD proceedings listed in Appendix A of China's panel request have not been changed or otherwise affected by the *GPX* legislation. The law maintains the *status quo* for these orders.

II. CHINA'S CLAIMS UNDER ARTICLE X:1 OF THE GATT 1994 ARE WITHOUT MERIT

7. We will first address China's claims under Article X:1. China's claims depend on reading words into Article X:1 that simply are not there, and these claims thus are without merit. Article X:1 imposes two procedural requirements for the publication of certain measures that have been "made effective." The first is that the measure be "promptly published." The second is that the measure be published in such a "manner as to enable governments and traders to become acquainted" with it. China has not demonstrated that the U.S. publication of the *GPX* legislation was inconsistent with these obligations. Article X:1 does not address how a measure should be applied following its publication. In fact and contrary to China's assertions, Article X:1 itself recognizes that measures may affect events that have occurred prior to the publication of a measure.

III. CHINA'S CLAIM UNDER ARTICLE X:2 OF THE GATT 1994 IS WITHOUT MERIT

8. Next, we will address China's claim that the *GPX* legislation is inconsistent with Article X:2. China's claim fails for the following reasons. First, China has failed to prove that the *GPX* legislation is covered by Article X:2. Second, even if found to be within the scope of Article X:2, China has failed to prove that the *GPX* legislation is somehow inconsistent with the obligation.

9. In order to fall within the scope of Article X:2, a measure of general application must be of a type that either (1) effects an advance in a rate of duty or other charge on imports under an established and uniform practice, or (2) imposes a new or more burdensome requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either type. While the burden is on China to make a *prima facie* case, the United States notes that CVD laws provide the framework for determining a CVD duty. The law itself does not prescribe any particular duty rate, let alone effect an "advance" in such a rate, nor does it impose a requirement, restriction or prohibition on imports. Imports are affected once the separate and distinct legal process of an investigation is completed.

10. The *GPX* legislation does not effect an *advance* in a rate of duty. Consistent with the plain text of Article X:2, the panel in *EC – IT Products* found that a covered measure must change an existing approach in order to bring about an increase in a rate of duty. In this dispute, the *GPX* legislation has not changed Commerce's existing approach to apply the U.S. CVD law to China. Further, the *GPX* legislation has not changed any part of the CVD proceedings and orders listed in Appendix A of China's panel request. The CVD rates established through those proceedings remain the same as previous to the enactment of the *GPX* legislation.

11. Similarly, the *GPX* legislation does not impose a *new or more* burdensome requirement, restriction, or prohibition on imports. The term "new" is defined as "not existing before" or "existing for the first time." The term "more" is defined as "in a greater degree" or "to a greater extent." Thus, in order to fall within the scope of Article X:2, imports from China must face a requirement, restriction or prohibition that did not previously exist prior to the enactment of the *GPX* legislation, or face a burden that is of a greater degree than prior to the *GPX* legislation.

12. The *GPX* legislation imposes neither such condition. Prior to the enactment of the *GPX* legislation, imports from China were already subject to the U.S. CVD law. Thus, the law did not impose any condition that had not existed before. Further, the *GPX* legislation did not impose a greater degree of burden on such imports. None of the CVD proceedings cited in China's panel request have been disturbed by the *GPX* legislation. Rather, the law maintained the *status quo* for Commerce's existing approach and the existing CVD orders. Based on these facts, China has failed to prove that the *GPX* legislation is within the scope of Article X:2.

IV. CHINA HAS NO BASIS FOR A CLAIM UNDER ARTICLE X:3(b) OF THE GATT 1994

13. Next, we will move on to China's claims under Article X:3(b). China has alleged that the U.S. failure to implement a judicial opinion that was pending on appeal, known as the *GPX V* opinion, is inconsistent with Article X:3(b). Such a claim fails as a matter of fact and law.

14. As a factual matter, China is incorrect in its assertion that the *GPX V* opinion was a final decision that was not subject to appeal and had legal effect under the U.S. judicial system. Specifically, China fails to account for the fact that a "mandate" is required to finalize a U.S. appellate court opinion. The U.S. Federal Circuit itself has stated that a mandate was not issued for the *GPX V* opinion because the case was still under appeal. Therefore, *GPX V* was not a final decision that could direct the court of first instance.

15. Further, because the mandate had not issued, the court of first instance could not implement the *GPX V* opinion as a matter of U.S. law. Thus, contrary to China's assertion that the appeal of the *GPX V* opinion was a mere technicality, the issuance of a mandate in the U.S. judicial system is crucial to finalizing what is, up until that point, a non-binding opinion. Prior to the issuance of the mandate, such an opinion is not within the scope of Article X:3.

16. The United States notes that even if the *GPX V* opinion could be considered a "decision" under Article X:3(b), the requirements of the treaty article still would not be applicable to *GPX* V. Article X:3(b) expressly recognizes that an administering authority need not implement a judicial

decision that is under appeal. Specifically, it states that judicial decisions must be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period." In *GPX V*, the United States filed a timely petition for rehearing before the U.S. Federal Circuit sitting *en banc*. In other words, the proceedings had not concluded and the United States had not exhausted its rights to appeal. In fact, the *GPX* litigation is still on-going.

17. As a matter of law, China's claim under Article X:3(b) is not based on the text of the relevant WTO provision, but instead on other vague or irrelevant legal concepts. China has no basis for such an interpretation, as it must prove its allegations based on the specific language of the specific obligations of Article X:3(b).

18. As an example, China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government" is incompatible with Article X:3(b). China's claim has no support in the text of the article. Article X:3(b) does not dictate the relationship between a domestic legislature and the judicial branch. Nor does it not prohibit the timing of when a piece of legislation may be enacted. Article X:3(b) does not prohibit the enactment of the *GPX* legislation because of pending domestic litigation. As the *GPX* litigation has been ongoing for the past five years, China's interpretation of Article X:3(b) would paralyze the ability of legislatures to enact laws and is unsupported by the plain text of the obligation.

V. CHINA'S CLAIM THAT THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLE 19.3 OF THE SCM AGREEMENT MUST BE REJECTED

19. China has advanced claims with respect to 31 sets of determinations. Yet, at each step in this case – in particular its panel request, and, most importantly, in its first written submission – China has failed to present and substantiate its claims through a discussion of the facts, and arguments. Despite advancing claims that dozens of Commerce's findings were inconsistent with the SCM Agreement, China barely discusses Commerce's determinations at all.

20. China declined to include in its first written submission virtually any discussion of the facts at issue in the determinations it challenges here. Accordingly, China has failed to establish a *prima facie* case. China's lackluster effort in making its legal argument raises an eyebrow. Rather than engage in a textual or contextual analysis of the obligations imposed by Article 19.3 of the SCM Agreement, it relies exclusively on statements made in the Appellate Body report in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

21. Now, aside from the defects in China's approach, the United States would like to take this opportunity to make a few points about the Appellate Body report in DS379 and also the U.S. interpretation of Article 19.3 of the SCM Agreement. First, this Panel is not bound by the Appellate Body report in DS379, particularly as the Appellate Body erred in its interpretation of Article 19.3. Second, with respect to the interpretation of Article 19.3 of the SCM Agreement, the Panel is to undertake its own interpretations of that term by applying the customary rules of interpretation of public international law.

22. When that text is analyzed pursuant to customary rules of interpretation, it becomes evident that 19.3 of the SCM Agreement is first and foremost a non-discrimination provision to ensure that the amount of countervailing duties levied corresponds to the amount of subsidies identified. Third, the context provided by the SCM Agreement and its structure support this understanding of Article 19.3. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement.

23. Therefore, because China has not alleged that Commerce's imposition or collection of CVDs was discriminatory, or did not correspond to the amount of subsidies identified in any of the 31 sets of determinations at issue in this dispute, China's claim that the United States acted inconsistently with Article 19.3 should be rejected.

24. Lastly, China contends that, because the United States acted inconsistently with Article 19.3 of the SCM Agreement, it also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement also must fail.

Executive Summary of the Second Written Submission of the United States of America

I. INTRODUCTION

1. China has made valiant efforts to make simple facts opaque and straightforward WTO obligations convoluted. But the relevant facts and law are simple and straightforward in this dispute. These facts establish that China's claims under Articles X:1, X:2 and X:3(b) of the GATT 1994 are without merit. Nonetheless, China attempts to explain away these facts by offering interpretations of U.S. law that have not yet been settled by the U.S. domestic courts and interpretation of Articles X:1, X:2 and X:3(b) that are unsupported by the plain text of the obligations. As set out in this submission, China's arguments do not withstand scrutiny.

2. Regarding its claim under Article 19.3 of the SCM Agreement, China's failure to make its *prima facie* case persists. China continues to misinterpret Article 19.3 of the SCM Agreement and simply has not addressed the U.S. interpretation or explained how it does not comport with customary rules of interpretation of public international law. Contrary to China's assertions, Article 19.3 of the SCM Agreement does not establish any requirement that administering authorities investigate and avoid overlapping remedies. China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should therefore be rejected.

II. CHINA'S CLAIM UNDER ARTICLE X:1 OF THE GATT 1994 IS WITHOUT MERIT

3. The substance of China's claim under Article X:1 of the GATT 1994 is primarily premised on the purported connection between the term "made effective" in Article X:1 and the term "effective date" in Section 1(b) of the *GPX* legislation. China asserts that the term "promptly" under Article X:1 must be evaluated in relation to the "effective date" in Section 1(b) rather than the date when the law was adopted.

