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

(WT/DS449)

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I. INTRODUCTION

1. The legislation of the U.S. Congress ("Congress") reaffirming the existing application of U.S. countervailing duty ("CVD") laws to imports from nonmarket economy countries ("NMEs"), or what is commonly known as the "*GPX* legislation,"[1] is fully consistent with U.S. obligations under Article X of the *General Agreement on Tariffs and Trade 1994* ("the GATT 1994"). China's claims under Article X of the GATT 1994 fail as a matter of fact and law.

2. China's claims are based on a fundamental misunderstanding of U.S. CVD law and the effect of the *GPX* legislation. The law affirmed the U.S. Department of Commerce's ("Commerce") pre-existing approach to the application of the U.S. CVD law to NME countries such as China. It did not change or otherwise affect the approach that Commerce had been using in the challenged CVD proceedings. Rather, it maintained the *status quo* that existed prior to its enactment.

3. China's claims under Article X:1 of the GATT 1994 are without merit. As an initial matter, China has failed to make a *prima facie* case that Section 1 of the *GPX* legislation is a measure of the type listed in Article X:1 of the GATT 1994. Even assuming *arguendo* that China could meet its burden of argument, China's claim fails as a factual matter. The *GPX* legislation was published the same day it was enacted. Further, the *GPX* legislation was published in a manner as to enable China and Chinese traders to become acquainted with it, and thus complies with the Article X:1 obligation regarding the manner of publication.

4. China also claims that the *GPX* legislation is inconsistent with the obligations under Article X:2 of the GATT 1994. Such a claim is baseless. China has failed to make a *prima facie* case that the *GPX* legislation falls within the scope of Article X:2 of the GATT 1994. As further explained below, China has not established that a measure involving countervailing duties falls within the general type of measure covered by Article X:2 of the GATT 1994. Further, given that the *GPX* legislation made no change in Commerce's application of countervailing duties, China cannot show that measure either effected *an advance in* a rate of duty under an established or uniform practice, or *a new or more burdensome* requirement, restriction, or prohibition on imports. Even aside from the fact that China has not demonstrated the *GPX* legislation falls within the scope of Article X:2 of the GATT, China has also not established that the measure was enforced before it was officially published.

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

[1] P.L. 112-99, 126 STAT. 265 (Mar. 13, 2012) ("*GPX* legislation") (CHI-1).

6. Further, China's claim under Article X:3(b) of the GATT 1994 is based on a faulty factual premise that the *GPX V* opinion was a final judicial decision on the meaning of U.S. law. To the contrary, as the statement of facts below shows, *GPX V* was not a final decision (and was under appeal), and has no legal effect under the U.S. legal system.

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

8. First, China neglects to make a *prima facie* case for its claim under the SCM Agreement. China, as the complaining party in this dispute, must apply the SCM Agreement to the facts in this dispute, and it must present to the panel legal arguments and evidence in order for the panel to properly address its claim. But here, it has made no attempt to do so.

9. Rather than present legal arguments and evidence, China makes generalized allegations without citing a single piece of evidence. China's submission contains no discussion of the facts at issue in the determinations made by Commerce. Therefore, China has failed to make a *prima facie* case.

10. Second, China also erroneously interprets Article 19.3 of the SCM Agreement. Rather than engage in a textual or contextual analysis of the obligations imposed by Article 19.3 of the SCM Agreement, China relies exclusively on statements made in the Appellate Body report in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). The Appellate Body's reasoning in DS379, however, is not persuasive.

11. Interpreting Article 19.3 of the SCM Agreement in accordance with the customary rules of interpretation, the text of Article 19.3 of the SCM Agreement is a non-discrimination provision that directs Members to apply CVDs in "the appropriate amounts in each case," for all sources found to be subsidized and causing injury. Reading Article 19.3 of the SCM Agreement in context supports the conclusion that 19.3 of the SCM Agreement is a non-discrimination provision that directs Members to apply CVDs in "the appropriate amounts in each case," for all sources found to be subsidized and causing injury. Because China's claim are premised on a faulty legal interpretation of article 19.3, China has not even alleged that Commerce's imposition or collection of CVDs was discriminatory, or did not correspond to the amount of subsidies identified in any of the 31 challenged sets of determinations at issue in this dispute. Therefore, China's claim that the United States acted inconsistently with Article 19.3 should be rejected.

12. For these and other reasons set out in full in the body of this submission, China's claims have no merit.

II. FACTUAL AND PROCEDURAL BACKGROUND

13. China states in its first written submission that "the background that follows is not material to China's principal claim concerning the retroactive enforcement of Section 1 of [the *GPX* legislation]."[2] China's statement is instructive. The background provided by China has no bearing on the United States' obligations under Article X of the GATT 1994 or Articles 10, 19.3 and 32.1 of the *SCM Agreement*. Its relevance, if any, may be to the domestic *GPX* litigation currently pending in U.S. domestic courts on matters of U.S. law.

14. However, and despite its lengthy recitation, China's discussion of Commerce's application of the U.S. CVD law to imports from China is incomplete. As such, the United States is compelled to respond to China's highly selective and inaccurate statements. The Annex of this submission contains a complete and accurate background of the history surrounding the U.S. approach to the application of the U.S. CVD law to NME countries. In this section, the United States provides a summary of those facts which may be relevant to the claims that China has raised under the WTO Agreement. The sections below will elaborate on the following points.

