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

(WT/DS449)

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

September 27, 2013

TABLE OF REPORTS

Short Form	Full Citation
Argentina – Safeguard Measures on Imports of Footwear	Panel Report, Argentina — Safeguard Measures on Imports of Footwear, WT/DS121/R, adopted 12 January 2000 as modified by Appellate Body Report WT/DS121/AB/R
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
US –1916 Act	Panel Report, *United States — Anti-Dumping Act of 1916*, WT/DS136/R, adopted 26 September 2000, as modified by Appellate Body Report WT/DS136/AB/R
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002
US — Continued Zeroing (AB)	Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US — Shrimp (Article 21.5 — Malaysia)	Article 21.5 Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW, adopted 21 November 2001, as modified by Article 21.5 Appellate Body Report WT/DS58/AB/RW
US — Shrimp (Article 21.5 — Malaysia) (AB)	Article 21.5 Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, adopted 21 November 2001
US – Stainless Steel	Panel Report, *United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179, adopted 1 February 2001
US – Underwear (AB)	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997

TABLE OF EXHIBITS

Exhibit Number	Description
USA-123	Shepard's Citation: *Levy v. Sterling Holding Company*, 544 F.3d 493 (3d Cir. 2008)
USA-124	19 U.S.C. §1671a
USA-125	*Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 77 Fed. Reg. 18,211 (Dep't of Commerce March 27, 2012)

1. In this submission, the United States comments on China's responses to the Panel's second set of questions. To a large extent, China's responses repeat prior arguments of China that are unsupported by the plain text of Article X of the GATT 1994 and Article 19.3 of the SCM Agreement. Rather than also repeat prior U.S. responses on these issues, the comments below contain additional points on China's arguments that we hope the Panel finds useful.[1]

1 ARTICLE X

1.1 Article X:1

Question to China

> **90. At paragraph 7 of its second written submission, China suggests that it would be inconsistent with Article X:1 for a Member to publish a quota and apply it retroactively to imports that had already occurred. Suppose that a Member publishes a law on 31 December, and that the law comes into effect on the same date. The law lowers import duties on product X. It provides that it not only applies to future imports of product X, but also that it applies retroactively to all imports of that product that occurred on or after 1 January of the same year. In China's view, has this Member acted inconsistently with Article X:1?**

2. China's response is that the Member's actions to reduce import duties is inconsistent with Article X:1 of the GATT 1994, as such a reduction "does not necessarily mean that it benefited foreign governments and traders."[2] In other words, under China's extreme approach, a reduction in import duties would be now be considered harmful and prohibited by Article X:1. Such an interpretation of Article X:1 of the GATT 1994 is illogical and unsupported by the plain text of the obligation.

3. In contrast to China's approach, the United States believes that the Member has not acted inconsistently with Article X:1 of the GATT 1994 because the measure was published when it was made effective.

4. This example illustrates that China's reliance on disputes involving the application of a quota to entries that have entered prior to publication is misplaced. In those disputes, involving so-called retroactivity or backdating, Article XIII:3 of the GATT 1994 or another substantive obligation (such as the *Agreement on Textiles and Clothing*) provides the basis for the finding that notice is required prior to the quota's administration. For example, Article XIII:3(b) states:

> In the case of import restrictions involving the fixing of quotas, the Member applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value.

[1] At the same time, 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] China Responses to the Panel's Second Set of Questions, para. 3.

5. In other words, the treaty article provides that public notice shall be given for a quota imposed for a "specified *future* period," such that traders would be able to determine if they are able and interested in filling the quota before it actually has been filled. In previous disputes under this provision, the problem was precisely that the quota announced related not only to "a specified future period" but also some time period that has already elapsed, contrary to Article XIII:3(b).

6. Regarding rates of duties, however, the WTO covered agreements do not impose the same substantive obligation as import quotas regarding the publication of a notice prior to the administration of the rates of duty. For example, Article 20 of the SCM Agreement expressly provides for instances when countervailing duties may be applied "retroactively" from the issuance of a final CVD determination.

7. Regardless, consistent with the obligation of Article X:1 of the GATT 1994 that measures be published promptly, the United States published the *GPX* legislation on the same day as it was enacted and thus made effective.

> **91. On 27 November 2006, USDOC published its intent to apply the US CVD law to China based on a change in the economic situation of China from 2006 going forward with the initiation of the *Coated Free Sheet Paper* CVD investigation (CHN First Written Submission, paras. 26-31; US First Written Submission, paras. 38-45). Please comment on whether, and if so how, this should inform the Panel's analysis of China's claim under Article X:1.**

8. China asserts in paragraph 4 of its response to this question that Commerce's 2006 notification, along with numerous other notifications, are not relevant to the Panel's evaluation of China's claim under Article X:1 of the GATT 1994. Such a response, however, is inconsistent with China's previous statements regarding its Article X:1 claim.

9. Specifically, China has repeatedly asserted that general principles of "due process" and "notice" are fundamental to its claim under Article X:1 of the GATT 1994.[3] Commerce's 2006 notification (USA-23) along with numerous other notices issued by the United States demonstrate that China's claim is without merit.

10. As an initial matter, the question in any dispute under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") is not whether some general principle not contained in the agreement text (be it "retroactivity" or the "due process" notion of notice) has been respected. Rather, the pertinent question is whether a Member's measure is consistent with an obligation reflected in the text of the covered agreements. As the United States has explained, the publication of the *GPX* legislation is consistent with the requirements of Article X:1.

[3] *See e.g.*, China First Written Submission, para. 65(discussing "the requirements of due process and transparency that underlie all of Article X, including Article X:1.").

11. However, the extent of notification that China and other interested parties have received about Commerce's application of the U.S. CVD law to China has been central to China's arguments under Articles X:1 of the GATT 1994, as well as its claim under Article X:2. For example, China has repeatedly relied on the Appellate Body's statements that Article X:2 embodies "due process" principles,[4] and that the fundamental importance of Article X:2 is to "promot[e] full disclosure of governmental acts …"[5] Further, the Appellate Body and previous panels have observed that one of the fundamental objectives of due process is to provide notice to interested parties, so that they can be heard.[6]

12. In this dispute, China has had both notice and an opportunity to be heard, in full, on the issue of whether the U.S. CVD law is applicable to NME countries. Commerce's interpretation of the law was not a secret, as China repeatedly received notice, beginning at least since 2006, if not earlier, that the United States was applying the U.S. CVD law to China. By means of illustration, in addition to Commerce's 2006 initiation notification in the *Coated Free Sheet* CVD investigation, the United States previously provided a chart of the instances when China was notified of the application of the U.S. CVD law to China during the second Panel hearing (USA-119).

13. Further, China has had ample opportunities to be heard. China and/or Chinese exporters have raised this issue in administrative proceedings before Commerce and in U.S. courts repeatedly. As China admits in its response to this question,

> [I]t is important to note that the Government of China and affected Chinese parties strongly objected to the USDOC's initiation of countervailing duty investigations of Chinese products beginning in 2006, on the grounds that this action was inconsistent with published U.S. law as it then existed.[7]

In other words, once Commerce's initiation notice in the *Coated Free Sheet* CVD investigation was published, China and Chinese traders have had numerous opportunities to seek modification of Commerce's approach.

14. In connection with its response to this question, China asserts that (1) it and other Chinese parties "ultimately prevailed in their understanding"[8] of the U.S. CVD law in *GPX V*, and that (2) Commerce was "acting inconsistently with published municipal law" in applying the U.S. CVD law to China. Both assertions are incorrect.

15. First, the domestic *GPX* litigation remains ongoing, as is the *Wireking* litigation and at least ten other cases pending before the U.S. CIT. As such, no party has "ultimately

---

[4] *See e.g.*, China Response to the Panel's First Set of Questions, para. 18.

[5] *See e.g.*, China Second Written Submission, para. 125 (quoting *US – Underwear (AB)*, p. 21).

[6] *See e.g.*, *US – Underwear (AB)*, p. 21; *US – Carbon Steel (AB)*, para. 126 (discussing the objective of "due process" in providing notice regarding the nature of a party's claim in a panel request); *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, para. 8.43 (June 25, 1999).

[7] China Responses to the Panel's Second Set of Questions, para. 5.

[8] *Id.*

prevailed" in these ongoing proceedings. And as the United States has extensively detailed, *GPX V* was never the final conclusion of the U.S. courts on the state of U.S. law. No mandate was ever issued by the U.S. Federal Circuit in relation to *GPX V*, and the *GPX VI* decision granting rehearing foreclosed any opportunity to seek further appeal of *GPX V*.