4. However, the United States explained in its First Written Submission and during the first substantive Panel meeting that the ordinary meaning of "made effective" confirms that the clause limits the application of Article X:1 of the GATT 1994 to measures that have been adopted or brought into operation. Otherwise, without the existence of the law, there is nothing to apply or make effective. China's approach also finds no support in the EC – IT Products panel report. In short, Article X:1 requires that measures be published promptly upon their adoption. With respect to the measure at issue in this dispute, the United States did just that: the GPX legislation was published as soon as the law was enacted or brought into existence. As such, China has no basis for any claim that the United States acted inconsistently with Article X:1 of the GATT 1994.

III. CHINA'S CLAIM UNDER ARTICLE X:2 OF THE GATT 1994 IS WITHOUT MERIT

5. China's claim under Article X:2 of the GATT 1994 fails for a simple reason: the *GPX* legislation was not enforced until its publication on March 13, 2012, and there were no administrative actions by Commerce or judicial actions by the courts on March 12, or any other prior date, to the contrary. This fact is fatal to China's claim.

6. Faced with that simple and compelling fact, China attempts to significantly complicate the facts and the law relating to its Article X:2 claim. But even on China's erroneous approach, its claim fails. China has made clear that its challenge to the *GPX* legislation is limited; it is based on that portion of the statute that is applicable to 27 proceedings that were initiated prior to the date of enactment of the legislation. China cannot establish that the challenged legislation falls within the scope of or breaches Article X:2.

7. The plain text of Article X:2 requires a determination of whether there has been an applicable change – an advance, or something new or more burdensome – "on imports." Thus, the terms "advance" and "new" or "more burdensome" must be evaluated in the context of the "imports" at issue. In this dispute, China has clarified that its challenge to Section 1 of the *GPX* legislation is only in respect of the 27 proceedings initiated prior to the date of enactment. Thus, the only "imports" at issue are those subject to the 27 CVD investigations listed by China in its panel request that resulted in a CVD order. Even if China is able to show that the *GPX* legislation

falls within one of the types of measures listed in Article X:2, it cannot show that there has been any "new or more burdensome" change with respect to the "imports" at issue in this dispute.

8. In making its arguments under Article X:2, China is asking the Panel to accept China's unsupported proposition that the *GPX V* opinion was "governing and controlling" law. Further, China argues that the U.S. Federal Circuit found in *Georgetown Steel* that Congress must amend the U.S. CVD law in order for it to be applied to NME countries and that such a "finding" also constitutes "governing and controlling" law. Such an assertion regarding the findings of *Georgetown Steel* is not accurate. China's Article X:2 argument is based entirely on the false premise that the *GPX V* opinion had been finalized, not appealed by the United States, and is legally binding on and was implemented by Commerce. As will be explained further below, China's claims are baseless for two reasons: (1) its premise is false, and (2) China cannot admit on one hand in its Article X:3(b) arguments that Commerce did not implement the *GPX V* opinion and on the other hand argue in its Article X:2 claim that the *GPX V* opinion was implemented.

9. China treats *GPX V* as it were the final word of U.S. law on the issue of whether Commerce may apply the U.S. CVD law to China. As the United States has shown in its response to Question 72 from the Panel, such an assertion is erroneous. The *GPX V* opinion is not a final decision of the U.S. Federal Circuit and has no legal effect under U.S. law. As such, Commerce was not obligated to implement its findings and, under U.S. law, was prohibited from such implementation.

10. China's arguments regarding a supposed change in U.S. law are internally inconsistent. On the one hand, China argues in the context of its Article X:3(b) arguments that the United States did not implement the *GPX V* opinion and that it did not "govern the practice of" Commerce in applying the U.S. CVD law. On the other hand, for the purpose of its Article X:2 claim, China treats the non-binding opinion as having already changed Commerce's treatment of the imports subject to the 27 challenged proceedings (i.e., that it governed Commerce's approach), and then proceeds to argue that the *GPX* legislation amounted to a retroactive reversal of that change. China cannot have it both ways.

11. In the context of its Article X:3(b) claim, China recognizes that the non-final *GPX V* opinion was not implemented by Commerce and did not govern its approach. This fact is the basis of China's challenge of Section 1(b) of the *GPX* legislation under Article X:3(b) of the GATT 1994. Specifically, Part VI(D) of China's First Written Submission discusses in detail its argument that the "United States has Fail[ed] to Ensure that the Federal Circuit's Decision in *GPX V* was '*Implemented by*', and *'Governed the Practice of'*, the USDOC."

12. The United States agrees that the non-binding *GPX V* opinion was never implemented by Commerce and that *GPX V* did not govern Commerce's approach to applying the U.S. CVD law. The United States has previously explained that Commerce was not required to implement the *GPX V* opinion because it was non-final and Commerce would have violated U.S. law if it did implement the opinion.

13. At the first substantive Panel meeting and in its Response to Panel Questions, China clarified that it is not challenging in this dispute whether Commerce's actions were *ultra vires*. China has stated that Article X:2 does not provide for the evaluation of alleged *ultra vires* actions. Further, in paragraph 120 of its Response to Panel Questions, China states that it "does not consider it directly relevant under Article X:2 whether a particular practice or requirement followed by domestic authorities was consistent with municipal law."

14. Despite these clear statements from China, in paragraph 121 of its Response to Panel Questions, China immediately contradicts itself by stating that Commerce's actions must be evaluated on whether it was "provided for under municipal law." In other words, China is asking the Panel to determine whether Commerce's actions were provided for under municipal law, or if Commerce acted in a manner that was not provided for under municipal law. Such a claim is the definition of an *ultra vires* challenge. Again, China's arguments are contradictory and unsustainable. China cannot admit that Article X:2 does not provide for an evaluation of an alleged *ultra vires* action while at the same time asking the Panel to make an *ultra vires* determination under Article X:2.

15. Further, and separate from China's legal inconsistencies, as a factual clarification on this issue, it should be noted that the U.S. courts have yet to issue conclusive findings on the application of the U.S. CVD laws to NME countries. The *GPX* litigation is on-going as to a determination of the constitutionality of the *GPX* legislation and resolution of various methodological issues. Further, parallel litigation is on-going on the application of the U.S. CVD law to NME countries. China cannot treat *GPX V*, a non-binding opinion, as "governing and controlling" law given the series of decisions that have been issued after the opinion in the on-going litigation. Nor can China claim that the opinions of *GPX V* constitute a definitive interpretation of the implications and reach of *Georgetown Steel*, particularly when the United States and domestic parties successfully petitioned the Federal Circuit for rehearing of the *GPX V* opinion. Because the petition was granted, the United States did not have an opportunity to seek further appeal rights.

16. China also claims that Section 1 of the *GPX* legislation falls within the scope of Article X:2 because it effected "an advance in a rate of duty or other charge on imports under an established and uniform practice." China argues that the law "increases the countervailing duty rate from no countervailing duty to whatever countervailing duty rate the USDOC determined in respect of each such product." The United States explained above that China's statement is erroneous. The *GPX* legislation in no way increased the rate of duties or other charge for the imports subject to the 27 proceedings challenged by China.

17. Further, China has failed to prove that any purported advance was with respect to "an established and uniform practice." That term indicates that there must have been an "an established and uniform practice" *prior* to the advance in a rate of duty or other charge on imports and also "an established and uniform practice" *after* the advance. Otherwise, without a "practice" before the purported advance, there would be no basis from which to evaluate the change.

18. Although China has used the terms "P.L. 112-99," "Section 1 of P.L. 112-99" and "Section 1(b) of P.L. 112-99" interchangeably in its Article X arguments, at this stage of the proceeding China has settled on its position as to what it is challenging in this dispute. China's claim under Article X:2 relates to the part of Section 1(b)(1) that applies to proceedings that had already been initiated prior to the enactment of the *GPX* legislation, and China's claims of breach are limited to this set of proceedings. This identifiable number of proceedings and subject imports does not fall within the ordinary meaning of the term "of general application" under Article X:2 of the GATT 1994.

19. As evident from China's panel request, submissions, and statements, these 27 proceedings were known as of the date of enactment of the *GPX* legislation, as were the products subject to those proceedings. In relation to this limited and known set of imports and proceedings, Section 1(b)(1) is not a law "of general application" under the ordinary meaning of the term as used in Article X:2.

20. China's only claim under Article X:2 is with respect to the portion of Section 1(b) that applies to proceedings that had already been initiated prior to the enactment of the *GPX* legislation. By identifying a determinate number of proceedings and subject imports, the challenged aspect of the measure is not "of general application." As such, the challenged section of the *GPX* legislation is not within the scope of Article X:2 of the GATT 1994.

21. Contrary to China's assertion, the challenged section of the *GPX* legislation does not pertain to the "rate" of CVD duties for the 27 proceedings at issue in this dispute. In its response to the Panel's Questions, China has continued to ignore the ordinary meaning of the term "rate," which is defined as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation." The *GPX* legislation is a statutory provision that makes clear the scope of the application of the U.S. CVD laws. It does not pertain to the total quantity, amount or sum of any particular CVD rate and is distinguishable from measures such as tariff classifications that do pertain to the "rate" of a duty.

22. China also has failed to show that the challenged section of the *GPX* legislation pertains to a requirement or restriction on imports subject to the 27 proceedings. China argues that Section 1 of the *GPX* legislation pertains to a "requirement … on imports" in that once a CVD investigation is initiated, "importers are required to participate in the countervailing duty investigation or face the

imposition of a countervailing duty determined on the basis of the facts available." Such a statement is false for the challenged imports.

23. First, a CVD proceeding is not a "requirement" on imports. That is, it does not impose requirements or conditions on the importation of goods. Second, Section 1 of the *GPX* legislation is not a "restriction" on the imports subject to the 27 proceedings. China has argued that U.S. CVD laws like the *GPX* legislation impose a "limiting condition" on imports. CVD laws do not restrict or limit imports, but establish the framework under which any alleged subsidies might be investigated and any resulting countervailing duties might be imposed. The laws themselves have no effect on imports.

