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

(WT/DS449)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING

July 18, 2013

Table of Reports

Short Form	Full Citation
EC – Customs (AB)	Appellate Body Report, *European Communities — Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Customs	Panel Report, *European Communities — Selected Customs Matters*, WT/DS315/AB/R, , adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R
EEC – Dessert Apples (Chile)	GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*, L/6491, adopted 22 June 1989, BISD 36S/93
EEC – Dessert Apples (United States)	GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by the United States*, L/6513, adopted 22 June 1989, BISD 36S/135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EC — Large Civil Aircraft (AB)	Appellate Body Report, *European Communities — Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Poultry Imports (AB)	Appellate Body Report, *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
Japan – Alcoholic Beverages (AB)	Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R / WT/DS10/AB/R / WT/DS11/AB/R, adopted 1 November 1996
U.S. – Continued Zeroing (AB)	Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
U.S. – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
U.S. – 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 No.	Description
USA-101	*Internal Operating Procedures*, U.S. Court of Appeal for the Federal Circuit, IOP Subject 14(2)(e)
USA-102	*Internal Operating Procedures*, U.S. Court of Appeal for the Federal Circuit, IOP Subject 10
USA-103	*Black's Law Dictionary* (1991) ("decision")
USA-104	*Ballentine's Law Dictionary* (2010) ("opinion")
USA-105	*Black's Law Dictionary* (1991) ("opinion")
USA-106	U.S. Federal Circuit Panel and *En Banc* Petitions for Rehearing (2001 – 2010)

Advance questions sent to the parties on 24 June 2013

I. THE MEASURES, INVESTIGATIONS AND REVIEWS AT ISSUE

A. Questions for China (Questions 9-10)

II. CLAIMS UNDER ARTICLE X OF THE GATT 1994

A. Questions for both Parties

Q11. *Article X:2 of the GATT 1994 provides that no measure falling within its scope may be "enforced" before such measure has been officially published. In contrast, Article X:1 refers to certain measures "made effective" by Members. Please address whether there is any difference between the concepts of "enforcement" and "made effective", and if so, what it is. ~~*For example, are measures "made effective" measures that are enforceable under the law of the Member concerned? Or is it that Article X:2-type measures may be made effective, but not enforced, prior to publication?*~~

1. As the United States explained in its First Written Submission, the terms "made effective" and "enforce" must be evaluated in relation to the applicable measure of general application. Without the existence of a measure, there is nothing to make effective or to enforce.[1]

2. As the United States explained in its First Written Submission, the ordinary meaning of "made effective" refers to when a measure is made "operative." In turn, the term "operative" refers to when a measure is "in force" or "come[s] into effect." Thus, it appears that the term is focused on the timing of when a measure is brought into effect. The *GPX* legislation became operative, or came into force, on March 13, 2012. The United States published the legislation on the same day and therefore published that measure promptly.

3. The ordinary meaning of the term "enforce" conveys a different meaning than "made effective." "Enforce" is defined as to "compel the observance of (a law, rule, practice, etc.)."[2] It is questionable that the concept of enforcement applies at all to a measure, such as the *GPX* legislation, that confirmed the longstanding practice with regard to the application of the U.S. CVD law to NMEs such as China, and did not result in any change of U.S. treatment of imports from China. To the extent the United States could be considered to have compelled the observance of the GPX legislation, this occurred after its official publication, that is, after the legislation was made effective.

Q12. *China at paragraph 69 of its first written submission suggests that a measure of the type described in Article X:2 can be applied only in respect of actions taken after the publication of the measure. What, if any, textual or contextual support is there for this view in Article X:2? In this regard, please take into account the phrase "[measure] effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports". ~~*Could this phrase be interpreted so as to cover "measures [prospectively or retroactively] effecting an advance in a rate of duty …, or [prospectively or retroactively] imposing a new or more burdensome requirement"? Why? Why not?*~~

[1] Further, as explained in the U.S. First Written Submission, the *GPX* legislation does not fall within the scope of Article X:2 and does not in any event breach the obligation in that provision.

[2] Oxford English Dictionary, p. 820.

4. China has offered no textual or contextual support for its assertion that Article X:2 requires the application of measures only to those actions that are taken after the publication of the measure. China's claims under Article X:2, therefore, are baseless.

5. Article X:2 is a procedural obligation focused on the publication of certain measures of general application. That is, the obligation is a notice requirement to ensure that interested parties are made aware, in an official publication, of certain measures that may change or otherwise affect the treatment of imports. The purpose of Article X:2 is to ensure that certain measures of general application that are being enforced with respect to imports are not kept secret from foreign governments and traders. In other words, if a Member wishes to impose a higher rate of duty or new or more burdensome restriction on imports based on a measure of general application, it must first publish the measure.

6. In this dispute, even setting aside the other ways in which the GPX legislation does not fall within or otherwise breach Article X:2, the facts are that nothing was kept secret from China or any other interested party. The measure being enforced was the U.S. CVD law, and Commerce published its intent to apply the U.S. 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.

7. Further, Article X:2 does not address what actions are instructed by the measure, or as the Appellate Body observed in *EC – Poultry*: Article X does not relate to the "substantive content" of covered measures.[3]

8. Reinforcing this view, the Appellate Body observed in *U.S. – Underwear* that Article X:2 does not address the so-called principle of "retroactivity" and as such, cannot be the basis of a Member's claim that there is a WTO breach if a Member's measure reaches past actions. The Member must look to an obligation that addresses the substantive content of the measure.

9. As the United States has explained in its First Written Submission, Article X does not stand for a general principle of law that prohibits the application of measures to events that occurred prior to the adoption of the measure. China must prove its claim based on the specific treaty language. Having failed to do such, China's claim is without merit.

Q13. [ ]

Q14. The United States in footnote 106 of its first written submission submits that it is not evident, in view of the Appellate Body report in *EC - Selected Customs Matters* (DS315) (paragraph 294), that administrative agencies are bound under Article X:3(b) by decisions of superior courts that have jurisdiction to review the decisions of courts of first instance. Please clarify, with specific reference to the Appellate Body's report, whether Article X:3(b) obliges agencies to implement and be governed by the decisions of superior courts.

10. As an initial matter, it must be emphasized that Commerce is bound by the final decisions of domestic courts that possess jurisdiction over its determinations. This is true whether the final decision be by the court of first instance (*i.e.*, the U.S. CIT) or by a court of superior jurisdiction (*i.e.*, the U.S. Federal Circuit, the U.S. Federal Circuit sitting *en banc*, or by the U.S. Supreme Court). Courts in the United States possess full powers of equity to ensure enforcement of their final decision, including, but not limited to, the ability to issue contempt citations and writs of mandamus. Regardless of whether Article X:3(b) obliges agencies to implement and be governed by the decisions of superior courts, Commerce's actions are governed by the final decisions of superior courts.

[3] *EC – Poultry (AB)*, para. 115.

11. However, as explained further in response to Question 71 from the Panel, the obligation in Article X:3(b) is a structural one. Article X:3(b) requires a Member to institute or maintain independent tribunals that issue decisions that must be implemented by and govern the practice of administering agencies. For there to be a breach of Article X:3(b), the Member must have failed to establish tribunals that issue final decisions that shall be implemented by agencies. This emphatically is not the case with the U.S. judicial system. Thus, even if Commerce were to flout a final decision of the U.S. federal courts, although that would constitute a serious problem under U.S. law and expose Commerce officials to sanctions, such an action would not establish a breach of the U.S. obligation to establish tribunals as set out in Article X:3(b) of GATT 1994. That such an action would be extraordinary and unlawful in fact demonstrates that the United States has established tribunals in accordance with Article X:3(b).

12. The plain text of Article X:3(b) does not speak to whether the decisions of courts or tribunals of superior jurisdiction, as such, "shall be implemented." Such a requirement is applicable to those "judicial, arbitral or administrative tribunals or procedures [engaged in] … the prompt review and correction of administrative action relating to customs matters." The panel in *EC – Customs* interpreted this provision to mean a court or tribunal of "first instance review." The Appellate Body affirmed the panel's finding that such a review is defined as "review by the first body or procedure to consider a decision after that decision has been taken."[4]

13. Specifically, in *EC – Customs*, the Appellate Body first noted that the parties had agreed that Article X:3(b) relates to first instance review. Going beyond the consensus of the parties, the Appellate Body analyzed the panel's findings and the specific language of the obligation. It concluded:

> [The Panel] found support for [its] interpretation in the separate reference in Article X:3(b) to the possibility of filing an appeal with 'a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers'. We agree that the phrase "unless an appeal is lodged with a court or tribunal of superior jurisdiction" contemplates the possibility that there may be an appeal to bodies of "superior jurisdiction" and confirms the view that Article X:3(b) relates to first instance review.[5]

14. The Appellate Body then noted that the panel had "relied on the proviso of Article X:3(b), which provides that the 'central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."[6]

15. Based on this analysis, the Appellate Body found that "Article X:3(b) requires that first instance review decisions 'shall be implemented by, and shall govern the practice of, such agencies' (that is, agencies entrusted with the administration of customs matters)."[7]

16. That is, the Appellate Body confirmed that the plain text of Article X:3(b) is focused on the first instance review of the administrative action. The United States notes that the Appellate Body's findings acknowledged some ambiguity about the applicability of Article X:3(b) to higher level review. In any event, the United States considers that once a system for independent judicial review has been established, the final results of the system of judicial review should be implemented.

17. The plain text of Article X:3(b) requires the establishment of a framework for "tribunals or procedures" to issue decisions independent from the administering authority. When appeals within this framework have run their course Article X:3(b) indicates that the decisions of the tribunals or

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[4] *EC – Customs*, para. 7.522, n. 895.

[5] *EC – Customs (AB)*, para. 294.

[6] *Id.*

[7] *Id.*

procedures – which may have been altered in an appeal proceeding – shall be implemented. The phrase "unless an appeal is lodged" makes clear that decisions under appeal do not govern the practice of agencies. In relation to this dispute, *GPX V* is not a "decision" within this framework and thus Article X:3(b) does not require its implementation.

18. Finally, the United States notes that the factual circumstances of this dispute are significantly different from the circumstances contemplated by the Appellate Body in *EC – Customs* regarding first instance review. China's claim rests not on whether the *GPX V* opinion was issued by a court of first instance review or superior jurisdiction, but whether the *GPX V* opinion had legal effect, or the ability to cause a change in the U.S. CVD law. It did not. The mandate for the *GPX V* opinion was never issued and the parties' right to appeal was not exhausted. As such, the opinion had no legal effect. Thus, the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to China.

Q15. Do the parties consider that the US Court of Appeals for the Federal Circuit in *GPX V* engaged in a "review … of administrative action relating to customs matters" within the meaning of Article X:3(b)?

19. Yes. The fundamental consideration of the U.S. Federal Circuit's actions in *GPX V* should be on whether the opinion resulted in a legally enforceable decision. It did not. The mandate for the *GPX V* opinion was never issued and the parties' right to appeal was not exhausted. As such, the opinion had no legal effect. Thus, the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to China. *See also* the U.S. response to Question 14 from the Panel above.

Q16. *Article X:3(b) contains the phrase "their decisions [decisions emanating from tribunals or procedures] shall be implemented by, and shall govern the practice of, such agencies, unless an appeal is lodged with a court or tribunal of superior jurisdiction…".

(a) How should the role of the US Court of Appeals for the Federal Circuit in the matter *GPX V* be characterized in terms of the afore-cited phrase? Did the Court act as a tribunal at first instance or a as a court or tribunal of superior jurisdiction?

20. The U.S. Federal Circuit is a court of superior jurisdiction. In the *GPX V* proceeding, the U.S. Federal Circuit was acting to review the decision of the Court of International Trade in *GPX IV*. The *GPX V* opinion does not fall within the scope of Article X:3(b) because the opinion lacked legal effect. As such, it cannot be considered a "decision" under Article X:3(b).

(b) Linked to sub-question (a), what about a case where the US Court of Appeals for the Federal Circuit grants a request for a rehearing *en banc* and conducts such rehearing?

21. An *en banc* rehearing by the U.S. Federal Circuit would be considered an appeal lodged with a court of superior jurisdiction. An *en banc re*hearing of the U.S. Federal Circuit involves all of the judges of the circuit court (approximately 12-14) engaging in a rehearing of the appeal heard by the original 3-judge panel. The *en banc* court may set aside the original panel opinion and any action by the court sitting *en banc* may be appealed to the U.S. Supreme Court.

22. In this context, it is helpful to provide a bit of background on the U.S. federal judicial system. In the U.S. federal judicial system, there are in fact several levels of courts of superior jurisdiction from the court of first instance review. That is, there are several higher courts of jurisdiction that would consider appeals from the U.S. CIT. An appellate court in the United States issues decisions that provide instructions to the lower court, not the parties to the dispute. In other words, the role of the U.S. Federal Circuit is to affirm, reverse, remand with additional instructions, or some combination thereof, the decisions of the U.S. CIT. The U.S. Federal Circuit

relies on the record established by the lower court and generally does not receive additional factual evidence.

23. In this dispute, there have been a series of judicial decisions in the *GPX* litigation, and as it is an on-going case, there may be additional judicial opinions. At the time the *GPX* legislation was enacted, there was a petition for a rehearing *en banc* pending before the U.S. Federal Circuit. The rehearing *en banc* or a possible appeal to the U.S. Supreme Court was then no longer necessary given the *GPX* legislation, but it is important to note that the parties' right to appeal had not been exhausted.

24. Given the on-going litigation, China has no basis for claiming that the non-final *GPX V* opinion, which does not have any legal effect, is the final word on the law of the United States.

(c) If the US Court of Appeals for the Federal Circuit issues an opinion and mandate, such as in the *Georgetown Steel* case, is that a "decision" within the meaning of Article X:3(b)?

25. Yes, issuance of an opinion and mandate by the Federal Circuit, such as in *Georgetown Steel*, renders the opinion a "decision" within the meaning of Article X:3(b). The *GPX* legislation did not change or otherwise affect the *Georgetown Steel* decision. The United States explained in its First Written Submission that the ordinary meaning of "decision" requires that a judicial opinion must put an end to or conclude the tribunal's consideration of the proceeding and result in a final judgment on an issue of law that is conclusive.

26. Under the U.S. judicial system, an appellate proceeding is not concluded until the mandate has issued. It is at this time that the opinion has legal effect to instruct the lower court. The mandate for *GPX V* opinion was never issued and thus, has no legal effect. As such, it would not be within the meaning of Article X:3(b).

(d) Are only final court or tribunal decisions that are legally enforceable (have legal effect) within the legal system of a Member "decisions" within the meaning of Article X:3(b)? Why? Why not? *If a lower court decision is under appeal, the wording of Article X:3(b) appears to contemplate that it would still be a "decision" within the meaning of that Article. Is it correct to say by extension that if an appellate review decision is subject to further appeal, and is not final in this regard, it would similarly constitute a "decision" within the meaning of Article X:3(b)?*

27. A "decision" requires that a judicial opinion must put an end to or conclude the tribunal's consideration of the proceeding and result in a final judgment that is conclusive. In order to be conclusive, a decision must have legal effect to end the proceeding. Otherwise, it could not be implemented.