16. Second, in asserting that Commerce was "acting inconsistently with published municipal law," China fails to acknowledge the fact that (1) U.S. law prior to the *GPX* legislation did not prohibit the application of the U.S. CVD law to NME countries[9], and (2) when interpreting a statute, Commerce's interpretation is governing under U.S. law unless a court issues a final, legal binding decision that such an interpretation is unreasonable.[10] As no court has ever issued such a final decision, Commerce's interpretation that the U.S. CVD law is applicable to NME countries has been and is governing U.S. law. The *GPX* legislation confirms Commerce's interpretation.

17. Finally, China asserts in paragraph 8 of its response that Commerce's numerous notifications did not provide China and Chinese traders with "sufficient notice" regarding the exception explained in Section 1(a) of the *GPX* legislation. This is supposedly because the *Georgetown Steel* Memorandum (USA-26), which discussed the "single entity" exception, was never published in the Federal Register and mentions such an exception "only once"[11] and is not explicitly captioned as an exception to the U.S. CVD law.

18. China's assertion is unrelated to its claim under Article X:1 and furthermore it is without merit. China has not challenged the application of the "single entity" exception to China under Article X:1. China's challenge is the application of the U.S. CVD law to China. To the extent that China has raised the "due process" notion of notice, the United States has demonstrated that China has had sufficient notice on the issue of whether the U.S. CVD law is applicable to NME countries.[12]

19. Further, the United States previously explained during the second substantive Panel meeting that the *Georgetown Steel* Memorandum (USA-26) was referenced in the Federal Register notice in the preliminary determination of the *Coated Free Sheet* CVD investigation[13] and published on Commerce's official Website.[14] Moreover, the rationale

---

[9] *See e.g.*, Section 701(a) of the Tariff Act (USA-2); *Gov't of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (USA-28) (finding that "it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs. Nothing in the language of the countervailing duty statute excludes NMEs.").

[10] *See* U.S. Response to the Panel's Second Set of Questions, paras. 65-69.

[11] China Responses to the Panel's Second Set of Questions, para. 8, footnote 2.

[12] *See e.g.*, USA-119.

[13] *Amended Affirmative Preliminary Countervailing Duty Determination*: *Coated Free Sheet Paper from the People's Republic of China:* 72 Fed. Reg. 17,484, 17,486 (Dep't of Commerce Apr. 9, 2007) (USA-25) ("Informed by those comments [from the December 2006 Notice of Opportunity to Comment] and based on our assessment of the differences between the PRC's economy today and the Soviet and Soviet-style economies that were the subject of *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), we preliminarily determine that the countervailing duty law can be applied to imports from the PRC. Our analysis is presented in a separate memorandum.").

articulated by Commerce in the Georgetown Steel Memorandum for no longer finding it impossible to identify and measure countervailable subsidies in China is reflected both textually and substantively in the "Exception" provision of section 1 of the *GPX* legislation.[15]

20. With regard to China's statements regarding the number of times the "single entity" exception was discussed and in which manner, it should be noted that Article X:1 does not impose numerical or stylistic obligations on how covered measures of general application should be published, so long as it is "published promptly in such a manner as to enable governments and traders to become acquainted with them." Thus, Article X:1 does not impose an obligation that an exception or requirement must be referenced more than "only once" or articulated with a specific or express caption as such.

Questions to the United States

(Questions 92 – 94)

1.2 Article X:2

Question to both parties

95. China argues that whether a challenged measure effects an "advance" in a rate of duty and/or imposes a "new" or "more" burdensome requirement or restriction on imports must be assessed in relation to prior municipal law as interpreted by domestic courts, whereas the United States argues that the relevant baseline is the existing approach followed by the administrative agency.

(a) Do the parties find support for their respective interpretations in any interpretations developed in prior panel or Appellate Body reports?

(b) Could the parties elaborate on whether and if so how their respective interpretations are supported by, or consistent with, Article X:1 and/or X:3(b)? For instance, if the existing practice followed by the administrative agency provides the relevant baseline, would the requirement in Article X:1 to publish trade regulations still fulfil its function of informing traders and foreign governments of the applicable rules? Or is it that an existing approach of an administrative agency should be presumed to be consistent with published trade regulations, until and unless the

[14] http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf (USA-26).

[15] *Compare GPX* legislation, section 1(a) (CHI-1) (". . . because the economy of that country is essentially comprised of a single entity. . .") *with* Memorandum for David M. Spooner from Shauna Lee-Alaia, et al, Countervailing Duty Investigation of Coated Free Sheet Paper from the Peoples's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, Mar. 29, 2007, at p. 10 ("Similarly, in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test.") (USA-26).

approach has been challenged through recourse to domestic judicial review as envisaged in Article X:3(b)?

(c) Should Article X:2 be interpreted as mandating a single baseline to be applied in all cases for the purpose of determining whether a challenged measure effects an "advance" in a rate of duty and/or imposes a "new" or "more" burdensome requirement or restriction on imports? Could a panel proceed by considering the totality of evidence, including evidence relating to the prior municipal law, and also the existing approach followed by any agencies administering that law, and potentially other available information?

21. In its response to this series of questions, China asserts that the "only interpretation"[16] of Article X:2 that would be consistent with Article X as a whole is to use "prior municipal law as the relevant baseline."[17] But even China does not faithfully apply its standard; as the United States has explained at the second panel meeting and in its answers to questions, a correct understanding of U.S. municipal law reveals that the interpretation by Commerce of the U.S. CVD law is governing law until and unless a court finds, in a binding and final decision, that interpretation unreasonable or contrary to the plain text of the statute. Throughout this proceeding, China has simply ignored and avoided addressing this fundamental aspect of U.S. law. Instead, China's entire argument rests on a proposed baseline that is the finding of a non-final court opinion, which has no legal effect under U.S. law. The United States has explained that China's rigid interpretation of Article X:2 has no basis in the plain text of the obligation and that 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.[18]

22. Rather, the inquiry of Article X:2 is whether a measure of general application that has either effected an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposed a new or more burdensome requirement, restriction or prohibition on imports has been officially published before it is enforced. Thus, the text of Article X:2 makes clear that it is the impact of a measure "on imports" in relation to the treatment previously given that gives the basis for comparison. The United States believes that the baseline for determining whether such an applicable change to the treatment of imports has occurred should be determined based on the totality of the evidence.[19]

---

[16] China Responses to the Panel's Second Set of Questions, para. 22.

[17] *Id.*

[18] *See e.g.*, U.S. Second Opening Statement, Part I.

[19] The U.S. interpretation is also consistent with Article 11 of the DSU, which requires that panels should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case …." The Appellate Body has observed that "Article 11 requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence." *US — Continued Zeroing (AB)*, para. 331; *see Chile — Price Band System (Article 21.5 — Argentina)*, para. 229 (noting that Article 11 "includes the discretion to identify which evidence the panel considers most relevant in making its findings, and

23. The pertinent evidence for considering the baseline for purposes of the Article X:2 evaluation is the treatment given to imports: In this dispute, based on a consideration of the totality of the submitted evidence, The totality of the submitted evidence includes not just a select non-final opinion of an intermediate U.S. court, as proposed by China, but also:

- The treatment of the imports at issue for the 27 CVD proceedings challenged by China is that they were subject to countervailing duties pursuant to Commerce's interpretation of the U.S. CVD law before the enactment of the *GPX* legislation. Those imports continue to be subject those duties after the law's passage, a fundamental point that China cannot contest. Thus, the most pertinent evidence for the Panel's evaluation established that the *GPX* legislation did not effect an advance in a rate of duty on imports nor did it impose a new or more burdensome requirement, restriction or prohibition on imports.

24. Consideration of other evidence put forward by the parties in this dispute does not change the treatment of those imports or this conclusion. Specifically, for each category of evidence China has raised, a proper evaluation continues to support and does not undermine the conclusion that there was no advance in a rate of duty or new or more burdensome requirement or restriction:

- Commerce's interpretation of the U.S. CVD law was that it was applicable to China, which, under recognized principles of U.S. law,[20] was governing U.S. law prior to the enactment of the *GPX* legislation.

- The text of the U.S. CVD law prior to the enactment of the *GPX* legislation, which specified that Commerce shall apply countervailing duties if it determined that a country was providing a countervailable subsidy with respect to the imported good under investigation (USA-2).

- The numerous instances when China was notified of the application of the U.S. CVD law to China (USA-119).

- Several other court cases from the U.S. CIT[21] and the U.S. Federal Circuit decision in *GPX VI* that have held that Commerce is not prohibited from applying the U.S. CVD law to China.

- The text of the *GPX* legislation itself, which affirms Commerce's prior interpretation of the U.S. CVD law as being applicable to NME countries.

---

to determine how much weight to attach to the various items of evidence placed before it by the parties to the case. A panel does not commit error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.").

