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 SECOND SUBSTANTIVE MEETING

September 13, 2013

TABLE OF REPORTS

Short Form	**Full Citation**
Argentina – Import Licensing	*Argentina – Measures Affecting the Importation of Goods*, WT/DS438 / WT/DS444 / WT/DS445
EC – Bananas III (AB)	Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
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 – Poultry (AB)	Appellate Body Report, *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
Thailand – Cigarettes from the Philippines	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Stainless Steel	Panel Report, *United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179, adopted 1 February 2001
US – Zeroing (Japan) (Article 21.5)	Article 21.5 Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan (AB)*, WT/DS322/AB/RW, adopted 31 August 2009

TABLE OF EXHIBITS

Exhibit No.	Description
USA-120	*GPX Int'l Tire Corp. v. United States*, No. 2011-1107, et al., Dkt. Entry 150 (June 4, 2012)
USA-121	Richard H. Fallon, John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation Press 6th ed. 2009)
USA-122	*Native American Technical Corrections Act of 2006*, P.L. 109-221, (May 12, 2006)

1 ARTICLE X

1.1 Article X:1

Question to China

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

1. The United States believes this is the logical implication of China's extreme approach to Article X:1 and looks forward to commenting on China's reply.

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

2. The United States looks forward to commenting on China's reply, given the ample notice since at least 2006 that the United States would apply its CVD law to China.

Question to the United States

92. Please comment on footnote 1 of the China's second written submission.

3. China is incorrect when it states in footnote 1 and paragraph 3 of its Second Written Submission that the U.S. position in this dispute is contrary to the position the United States took in *EC – IT Products*[1] and the position the United States is taking in *Argentina- Import Licensing*.[2] China fails to understand both the facts and the arguments in those disputes.

4. In all cases the necessary evaluation under Article X:1 for when a measure has been "made effective" is when it is made operative or was "brought into effect in practice."[3]

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[1] 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 – IT Products*").

[2] First Written Submission of the United States, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438 / WT/DS444 / WT/DS445 ("*Argentina – Import Licensing*").

[3] *See e.g.*, U.S. First Written Submission, paras. 71-78, U.S. Second Written Submission, Part II.

5. In this dispute, the *GPX* legislation was brought into effect when it was enacted. That is, the law was brought into effect in practice at the same time as it was formally enacted and published. The United States has explained that, as a structural matter, draft laws have no legal effect under U.S. law, and as a matter of fact, the *GPX* legislation was not applied prior to its enactment.

6. Contrary to the situation in this dispute, in *EC – IT Products*, the measure was made operative prior to the formal adoption by the European Commission. That is, the EC, through the actions of certain EC member State customs authorities, began administering (or brought into effect in practice) certain tariff classification amendments after they were discussed by the EC Customs Code Committee, but prior to their formal adoption and publication by the Commission. To analogize to this dispute, the behavior of the EC would be as if the United States began to administer the *GPX* legislation or asked the courts to apply the legislation when it was approved by the U.S. House of Representatives, but not yet approved by the U.S. Senate or signed by the President. The United States, however, did not administer the law until it was formally enacted and published.

7. In *Argentina – Import Licensing*, the United States has cited to the panel's observations in *EC – IT Products* to support the argument that Argentina has failed to publish a measure of general application even after its formal adoption. Specifically, the full quote of the U.S. submission in *Argentina – Import Licensing* is that "[a]s explained by the *EC – IT Products* and *China – Raw Materials* panels, a measure may be considered to be 'made effective' on the date that it is first rendered operative or applied in practice, or formally promulgated, whichever is earlier."[4] To analogize to this dispute, the behavior of Argentina would be as if the United States enacted and began to administer the *GPX* legislation, but did not publish the text of the law. Therefore, the arguments of the United States in this dispute are entirely consistent with U.S. arguments in these two other disputes. The same cannot be said of China's arguments on the issues of the status and effect of Appellate Body reports and the issue of municipal law.

93. With reference to Section 1(b), which is entitled "effective date", please answer the following questions:

(a) Does Section 1(b) of P.L. 112-99 define the effective date of (i) Section 1 of P.L. 112-99, (ii) the new Section 701(f) of the Tariff Act of 1930 or (iii) of something else still?

8. Section 1(b) defines what facts will be affected by Section 701(f) of the Tariff Act (this is option (ii) in the question).

(b) **If the answer to sub-question (a) is (ii) or (iii), is it the US position that 13 March 2012 is also an "effective date" for purposes of US law, and more specifically that it is the effective date of Section 1 (and 2) of P.L. 112-99?**

[4] *Argentina – Import Licensing*, First Written Submission of the United States, para. 178.

9. To be clear, the term "effective date" as used in P.L. 112-99 does not mean the date on which the legislation is "made effective by any contracting party" within the meaning of GATT 1994 Article X:1.

10. First, Sections 1(b) and 2(b) of the *GPX* legislation establish the "effective dates" for the requirements of Section 701(f) and 777A(f) of the U.S. Tariff Act, respectively.

11. The statute makes clear that the term "effective date" refers to the universe of facts that will be affected by Sections 1(a) and 2(a), respectively. For example, as Section 1(b) states: "(b) Effective Date.---Subsection (f) of section 701 of the Tariff Act of 1930, as added by subsection (a) of this section, **applies to** . . ." and then specifies the facts (proceedings, actions, etc.) to which the provision applies. Thus, "effective date" as used in P.L. 112-99 does not refer to *when* the legislation is brought into effect in practice but *what* the legislation "applies to." As the United States has explained, Article X:1 does not address what facts a measure may affect, as it is a procedural, publication obligation. It does not address the substance of a measure.

12. Thus, March 13, 2012, is not an "effective date" within the meaning of the statute. Rather, March 13 is the date on which the law was approved, or enacted (as the text of the legislation itself reflects). As explained previously, March 13, 2012, is when the *GPX* legislation was made operative or brought into effect in practice, both as a legal and factual matter. This is the date the law was "made effective" under Article X:1.