28. The pendency of an appeal is not determinative of whether an opinion constitutes a "decision" under Article X:3(b). The issue is whether the opinion concludes the proceeding under the relevant legal system of the Member such that the opinion has legal effect. While the question suggests that a lower court opinion is a "decision" even while under appeal, the text of Article X:3(b) suggests that a Member may prescribe some period of time in which the opinion of the lower court is not a "decision [that] shall be implemented by, and shall govern the practice of," administering agencies. Otherwise, if an opinion were automatically considered a "decision" within the meaning of X:3(b), it would have to be implemented by and govern the practice of agencies immediately and then cease to do so upon appeal. A more reasonable understanding of "decision" as used in Article X:3(b) is those opinions that have become final and legally enforceable.

29. For example, under the U.S. legal system, when the U.S. CIT or lower court issues a judgment and there is no appeal, that decision is generally legally enforceable upon issuance and concludes the proceedings. When the U.S. Federal Circuit issues a judgment, following the

issuance of a mandate, and there is no appeal to the U.S. Supreme Court, that decision is likewise legally enforceable and concludes the proceeding.

(e) Is the *GPX V* opinion, for which the United States contends no mandate had been issued when P.L. 112-99 entered into force, a "decision" to be implemented and govern the practice of relevant agencies under Article X:3(b)? If not, what is it for purposes of Article X:3(b)?

30. The *GPX V* opinion is not a decision to be implemented and govern the practice of Commerce under Article X:3(b) because it is not a "decision" within the ordinary meaning of the term. It was never final because a mandate never issued and the United States had not exhausted its right to appeal.

31. Because the *GPX V* opinion was not finalized and has no legal effect, it could not be implemented by Commerce. Thus, the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries. The U.S. Federal Circuit's legally binding decision in *GPX VI* confirms this fact.

B. Questions for China (Questions 17 – 23)

C. Questions for the United States

Q24. Does the United States consider that Section 1 of P.L. 112-99 is a measure "of general application" within the meaning of Articles X:1 and X:2?

32. Section 1 of P.L. 112-99 sets out a measure of general application with respect to those imports and associated proceedings that were not known at the time of enactment of the measure. That is, the measure would be generally applied to unidentified imports and proceedings that meet the general criteria set in the measure. In this regard, we note the findings of the panel, upheld by the Appellate Body, in *U.S. – Underwear* that an administrative order was of general application "to the extent that the restraint affects an *unidentified number* of economic operators."[8]

33. We also note that Section 1 by its terms also applies to specific proceedings – those "initiated under subtitle A of title VII of that Act (19 U.S.C. 1671 et seq.) on or after November 20, 2006" through the date of enactment of the legislation. Those proceedings were known as of the date of enactment of the measure as were the imports subject to those proceedings. In relation to this limited and known set of imports and proceedings, it is difficult to see in what respect Section 1 is a measure "of general application". And as the United States has noted, China has not explained in what regard Section 1 is of "general application" in relation to the proceedings initiated before the date of enactment of the legislation.

Q25. P.L. 112-99 was enacted on 13 March 2012, and officially published on the same day. Section 1(b) of P.L. 112-99, entitled "EFFECTIVE DATE", indicates that it "applies" to proceedings initiated on or after 20 November 2006 (and resulting actions and proceedings). With respect to China's claim under Article X:1, is it the United States' position that Section 1 of P.L. 112-99 was "made effective", within the meaning of Article X:1, on 13 March 2012?

34. Yes, Section 1 was "made effective" on March 13, 2012. The term "made effective" cannot be interpreted without consideration of the measure at issue. That is, there must first be a measure (a law, regulation, judicial decision, or administrative ruling of general application) in order to make it effective. The *GPX* legislation did not come into existence and was not made

[8] US – Underwear (Panel), para. 7.65.

effective until it was enacted on March 13, 2012. Put another way, Section 1 of P.L. 112-99 was not "made effective" (that is, made "operative" or put "into effect") on March 12, 2012. It had no legal effect or force on that date, and China has not contended to the contrary.

35. While China has cited to the *EC – IT Products* panel report, that report in fact supports the U.S. interpretation of Article X:1. In that dispute, the panel found that the European Union "brought into effect in practice" certain amendments prior to publication.[9] That is, the relevant measure (amendments to the CNENs (Explanatory Notes to the Combined Nomenclature)) were made effective before adoption by the Commission and before publication. The amendments were found to have been "made effective" following votes in Customs Code Committee, a statement by the Chair of the Committee, and issuance of customs decisions by EU member State customs authorities.[10] That is, that the measure had been "made effective" was demonstrated by its application to produce legal effects. By contrast, there is no evidence that Section 1 of P.L. 112-99 had any legal effect before its enactment. In general, in the United States, a draft or proposed law has no legal effect and cannot be brought into effect, either as practical or legal matter, until enacted by Congress and signed by the U.S. President.

Q26. China characterizes Section 1 of P.L. 112-99 as "retroactive" legislation. The United States uses different terminology, referring, for example, to a measure "touching on events that have occurred prior to the publication of the measure" (paragraphs 64 and 81 of the US first written submission). Does the United States consider that Section 1 of P.L. 112-99 can be characterized as "retroactive" legislation, or as legislation that applies retroactively?

36. No. The term "retroactive" when applied to legislation or its application could have different meanings in different legal systems. That term does not appear in Article X, and therefore would need to be defined to be used for purposes of discussion. However, without specific treaty language to define the parameters of such a concept, the utility of defining a non-treaty term is limited. As such, the United States is not in a position to determine whether the *GPX* legislation may be characterized as "retroactive" legislation, or as legislation that applies retroactively. This is unlike U.S. domestic law, where "retroactivity" is a defined legal concept.[11]

37. For this reason, the United States has preferred in its submissions to be specific about the issue being discussed, for example, to discuss a measure "touching on events that have occurred prior to the publication of the measure". As the United States has explained, the *GPX* legislation did not change Commerce's existing approach to the application of the U.S. CVD law to China or any of the measures cited in China's panel request. Rather, the law confirmed that Commerce had legal authority to apply the CVD provisions of the Tariff Act of 1930 to imports from China.

Q27. The United States at paragraph 139 of its first written submission identifies a distinction within the US judicial system between opinions of a superior tribunal that have been issued and the issuance of the mandate relating to that same opinion. Could the United States please confirm that in the matter *GPX V* the Court of Appeals for the Federal Circuit issued an opinion and could it also indicate to whom it was issued (parties only, general public, etc.)?

38. The U.S. Federal Circuit issued its opinion in *GPX V* to the lower court and the parties to the dispute. The opinion also was made available to the general public at the same time.

39. The reason that federal appellate courts, such as the U.S. Federal Circuit, do not issue opinions and mandates at the same time, and instead issue the mandate only after a prescribed

[9] *EC – IT Products*, para. 7.1046

[10] *EC – IT Products*, para. 7.1069.

[11] *See Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (USA-85).

period, is to permit parties to seek an appeal of an opinion with which they disagree. If an appeal is filed, the mandate is stayed and the opinion is not final and has no legal effect.

40. The mandate for the *GPX V* opinion was never issued and the parties' right to appeal was not exhausted. As such, the opinion had no legal effect. Thus, the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to China.

Q28. Could the United States explain which is the institution within the US legal system that has the authority to determine the authoritative and binding interpretation of US Federal Law? When Congress legislated PL 122-99, was it engaging in an interpretative process or was it legislating new law?

41. In the U.S. legal system, it is Congress that makes the laws, the Executive Branch that administers the law, and the judicial branch that interprets the laws when called to resolve a case or controversy. In this regard, it is important to note that, as a bedrock principle of U.S. administrative law, agencies of the Executive Branch must often interpret the law in order to apply it.[12] It is only in case that an interested party disagrees with the understanding of the law that underlies the agency's action that the judicial branch would be called upon to review that interpretation of the law.[13]

42. There are instances when ambiguities in the law warrant clarification from Congress, particularly when the judicial branch has issued differing opinions as to the legislative meaning or intent of a law.

43. The U.S. court case, *Beverly Community v. Belshe*, submitted as USA-55, is instructive. The case involved the statutory clarification of existing law on payments for the healthcare of low income individuals. The U.S. appellate court found that it should apply the new clarifying law to the pending court case, stating that "[g]iven the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [a law] is worthy of real deference."[14]

III. CLAIM UNDER ARTICLE 19.3 OF THE SCM AGREEMENT

A. Questions for both Parties

Q29. In this dispute, China challenges the imposition of countervailing duties arising from investigations and reviews. For the purpose of assessing China's claim under Article 19.3, are there any legally relevant differences between investigations and reviews?

44. Yes. Under the U.S. retrospective system, investigations serve as the basis to determine whether to issue a countervailing duty order on a particular product. Commerce directs the customs authority to collect security against future liability (cash deposits or bonds) after it issues an order following affirmative determinations of subsidization and injury. Reviews, which may be

[12] *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (USA-15); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)(USA-14).

[13] In *Chevron*, the U.S. Supreme Court held that, when a court reviews a federal agency's construction of the statute which it administers, the first question is whether the U.S. Congress has spoken to the precise question at issue. If, however, the U.S. Congress has not directly addressed the question at issue, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43 (USA-14).

[14] 132 F.3d at 1266.

conducted annually after issuance of an order, may be requested and serve as the basis to determine the actual amount of duties to be assessed.

45. The distinction is important because, under the U.S. retrospective system, duties are primarily assessed, or "levied," through reviews. Article 19.3 applies to situations "[w]hen a countervailing duty is imposed in respect of any product." Article 19.3 further states that "such countervailing 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 subsidized and causing injury." Article 19.4 similarly uses the term "levied" and footnote 51 to Article 19.4 clarifies that, "[a]s used in this Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax." 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. The distinction was not presented to or considered by the Appellate Body in DS379.

B. Questions for China (Question 30)

C. Questions for the United States

Q31. The United States at paragraph 189 of its first written submission indicates that it has presented arguments relating to the interpretation of Article 19.3 not considered by the Appellate Body in DS379. Could the United States please identify which of the arguments that the United States has put forward in its submission are new?

46. In DS379, Article 19.4 of the SCM Agreement was the primary focus of the parties in their submissions before the Appellate Body. To the extent Article 19.3 was addressed, it was in response to the Panel's reasoning, which relied in large part on the panel report in *EC – Salmon (Norway)* to conclude that CVDs are collected "in the appropriate amounts insofar as the amount collected does not exceed the amount of the subsidy found to exist."[15] The arguments before the Appellate Body in DS379 concerning Article 19.3 primarily related to the Panel's interpretation in *EC – Salmon (Norway)* of the phrase "appropriate amounts."

47. Although the Appellate Body in DS379 did address *EC – Salmon (Norway)* in its report, its analysis went far beyond what was argued by the parties. For instance, the Appellate Body relied on Article 19.2 as context to interpret Article 19.3 despite the fact that no party in that dispute made such an argument. It did the same in relying upon Articles 10, 21.1 and 32.1 of the SCM Agreement as context although no parties raised such arguments before the panel or the Appellate Body.

48. As a result, with the exception of paragraphs 178 through 180 addressing *EC – Salmon (Norway)*, and paragraphs 183 and 188 addressing context and negotiating history for Article 19.3, the arguments put forward by the United States in its submission concerning Article 19.3 are new. The United States in this proceeding has put forward new arguments that, interpreted in accordance with the customary rules of interpretation, Article 19.3 is first and foremost a non-discrimination provision; and that this interpretation is supported by relevant context, including the structure of the SCM Agreement, as the United States argues in paragraphs 171 to 178. Nor has the United States previously had an opportunity to address rationales first introduced by the Appellate Body, and not argued by China, in its report to support its interpretation of Article 19.3.

Q32. The United States at paragraph 198 of its first written submission suggests that the Appellate Body incorrectly presumed that domestic subsidies would automatically lower export prices to some degree. Could the United States please explain why and how this argument

[15] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (Panel)*, para. 14.128.

demonstrates that the Appellate Body's interpretation of Article 19.3 is unpersuasive?

49. First, the United States notes that the Appellate Body in DS379 relied on the factual findings of the Panel, which presumed domestic subsidies are "likely" to lower export prices to some degree. Notwithstanding this "factual" finding by the Panel, the United States contends that this finding is actually a presumption resting on a faulty premise.

50. As explained in the U.S. first written submission, domestic subsidies may not result in a reduction in export price for many reasons. As noted in our opening statement, the Appellate Body identified a presumed problem, and then sought an interpretative solution to this presumed problem, which in our view is a flawed approach. The Appellate Body's interpretation places investigating authorities in an untenable position of having to adhere to an obligation to identify and avoid overlapping remedies, when the existence of overlapping remedies in each case cannot be presumed and may not be proven. As the United States has noted, Article 19.3 imposes an obligation to *levy* countervailing duties on a non-discriminatory basis and in the appropriate amounts in each case. If it cannot be presumed that overlapping remedies will occur, then there is no basis to presume that duties levied in an amount equivalent to the subsidy found to exist will not be appropriate, even under the Appellate Body's flawed approach of finding a countervailing duty not to be in an appropriate amount to the extent of any overlap.

51. Although the Panel in DS379 may have operated from a faulty premise, this Panel is not obliged to do so, and in fact has an obligation to make an objective assessment of the effect of domestic subsidies on export prices based on evidence from the sets of determinations that China is challenging. China has made no effort to demonstrate the existence of an overlapping remedy in any of those determinations or to identify evidence from any of the challenged determinations that would support the presumptive theory adopted by the Panel in DS379.

Additional advance questions sent to the parties on 2 July 2013

1 THE MEASURES, INVESTIGATIONS AND REVIEWS AT ISSUE

To the United States

Q33. With reference to Section 1(b)(1) of P.L. 112-99, does the reference to "all proceedings under subtitle A of title VII of that ACT (19 USC 1671 et seq)" cover both investigations and reviews initiated on or after 20 November 2006?

52. Yes. The reference to "all proceedings" covers both investigations and reviews initiated on or after 20 November 2006.

Q34. When did P.L. 112-99 enter into force? Please provide the precise date and explain why the date to be indicated is the date of entry into force.

53. P.L. 112-99 entered into force on March 13, 2012. As noted in the U.S. response to Question 11 from the Panel, the term "made effective" refers to when a measure becomes "operative" – that is, when it is "in force" or "come[s] into effect." Therefore, we understand the term "enter into force" to have the same meaning as when a measure is "made effective". As previously noted, P.L. 112-99 was not capable of having any force or legal effect until it was made operative.

54. It is important to note that Section 1 did not replace the underlying legal authority for Commerce to initiate the CVD investigations from 2006 – 2012. Rather, Commerce has always had this authority under Section 701(a) of the Tariff Act, and the GPX legislation made this

authority explicit. As such, regardless of when the law entered into force, Commerce has always had a legal basis for applying the U.S. CVD law to the proceedings cited in China's panel request.