[20] *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*") (USA-14); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) ("*Eurodif*") (USA-15); *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 ("*City of Arlington*") (USA-42).

[21] *See e.g., Gov't of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (USA-28); *GPX II* (CHI-3).

25. This evidence supports the conclusion that the imports at issue in this dispute have been and continue to be subject to the U.S. CVD law. In other words, the *GPX* legislation did not effect an increase in a rate of duty on these imports. It did not impose a new or more burdensome requirement, restriction or prohibition on these imports. As such, China's Article X:2 claim is without merit.

26. China's approach is that whether a measure effected an advance in a rate of duty or imposed a new or more burdensome requirement is to be determined under the domestic law of the Member, as "properly" determined by a WTO panel. China's approach not only has no basis in the text of the GATT 1994, but it would actually undermine Article X:2. Under China's approach, it would appear that a Member would be free to enforce an increase in duties or new or more burdensome import restrictions prior to publication (indeed without ever publishing them at all) if they were not permitted under domestic law. That is, because under municipal law as "properly" determined those higher duties or more burdensome restrictions were not legal, the duty or restriction to be compared to the baseline duty or restriction would not be the actual duty or restriction being applied but the "proper" one. Even though the higher rate of duty was being imposed, for example, and imports were being adversely affected by these measures, the Member would be free to enforce them regardless of whether they were published.

96. At paragraph 34 of its second written submission, the United States indicates that whether "this treatment of the subject imports is in compliance with U.S. law is an issue of an alleged *ultra vires* action that has yet to be resolved by the U.S. courts". Is this issue now before the US courts?

27. China pointedly refuses to answer the question posed by the Panel and refuses to acknowledge that the issue is currently before U.S. courts in *Wireking*, *GPX*, and at least 10 other cases at the U.S. CIT.[22] Instead, China asserts in this response that "U.S. municipal law did not previously permit the application of countervailing duties to imports from nonmarket economy countries, and the United States has offered nothing but assertion in response."[23] As explained above, China's approach of asking the Panel to speculate on what a U.S. court would find U.S. CVD law to permit and substitute its judgment has no basis in Article X:2, which refers to the treatment given by a measure "on imports." But the United States has also responded specifically to China's assertions on the content of U.S. CVD law. The United States has repeatedly demonstrated that under U.S. law, an agency's interpretation or approach is governing U.S. law in the absence of a final, legal binding decision by the U.S. courts.

[22] *See* USA-117 at vii-viii for a list of those cases.

[23] China Responses to the Panel's Second Set of Questions, para. 38.

28. China has yet to address the U.S. Supreme Court cases that establish this principle of U.S. law.[24] In the statement he prepared for China, however, Professor Fallon does recognize the role of the administrating agency in interpreting U.S. law, stating:

> When Congress has generally entrusted the execution or enforcement of a particular body of law to an agency of the Executive Branch, and when the law permits more than one interpretation, the Supreme Court has held that Congress should be presumed to have vested the responsibility for determining which reasonable interpretation to adopt in the relevant executive agency.[25]

29. In other words, Commerce was vested with the responsibility to determine whether the U.S. CVD law was applicable to the imports at issue in the 27 CVD proceedings challenged by China. Because no court has issued a final, legal binding decision to the contrary, Commerce's interpretation that such law is applicable to these imports remains valid. The *GPX* legislation, which states that the U.S. CVD law is applicable to or "includes merchandise imported into the United States from a nonmarket economy country", does not change or otherwise affect Commerce's treatment of the imports at issue. As such, China's claim under Article X:2 is without merit.

30. Rather than discuss the facts of this dispute, China devotes its energy to attempting to "put an end" to issues that are currently being litigated in U.S. courts.[26] That is because the only way that China could begin to overcome the fact that Commerce's interpretation of the U.S. CVD law is governing law is to convince the Panel to speculate as to the final outcome in domestic litigation and substitute its judgment for that of Commerce and U.S. courts currently charged with resolving these complex issues of U.S. municipal law.

31. The Appellate Body has been clear, however, that panels should not speculate as to ultimate outcome of pending domestic litigation. For example, in *US – Shrimp (Article 21.5 — Malaysia)*, Malaysia challenged the Article 21.5 panel's treatment of a declaratory judgment by the U.S. CIT ("*Turtle Island* case"). The U.S. CIT had declared that certain U.S. guidelines ("Revised Guidelines") taken to come into compliance with the Appellate Body's findings were invalid as a matter of U.S. law, but did not require the U.S. Department of State to modify the guidelines or take any action. Further, the decision was being appealed to the U.S. Federal Circuit at the time of Article 21.5 proceeding. As such, the panel found that:

> As was recalled by the Appellate Body, we are not supposed to interpret domestic law, which we are to treat as a fact. Even if the possibility cannot be excluded that the Revised Guidelines be modified, the situation before us is, for the

[24] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (USA-14); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (USA-15); *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 (USA-42).

[25] CHI-83, para. 19.

[26] Specifically, the two issues are: (1) whether the *GPX* legislation was a clarification or change of existing law; and (2) whether the *GPX V* opinion has any legal effect under U.S. law. *See e.g.*, China Responses to the Panel's Second Set of Questions, paras 27 – 31; China Second Written Submission, paras. 21, 59-88; CHI-83.

> moment, the one provided for in the Revised Guidelines, which on this point are not contested by Malaysia.[27]

32. The Appellate Body agreed with the panel's treatment of the U.S. CIT decision, confirming that:

> [T]he ruling in the *Turtle Island* case is declaratory: the CIT has not ordered the United States Department of State to modify either the content or the interpretation of the Revised Guidelines; in the legal interpretation of the United States authorities entrusted with enforcing them, the Revised Guidelines remain the same. … Rightly, when examining the United States measure, the Panel took into account the status of municipal law at the time. In particular, the Panel took note of the fact that the CIT ruling in the *Turtle Island* case has not altered the content of the Revised Guidelines ….[28]

33. The Appellate Body further explained of the *Turtle Island* case:

> There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States. It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that

---

[27] *US — Shrimp (Article 21.5 — Malaysia)*, para. 5.109 . In full, the panel's findings were:

> 5.108 Malaysia does not contest the fact that importation of shrimp harvested by vessels using TEDs may be allowed, even when the exporting nation is not certified pursuant to Section 609. Malaysia expressed concerns that this part of the Revised Guidelines has been found illegal in a judgement of the US Court of International Trade (CIT). Malaysia claims that the United States is responsible for actions of all its branches of government, including courts, and refers to the finding of the Appellate Body in paragraph 173 of its Report.
>
> 5.109 We first note that in its judgement, the CIT, while ruling that the interpretation of the Department of State was not compatible with the terms of Section 609, refrained from granting an injunction that the US Department of State modify its guidelines. As a result, the Panel is satisfied that the United States does not, for now, have to modify its Revised Guidelines. The decision has been appealed before the Court of Appeals for the Federal Circuit. At our request, the United States confirmed that the Court of Appeals could require that the Revised Guidelines be modified in accordance with the interpretation of Section 609 made by the CIT. However, until a decision is reached by the Court of Appeals, the Revised Guidelines remain applicable. Moreover, no judgement is likely to be issued for several months and an appeal before the US Supreme Court cannot be excluded. As was recalled by the Appellate Body, we are not supposed to interpret domestic law, which we are to treat as a fact. Even if the possibility cannot be excluded that the Revised Guidelines be modified, the situation before us is, for the moment, the one provided for in the Revised Guidelines, which on this point are not contested by Malaysia.
>
> 5.110 Second, we do not consider that Malaysia appropriately referred to the Appellate Body finding in paragraph 173. A State is to be presumed to act in good faith and in conformity with its international obligations. The CIT itself did not require that the Revised Guidelines be modified. There is no reason to consider that this situation will inevitably change in the near future.

Id. (internal citations omitted).

[28] *US — Shrimp (Article 21.5 — Malaysia) (AB)*, para. 94.

> injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".[29]

34. Similarly, in this dispute, the *GPX V* opinion never altered Commerce's approach of applying the U.S. CVD law to the imports at issue – the Federal Circuit never ordered Commerce to do or change anything in relation to those imports – , and in any event has since been superseded by the U.S. Federal Circuit in *GPX VI*. Thus, the current state of U.S. law is the same as it was prior to the enactment of the *GPX* legislation. As such, China cannot demonstrate that the *GPX* legislation effected or imposed a type of change listed under Article X:2 of the GATT 1994.

35. In sum, there is no need for the Panel to speculate as to how the U.S. courts may ultimately treat the *GPX V* opinion or whether the *GPX* legislation was a "change" or "clarification" of U.S. law in order to find that China's Article X:2 claim is without merit.

