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 SECOND SUBSTANTIVE MEETING OF THE PANEL

September 3, 2013

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

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

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

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

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

6. Third, Article X:3(b) imposes a structural obligation to establish or maintain review procedures meeting certain criteria. The United States has met those obligations, and China has

failed to prove that Article X:3(b) imposes any limitations on the ability of a legislative body to enact laws, whether or not judicial proceedings are pending.

7. The United States recalls that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its AD law, and China is not challenging that concurrent application in itself. The United States has exercised this right since 2006. China nevertheless claims that the United States, of all WTO Members, could not apply CVDs to exports from China during the period from 2006 until 2012, and that WTO law should prohibit the application of legislation enacted by the U.S. Congress to preserve Commerce's existing practice of applying CVDs to exports from China. That is an astonishing argument, and as we set out in this statement, one entirely dependent not only on the Panel committing a series of interpretive errors, but also for the Panel to resolve issues of U.S. law contrary to Commerce's interpretation, contrary to the intent and expectation of the U.S. Congress, and which the U.S. courts are considering but have not resolved. The Panel should not engage in that speculative exercise and it can resolve China's claims on simpler grounds under Article X of the GATT 1994.

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

I. China's Article X Claims Are Without Merit

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

10. While neither of these concepts applies under Article X, China's arguments under Article X depend entirely on its being able to obtain findings from the Panel on these concepts.

However, in doing so, China is asking the Panel to make factual findings on issues of U.S. constitutional and other domestic law issues that are unresolved and currently being litigated in U.S. courts. The Panel should avoid making findings that at this point would simply involve speculation as to the outcome of domestic legal proceedings and that are not necessary to the resolution of China's Article X claims.

II. China's Argument that the Panel Should Speculate and Substitute its Judgment on U.S. Law Under Article X:2 is Without Merit

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

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

13. Further, despite pending domestic litigation on these issues, China asserts in its Second Written Submission that a statement by Professor Richard Fallon will "put an end" to and "properly determine" whether the *GPX* legislation was a clarification or change of existing law and whether the *GPX V* opinion has any legal effect under U.S. law. China's assertion has no legal basis. First, the conclusions in the statement that Professor Fallon prepared for China are incorrect. Second, under the U.S. legal system, law professors have no special or authoritative role in interpreting U.S. law. Nonetheless, to the extent the panel is interested in the views of U.S. law professors, the United States has requested the views of Dean John Jeffries, a noted U.S. constitutional law expert. Dean Jeffries' expert statement, submitted as exhibit USA-115, explains numerous shortcomings in Professor Fallon's statement.

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

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

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

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

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

III. China's Retroactivity Claim Under Article X:2 is Without Merit

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

IV. Article X:3(b) Does Not Address How a Legislative Body Can Enact Legislation

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

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

V. China Has Not Established Either a Factual Basis or a Legal Basis for its Claim Under Article 19.3 of the SCM Agreement

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

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

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

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

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

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

28. China refuses to analyze the specific facts of each determination. Consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the parties have put before it here.

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

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

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