> **94. Assume that Country A's unbound tariff rate on a certain product is x%, and that it has been published properly in its official gazette. On January 1, 2013, Country A's customs authorities start collecting customs duties on this product at the rate of 2x%, although the published tariff rate is x%, and in spite of protests by importers of the product in question. On June 1, 2013, Country A's Minister of Finance signs an order to raise the duty on this product to 2x% with an effective date of January 1, 2013. The order, which is within his authority under the laws of Country A, is published promptly on the same day that it was signed. Would Country A's actions be consistent with GATT Articles X:1 and X:2?**

13. No. As explained below, each of Country A's actions must be analysed, and certain of those actions would not be consistent with Articles X:1 and X:2 of the GATT 1994 if it was established that the customs authorities' actions from January 1, 2013, were a measure of general application and were not published. As the United States will explain, however, this hypothetical does not represent the situation in this dispute.

14. In this scenario, the actions of Country A's customs authorities as of January 1, 2013, would be subject to Articles X:1 and X:2 only if those actions were a measure of general application. That is, the collection of a duty at the rate of 2x% by only certain customs authorities (perhaps at certain ports or at certain times) would not appear to be a measure of general application. Rather, each collection would be a measure in itself and not of general application.

15. If it were established that the customs authorities had begun to uniformly collect 2x%, then this could serve as evidence that there is a measure of general application (such as a notice, regulation, decision, or order) which had directed the actions of the customs authorities. If such a measure could be established, and it were not published, then Country A's actions could be inconsistent with Article X:1 if the measure were not published promptly after January 1 and would be inconsistent with Article X:2 as from January 1 as the measure was enforced before publication.

16. It should be noted that this breach (on January 1, 2013) would not impact an analysis of whether the Minister of Finance's order was inconsistent with Articles X:1 and X:2. In this scenario, the Minister of Finance's order on June 1 would not be inconsistent with Article X:1 because it was published on the date it was made effective. Further, it would not be inconsistent with Article X:2 because the Minister's order was not enforced before it was published. The order also would not fall under one of the listed changes under Article X:2 in the scenario in which there was a measure of general application pursuant to which the customs authorities applied a rate of 2x%. That is, the order was not an "advance" on a rate of duty or other charge on imports under an established and uniform practice, nor was it a "new" or "more burdensome" requirement, restriction or prohibition on imports.

17. Such a distinction between the unpublished measure of general application made effective and enforced on January 1, 2013, and the Minister of Finance's order on June 1, 2013, is important because Article X is not a substantive obligation. As a procedural obligation, form matters. These provisions ensure that measures are published so that traders can make informed decisions, either to adjust their activities or alternatively to seek modification of those measures. Significantly, in the scenario set out in this question, Articles X:1 and X:2 provide an incentive for a Member to adopt a transparent measure. While traders may not like the substance of the Minister's order, they are aware of it because it is published and have the opportunity to seek its modification. In the case of the unpublished measure, on the other hand, traders are simply unaware of the basis for the duty applied to imports and what measure would need to be revised and what government entity would need to be approached to change that treatment.

18. Finally, this hypothetical is distinguishable from this dispute. The U.S. law prior the *GPX* legislation has never been that Commerce is prohibited from applying the U.S. CVD law to NME countries. Thus, using this hypothetical as an analogy, there has never been a legally binding interpretation of U.S. law that the tariff rate is x%. Rather, the law has always been 2x%.

1.2 Article X:2

Question to both parties

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

argues that the relevant baseline is the existing approach followed by the administrative agency.

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

19. Yes, the approach of the panel in *EC – IT Products* supports the U.S. interpretation. As an initial matter, it should be noted that the U.S. position is not that any approach of an administrative agency could be used as the baseline for an Article X:2 analysis. It needs to have been a measure "of general application." Further, there is no singular approach that must be followed in each and every dispute. As explained below, the determination should be based on the totality of the evidence of how the imports were treated before and after the publication of the measure at issue.

20. In this dispute, under recognized principles of U.S. law, Commerce's interpretation of the U.S. CVD law is presumed to be the governing interpretation of the U.S. Tariff Act until and unless a court finds that Commerce's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding decision.[5] This has never happened, and as such, Commerce's interpretation and approach has always been the state of law in the United States.

21. The U.S. approach is based on the explicit use of the term "on imports" in Article X:2, which is being modified by the terms "advance" and "new" or "more burdensome." Thus, the focus must be on how the challenged measure has affected the imports at issue. That is because, as explained in the U.S. response to Question 54, "[i]t is the actual impact on trade that is relevant, not potentially arcane issues concerning the status under domestic law."[6]

22. The panel in *EC – IT Products* supports the U.S. view that Article X:2 is based on how imports were treated by administrating authorities before and after the measure at issue was made effective. Specifically, the panel looked not just at the amendment and the original measure to determine the baseline for its analysis, but also the approach or practice of the customs authorities.[7]

(b) Could the parties elaborate on whether and if so how their respective interpretations are supported by, or consistent with, Article X:1 and/or X:3(b)? For instance, if the existing practice

[5] *See* Statement of Dean John Jeffries, paras. 26-27 (USA-115)*; Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (USA-14); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (USA-15); *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 (USA-42).

[6] U.S. Response to Panel Question 54, para. 137.

[7] *EC – IT Products*, para. 1108 (stating that it "seems clear to us that although the measures at issue themselves do not specify the rates of duty to be applied, the measures result in the exclusion of certain [products] from duty-free treatment. The … amendments at issue necessarily lead to certain [products] being classified in tariff lines that impose a duty rate in excess of zero while other [products] are classifiable in duty-free tariff lines.").

followed by the administrative agency provides the relevant baseline, would the requirement in Article X:1 to publish trade regulations still fulfil its function of informing traders and foreign governments of the applicable rules? Or is it that an existing approach of an administrative agency should be presumed to be consistent with published trade regulations, until and unless the approach has been challenged through recourse to domestic judicial review as envisaged in Article X:3(b)?

23. The U.S. interpretation of Article X:2 is consistent with and supported by Articles X:1 and X:3(b).

24. Regarding Article X:1, under the hypothetical provided, if the baseline was the existing "established and uniform practice" of an agency, such a practice would be published if it was part of a measure of general application.

25. However, even if an agency's established and uniform practice was not itself part of a measure of general application, other obligations of the WTO covered agreements could ensure its publication. In the CVD context, for example, Article 22 of the SCM Agreement imposes requirements on public notice and explanation of preliminary and final CVD determinations, which may set out relevant agency practice. In other words, the transparency objectives of the WTO covered agreements are not limited to Article X:1, as not all measures must be published under Article X:1.