24. China asserts that the United States has never provided an interpretation of Article X:2. This is incorrect. The United States has also been clear on what Article X:2 is not. Article X:2 does not address the issue of the application of measures to events or actions that predate its enactment. Thus, any challenge of whether a measure may affect such events or actions must be based on a treaty article imposing a substantive obligation. Just as Article X:2 does not address the content or scope of a measure of general application, notably, neither do Article X:1 or Article X:3(a).

25. The Appellate Body has observed that Article X does not address the "substantive content" of measures. This observation that Article X does not discipline the content or scope of measures is reinforced by the very title of Article X, "Publication and Administration of Trade Regulations." China cannot impute into such obligations requirements on the scope and content of covered measures. In other words, Article X:2 cannot be interpreted as a substantive obligation to prohibit so-called "retroactive effect" for all measures of general application, as proposed by China.

26. For measures that do fall within its scope, Article X:2 links transparency and administration of a measure to ensure that Members would not enforce a secret measure on imports effecting an advance in a rate of duty or imposing a new or more burdensome requirement, restriction, or prohibition. For those changes, Article X:2 requires a Member to publish the measure in an official publication prior to its enforcement.

27. The Appellate Body has observed that the fundamental importance of Article X:2 is to "promot[e] full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality." China and other interested parties had full knowledge of the *GPX* legislation upon enactment and prior to its enforcement; Congressional consideration of the legislation was also widely publicized. Furthermore, the U.S. legal system does not lack for disclosure. Article X:2 is silent on matters relating to the substance of a measure. China argues that the Panel should read into this silence an implied absolute prohibition on so-called "retroactivity." However, Article X:2 cannot be interpreted to contain such a prohibition.

28. In summary, Article X:2 does not address the issue of retroactivity. Previous Appellate Body and panel proceedings have looked to an article imposing a substantive obligation in order to evaluate whether a measure may affect events or actions prior to the enactment of the measure. Such an approach is consistent with the plain text of Article X:2 of the GATT 1994. China has not made an allegation that Section 1 of the *GPX* legislation has breached a substantive obligation of the covered agreements, and its claim under Article X:2 is baseless.

IV. CHINA'S CLAIMS UNDER ARTICLE X:3(B) OF THE GATT 1994 ARE UNSUPPORTED BY THE PLAIN TEXT OF THE OBLIGATION

29. China now appears to raise a broader and potentially new claim, seemingly asking the Panel to find that Article X:3(b) imposes restrictions on national legislatures to define the scope of duly enacted legislation if there is pending or on-going litigation that may interpret a related provision of law. Nothing in the text of the GATT 1994 supports China's argument.

30. China's reformulated claim under Article X:3(b) is based exclusively on the actions of "the national legislature." Article X:3(b), however, does not speak to, and therefore does not impose, any limitations on the ability of a national legislature to enact legislation or how that legislation may be applied. Article X:3(b) requires Members to establish and maintain a "judicial, arbitral or

administrative tribunal[ ] or procedure[ ] for the purpose … of the prompt review and correction of administrative action relating to customs matters." No additional requirements are imposed for this review and correction mechanism aside from the following:

- The tribunal or procedures must be "independent of the agencies entrusted with administrative enforcement"; and

- The "decisions" issued from the tribunal or procedures "shall be implemented by, and shall govern the practice of," the administering agency unless certain criteria are met.

31. Outside of these two requirements, Article X:3(b) does not dictate how a tribunal or procedures must review and correct an administrative action relating to customs matters. Despite the plain text of Article X:3(b), China is asking the Panel to decide the merits of the on-going *GPX* litigation by making a definitive conclusion on unsettled U.S. law (i.e., that the United States is prohibited, as a matter of U.S. law, from applying the U.S. CVD law to China). Further, China is asking the Panel to find that U.S. courts are prohibited from ever applying newly enacted laws to pending court cases, even though such application is a fundamental principle of U.S. law.

32. China's argument, however, is unsupported by the principles of treaty interpretation. Applying those principles here, where the plain text of Article X:3(b) does not impose a limitation on national legislatures, China cannot impute one.

33. The United States also notes that such an interpretation would result in unreasonable and extreme outcomes. For example, a national legislature may mistakenly set a tariff rate for certain imports at 100 percent as a typographical error, when the rate should have been 10 percent. When 100 percent tariffs are collected by the customs authority, importers immediately challenge the over collection in domestic courts. Under China's interpretation of Article X:3(b), the court could not apply a legislative clarification or change of the rate to its intended 10 percent rate because the case was pending in domestic courts. However, for those importers that waited until after the legislative clarification or change, the courts could apply the lower rate. Article X:3(b) does not require such an outcome nor did it restrict Congress from enacting the *GPX* legislation. As such, China's claim under Article X:3(b) must fail.

34. China argues that the actions of the U.S. Federal Circuit in following established U.S. law to apply the *GPX* legislation to a case that was pending before the court was a violation of Article X:3(b). Specifically China states that "[a]n intervention by the national legislature to change the applicable law retroactively and thereby direct the outcome of an appeal is not among the exceptions set forth in Article X:3(b)." Such an assertion has ramifications far beyond the judicial proceeding raised by China in this dispute in its Panel Request (*GPX V*). China's claim now suggests that the legal system of Members with respect to the review of customs matters would be flawed if a Member's legislature could carry out their role and enact laws while litigation is pending. But nowhere have Members agreed to this, and we are doubtful WTO Members with their disparate legal systems could abide by such a radical intrusion into the relationship between their legislatures and judiciaries (or other review mechanisms).

35. The United States has established a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters. The *GPX* litigation amply demonstrates that independence, and the numerous implementing actions by Commerce in relation to antidumping and countervailing duty litigation amply demonstrates that final court decisions are implemented by and govern the practice of Commerce. As such, China has failed to prove that the United States has acted inconsistently with Article X:3(b).

V. CHINA HAS NOT ESTABLISHED EITHER A FACTUAL BASIS OR A LEGAL BASIS FOR ITS CLAIM UNDER ARTICLE 19.3 OF THE SCM AGREEMENT

36. China continues to rely on unsupported assertions and other shortcuts instead of meeting its burden to make its *prima facie* case. Although this approach may be expedient for China, it is not sufficient to establish a *prima facie* case.

37. Instead of attempting to make its case through a careful examination and explication of each challenged determination, China resorted to a shortcut. China has argued that it need not do more to establish a breach under Article 19.3 of the SCM Agreement than to point to Commerce's purported lack of legal authority under U.S. law to account for the potential of overlapping remedies when countervailing duties are imposed concurrently with antidumping duties calculated under the alternative methodology for imports from NME countries.

38. Exhibits USA-99 and USA-100 demonstrate China's failure to establish that Commerce lacked authority to address overlapping remedies. The United States has explained that in these determinations by Commerce it never stated that it lacked authority under U.S. law to address the potential of overlapping remedies arising from the concurrent application of countervailing and antidumping duties to imports from NME countries. If that were the case, Commerce would have simply responded to China and Chinese respondents by invoking that lack of authority. Instead, Commerce engaged in a full response to the evidence and arguments relating to allegedly overlapping remedies that China and Chinese respondents presented. While China introduced submitted Exhibits CHI-27 through CHI-78 with its answers to questions, China does not point to or discuss the relevant portions of these determinations (with two exceptions, discussed below) to attempt to establish that Commerce stated it lacked legal authority. Thus, these bare exhibits do not satisfy China's burden to support its assertions.

39. China also attempts to address its evidentiary deficit by citing to an excerpt from the Appellate Body report in DS379. This effort is unavailing. First, the Appellate Body statement only relates to the CVD side of concurrent AD and CVD proceedings, and in fact was not supported by the record in DS379. Further, a statement in a report in a different dispute does not constitute evidence with respect to the proceedings at issue here.

40. The Appellate Body report in DS379 did not cite any findings in the panel report to support the factual statements on which China relies. Instead, the panel report notes that, in the context of the anti-dumping investigations, the United States had rejected China's suggestion that Commerce had made any broad statement as to whether it lacked legal authority.

41. China has steadfastly avoided any meaningful discussion of the relevant facts of the determinations that China claims are inconsistent with U.S. obligations under Article 19.3 of the SCM Agreement. Rather than present evidence from each of the challenged determinations necessary to support its claims under Article 19.3 of the SCM Agreement, China continues to make conclusory and generalized allegations as to what Commerce found in those determinations and cites almost no evidence from those determinations.

42. China continues to rely on the Appellate Body report in DS379, which is unpersuasive. As detailed extensively by the United States in its written responses to questions following the first Panel meeting, a panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. As explained above, China has yet to establish that the reasoning of the Appellate Body report is persuasive or that its reading of Article 19.3 makes sense under customary rules of interpretation. Nor has China established that the Appellate Body's interpretation would in fact be applicable to the facts in this dispute.

43. The Appellate Body's reasoning in DS379 is flawed. Nowhere does Article 19.3 of the SCM Agreement contain an obligation that would require an administering authority to engage in any sort of investigative function. The Appellate Body report in DS379 also fails to recognize that Article 19.3 of the SCM Agreement is first and foremost a non-discrimination provision. China has done nothing to demonstrate that this reading is flawed in any respect.

44. China errs when it argues that investigations are subject to Article 19.3. China ignores the text of the SCM Agreement in conflating investigations and reviews for purposes of assessing its claim under Article 19.3. China commits a similar error when it argues that preliminary determinations are subject to Article 19.3.