15. First, it is important that any discussion of the U.S. CVD law must begin with the plain text of the law, which China fails to provide in its background section. The plain text of the law requires that Commerce must apply countervailing duties to any country where it can identify a countervailable subsidy.

16. Second, and contrary to China's assertions, a 1986 decision by a U.S. appellate court, *Georgetown Steel v. United States* ("*Georgetown Steel*"), did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the U.S. appellate court in *Georgetown Steel* deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. In other words, the U.S. appellate court simply affirmed Commerce's broad discretion to find the existence of a countervailable subsidy (or what was termed a "bounty or grant" at that time under the U.S. CVD law).

17. Third, China asserts that following the *Georgetown Steel* decision, the existing U.S. law prohibited the application of the U.S. CVD law to NME countries.[3] China's assertion fails as a matter of fact. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies.

18. Fourth, in 2006, based on a petition from a U.S. domestic industry, Commerce initiated a CVD investigation on certain Chinese imports in which it determined that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s that it was no longer impossible to identify subsidies there.

[2] China First Written Submission, para. 9.

[3] China First Written Submission, para. 16.

19. Fifth, the so-called *GPX* litigation is an on-going challenge to Commerce's approach in the U.S. domestic court system. One of the opinions issued in the middle of a string of judicial opinions in this litigation raised a differing view of what Congress intended in the U.S. CVD law. This view differed from previous court decisions and Commerce's existing application of the U.S. CVD law. The opinion, *GPX V*, however, is legally insignificant as it never became final.

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

A. Requirements of the U.S. CVD Law

21. In its elaborate analysis of the U.S. CVD regime, China never once states the actual requirements of U.S. law. In its current form, the U.S. CVD law states:

> (a) General rule
>
> If— (1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States ….
>
> * * *
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.[4]

22. The plain text of the statute requires that every country exporting merchandise to the United States is subject to the CVD law, with no exceptions. In other words, NME countries are ""countries"[5] and products imported from them are "merchandise." As such, where Commerce determined that a NME country was providing a "countervailable subsidy"[6] with respect to imported "merchandise," the plain language of the statute required that CVDs "shall be" imposed upon that merchandise. Given this directive, the United States has applied the U.S. CVD law to all governments of countries (except where this proved to be impossible), including NME countries such as China and Vietnam.[7]

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[4] 19 U.S.C. § 1671(a) (USA-02).

[5] The U.S. CIT has acknowledged that the statute does not "limit[ ] the type of country to which Commerce is permitted to apply the CVD law . . . ." *GPX Int'l Tire Corp. v. United States ("GPX I"*), 645 F. Supp. 2d 1231, 1238 (Ct. Int'l Trade 2009) (USA-93).

[6] In accordance with the SCM Agreement, a foreign government action must satisfy three basic requirements in order to constitute a countervailable subsidy under U.S. CVD law. The foreign government must make a "financial contribution," that confers a "benefit" upon the recipient, and that benefit must satisfy the "specificity" requirement. *See* 19 U.S.C. §1677(5); § (5A) (USA-06).

[7] Commerce considers China to be an NME country under the U.S. antidumping law. *See* 19 U.S.C. § 1677(18) (USA-06).

23. Although the law is clear on its face, the *GPX* litigation generated significant confusion regarding the application of the U.S. CVD law to NME countries. In this context, Congress enacted the *GPX* legislation to provide a definitive statement of its intent. Section 1 of the *GPX* legislation is reflected in U.S. law as:

> (f) Applicability to proceedings involving nonmarket economy countries
>
> (1) In general: Except as provided in paragraph (2), the merchandise on which countervailing duties shall be imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country.
>
> (2) Exception: A countervailing duty is not required to be imposed under subsection (a) on a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country if the administering authority is unable to identify and measure subsidies provided by the government of the nonmarket economy country or a public entity within the territory of the nonmarket economy country because the economy of that country is essentially comprised of a single entity.[8]

B. Commerce's Efforts to Apply the U.S. CVD Law to Certain NME Countries and the *Georgetown Steel* Decision

24. In a series of decisions taken in 1983 and 1984, Commerce determined that it could not identify countervailable subsidies in various countries of the former Soviet bloc. Commerce explained at the time that the economies of these countries were controlled by the government to the extent that even if they attempted to provide their producers with an economic incentive to increase production, the producers would have neither the motive nor the capacity to respond.[9] In such systems, attempting to isolate a government financial contribution that gave rise to a benefit or, in the nomenclature of the time, "a bounty or grant," was essentially impossible.

25. Commerce's findings are best summarized in a preliminary determination involving a CVD investigation of carbon steel wire from Poland, in which Commerce stated its belief "that Congress did not exempt nonmarket economy countries from" the CVD law, which by its terms applies to "*any* country, dependency, colony, province, or other political subdivision of government.[10] After examining the facts in Poland, however, Commerce concluded that:

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[8] 19 U.S.C. § 1671(f) (USA-02).

[9] *See, e.g.*, *Final Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370 (Dep't of Commerce May 7, 1984) [hereinafter *Wire Rod from Czechoslovakia*] (USA-07).