26. Regarding Article X:3(b), such an obligation establishes a structural framework for the review and correction of administrative actions relating to customs matters, which necessarily is focused on imports. On this obligation, it should be noted that Commerce's interpretation and enforcement of the U.S. CVD law is presumed to be consistent with published trade regulations and is entitled to deference by the U.S. courts unless the courts find that it is an impermissible interpretation of the statute.

27. Under U.S. law, the U.S. Supreme Court held in the *Chevron* case, submitted as USA-14, that if an agency has interpreted a statute, "the court does not simply impose its own construction on the statute …. 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."[8] The U.S. Supreme Court recently restated in the *Eurodif* case, submitted as USA-15, that Commerce's interpretation of a statute "*governs* in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."[9]

(c) Should Article X:2 be interpreted as mandating a single baseline to be applied in all cases for the purpose of determining whether a challenged measure effects an "advance" in a rate of duty and/or

[8] *Chevron*, 467 U.S. at 843 (USA-14).

[9] *Eurodif*, 555 U.S. at 316 (citations omitted) (emphasis added) (USA-15).

imposes a "new" or "more" burdensome requirement or restriction on imports? Could a panel proceed by considering the totality of evidence, including evidence relating to the prior municipal law, and also the existing approach followed by any agencies administering that law, and potentially other available information?

28. The analysis under Article X:2 should proceed by considering the totality of the evidence and does not call for the approach argued by China of domestic law, "properly determined." Article X:2 focuses on the treatment of imports, and as such, it does not matter if the imports at issue were subject to a law, regulation or practice prior to the publication of the challenged measure. The evaluation would be on whether the challenged measure of general application effected an "advance" on a rate of duty or other charge on imports under an established and uniform practice, or imposed a "new" or "more burdensome" requirement, restriction or prohibition on imports. Such a factual determination would necessarily be determined by considering the entire record.

29. For example, in *EC – IT Products*, the panel looked at the totality of the evidence, including votes in the Customs Code Committee, a statement by the Chair of the Committee, and issuance of customs decisions by EU member State customs authorities.[10] Specifically, the panel stated that it "emphasize[s] that we reach this conclusion on the basis of the particular circumstances of the case considered as a whole."[11]

30. In this dispute, the totality of the evidence demonstrates that the *GPX* legislation has not effected or imposed any of the changes listed under Article X:2 on the imports at issue.

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

31. Yes, this issue, among others, is now before the U.S. Federal Circuit in the *Guangdong Wireking v. United States* proceeding. In addition to the *Wireking* proceedings, the *GPX* litigation remains on-going, as are least 10 other cases before the U.S. CIT.[12]

32. In the *Wireking* case, the U.S. Federal Circuit is currently considering arguments that Commerce was prohibited from applying the U.S. CVD law to China prior to the *GPX* legislation as part of its consideration of the constitutionality of the *GPX* legislation.

33. The United States has submitted the *Wireking* appellate brief of the United States as USA-117 to demonstrate that the issues claimed to have been put to an end by Professor Fallon are currently unresolved.

[10] *EC- IT Products*, para. 7.1043.

[11] *Id.*, para. 7.1069 (emphasis added).

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

Question to China

97. The following questions relate to the issue of whether P.L. 112-99 was a "clarification" rather than an "amendment" of the prior law:

(a) At paragraph 41 of his expert opinion (Exhibit CHN-83), Professor Fallon indicates that "P.L. 112-99 bears none of the indicia that the courts have treated as crucial hallmarks of merely clarificatory legislation, including in those cases that the United States has called to the attention of this panel". In this regard, Professor Fallon states that "[p]erhaps the most important of these indicia is an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law." As set forth in its response to Panel question No. 64, the United States' position is that while Section 1 of P.L. 112-99 is merely a "clarification" of existing US law, Section 2 is indeed an "amendment" of existing US law. Would it be unusual for a single piece of US legislation to contain both "clarifications" and "amendments"? In such cases, what kind of indication, if any, would be expected in the title or text of a statute so as to reflect its dual purposes?

34. It is not unusual for a single piece of U.S. legislation to contain clarifications or codifications of agency practice as well as amendments.[13] Further, there is no requirement that a clarifying statute must explicitly state that it is a clarification. As the United States has explained, several federal appellate courts, including the court in the *Levy* case (USA-116), have indicated that a description in the text of the law as a clarification or change is not necessarily relevant to the legal analysis.[14] In light of these facts, the United States looks forward to reviewing and commenting on China's reply.

(b) It appears that in *GPX VI* the CAFC did not definitely rule on whether Section 1 was a clarification of prior law or an amendment, that in *GPX VII* the CIT avoided ruling on this issue, and instead proceeded on an arguendo approach, and that in *Guangdong* (Exhibit USA-49) the CIT took a similar approach. Does this demonstrate that there is no clear answer to this question?

[13] *See e.g.*, *Native American Technical Corrections Act of 2006*, P.L. 109-221, Section 501 ("Clarification of provisions and amendments relating to inheritance of Indian lands.") (USA-122).

[14] *See e.g.*, *Piambra Cortes v American Airlines*, 177 F.3d 1272 (11th Cir. 1999) (USA-56) (stating "[a] significant factor in determining whether a statutory amendment applies retroactively is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted; if such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law."); *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004) (USA-57) (stating In determining whether a statutory amendment clarifies or changes an existing law, a court looks to statements of intent made by the legislature that enacted the amendment.").

35. In light of the extensive discussion by the parties of these issues at the second panel meeting, the United States wishes to comment briefly on this question to China. As reflected in its appellate brief in *Wireking*, the United States believes there is a clear answer (that Section 1 of the *GPX* legislation was a clarification of the law), but the issue remains unresolved by U.S. courts. Further, the Panel need not resolve this issue to address China's claims under Article X:2. That is because, regardless of whether the *GPX* legislation is eventually found to be a clarification or change of prior U.S. law, China cannot prove that the law effected or imposed any of the changes listed under Article X:2 on the imports at issue.

36. At this point, the Panel has received statements from two noted U.S. constitutional law experts with differing opinions on whether the *GPX* legislation was a change or clarification of the law. The U.S. courts also have not definitively ruled on this issue. As such, it would be inaccurate for China to assert that it or Professor Fallon have put an end to this issue.

