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

(WT/DS449)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 10, 2013

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. The United States notes that even if the *GPX V* opinion could be considered a "decision" under Article X:3(b), the requirements of the treaty article still would not be applicable to *GPX* V. Article X:3(b) expressly recognizes that an administering authority need not implement a judicial decision that is under appeal. Specifically, it states that judicial decisions must be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period."In *GPX V*, the United States filed a timely petition for rehearing before the U.S. Federal Circuit sitting *en banc*. In other words, the proceedings had not concluded and the United States had not exhausted its rights to appeal. In fact, the *GPX* litigation is still on-going.

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

18. As an example, China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government" is incompatible with Article X:3(b). China's

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

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

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

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

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

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

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

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