[10] *Preliminary Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 6,768, 6,879 (Dep't of Commerce Feb. 23, 1984) (USA-8); *see also Preliminary Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 6,773 (Dep't of Commerce Feb. 23, 1984) (USA-9). After examining the facts in Poland, however, Commerce concluded that "[w]here prices and profits do not have some economic meaning, we cannot find programs like Poland's price equalization payment to confer a

> [w]here prices and profits do not have some economic meaning, we cannot find programs like Poland's price equalization payment to confer a subsidy. Thus we preliminarily determine that Poland's price equalization payments do not confer a bounty or grant within the meaning of the Act.[11]

In the final determinations of that investigation and a parallel CVD investigation of carbon steel rod from Czechoslovakia, Commerce affirmed that the CVD law applies to imports from any country, but explained that, in the NME countries it was examining in those cases, it was simply impossible to identify the transfer of a "bounty or grant" from the government to a producer or exporter.[12]

26. In sum, Commerce concluded that the essential characteristic of NMEs at that time was that there were no markets, because the governments had taken over the entire economic system. Because producers and exporters in NME countries effectively were branches of their central governments, it was impossible to conclude, in any meaningful sense, that the central governments had transferred subsidies to them.[13] Further, although Commerce's determinations cited NMEs in general, they plainly were based on the "essential characteristic" that it was simply impossible to identify subsidies in the NME countries involved in these proceedings – the Communist countries of the Soviet Bloc in the early 1980's.[14]

27. Because the U.S. CVD law mandated that CVDs "shall be applied" to subsidized imports, the exception invoked by Commerce was limited to those situations in which it was impossible to apply the law when a subsidy could not be identified in the case before it, not because of the country under examination. Commerce did not have the authority to create an exception to the statutory mandate based on policy – for example, that it need not apply the CVD

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subsidy. *Preliminary Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. at 6,773 (USA-08).

[11] *Carbon Steel Wire Rod from Poland* (USA-8)*; Preliminary Negative Countervailing Duty Determination*, 49 Fed. Reg. at 6,773 (USA-09).

[12] *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,371 (USA-7); *Final Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374, 19,375–76 (Dep't of Commerce Feb. 23, 1984) [hereinafter *Wire Rod from Poland*] (USA-71, USA-10).

[13] In those determinations, Commerce defined a subsidy as a distortion in the normal operation of market forces. Where virtually all economic activity was controlled by the central government, instead of market forces, Commerce concluded that it would be arbitrary and meaningless to pick out individual actions and identify them as subsidies.

[14] The decisions carefully describe the conditions in those countries and explain how those conditions made it impossible to identify subsidies. "Based on our analysis, we have found that NME systems share certain features that make it impossible to find that a bounty or grant exists. These nonmarket features are, moreover, apparent in Czechoslovakia." *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,372 (USA-7). Commerce also observed, for example, that "[i]nstead of being incentives or subsidies in a market sense, they are means of controlling the enterprise. This is apparently the situation in Czechoslovakia . . . . Thus, we have found generally for NMEs and specifically for Czechoslovakia that prices are administered and that these prices do not have the same meaning as prices in a market economy." *Id.* at 19,372–73. Commerce also noted that "[m]ost NME systems are characterized by centrally administered prices . . . . Prices in Poland are similarly controlled . . . . Instead of being incentives or subsidies in a market sense, they are means of controlling the enterprise. This is apparently the situation in Poland. . ." *Wire Rod from Poland*, 49 Fed. Reg. at 19,376 (USA-09).

law in situations where that would be complex and burdensome or politically difficult. Nor did Commerce presume to have such authority. Instead, Commerce took the position that it could not be required to apply the CVD law where that would be impossible, and that it was impossible to apply the law when a subsidy could not in fact be identified in the case at issue.

28. Thus, when Commerce concluded that it could not apply the CVD law to "NME countries," the *only* rule that Commerce was applying was that the CVD law did not require the imposition of CVDs where the very identification of a subsidy was impossible. The result of applying that rule to the NME countries of that era was that the CVD law did not apply to any NME countries at that time. This did not preclude a different outcome if those facts should change. Commerce had no authority to address future fact patterns before they arose, no authority to carve out an exception to the statutory mandate on any basis other than impossibility, and did not attempt to do determine that the CVD law could never be applied to any NME country, ever. Commerce simply addressed the situation before it, which was similar across the NME countries in the world at that time.

29. These and similar determinations were challenged under U.S. domestic law, first at the U.S. Court of International Trade ("U.S. CIT"), which has jurisdiction in the first instance over actions challenging Commerce's determinations under the antidumping ("AD") and CVD law,[15] then to the U.S. Court of Appeals for the Federal Circuit ("U.S. Federal Circuit"), which has jurisdiction over appeals from a final decision of the U.S. CIT.[16] The U.S. Federal Circuit in 1986 affirmed that Commerce was not required to apply the U.S. CVD law to certain countries based on its findings regarding the Soviet-style centrally planned economies of those countries at that time in *Georgetown Steel*. Like Commerce's underlying determinations, the *Georgetown Steel* decision plainly states that it is based on the facts in the Soviet-bloc countries under consideration. In the words of the court: "[e]ven 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."[17]

30. Thus, *Georgetown Steel* did not decide that Commerce could not apply the CVD law to exports from any country characterized as a NME. Consistent with the legal principle under U.S. law that an agency's interpretation of the statutes it administers "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous,"[18] the U.S. Federal Circuit deferred to Commerce's judgment that it was not

[15] *See* 28 U.S.C. §1581(c) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 {19 U.S.C. §1516a}"); *see also* 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (providing for judicial review of final affirmative CVD determinations) (USA-11).