37. The issue of finality, including the issue of a mandate, is crucial to China's Article X:2 claim because of its assertion the *GPX V* opinion is legally binding or precedential under U.S. law. Specifically, China is asking "the Panel [to] treat decisions of U.S. courts as definitive statements of the meaning of U.S. law", which in China's view should include *GPX V*. On this issue, the United States has explained that without the issuance of a mandate along with other factors, the *GPX V* opinion cannot be considered authoritative or precedential.[15] In addition, and separate from the statement he prepared for China, Professor Fallon and other law professors have explained that "[j]udicial judgments are obviously subject to judicial revision until they become 'final' following the completion of appellate review or the expiration of the period for appeal."[16] Further, the United States had not exhausted its right to appeal to the U.S. Supreme Court.

1.3 Article X:3(b)

Question to both parties

98. The United States argues that Article X:3(b) contains a "structural" obligation, such that the failure to implement or be governed by the practice of a judicial decision in one case would not be sufficient to demonstrate a breach of this obligation.

(a) At paragraphs 6.178 and 7.994-7.997 of its report, the panel in *Thailand – Cigarettes (Philippines)* discussed the issue of what is needed to establish a violation of Article X:3(b). Please comment on whether, and if so how, that panel's discussion should inform the Panel's analysis of this issue.

[15] *See e.g.*, Statement of Dean John Jeffries, paras. 7-13 (USA-115); U.S. First Written Submission, paras. 135-140; U.S. Response to Panel Questions Following the First Substantive Meeting, paras. 18-19; 38-40; 171.

[16] Richard H. Fallon, John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System*, p. 93 (Foundation Press 6th ed. 2009) (USA-121). The authors also explain that "the courts are obligated to apply the law (otherwise valid) as they find it at the time of their decision, including, when a case is on review, new statutes enacted after the judgment below." *Id.* at p. 88.

38. The United States believes that the panel's explanation and rationale of the obligations of Article X:3(b) in *Thailand – Cigarettes from the Philippines* is persuasive and should inform the Panel's analysis of this issue. Specifically, the United States agrees with the panel's rationale for concluding that Article X:3(b) imposes a systemic obligation to establish and maintain a framework for the review and correction of customs matters.

39. As an initial matter, the panel did not distinguish between the first and second sentence of Article X:3(b). The panel in *Thailand – Cigarettes from the Philippines* examined the ordinary meaning of Article X:3(b), in its entirety, and its relationship with Article X:3(a) to conclude that "a violation of Article X:3(b) will be found if the process that a Member maintains for review of administrative actions relating to customs matters, when viewed in its entirety, presents a flaw that systemically prevents such actions from being reviewed by an independent tribunal without delay."[17]

40. In making this finding that Article X:3(b) is a structural obligation, the panel expressed doubt regarding whether the treaty article also imposes an "obligation for relevant tribunals to *in fact* provide for a *prompt* review in specific instances."[18] Such a claim would be "more properly within the scope of Article X:3(a)."[19]

41. Thus, "[t]he text of Article X:3(b), considered in the light of the ordinary meaning of the terms 'maintain' and 'institute', therefore suggests that Article X:3(b) mandates Members to keep, or create if not already in place, in their domestic system the existing independent tribunals or procedures designed for the purpose of the prompt review of administrative actions."[20]

42. The United States has established and maintained a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters. As an example, the *GPX* litigation, *Wireking* litigation and at least 10 other currently pending U.S. court cases demonstrate the independence of the U.S. judicial system. Further Commerce's actions in relation to AD and CVD litigation demonstrate that final court decisions are implemented by and govern the practice of Commerce.

(b) At paragraph 6.50 of its report, the panel in *US — Stainless Steel* discussed whether the WTO dispute settlement system can function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice". Please comment on whether, and if so how, that panel's discussion should inform the Panel's analysis of this issue.

[17] *Thailand – Cigarettes from the Philippines*, para. 7.1011

[18] *Id.* para. 7.993.

[19] *Id.*, para. 7.997.

[20] *Id.*

43. The situation in *US-Stainless Steel* is analogous to China's current claim under Article X:3(b). China is attempting to use its Article X:3(b) claim to circumvent the proper determination of U.S. law by the U.S. courts, as well as the actions of the U.S. Congress in enacting U.S. law.

44. The United States believes that the panel report in *US – Stainless Steel* would also be helpful in informing the Panel's analysis of Article X:3(b). The panel made this statement as part of its evaluation of Korea's Article X:3(a) claim regarding certain U.S. antidumping determinations.

45. Specifically, Korea alleged that Commerce's actions in an AD investigation departed from a so-called "established policy" by the agency. Such a departure was, according to Korea, a violation of Article X:3(a). The United States refuted these claims, stating that as a fundamental matter, the WTO dispute settlement system is not as a substitute for a domestic court. Rather it "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements."[21]

46. The panel agreed with the United States, stating that the WTO dispute settlement system "was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform."[22]

47. The panel warned that "[a]n incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*."[23]

Questions to China

(Questions 100 – 101)

Questions to the United States

101. What is the basis, textual or otherwise, for the United States' view that Article X:3(b) does not govern the relationship between the legislative branch and the judicial branch (or the legislative branch and administrative agencies)?

48. Article X:3(b) of the GATT 1994 does not establish the universe of what a review and correction mechanism is meant to encompass. China is thus incorrect in its restrictive interpretation of Article X:3(b) that disallows all actions that are not explicitly listed in the treaty article.

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

[22] *Id.*

[23] *Id.*

49. By its plain text, Article X:3(b) is meant to establish requirements for the relationship between a review and correction mechanism and the administering agency of customs matters. It does not prescribe the relationship between the legislative branch and the judicial branch, or the legislative branch and the administrative agency.

50. In other words, the plain text of Article X:3(b) imposes a requirement that a Member's review and correction mechanism "must be independent of the agencies entrusted with administrative enforcement."

> **102. The United States explains that, had a mandate issued in *GPX V* and the time for a petition for a *writ of certiorari* to the Supreme Court expired, any subsequent legislative action seeking to overturn the result for the particular shipments at issue in that case would have violated the US separation of powers doctrine under US law. In this connection, the United States at footnote 123 of its first written submission refers the Panel to the decision of the US Supreme Court in *Plaut v. Spendthrift* (Exhibit USA-85). Is it the United States' position that while there is a separation of powers doctrine under domestic US law, Article X:3(b) does not impose any limitations or restrictions on what the legislative branch may do in response to a judicial decision?**
>
> **(a) If this is the United States' position, why would it matter, for purposes of considering China's claim under Article X:3(b), whether or not the mandate in *GPX V* had issued at the time that P.L. 112-99 was enacted?**

51. Yes, the U.S. position is that Article X:3(b) prescribes the relationship between the judicial branch and the administering agency of customs matters. It does not prescribe the relationship between the legislature and the judicial branch.