45. As noted in the first written submission and the U.S. answers to panel questions, the Appellate Body did not benefit from the full argumentation of the parties before reaching its conclusions in DS379. For example, the Appellate Body misconstrued Article 19.3 in articulating a duty for an authority to engage in an investigative function. The Appellate Body also misconstrued

the findings in *US – Countervailing Measures on Certain EC Products.* In particular, the Appellate Body interpreted Article VI:3 using Article 19.4 of the SCM agreement as context. By contrast, the Appellate Body in DS379 viewed the *US – Countervailing Measures on Certain EC Products* analysis without any context, and drew false parallels as a result. Nothing in Article 19.3 requires an investigating authority to determine or investigate the amount of the subsidy before levying a duty. These arguments were not presented in DS379.

46. The path the Appellate Body followed to reach its conclusions departed significantly from the arguments made by the parties. First, in DS379, Article 19.4 of the SCM Agreement was the primary focus of the parties in their submissions before the Appellate Body. Although the Appellate Body in DS379 did address *EC – Salmon (Norway)* in its report, its analysis and reasoning went far beyond what was argued by the parties. For instance, the Appellate Body relied on Article 19.2 as context to interpret Article 19.3 despite the fact that no party in that dispute made such an argument. It did the same in relying upon Articles 21.1 and 32.1 of the SCM Agreement as context, although no parties raised these arguments before the panel or the Appellate Body.

47. Article 19.3 of the SCM Agreement seeks to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated under the rules of the SCM Agreement. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should be rejected and the United States respectfully requests the Panel to find that the United States did not act inconsistently with Article 19.3 in the challenged determinations.

VI. THE UNITED STATES ACTED CONSISTENTLY WITH ARTICLES 10 AND 32.1 OF THE SCM AGREEMENT

48. As previously noted by the United States, the sole basis for China's claims under Articles 10 and 32.1 of the SCM Agreement derives from China's contention that the United States acted inconsistently with Article 19.3 of the SCM Agreement. Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement must also fail.

VII. CONCLUSION

49. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.

Executive Summary of the Opening Statement of the United States of America at the Second Substantive Meeting of the Panel

1. In our oral presentation, the United States will address how China has continued to fail to prove its claims under Article X of the GATT 1994 and Article 19.3 of the SCM Agreement, addressing certain key legal and factual deficiencies in China's Second Written Submission. And while we address those issues in some depth, that we do not address other of China's arguments in this statement does not reflect agreement with China but rather our interest in economizing time.

2. We do wish to summarize briefly where we are. While China has spent pages upon pages spinning forth, to be charitable, a "creative" approach to GATT 1994 Article X, that very creativity should give the Panel pause. And we ask you to ask yourself, is it really the case that these provisions from the GATT 1947 were intended to prohibit the application of measures touching on any events prior to publication and to regulate the constitutional relationship between a Member's legislature and judiciary? Can those texts fairly be read to reflect such far-reaching and profound limitations on Member's rights?

3. To the United States, the answer is no, and this explains why China finds no support in previous reports examining claims under these provisions. As we have explained, Article X is by its own terms directed to the transparency and administration of certain measures bearing on trade. With respect to the U.S. measure at issue in this dispute, P.L. 112-99, the United States has amply satisfied those obligations. Indeed, what is truly astonishing is that China would claim that the U.S. legislation lacks transparency or that the U.S. courts do not issue decisions that bind the U.S. Department of Commerce. Such propositions are contrary to common sense as well as the facts leading to this dispute.

4. As a result, the United States believes the resolution of China's claims in this dispute is straightforward and requires no mental gymnastics. First, China's Article X:1 claim has no merit. The United States published the GPX legislation on the same day it was enacted on March 13, 2012, fulfilling the transparency called for in that provision.

5. Second, China's Article X:2 claim fails on multiple grounds. Fundamentally, the claim fails because the GPX legislation was not enforced before the date of its publication; no U.S. entity gave any legal effect to that legislation on any day prior to its publication, nor could they have. The United States has also demonstrated, at length, other failings of China's arguments, including that China has not demonstrated that the GPX legislation is a measure of general application with respect to its application to previously initiated proceedings, that China has not demonstrated the legislation advances a rate of duty or imposes a restriction or requirement, and that China has not demonstrated that the legislation imposes any "advance" in a rate of duty or a "new or more burdensome" restriction or requirement. On this last point, as we will address in more detail in this statement, the fact is that the GPX legislation did not change or affect the U.S. Department of Commerce's existing and well-known treatment of the imports subject to the 27 proceedings at issue in this dispute.

6. Third, Article X:3(b) imposes a structural obligation to establish or maintain review procedures meeting certain criteria. The United States has met those obligations, and China has failed to prove that Article X:3(b) imposes any limitations on the ability of a legislative body to enact laws, whether or not judicial proceedings are pending.

7. The United States recalls that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its AD law, and China is not challenging that concurrent application in itself. The United States has exercised this right since 2006. China nevertheless claims that the United States, of all WTO Members, could not apply CVDs to exports from China during the period from 2006 until 2012, and that WTO law should prohibit the application of legislation enacted by the U.S. Congress to preserve Commerce's existing practice of applying CVDs to exports from China. That is an astonishing argument, and as we set out in this statement, one entirely dependent not only on the Panel committing a series of interpretive errors, but also for the Panel to resolve issues of U.S. law contrary to Commerce's interpretation, contrary to the intent and expectation of the U.S. Congress, and which the U.S. courts are considering but have not resolved. The Panel should

not engage in that speculative exercise and it can resolve China's claims on simpler grounds under Article X of the GATT 1994.

8. Finally, with respect to China's claims under Article 19.3 of the SCM Agreement, the United States in this statement will explain why China's arguments fail to set out a valid interpretation of that provision and fail to make out a case even under the Appellate Body's flawed interpretation of that provision in DS379. Indeed, given China's failure to engage on the interpretation of Article 19.3 and to address U.S. arguments under customary rules of interpretation of public international law, it is clear that China's entire legal argument rests on its "expectation" that the Panel will simply accept the Appellate Body's approach without any further engagement by the parties. The lack of engagement by China confirms the U.S. view that it does a profound disservice to Members and the dispute settlement system for any panel to accept the view that, once the Appellate Body has made a finding on an issue of law, it must follow that interpretation uncritically. But such an approach is, in fact, contrary to the text and structure of the DSU, and as we will continue to point out in these proceedings, it is not an "expectation" that China itself holds when it disagrees with Appellate Body findings.

I. CHINA'S ARTICLE X CLAIMS ARE WITHOUT MERIT

9. The United States has provided multiple bases on which China's claims can be rejected. Thus, it would not be necessary to make findings on every distinct basis on which those claims are flawed. However, because China expends a significant amount of effort and space attempting to read two uniquely domestic legal concepts into Article X, we will spend some time today rebutting those arguments to demonstrate that none of China's arguments withstand scrutiny. Those arguments are (1) that Commerce has acted ultra vires, and as a result, has violated Article X:2, and (2) that Articles X:1 and X:2 prohibit the "retroactive" application of domestic laws. Although China has stopped referring to these terms explicitly, it has continued to pursue them in its Second Written Submission.

10. While neither of these concepts applies under Article X, China's arguments under Article X depend entirely on its being able to obtain findings from the Panel on these concepts. However, in doing so, China is asking the Panel to make factual findings on issues of U.S. constitutional and other domestic law issues that are unresolved and currently being litigated in U.S. courts. The Panel should avoid making findings that at this point would simply involve speculation as to the outcome of domestic legal proceedings and that are not necessary to the resolution of China's Article X claims.

II. CHINA'S ARGUMENT THAT THE PANEL SHOULD SPECULATE AND SUBSTITUTE ITS JUDGMENT ON U.S. LAW UNDER ARTICLE X:2 IS WITHOUT MERIT

11. China has continued to advance its ultra vires claim, this time as an issue of how domestic law should be "properly determined" for purposes of a so-called "baseline" for Article X:2. There are two fundamental problems with China's "properly determined" argument. First, Article X:2 does not address allegedly ultra vires actions by an administering agency. Thus, whether or not an administering agency's actions were ultra vires under domestic law is irrelevant for an evaluation of the consistency of a measure with Article X:2.

12. Second, China's argument would compel the Panel to speculate on the content of U.S. law and find that Commerce's interpretation was contrary to law. But the legal issue of whether Commerce was prohibited from applying the U.S. CVD law to China has not been resolved by U.S. domestic courts. Given that the courts have not finally spoken to the contrary and therefore Commerce's interpretation remains valid as a matter of U.S. law, the Panel has no basis under U.S. law to substitute its judgment for that of Commerce. The United States would caution that, if the Panel were to speculate and substitute its judgment on the content of U.S. law for Commerce's interpretation, it would run a significant risk of making a factual error.

13. Further, despite pending domestic litigation on these issues, China asserts in its Second Written Submission that a statement by Professor Richard Fallon will "put an end" to and "properly determine" whether the GPX legislation was a clarification or change of existing law and whether the GPX V opinion has any legal effect under U.S. law. China's assertion has no legal basis. First, the conclusions in the statement that Professor Fallon prepared for China are incorrect. Second,

under the U.S. legal system, law professors have no special or authoritative role in interpreting U.S. law. Nonetheless, to the extent the panel is interested in the views of U.S. law professors, the United States has requested the views of Dean John Jeffries, a noted U.S. constitutional law expert. Dean Jeffries' expert statement, submitted as exhibit USA-115, explains numerous shortcomings in Professor Fallon's statement.

14. As an initial matter, Professor Fallon – even though he prepared the statement on behalf of China – does not state and cannot state that the U.S. courts would find or have found that the GPX legislation is a change from previous law. His conclusion is only that it would be "unlikely" for a court to find that the law was a legislative clarification. On the legal status of GPX V, he states that "a U.S. court could very plausibly regard" the opinion to have binding legal effect. Such conclusions are speculative and cannot be treated as putting an end to the matter, as asserted by China.

15. First, on the issue of whether the GPX legislation is a change or clarification of the law, Professor Fallon's statement fails to provide the indicia that the courts have used to determine whether a law is a change or clarification. Rather, the statement focuses on whether there is "an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law." This indication, in Professor Fallon's opinion, is one of the "most important" indicia.