[16] *See* 28 U.S.C. §1295(a)(5) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—of an appeal from a final decision of the United States Court of International Trade") (USA-13).

[17] *Georgetown Steel v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986) ("*Georgetown Steel*") (CHI-2).

[18] *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). 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

required to apply the CVD law where it was impossible to do so. Contrary to China's assertion that Commerce held that the CVD law did not apply to NME countries "as a matter of law," the U.S. Federal Circuit simply affirmed Commerce's broad discretion to determine the existence of a bounty or grant.[19]

31. Rather than properly characterize the holding of the *Georgetown Steel* decision, China emphasizes other statements by the U.S. Federal Circuit that "Congress had taken to 'deal[] with the problem of exports by nonmarket economies through other statutory provisions,'" namely the NME provisions of the U.S. AD law.[20] However, the U.S. Federal Circuit itself identified such ruminations as only "[f]urther support for [its] conclusion."[21] As explained above, the issue presented under U.S. law in *Georgetown Steel* was whether Commerce reasonably interpreted the statutory term "bounty or grant" given the impossibility of identifying and measuring subsidies in the Soviet-bloc economies of that era. The excerpted passages of Georgetown Steel highlighted by China constitute *dicta* and therefore lack any precedential weight under U.S. law.[22]

C. Legislation and Commerce's Administrative Approach after *Georgetown Steel*

32. In 1988, Congress added the term "nonmarket economy country" to the AD statute along with the "factors of production" methodology for determining normal value in AD proceedings involving exports from NME countries.[23] The legislative history makes clear that these changes were made to address the problem that "[t]he current antidumping duty law and procedures as they apply to nonmarket economies do not work well."[24] The legislative history of these provisions makes no reference to the CVD law and does not suggest that the changes in the AD law had anything to do with the Federal Circuit's decision in *Georgetown Steel*.

33. In 1994, extensive changes were made to both the AD and CVD law to implement the WTO Uruguay Round Agreements.[25] The only change in the basic requirements of the CVD law

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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).

[19] China First Written Submission, para. 11 (*citing Georgetown Steel* at 1310).

[20] China First Written Submission, paras. 13-15 (citing *Georgetown Steel* at 1316).

[21] *Georgetown Steel*, 801 F.2d at 1316 (CHI-2).

[22] *See Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004) (citing *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972)) (USA-16).

[23] Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 1316, 102 Stat. 1107 (1988) (USA-96).

[24] S. Rep. No. 100-71, at 108 (1988); *see also* H.R. Rep. No. 576 (1988) (Conf. Rep.), *reprinted in* 134 Cong. Rec. H2031 (daily ed. Apr. 20, 1988) (USA-18, USA-19).

[25] A fleeting reference in the 1994 legislative history summarizing *Georgetown Steel* as being "limited to the reasonable proposition that the countervailing duty law cannot be applied to imports from nonmarket economy countries" should not be taken out of context in the way that China does. *See* China First Written Submission, para. 19. The statement merely sought to clarify that a binational panel under Chapter 19 of the North American Free Trade Agreement had misunderstood the holding of *Georgetown Steel* to require an "effects test" in determining whether a subsidy can be countervailed. *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), at 926 (USA-02).

discussed above was that the term "bounty or grant" was replaced with the term "countervailable subsidy," which is defined in more detail.[26]

34. Significantly, Article 15 of the Tokyo Round Subsidies Code (with its requirement that Members choose between AD and CVD remedies with respect to exports from NME countries) was dropped in the Uruguay Round WTO Agreements. Thus, when the Uruguay Round Agreements Act was passed in 1994, it was evident that both ADs and CVDs could be applied to exports from NME countries, consistent with the WTO Agreements. The Uruguay Round Agreements Act did not make any changes to U.S. law to reflect this changed situation, because no changes were necessary. Nor does the legislative history of the Act give any indication that the deletion of Article 15 of the Tokyo Round Subsidies Code created any question in Congress as to whether it was necessary to amend the CVD law to permit U.S. petitioners to exercise the rights enjoyed by petitioners in the other WTO Member States.

35. China states that following the *Georgetown Steel* decision, "it was clear that existing U.S. law did not permit the application of countervailing duties to imports from countries that the United States designates as non-market economies."[27] China fails to present any evidence for this conclusory statement. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies.[28]

36. Following *Georgetown Steel*, Commerce continued its approach of not applying the CVD law to NME countries, and often described the holding of *Georgetown Steel* as being that the CVD law did not apply to exports from NME countries.[29] Nevertheless, Commerce did not indicate that *Georgetown Steel* created a steadfast rule that the CVD law could never be applied to any NME country.

37. In June 2005, the Government Accountability Office ("GAO") issued a report entitled *U.S. – China Trade: Commerce Faces Practical and Legal Difficulties in Applying*

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[26] *See* 19 U.S.C. §1671(a).

[27] China First Written Submission, para. 16.

[28] *See e.g., General Issues Appendix*, appended to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37,225, 37,261 (July 9, 1993) (stating that "*Georgetown Steel* stands simply for the proposition that, in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place"). For example, in 1991 Commerce initiated certain CVD investigations of Chinese imports, but ultimately declined to complete these investigations because of the structure of the Chinese economy at that time. (USA-21) *See e.g., Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the China*, 57 Fed. Reg. 10,459 (Dep't of Commerce Mar. 26, 1992) (USA-94); *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From China*, 57 Fed. Reg. 24,018 (Jun. 5, 1992) (USA-95).