Question to China

> **97. The following questions relate to the issue of whether P.L. 112-99 was a "clarification" rather than an "amendment" of the prior law.**
>
> **(a) At paragraph 41 of his expert opinion (Exhibit CHN-83), Professor Fallon indicates that "P.L. 112-99 bears none of the indicia that the courts have treated as crucial hallmarks of merely clarificatory legislation, including in those cases that the United States has called to the attention of this panel". In this regard, Professor Fallon states that "[p]erhaps the most important of these indicia is an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law." As set forth in its response to Panel question No. 64, the United States' position is that while Section 1 of P.L. 112-99 is merely a "clarification" of existing US law, Section 2 is indeed an "amendment" of existing US law. Would it be unusual for a single piece of US legislation to contain both "clarifications" and "amendments"? In such cases, what kind of indication, if any, would be expected in the title or text of a statute so as to reflect its dual purposes?**
>
> **(b) It appears that in GPX VI the CAFC did not definitely rule on whether Section 1 was a clarification of prior law or an amendment, that in GPX VII the CIT avoided ruling on this issue, and instead proceeded on an arguendo approach, and that in Guangdong (Exhibit USA-49) the CIT took a similar approach.**

[29] *US — Shrimp (Article 21.5 — Malaysia) (AB)*, para. 95.

Does this demonstrate that there is no clear answer to this question?

36. In response to this set of questions, China continues to assert that "perhaps the most important"[30] indicia for determining whether the *GPX* legislation is a "change" or "clarification" of U.S. law is an explicit indication in the title or text of the statute as such.

37. But China's response misses a fundamental point. Contrary to China's assertion that the U.S. position is that "*the Panel* should accept the 'clarification' theory"[31], the United States has been clear that the Panel need not resolve this issue in order to evaluate China's claim under Article X:2 of the GATT 1994.[32] A discussion of whether the *GPX* legislation is a "change" or a "clarification" is at best an academic exercise that does not help resolve the dispute.

38. However, to ensure that the Panel has the accurate background for this question, the United States has demonstrated that such an issue is a complex determination under U.S. law, and not the simple exercise claimed by China. Thus, to the extent that China is asserting that the *GPX* legislation is a clear "change" of U.S. law, the United States has demonstrated that China has failed to fully explain the indicia used by U.S. federal appellate courts to determine whether a new law is a clarification or change of the previous law.

39. For example, the United States has submitted the U.S. Court of Appeals for the Third Circuit's decision in the *Levy* case (USA-116) to demonstrate that there is no bright-line test to determine if a statute is a clarification or change of pre-existing law, and at least three U.S. federal appellate courts have looked at factors that are equally, if not more, important than an explicit indication.

40. In the second opinion he has prepared for China, Professor Fallon criticizes the *Levy* case decision as "inconsistent with the weight of lower court authority, and even with the cases on which the United States relied in its earlier submissions and indeed in its Opening Statement."[33] His statement does recognize that the factors listed by the *Levy* "can certainly be significant in some cases."[34]

41. First, it should be noted that under U.S. law, the decisions of "lower court authority" do not take precedence over those of the U.S. federal appellate courts. The *Levy* case is a final,

[30] China Responses to the Panel's Second Set of Questions, para. 39.

[31] China Responses to the Panel's Second Set of Questions, para. 27 (emphasis in original).

[32] *See e.g.*, U.S. Second Opening Statement, Part II(A).

[33] CHI-124, para. 20.

[34] *Id.*

legal binding decision of a U.S. federal appellate court that has been cited and followed by other U.S. courts.[35]

42. Second, the cases used by Professor Fallon to support his opinion and those discussed in the U.S. Opening Statement were reviewed and considered by the U.S. Court of Appeals for the Third Circuit's decision in the *Levy* case.[36] The court found that "[a]fter reviewing the relevant case law from our Court and other courts of appeals, however, we think that four factors are particularly important for making this determination."[37] In the court's opinion, however, the following four factors were particularly important:

- Whether the text of the old law was ambiguous;
- Whether the new law resolved, or at least attempted to resolve, that ambiguity;
- Whether the new law's resolution of the ambiguity is consistent with the text of the old law; and
- Whether the new law's resolution of the ambiguity is consistent with the agency's prior treatment of the issue.[38]

43. Based on these four factors, it would not be "unlikely," as Professor Fallon opines, for the U.S. Federal Circuit to find the *GPX* legislation is a clarification of the law. Specifically, on the first factor, while the United States does not believe that the text of the statute is ambiguous, as it contains no prohibition as to its applicability to NME countries, there could be an argument that given a non-final court opinion, it might be said the language could be ambiguous in the sense that a court could read such a prohibition. On the second factor, the court would likely find that the *GPX* legislation resolved the ambiguity because it did clarify that the reference to "country" in section 701(a) of the Tariff Act incorporates NME countries. On the third factor, the court would likely find that the *GPX* legislation is consistent with the text of the law. That is, the *GPX* legislation is consistent with the pre-existing language of the law that states that countervailing duties "shall be imposed" if Commerce finds a countervailable subsidy. On the fourth factor, the *GPX* legislation is consistent with Commerce's prior treatment of the issue. That is, prior to the *GPX* legislation, Commerce applied the U.S. CVD law to NME countries subject to an impossibility exception.

44. In light of the U.S. federal appellate courts' decisions, it is not correct that the U.S. Federal Circuit would be "unlikely" to find the *GPX* legislation is a clarification of the law.

---

[35] Shepard's Citation: *Levy v. Sterling Holding Company*, 544 F.3d 493 (3d Cir. 2008) (USA-123). The Shepard's Citations service provides a comprehensive case citation and treatment history to verify the validity of case law, statutes, agency opinions, and other legal documents.

[36] *Levy v. Sterling Holding Company*, 544 F.3d 493, 506-07 (3rd Cir. 2008) (USA-116) (citing *Piambra Cortes v American Airlines*, 177 F.3d 1272 (11th Cir. 1999) (USA-56) and *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004) (USA-57)).

[37] *Levy v. Sterling Holding Company*, 544 F.3d 493, 507 (3rd Cir. 2008) (USA-116).

[38] *Id*.

Thus, China cannot assert that it has "put an end" to whether the *GPX* legislation is a change of U.S. law. Rather, the United States agrees with the Professor Fallon's statement that the factors listed by the *Levy* "can certainly be significant in some cases", including in the ongoing domestic litigation over the *GPX* legislation.

1.3 Article X:3(b)

Question to both parties

> **98. The United States argues that Article X:3(b) contains a "structural" obligation, such that the failure to implement or be governed by the practice of a judicial decision in one case would not be sufficient to demonstrate a breach of this obligation.**
>
> **(a) At paragraphs 6.178 and 7.994-7.997 of its report, the panel in *Thailand – Cigarettes (Philippines)* discussed the issue of what is needed to establish a violation of Article X:3(b). Please comment on whether, and if so how, that panel's discussion should inform the Panel's analysis of this issue.**
>
> **(b) At paragraph 6.50 of its report, the panel in *US — Stainless Steel* discussed whether the WTO dispute settlement system can function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice". Please comment on whether, and if so how, that panel's discussion should inform the Panel's analysis of this issue.**

45. China's statement that it "is not asking the Panel to evaluate the consistency of any U.S. practice or ruling with U.S. domestic law and practice"[39] is wholly inconsistent with its proposed Article X:2 "baseline" of municipal law, "properly determined."[40]

46. In fact, China's Article X:2 claim is based on doing exactly what the panel in *US – Stainless Steel* cautioned against: the WTO dispute settlement system "was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*."[41]

[39] China Responses to the Panel's Second Set of Questions, para. 47.

[40] *See* China Second Written Submission, paras. 41-48.

[41] *US – Stainless Steel*, para. 6.50.

Questions to China

99. At paragraphs 148 through 150 of its second written submission, China seems to take the position that, as regards the obligation for administrative agencies to implement and be governed by judicial decisions, "there are no other exceptions to this requirement" apart from the those set forth in the text of Article X:3(b). However, at paragraph 151 of its second written submission, China seems to take the view that Members can change the law, provided the changed law applies only prospectively, and not to any on-going judicial proceedings. Please clarify.

47. China states in response to this question that "[w]ith respect to Article X:3(b), any change in the law cannot have the effect of changing the outcome of a judicial decision that concerns the actions of a government agency prior to the enactment of the new law."[42] That is because, "the law that a court or tribunal must apply to 'review and correct' an agency's conduct is the law that was in effect at the time of the underlying agency action."[43]

48. As an initial matter, Article X:3(b) does not dictate the type of law that a tribunal must apply to review and correct an administering agency's conduct. Further, under China's argument, a national legislature would not only be limited in its ability to enact legislation during the pendency of a court case, but it would never have an opportunity to change the law if a court of first instance had issued a final, legally binding decision. That is because in China's view, the only way to change such a decision would be under the exception in Article X:3(b) for review in another proceeding. Once a domestic court had issued a "decision", the administering agency's practice would be "governed" by that decision, without any explicit exception in Article X:3(b) for a legislative change. Such a reading of Article X:3(b) is not contemplated by the ordinary meaning of the text. Nor does the United States understand how such a reading is in China's own interests as a systemic matter.