16. This is incorrect. Several U.S. federal appellate courts have come to the opposite conclusion. In 2008, the U.S. Court of Appeals for the Third Circuit stated that it "did not consider an enacting body's description of an amendment as a 'clarification' of the pre-amendment law to necessarily be relevant to the judicial analysis." The case is submitted as USA-116. Such a conclusion was also reached by the U.S. Courts of Appeals for the Fourth and Eleventh Circuits in decisions previously submitted as USA-56 and USA-57.

17. After surveying U.S. case law on the issue, the Court of Appeals for the Third Circuit found that there is "no bright-line test" to determine whether a law or regulation "clarifies" the existing law. The court noted that it did not "take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification." The court reasoned that "one could posit that quite the opposite was the case – that the new language was fashioned to clarify the ambiguity made apparent by the case law."

18. Second, regarding the issue of the legal status of GPX V, China's reliance on Professor Fallon's statement in no way advances China's argument. Further, the opinion stated by Professor Fallon is contrary to the overwhelming weight of authority under U.S. law. Importantly, it is contrary to the Federal Circuit's own decision in GPX VI, in which it stated that "an appellate court's decision is not final until its mandate issues." Further, Dean Jeffries explains that the U.S. Federal Circuit's position that the grant of rehearing suspended any legal effect of GPX V accords with settled law. Under U.S. law, when a panel grants rehearing, its original decision loses any effect. As a senior federal appellate judge stated, "[t]he first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated."

III. CHINA'S RETROACTIVITY CLAIM UNDER ARTICLE X:2 IS WITHOUT MERIT

19. In addition to insisting that the Panel should speculate and substitute its judgment for that of the administering authority, China continues to read into Article X:2 a prohibition against the so-called concept of "retroactivity." On this issue, the United States has been clear: such a concept of domestic law is not addressed under Article X:2. China's arguments to the contrary have no merit.

IV. ARTICLE X:3(B) DOES NOT ADDRESS HOW A LEGISLATIVE BODY CAN ENACT LEGISLATION

20. In its Second Written Submission, China continues to argue that "the intervention by the U.S. Congress in ongoing judicial proceedings" is inconsistent with Article X:3(b). As the United States has explained, Article X:3(b) does not impose any limitations on the ability of a legislative body to enact laws altering the substantive content of the law.

21. Rather, Article X:3(b) imposes an obligation regarding the structure or framework of a judicial review system. The United States has acted consistently with Article X:3(b). Specifically, the United States has established a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters. As such, China's claim under Article X:3(b) is without merit.

V. CHINA HAS NOT ESTABLISHED EITHER A FACTUAL BASIS OR A LEGAL BASIS FOR ITS CLAIM UNDER ARTICLE 19.3 OF THE SCM AGREEMENT

22. After several months, and with numerous opportunities to substantiate its claim, China still cannot justify its claim under Article 19.3 of the SCM Agreement. China continues to make shortcuts in arguing its case -- making generalized allegations relating to Commerce's determinations, and citing almost no evidence from those determinations. And China continues to misinterpret Article 19 of the SCM Agreement. China has refused to address the U.S. interpretation, which is based on customary rules of interpretation of public international law. In particular, China's entire Article 19.3 case fails, for four reasons.

23. First, China continues to rely on the Appellate Body report in DS379. China also argues that the United States has failed to provide "cogent reasons" to depart from the Appellate Body report in DS379. But one example of a "cogent reason" to depart from Appellate Body findings is where Appellate Body findings are not persuasive. As detailed at length in our submissions, the Appellate Body findings in DS379 are legally erroneous and therefore cannot be persuasive.

24. The Appellate Body's interpretation goes far beyond the principles of non-discrimination and, as already noted, imposes an investigative function not reflected in that Article. Article 19.3 of the SCM Agreement seeks to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's arguments should be rejected.

25. Finally, in relation to the Appellate Body's finding that there is a breach of Article 19.3 if an investigating authority fails to investigate the extent of any alleged double remedy, we would pose a simple question. If the investigating authority does not "investigate" the extent of any possible double remedy, but imposes an antidumping duty at a rate of zero, is there any breach of the obligation under Article 19.3, under which a "countervailing duty shall be levied, in the appropriate amounts in all cases, on a non-discriminatory basis on imports … from all sources…"? Is it possible to "levy" a duty in an amount that is not appropriate, based on a concern that a double remedy may be imposed, if there is no anti-dumping duty levied at all? The Appellate Body's interpretation of Article 19.3 would suggest the answer is "yes", but the United States sees no basis in the text of Article 19 for that result.

26. Second, in the rare instances in which China offers its own interpretation of Article 19.3, the interpretation is flawed, and unsupported by the text of the covered agreements. China, for example, errs when it argues that original investigations are subject to Article 19.3. "Levy" is defined under footnote 51 of the SCM Agreement as "the definitive or final legal assessment or collection of a duty or tax." In the U.S. system, the "definitive or final legal assessment or collection of a duty or tax" does not occur until the review stage. The obligation in Article 19.3 on its own terms applies to the levying of duties, which does not result from investigations in the U.S. system.

27. Third, the United States has noted that in China's submissions and responses to questions from the Panel, it has taken various shortcuts, failed to analyze the specific facts, and failed to make a prima facie case.

28. China refuses to analyze the specific facts of each determination. Consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the

case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the parties have put before it here.

29. China makes no effort to demonstrate the existence of an overlapping remedy in any of the challenged determinations or to identify evidence from any of the challenged determinations that would support the theory adopted by the panel in DS379. In making as-applied challenges, China cannot simply rely on factual findings from a prior dispute.

30. Fourth, China unduly ignores the record in this dispute in asserting that "it is not enough for the investigating authority to 'fully consider[] the factual evidence and arguments made by respondent parties' if the investigating authority never solicits relevant evidence in the first place." But in fact, Commerce requested public comment in 2006 on the applicability of CVD law to China, and China, in addition to other parties, presented their views. And in 2007, Commerce further indicated that it would consider any and all evidence that would support any claims of overlapping remedies. Thus, Commerce solicited the views of respondents; it evaluated these views; and it offered its conclusions based on the arguments presented. To the extent Article 19.3 entails a duty to investigate, Commerce met this standard.

31. In sum, China's arguments with respect to Article 19.3 fail.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

Executive Summary of the Written Submission of Australia

I. INTRODUCTION

1. This dispute raises important issues concerning Article X of the GATT 1994 and its reach into Members' domestic legal orders.

II. ARTICLE X:1

2. Article X:1 of the GATT 1994 requires Members to "promptly publish in such a manner as to enable governments and traders to become familiar with them", laws, regulations, judicial decisions and administrative rulings of general application pertaining to the range of subject matters listed in this paragraph. Article X:1 outlines a World Trade Organization (WTO) Member's obligations in relation to the publication of trade regulations and is fundamentally a provision about transparency.

3. Article X:1 is silent on whether "laws, regulations, judicial decisions and administrative rulings" can be applied retrospectively from the date of publication. This is notwithstanding the term "made effective", in the first sentence of Article X:1 which, in Australia's view, could, in the context of domestic legislation, mean "in force". This is consistent with the Appellate Body's interpretation of the term "made effective" in the context of Article XX(g) of the GATT 1994 in *US – Gasoline*.[1]

4. We note that the Panel in *EC – IT Products* found in relation to "made effective" that Article X:1 "covers measures that were brought into effect, or made operative, in practice and is *not limited to* measures formally promulgated or that have formally "entered into force"" (emphasis added).[2] However, this was in the context of an inquiry into whether Article X:1 extended to measures that were applied in practice, despite not being formally binding under European Union law.[3]

5. The factual situation at issue in this case is different. In our view, the Panel's statement in *EC – IT Products* cannot be read as meaning that publishing a law upon its enactment would be a violation of Article X:1 if the law has effects in the past. In Australia's view, Article X:1 does not render laws which have retroactive effects inconsistent with this provision.

6. Finally, it is important that Article X:1, which concerns a procedural obligation to publish, and X:2, which deals with the enforcement or operation of measures, not be conflated.

III. ARTICLE X:2

7. The Appellate Body in *US – Underwear* stated that the "essential implication" of Article X:2 is that "Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures".[4] The Appellate Body also noted that "prior publication is required for all measures falling within the scope of Article X:2, not just

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[1] Appellate Body Report, *US – Gasoline*, p. 20.

[2] Panel Report, *EC – IT Products*, para. 7.1048.

[3] "This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order." Panel Report, *EC – IT Products*, para. 7.1048.

[4] Appellate Body Report, *US – Underwear*, p. 21.

ATC [Agreement on Textiles and Clothing] safeguard restraint measures sought to be applied retrospectively".[5]

8. The Panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that Article X:2 can preclude retroactive application of a measure. It also noted, however, that compliance with this obligation depends on "the timing of the publication of a measure, and its enforcement *in particular circumstances affecting the rights of WTO Members*" (emphasis added).[6]

9. In Australia's view, where a measure does not "advance in a rate of duty or other charge on imports", or impose a "new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor", failure to publish that measure would not fall foul of Article X:2. This is consistent with the purpose of Article X:2 to protect the fundamental principle of transparency by ensuring due process where parties' interests are concretely affected by a particular measure.[7]

IV. ARTICLE X:3(B)

10. Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness.[8] It requires a balance between a trader's fundamental right to procedural fairness and the sovereign right of WTO Members to manage the manner in which they administer their own laws and regulations.[9]

11. Article X:3(b) contains a number of specific obligations. This includes that WTO Members are required to maintain independent tribunals in respect of the review of customs actions which "shall be implemented by and shall govern the practice of" the agencies concerned "unless an appeal is lodged …".

12. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in this provision and remains a matter for each WTO Member in accordance with its own constitution and system of government.[10]

13. Article X:3(b) does not prevent WTO Members from legislating and having such legislation applied by their courts so long as they comply with the specific obligations of the provision. A WTO Member's ability to legislate retroactively on a matter that is being considered by a court is a matter for each Member's domestic legal system.

[5] Ibid.
[6] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.181.
[7] Appellate Body Report, *US – Underwear*, p. 21.
[8] Appellate Body Report, *US – Shrimp*, para. 183.
[9] Panel Report, *Thailand – Cigarettes*, para. 7.874.
[10] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 205.

Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel

INTRODUCTION

1. This dispute raises important issues concerning Article X of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as well as the Agreement on Subsidies and Countervailing Measures.

2. Australia, in a separate written submission, has already addressed issues concerning Article X. This Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel considers what a party needs to demonstrate in order to establish a violation of World Trade Organization (WTO) law.

II. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

3. It is a well-established principle that to establish a violation of WTO law, a party needs to adduce evidence and make arguments as to how a measure or measures are inconsistent, as such or as applied, with an obligation under relevant provisions of the WTO Agreement.[1]

4. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body (DSB)] cannot add to or diminish the rights and obligations provided in the covered agreements." Taken together with Articles 7 and 11 of the DSU, it is clear that panels are obliged to consider each dispute on its merits under the relevant provisions of the covered agreements.

5. While there is no binding rule of precedent in the WTO dispute settlement system, the Appellate Body has previously stated that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[2] This is consistent with the view it previously expressed that panel decision give rise to "legitimate expectations among WTO Members"[3] and "should be taken into account where they are relevant to any dispute."[4]

6. Australia considers that there may be instances where it would be appropriate for a panel to depart from prior Appellate Body findings, including where the evidence presented in a particular case gives rise to a different factual situation that could distinguish it.

7. For Australia, it is nevertheless important to distinguish the question of the *role of precedent* in the WTO dispute settlement system from the question of *the status of prior panel and Appellate Body findings for WTO Members' rights and obligations under WTO Law*. Australia considers that while previous decisions of the Appellate Body may be highly persuasive in how a provision of a covered agreement should be *interpreted*, these interpretations do not in themselves give rise to substantive obligations. To establish a violation of WTO law it remains necessary to identify the relevant WTO provision and obligation contained therein, and to explain the basis for the claimed inconsistency of the measure with that provision on the basis of evidence.[5]

[1] Appellate Body report, *US – Gambling*, paras. 140-141.
[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[3] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.
[4] Ibid.
[5] See, for example, Appellate Body Report, *US – Gambling*, para. 141.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules. Canada's submission will address the concurrent application of anti-dumping and countervailing duties in cases in which normal values are calculated using costs or prices from outside the export nation in question.

II. THE CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING DUTIES WHERE NORMAL VALUE IS CALCULATED USING COSTS OR PRICES OUTSIDE CHINA

2. Canada submits that the WTO Agreements permit the concurrent application of anti-dumping and countervailing duties even where the investigating authority has calculated normal values using costs or prices from outside the home market in the dumping investigation. Canada agrees with the United States that this view is confirmed by the text of the relevant agreements, the Tokyo Round Subsidies Code and specifically confirmed with respect to China as a result of its accession protocol.

3. First, dumping and subsidization are acknowledged as two different causes of injury to domestic industries with distinct sets of rules giving rise to separate remedies: an anti-dumping duty to remedy injurious dumping and a countervailing duty to remedy injurious subsidization.

4. When an imported product happens to be both dumped and subsidized, and causes injury, an importing Member may impose both an anti-dumping duty up to the margin of dumping and a countervailing duty up to the amount of the subsidy.

5. Second, Article VI:5 of GATT 1994 confirms this right to impose concurrent anti-dumping and countervailing duties and expressly limits it in the particular circumstances of export subsidization.

6. Furthermore, the second supplementary provision to Ad Article V:1 of GATT 1994 provides that an importing WTO Member may calculate the normal value of products from centrally planned (i.e. non-market) economies using costs or prices in a surrogate country, instead of domestic prices (which is the norm under Article VI:1 of GATT 1994 and the Anti-dumping Agreement).

7. Third, the Tokyo Round Subsidies Code prohibited importing countries from applying both anti-dumping duties determined on this basis and countervailing duties. However, while WTO Members could have transferred this prohibition into the SCM Agreement during the Uruguay Round, they chose not to. If WTO Members had intended for the prohibition to be carried forward, they would have expressly provided for this.

8. Fourth, with respect to Chinese products specifically, the possibility of imposing concurrent anti-dumping and countervailing duties even if they are not based on the prices or costs found in China is also confirmed by China's Accession Protocol.

9. Subparagraph 15(a)(ii) of China's Accession Protocol expressly permits importing WTO Members to calculate normal value on the basis of costs or prices outside China, if the Chinese producers under investigation fail to show clearly that market economy conditions prevail in their industry. Subparagraph 15(b) of China's Accession Protocol also contemplates that importing WTO Members may impose countervailing duties on Chinese products, allowing them to calculate Chinese subsidies on the basis of benchmarks outside China if there are "special difficulties" in the application of Article 14 of the SCM Agreement.

10. If WTO Members had intended to prohibit the concurrent application of anti-dumping duties calculated specifically on Chinese products on the basis of subparagraph 15(a)(ii) of China's Accession Protocol and countervailing duties, they would have done so in China's Accession Protocol just as they had done earlier in the Tokyo Round Subsidies Code. Instead, China's Accession Protocol enables importing WTO Members to impose both anti-dumping duties calculated on the basis of costs or prices outside China and countervailing duties at the same time.

11. Under GATT Article VI:3 the purpose of imposing a countervailing duty is to offset any subsidy. This purpose is reflected in Article 19.1 of the SCM Agreement, which provides that a countervailing duty may only be imposed "in accordance with the provisions of this Article". Article 19.4 of the SCM Agreement permits importing WTO Members to impose countervailing duty up to "the amount of the subsidy found to exist". A countervailing duty on a Chinese product will be in "the amount of the subsidy found to exist" if that amount is calculated in accordance with either: (a) Article 14 of the SCM Agreement ("Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient"); or (b) subparagraph 15(b) of China's Accession Protocol. No other method for calculating "the amount of the subsidy" is expressly prescribed.

12. Therefore, as long as the importing WTO Member does not impose a countervailing duty in excess of "the amount of the subsidy found to exist" (i.e. according to Article 14 of the SCM Agreement or subparagraph 15(b) of China's Accession Protocol), the duty will be in the "appropriate amount", as required by Article 19.3 of the SCM Agreement.

13. Canada notes that while the panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body regrettably reversed these findings. Canada considers that this reversal was in error. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the Dispute Settlement Understanding.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN UNION

1.1. CHINA'S CLAIMS AGAINST SECTION 1 OF P.L. 112-99

1. Whilst not taking a final position on the specific facts of the case, and in particular on the question of whether Section 1 of P.L. 112-99 maintains the *status quo* on procedures relating to the application of countervailing duties to NME countries, the European Union would like to make the following observations on the various claims raised by China under Article X of the GATT 1994.

1.1.1. China's claim under Article X:1 of the GATT 1994

2. The European Union disagrees with China's interpretation of Article X:1 of the GATT 1994 and agrees with the United States. The European Union considers that Article X:1 of the GATT 1994 seeks to ensure that trade rules are not kept secret but are publicly known by governments and traders so that they know what conditions would apply to their goods when imported into a Member's territory. The fact that those conditions may be altered by publishing a measure of general application in the future does not mean that such a measure was published in breach of the obligations under Article X:1 of the GATT 1994, insofar as the measure was published promptly (i.e. the time span between the adoption of the measure and its publication was "quickly" and "without undue delay") and in an appropriate manner (i.e., with respect to the means employed to make it available to the public) so that governments and traders became aware that the measure exists, regardless of its application only for the future or also to past events.

1.1.2. China's claim under Article X:2 of the GATT 1994

3. The European Union observes that Article X:2 of the GATT 1994 precludes retroactive application of a measure falling under its scope. Compliance with this obligation depends on the timing of the publication of a measure and its enforcement in particular circumstances affecting acquired rights of WTO Members and private entities. That being said, the European Union notes that the Anti-Dumping Agreement (Article 10) and the SCM Agreement (Article 20) both contemplate provisions envisaging the retroactive application of duties to a date prior the imposition of provisional and/or definitive measures. In the European Union's view, this indicates that the prohibition against retroactive effect in Article X:2 of the GATT 1994 is not absolute and has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities.

4. In the European Union's view, a relevant question for the Panel to examine is whether on 13 March 2012 there were any acquired rights or legitimate expectations that were affected by the US legislator's decision. The European Union understands that China agrees that "because the [Federal Circuit] court had not yet acted on the petition for rehearing, the [OTR] case was technically still pending before the court". If on 13 March 2012 the final collection of duties was still suspended until the court proceedings were completed, it could be argued that on that date private entities had not yet acquired rights or had legitimate expectations that the final collection of duties was definitive and final. In contrast, in cases where countervailing duties were imposed and finally collected and all judicial instances had been completed, those entities would have acquired a legitimate right and the legitimate expectation to have their duties revoked. The application of P.L. 112-99 to those events would be retroactive, contrary to Article X:2 of the GATT 1994. Therefore, the European Union considers that Article X:2 of the GATT 1994 protects acquired rights and legitimate expectations of WTO Members and private entities. In view of the transparency objective contained in Article X, Article X:2 permits operators to protect and adjust their activities in accordance with new laws and requirements affecting

their business and, thus, ensures that measures will not be applied to completed events or situations (e.g., where decisions under municipal law are final).