Q35. With reference to Section 2(b)(1) and (2) of P.L. 112-99, what is the "date of enactment of this Act"? Is this date different from the date of entry into force? If so, please explain.

55. As noted above, the entirety of P.L. 112-99, including Section 2, entered into force on its date of enactment, which is March 13, 2012.

2 ARTICLE X OF THE GATT 1994

2.1 Article X:1

To both parties

Q36. Assuming for the sake of argument that Article X:1 applies only to "laws of general application" and noting that Article X:2 by its terms applies to "measures of general application", could the Parties address (further) whether Section 1 of P.L. 112-99 is a provision of a law of general application, having regard, inter alia, to the fact that Section 1 thereof appears to be concerned exclusively with countervailing duties that would be imposed on products imported, or sold for importation, into the United States "from a nonmarket economy country".

56. The United States does not believe that application to "a nonmarket economy country" would result in Section 1 of the *GPX* legislation not being a measure of general application. As explained in more detail in the U.S. answer to Question 24 from the Panel, Section 1 of P.L. 112-99 sets out a measure of general application with respect to those imports and associated proceedings that were not known at the time of enactment of the measure – that is, the measure is of general application "to the extent that [it] affects an unidentified number of economic operators" or imports. Section 1 by its terms also applies to specific proceedings – those "initiated under subtitle A of title VII of that Act (19 U.S.C. 1671 et seq.) on or after November 20, 2006" through the date of enactment of the legislation. Those proceedings were limited and known as of the date of enactment of the measure as were the imports subject to those proceedings. In relation to this limited and known set of imports and proceedings, it is difficult to see in what respect Section 1 is a measure "of general application", and China has provided no such explanation.

To the United States

Q37. *At paragraph 62 of its first written submission, China states that P.L. 112-99 is a law of general application. Does the United States agree that the phrase "of general application" in the first sentence of Article X:1 qualifies not just the last element (administrative rulings), but also the preceding three (laws, regulations and even judicial decisions)? *If so, could the United States please explain what is a judicial decision of general application, noting also the United States' view that judicial decisions necessarily impose legal consequences on past events (see paragraph 18 of the US oral statement)?*

57. Yes, we would agree that the first sentence of Article X:1 qualifies not just the last element (administrative rulings), but also the preceding three (laws, regulations and even judicial decisions).

58. The Appellate Body in *U.S. – Underwear* observed with respect to the term "of general application":

> While the restraint measure was addressed to particular, i.e. named, exporting Members, including Appellant Costa Rica, as contemplated by Article 6.4, ATC, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint.[16]

59. Similarly, when a judicial decision affects only individual persons or entities, such as when it resolves issues involving a contract between two persons, then it may not be a judicial decision of general application. However, when the judicial decision affects an unspecified number of parties, such as when it resolves an interpretation of domestic law, then it may be considered a judicial decision of general application. The judicial decision may then have bearing on an unknown number of proceedings, persons, or facts, rather than applying only to an identifiable or closed set.

2.2 Article X:2

To both parties

> **Q38. *In the context of discussing Article X:2 of the GATT 1994, the European Union referred, at paragraph 33 of its third-party submission, to provisions of the SCM Agreement (Article 20) and the Anti-Dumping Agreement (Article 10) envisaging the retroactive application of duties to a date prior to the imposition of provisional and/or definitive measures. Do these provisions constitute relevant context to the interpretation of Article X:2? *If so, how should they inform the Panel's analysis?***

60. The United States would agree with the European Union that these provisions provide context that Article X:2 does not reflect a principle of international law that prohibits measures from affecting events prior to publication. While Article 20 of the SCM Agreement and Article 10 of the AD Agreement are not directly applicable to the facts of this dispute, they support the Appellate Body's interpretation in *US – Underwear* that a complaining party must look to a provision of a covered agreement imposing a substantive obligation to determine whether that covered agreement prohibits application of a measure to events that have occurred prior to the enactment of the measure. Article X:2 neither permits nor prohibits so-called retroactivity.

2.3 Article X:3(a)

To China (Question 39)

2.4 Article X:3(b)

To both parties

> **Q40. What is the relationship between Article X:3(b) of the GATT 1994 and Article 23 of the SCM Agreement and Article 17 of the Anti-Dumping Agreement? In particular, what is the relevance of the omission, in Articles 23 and 17, of the requirement that judicial decisions be implemented by and govern the practice of administrative agencies?**

61. GATT 1994 Article X:3(b) relates to administrative action relating to customs matters while SCM Agreement Article 23 and AD Agreement Article 17 are specific to CVD and AD proceedings, respectively. As the more specific obligations in the context of trade remedies, Article 23 and Article 17 govern the review of CVD and AD determinations or reviews in the first instance.

62. While the latter provisions are the more specific obligations, we note that they do not address implementation of decisions of tribunals or procedures. Given this silence, and even though Article X:3(b) is the more general obligation, we believe that its requirements on

[16] *U.S. – Underwear (AB)*, p. 21.

implementation would be applicable to all administrative actions relating to customs matters, including AD and CVD proceedings.

63. China has made it very clear from the first Panel meeting, however, that it acknowledges that Commerce did not have an obligation to implement the non-binding *GPX V* opinion. China's claim focuses exclusively on the applicability of Article X:3(b) to action by domestic legislatures. As the United States has explained, Article X:3(b) does not define the relationship between legislatures and the judicial branch or proscribe action by the legislature to clarify (or amend) the content of domestic law.

3 ARTICLE 19.3 OF THE SCM AGREEMENT

To both parties

Q41. At paragraph 191 of its first written submission, the United States indicates that Appellate Body reports are not binding on panels. Under what circumstances, if any, would it be appropriate for a panel to depart from a prior Appellate Body finding on a question of law?

64. There is nothing in the DSU that provides that Appellate Body reports are binding on panels – there is no *stare decisis* in WTO dispute settlement. Indeed, Article 3.9 of the DSU makes it clear that an Appellate Body report is not an authoritative interpretation of the covered agreements. And it is significant that Article 3.2 of the DSU, in specifying the basis for clarifying the covered agreements, refers only to the customary rules of interpretation of public international law and makes no mention of prior panel or Appellate Body reports. Therefore, an Appellate Body report cannot be binding on panels other than for the particular parties to the particular dispute involved in the appeal that generated the Appellate Body report.[17]

65. As the Appellate Body has itself explained in *Japan – Alcoholic Beverages (AB)*:

> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX:2 of the WTO Agreement provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.[18]

66. The Appellate Body also explained that: "The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report."[19] This statement is significant in light of Article XVI:1 of the *Marrakesh Agreement Establishing the World Trade Organization*, which provides that "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947." Nothing in the covered agreements provides that this practice is not to guide

[17] See also Article 17.14 of the DSU, which makes it clear that an Appellate Body report is unconditionally accepted only by the parties to the dispute, not by the Members as whole.

[18] Page 13.

[19] *Id*.

67. Accordingly, a prior Appellate Body report is to be taken into account only to the extent it is relevant and a panel would follow the reasoning in a prior Appellate Body report only if that panel found the reasoning to be persuasive.

68. A panel is charged under Article 11 of the DSU with making its own objective assessment of the matter referred to it by the DSB. As Articles 6 and 7 of the DSU make clear, the "matter" referred to a panel consists of the measures at issue and the legal claims. Therefore any legal findings by the panel must be those resulting from the panel's objective assessment of the measures and claims. In general, then, panels are free to and necessarily will differ with prior Appellate Body findings (and, in that sense, "depart from" those findings) where the panel, in conducting its own objective assessment of the matter, does not consider those findings to be persuasive. The same would be true for prior panel findings.

69. The United States recognizes that as a practical matter a panel is unlikely to take lightly a decision to depart from prior relevant findings by a panel or the Appellate Body, and the United States believes that such findings should be considered seriously by a subsequent panel (or the Appellate Body). The recognition that panels are likely to follow prior relevant findings may be what underlies the Appellate Body's statement that "it is expected" that prior findings will be followed.[20] However, the United States notes that, in making this assertion of an "expectation", the Appellate Body cited no legal basis in the DSU or factual basis, and in fact did not indicate whose expectation it was, other than the Appellate Body's. Whatever the accuracy or source of any such expectation, it cannot diminish the role of a panel or the important responsibility entrusted to it by Members.

70. The Appellate Body has also itself recognized that at a minimum panels are free to depart from prior Appellate Body findings where there are cogent reasons.[21] And one example of a cogent reason would be where the Appellate Body findings are not persuasive or not in keeping with the covered agreements. The DSU makes this clear when it stipulates in Articles 3.2 and 19.2 that panel and Appellate Body findings, and DSB recommendations and rulings, "cannot add to or diminish the rights and obligations provided in the covered agreements." In fact, in another dispute, China and the United States have each indicated that they agree that an error of law by the Appellate Body is a cogent reason for departing from those prior Appellate Body findings.

71. The important, fundamental nature of this principle is emphasized by the fact that Members agreed to state it twice in the DSU.

72. Accordingly, where a panel makes an objective assessment of a matter and concludes that prior Appellate Body findings would not be in keeping with the covered agreements (and by definition then would add to or diminish the rights and obligations provided in the covered agreements), not only is the panel free to depart from those prior findings, the panel would be obligated to do so. Otherwise, to follow those prior Appellate Body findings would result in panel findings that are themselves proscribed under the DSU since the findings would add to or diminish the rights and obligations provided in the covered agreements.

Q42. Canada, at paragraphs 12 through 14 of its third-party submission, argues that subparagraphs 15(a)(ii) and 15(b) of China's Accession Protocol confirm the possibility of imposing concurrent countervailing duties and anti-dumping duties calculated using an NME methodology. Could the parties please comment on Canada's argument?

73. As a general proposition, the U.S. agrees with Canada's argument contained at paragraphs 12 through 14 of its third party submission. However, the U.S. does not understand China to be arguing in this dispute that an authority that imposes concurrent countervailing duties and anti-dumping duties calculated using an NME methodology is acting inconsistently with WTO rules. China acknowledges as much in paragraph 6 of its first written submission. China is arguing that

[20] *U.S. – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188.

[21] *U.S. – Continued Zeroing (AB)*, para. 362.

Article 19.3 of the SCM Agreement applies to the concurrent imposition of countervailing duties and anti-dumping duties calculated using an NME methodology and imposes an obligation to investigate the extent of any allegedly overlapping remedies – and the U.S. disagrees with China on this point.

To China (Question 43)

To the United States

Q44. [As regards the meaning of the phrase "in the appropriate amounts in each case", the United States' position appears to be that this phrase means that the non-discrimination obligation in Article 19.3 does not oblige the importing Member to impose a single antidumping duty rate on different exporters. Is that an accurate understanding of the United States' position?]

74. The United States understands that the Panel intends to refer to a single subsidy rate, rather than a single antidumping rate. With this understanding in mind, the United States offers the following response.

75. The U.S. interpretation of Article 19.3 involves two aspects. First, the in "the appropriate amounts in each case" text means that the amount of CVDs "levied" should correspond to the amount of subsidies identified for the particular producer or exporter. Second, the main clause of Article 19.3 makes clear that it is first and foremost a non-discrimination provision.

76. Article 19.3 permits Member States to impose different amounts of CVDs upon different exporters because different producers and exporters of the product in question may have received different amounts of subsidies. For example, it is common for CVD investigations to examine many different subsidy programs and for the various subsidy recipients to have received benefits under different programs. In addition, producers benefiting from the same program may have received different amounts of benefits under that program.

77. Article 19.3 also sets out that a countervailing duty shall be levied on a non-discriminatory basis on imports from all sources. The non-discrimination requirement may apply to the duties levied in several ways. For example, the duty for each entry must be determined by applying the same amortization and allocation methodology to each producer or exporter, so that, all other things being equal (for example, the time of receipt of the subsidy and the amount of production benefitting from the subsidy), receipt of the same subsidy will result in the imposition of the same amount of CVDs.[22]

78. Another example of discrimination in levying CVDs that would not be permitted would be if an authority could find subsidization for one product from a company in Country A, and the same product from another company in Country B, but decide to levy CVDs on only the company in Country A and not Country B. Or, if an authority finds subsidization for one product from several companies in the same country, authorities could levy CVDs that correspond to 100 percent of the subsidy rate for one company but give a 50 percent break to the other company, even though both companies have the same subsidy rate.[23] If an authority levied a single CVD on different exporters, even though these exporters had different subsidy rates, then that would be discriminatory as well.

[22] For example, assume that producers A and B receive an identical grant of $100 on the same day which is entirely allocated to the year of receipt. If producer A produces 50 units in that year, producer A's CVD rate will be $2/unit. If producer B produces 100 units in that year, B's CVD will be $1 per unit. This does not constitute discrimination contrary to Article 19.3 because the same allocation methodology – dividing the subsidy by the number of units produced – has been applied to both A and B.

[23] This is the scenario highlighted in our footnote 145 of the first written submission.

Q45. At paragraph 601 of its Report in DS379, the Appellate Body found that an investigating authority is under an "affirmative obligation" to establish the appropriate amount of the duty under Article 19.3, and that this obligation encompasses a requirement to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination "on positive evidence in the record".

a. Does the United States agree or disagree with the finding set forth at paragraph 601 of the Appellate Body Report? Why?

79. The United States disagrees. The simple answer is that on its face, Article 19.3 does not contain any obligations that require an administering authority to engage in an investigative function. Article 19 is entitled "imposition and collection" of CVDs, and Article 19.3 sets out an obligation relating to the countervailing duty "levied". Noting in Article 19 relates to an obligation to investigate; other provisions in the SCM Agreement govern the conduct of investigations.

80. The Appellate Body's interpretation of Article 19.3 is flawed. In paragraph 601 of its Report, the Appellate Body drew "a parallel between the obligation of an investigating authority under Article VI:3 of the GATT 1994 to determine the precise amount of the subsidy, on the one hand, and the analogous obligations that an investigating authority has under Articles 19.3 and 19.4 of the SCM Agreement, on the other hand to determine and levy countervailing duties in amounts that are appropriate in each case and do not exceed the amount of the subsidy found to exist."

81. This "analogy," however, is misplaced and fails to consider closely the relevant text of these provisions. Article VI:3 requires that CVDs imposed upon imported merchandise "not exceed the estimated bounty or subsidy *determined to have been granted*." Thus, in concise terms, this provision presupposes that the bounty or subsidy has been "determined", and in the absence of more specific provisions in the GATT 1994 may be understood to require a determination before levying of a duty. Article 19.3 does not contain any equivalent language. Article 19.4 contains similar language that a CVD may not be levied in excess of "the amount of the subsidy *found to exist.*" However, the language of Article 19.4 does not itself impose an obligation to determine the amount of the subsidy. That obligation instead can be found in Article 19.1, which provides that a Member "may impose a countervailing duty" *if* a Member, inter alia, "*makes a final determination of the existence and amount of the subsidy*."