100. According to China, if Article X:3(b) were interpreted in a manner that does not prohibit the legislative branch from changing the law applicable to on-going cases pending appeal, it would be pointless for governments and traders to seek review by domestic courts and tribunals, because the national legislature could simply change the law applicable to the underlying agency action. However, it appears to be common ground between the parties that under US law, as reflected in the US Supreme Court decision in *Plaut v. Spendthrift* referenced repeatedly in Professor Fallon's expert opinion (CHI-83), and as applied by the CAFC in *GPX VI*, that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly". Could China please address why an outcome that the US Supreme Court appears to consider

[42] China Responses to the Panel's Second Set of Questions, para. 49.

[43] *Id.*

acceptable under US law should not be acceptable to a WTO panel under Article X:3(b)?

49. China's response to this question demonstrates that it has no basis for its claim under Article X:3(b). For example, China attempts to narrow the scope of its argument for a broad restructuring of the U.S. legal system by asserting that:

> [T]he application of the *Plaut* standard to cases that solely affect the interests of domestic parties is altogether different than the application of this standard to cases that affect the interests of foreign governments and traders. It is only this small subset of actions that is governed by Article X:3(b) of the GATT; it remains entirely within the prerogative of the United States to apply new laws to alter the outcome of ongoing judicial proceedings, so long as those actions do not touch upon the concerns of the GATT.[44]

50. China's argument fails as a matter of U.S. law and under Article X:3(b). First, China has failed to explain how cases that affect the interests of domestic parties is "altogether different" from those that affect the interests of "foreign governments and traders." Such a distinction is not recognized under U.S. law. "Foreign governments and traders" can avail themselves of the same rights as domestic parties under U.S. law to challenge Commerce's determinations before U.S. courts. In fact, the *Plaut* standard is equally applicable to all parties, regardless of their nationalities.

51. China also fails to recognize that its argument would create special rights in the GATT for purely domestic parties insofar as a Member has assigned review of customs matters in tribunals or procedures that consider other matters. That is, the second sentence of Article X:3(b) sets out attributes of those tribunals or procedures but does not limit their application to proceedings involving customs matters. Thus, parties with any other non-customs matters within the jurisdiction of those tribunals or procedures would, on China's interpretation, seemingly have the ability to mount challenges (through a WTO Member) under GATT 1994 for action that is lawful under the U.S. Constitution.

52. Further, China's argument has no merit under Article X:3(b). Article X:3(b) does not impose requirements on the substantive content of laws that apply to proceedings of administrative actions relating to customs matters. That is, Article X:3(b) does not establish an alternate *Plaut* standard that would so paralyze national legislatures.

53. As the United States has explained, Article X:3(b) imposes an obligation regarding the structure or framework of a judicial review system. The United States has demonstrated that its legal system is consistent with the obligations of Article X:3(b) of the GATT 1994 for both domestic and foreign parties. That is, the United States has instituted and is maintaining a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters, and the decisions of such review tribunals or procedures are implemented by and govern the practice of those agencies.

[44] China Responses to the Panel's Second Set of Questions, para. 52.

Questions to the United States

(Questions 101 – 104)

2 ARTICLE 19.3

Question to both parties

105. At paragraphs 132 to 136, the United States argues that in the US system, only administrative reviews, and not original investigations (either preliminary or final determinations), are subject to the obligation in Article 19.3. In DS379, the Appellate Body found that the United States acted inconsistently with Article 19.3 in the context of the four sets of investigations at issue in that dispute. Were those investigations original investigations or administrative reviews?

54. As explained, Article 19.3 of the SCM Agreement, on its own terms, applies to the levying of countervailing duties, which does not result from investigations in the U.S. retrospective system of duty assessment. Accordingly, original investigations under the U.S. retrospective system, which result in a decision whether to impose a countervailing duty, and not the amount of duty to levy, are not subject to Article 19.3 of the SCM Agreement.[45] In its response to panel questions, China refuses to engage on this straightforward interpretation of Article 19.3. Instead, China raises irrelevant points that do nothing to shed light on the proper interpretation of Article 19.3.

55. China, for instance, criticizes the United States for not making these arguments before the Appellate Body in DS379: "In the proceedings before the Appellate Body in that dispute, the United States did not even attempt to argue that Article 19.3 (or Article 19.4, for that matter) is inapplicable in the context of original countervailing duty determinations."[46] This statement is misleading. The United States, in fact, emphasized this distinction before the panel with respect to the proper interpretation of Article 19.4 of the SCM Agreement, however, the panel found on other grounds and thus did not reach the issue.[47]

56. The United States did not emphasize the distinction between original investigations and administrative reviews under footnote 51 and Article 19.3 of the SCM Agreement before the Appellate Body because it had no reason to make these arguments. The panel in DS379 issued findings on other grounds, meaning that the arguments before the Appellate Body focused on the panel's interpretation of Articles 19.4 of the SCM Agreement, not alternate arguments posed by the United States that were not addressed by the panel.[48] The distinction

[45] *See* U.S. Response to Responses to the Panel's First Set of Questions, paras. 44-45; U.S. Second Written Submission, paras. 132-36; U.S. Second Opening Statement, paras. 61-62; U.S. Responses to the Panel's Second Set of Questions, para. 60.

[46] China Responses to the Panel's Second Set of Questions, para. 53.

[47] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 14.109-14.112.

[48] *See* U.S. Response to the Panel's First Set of Questions, paras. 46-48.

between original investigations and administrative reviews is one of the many new arguments presented by the United States that the Appellate Body in DS379 did not consider.

57. China also cites a few WTO reports, in an apparent attempt to support its claim that Article 19.3 of the SCM Agreement should apply to original investigations.[49] China, however, omits the fact that none of these reports analyzes footnote 51 of the SCM Agreement, or whether Article 19.3, in particular, applies to original investigations or administrative reviews. These reports are not dispositive of the question before the Panel.

58. Again, as it has throughout this proceeding, China has refused to engage on the proper interpretation of Article 19.3.[50] Accordingly, China has failed to meet its burden and its claims should fail.

Question to the United States

(Question 106)

Question to China

107. Please comment on the statement, found at paragraph 6 of the US second written submission, that "[t]he *only* underlying basis for China's as-applied claims under Article 19.3 of the SCM Agreement is Commerce's purported lack of legal authority" under US 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.

59. China's prior statements on this issue speak for themselves and confirm that the underlying basis for its as-applied claims under Article 19.3 of the SCM Agreement is, in fact, Commerce's alleged lack of legal authority 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. In its first written submission, China defined the basis for its as-applied claims as follows: "It is now evident that the USDOC failed to investigate and avoid double remedies in these investigations and reviews because it had no authority under U.S. law to do so."[51] China reiterated this position in in its opening statement at the first Panel meeting when it characterized as an "undisputed fact" the assertion that "Commerce had no legal authority to do anything to address the problem of double remedies in these investigations."[52]

60. That fact, however, is very much in dispute. Commerce never once stated in any of the challenged determinations that it lacked legal authority to account for the potential of

[49] China Responses to the Panel's Second Set of Questions, para. 55.

[50] U.S. Second Opening Statement, para. 55.

[51] China First Written Submission, para. 125.

[52] China First Panel Meeting Opening Statement, para. 68.

overlapping remedies, whether it be under the U.S. countervailing duty law or U.S. antidumping law.[53] China can point to no such statement.

61. China now appears to be backing away from the central factual premise of its as-applied claims under Article 19.3 of the SCM Agreement. In its response to this question from the Panel, China states: "The fact that the USDOC had no authority under U.S. law to investigate and avoid double remedies prior to 13 March 2012 explains *why* the USDOC acted inconsistently with Article 19.3 in investigations and review at issue. . . ."[54] But China makes no attempt in its answer to rehabilitate its discredited assertion that Commerce lacked legal authority to consider and address that issue in the challenged determinations, which is a necessary predicate to explain Commerce's purported behavior in the challenged determinations under China's theory of the dispute. If China cannot substantiate the central factual premise of its Article 19.3 claims, then those claims must fail.

62. It must be re-emphasized that, in defining the issue for the Panel, China has purposefully avoided any discussion of the pertinent facts of any of the challenged determinations, which would have shown that Commerce in fact considered the arguments raised by the parties and found no evidence to substantiate claims of overlapping remedies.[55] In one of many shortcuts as part of its claims under Article 19.3 of the SCM Agreement, China has relied on a blanket assertion that Commerce lacked authority to consider and address the issue.