52. However, it would not be correct to say that Article X:3(b) imposes no limitations whatsoever on the response by a legislature to a decision by a judicial or other review mechanism. Any such response would need to respect the obligations set out in Article X:3(b). For example, if the legislature enacted an law that took away or otherwise weakened the structural framework required by Article X:3(b), for example, by eliminating the independent review and correction of customs matters, then the Member would be acting inconsistently with Article X:3(b).

53. The issue of whether a mandate was issued in *GPX V* is not determinative for Article X:3(b) or any of the U.S. positions on China's Article X claims. The issuance of a mandate and the finality of the *GPX V* opinion, however, is vital to China's Article X:2 claim. Specifically, China's Article X:2 claim is based on the incorrect assertion that the *GPX V* opinion has legal effect and should have been implemented by Commerce. Only under such an assertion could China advance its Article X:2 claim.

54. If the *GPX V* opinion was never finalized, and therefore, never governed the practice of Commerce, then it cannot be true, as argued by China, that the imports at issue were ever affected by the *GPX* legislation. As such, China's claim under Article X:2 is without merit.

103. At paragraph 142 of its second written submission, China refers to the US response to Panel question No. 14 and states that "the parties appear to agree that the decisions that must be implemented under Article X:3(b) include the decisions of courts or tribunals of superior jurisdiction". Does the United States agree?

55. Yes, the United States agrees if the decision is final and legally binding.

104. In its first written submission, the United States emphasized that because the mandate never issued in *GPX V*, it never became final, and is therefore not a "decision" within the meaning of Article X:3(b) that had to be implemented by, and govern the practice of, USDOC. At paragraphs 85-86 of its second written submission, the United States observes that "[d]uring the first substantive Panel meeting, China made clear that it is not alleging that the *GPX V* opinion should have been implemented by Commerce", and that "[a]s opposed to arguments regarding a supposed obligation to implement the *GPX V* opinion, China now appears to raise a broader and potentially new claim, seemingly asking the Panel to find that Article X:3(b) imposes restrictions on national legislatures". In the United States' view, does this clarification render moot the question of whether *GPX V* is a "decision" within the meaning of Article X:3(b)?

56. As previously explained, the obligation in Article X:3(b) is a structural one, requiring Members to maintain tribunals or procedures whose decisions are to be implemented by administering authorities. The "decisions" referenced in Article X:3(b) are only the final decisions.

57. To the extent that China has confirmed that it is no longer pursuing a claim that Commerce should have implemented the *GPX V* opinion under Article X:3(b), then the Panel need not determine whether *GPX V* is a "decision" under Article X:3(b).

58. However, it is unclear whether China has indeed dropped its claim regarding *GPX V*. That is, China is continuing to assert that *GPX V* has precedential or legally binding effect under U.S. law. As part of its rebuttal submission, China has now submitted a statement from a law professor, which it claims "put[s] an end" to the issue of whether *GPX V* is legally authoritative under U.S. law. In making this assertion, China appears to be asking the Panel to find that Commerce should have implemented the *GPX V* opinion. That is, if the *GPX V* has legal effect, the necessary conclusion would be that it would need to be implemented by the lower courts and administering authority.

59. Thus, the issue may not be moot at this point, and the United States has therefore rebutted China's assertion that the *GPX V* opinion has legal effect under U.S. law.

2 ARTICLE 19.3

Question to both parties

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

60. The four sets of investigations at issue in DS379 were original investigations, not administrative reviews. Article 19.3 of the SCM Agreement on its own terms applies to the levying of countervailing duties, which, as explained previously, does not result from investigations in the U.S. retrospective system of duty assessment.[24] Accordingly, original investigations under the United States retrospective system, which result in a decision whether to impose a countervailing duty, and not the amount of duty to levy, are not subject to Article 19.3 of the SCM Agreement. As is evident in its report, the Appellate Body in DS379 did not consider the distinction between original investigations and administrative reviews in the United States retrospective system in interpreting Article 19.3 of the SCM Agreement. This is one reason why the Appellate Body's findings in DS379 are unpersuasive.

Question to the United States

106. At paragraph 198 of its first written submission, the United States indicates that "the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree". However, it appears that in DS379, both the panel and the Appellate Body agreed with the United States that a complete double remedy would not *necessarily* result from all instances of concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. In this regard, at paragraph 599 of its Report the Appellate Body explained that "we are not convinced that double remedies *necessarily* result in every instance of such concurrent application of duties. This depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation." To what extent, if any, does the US analysis at paragraphs 198-201 of its first written submission actually differ from the analysis of the panel and the Appellate Body in DS379?

[24] *See* U.S. Response to Panel Questions Following First Panel Meeting, paras. 44-45; U.S. Second Written Submission, paras. 132-36; U.S. Second Opening Statement, paras. 61-62.

61. The United States in paras. 198-201 was referring to paragraph 542 of the Appellate Body report, which does use the term "presumably." To the extent the Appellate Body report in paragraph 599 reflects a different view by the Appellate Body, there would appear to be some tension between paragraph 599 and paragraph 542. The United States does not dispute the following excerpt from paragraph 599 of the Appellate Body report in DS379: "[W]e are not convinced that double remedies necessarily result in every instance of such concurrent application of duties. This depends, rather on whether and to what extent domestic subsidies have lowered the export price of a product . . . ." As the United States has explained, it cannot be presumed that domestic subsidies automatically lower export prices.[25]

62. The United States, however, disputes the remainder of that excerpt from the Appellate Body report. The language "whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation," in particular the phrase "factual situation," presupposes some overlap of remedies requiring action by the investigating authority regardless of whether such an overlap has been demonstrated as an evidentiary matter to exist. And if a double remedy does not *necessarily* result from concurrent application, then to say it is *likely* that such a remedy results reflects an assumption that "domestic subsidies lower the export price of a product" to some extent and with some frequency. This is consistent with the Appellate Body's view in paragraph 542 of its report, which the United States explained as reflecting a presumption "that domestic subsidies automatically lower export prices to some degree." Moreover, this language in paragraph 599 entails a duty to investigate on the part of the administering authority that is not contemplated by Article 19.3 of the SCM Agreement, which is concerned exclusively with the imposition and collection of countervailing duties.

