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

**(WT/DS449)**

# EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**June 19, 2013**

# I. INTRODUCTION

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

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

# II. FACTUAL AND PROCEDURAL BACKGROUND

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

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

on appeal, Congress enacted the *GPX* legislation, which affirmed that the U.S. CVD law is applicable to all countries, including NME countries.

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

5. China's claims under Article X:1 of the GATT 1994 rest not on a proper interpretation of the text of that provision, but on an implausible reading that would require publication before the existence of a measure and substantive requirements governing the content of a measure. Such a reading is unfounded.

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

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

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

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

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

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

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

13. China argues that "the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries." The plain meaning of "manner" is "the way in which something is done, the mode or procedure." China has presented no basis for a claim that the U.S. publication of the *GPX* legislation was inconsistent with the obligation in Article X:1 of the GATT 1994 regarding the manner of publication. In fact, the *GPX* legislation was published in the *United States Statutes at Large*, on the same day it was enacted. The *United States Statutes at Large* is readily available to China, Chinese traders and other members of the public. Accordingly, the publication of the *GPX* legislation met the Article X:1 of the GATT 1994 obligation regarding the manner of publication.

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

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

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

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

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

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

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

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

21. The requirements for a measure to be covered by Article X:2 of the GATT 1994 can be separated into two parts: the general type of measure, and the requirement that the measure represents a certain type of change from a prior measure. The general types of measures covered by Article X:2 of the GATT 1994 are either a measure of general application effecting a duty rate or other charge on imports under an established and uniform practice, or a measure of general application imposing a requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either category. As such, China has failed to present *a prima facie* case.

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

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

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

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

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

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

28. Section 1 of the *GPX* legislation was neither a change in the law, nor did it result in any change in the treatment of imports from China. Rather, the legislation reaffirmed Commerce's interpretation of existing law for the purposes of resolving confusion in ongoing litigation. Prior to the law's enactment, Commerce acted pursuant its reasonable interpretation of the Tariff Act of 1930 to apply the U.S. CVD law to China when it could identify a countervailable subsidy in China. For the past seven years, the U.S. CVD laws have applied to imports from China.

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

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

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

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

the Appellate Body rejected the argument that Article X:2 precluded the application of the safeguard to imports that entered prior to the June 1995 adoption of the measure.

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

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

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

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

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

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

37. China fails to put forward legal arguments to make out a *prima facie* case. Instead, China merely argues that the findings of the Appellate Body in DS379 should be applied to the investigations and reviews at issue in the instant dispute. Rather than present the evidence necessary to support its legal claims, China makes conclusory and generalized allegations as to what Commerce found across 31 sets of determinations without even a cursory citation to a single piece of evidence. To make out a *prima facie* case, China must establish the facts of each determination to demonstrate evidence adequate to make out its case under the legal theory that

it advances. However, China makes no mention of Commerce's determinations at all except to cite the list of challenged determinations in CHI-24.

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

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

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

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

42. Furthermore, the United States notes that nothing on the face of the phrase "levied in the appropriate amounts in each case" (nor any other language in the SCM Agreement) has any tie to

the question of whether or not other measures, such as *anti-dumping* duties, have been applied, nor any relation to rules outside the SCM Agreement. To read "in the appropriate amounts" as permitting consideration of the application of other measures or other, non-SCM Agreement rules, would convert "in the appropriate amounts" into a subjective standard, with bounds only set by the eyes of the particular interpreter.

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

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

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

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

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

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

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

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

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

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

the importing Member to prove that CVDs are levied in the appropriate amounts in each case, regardless of whether the exporting Member presented evidence to indicate otherwise.

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

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

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

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

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