82. Thus, there is no "parallel" between Article VI:3 of the GATT 1994 and Article 19.3 of the SCM Agreement, and the corresponding "affirmative obligation" to investigate an "appropriate amount" cannot be found in Article 19.3. Rather, the "affirmative obligation" to investigate the amount of the subsidy is set out expressly in the SCM Agreement and need not be found by analogy and inference.

b. At paragraphs 155 through 159 of its first written submission, the United States asserts that in its determinations, Commerce "fully addressed any evidence and arguments relating to allegedly overlapping remedies" that respondents presented. Is the United States arguing that Commerce fulfilled any requirement that it may have been under to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination "on positive evidence in the record"? Is it the United States' position that Article 19.3 does not require USDOC to initiate an examination of whether double remedies would arise if interested parties fail to provide sufficient evidence at their own initiative?

83. With respect to the panel's first question, the U.S. would like to first observe that China has failed to make its *prima facie* case with respect to the determinations challenged by China. While the United States argues that Commerce in fact did fully address evidence and arguments

presented regarding overlapping remedies in these determinations, China must make its own case, and it cannot rely on the United States or the panel to make its case for it.

84. The U.S. would also dispute that Article 19.3 imposes an obligation to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination "on positive evidence in the record." Article 19.3 contains no such obligation to investigate, as explained in the U.S. answer to Panel Question 45(a), our first written submission, and our opening statement.

85. However, to the extent the panel wishes to understand the approach of Commerce to any evidence and arguments, as explained in the answer to Panel Question 79(b), Commerce did take steps to identify and avoid any allegedly overlapping remedies.

86. Neither China nor the Chinese producers or exporters involved in any of these sets of determinations ever attempted to present Commerce with any evidence concerning what the Appellate Body identified as the key issue - - "whether and to what extent domestic subsidies have lowered the export price of a product."[24] This is particularly important in that most of the evidence concerning the effect of the subsidies (if any) on export prices would be in the possession of the Chinese companies that received those subsidies and set those export prices. The Appellate Body did not find that CVDs could not be applied in circumstances in which subsidy recipient presented no such evidence. Nor did the Appellate Body relieve China or the Chinese producers or exporters from the requirement to submit reasonably available information supporting their claim to adjust duties to avoid overlapping remedies where there were concurrent AD and CVD proceedings.

87. With respect to the panel's second question, the U.S. position is that, notwithstanding the Appellate Body report in DS379, Article 19.3, when interpreted properly, does not require Commerce to affirmatively undertake an examination of whether overlapping remedies would arise if interested parties fail to provide evidence to support their assertions and create a genuine question, for example, by providing evidence of receipt of subsidies and effects on export prices.

3.1 Article X - general

Q46. At footnote 89 of its first written submission, the United States indicates that "[t]he legislative record states that 'Commerce has always had the authority to apply countervailing duties to nonmarket economies such as China.'" Exhibit USA-44 contains an extract from the "Congressional Record", and it appears from Exhibit USA-44 that the statement in question was made by Mr. Levin. What is the legal status of the Congressional Record, and of the individual statements recorded therein?

88. The Congressional Record is a transcript of the debate of Congress as it considers proposed legislation. As such, it is a source of legislative history, which U.S. domestic courts use to help discern Congressional intent. Because the Record reflects a debate, individual statements may not be particularly useful in such an analysis. As such, other forms of legislative history would be considered more persuasive for the domestic court's purposes.

89. However, in the absence of other legislative history and when taken a whole, the Record may shed light into the intent of Congress as it makes the law.

90. For the *GPX* legislation, the only legislative history available is the Congressional Record. The Record demonstrates that as a whole, the representatives characterized the U.S. Federal

[24] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (AB)*, para. 599.

Circuit's decision in *GPX V* as "erroneous," "flawed," "wrong[]" or "faulty;"[25] in the words of one representative, *GPX V* was based on a "deeply flawed assessment of Congressional intent." Beyond Mr. Levin's statement, the legislation was repeatedly described as reaffirming and continuing Commerce's application of the CVD law to NME countries.[26]

Additional questions

1 THE MEASURES, INVESTIGATIONS AND REVIEWS AT ISSUE

To China (Question 47)

To the United States

Q48. With reference to paragraph 113 of China's first written submission, could the United States please explain the meaning and function of Section 2(b)(2) of P.L. 112-99?

91. Section 2(b)(2) of P.L. 112-99 requires the Department of Commerce to make the adjustment set out in Section 2(a) in any determination issued under section 129(b)(2) of the Uruguay Round Agreements Act (19 U.S.C. §3538(b)(2))("URAA") on or after 13 March 2012.

92. In turn, Section 129(b)(2) of the URAA specifies the procedure for complying with DSB recommendations and rulings that specific determinations by Commerce are not in conformity with the obligations of the United States under the AD or SCM Agreements. Accordingly, taken together, section 2(b)(2) means that the clarifications in section 2(a) of the GPX legislation apply to procedures under URAA section 129(b)(2), which as noted, are a mechanism to bring Commerce determinations into compliance with DSB recommendations and rulings.

2 ARTICLE X OF THE GATT 1994

2.1 Article X:1

To both parties

[25] *See* Congressional Record – House, March 6, 2012, H 1166 et seq (USA-44). Mr. Camp stated (at H1167) that "The legislation reaffirms that our . . . countervailing duty laws[] apply to subsidies from China and other nonmarket countries and it overturns an erroneous decision by the Federal circuit . . . ." Mr. Rohrabacher noted (at H 1168) that "[t]his bill should not have been necessary. It overturns a faulty court decision that claimed U.S. law prohibits the Department of Commerce from applying countervailing duties to nonmarket economies." Mr. Critz (at H1170) urged the House "to overturn a flawed court ruling and to ensure that the Department of Commerce can continue to fight unfair subsidies . . . ." Mr. Dingel (at H1173) characterized the U.S. Federal Circuit's decision as "flawed."

[26] *See* Congressional Record – House, March 6, 2012, H 1166 et seq (USA-44). Mr. Levin stated (at H1167) that *GPX* was based on a "deeply flawed assessment of Congressional intent . . . " that " . . . cannot stand. Commerce has always had the authority to apply countervailing duties to nonmarket economy countries such as China." Mrs. Ellmers stated (at H1169) that the legislation " . . . will ensure that the Department of Commerce can continue to apply [the CVD law] to nonmarket economies . . . ." Mr. Michaud stated (at H1170) that the legislation "will ensure that countervailing duties can continue to be applied to illegally subsidized goods from all countries, including China." Ms. Jackson Lee stated (at H1171) that the legislation "overturns the decision of the Court of Appeals for the Federal Circuit and preserves the validity of the countervailing duty proceedings against imports from China . . . ." Mr. Gene Green stated (at H1173) that the legislation ". . . would reverse the court's ruling and make clear the intent of Congress to allow CVDs to be applied to non-market economies. . . ." Mr. Turner stated (at 1173) that the legislation ". . . confirms the Department of Commerce may continue to apply CVDs against unfairly subsidized imports from nonmarket economies like China."

Q49. Article X:1 appears to indicate that for a measure to be governed by it, it must pertain to the identified subject matter: "the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use". In this regard, China at paragraph 62 of its first written submission appears to suggest that P.L. 112-99 falls within two of these categories that are separated by the word "or". Is it possible for Section 1 of P.L. 112-99 to fall at the same time within the category "rates of duty, taxes or other charges" and the category "requirements, restrictions or prohibitions on imports"? Why? Why not?

93. While there may be circumstances where a measure of general application may simultaneously fall under both categories of "rates of duty" and "requirements, restrictions or prohibitions in imports," the use of the word "or" provides an indication that the two categories may cover different types of measures. Further, on its face, a measure pertaining to the "rates" of duty does not appear to overlap with "requirements, restrictions or prohibitions" on imports, and China has failed to demonstrate such an overlap.

94. In fact, China has failed to prove that the measure falls under *either* category.

To the United States

Q50. China at footnote 64 of its first written submission refers to the GATT panel report in *EEC - Dessert Apples*. Could the United States please comment on whether, and if so how, that panel's findings under Article X:1 should inform this Panel's analysis?

95. Like all GATT 1947 panel reports, the GATT 1947 panel report in *EEC – Dessert Apples* can be taken into account to the extent it is relevant and has persuasive value. In *Japan – Alcoholic Beverages*, the Appellate Body observed of GATT 1947 panel reports:

> Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.[27]

96. The Appellate Body further explained that:

> Although GATT 1947 panel reports were adopted by decisions of the CONTRACTING PARTIES, a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.
>
> We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994.[28]

[27] *Japan – Alcoholic Beverages (AB)*, p. 14 (internal citations omitted).

[28] *Id.*, p. 13.

97. In sum, while GATT 1947 panel reports do not provide definitive interpretations of a treaty obligation, their discussion or analysis of such obligations should be taken into account where relevant in a WTO dispute.

98. Further, to clarify a factual matter, China's quotation of *EEC – Dessert Apples* at footnote 64 of its First Written Submission is not from the panel report based on a complaint by Chile, or L/6491, as cited in China's Table of Cases. The panel report in L/6491 made findings on Chile's claim that the EEC's publication of a licensing system that was enforced two weeks later was "insufficient" under Article X:1 to allow traders to become acquainted with the new rules. The GATT 1947 panel did not accept Chile's argument, stating that it "found that the EEC had observed the requirement of Article X:1 to publish the measures under examination 'promptly in such a manner as to enable governments and traders to become acquainted with them' through their publication in the Official Journal of the European Communities."[29] The panel added that it "noted that no time limit or delay between publication and entry into force was specified by this provision."[30]

99. To the extent that the GATT panel discussed the requirements of Article X:1 regarding the use of so-called "back-dated quotas," such findings were conclusory. The panel did not provide a discussion of the interpretation of the obligation, merely concluding that "it interpreted the requirements of this provision as clearly prohibiting the use of back-dated quotas, whose use by the EEC in the case of Chile had already been the subject of a finding under Article XIII."[31] Without setting out the basis for its interpretation, there is no reasoning for the panel findings, and therefore no reasoning that can be persuasive.

100. China's quotation of *EEC – Dessert Apples* at footnote 64 of its First Written Submission is from the panel's discussion of Article X:1 in the report on the complaint brought by the United States, or L/6513. Similar to the report based on the complaint by Chile, the panel in L/6513 does not provide a discussion of the interpretation of Article X:1. The panel's conclusions on Article X:1 regarding the use of so-called backdated quotas appear to be an afterthought to the panel's analysis of the substantive obligations of Article XIII:3.[32] Specifically, the panel's only comment

[29] *EEC – Dessert Apples (Chile)*, para. 12.29.

[30] *Id.*

[31] Specifically, the panel found that:

> [T]he EEC had observed the requirement of Article X:1 to publish the measures under examination "promptly in such a manner as to enable governments and traders to become acquainted with them" through their publication in the Official Journal of the European Communities.
>
> It further noted that no time limit or delay between publication and entry into force was specified by this provision. However it interpreted the requirements of this provision as clearly prohibiting the use of back-dated quotas, whose use by the EEC in the case of Chile had already been the subject of a finding under Article XIII (above).

EEC – Dessert Apples (Chile), para. 12.29.

[32] Specifically, the panel stated:

> The Panel noted that Article XIII:3(b) requires that "in the case of import restrictions involving the fixing of quotas, the contracting party 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 that Article XIII:3(c) requires that "in the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof". In the context of Article XIII's overall concern with the non-discriminatory application of quantitative restrictions, the Panel interpreted

about Article X:1 in this context was that "[i]t also interpreted the requirements of Article X:1 as likewise prohibiting back-dated quotas."[33] Again, without an interpretation of the requirements of Article X:1, there is no reasoning for the panel findings, and therefore no reasoning that can be persuasive.

101. The GATT panel's[34] approach in *EEC – Dessert Apples* in both the complaints from Chile and the United States is, however, similar to the Appellate Body's findings in *U.S. – Underwear* in one respect. These reports suggest that a Member's claim of so-called retroactivity (backdating) must be based on another provision imposing a substantive obligation rather than on the procedural obligations of Article X. In fact, the Appellate Body's citation in *U.S. – Underwear* of both *EEC – Dessert Apples* GATT 1947 panel reports was regarding Costa Rica's claims under Article XIII:3(b) of the GATT 1994.[35]

102. In this dispute, China has not alleged that the United States has breached Article XIII:3(b), and thus, its reliance on both *EEC – Dessert Apples* GATT 1947 panel reports is misplaced.

2.2 Article X:2

To both parties

Q51. With respect to US court decisions issued prior to the enactment of P.L. 112-99, please direct the Panel to the US court decisions (and relevant passages in these decisions) in the record that:

(a) ruled on, or discussed, the question of the applicability of US CVD law to China, and/or other countries designated as NMEs by the United States;

103. The following U.S. court decisions in the record have discussed the applicability of the U.S. CVD law to countries designated as non-market economies prior to the enactment of the *GPX* legislation.

104. *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (CHI-2): The sole issue before the U.S. Federal Circuit in *Georgetown Steel* was "whether the economic incentives and benefits that the nonmarket economies of the Soviet Union and the German Democratic Republic have granted in connection with the export of potash from those countries to the United States constitute a 'bounty' or 'grant' …."[36] The court concluded that:

> these provisions together as requiring that both the total quota and the shares allocated in it be publicly notified for a specified future period. The Article XIII:3(c) requirement to promptly notify other contracting parties with an interest in supplying the product would otherwise be meaningless, as would the Article XIII:3(b) provision for supplies en route to be counted against quota entitlement. The Panel therefore considered that the allocation of back-dated quotas did not conform to the requirements of Article XIII:3(b) and (c). It also interpreted the requirements of Article X:1 as likewise prohibiting back-dated quotas. It therefore found that the EEC had been in breach of these requirements since it had given public notice of the quota allocation only about two months after the quota period had begun.

EEC – Dessert Apples (United States), para. 5.23.

[33] *Id.*

[34] The panel members were the same in *EEC – Dessert Apples (Chile)* and *EEC – Dessert Apples (United States)*.

[35] *See U.S. – Underwear (AB)*, pp. 6, 8, 10.

[36] *Georgetown Steel*, 801 F.2d at 1313-1314 (CHI-2).

> We cannot say that [Commerce's] conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion.[37]

105. In other words, the court affirmed Commerce's broad discretion to determine the existence of a bounty or grant. The U.S. Federal Circuit reasoned that:

> Even if one were to label these incentives as a "subsidy" in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves. Those governments are not providing the exporters of potash to the United States with the kind of "bounty" or "grant" for which Congress in section 303 prescribed the imposition of countervailing duties.[38]

106. As explained in the U.S. First Written Submission, the holding of *Georgetown Steel* is that Commerce is not required to apply the CVD law to NMEs where that is impossible. The decision did not hold that it would always be impossible for Commerce to apply to the CVD law to every country classified as a NME country for antidumping purposes. Rather, the holding only applied to the specific NMEs ("those nonmarket economies") that were subject to the Commerce determination.