[29] Commerce would at times also explain the rationale which produced that result. For example, in the *General Issues Appendix* to the 1993 CVD investigations of certain carbon steel products from various countries, Commerce stated that "*Georgetown Steel* stands simply for the proposition that, in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place." *General Issues Appendix*, appended to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37225, 37261 (July 9, 1973) (USA-21).

Countervailing Duties.[30] China places great reliance upon this report highlighting the GAOs assessment that Commerce had "two options" to apply the CVD law to China – either declare China to be a market economy country or "depart" from *Georgetown Steel*.[31] However, even if the GAO report had made such an assessment, GAO reports have no status whatsoever under U.S. law.[32] Moreover, the GAO did not state that Commerce had no ability to apply the CVD law to China as an NME.

D. Commerce's Application of the U.S. CVD Law to China

38. In October 2006, Commerce received a petition to initiate a CVD investigation on coated free sheet paper ("*CFS Paper*") from China.[33] In accordance with its obligation under Article 13 of the *SCM Agreement*, the United States notified China that it had accepted such a petition. Consultations between the two governments were held on November 9 and 20, 2006. As such China was fully apprised of the law that was being applied to it.

39. On November 27, 2006, Commerce published the initiation of the CVD investigation on CFS from China in the U.S. Federal Register. In the publication, Commerce stated:

> Application of the Countervailing Duty Law to the PRC
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> Petitioner has provided sufficient argument and subsidy allegations (see "Initiation of Countervailing Duty Investigations") to meet the statutory criteria for initiating a countervailing duty investigation of CFS paper from the PRC. Given the complex legal and policy issues involved, and on the basis of the Department's discretion as affirmed in *Georgetown Steel*, the Department intends during the course of this investigation to determine whether the countervailing duty law should now be applied to imports from the PRC. The Department will invite comments from parties on this issue.[34]

Subsequently, in December 2006, Commerce published a Notice of Opportunity to Comment on whether the current economic situation in China now warranted the application of the U.S. CVD

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[30] *U.S. – China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties*, GAO-05-474, June 2005 [hereinafter GAO Report] (CHI-16).

[31] China First Written Submission, para 22.

[32] The GAO is an advisory unit that works for Congress. It has no authority to make, interpret, or otherwise change U.S. law nor can it issue binding (or nonbinding) decisions. *See* http://www.gao.gov/about/ (stating that the GAO's objective "is to advise Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive.").

[33] *See Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea*, 71 Fed. Reg. 68,546 (Dep't of Commerce Nov. 27, 2006) ("*CFS Paper Initiation*") (USA-23).

[34] *CFS Paper Initiation*, 71 Fed. Reg. at 68,549 (USA-23).

law to a NME country.[35] China, along with several other interested parties, submitted comments through this process.[36]

40. Soon after initiation of the CVD investigation, China and certain Chinese respondents in the *CFS Paper* 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:

> …it 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.[37]

41. 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:

> . . . the *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.[38]

42. On April 9, 2007, Commerce published the affirmative preliminary determination in the CVD investigation of *CFS Paper* from China in the U.S. Federal Register. The publication states that

> Informed by those comments [from the December 2006 Notice of Opportunity to Comment] and based on our assessment of the differences between the PRC's economy today and the Soviet and Soviet-style economies that were the subject of *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), we preliminarily determine that *the countervailing duty law can be applied to imports from the PRC*. Our analysis is presented in a separate memorandum.[39]

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[35] *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (Dep't of Commerce Dec. 15, 2006) (USA-24).

[36] *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (Dep't of Commerce Dec. 15, 2006) (USA-24).

[37] *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).

[38] *Id.* at 1282.

[39] *Amended Affirmative Preliminary Countervailing Duty Determination*: *Coated Free Sheet Paper from the People's Republic of China:* 72 Fed. Reg. 17,484, 17,486 (Dep't of Commerce Apr. 9, 2007) [hereinafter *CFS Paper Preliminary Determination*] (emphasis added) (USA-25).

43. The analysis referenced in the publication, which is available on Commerce's official website,[40] goes on to explain in detail that Commerce's decision was based on the fact that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s in that it was no longer impossible to identify subsidies there. As Commerce stated:

> In sum, the nature of Soviet-style economies in the mid-1980s made it impossible for the Department to apply the CVD law. To determine that a countervailable subsidy had been bestowed, the Department needed to establish that (a) the NME had bestowed a "bounty or grant" on a producer; and (b) that grant was specific. The Soviet –style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In such a situation, subsidies could not be separated out from the amalgam of government directives and controls.
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> * * *
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> The current nature of China's economy does not create these obstacles to applying the statute. As noted above, private industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. . . . . The role of central planners is vastly smaller. . . . The Department has determined in recent years that many more companies' export activities are independent from the PRC government in comparison with the early-to- mid-1990s.
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> * * *
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> Given these developments, we believe that it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer . . . . Because we are capable of applying the necessary criteria in the CVD law, the Department's policy that gave rise to the *Georgetown Steel* litigation does not prevent us from concluding that the PRC Government has bestowed a countervailable subsidy upon a Chinese producer. [41]

44. In sum, by 2007, producers and exporters in China were sufficiently distinct from the government of China to permit a rational determination that the Government had transferred a subsidy to them. Thus, contrary to China's assertion that the change was a policy decision, Commerce applied its longstanding policy – of not applying the CVD law where it was impossible to so – to the situation in China, which was that it was no longer impossible to apply the CVD law. .