Question to China

(Questions 107 – 108)

Additional advance questions sent to the parties on 27 August 2013

1 ARTICLE X

1.1 Article X:1

Question to United States

109. [omitted]

110. At paragraph 9 of its second written submission, the United States asserts by reference to Exhibit CHI-1 that PL 112-99 was made effective on 13 March 2012 and not on 20 November 2006. Could the United States please explain how the references to 13 March 2012 in Exhibit CHI-1 permit this inference?

[25] *See* U.S. First Written Submission, paras. 198-201.

63. CHI-1 is the text of the *GPX* legislation, as published in the U.S. Statutes at Large.

64. The United States explained during the second substantive Panel meeting that the text of the law states that it was approved or enacted on March 13, 2012. Specifically, it is listed on the last line of the text, on the right hand column and also in the header of the publication. This was the date that the law was made effective. Other references to March 13, 2012, likewise refer to the legislation's enactment date or, alternatively, its publication date. Before March 13, 2012 the draft legislation had no legal effect nor was it applied in practice.

1.2 Article X:2

Question to China

(Questions 111 – 116)

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

65. In light of the extensive discussion by the parties on this issue, the United States wishes to comment on the question to China. On the issue of the meaning of U.S. law, in addition to the text of the published law and judicial decisions, China acknowledged during the second substantive Panel meeting that an agency's interpretation of a statute could be relevant to the determination of the meaning of existing domestic law. Professor Fallon does likewise in paragraph 19 of his report on behalf of China (CHI-83).

66. China has understated the relevance of an agency's interpretation in determining the meaning of U.S. law. The U.S. Supreme Court has been clear in numerous decisions that a court cannot supplant an agency's interpretation of a statute with the court's interpretation simply because it believes it has the better interpretation.[26] The U.S. Supreme Court explained in the *Chevron* case (USA-14) that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[27] In the *Chevron* case, the U.S. Supreme Court held that an administering agency's interpretation

[26] *See e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (USA-14) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (USA-15); *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 (USA-42) ("When a court reviews an agency's construction of a statute the agency administers, it is confronted with two questions. First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. But 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.").

[27] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (USA-14).

of U.S. law was not unreasonable and therefore was properly governing law, explaining that "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[28]

67. The U.S. Supreme Court explained the basis for its finding in *Chevron* as "rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[29] Such an understanding "provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[30]

68. Similarly, in the trade remedies context, the U.S. Supreme Court held in the *Eurodif* case (USA-15) that the issue was not whether the U.S. Federal Circuit had a better interpretation of the U.S. antidumping law, but whether Commerce's interpretation was reasonable. Specifically, the U.S. Supreme Court found that:

> The issue is not whether, for purposes of 19 U.S.C. § 1673, the better view is that a SWU contract is one for the sale of services, not goods. The statute gives this determination to the Department of Commerce in the first instance, § 1677(1), and when the Department exercises this authority in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.[31]

69. In other words, an agency's interpretation of a statute is governing law unless the court finds that such an interpretation is an unreasonable understanding of ambiguous text or contrary to the unambiguous text of the statute. Accordingly, as there is no final decision by U.S. courts to the contrary, Commerce's interpretation of the U.S. CVD law as being applicable to NME countries has been and is governing U.S. law.

Questions to the United States

> **118. Could the United States please comment on China's argument at paragraph 24 of its second written submission that even if Section 1(b) were deemed to apply to a known set of investigations and products, it would still constitute a measure of general application?**

[28] *Id.*, 467 U.S. at 866.

[29] *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013, pp. 10-11 (USA-42).

[30] *Id.*

[31] *United States v. Eurodif S.A.*, 555 U.S. 305, 315 (2009) (USA-15).

70. China states at paragraph 24 of its Second Written Submission that "even if Section 1(b) of P.L. 112-99 were deemed to apply to a known set of investigations and products, the exporters subject to the *resulting countervailing duty orders* constitute 'an unidentified number of economic operators'."[32] The subject of China's claims under GATT 1994 Articles X:1 and X:2, however, are not the CVD orders on the imports at issue. Rather, China's claims are that P.L. 112-99 is inconsistent with those provisions because that legislation allegedly retroactively authorized the initiation of the 27 CVD proceedings listed in its Panel Request.[33]

71. For these claims, China has failed to prove that the relevant section of P.L. 112-99 is "of general application". To the contrary, China's argument is precisely that the legislation applied to a pre-existing, and therefore known and identifiable, set of 27 proceedings that had been initiated prior to the enactment of the legislation. And for these proceedings, the subject imports and investigated parties were also known and identifiable.

72. China cannot deny those facts and therefore seeks to change the focus of the inquiry to the CVD orders that resulted from the named proceedings. But its claims are with respect to P.L. 112-99, not each CVD order. If China had wished to support claims under Articles X:1 and X:2 on each CVD order as a measure of general application, it would have had to at least allege that each order was not published promptly in relation to its effective date or was enforced prior to publication. China has not even bothered to try to make those allegations, however, as they are contradicted by the record before the Panel and easily dismissed.

119. With reference to paragraph 64 of China's second written submission, could the United States please comment on the reference to the *GPX VII* decision, including on whether it supports or contradicts the "clarification" characterization?

73. China asserts in paragraph 64 of its Second Written Submission that the United States has failed to explain "why the CIT in *GPX VII* was unprepared to accept the 'clarification' characterization as the basis for resolving the case before it."

74. The United States and the U.S. CIT in *GPX VII* have been clear that the issue of whether the GPX legislation was a clarification or change of the law was "simply not clearly decided by" the U.S. Federal Circuit. Specifically, the U.S. CIT stated: "As indicated, this is *simply not clearly decided* by the CAFC [Federal Circuit] 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

[32] China Second Written Submission, para. 24 (citing *US - Underwear*, para. 7.65) (emphasis added).

[33] *See e.g.*, China First Written Submission, para. 2 ("The measure at issue in this dispute is a measure that violates these requirements on its face. This measure is U.S. Public Law 112-99 (P.L. 112-99), 'An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes'.").