107. *Government of China v. United States*, 483 F. Supp. 2d 1274 (Ct. Int'l. Trade 2007) (USA-28): Following the initiation of the first CVD investigation against China in 2006, China and certain Chinese respondents in the investigation brought an action in the U.S. CIT to enjoin Commerce from conducting the investigation, on the grounds that Commerce had no authority to do so. The U.S. CIT refused to issue such an injunction, explaining that:

> [I]t 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. In fact, "[a]t the time of the original enactment [of the countervailing duty statute] there were no nonmarket economies; Congress therefore had no occasion to address" whether countervailing duty law would apply to NMEs.[39]

108. The court concluded that "[w]hile a later court may determine that the statute favors Plaintiffs' interpretation that countervailing duty law does not apply to NMEs, it is not clear at this point that Commerce's initiation of the countervailing duty investigation was 'patently *ultra vires.*'"[40]

109. The U.S. CIT further rejected China's argument that the U.S. Federal Circuit decision in *Georgetown Steel* stood for the proposition that Commerce could not apply U.S. CVD law to NME countries. Specifically, the court stated:

> [T]he *Georgetown Steel* court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing "broad discretion" of the agency to determine whether to apply countervailing duty law to NMEs.[41]

110. *GPX Int'l. Tire Corp. v. United States*, 587 F. Supp. 2d 1278, 1289-90 (Ct, Int'l. Trade, 2008) (USA-93) ("*GPX I*"): In this case before the U.S. CIT, one of the respondents in

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[37] *Id.*at 1318 (CHI-02).

[38] *Id.*at 1317 (CHI-02).

[39] *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).

[40] *Id.*

[41] *Id.*

Commerce's CVD investigation of certain off-the-road tires from China, GPX, alleged that the decision in *Georgetown Steel* prevented the application of CVDs to any country classified as an NME country. GPX filed a motion for a preliminary injunction against Commerce alleging that the collection of deposits of estimated CVDs on its exports was *ultra vires* and would cause it irreparable harm.

111. The U.S. CIT denied GPX's motion for a preliminary injunction, explaining:

> [*Georgetown Steel*] was more than twenty years old. It is also not clear whether the Court of appeals in interpreting the trade laws at issue in *Georgetown Steel* was deferring to a determination of Commerce based on ambiguity in the statute or whether the Court held that there was only one legally valid interpretation of the statute. There is now guidance on how to proceed in such a situation, that is [the *Brand X* Supreme Court decision]. *Brand X* states that in a case of this type of ambiguity, that is, when we are not sure what the court meant, for *stare decisis* purposes we are to read the case as deciding that the agency determination at issue did not conflict with the statute, not that a new agency reading, not before the court at this time, must be rejected. . . ."[42]

112. The U.S. CIT, however, did not address whether Commerce was statutorily prohibited from applying the U.S. CVD to NME countries, stating that "[t]he court does not resolve these grave questions in the context of this preliminary injunction proceeding …."[43]

113. *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (CIT Sept. 18, 2009) (CHI-3) ("*GPX II*"): As part of the on-going *GPX* litigation, the U.S. CIT's decision in *GPX II* stated:

> Commerce … has been granted broad discretion in determining the existence of a subsidy under the CVD law. The court, therefore, cannot say from the statutory language alone that Commerce does not have the authority to impose CVDs on products from an NME-designated country.[44]

114. As such, the court found that "Commerce is not barred by statutory language from applying the CVD law to imports from the PRC."[45]

115. *GPX V* addressed the issue throughout the U.S. Federal Circuit's opinion. *GPX V,* however, is not a final decision under U.S. law and its discussion of the state of U.S. law does not have any legal effect.

(b) ruled on, or discussed, the question of whether USDOC had any legal authority to investigate and avoid double remedies;

116. The following U.S. court decisions in the record have discussed the question of whether Commerce had legal authority to investigate and avoid double remedies.

117. *GPX II* (CHI-3), 645 F. Supp. 2d 1231 (CIT 2009).

> 1240: "[T]he court finds that *while Commerce may have the authority to apply the CVD law to products of an NME-designated country*, the CVD and NME AD statutes are unclear as to how Commerce is to account for the overlap between the statutes when imposing both CVD and AD duties on goods from an NME country."

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[42] G*PX I*, 587 F. Supp. 2d at 1289-90 (USA-93).

[43] *Id.*

[44] *GPX II* (citations omitted) (CHI-3).

[45] *Id.* at 2-3 (CHI-3).

> 1245-46: Commerce must determine how best to harmonize these two [CVD and NME AD] statutes and account for the fact that the statute provides no direction as to how to calculate both NME ADs and CVDs at the same time. That is, Commerce must meaningfully address this issue, fill in these gaps, and have some procedures for addressing GPX's legitimate concerns as to NME ADs if it chooses to impose CVDs on the products of NME-designated countries, despite how administratively difficult such an endeavor may be.

118. *GPX III* (CHI-4), 715 F. Supp. 2d 1337 (CIT 2010).

> 1345-46: In its remand redetermination, Commerce identified what it believed to be the only three procedural options remaining after GPX. See Remand Results at 8. There is no indication in the language used that this list was intended to be anything other than exhaustive. The court, therefore, accepts this list as a tacit admission that, at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring. In accordance with the court's remand instructions, the only option remaining for Commerce is not to apply CVD law to Starbright's NME goods. Accordingly, the court remands this matter to Commerce with instructions to forego the imposition of CVD law on Starbright's merchandise at issue.

119. GPX *VI* (CHI-7), 678 F.3d 1308 (Fed. Cir. 2012).

> 1311: "Congress enacted the double-counting provision … requiring the Department of Commerce to make an adjustment when there is evidence of a double remedy."

> **(c) were, prior to the enactment of P.L. 112-99, the governing and controlling decision(s) regarding (a) and/or (b) above.**

120. The United States understands the phrase "governing and controlling" to mean those decisions that have the ability to direct or determine the decisions of subsequent lower court proceedings on the same issue of law. As the only final appellate court decision in this group, *Georgetown Steel* is, before and after the enactment of the *GPX* legislation, a governing and controlling decision (with the holding described above) on the U.S. CIT.

121. The remaining three U.S. CIT cases are not governing and controlling decisions. The U.S. CIT decision in *Government of China v. United States* did not move beyond the court's denial of China's motion for a preliminary injunction. The *GPX I* and *GPX II* decisions are part of the continuing *GPX* litigation currently pending in U.S. domestic courts.

122. Finally, as noted elsewhere, *GPX V* has never had governing or controlling authority in the United States.

> **Q52. Does the Panel need to resolve the question of whether Section 1 of P.L. 112-99 changed the law, as contended by China, or merely clarified the law as it had always been, as contended by the United States? Does the consistency of Section 1 of P.L. 112-99 with Article X turn on this question of fact?**

123. No. As the United States has explained in its First Written Submission, the Panel need not resolve whether or not Section 1 of the *GPX* legislation changed the content of the CVD law (although, as the United States has explained, it did not in fact change the law.) The terms of reference of the Panel in this dispute, in pertinent part, are to consider the U.S. measures in light of the obligations of Article X the GATT 1994. The application of those provisions does not require the Panel to make a determination about whether or not the GPX legislation changed U.S. law. The United States will address below each of the three GATT 1994 provisions at issue.

124. Article X:1 requires that certain measures of general application "shall be published promptly in such a manner as to enable governments and traders to become acquainted with them." It is not necessary to decide whether Section 1 of P.L. 112-99 changed the law to reject China's claim.

Even if for purposes of argument one were to consider this provision of P.L. 112-99 a change in the law, first, China has not demonstrated that Section 1 of P.L. 112-99 is a measure of general application. And second, the GPX legislation was published promptly (the same day as it was enacted) in the United States Statutes at Large, which is readily available to China, Chinese traders and other members of the public.

125. Article X:2 requires that certain measures of general application that "effect[ ] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[e] a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor," cannot be "enforced" before it is officially published. Again, it is not necessary to decide whether Section 1 of P.L. 112-99 changed the law to reject China's claim. Even if for purposes of argument one were to consider this provision of P.L. 112-99 a change in the law, first, China has not demonstrated that Section 1 of P.L. 112-99 is a measure of general application. Second, Section 1 was not enforced until it was officially published. Article X:2 does not address how or to what facts a measure is applied after its official publication. That is, a Member must look to an article imposing a substantive obligation to support a claim regarding whether a measure may apply to facts that have occurred prior to the official publication of the measure.[46] Third, there would be no new or more burdensome requirement or restriction on imports because, for proceedings initiated prior to enactment of the legislation, imports had already been subjected to the CVD law pursuant to Commerce's understanding of that law.

126. Article X:3(b) requires Members to institute and maintain judicial tribunals or procedures that are "independent" of the administering authority and the decisions of which "shall be implemented by, and shall govern the practice of, such agencies". Again, it is not necessary to decide whether Section 1 of P.L. 112-99 changed the law to reject China's claim. Even if for purposes of argument one were to consider this provision of P.L. 112-99 a change in the law,, first, Article X:3(b) could not be breached by enactment of Section 1 because this would not demonstrate that the United States had failed to institute tribunals satisfying the criteria of Article X:3(b). Second, Section 1 is not covered by Article X:3(b); even on China's reading, the breach would be the administering agency's failure to implement or be governed by the judicial decision. Third, Article X:3(b) simply does not speak to and thus, does not prohibit a domestic legislature from enacting a change in the law.

127. Further, the Panel need not resolve this issue because China has not proved that the *GPX* legislation changed or otherwise affected the proceedings at issue in this dispute. The significance of the *GPX* legislation was to settle an area of U.S. domestic law that may have potentially been unsettled by the non-binding *GPX V* opinion. The U.S. Congress acted to make clear that, under U.S. law, Commerce is not prohibited from applying the U.S. CVD law to NME countries and that the *status quo* should be maintained for those proceedings that were conducted pursuant to Commerce's existing approach. China's arguments regarding changes made by the *GPX* legislation in its opening statement of the first substantive meeting of the Panel, such as the name of the law, are irrelevant to the issue before this panel.[47]

Q53. Did the CAFC in GPX VI or the CIT in GPX VII, or a US court in any other case, rule definitively and expressly on the question of whether Section 1 of P.L. 112-99 was a change to the pre-existing US law, as opposed to merely confirming pre-existing US law? Please provide references to any relevant passages in the relevant decisions in the record.

128. No. Neither the U.S. Federal Circuit nor the U.S. CIT ruled definitively regarding whether Section 1 of the *GPX* legislation was a clarification or change of pre-existing U.S. law.

129. *GPX VI* (CHI-7): In *GPX VI*, the U.S. Federal Circuit instructed the U.S. CIT to determine if the *GPX* legislation was inconsistent with the U.S. Constitution. The U.S. Federal Circuit did not

[46] *See e.g., U.S. – Underwear.*

[47] Oral Statement of China at the First Substantive Hearing of the Panel, pp. 3-4.

make any express findings with regard to whether Section 1 of the GPX legislation was a change or clarification of pre-existing U.S. law. Rather, it found that the only clear change to pre-existing law was Section 2 of the *GPX* legislation. Specifically, the court held that "Congress clearly did not view this statutory change [Section 2 of the *GPX* legislation] as reflecting a clarification of existing law, but rather as a change in the law."[48]

130. By expressly contrasting the "change" that Section 2 of the *GPX* legislation made to the statute with the more limited purpose of Section 1 of the *GPX* legislation to address the court's earlier decision in *GPX V*, the U.S. Federal Circuit provided indication that it did not view Section 1 as a change to the legal regime.

131. *GPX VII* (CHI-8): The U.S. CIT did not rule on whether Section 1 of the *GPX* legislation was a change or clarification of pre-existing U.S. law. The U.S. CIT assumed *arguendo* that there was a change to U.S. law in order to "enable[ ] the court to directly address the issues it concludes were remanded to it by its court of appeals. Failure of Plaintiffs on such issues would render the question of a retroactive change versus mere clarification in the law irrelevant."[49]

132. In its entirety, the relevant passage is:

> Thus, only the basic question remains as to whether Section 1, which because of its clear retrospective effective date, is a change in prior law or a clarification of it. As indicated, this is simply not clearly decided by the CAFC and the best approach for reason of judicial economy, and to make sure that the court obeys the direction of the CAFC to consider constitutional issues, is to view Section 1 of the New Law as a retrospective change in the law, and not a clarification. That is, the court will assume that at the time of importation, the law was as stated in GPX V, i.e., CVD remedies were not permitted.
>
> In sum, given the difficulties in concluding that Section 1 and the implied retrospective effects of Section 2 are together a simple clarification of prior law, the court will proceed to analyze the constitutionality of the New Law assuming, at least arguendo, that the New Law effected a retroactive change in the law. This enables the court to directly address the issues it concludes were remanded to it by its court of appeals. Failure of Plaintiffs on such issues would render the question of a retroactive change versus mere clarification in the law irrelevant. [50]

133. The U.S. CIT found based on its *arguendo* assumption that the *GPX* legislation was constitutional.[51]

134. *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States* (USA-46): In this 2013 U.S. CIT decision, the court noted that *GPX VII* "did not rule on whether the new law retroactively changed CVD law, but found that the new law was nonetheless constitutional even assuming that it did make a retroactive change."[52]

135. The U.S. CIT did not rule on whether Section 1 of the *GPX* legislation was a change or clarification of pre-existing U.S. law. Specifically, the court held that "even if the *GPX Legislation* is a retroactive change as Plaintiffs contend, the court need not decide this issue because, for the

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[48] *GPX VI*, pp. 5-6 (CHI-7).

[49] *GPX VII*, 893 F. Supp. 2d 1296, 1309 (CIT 2013) (CHI-8).

[50] *Id*.

[51] *Id.* at 1318.

[52] *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 900 F. Supp. 2d 1362, 1369 (CIT 2013) (USA-46).

reasons articulated below, Plaintiffs fail to]demonstrate that section 1 [of the *GPX* legislation] is unconstitutional."[53]

Q54. Article X:2 applies to measures of general application effecting an "advance" in a rate of duty, or imposing a "new" or "more" burdensome requirement, restriction or prohibition on imports. For the purpose of determining whether Section 1 of P.L. 112-99 effects an "advance" or imposes a "new" or "more" burdensome requirement, what should P.L. 112-99 be compared with? Is it the practice or requirements that had been followed prior to its enactment, regardless of whether that practice was legally permissible under US law? Or is it the practice or requirements that should have been followed prior to its enactment, under US law as correctly interpreted and applied?

136. The terms "advance,"[54] "new"[55] and "more"[56] are used to compare one thing to another. In order to compare the relevant measure of general application under Article X:2, one must first determine the existing approach prior to the measure's enactment. Commerce's approach previous to P.L. 112-99 has been to apply the U.S. CVD law to China. This approach did not change following the enactment of the legislation. In other words, there was no "advance" in a rate of duty, nor was there a "new" or "more burdensome" requirement, restriction or prohibition on imports because of the *GPX* legislation.