1.1.3. China's claim under Article X:3(b) of the GATT 1994

5. Article X:3(b) of the GATT 1994 relates to first instance review. It requires WTO Members to have procedures to review actions taken by administrative bodies relating to customs matters, thereby including the imposition of anti-dumping and countervailing duties. In this respect, Article X:3(b) ensures due process in relation to customs matters, and establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations. Article X:3(b) further requires that the decisions issued by those review procedures must be implemented and followed by the administrative bodies. Indeed, otherwise, the obligation under Article X:3(b) to establish such review procedures would be useless. Thus, WTO Members are required to ensure that their system of review provides for the relevant administrative action to be set right. Article X:3(b) also establishes the possibility to have the decision issued under the review procedures appealed before a court or a tribunal. In other words, it provides a guarantee of several instances of legal review of decisions issued by administrative bodies.

6. The European Union disagrees with China's interpretation. The fact that Article X:3(b) does not contemplate explicitly enacting a new law and directing national courts to apply the law retroactively to change the outcome of a case does not imply that there is an obligation to refrain from doing so in this provision. Silence on this issue should not be interpreted as imposing such obligation upon WTO Members. Article X:3(b) of the GATT 1994 establishes a due process obligation and minimum standards for transparency and procedural fairness in Members' administration relating to customs matters. However, this provision does not alter the possibility of legislators modifying rules or setting the temporal application of those rules. In the European Union's view, legislators should be allowed to change the law and confer it retroactive effect insofar as acquired rights and legitimate expectations are preserved.

7. In sum, the European Union considers that Article X:3(b) of the GATT 1994 should not be interpreted as prohibiting Members from taking legislative actions which would impact the decisions issued under the review procedures required under that provision. This is even more the case in situations where those decisions are not yet final.

1.2. DOUBLE REMEDIES

8. In *DS379* the AB explained that "double remedies" arise when the simultaneous application of ADDs and CVDs offset the same subsidization twice. "Double remedies" are "likely" to occur if an NME methodology is used. When authorities calculate a dumping margin for a product from an NME, they compare the export price to a NV that is based on surrogate costs or prices from a third country. Because prices and costs in the NME are unreliable, prices or COP in a market economy are used to calculate NV. Authorities compare the product's constructed NV (not reflecting any subsidy) with the product's actual export price (which, when subsidies have been received, is presumed lower than it would otherwise be). The dumping margin is thus based on an asymmetric comparison and is higher than it would otherwise be. Thus, dumping margins calculated with an NME methodology reflect not only dumping, but also subsidies affecting the producer's COP. An ADD calculated with an NME methodology may "remedy" or "offset" a domestic subsidy, if such subsidy has contributed to a lowering of the export price. The subsidization is "counted" within the overall dumping margin. When a CVD is levied against the same imports, the same domestic subsidy is also "counted" in the calculation of the rate of subsidization and, therefore, the resulting CVD offsets the same subsidy a second time. Accordingly, the concurrent imposition of an ADD calculated with an NME methodology, and a CVD results in a subsidy being offset twice. Double remedies may also arise in the context of domestic subsidies granted within market economies when ADDs and CVDs are concurrently imposed and an unsubsidized, constructed, or third country NV is used.

9. Article 19.3 ADA requires that CVDs be levied in the appropriate amounts in each case; and on a non-discriminatory basis. The term "appropriate" is not an absolute standard, but a relative one. The two requirements in the first sentence of Article 19.3 inform each other. Thus, it would not be appropriate for an importing Member to levy CVDs on imports

from sources that have renounced subsidies, or if price undertakings have been accepted. Similarly, the requirement that the duty be imposed on a non-discriminatory basis should not be read in an overly formalistic manner. While leaving to the importing Member the decision as to whether the amount of the CVD to be imposed shall be the full amount of the subsidy or less, Article 19.2 states that it is "desirable" that "the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury". Article 19.2 thus encourages authorities to link the amount of the CVD to the injury. Once a causal link is demonstrated, the imposition of CVDs is not isolated from any consideration related to injury. A link between the amount of the CVD and the injury is also reflected in Article 19.3, which provides that a "CVD shall be levied, in the appropriate amounts in each case ... on imports of such product ... found to be subsidized and causing injury". Other provisions of the ASCM link the CVD to the injury. Article 19.1 allows for the imposition of CVDs when subsidized imports "are causing injury". The use of the present tense in this provision suggests that injury is a continuing prerequisite for the imposition and levying of CVDs. This is confirmed by Article 21.1.

10. Article 10 establishes that Part V relates to the application of Article VI GATT 1994, and that CVDs must conform to that provision. By providing that "only one form of relief shall be available", footnote 35 makes clear that there can be no "double remedies". Footnote 36 defines a "CVD" as a special duty levied for the purpose of "offsetting" a subsidy. The link between the GATT 1994 and the ASCM also figures in Article 32.1. Article VI:5 prohibits the concurrent application of ADDs and CVDs to compensate for the same situation of dumping or export subsidization. The term "same situation" is central to an understanding of the rationale underpinning this prohibition, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent. An export subsidy will result in a pro rata reduction in export price, but will not affect the domestic price. The subsidy will lead to a higher margin of dumping. The situation of subsidization and the situation of dumping are the "same situation", and the application of concurrent duties would amount to the application of "double remedies". By comparison, domestic subsidies will affect domestic and export prices in the same way. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the calculation, the overall dumping margin will not be affected. In such circumstances, the concurrent application of duties would not compensate for the same situation.

11. Thus, the presence of an express prohibition on the concurrent application of duties to counteract the "same situation" of dumping or export subsidization is logical, when NV is calculated on the basis of domestic sales prices. Article VI:1(a) GATT 1994, like Article 2.1 ADA, provides that the usual method for calculating NV will be based on the comparable price for the like product in the exporter's domestic market. Thus, in anti-dumping investigations, NV will typically be based on domestic sales prices and any domestic subsidy will have no impact on the calculation of the dumping margin. Nonetheless, Article VI:1(b), like Article 2.2 ADA, sets out exceptional methods for the calculation of NV, which are not based on actual prices in the exporter's domestic market. The second Ad Note to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations, also authorizes recourse to exceptional methods for the calculation of NV in investigations of imports from NMEs. In case of domestic subsidization, it is only in these exceptional situations that there is any possibility that the concurrent application of anti-dumping and CVDs on the same product could lead to "double remedies". The references to Article VI GATT 1994 in Articles 10 and 32.1 ASCM, Article VI itself, and the many parallels between the obligations that apply to Members imposing ADDs or CVDs, suggest that any interpretation of "the appropriate amounts" of CVDs must not be based on a refusal to take account of the context offered both by Article VI GATT 1994 and by the provisions of the ADA. Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another. This view is reinforced by the fact that, although the disciplines that apply to a Member's use of ADDs and its use of CVDs are legally distinct, the remedies that result are, from the perspective of producers and exporters, indistinguishable.

12. It follows that a proper understanding of the "appropriate amounts" of CVDs cannot be achieved without regard to relevant provisions of the ADA and recognition of the way in which the two legal regimes, and the remedies which they authorize, operate. The requirement that any amounts be "appropriate" means that authorities may not, in fixing

the appropriate amount of CVDs, simply ignore that ADDs have been imposed to offset the same subsidization. Each agreement sets out strict conditions that must be satisfied before the authorized remedy may be applied. The purpose of each authorized remedy may be distinct, but the form and effect of both remedies are the same. Both the ADA and the ASCM contain provisions requiring that the amounts of ADDs and CVDs be "appropriate in each case". Both agreements also set ceilings on the maximum amount of duties that can be imposed. Article 19.4 ASCM establishes that CVDs shall not exceed the amount of the subsidy found to exist and Article 9.3 ADA establishes that ADDs shall not exceed the margin of dumping. Only if these provisions are read in wilful isolation from each other can it be maintained that the respective rules on the imposition and levying of duties are complied with when double remedies are imposed. In contrast, reading the two agreements together suggests that the imposition of double remedies would circumvent the standard of appropriateness that the two agreements separately establish. In other words, considering that each agreement sets forth a standard of appropriateness and establishes a ceiling for the respective duties, it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization. It is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of ADDs and CVDs that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and CVDs which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found.

13. The EU expects that the Panel will follow a similar line of reasoning in this case.

2. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN UNION (INCLUDING SOME RESPONSES TO THE PANEL'S QUESTIONS)

14. As suggested by the Panel, the EU will provide preliminary answers to the questions advanced by the Panel relating to the GATT 1994. Starting with question 5, the EU considers that the term "enforced" in Article X:2 of the GATT 1994 speaks to the application of the measure in question, i.e. that the measure is being applied or has been put into application. In contrast, the term "made effective" under Article X:1 does not necessarily require an actual application of the measure of general application. A law may be published today and establish that it will be applied only to actions taking place as of 1 January 2014. Such a law will be made effective today although it will be enforced only as of next year. Moving on to question 6, the EU considers that there is no textual or contextual support for China's interpretation of Article X:2, according to which the measures falling under such a provision can be applied only with respect to actions taken after the publication of the measure. As explained in our written submission, Article X:2 has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities. With respect to question 7, the EU considers that Article X:2 does not relate to authority, but rather to transparency and due process. Finally, to answer question 8, the European Union considers that Article X:3(b) obliges agencies to implement and be governed by the decisions of courts of first instance as modified or complemented by the decisions of superior courts with respect to the same matter.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

Executive Summary of the Written Submission of Japan

A. Prompt publication of P.L. 112-99 in accordance with Article X:1 of the *GATT*

1. In the *First Written Submission of China* ("China FWS"),[1] China alleges that "Section 1 of P.L. 112-99 was 'made effective' as of 20 November 2006".[2] China argues that the "basic inquiry [of Article X:1 of the *GATT*] is whether the measure was 'published promptly' in relation to this effective date".[3] China thus claims that the publication of P.L. 112-99 is inconsistent with Article X:1 because it was not been published for "nearly five and half years after the date on which it was made effective."[4]

2. While China submits that "in no event can publication be considered "prompt" if it takes place after the measure has taken effect",[5] Japan is of the view that the requirement under Article X:1 would be satisfied even when the law is published after the effective date of the law. This interpretation is supported by the panel in *EC – IT Products*, which stated "in circumstances where the relevant measure has been 'made effective', the requirement to publish promptly will arise". [6] As stated by the panel, the event triggering the application of Article X:1 is the action to make the measure in question, P.L. 112-99 in this case, effective. The question then is whether the P.L. 112-99 was published promptly after it was made effective.[7] The date from which the law would actually be applied is irrelevant to Article X:1.