45. On October 25, 2007, Commerce issued an affirmative final determination in the CVD investigation of *CFS Paper* from China.[42] Because the U.S. International Trade Commission

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[40] Memorandum for David M. Spooner from Shauna Lee-Alaia, et al, Countervailing Duty Investigation of Coated Free Sheet Paper from the Peoples's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, Mar. 29, 2007, available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf (USA-26).

[41] *Id.* at 9–10 (emphasis in original) (USA-26).

[42] *Final Affirmative CVD Determination: Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,645 (Dep't of Commerce Oct. 25, 2007) (USA-27).

eventually concluded that imports of *CFS Paper* from China were not injuring the U.S. industry, Commerce did not enter a CVD order against these imports.[43] Consistent with *Georgetown Steel* and the U.S. CIT's affirmation of Commerce's broad discretion, Commerce continued its approach to apply the U.S. CVD law to China.

E. *GPX* Litigation

46. One year later, the U.S. CIT once again had the opportunity to consider whether the U.S. CVD law could be applied to China. Specifically, one of the respondents in a CVD investigation on certain Chinese imports, *GPX*, argued that *Georgetown Steel* prevented the application of CVDs to any country classified as a NME country. The U.S. CIT rejected this assertion 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.[44]

As such, the U.S. CIT found that *Georgetown Steel* should be read as deciding that Commerce's interpretation did not conflict with the statute.[45] Once again, the court of first instance found that Commerce was not prohibited from applying the U.S. CVD law to China. In a subsequent case involving the same parties, the U.S. CIT reaffirmed that "Commerce is not barred by statutory language from applying the CVD law to imports from the PRC . . . ."[46]

47. The parties continued to litigate certain issues before the U.S. CIT regarding the underlying CVD proceeding, mainly on the issue of so-called double remedies alleged to result from the concurrent application of countervailing duties and antidumping duties on imports from NME countries. Once those issues were resolved by the U.S. CIT, the parties appealed those judgments to the U.S. Federal Circuit in *GPX V*. The U.S. Federal Circuit, however, never reached the issue of double remedies, because it concluded that Commerce could not apply the CVD law to China, as long as China was classified as a NME country. The U.S. Federal Circuit

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[43] *See Coated Free Sheet Paper From China, Indonesia, and Korea*, U.S. International Trade Commission, 72 Fed. Reg. 70,892 (Dec. 13, 2007) (USA-29).

[44] *GPX I*, 587 F. Supp. 2d 1278, 1289-90 (Ct, Int'l Trade 2008) (USA-93).

[45] *Id.* at1290 (USA-93). The U.S. CIT denied the plaintiffs' motion for reconsideration on December 30, 2008. *GPX Int'l Tire Corp. v. United States*, 593 F.Supp. 2d 1389 (Ct, Int'l Trade 2008). The court in *GPX I* explained that:

> There is now guidance on how to proceed in such a situation, that is *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). *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 . . . .

GPX I, 587 F. Supp. 2d at 1290 (citations omitted) (USA-93).

[46] *GPX II* at 2–3 (CHI-3).

reasoned that, in "amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that the [CVD] law does not apply to NME countries."[47] In other words, the rationale of the U.S. Federal Circuit was based not on the plain text of the statute – which unambiguously provided that Commerce "shall" apply CVD law to all countries – but rather on the Court's interpretation of the legislative intent of Congress. Such a decision was a misinterpretation of the CVD law[48] and an overbroad interpretation of *Georgetown Steel*, and it was appealed to the full court *en banc* in accordance with the U.S. Federal Circuit's procedural rules.

48. Contrary to the findings of the lower court that the *Georgetown Steel* decision deferred to the discretion of the administering authority, the U.S. Federal Circuit in *GPX V* interpreted *Georgetown Steel* as standing for the proposition that there could never be a country treated as a NME under the AD law in which it would be possible to identify subsidies. The U.S. Federal Circuit concluded that, by remaining silent about the issue when it subsequently amended the CVD law, Congress "legislatively ratified" precisely this overbroad interpretation of *Georgetown Steel.* While the U.S. Federal Circuit did not dispute Commerce's interpretation of the CVD law directly, it rendered Commerce's interpretation of the law irrelevant by relying upon an incomplete selection of legislative history to conclude that Congress had effectively amended the CVD law to override it.

49. The *GPX V* opinion, however, never became final because a "mandate" was not issued. Within the U.S. judicial system, a mandate must be issued before an opinion of the U.S. Federal Circuit has binding legal effect.[49] Pursuant to Rule 41 of the U.S. Federal Rules of Appellate Procedure ("U.S. FRAP"), if no party files an appeal during a specified period, the appellate court will issue a "mandate."[50] If an appeal is timely filed, the mandate is stayed. An opinion of

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[47] *GPX Int'l. v. United States* (*GPX V*), 666 F.3d 732, 739 (Fed. Cir. 2011) (CHI-6).