137. Further, it should be noted that Article X:2 of the GATT 1994 does not address the issue of whether Commerce's approach was legally permissible under U.S. law. Indeed, Article X:2, as part of a multilateral trade agreement, is concerned with the perspective of the impact on trade – have the conditions of trade changed in the manner specified. This is not a question of the status of any particular trade measure under domestic law. Indeed, it would be surprising if China's general position were that Article X:2 is to be viewed from the perspective of domestic law. Such a position would mean, for example, that if domestic law actually required a particular rate of duty but a lower rate was mistakenly being applied, then increasing the rate to the domestically required amount would not be an "advance" in a rate of duty and would not be subject to the requirements of Article X:2. Such an approach would not make sense. It is the actual impact on trade that is relevant, not potentially arcane issues concerning the status under domestic law.

138. Accordingly, what was legally permissible under U.S. law, or the issue of *ultra vires* actions, is a matter of determination for the domestic courts. China must prove its WTO claims based on the requirements of Article X:2 of the GATT 1994, not U.S. law.

139. Finally, the U.S. Federal Circuit's opinion in *GPX V* cannot be considered the "correct" or final interpretation of U.S. law. At the time of the enactment of the *GPX* legislation, the parties had not yet exhausted their rights to appeal. The United States had filed a petition for a rehearing *en banc*, and had not yet exercised its right to appeal the opinion to the U.S. Supreme Court. Prior to the exhaustion of these rights and the issuance of a mandate, an opinion of the U.S. Federal Circuit is not a legally significant or binding interpretation of U.S. law and should not be treated as such.

Q55. With reference to Articles 2(i) and 3(g) of the Agreement on Rules of Origin, which is part of the wider context of Article X, please answer the following questions:

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[53] *Id.* at 1370.

[54] The panel in *EC – IT Products* found the term "advance" in this context to mean an "increase" in a rate of duty. *EC – IT Products*, para. 7.1107.

[55] The Oxford English Dictionary defines "new" as "[n]ot existing before; now made or existing for the first time." *The New Shorter Oxford English Dictionary* at 1912 (1993) (USA-52).

[56] The term "more" as a modifier of an adjective is defined as "[i]n a greater degree; to a greater extent." *The New Shorter Oxford English Dictionary* at 1829 (1993) (USA-53).

(a) Articles 2(i) and 3(g) both contain the phrase "shall not apply such changes retroactively *as defined in, and without prejudice to, their laws or regulations*" (emphasis added). What is the meaning and intent behind the highlighted portion of that phrase?

140. As the United States has stated, the so-called principle of "retroactivity" can have many meanings based on the facts of the situation or the particular legal system of the Member. It would appear based on the plain text of the obligation that Articles 2(i) and 3(g) of the Agreement on Rules of Origin recognize such differences in the definition of "retroactivity" based on the laws and regulations of the individual Member.[57]

(b) Do Articles 2(i) and 3(g) shed light on, and permit inferences as to, whether Article X:2 prohibits the application of covered measures to events that occurred prior to the date of publication of that measure? If so, why? If not, why not, and – under this hypothesis – why did Members prohibit the retroactive application of relevant changes in the Agreement on Rules of Origin, but not in the situations contemplated in Article X:2?

141. These articles support the conclusion reached by the Appellate Body in *US – Underwear* that Article X:2 neither permits nor prohibits the application of covered measures to events that occurred prior to the date of publication. Rather, a complaining party must look to an obligation imposing a substantive requirement to resolve such an issue.

142. In other words, when actions are prohibited by a WTO agreement, the text of the obligation clearly states the prohibition. Thus, the text of Articles 2(i) and 3(g) explicitly state that changes to a Member's rules of origin or new rules of origin cannot be applied retroactively, as the term is defined by the Member's laws and regulations. Article X:2 does not contain any such prohibition. As such, China's interpretation of Article X:2 must fail.

(c) Does Article X:2 apply to changes to rules of origin of the kind contemplated in Articles 2(i) and 3(g)?

143. Article X:2 of the GATT 1994 is applicable to the particular types of measures specified therein. It is not easy to see how a change in a rule of origin would be a "measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor." Were a change in a rule of origin to be properly characterized as one of these types of measures, however, any condition regarding retroactive application would flow from Article 2(i) or 3(g) of the *Agreement on Rules of Origin* rather than from Article X:2 of the GATT 1994.

Q56. Article X:2 contains the phrase "under an established and uniform practice". Could the parties please address this phrase further, including by answering the following questions:

(a) What is the meaning and intent behind this phrase? What does it add that would or might not be clear otherwise?

144. The plain text of the phrase "under an established and uniform practice" indicates that prior to the increase in a rate of duty there must have been an existing and uniform practice for the rate

[57] The United States would also note that under the customary rules of interpretation, the only relevant "object and purpose" is of the treaty itself, and those customary rules of interpretation do not look to the "intent" of an individual provision or phrase.

of duty or other charge on imports. Thus, there must have been a tariff rate lower than that effected by the measure of general application already in place that was the established and uniform practice of the Member.

145. The addition of this phrase makes clear that not every advance in a rate of duty falls within the ambit of Article X:2. For example, when the product has not uniformly been subject to a particular rate by a Member, notification of an advance is not required by Article X:2. When the product has been subjected to *ad hoc* levels of duty such that an established practice has not developed, again, notification of an advance is not required by Article X:2. Thus, it is only where a measure of general application advances a rate of duty under such an established or uniform practice that the Member must publish the measure before enforcing it.

146. As the United States explained in its First Written Submission, China has failed to prove how the *GPX* legislation falls within this category. A statute concerning the framework for applying countervailing duties does not "effect" any particular "rate" of a CVD duty, let alone under an established or uniform practice, unlike a customs tariff schedule, which sets out rates of duty. Rather, 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.

(b) What is the "practice" at issue? Is it a practice of applying duties or charges at a certain rate?

147. The "practice" referenced in Article X:2 would appear to be the practice of applying particular duties or other charges on particular imports. China has failed to explain the "practice" at issue in this dispute. The only existing "established and uniform practice" in the United States since at least 2006 has been to apply the U.S. CVD law to China, but this is not a particular duty or other charge on any particular import. 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. Thus, China has not provided any basis for a finding that there existed a duty rate under an established and uniform practice which involved the non-application of the U.S. CVD law to China.

Q57. Do all measures that fall within the scope of Article X:2 (e.g. measures of general application that effect an advance in a rate of duty or other charge on imports under an established and uniform practice) also fall within the scope of Article X:1? If so, why? If not, why not?

148. As a general matter, without considering all possible factual scenarios, it is difficult to speculate on whether two different provisions, with different scopes, might apply to various sets of facts. For example, by their terms, Article X:2 covers a "measure" of general application while Article X:1 covers "[l]aws, regulations, judicial decisions and administrative measures" of general application, which may have a different scope. That said, it does appear that the *types* of measures covered by Article X:2 would also fall within the scope of Article X:1.

149. Article X:1 applies generally to certain measures that "pertain[] to … rates of duty, taxes or other charges." Article X:2 applies to a narrower subset of measures relating to rates of duties since, in order to fall under Article X:2, the measure of general application must (1) effect an advance in rates of duty or other charges and (2) be taken under an established and uniform practice.

Q58. Section 1(b)(1) states that Section 701(f) of the Tariff Act "applies to" CVD proceedings initiated on or after 20 November 2006. Should Section 1(b)(1) be construed to mean that Section 701(f) produced the envisaged legal effect of "applying to" the identified proceedings "automatically" upon entry into force of P.L. 112-99? Or was/is there a need for an implementing act or other act of application by USDOC or US courts before Section 701(f) applied/applies to the identified proceedings?

150. Yes, Section 1(b)(1) means that Section 701(f) applied automatically to identified proceedings, although we note that Commerce always had the authority to apply the U.S. CVD law to NME countries pursuant to Section 701(a) of the U.S. Tariff Act of 1930. The *GPX* legislation maintained Commerce's pre-existing approach based on Section 701(a).

151. As a result, there is no need for an implementing or other act. Once the law was enacted, Commerce, as the administering authority of U.S. AD and CVD laws, was required to apply the law as clarified by Congress. The *GPX* legislation required no additional implementing acts before it was applied.

To China (Questions 59-62)

To the United States

Q63. China at paragraph 69 of its first written submission suggests that Article X:2 requires publication of a relevant measure of general application prior to its application. Please address whether Article X:2 would also permit application of a measure at the same time as it is published.

152. Article X:2 states that "[n]o measure of general application … shall be enforced *before* such measure has been officially published." By the use of the term "before," as a matter of logic, the obligation would permit the enforcement of a measure upon publication.

153. In this dispute, the United States officially published the GPX legislation on its date of adoption, March 13, 2012. Commerce took no action before that date to enforce the measure.

Q64. At the first substantive meeting, the United States suggested that Section 1 of P.L. 112-99 is a "clarifying law" rather than an interpreting or amending law.

(a) Could the United States indicate where this is indicated in P.L. 112-99 or which other evidence on the record supports that view?

154. Section 1 of P.L. 112-99 is a clarification of U.S. law. The structure and substance of Section 1, as well as (a) Commerce's consistent, pre-existing practice of applying the U.S. CVD law to China (as set out in the U.S. First Written Submission), (b) the text of pre-existing U.S. law, (c) prior court decisions, and (d) the legislative history make clear that Congress was clarifying that Commerce's longstanding interpretation of Section 701(a) of the U.S. Tariff Act is correct.

155. As the United States explained in its First Written Submission, Section 1 exactly tracks Commerce's longstanding interpretation – that application of the U.S. CVD law to subsidized imports from any country is mandatory, unless Commerce finds such application to be impossible as a factual matter.

156. Commerce's pre-existing interpretation is based on the clear language of Section 701(a) of the U.S. Tariff Act, which states that "if the administering authority determines that the government of a country … is providing, directly or indirectly, a countervailable subsidy" and an industry is materially injured by reason of imports of that merchandise, "there shall be imposed upon such merchandise a countervailing duty."

157. Further, the U.S. Federal Circuit's decision in *Georgetown Steel* did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the court deferred to Commerce's finding that it was impossible to apply CVD law to various NME countries of the Soviet bloc because it was impossible to identify the transfer of "a bounty or grant" from the government to a producer or exporter.

158. Finally, the many floor statements concerning the *GPX* legislation, as published in the *Congressional Record*, repeatedly and uniformly describe the *GPX* legislation as reaffirming and continuing Commerce's application of the U.S. CVD law to NME countries. The statement by Representative Levin referenced in the U.S. response to Question 46 from the Panel provides one such example of how individual legislators viewed the *GPX* legislation as a necessary clarification of the law.

(b) What about Section 2 of P.L. 112-99? Is it a clarifying law, interpreting or an amending law? What supports your view?

159. Section 2 of the *GPX* Legislation amends the U.S. antidumping law (section 777A of the Tariff Act of 1930, as amended (19 U.S.C. §1677f-1)) by requiring Commerce to take into account the potential for the simultaneous imposition of antidumping and countervailing duties to result in overlapping remedies and to reduce the antidumping duty to the extent of overlap. Prior to the amendment, the statute did not provide a specific mechanism to account for any potential overlap of countervailing and antidumping duties, and it did not contain an explicit requirement or preclusion to account for the potential overlap of antidumping and countervailing duties.

160. *GPX VI* supports this view. On remanding the case to the CIT, the CAFC held: "the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of countervailing duties on goods imported by NME countries to account for double counting." *GPX VI* (CHI-7), 678 F.3d at 1311. It did not extend this reasoning to section 1 of the *GPX* Legislation, which is consistent with the fact that section 1 was a clarification of the law.

Q65. If a law requires an administrative agency to apply it to events or circumstances that occurred prior to the date of publication of the law, but no enforcement action is taken by the agency until after the date of publication, would the Member concerned be in breach of its obligations under Article X:2? If not, how would the United States characterize the requirement that specified the relevant events or circumstances by date to distinguish it conceptually from the date of enforcement at issue in Article X:2?

161. Article X:2 neither prohibits nor permits measures of general application from applying to events that occurred prior to the date of publication.[58] Thus, regardless of the substantive content of the measure, including its application date, the determinative issue for compliance with Article X:2 is the date from which the measure was enforced. If no enforcement action is taken prior to the date of publication of the covered measure, then the Member is not in breach of its obligations under Article X:2.

162. As the United States explained in its response to Question 11 from the Panel, the term "enforce" is defined as to "compel the observance of (a law, rule, practice, etc.)."[59] To the extent that the concept of "enforcement" even applies to the clarification confirming pre-existing practice contained in Section 1 of the GPX legislation, the United States did not compel nor could it compel the observance of the *GPX* legislation until after its official publication.

163. Conceptually, the issue of whether a covered measure may apply to events that occurred prior to the date of publication is a question regarding the substantive content of a measure. The Appellate Body observed in *EC – Poultry Imports* that Article X does not relate to the "substantive

[58] *See U.S. – Underwear (AB)*, p. 21.

[59] *The New Shorter Oxford English Dictionary* (1993) at p. 820 (USA-50).

content" of covered measures.[60] As such, a complaining party must look to a treaty article that establishes a substantive obligation.

164. The issue of whether a measure is enforced before it has been officially published is a question regarding the procedural aspect of a measure. Such a question would be answered by Article X:2 of the GATT 1994. There have in fact been a number of disputes based on Article X:2 in which the complaining party has claimed that a Member was enforcing a measure that had not yet been officially published.[61]

165. Further, it should be noted that based on the facts of this dispute, and as fully explained by the United States in its First Written Submission and the First Substantive Panel Meeting, the *GPX* legislation is not covered by Article X:2.

2.3 Article X:3(b)

To both parties

Q66. Was the appeal to the Federal Circuit Court in the matter *GPX V* an appeal lodged by an importer, as referred to in Article X:3(b)? Does it matter? Why? Why not?

166. No, the appeal to the U.S. Federal Circuit in *GPX V* was not brought by an importer. First, GPX International Tire Corporation, an importer of off-the-road tires from China, appealed Commerce's AD and CVD determinations to the U.S. CIT, the court of first instance. Then, after several remands and as part of the on-going *GPX* litigation, the United States and U.S. manufacturers of the products at issue appealed the U.S. CIT's decision in *GPX IV* to the U.S. Federal Circuit.

167. However, it does not matter for purposes of Article X:3(b) that the appeal was not lodged by an importer. Article X:3(b) states, in relevant part, that "decisions [of tribunals] shall be implemented by, and shall govern the practice of, [administering] agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers." The phrase "lodged by importers" modifies the time period, not who lodges the appeal. Consequently, Article X:3(b) does not specify who lodges the appeal, but rather the time limit within which it is to be lodged. And in this instance, the appeal was lodged within the time prescribed for appeals by importers. Indeed, the same time period is prescribed for everyone.

Q67. China at paragraphs 50-52 of its first oral statement submits that under Article X:3(b) the US Congress may not change applicable law retroactively and direct courts to apply this new rule of law to cases under review. In this context, do the parties agree that under international law, Article 28 of the Vienna Convention (which was referred to by the United States in its first written submission at paragraph 87) does not speak to continuing situations and that such situations may be governed by a new treaty that was not yet in force at the time the situation began to exist? If so, is an on-going domestic appellate review proceeding comparable, *mutatis mutandis*, to a continuing situation? If so, could a domestic law-maker of a Member consequently change the substantive law that is applicable to the case under appellate review, provided that Article X:3(b) does not stipulate otherwise?