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."[34]

75. In other words, the reason why the U.S. CIT did not decide on the issue of whether the *GPX* legislation is a change or clarification of the law is because the court could find that the *GPX* legislation was constitutional even assuming *arguendo* that the law was a change. Moreover, the remand order issued by the U.S. Federal Circuit in *GPX VI* specifically called upon the U.S. CIT to resolve the constitutional issues being remanded to it. As a matter of judicial economy, the U.S. CIT did not need to reach the issue in order to comply with the instructions from the U.S. Federal Circuit.

76. Similarly, the Panel in this dispute need not determine whether the *GPX* legislation was a clarification or change of the law in order to find that China has failed to establish that the *GPX* legislation effected or imposed a change listed under Article X:2 on the imports at issue.

120. With reference to paragraph 86 of China's second written submission, is it correct that the CAFC in *GPX VI* declined to vacate its prior decision in *GPX V*?

77. Yes, this is correct, but it was for reasons other than those asserted by China. That is, the court's failure to vacate was not a definitive indication that *GPX V* is legally authoritative and precedential.

78. As an initial matter, China has presented no U.S. case law to establish that the failure to vacate a decision overrides the principles of finality of a mandate, which the United States has explained in detail in its submissions.[35] The United States has also explained that regardless of whether a decision is formally vacated, U.S. law is clear that when a panel grants rehearing, its original decision loses any effect.[36]

79. Further, U.S. law establishes that the lower court's judgment remains the law of the case pending a rehearing by the appellate court even if the appellate court's original first decision reversed the lower court. On this point, China fails to address the fact that the U.S. Federal Circuit, in response to a motion by the United States, amended its final judgment in *GPX VI* "to state that the judgment of [the Court of International Trade] is vacated" and remanded for further proceedings consistent with its *GPX VI* decision.[37]

[34] *GPX VII* (CHI-8), p. 14 (emphasis added).

[35] *See e.g.*, U.S. First Written Submission, paras. 135-140; U.S. Response to Panel Questions Following the First Substantive Meeting, paras. 18-19; 38-40; 171.

[36] *See* Statement of Dean John Jeffries, paras. 14-15 (USA-115); *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 33 ("The first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated.") (USA-118).

[37] *GPX Int'l Tire Corp. v. United States*, No. 2011-1107, et al., Dkt. Entry 150 (June 4, 2012) (USA-120).

1.3 Article X:3(b)

Questions to China

(Questions 121 – 123)

Questions to the United States

124. With respect to the United States' argument that Article X:3(b) contains an obligation that is "structural" in nature:

(a) Does the United States consider that the first two sentences of Article X:3(b) contain a single obligation, or two or more distinct obligations?

80. The United States considers that these two sentences contain a single obligation on Members to establish or maintain tribunals or procedures with multiple attributes. The second sentence sets out those attributes; the use of "[s]uch tribunals or procedures" at the beginning of the second sentence establishes an explicit link to the first. The first clause of the second sentence establishes that "such" tribunals or procedures must be independent and must issue decisions that are implemented by and govern the practice of the administering agency. Both of these attributes of X:3(b) tribunals or procedures are structural in nature.

(b) Can the United States identify other obligations in the covered agreements that are, in its view, similarly "structural" in nature?

81. Yes. In the trade remedies context, Article 23 of the SCM Agreement and Article 13 of the AD Agreement both impose structural obligations to institute and maintain judicial review mechanisms for the review of administrative actions relating to countervailing duty and antidumping duty determinations, respectively. Both articles contain text that is similar to that of Article X:3(b) of the GATT 1994.

82. Specifically, Article 23 of the SCM Agreement is entitled "Judicial Review" and states:

> Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

83. Article 13 of the AD Agreement contains similar language in the antidumping duty context.[38]

84. The Appellate Body and other panels have found that Article 23 of the SCM Agreement is of a systemic or structural nature. For example, the Appellate Body has observed that the obligation "requires that there be tribunals or procedures for independent review of certain countervailing duty determinations."[39] Further, the panel in *Mexico – Olive Oil* noted that, among other provisions, Article 23 of the SCM Agreement "leave[s] considerable discretion to Members to define their own procedures … This leads us to believe that, in general, unless a specific procedure is set forth in the *Agreement* the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide."[40]

85. Similarly, Article X:3(b) imposes a structural obligation to institute and maintain a review and correction mechanism that is independent from the agency entrusted with the enforcement of customs matters. The treaty obligation does not establish the universe of the requirements for the mechanism, as it leaves considerable discretion to Members to define the procedures and rules for the system.

2 ARTICLE 19.3

2.1 Article 19.3

125. [omitted]

Questions to the United States

126. Could the United States please comment on paragraph 179 of China's second written submission, specifically the statement that it is not enough for the investigating authority to fully consider the evidence and arguments presented to it if it never solicits relevant evidence in the first place?

86. The United States reiterates that nothing in Article 19.3 of the SCM Agreement, which concerns the "Imposition and Collection of Countervailing Duties," entails any investigative function on the part of the administering authority. As detailed at length by the United States in its prior submissions,[41] Article 19.3 of the SCM Agreement is first and foremost a non-

[38] Article 13 states that "Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."

[39] *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan (AB)*, WT/DS322/AB/RW, adopted 31 August 2009, para. 186.

[40] *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, para. 7.26, footnote 63.

[41] *See, e.g.*, U.S. First Written Submission at paras. 163-182.

discrimination provision that requires a Member to levy duties (i) on imports from all sources found to be subsidized and causing injury, (ii) on a non-discriminatory basis on imports from those sources, and (iii) "in the appropriate amounts."

87. Even under the Appellate Body's interpretation of Article 19.3, the United States disagrees with China's assertion that it is not enough for the investigating authority to fully consider the evidence and arguments presented to it if it never solicits relevant evidence in the first place. Although the Appellate Body in DS379 referred in passing to an obligation "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts,"[42] the Appellate Body never elaborated on what is meant or required by "solicitation."

88. As noted previously, Commerce's regulations solicit any information interested parties consider relevant; therefore, respondent parties in the proceedings challenged by China had ample opportunity under those regulations to submit evidence relevant to the question of potentially overlapping remedies.[43] It would elevate form over substance (and impose an undue burden on an administering authority) to consider that the authority must solicit specific pieces of information about a possible adjustment when parties are otherwise free and unencumbered to place such information on the record themselves. This is particularly true when it is respondent parties, not Commerce, that are in possession of the factual information that presumably form the basis of, and may substantiate, any claims they are making about overlapping remedies. Such information may have included, without limitation, data about the relationship between actual input costs and prices for which respondent parties were in exclusive possession.