3. In this regard, Japan has doubt on China's argument that Section 1 of P.L. 112-99 was 'made effective' within the meaning of Article X:1 as of 20 November 2006. Section 1(b) of P.L. 112-99, on its face, sets forth that the provisions of Section 1(a) apply to all countervailing duty proceedings initiated on or after 20 November 2006, and all resulting actions by US Customs and U.S. Federal courts.[8] From Japan's view, Section 1(b) of P.L. 112-99 addresses the subject matter to which the law applies, not the date on which the law was enacted. Accordingly, the 20th November of 2006 is not the date of enactment, but the date which establishes the scope of application of the law. If this understanding is correct, China's approach to consider the relationship between the 20th November of 2006 and the date of publication in examining the consistency with Article X:1 is doubtful.

4. In connection with the question whether the United States "promptly" published the P.L. 112-99 under Article X:1, Japan agrees with the analysis by the panel in *EC – IT Products*. It explained "an assessment of whether a measure has been published 'promptly' … necessarily requires a case-by-case assessment"[9] in light of whether such publication was made "in such a manner as to enable governments and traders to become acquainted with them."

B. Enforcement of a Measure of General Application before Publication in Accordance with Article X:2 of the *GATT*

5. China argues that Section 1(b) of P.L. 112-99 is inconsistent with Article X:2 of the *GATT*, stating "rights of transparency and due process to which governments and traders are entitled

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[1] *See* China FWS, submitted to this Panel on 15 May 2013.
[2] *Id.*, para. 63.
[3] *Id.*, paras. 63-64.
[4] *Id.*, para. 65.
[5] China FWS, para. 64.
[6] Panel Report, *EC – IT Products*, para. 7.1048.
[7] In contrast, under Article X:2 the relevant date is the date of the application of the measure because the provision obliges that WTO members enforce the measure falling within its scope after the measure's official publication.
[8] *See* Pub. L. No. 112-99, CHN-1.
[9] Panel Report, *EC – IT Products*, para. 7.1076.

under Article X:2 are necessarily denied when a measure is applied prior to its official publication."[10]

6. Article X:2 makes explicit that any measure of general application, if it is "effecting an advance in a rate of duty or other charges on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports …", shall be published prior to its enforcement. Consequently, a WTO Member fails to comply with this requirement, if the Member enforces a measure of general application before its publication.

7. As explained by the Appellate Body[11], the prior publication requirement under Article X:2 may embody the principles of transparency and due process. The publication of measures of general application must be made in advance to its enforcement, "so as to enable governments and traders to become acquainted with them".[12]

C. Reversal by Legislature of Court Decisions in Accordance with Article X:3(b) of the *GATT*

8. China argues that P.L. 112-99 is "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government".[13] According to China, "[t]his type of legislative intervention, if accepted, would render meaningless the independent judicial review that is guaranteed by Article X:3(b)." [14] China thus claims that "[e]nacting a new law and directing national courts to apply the law retroactively to change the outcome of a case is not permitted by Article X:3(b) and, if accepted, would gut independent judicial review of any meaning." [15]

9. Article X:3(b) set forth rules on the review by the judicial branch of actions taken by administrative agencies. This Article, however, is silent on relationship between administrative agencies and the legislature, or between the judicial branch and the legislature. At minimum, no rules are set against actions to be taken by the legislature in response to the judicial decision. Therefore, no express obligations to WTO Members are set forth in Article X:3(b) with respect to actions by the legislature in response to judicial decisions.

10. China argues that "legislative intervention, if accepted, would render meaningless the independent judicial review." Article X:3(b), however, explicitly states that the judicial review must be "independent of the agencies" only. Article X sets forth the rules on "laws" in paragraphs 1, and 3(a) and (b), and thus the Article explicitly recognizes the importance of the role of the legislature to establish trade regulations. If it had been contemplated that Article X:3(b) should set forth disciplines on the potential enactment of law in response to judicial decisions, Article X:3(b) could have been drafted to do so. The drafters of the Article, however, did not include any such requirement. Such omission should also be given the meaning.

11. In sum, it is Japan's view that Article X:3(b) does not provide any disciplines on the legislative actions in response to the judicial decision.

D. Avoidance of Double Remedy Pursuant to Article 19.3 of the *SCM Agreement*

12. China alleges that "the USDOC initiated 29 parallel anti-dumping and countervailing duty investigations and periodic reviews that resulted in the imposition of duties on products from China, either on a preliminary or final basis."[16] China claims that the "USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the *SCM Agreement*." [17]

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[10] *Id.*, para. 70.
[11] Appellate Body Report, *US – Underwear*, p. 21.
[12] See Article X:1 of the GATT 1994
[13] China FWS, para. 85.
[14] *Id*, para. 101.
[15] *Id.*, para. 85.
[16] *Id*, para. 124.
[17] *Id.*, para. 126.

13. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* examined the issue of the double remedy, and has reached the conclusion that the investigating authority is "subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3" upon conducting "a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." [18] With respect to the question of when double remedies arise, the Appellate Body found that "double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties"[19] because the use of an NME methodology in calculation of dumping margins "likely provides some form of remedy against subsidization".[20]

14. The Appellate Body then applied this legal analysis to four countervailing investigations in the dispute, and found that "the USDOC made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties." [21] Consequently, "the USDOC failed to fulfill its obligation to determine the 'appropriate' amount of countervailing duties within the meaning of Article 19.3 of the *SCM Agreement*." [22]

15. As clarified by the Appellate Body, an investigating authority has an affirmative obligation to make sure that double remedies would not occur when anti-dumping and countervailing duties are simultaneously imposed on products from NME countries.

[18] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602 (a footnote omitted).

[19] *Id.*, para. 599, referring in its footnote to the Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67 and 14.75 (emphasis in original).

[20] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.67.

[21] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 604.

[22] *Id.*, para. 606.

Executive Summary of the Oral Submission of Japan

1. The United States argues that the *GPX* legislation does not fall within the scope of Article X:2 of the *GATT*. Specifically, the United States argues that "Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty" because "there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports."[23] The United States explains that the USDOC established individual CVD measures in accordance with the CVD law that existed at the time of the establishment of these individual measures.[24] The Chinese government and traders thus had been on notice that the USDOC would apply the CVD law to imports from China.[25] According to the arguments of the United States, therefore, the due process rights under Article X:2 have been observed.

2. The United States appears to submit that it is important whether the Chinese government and traders were given a prior notice of the application of the CVD law as of 20 November 2006. Japan finds the United States' apparent approach proper and is of the view that the Panel should take the following points into consideration.

3. As discussed in the third party submission of Japan, Article X:2 may embody transparency and due process rights of WTO Members and traders by ensuring that imports may not be subject to an advance in a rate of duty or subject to a new or more burdensome requirement without prior public notice of such measures of general application. An importing Member thus would have acted inconsistently with Article X:2, if the importing Member were to apply such measures to imports in such situations that the exporting Member and traders had been unable to be aware that their imports would generally be subject to the measure. They must be given a prior notice of the application of the measure to imports so that they "have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[26]

4. Accordingly, one question in this case under Article X:2 would be whether the Chinese government and traders in fact received public notice that the USDOC would apply the CVD law to imports from China prior to the application of such law. Japan does not take any specific position of the factual aspect in this case. Japan respectfully requests that the Panel review the underlying facts to determine whether the Chinese government and traders were appropriately informed of the application of CVD measures generally to imports from China so that they had a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.

5. Japan recalls that the United States also states that "the *GPX* legislation was officially published on its date of adoption, March 13, 2012", and "Commerce took no action prior to that date to enforce"[27] the *GPX* legislation even if the *GPX* legislation were within the scope of Article X:2.

6. Japan would welcome further clarification by the United States on this argument. Nonetheless, to the extent that, given that the GPX legislation is the relevant measure at issue here (as China claims), the United States intends to argue that Article X:2 may permit the application of a more burdensome legislation to action taken by a trader before its publication because the actual enforcement action can occur only after the publication, Japan could not agree. As discussed, the rationale underlying Article X:2 is to ensure that an exporting Member and its traders be given a prior notice so as to have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures before the measure is in fact applied. In this manner, Article X:2 may embody the transparency and due process in the international trade rules. The importing Member, therefore, would have acted inconsistently with Article X:2 if it fails to give an exporting Member and traders such notice prior to the action of such traders to which

[23] First Written Submission of the United States ("US FWS"), para. 106.
[24] *See* US FWS, paras 44-45.
[25] *See* US FWS, para. 60, citing the decision by the United States Court of International Trade in *GPX VII* at 25 in CHI-8.
[26] Appellate Body Report, *US – Underwear*, p. 21.
[27] US FWS, para. 119.

the measure at issue applies. Accordingly, the alleged retroactive application of the *GPX* legislation thus could be inconsistent with Article X:2 if Chinese traders and government did not receive the required public notice of authentic information about the state of the CVD law so as to be aware of it before such traders take action to which the measures apply in a manner that would respect the basic principles of transparency and due process.

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