[60] *EC – Poultry Imports (AB)*, para. 115.

[61] *See e.g., EC – IT Products*, para. 7.1046 (the complaining parties alleged that the EC was enforcing or applying a draft amendment prior to its publication in an official journal).

168. The United States would agree that the language of Article 28 of the Vienna Convention does not speak to continuing situations.[62] Indeed, panels and the Appellate Body have previously found that the rule in Article 28 does not prevent a covered agreement from governing situations that began to exist before the entry into force of the WTO Agreement.

169. For example, in *EC — Large Civil Aircraft*, the Appellate Body considered Article 28 in the context of interpreting Article 5 of the SCM Agreement. The Appellate Body observed that

> In practice, it is often difficult to distinguish between, on the one hand, an act or fact that was "completed" before the entry into force of the new treaty and, on the other hand, an act, fact, or situation that "continues" or has "continuing effect". In order to draw the line between these concepts, we turn to the text of Article 28 of the Vienna Convention.
>
> Article 28 refers to "acts or facts which took place", as well as to "situations which ceased to exist". The Appellate Body has previously described the word "act" within the meaning of Article 28 as "something that is 'done'". In assessing the temporal scope of a treaty provision that is directed at "acts" or "facts", the relevant question is whether the act or fact "occurred" or "took place" prior to the entry into force of the treaty. By contrast, with regard to treaty provisions that are directed at a "situation", Article 28 does not ask whether the "situation" "took place", but rather whether it "ceased to exist" prior to the entry into force of the treaty. As the Appellate Body found in *Canada – Patent Term*, the use of the word "situation" in Article 28 "suggests something that subsists and continues over time". The reference to "ceased to exist" supports the notion that a "situation" may continue to exist over a period of time, rather than simply occur at a particular instant in time, after which the "situation" may "cease{} to exist".[63]

170. The Appellate Body concluded:

> In sum, we agree with the Panel that Article 5 [of the SCM Agreement] addresses a "situation" that consists of causing, through the use of any subsidy, adverse effects to the interests of another Member. It is this "situation", which is subject to the requirements of Article 5 of the SCM Agreement, that is to be construed consistently with the non-retroactivity principle reflected in Article 28 of the Vienna Convention. The relevant question for purposes of determining the temporal scope of Article 5 is whether the causing of adverse effects has "ceased to exist" or continues as a "situation". We consequently disagree with the European Union that, by virtue of Article 28 of the Vienna Convention, no obligation arising out of Article 5 of the SCM Agreement is to be imposed on a Member in respect of subsidies granted or brought into existence prior to the entry into force of the SCM Agreement. This may mean that a subsidy granted prior to 1 January 1995 falls within the scope of Article 5 of the SCM Agreement, but this is only because of its possible nexus to the continuing situation of causing, through the use of this subsidy, adverse effects to which Article 5 applies. In reaching this conclusion, we are not saying that the causing of adverse effects, through the use of pre-1995 subsidies, can necessarily be characterized as a "continuing" situation in this case. Rather, we simply find that a challenge to pre-1995 subsidies is not precluded under the terms of the SCM Agreement.[64]

171. U.S. law directs courts to apply the law as it exists at the time a decision is rendered. In *First Gibraltar Bank v. Morales* (USA-72), a U.S. federal appellate court was asked to rule on the

[62] Article 28 of the Vienna Convention states that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

[63] *EC — Large Civil Aircraft* (AB), paras. 677-678.

[64] *Id.*

relationship between a new law that had been enacted prior to the issuance of a mandate and the court's "prior analysis" of the case. The court held that a matter of law, "we are to apply the law as it currently exists, and we must necessarily include the effects of the Amendment [the new law] in our consideration."[65] In this sense, a pending U.S. court proceeding is comparable to a continuing situation.

172. Article X:3(b) does not impose requirements on the timing of when a lawmaker may enact a piece of legislation. Thus, in situations where there has been a clarification of the domestic law, the application of such law to pending domestic court proceedings would be guided by domestic law.

Q68. Could the parties confirm what they suggested in response to Panel question No. 16 (and explain, as appropriate), which is that the *GPX V* opinion was not subject to an *en banc* rehearing but rather was reviewed in *GPX VI* by the same 3-member panel of Federal Circuit that heard the appeal in *GPX V*?

173. The United States confirms that it was the same 3-member panel of the U.S. Federal Circuit that reviewed *GPX V* in *GPX VI*. The United States filed a petition for rehearing *en banc*, but the same 3-member panel of the U.S. Federal Circuit issued *GPX VI*. Under U.S. law, such action is expressly permitted in response to a petition for rehearing *en banc* and is at the discretion of a majority of the original panel.

174. Specifically, Subject 14 of the U.S. Federal Circuit's Internal Operating Procedures states that:

> At any time before a majority of the active judges who are eligible to participate vote to grant a petition for rehearing *en banc*, a majority of the panel members may inform the *en banc* court that the panel wishes to take the petition back for action. The panel shall inform the full court of any action on the petition, and if the panel grants less than all of the relief requested, any judge may request a response to the petition for rehearing *en banc* or a poll within 10 business days of the panel's notification to the full court.[66]

Question 68 (cont'd): In this context, did *GPX VI* reverse *GPX V*?

175. In *GPX VI*, the U.S. Federal Circuit did not indicate that it had reversed its decision in *GPX V*. Rather, the court granted the petition for rehearing, reached a different conclusion than in *GPX V* by acknowledging that Commerce was not prohibited from applying the U.S. CVD law to NME countries, and remanded certain U.S. constitutional issues for consideration by the U.S. CIT.

176. The U.S. CIT subsequently upheld the constitutionality of the GPX legislation in *GPX VII*. The court remanded the proceeding to Commerce to consider several issues unrelated to Section 1 of the *GPX* legislation. Once the U.S. CIT affirms Commerce's remand redetermination, the parties can appeal the U.S. CIT's decision in *GPX VII* to the U.S. Federal Circuit.

<u>To China:</u> (Questions 69-70)

<u>To the United States</u>

Q71. The United States indicated at paragraph 3 of its oral statement that the provisions of Article X:3(b) are directed to ensuring that Members

[65] *First Gibraltar Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) (holding that "[b]ecause the mandate is still within our control, we have the power to alter or to modify our judgment.") (USA-72).

[66] *Internal Operating Procedures*, U.S. Court of Appeal for the Federal Circuit, IOP Subject 14(2)(e) (USA-101).

set up an "appropriate structure", and in its response to Panel question No. 15, the United States referred to Article X:3(b) as a "structural obligation". Please clarify and indicate whether and how any such structural obligation is relevant to China's Article X:3(b) claim that appears to be based on the phrase "their decisions shall be implemented by, and govern the practice of, such agencies…".

177. By "structural obligation," the United States means that Article X:3(b) is meant to address the overall framework of a Member's adjudicatory system for administrative action relating to customs matters. Specifically, Article X:3(b) requires Members to establish tribunals and procedures that are independent from administering agencies and that issue decisions that shall be implemented by, and govern the practice of, the agencies.

178. The United States maintains a highly effective court system to review CVD determinations. Commerce is required to implement final decisions issued under this system and its practice is governed by those decisions. Indeed, U.S. courts certainly consider that Commerce is required to implement, and be governed by, their decisions. China does not claim otherwise. Therefore, it is not credible to claim that the United States has breached Article X:3(b) by failing to institute judicial tribunals that meet the criteria in that provision. China instead is seeking to read into Article X:3(b) an obligation that is not there.

179. First, China appears to be seeking to read Article X:3(b) to apply to non-binding, non-final judicial opinions. Opinions that do not yet have the force of law are not "decisions" within the meaning of Article X:3(b). Nothing in the text of Article X:3(b) requires Members to implement non-binding opinions, and under U.S. law, such implementation would be unlawful.[67]

180. Second, China has clarified that its only claim under Article X:3(b) is that the enactment of legislation during the pendency of a judicial proceeding on administrative action relating to customs matters breaches Article X:3(b). Article X:3(b) does not impose restrictions or prohibitions on the ability of a legislative body to enact laws. As such, China's claim is baseless and its attempted reading of Article X:3(b) is not consistent with the agreement text.

Q72. Had the 19 December 2011 opinion of the Federal Circuit in *GPX V* become final as issued, what legal consequences would have followed under US law? Does the United States agree with China's statement, at paragraph 41 of its first written submission, that the USDOC would have been "required to revoke all existing countervailing duty orders on Chinese products and terminate any pending countervailing duty investigations of Chinese products that had yet to result in a final determination"?

181. No, the United States does not agree with China's statement. If *GPX V* had become final (*i.e.*, a mandate was issued), the United States and U.S. manufacturers would have had 90 days after the date that the *GPX V* opinion was issued (December 19, 2011) to file a petition asking the U.S. Supreme Court to review the decision.

182. If the U.S. Supreme Court had granted the petition and reversed the decision, *GPX V* would have been nullified. If the U.S. Supreme Court had not taken up the appeal, or had taken up the appeal and affirmed *GPX V*, Commerce would have been required to revoke the CVD order on off-the-road tires from China, which was the only determination at issue in the *GPX* litigation.

183. If *GPX V* had become final in December 2011 and the GPX legislation been subsequently enacted, the *GPX* legislation nevertheless would have nullified the precedential effect of the decision, so that Commerce and U.S. courts would have been required to follow the U.S. CVD law as clarified by Congress, rather than as misinterpreted by the U.S. Federal Circuit, in all on-going

[67] *See, e.g., Kusay v. the United States*, 62 F.3d 192 (7th Cir. 1995) (USA-75).

and subsequent proceedings. The *GPX* legislation would not, however, in this scenario have overturned the *GPX V* decision.

Q73. If a mandate had issued in *GPX V*, would the enactment of P.L. 112-99 have breached the United States' obligation under Article X:3(b)?

184. No. As a factual matter, as explained in our answer to Question 72, although the *GPX* legislation would have governed pending and future court proceedings under the U.S. CVD law, it would not have disturbed the judgment issued pursuant to *GPX V* had the mandate issued for the opinion.

185. As explained in Question 71, the United States has satisfied the structural obligation of Article X:3(b) to institute tribunals or procedures that issue legally binding judicial decisions that "shall be implemented by, and govern the practice of" the administering agency. Thus, pursuant to U.S. law, had the mandate issued for *GPX V*, Commerce would have implemented the decision and rescinded the CVD order on off-the-road tires from China. The enactment of the *GPX* legislation would not have disturbed this judicial process. Nothing in Article X:3(b) prevents a Member from clarifying or amending its law. Indeed, the United States would be surprised if, outside the context of this dispute, China were to endorse the position it espouses here. WTO Members reserve the right to clarify or change their laws, and Article X:3(b) does not require Member's to freeze in perpetuity their laws.

Q74. China at paragraph 101 of its first written submission suggests that if a Member could undo a reviewing court's decision by a legislative intervention that amends the law retroactively and directs the courts to apply the amended law to the administrative action under review, there would be no point in seeking judicial review. In China's view, such an outcome would be inimical to Article X:3(b). Could the United States please comment on whether such a legislative intervention would be contrary to Article X:3(b)? If not, why not?

186. A legislative intervention before a decision has become final is not contrary to Article X:3(b). Article X:3(b) establishes a structural obligation to maintain courts or tribunals independent of the agencies entrusted with administrative enforcement; it clearly contemplates that courts or tribunals will be applying the law as it exists at the relevant time. It does not dictate the relationship between the legislature and the judiciary and does not give judicial decision primacy over legislative action. Thus, China has read words into Article X:3(b) that are not there.

187. In addition, the suggestion that a legislature could never intervene if there was an issue being appealed is untenable. The *GPX* litigation is a good example of this: the *GPX* litigation has been on-going for more than six years. If the legislature were prohibited from enacting laws simply because a case is still pending, it would be paralyzed. China's argument that there would be "no point in seeking judicial review" if the legislature could intervene in non-final judicial decisions is incorrect. As a practical matter, there would be no reason for parties to assume that legislatures would routinely act during the pendency of an appeal, and that is in fact not what happens in the United States. Furthermore, as we explained in our answer to Question 72, the opinion issued in *GPX V* would have required Commerce to rescind the CVD order on off-the-road tires from China if the mandate for the opinion had been issued.

Q75. China at paragraph 20 of its first oral statement states that the Federal Circuit's decision in *GPX V* is a precedential decision of a US court, bound in the official reports, and a valid statement of US law as it existed prior to enactment of P.L. 112-99.

(a) Does the United States agree with this statement? If not, why not?

188. The United States does not agree with this statement. *GPX V* is not a precedential opinion because it has no legal effect under U.S. law. A mandate, which must be issued before an opinion

has binding legal effect, never issued and the United States never had an opportunity to exercise fully its right to appeal. The U.S. Federal Circuit itself stated that "[GPX V] was still pending on appeal when Congress enacted the new legislation, as our mandate had not yet issued … No issue is raised by the fact that our decision in *GPX [v]* had issued prior to enactment of the new legislation because this case remained pending on appeal."[68]

189. That *GPX V* is listed on the U.S. Federal Circuit's website as "precedential" has no bearing on the question of whether *GPX V* is an opinion with legal effect, because, as the United States explained at the First Substantive Panel Meeting and in Exhibit USA-98, the distinction between precedential and non-precedential simply divides decisions into two groups: "precedential" opinions that may have precedential effect and "non-precedential" opinions that can never have any precedential effect.

190. The U.S. Federal Circuit in its Internal Operating Procedures explained the distinction as such:

> 1. The workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.
>
> 2. The purpose of a precedential disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently informed of the court's reasoning in a nonprecedential opinion.
>
> 3. Disposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion [below]. Nonprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public.[69]

191. "Precedential" opinions chosen by the U.S. Federal Circuit are often reversed, usually by the U.S. Supreme Court, and thus never have any precedential effect, even though they belong in the category of opinions that will be precedential if not disturbed. A good example of this in the trade area is the opinion of the Federal Circuit in *Eurodif SA v. United States* (USA-15), which was reversed by the U.S. Supreme Court and so has no precedential effect, but which, nevertheless, is correctly listed on the U.S. Federal Circuit's website as "precedential."

192. "Nonprecedential" opinions are reserved for purely procedural orders or judgments issued without an opinion. The publishing company West Publishing, a division of Thomson Reuters and a private company, publishes opinions and decisions issued by the thirteen circuits of the U.S. Court of Appeals. Those opinions which are listed as "precedential" by the U.S. Federal Circuit are published in the Federal Reporter. "Unpublished" or "nonprecedential" opinions may be found in the Federal Appendix, which is also published by West Publishing.