[48] As explained above, the application of CVDs to subsidized merchandise exported to the United States is mandatory where U.S. petitioners have satisfied the conditions for relief under the statute. The term "country" in the CVD law is not limited to countries with market economies. It refers to all countries. The term "nonmarket economy country" did not appear in the CVD law, so that the classification of a country as a NME, *per se*, country has no necessary consequence under the CVD law. The only statutory consequence of being classified as a NME country is that, in calculating dumping margins, Commerce must base normal value on the nonmarket economy methodology set forth in 19 U.S.C. §1677b(c). Commerce did not conclude (and lacked statutory authority to conclude) that it would never be possible to apply the CVD law to any NME country that might exists at some future date.

[49] *See generally* David G. Knibb, FEDERAL COURT OF APPEALS MANUAL § 34:1 (5th ed. 2007) (USA-64).

[50] U.S.. FRAP Rule 41 (USA-41). Rule 41 of the U.S. FRAP states:

> (a) Contents.
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> Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
>
> (b) When Issued.
>
> The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> (c) Effective Date.
>
> The mandate is effective when issued.

the U.S. Federal Circuit is not final and does not take effect until the mandate issues. It is the issuance of the mandate that, if appropriate, transfers jurisdiction from the appellate court to the first instance tribunal.[51]

50. In the *GPX* litigation, following the issuance of the *GPX V* opinion, the United States filed a petition for rehearing on March 5, 2012. The timely filing of this petition meant that the U.S. Federal Circuit's decision in *GPX V* was not final and appealable. The petition stayed the issuance of the mandate until the petition was either granted or denied. While the petition was pending and prior to the issuance of the mandate, Congress acted to overturn the *GPX V* decision.

F. *GPX* Legislation

51. On March 13, 2012, after the petition for rehearing was filed, but before the U.S. Federal Circuit had a chance to rule on that petition, Congress enacted the *GPX* legislation. The *GPX* legislation not only makes explicit that the CVD law is applicable to NME country exports going forward, but makes explicit that the law had always applied to such exports, as Commerce maintained throughout the *GPX* litigation.

52. Section 1 of the *GPX* legislation, "Application of Countervailing Duty Provisions to Nonmarket Economy Countries," provides that, "In General -- . . . the merchandise on which countervailing duties shall be imposed under [the CVD law] includes [merchandise] from . . . nonmarket economy countr[ies]."[52] The Act excludes from this requirement merchandise from

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> (d) Staying the Mandate.
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> (1) On Petition for Rehearing or Motion.
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> The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.
>
> (2) Pending Petition for Certiorari.
>
> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.
>
> (B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.
>
> (C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

[51] *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.") (USA-75); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came.") (USA-76); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate.")

[52] *GPX* legislation, Section 1 (CHI-1).

a NME country in which Commerce "is unable to identify and measure subsidies . . . because the economy [of the exporting country] is essentially comprised of a single entity." The Act states that this provision applies to "all proceedings initiated under [the CVD law] on or after November 20, 2006 [and to certain other proceedings]."

53. The structure of the legislation closely parallels Commerce's longstanding interpretation of the statute. First, it makes explicit that the general rule that the CVD law applies to imports from all countries includes NME countries. Second, it recognizes the exception to this general rule made by Commerce in the 1980s – that Commerce is not obligated to apply the law where it is "unable" to do so. Finally, the Act explains what is meant by Commerce being "unable" to apply the CVD law to an NME country in language that tracks Commerce's explanation in the CFS Paper investigation.

54. In order to eliminate any doubt that the *GPX V* misread the existing state of the law and therefore should not apply to any current CVD proceeding, the *GPX* legislation explicitly makes these provisions applicable "all proceedings initiated under [the CVD law] on or after November 20, 2006," which corresponds to the date on which the *CFS Paper* CVD investigation was initiated.[53] In short, Congress made it explicit that the U.S. CVD law should be administered in accordance with Commerce's interpretation, not that of the U.S. Federal Circuit in *GPX V*.

55. Several congressmen spoke about the legislation during the floor debate..[54] Together, they made explicit that Commerce had always had the authority to apply the CVD law to NME countries, except where that was impossible. In floor statements, the representatives characterized *GPX V* as "erroneous," "flawed," "wrong[]" or "faulty;"[55] in the words of one representative, *GPX V* was based on a "deeply flawed assessment of Congressional intent," and the legislation was repeatedly described as reaffirming and continuing Commerce's application of CVD law to NMEs.[56]

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[53] *See CFS Paper Initiation* (USA-23).

[54] There was no debate in the Senate, where the bill was passed by unanimous consent.

[55] *See* Cong. Rec. H1166 (Mar. 6, 2012) (USA-44). Mr. Camp stated (at H1167) that "[t]he 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 . . . ." *Id.* at H1167. Mr. Rohrabacher noted 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." *Id*. at H1168. Mr. Critz urged the House "to overturn a flawed court ruling and to ensure that the Department of Commerce can continue to fight unfair subsidies . . . ." *Id.* at H1170. Mr. Dingel characterized the U.S. Federal Circuit's decision as "flawed." *Id.* at H1173.

[56] *See id.* 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." *Id.* at H1167. Mrs. Ellmers stated that the legislation " . . . will ensure that the Department of Commerce can continue to apply [the CVD law] to nonmarket economies . . ." *Id.* at H1169. Mr. Michaud stated that the legislation "will ensure that countervailing duties can continue to be applied to illegally subsidized goods from all countries, including China." *Id.* at H1170. Ms. Lee stated 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 . . . ." *Id*. at H1171. Mr. Gene Green stated 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. . . ." *Id*. at H1173. Mr. Turner stated (at 1173) that the legislation ". . . confirms the Department of

56. Finally, it should be emphasized that the *GPX* legislation does not overturn the decision of the Federal Circuit in *Georgetown Steel*. Quite to the contrary, it confirms Commerce's longstanding interpretation that the CVD law applies to all countries, with the exception, fashioned by Commerce and accepted by the Federal Circuit in *Georgetown Steel*, that Commerce is not required to apply the law where that is impossible.