89. Under its regulations, Commerce solicited relevant facts and evidence deemed relevant by parties in the challenged proceedings. Respondent parties, however, failed to submit positive evidence to substantiate their claims regarding overlapping remedies. Rather than provide Commerce with positive evidence, respondent parties made the conscious decision to rely on a theoretical argument that the concurrent application of countervailing duties and antidumping duties calculated pursuant to the alternative NME methodology automatically resulted in a 100 percent overlap of remedies, in every instance. Commerce considered these arguments, and responded in full,[44] thereby satisfying the obligations identified by the Appellate Body in DS379 under Article 19.3 of the SCM Agreement.

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[42] *US – Anti-Dumping and Countervailing Duties (AB)*, para. 602.

[43] *See, e.g.*, U.S. Second Opening Statement, paras. 70-71; 19 C.F.R. §§ 351.102(21) and 351.301(b)(1)-(2) (2008) (USA-86 and USA-87).

[44] *See, e.g.*, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Multilayered Wood Flooring From the People's Republic of China (October 11, 2011) (CHI-48), pp. 20-35; 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 (July 20, 2009) (USA-100), pp. 30-37; Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (July 20, 2009) (USA-99), pp. 3-17.

Additional Questions

1 ARTICLE X

1.1 Article X:2

Questions to both parties

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

90. In relevant part, Article X:2 states that "[n]o 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 … shall be enforced before such measure has been officially published."

91. The phrase "under an established and uniform practice" would appear to modify both the rate of "duty" and "other charge." The intervening phrase "on imports" similarly applies to both the "duty" and "other charge." That is, Article X:2 concerns in this part an advance in a rate of duty or other charge "on imports," rather than on exports, and such a rate on imports "under an established and uniform practice," rather than a rate that does not rise to that standard. It would be contrary to the structure of the sentence to read the phrase "on imports" to apply to both the "duty" and "other charge" but read the subsequent phrase "under an established and uniform practice" to apply only to the second term ("other charge").

Question to China

(Questions 128 -129)

Question to the United States

130. The United States at paragraph 45 of its second oral statement observes that USDOC was not ordered to implement *GPX V*. Could the United States indicate whether between 20 November 2006 and 13 March 2012, USDOC was ever ordered or otherwise required by a US court to change its practice of applying US CVD law to NME imports on the grounds that such practice was based on an incorrect interpretation of the same law (ie the USDOC interpretation that US CVD law permitted the application of CVD law to NME imports)?

92. No. Commerce has never been ordered or otherwise required by a U.S. court to change its approach of applying the U.S. CVD law to NME countries on the grounds that such an approach was based on an incorrect interpretation of the law.[45]

1.2 Article X:3

Question to China

(Question 131)

Question to the United States

132. According to the United States, Article X:3(b) sets forth a single, structural obligation. Could the United States please address whether Article X:3(a) likewise sets forth a structural obligation? If so, why, and has it been applied as such in WTO dispute settlement practice? If not, why not?

93. Article X:3(a) addresses the "administration" of certain covered measures of general application. Specifically, it states that "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." As such, it imposes normative requirements on the application or implementation of certain measures rather than a structural obligation on the nature of Member's legal system.

94. The Appellate Body has clarified that Article X:3(a) focuses on how certain measures are applied or administered rather than the substance of the measure itself. Specifically, in *EC – Bananas III*, the Appellate Body observed:

> The text of Article X:3(a) clearly indicates that the requirements of 'uniformity, impartiality and reasonableness' do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled 'Publication and Administration of Trade Regulations', and a reading of the other paragraphs of Article X, make it clear that Article X applies to the administration of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[46]

[45] To the extent that the U.S. CIT ordered Commerce not to apply the CVD law to certain Chinese imports in *GPX III* (CHI-4), an order held in abeyance while the decision was appealed (and subsequently vacated by the Federal Circuit), it was based upon the Court's concern about the potential for overlapping AD and CVD remedies. The U.S. CIT had previously rejected China's argument that the U.S. CVD law was not applicable to NME countries, concluding that it "cannot say from the statutory language alone that Commerce does not have the authority to impose CVDs on products from an NME-designated country." *GPX II*, 645 F. Supp. 2d at 1240 (CHI-3).

[46] *EC – Bananas III (AB)*, para. 200. *See also EC — Poultry (AB)*, para. 115.

95. Similarly, the panel in *Thailand – Cigarettes (Philippines)* found that Article X:3(a) addresses the application of measures that fell under Article X:1 by a Member's administering authorities. It stated:

> [T]he guidance provided by the Appellate Body suggests that Article X:3(a) dictates the disciplines governing the administration of the legal instruments of the kind described in Article X:1. The scope of administration that is subject to a challenge under Article X:3(a) includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation.[47]

96. The same panel also distinguished between the systemic obligation of Article X:3(b) and Article X:3(a)'s focus on the application of covered measures:

> [I]t is our view that a claim on whether a tribunal maintained by a Member pursuant to Article X:3(b) does in fact promptly review an administrative action is a matter falling more properly within the scope of Article X:3(a). As addressed above, Article X:3(a) requires that Members administer the legal instruments of the kind in Article X:1 in a uniform, impartial and reasonable manner. We also clarified that the term "administer" under Article X:3(a) covers the application or implementation of the relevant legal instruments, including judicial decisions. This understanding, in our view, ensures that the distinctive disciplines embodied in Article X:3(a) and X:3(b) are not blurred.[48]

97. Thus, in contrast to Article X:3(a) and its focus on the actions of administrating authorities, Article X:3(b) imposes a structural obligation for Members to "institute" and "maintain" a framework for the review and correction of such actions. As previously explained, the United States maintains a judicial system for the prompt review and correction of administrative actions relating to customs matters. Such a judicial system is independent from the agencies entrusted with administrative enforcement of customs matters, and the final, legally binding decisions of U.S. courts are implemented by and govern the practice of such agencies.

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[47] *Thailand – Cigarettes (Philippines)*, para. 7.873.

[48] *Id.*, para. 7.997.