(b) The United States appears to contend that the *GPX V* opinion is not binding precedent, has no legal status under US law, and did/does not produce any legal effect. If so, could the United States explain why it was nonetheless necessary or appropriate to publish it in the official reports? (In some countries, only decisions

[68] *GPX VI*, 678 F.3d at 1312 (CHI-7).

[69] *Internal Operating Procedures*, U.S. Court of Appeal for the Federal Circuit, IOP Subject 10 (emphasis in original) (USA-102).

that have, or are intended to have, strict or soft precedential effect are published.)

193. That is correct: *GPX V* is not binding and has no legal status or effect under U.S. law. The Federal Reporter, the publication in which *GPX V* appears, is not an "official" report. West Publishing, a division of Thomson Reuters, is a private company not affiliated with the United States Government. Thus, the U.S. Federal Circuit does not compel or dictate the publication of any of its opinions in the Federal Reporter. The West Publishing reports contain many decisions that have been reversed and or have otherwise been deprived of precedential effect.

Q76. The parties have used terms like "decision" and "opinion" when referring to the holdings of US courts such as those in *Georgetown*, *GPX V* and *VI*. For purposes of US law, are both terms correct or only one, or should some other term be used instead?

194. The U.S. CIT, the U.S. Federal Circuit and the U.S. Supreme Court issue "opinions", on the one hand, and "orders" or "judgments", on the other. The opinions set forth the reasoning and the principles of law applied to the facts of the case, and the orders or judgments direct the outcome consistent with the opinion (*e.g.*, in its order, the U.S. Federal Circuit may order that a case is remanded to the U.S. CIT).

195. Thus, while the terms "opinion" and "decision" are often used interchangeably, a "decision"[70] more properly refers to the court's judgment or order, while the "opinion"[71] refers to the reasons for the court's judgement or order. However, whether the term "opinion" or "decision" is used, the important factor to consider for purposes of Article X:3(b) is whether the opinion or decision has legal effect.

Q77. With reference to the CBO letter referred to by China at footnote 89 of its first written submission, the United States indicated that it could provide statistical information about the success rate of *en banc* rehearings. If this information can be obtained with limited effort, it would be helpful if the United States could provide such information to the Panel.

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[70] Ballentine's Law Dictionary defines decision as "the report of a conclusion reached, especially the conclusion of a court in the adjudication of a case or the conclusion reached in an arbitration." *Ballentine's Law Dictionary* (2010) ("decision") (USA-84). Black's Law Dictionary defines the term as:

> [A] determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term has no fixed, legal meaning… 'Decision' is not necessarily synonymous with 'opinion'… A decision of a court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge. But the two words are sometimes used interchangeably."

Black's Law Dictionary (1991) ("decision") (USA-103).

[71] Ballentine's Law Dictionary defines "opinion of court" as "a statement given by the court for its decision, usually presented in writing and published in a court report; an opinion accompanying a decision is an opinion of the court only when it has been approved by the court making the decision." *Ballentine's Law Dictionary* (2010) ("opinion") (USA-104). Further, "the opinion of the court represents merely the reasons for its judgment, while the decision of the court is the adjudication" and "it is the 'decision' rather than the 'opinion' which the subject of appellate review." *Id.*

Further, Black's Law Dictionary defines opinion as "the statement by a judge or court of the decision reached in regard to a cause tries or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based." *Black's Law Dictionary* (1991) ("opinion") (USA-105).

196. The United States has provided a chart obtained from http://www.patentlyo.com/files/panel_and_en_banc_petitions_for_rehearing_2001-20102.pdf.[72] This chart identifies the number of *en banc* rehearings granted from 2001-2010. There were 341 petitions for rehearing *en banc* filed and 926 combined panel/*en banc* petitions filed. The U.S. Federal Circuit granted 31 *en banc* rehearings, or 2.45 percent. The rate of rehearings granted has no bearing on the question of whether the decision of the court is final and conclusive. Court decisions are not final until the mandate has issued and the rights to appeal have been exhausted.

IV. ARTICLE 19.3 OF THE SCM AGREEMENT

To both parties

Q78. In DS379, the panel found that the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once (Panel Report, paras. 14.67-14.75, Appellate Body Report, paras. 541-544). May the Panel rely on this factual finding for the purpose of assessing China's "double remedies" claims in the present dispute?

197. As noted in the U.S. answer to Panel Question 32, the Panel should not rely on the "factual" finding of the panel in DS379 because it rests on a flawed premise that domestic subsidies are "likely" to lower export prices to some degree. To the extent that the Panel relies on that finding, however, the Panel should consider that in reasoning that a subsidy may be offest "more than once," (in para. 14.67) the panel in DS379 did not mean "twice."[73] The term "more than once" includes 1.01 times, 1.1 times, 1.2 times, and so forth, with "twice" being only one of the potential possibilities.

198. The DS379 panel made this clear by stating: "*To the extent that part of the dumping margin* found to exist resulted from subsidies provided in respect of the exported good, the anti-dumping duties calculated under an NME methodology will remedy both dumping and subsidization. In this sense, it can be said that if countervailing duties are simultaneously applied to imports of the same good, the subsidy is likely to be 'offset' *more than once, i.e., once through the anti-dumping duty, and again at least partially* through the countervailing duty."[74] (emphasis added). The panel, however, erred in its logic in describing which remedy offsets the subsidy: the CVD offsets the subsidy once if applied in an amount equal to the subsidy, and the AD may result in the imposition of a remedy in relation to that subsidy but only to the extent that the subsidy increases the dumping margin through a reduction in export price.

Q79. In the context of its oral response to Panel question No. 32, the United States submitted an extract from the "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China", and an extract from the Issues and Decision Memorandum for the Final Determination in the parallel antidumping investigation (Exhibits USA-100 and USA-99).

(a) Are these "issues and decision memoranda" the final determinations?

[72] U.S. Federal Circuit Panel and *En Banc* Petitions for Rehearing (USA-106).

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

[74] *Id.*, para. 14.70.

199. Yes, the issues and decision memoranda, together with the summary published in the Federal Register, constitute Commerce's final determination.

(b) Leaving aside the question of whether the Appellate Body was correct in finding at paragraphs 601-602 of its report in DS379 that the burden is on the investigating authority to determine whether there are double remedies, please elaborate on whether Exhibits USA-99 and USA-100 demonstrate that the USDOC did or did not discharge such a burden.

200. First, the United States notes that China has failed to make its *prima facie* case with respect to the determinations challenged by China. China must make its own case, and it cannot rely on the U.S. or the Panel to make its case for it.

201. Second, by fully considering the factual evidence and arguments made by respondent parties, as illustrated by Exhibits USA-99 and USA-100, Commerce discharged any alleged burden to determine whether overlapping remedies would arise.

202. Exhibit USA-99, the Issues and Decisions Memorandum from the final antidumping determination in the Kitchen Appliance Shelving and Racks from China investigation, reflects the approach that China and the Chinese respondents followed in all of these proceedings. That is, they did not attempt to submit any evidence that the subsidies identified actually had increased the dumping margins, creating overlapping remedies to the extent of the increase.[75] Rather, the Chinese respondents urged Commerce to treat China as market economy country, forego the imposition of both remedies, or provide an offset that would eliminate one remedy entirely. In support of their position, they argued that the NME AD methodology automatically and completely offset any subsidies, because these subsidies automatically were fully passed through into export prices and had no effect on normal values calculated under the NME methodology.[76]

203. Commerce rejected both propositions for the simple reason that neither is true. Basic economics teaches that a subsidy may increase supply, which will result in a new equilibrium price. But to suggest that every subsidy automatically will be passed through 100% into the export price in every instance, regardless of any other factors (such as the market share of the subsidy recipients) is unsupportable.[77] Similarly, while normal values calculated under the NME methodology apply *values* for each factor of production (e.g., raw materials, labor, and overhead) from market-economy countries, they do not import the *quantities* of the factors valued, but use quantities of factors consumed in the NME country. China presented these same arguments to the panel and the Appellate Body in DS379, without success.[78]

204. The Chinese respondents would have been well aware that Commerce had in the past rejected these arguments, but that Commerce had also acknowledged that there was some potential for concurrent ADs and CVDs on exports from NME countries to overlap. However, the respondents never presented Commerce with basic data from their producers and some off-the-shelf estimates of the extent to which changes in costs affect prices in the relevant market. They never presented, or attempted to present, any evidence concerning the actual extent to which the remedies may have overlapped. Rather, the Chinese respondents argued only that they necessarily must obtain an automatic, 100% adjustment in every proceeding.

205. Exhibit USA-100 - the Issues and Decision memorandum from the concurrent countervailing duty investigation of Kitchen Appliance Shelving and Racks – is also instructive. In this proceeding, the Chinese respondents similarly presented broad, theoretical arguments to support

[75] *See*, *e.g.*, *Certain Kitchen Appliance Shelving and Racks (AD)*, p. 10 (USA-99).

[76] *See*, *e.g.*, *id.*, p. 4.

[77] *See*, *e.g.*, *id.*, p. 12-17.

[78] *See US – Anti-Dumping and Countervailing Duties (Panel)*, paras. 14.49-14.51, 14.67-14.75; *See US – Anti-Dumping and Countervailing Duties (AB)*, para. 599.

the argument that Commerce should refrain from applying CVDs to Chinese exports altogether or offset the two remedies so as effectively to eliminate one of them.

206. Nowhere in Exhibits USA-99 and USA-100 did Commerce state that it lacked legal authority to address the potential of overlapping remedies.

(c) In the light of the parties' exchange in response to Panel question No. 32, are the determinations in Exhibits USA-99 and USA-100 identical to or representative of China's arguments and USDOC's response on the double remedies in all of the 26 investigations and reviews at issue?

207. The determinations in Exhibits USA-99 and USA-100 can be seen as representative of China's arguments and Commerce's responses on the issue of overlapping remedies in the challenged determinations because in none of the challenged sets of determinations did China or Chinese respondents present actual evidence to demonstrate the existence of an overlapping remedy. Instead, as noted in the first written submission and the answer to question 79(b), to the extent the issue of overlapping remedies was raised, China and Chinese respondents companies relied exclusively on theoretical economic arguments that concurrent application of CVDs and NME ADs automatically resulted in a one hundred percent overlap in every instance, to which Commerce responded in full.

To China: (Questions 80 – 85)

To the United States:

Q86. China at footnote 95 of its first written submission refers to the decision by the CIT in *GPX III*. Does the United States agree that the CIT in that decision found or suggested that USDOC did not have the legal authority to investigate and avoid double remedies? If not, why not?

208. The United States does not agree that the CIT found or suggested in *GPX III* that Commerce did not have legal authority to investigate and avoid double remedies. One issue in the *GPX* litigation was whether Commerce had authority simply to offset all CVDs imposed against exports from NME countries against the dumping margins in concurrent AD proceedings. The court ruled that Commerce did not have this authority.[79] Slip Op. at p. 10. (CHI-4).

209. The court did not rule that Commerce had no other authority anywhere else in the statute to address the issue of potential overlapping remedies. The court stated that Commerce's position that it was required to apply the CVD law to NMEs, where possible, and decision not to make an offset in the circumstances of that proceeding (in which China never attempted to present any evidence of the actual effect of subsidies upon the dumping margins) as "a tacit admission that, at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring."[80] The court was not suggesting that no statutory authority exists to address the problem of potential overlapping remedies. Indeed, the court suggested that "improved methodologies" could solve the problem, even absent additional statutory support.[81] But in that particular case, the Court ruled that, as long as Commerce continued to find it "too difficult" to resolve the issue of potentially overlapping remedies, it could not apply the CVD law with respect to imports of off-the-road tires from China.[82]

[79] *GPX III* at 10 (CHI-4).

[80] *Id.* at 11.

[81] *Id.*

[82] *Id.*

Q87. Could the United States please respond to China's statement in response to Panel question No. 9 that it is making claims under Article 19.3 concerning preliminary determinations?

210. Article 19.3 provides that, when imposing a countervailing duty, "such countervailing 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 subsidized and causing injury." Footnote 51 of the SCM Agreement defines the term "levy" as "the definitive or final legal assessment or collection of a duty or tax." As explained in response to Panel Question 9(a), there can be no countervailing duty order, and thus no collection or imposition of duties, without final determinations of subsidization by Commerce and injury by the ITC. Therefore, a preliminary determination cannot be found inconsistent with Article 19.3 as a preliminary determination does not "levy" a countervailing duty.

Q88. Could the United States please elaborate on its comment in response to China's answer to Panel question No. 29 that, in the context of the United States' retrospective system, Article 19.3 may not apply in the same way to investigations and reviews?

211. Article 19.3 states that countervailing duties "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 subsidized and causing injury." "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. As noted in the answer to question 29, 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.

Q89. In response to Panel question No. 32 the United States appeared to make a distinction between whether US law prior to the enactment of Section 2 of P.L. 112-99 required USDOC to investigate and avoid double remedies and whether it authorized (or prohibited) USDOC to do so. Could the United States please clarify what was the legal position prior to Section 2? In this connection, please also address the second paragraph of page 17 of Exhibit USA-99, specifically the statement that "[t]he only point at which the statute requires the Department to reconcile these separate remedies is in the case of CVDs to offset export subsidies".

212. Because in the challenged determinations China and Chinese respondents never brought forward evidence to support their assertions as to overlapping remedies, Commerce never had a basis to conclude that overlapping remedies existed, and therefore it was not necessary for Commerce to identify the specific source of domestic legal authority that may have permitted it to account for overlapping remedies in the duties to be applied. Contrary to China's assertions, Commerce never stated that it lacked authority under U.S. law to make such an adjustment. Despite its obligation to establish a *prima facie* case, China has failed to substantiate its allegation that Commerce lacked legal authority to account for overlapping remedies, which China acknowledges is the basis for its *as-applied* claims under Article 19.3 of the SCM Agreement.

213. The statement that "[t]he only point at which the statute requires the Department to reconcile these separate remedies is in the case of CVDs to offset export subsidies" refers to Section 772(c)(1)(C) of the Tariff Act (19 U.S.C. 1677a(c)(1)(C)), which is the provision of the statute giving effect to Article VI:5 of the GATT prohibiting simultaneous application of antidumping and countervailing duties to "compensate for the same situation of dumping or export subsidization."

214. As noted by the United States at the first substantive meeting of the Panel, there are different types of statutory authority afforded to the Commerce under U.S. law. For instance, Commerce may be subject to mandatory authority, which *requires or precludes* Commerce from taking certain action, or subject to permissive authority, which *permits or gives discretion* to Commerce to take certain action. Similar to Section 2 of the *GPX* Legislation, which imposes an

affirmative obligation upon Commerce to take certain action should certain conditions be met, Section 772(c)(1)(C) is mandatory in that it requires Commerce under U.S. law to make a certain adjustment to export price to account for export subsidies in calculating antidumping duties. As such, Section 772(c)(1)(C) is the only other point where the U.S. statute *requires* the Department to reconcile separate AD and CVD remedies. As noted above, permissive authority may have been found elsewhere in the domestic statute, prior to the GPX Legislation's enactment, to reconcile potentially overlapping remedies for domestic subsidies.