63. If China is now revising its position with respect to the basis for its as-applied claims, then that only highlights the necessity for China to make its *prima facie* case with respect to the challenged determinations. By thus far ignoring the relevant facts and details for the vast majority of those determinations, China has failed to satisfy that burden.

108. How does China respond to the US suggestion, at paragraphs 105 and 113 of its second written submission, that China has resorted to "shortcuts" instead of making a prima facie case?

64. China, in its response to the Panel's question, repeats its unsubstantiated assertion that it "has demonstrated that the USDOC's treatment of the issue of overlapping remedies in the measures at issue is identical to the USDOC's treatment of potential double remedies in the DS379 investigations."[56] As explained, China fails to adequately support this assertion with an actual comparison of the challenged determinations with the determinations at issue in DS379. And to the extent there is similarity in these determinations, it is because China and Chinese respondents decided as a strategic matter to employ the same arguments in each case

[53] *See* U.S. Second Written Submission, paras. 116-120.

[54] China Responses to the Panel's Second Set of Questions, para. 58 (emphasis in original).

[55] *See, e.g.*, U.S. Responses to the Panel's Second Set of Questions, paras. 88-89.

[56] China Responses to the Panel's Second Set of Questions, para. 61.

rather than present Commerce with case-specific evidence to substantiate their claims of overlapping remedies.[57]

65. China's claims under Article 19.3 of the SCM Agreement are predicated entirely upon shortcuts. China purports to be challenging 27 countervailing duty determinations issued by Commerce, but has thus far in its submissions to the Panel discussed only one such determination at any length – that involving kitchen appliance shelving and racks (USA-100)– and that was only at the prodding of the United States.

66. To quote the Appellate Body, a "complaining party will satisfy its burden when it establishes a prima facie case by putting forward adequate legal arguments and evidence."[58] Rather than present the panel with evidence from the challenged determinations, China relies upon blanket, conclusory assertions about Commerce's legal authority and Commerce's determinations without supporting those claims with any evidence or analysis. In so doing, China has fallen well short of its obligation to make a *prima facie* case with respect to its claims under Article 19.3.

67. China's resort to shortcuts infects not only its factual arguments. China also has failed to engage in any type of legal argument or analysis throughout the course of this proceeding. For instance, China has failed to reference the negotiating history of Article 19.3, which in fact supports the U.S. interpretation of Article 19.3.

68. While the United States considers that its interpretation of Article 19.3 reads that text according to its ordinary meaning, in its context and in light of the object and purpose of the agreement, and leads to a reasonable and unambiguous result, the Panel may have recourse to the negotiating history to confirm that result. The United States raised the negotiating history with the Panel and China at the second panel meeting and provided relevant citations, but China has regrettably refused to engage with that material. While the Panel is already aware of that material, the United States refers briefly to those documents here.

69. As discussed previously, a predecessor provision to Article 19.3 (with the phrase "in the appropriate amounts") can be found in Article 4.3 of the Tokyo Round Subsidies Code. At the same time, the Subsidies Code contained an explicit provision that required a signatory to base its procedures and measures on imports from a non-market economy (as set out in the Ad Note to Article VI) on the Subsidies Code "or, alternatively" on the Tokyo Round Anti-dumping Code. As noted in the DS379 dispute, that provision was not brought forward into the WTO Subsidies Agreement. As telling, however, is that the Appellate Body's interpretation of "in the appropriate amounts" renders Article 4.3 irrelevant to the issue of double counting in light of Article 15 and raises the question why the same issue would be treated in two articles and in very different fashions.

70. The predecessor provision to the Subsidies Code lies in the 1967 Kennedy Round Antidumping Code (L/2812). That is, before any additional rules on subsidies or countervailing duties had been elaborated, Contracting Parties had agreed to an additional

[57] U.S. Opening Statement at Second Panel Hearing, paras. 68-69.

[58] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.

discipline on antidumping duties. Article 8(b) of the Kennedy Round Antidumping Code contains operative language -- "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury." -- almost identical to that later used in the Tokyo Round Subsidies Code and WTO Subsidies Agreement.

71. This language resulted from efforts by Contracting Parties to elaborate on the non-discrimination obligation of GATT 1947 Article I. In the 1960 Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties (L/1141) the Group noted: "In equity, and having regard to the most-favoured nation principle the Group considered that where there was dumping to the same degree from more than one source and where that dumping caused or threatened material injury to the same extent, the importing country ought normally to be expected to levy anti-dumping duties equally on all the dumped imports." That is, the principle expressed was that duties would be "levied" equally on all sources of dumped imports.

72. After discussions in the Group on Anti-Dumping Policies, the United Kingdom produced in 1965 a Draft International Code on Anti-Dumping Procedure and Practice (Spec(65)86). The Draft Code elaborates on the non-discrimination obligation in GATT 1947 Article I. Provision 19 of the Code states: "In cases where the dumped imports are being supplied by more than one country anti-dumping duties shall be imposed on a non-discriminatory basis; that is the duties shall, save in some quite exceptional circumstances, be applied at the appropriate levels on all dumped imports of the goods in question." The use of the phrase "that is" explains that applying the duties "at the appropriate levels on all dumped imports" was the means by which duties "shall be imposed on a non-discriminatory basis."

73. Following a July 1966 meeting of the Group on Anti-Dumping Policies, the GATT Secretariat produced on its own responsibility Draft Elements to Be Considered for Inclusion in an Anti-Dumping Code (TN.64/NTB/W/13). The language on non-discrimination was changed from the UK Draft Code. Specifically, item 7(e) states: "Anti-dumping duties shall be imposed on a non-discriminatory basis on all dumped goods from all sources or suppliers." In this text, the phrase "at the appropriate levels" was omitted.

74. However, the subsequent working document records that the Draft Elements were "examined at a meeting of the Group of Anti-Dumping Policies on 11-14 October 1966. In the light of the views expressed at the meeting and comments received thereafter from a number of governments, the secretariat has prepared the following revised list of elements, which will be examined by the Group . . . ." Item 9(b) of the Revised List (TN.64/NTB/W/14) reads: "Anti-dumping duties, in the appropriate amounts in each case, shall be imposed on a non-discriminatory basis on all imports from all sources of the goods in question found to be dumped and to be causing or threatening to cause material injury." That is, following discussion by delegations, the phase "in the appropriate amounts in each case" was inserted in the Secretariat draft. This phrase mirrors the phrase "at the appropriate levels" from the original UK Draft.

75. The phrase "in the appropriate amounts in each case" was carried forward into the final 1967 Kennedy Round Antidumping Code. However, as can be noted in the text quoted above, the phrase was moved; rather than follow "anti-dumping duties" as in the Secretariat's Revised List, it was placed after "shall be levied" and before "on a non-discriminatory basis". That is, following further discussion, its final placement emphasized the link between "appropriate amounts" and "on a non-discriminatory basis." Furthermore, it was clarified that the non-discrimination obligation required that the duties be "levied" in the appropriate amounts, not "imposed" as in the secretariat Draft Elements (also reinforcing the distinction the United States has noted between imposing and levying a countervailing duty).

76. As discussed at the second panel meeting, then, the negotiating history of the text that became Article 19.3 of the Subsidies Agreement supports the U.S. interpretation of "in the appropriate amounts in each case" as an integral element in Article 19.3's non-discrimination obligation. The UK Draft Code, following the concern raised by the Group of Experts, makes the link between the appropriate level and non-discrimination explicit. The omission of the UK Code's "appropriate levels" phrase from the first Secretariat draft, and the subsequent insertion of "appropriate amounts" following discussion by delegations, suggests that Contracting Parties viewed the language as important to capture the non-discrimination obligation they were trying to elaborate. That China has refused to engage with this significant historical material is regrettable; that the Appellate Body did not examine this material in its report in DS379 is undeniable and provides further support for the view that its interpretation was erroneous.

Additional advance questions sent to the parties on 27 August 2013

I. ARTICLE X

2.1 Article X:1

Question to United States

(Questions 109 -110)

2.2 Article X:2

Question to China

111. At paragraph 55 of its second written submission, the United States lists 30 investigations or reviews that were initiated prior to 13 March 2012. Could China please indicate whether all 30 or only some of these 30 are proceedings at issue, and for which of its claims this is the case?

77. The United States notes that both parties agree that the CVD proceedings listed in paragraph 55 of the U.S. Second Written Submission are within the scope of this dispute. China reiterates that its claim under Article X:2 is that the United States enforced Section 1 of the *GPX* legislation before its publication.[59] Therefore, while certain proceedings may be

[59] China Responses to the Panel's Second Set of Questions, paras. 64, 69-70.

listed in China's Panel Request and may be within the scope of the dispute (while others are not), China has advanced no arguments and claims with respect to those proceedings. Rather, they appear simply to serve as evidence to support China's argument that Section 1 of the *GPX* legislation was enforced prior to publication.

112. Could China please comment on footnote 54 of the United States' second written submission, and specifically whether, and if so why, the identified CVD investigation has been included?

78. China's Panel Request specifies that it includes only those "countervailing duty investigations or reviews *initiated* between 20 November 2006 and 13 March 2012."[60] The U.S. CVD law provides that "{a} countervailing duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty . . . exist."[61] Commerce, as the "administering authority," did not initiate the CVD investigation on drawn stainless steel sinks from China until March 27, 2012, after enactment of the *GPX* legislation.[62] As such, the investigation is not within the scope of this dispute.

113. The United States at paragraphs 23 and 46-47 of its second written submission states that China has clarified that its challenge to Section 1 is only in respect of the investigations and reviews initiated prior to the date of its enactment. Could China please confirm that this is the case?

79. China states in response to this question that its "claim is not limited to specific investigations and reviews initiated prior to the date of enactment of P.L. 112-99."[63] However, in the same paragraph, China also acknowledges that its "claim encompasses all determinations and actions listed in paragraph 65 above."[64] Paragraph 65 of China's submission is a quotation of its Panel Request, which states that the CVD proceedings at issue in this dispute are those that were "initiated between 20 November 2006 and 13 March 2012."[65] Such proceedings are the universe of CVD investigations and reviews that were initiated prior to the date of enactment of the GPX legislation, which was on March 13, 2012.

80. The United States has explained that because China's claims, premised on its erroneous assertions of a prohibition on "retroactivity", are entirely based on the application of Section 1 of the *GPX* legislation to those CVD proceedings initiated before the enactment of the *GPX* legislation[66], it is necessary to consider this portion of the legislation as the challenged

[60] China Panel Request, p. 2 (emphasis added).

[61] Section 702(a) of the Tariff Act (USA-124).

[62] *Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 77 Fed. Reg. 18,211 (Dep't of Commerce March 27, 2012) (USA-125).

[63] China Responses to the Panel's Second Set of Questions, para. 69.

[64] *Id.*

[65] China Panel Request, p.2.

[66] *See* China Responses to the Panel's Second Set of Questions, paras. 69-70.

measure, and that portion of Section 1 of the *GPX* legislation challenged by China is not a measure of general application.[67] China has simply advanced no arguments in relation to section 1 as it applies prospectively, that is, to proceedings initiated on or after the date of enactment of the legislation.

114. The United States at paragraph 52 of its second written submission states that China has not challenged all three paragraphs of Section 1(b). Could China please confirm whether this is the case?

81. China's response to this question is that it is challenging all three paragraphs of Section 1(b)[68] as part of its claim under Article X:2 of the GATT 1994. China has failed to explain, however, how Section 1(b)(3) of the *GPX* legislation is applicable to its Article X:2 claim. Specifically, Section 1(b)(3) states that the *GPX* legislation applies to "all civil actions, criminal proceedings, and other proceedings before a Federal court relating to proceedings referred to in paragraph (1) or actions referred to in paragraph (2)."[69] China has failed to provide evidence and arguments as to how this provision is inconsistent with the U.S. obligations under Article X:2.

115. Does China agree that Article 20 of the SCM Agreement and Article 10 of the Anti-Dumping Agreement militate against China's interpretation of Article X:2 (because Article X:2 would make these provisions redundant or they would conflict with Article X:2)? Why? Why not?

82. China admits in its response to this question that "Article 10 and Article 20 permit the enforcement of a measure imposing a duty prior to its official publication."[70] Previous to this response, China has staunchly maintained that:

> "[P]rior 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.[71]

83. In other words, China is asking the Panel to find that Article X:2 contains a strict prohibition against the so-called retroactive application of measures in all cases, with no exceptions. In admitting that there are exceptions, China appears now to recognize that Article X:2 of the GATT 1994 does not contain such an absolute prohibition.

84. Article X:2 does not prohibit the application of measures to events or actions that predate its publication. As China's response demonstrates, any challenge of whether a

[67] U.S. Second Written Submission, Part III(C).

[68] China Responses to the Panel's Second Set of Questions, para. 70.

[69] Section 1(b)(3), *GPX* legislation (CHI-1).

[70] China Responses to the Panel's Second Set of Questions, para. 72.

[71] China First Written Submission, para. 69 (emphasis added).

measure may affect such events or actions must be based on a provision of a covered agreement imposing a substantive obligation, such as Article 10 of the AD Agreement and Article 20 of the SCM Agreement.

116. With reference to paragraph 23 of China's second written submission, could China please address whether Section 1 could be a measure of general application to the extent it applies to investigations and reviews initiated after 13 March 2012, and not a measure of general application to the extent it applies to investigations and reviews initiated between 20 November 2006 and 13 March 2012?

85. China states that there is no basis to distinguish Section 1 of the *GPX* legislation from the 27 challenged CVD proceedings because then "any measure of general application could be seen as 'not' a measure of general application when viewed in relation to particular transactions or conduct that took place prior to its official publication."[72] However, as the United States has explained, this is how China has structured its claim.[73]

86. Further, China's assertion is contrary to its claim regarding the *GPX* legislation. Specifically, China has stated that Section 1 of the *GPX* legislation is the "measure" at issue. The United States questions on what basis China would separate Section 1 from Section 2 of the *GPX* legislation. In other words, if it is appropriate to separate Section 1 from Section 2, then there also would be a basis to further separate Section 1(a) from Section 1(b). As China's claims relate solely to the application of Section 1(a) to those CVD proceedings that were initiated prior to the enactment of the *GPX* legislation, it would indeed reflect China's claim to consider the measure as actually challenged by China, and to consider the measure in respect of those proceedings initiated prior to the law's enactment from those that were initiated after the law's enactment.

87. Finally, China's response demonstrates a misunderstanding of the U.S. position regarding Article X:2. The United States is not arguing that "there could never be a violation of Article X:2" if a measure could be seen as not a measure of general application for a particular transaction occurring prior to the measure's publication. The United States believes that if a measure is enforced prior to its publication, then for that period the Member has breached the obligations of Article X:2 of the GATT 1994. If the Member publishes the measure subsequent to its enforcement, such a publication does not mean that the breach did not occur. However, the situation with Section 1 of the *GPX* legislation is entirely different from this scenario. China makes no claim that the *GPX* legislation was enforced on any date prior to its publication but rather that it was applied to events preceding its publication. Therefore, China's claim under Article X:2 is without merit.

117. At paragraph 55 of its second written submission, China refers, *in fine*, to "judicial decisions". Could China clarify whether its proposed standard is "prior municipal law as published" (and this would include judicial

[72] China Responses to the Panel's Second Set of Questions, para. 74.

[73] *See* U.S. Second Written Submission, Part III(C).

decisions) or "prior municipal law as published and as subsequently interpreted by US courts"?

88. The United States has previously commented on this question in paragraphs 65 – 69 of its responses to the Panel's questions following the second substantive Panel meeting. In addition, the United States notes that China, in its response to this question, has again referenced the Appellate Body's statements in *US – Carbon Steel* regarding how to properly determine municipal law.[74] China, however, continues to fail to acknowledge that findings regarding municipal law is an issue of fact that must be determined not according to an abstract pronouncement of the Appellate Body, but by reference to municipal law principles on statutory construction and interpretation.[75] China's response to this question confirms that it has utterly failed to explain to the Panel how statutory interpretation would occur under the U.S. legal system.

Questions to the United States

(Questions 118 – 120)

2.3 Article X:3(b)

Questions to China

121. Unlike Article X:1, which refers to laws and regulations, Article X:3(b) does not mention legislative acts; rather, it refers specifically only to the agencies entrusted with administrative enforcement, and judicial, arbitral or administrative tribunals or procedures. In the light of this, can China elaborate further on how and why Article X:3(b) imposes a constraint on the

[74] China Responses to the Panel's Second Set of Questions, para. 76 (quoting *US – Carbon Steel (AB)*, para. 157).

[75] *US –1916 Act*, paras. 6.48, 6.51. Specifically, paragraph 6.48 of the panel report states that:

> The understanding of a law the WTO-compatibility of which has to be assessed begins with an analysis of the terms of that law. However, we consider that we should not limit ourselves to an analysis of the text of the 1916 Act in isolation from its interpretation by US courts or other US authorities, even if we were to find that text to be clear on its face. If we were to do so, we might develop an understanding of that law different from the way it is actually understood and applied by the US authorities. This would be contrary to our obligation to make an objective assessment of the facts of the case, pursuant to Article 11 of the DSU. Therefore, we must look at all the aspects of the domestic legislation of the United States that are relevant for our understanding of the 1916 Act. However, looking at all the relevant aspects of the domestic law of a Member may raise some methodological difficulties, such as how much deference must be paid to that Member's characterisation of its legislation. In that context, we will determine first how to deal with that aspect of the examination of a domestic law and how we should consider the case-law related to it, since courts are, inter alia, responsible for interpreting the law. Moreover, in light of the fact that the law at issue was enacted more than eighty years ago and not regularly invoked, and since the parties have referred to other elements such as the historical context, the legislative history and subsequent declarations of US authorities made in relation to the 1916 Act, we shall also explain how we will consider them.

Id.

nature and type of legislative acts that are permissible in the context of on-going judicial proceedings?

89. In response to this question, China states that "[t]he formulation 'shall … unless' in Article X:3(b) indicates that the only exceptions to the requirement to implement the decisions of court or tribunals are the two exceptions set forth in Article X:3(b) itself."[76] China argues that because of such a formulation, "other possible exceptions – such as the intervening enactment of legislation to change the outcome of a decision – are not permissible under Article X:3(b)."[77]

90. The United States notes that even under China's own theory, China's argument fails based on the plain text of Article X:3(b). Specifically, the second sentence of Article X:3(b) quoted by China begins with "[s]uch tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement …." As such, the exceptions cited by China are directed to the relationship between the administering agency and the review and correction tribunal or procedures. It does not constrain the nature and type of legislative acts that are permissible in the context of ongoing judicial proceedings.

122. Does China agree with the United States that the obligation set forth in the <u>first</u> sentence of Article X:3(b) is "structural" in nature?

91. In response to this question, China admits that the first sentence of Article X:3(b) is a structural obligation, but notes that it is not sufficient for a Member to only institute the structural framework "without taking steps, as necessary, to 'maintain' their purpose of providing for the 'prompt review and correction of administrative action relating to customs matters.'"[78]

92. China's response appears to be asking the Panel to conclude that the United States has failed to meet the structural obligation of Article X:3(b) to "maintain" a review and correction mechanism based solely on the actions of the U.S. Congress in enacting the *GPX* legislation and its application to one pending court proceeding. Such an invitation is not an evaluation of the structural framework of the U.S. judicial system under Article X:3(b), but what the panel in *Thailand – Cigarettes (Philippines)* appropriately found was a challenge under Article X:3(a). Specifically, the panel found that

> [I]t is our view that a claim on whether a tribunal maintained by a Member pursuant to Article X:3(b) does in fact promptly review an administrative action is a matter falling more properly within the scope of Article X:3(a). As addressed above, Article X:3(a) requires that Members administer the legal instruments of the kind in Article X:1 in a uniform, impartial and reasonable manner. We also clarified that the term "administer" under Article X:3(a) covers the application or implementation of the relevant legal instruments, including judicial decisions.

[76] China Responses to the Panel's Second Set of Questions, para. 78.

[77] *Id.*

[78] China Responses to the Panel's Second Set of Questions, para. 81.

> This understanding, in our view, ensures that the distinctive disciplines embodied in Article X:3(a) and X:3(b) are not blurred.[79]

93. As such, China's claim under Article X:3(b) is without merit. Further, China has not advanced any arguments that the *GPX* legislation is inconsistent with Article X:3(a) of the GATT 1994.

123. China interprets Articles X:1 and X:2 as prohibiting the enactment of any legislation that applies to events prior to its enactment. It appears to be common ground between the parties that under current US law, the legislative branch is not prohibited from enacting legislation that applies to events prior to enactment (as reflected for example in the CIT decision in *GPX VII*). Is it therefore correct to conclude that China reads Articles X:1 and X:2, which were already contained in the GATT 1947, as establishing disciplines on the US legislative branch that go beyond the corresponding disciplines that the US legislative branch is subject to under current US constitutional law?

94. While we applaud China's straightforward response to this question, it confirms the radical and far-reaching nature of China's interpretation of Article X, as China would seemingly assert that the constitutional relationship between the U.S. legislature and judiciary could be viewed as inconsistent with Article X.

Questions to the United States

(Question 124)

3 ARTICLE 19.3

3.1 Article 19.3

125. [omitted]

Questions to the United States

(Question 126)

[79] *Thailand – Cigarettes (Philippines)*, para. 7.997.

Additional Questions

1 ARTICLE X

1.1 Article X:2

Questions to both parties

127. Regarding the phrase "under an established and uniform practice" in Article X:2, could the parties please indicate whether that phrase relates to both an advance in a duty rate and an advance in an other charge on imports, or only the latter?

95. The United States notes that both parties agree that the phrase "under an established and uniform practice" relates to both "an advance in a duty rate" and an advance in an "other charge on imports."

Question to China

128. It appears that according to China's view, retroactive legislation would normally violate Article X:1 by virtue of its having been made "effective" prior to its publication. If that were correct, could China indicate what purpose is served by Article X:2? Does China's interpretation of Article X:1 render Article X:2 redundant?

96. China states in response to this question that "[t]here may be exceptional circumstances in which publication of a measure could still be considered sufficiently 'prompt' [under Article X:1] if it were published shortly after it was made effective."[80] This statement is in direct contradiction to China's statement in its First Written Submission that:

> 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.[81]

97. China has staunchly maintained that Article X:1 contains an absolute prohibition on the ability of a Member to make effective a measure prior to the measure's publication. China now appears to recognize that Article X:1 contains no such prohibition. China's change of position not only demonstrates that Articles X:1 and X:2 would be redundant under China's interpretation, but that Articles X:1 and X:2 do not prohibit the application of measures to events or actions that predate its publication.

98. Finally, China asserts that "[t]he United States has yet to articulate any interpretation of Article X:2 that would give this provision independent meaning and effect in relation to the obligation established under Article X:1."[82] The United States has already explained in depth

[80] China Responses to the Panel's Second Set of Questions, para. 84.

[81] China First Written Submission, para. 64 (emphasis in original).

[82] China Responses to the Panel's Second Set of Questions, para. 87.

how Article X:2 differs from Article X:1, including the incentives it provides to governments and the benefits it provides to traders.[83] China's assertion is therefore baseless.

129. Were the CVD determinations at issue specific to individual Chinese exporters, or did/do they apply to, or have a bearing on, any Chinese exporter that exported the product(s) subject to the order?

99. As the United States explained in paragraph 74 above, China has not challenged the CVD determinations as inconsistent with either Article X:1 or Article X:2 of the GATT 1994. Rather, the 27 CVD proceedings at issue appear to serve as evidence to support China's argument that Section 1 of the *GPX* legislation was enforced prior to publication. Further, the United States would note that the possibility that a CVD order may reach an unknown set of exporters *in the future* is irrelevant to China's claims. China's challenge is that section 1 of P.L. 112-99 is inconsistent with the GATT 1994 with regard to CVD proceedings that were initiated prior to the enactment of the *GPX* legislation. For those past proceedings, the exporters subject to those investigations and resulting orders or determinations were known as of the date of enactment of the *GPX* legislation. In other words, past exporters are necessarily a defined set.

Question to the United States

(Question 130)

1.2 Article X:3

Question to China

131. At paragraph 22 of its second oral statement, China refers to "the purpose of independent judicial review". To the extent that China is implying that this is a purpose of Article X:3(b), could China please indicate how it reaches the conclusion that Article X:3(b) speaks to the independence of judicial review vis-à-vis the legislature (as opposed to the independence of judicial review vis-à-vis an administrative agency)?

100. Rather than respond to this question, China asserts that it is the U.S. position that Article X:3(b) allows for Congress to "act[ ] as a court or tribunal of superior jurisdiction … even though it is not its function within the U.S. constitutional system."[84]

101. However, and as a point of clarification, the United States is not arguing that Congress acted as a court of superior jurisdiction in enacting in the *GPX* legislation. Rather, Congress was performing its legislative role concerning the enactment of laws. Pursuant to U.S. law, as explained in the *Plaut* case, such legislation was applicable to pending court proceedings. As the *GPX* litigation was pending at the time of the enactment of the *GPX* legislation, the U.S. Federal Circuit properly applied the law as it existed at the time of its decision. As the

[83] *See e.g.,* U.S. Second Written Submission, Part III(E).

[84] China Responses to the Panel's Second Set of Questions, para. 89.

U.S. Federal Circuit itself explained, "no issue is raised by the fact that our decision in *GPX* had issued prior to enactment of the new legislation because this case remained pending on appeal."[85] In no way could these actions be considered Congress acting as a court of superior jurisdiction.

Question to the United States

(Question 132)

[85] GPX VI, p. 6 (CHI-7).