57. Following the passage of the *GPX* legislation, on May 9, 2012, the U.S. Federal Circuit granted the United States' petition for a rehearing, acknowledging that Congress "sought to overrule our decision in *GPX* [*V*]."[57] The court also agreed that *GPX V* had been overturned before it had become final, explaining:

> This case [*GPX V*] was still pending on appeal when Congress enacted the new legislation, *as our mandate had not yet issued*. … [N]o issue is raised by the fact that our decision in *GPX* had issued prior to enactment of the new legislation because this case remained pending on appeal.[58]

58. The mandate was issued for this decision (*GPX VI*).[59] As such, the U.S. Federal Circuit transferred jurisdiction back to the U.S. CIT to rule on a challenge that the *GPX* legislation was inconsistent with the U.S. Constitution.[60] As such, the U.S. Federal Circuit transferred jurisdiction back to the U.S. CIT to rule on a constitutional challenge raised by the respondents concerning the new legislation.[61]

59. In sum, the opinion of the U.S. Federal Circuit in *GPX V* never became final. As the U.S. Federal Circuit explained, "this case was still pending on appeal when Congress enacted the new legislation, as our mandate had not yet issued."[62] Moreover, the *GPX* legislation ensured that *GPX V* would never have any effect under U.S. law, so that there would have been no basis for an appeal, even if the decision had become final.[63] Accordingly, *GPX V* is not a binding precedent under U.S. law.

Commerce may continue to apply CVDs against unfairly subsidized imports from nonmarket economies like China." (USA-44)

[57] *See GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) ("*GPX VI*")(CHI-7).

[58] *Id.* at 1312 .

[59] *Id.*

[60] *Id.*

[61] *Id.*, 678 F.3d at1313. The U.S. CIT subsequently rejected the constitutional claims raised by the respondents. Contrary to China's assertions, the U.S. CIT in this decision explicitly declined to decide the issue of whether the *GPX* legislation was a "clarification" or "change" of the law, noting that the Federal Circuit had not done so. Thus, there is no judicial authority to the contrary of Commerce's interpretation that the CVD law has always applied to exports from any country, except in countries where it is impossible to identify a subsidy.

[62] *Id.* at 1312, citing *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (USA-71); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (USA-97).

[63] In U.S. legal terminology, there was no remaining "case or controversy" to support an appeal to the Supreme Court. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (federal courts restricted to "the resolution of cases and controversies") (USA-45).

60. As part of the ongoing *GPX* litigation, the U.S. CIT recently rejected in *GPX VII* the argument that respondents were deprived of their due process right by Commerce's decision to apply the U.S. CVD law to NME countries. The court stated:

> At a minimum, the parties here had notice at the time of an affirmative preliminary determination [in 2007] that Commerce would subject their imports entered thereafter to full trade remedy duties, because that is exactly what Commerce did.[64]

61. At a minimum, the *GPX* litigation evidences a conflict in the interpretation of the law previous to the *GPX* legislation. While Commerce's clear interpretation of the U.S. CVD law was upheld by several judicial tribunals, the U.S. Federal Circuit issued a different interpretation in *GPX V* based on its reading of Congressional intent. Recognizing the court's mistake, Congress acted quickly to resolve the ambiguity and to make clear the requirements of the law before the *GPX V* opinion could take effect. Such actions have been found to be in accordance with U.S. due process requirements and likewise meet the United States' WTO obligations.

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

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

63. As an initial matter, China has failed to make a *prima facie* case that Section 1 of the *GPX* legislation is a measure of the type listed in Article X:1 of the GATT 1994. Even assuming *arguendo* that China could meet its burden of argument, China's claim fails as a factual matter. The *GPX* legislation was published the same day it was enacted. It could not have been published more promptly. Further, the *GPX* legislation was published in a manner as to enable China and Chinese traders to become acquainted with it, and thus complies with the Article X:1 obligation regarding the manner of publication.

64. Finally, China argues – without any textual basis – that Article X:1 of the GATT 1994 must be read as to prohibit a measure from touching on events that have occurred prior to the publication of the measure. This argument is without merit. Article X:1 of the GATT 1994 and does not address the substantive content of measures, but rather their publication so as to provide notice to governments and traders.

A. China Has Failed to Make a *Prima Facie* Case

65. As an initial matter, China fails to state which of the categories listed in Article X:1 of the GATT 1994 is applicable to the *GPX* legislation. Specifically, measures of general application

[64] *GPX VII* at 25 (CHI-8).

under Article X:1 of the GATT 1994 must "pertain[ ] to 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." Without satisfying this threshold issue, China's claims under Article X:1 of the GATT 1994 must fail.

66. Even assuming *arguendo* that the *GPX* legislation may pertain to one of these categories, China has failed to demonstrate that the United States acted inconsistently with its obligations under Article X:1 of the GATT 1994.

B. Section 1 of the *GPX* Legislation Was Published Promptly in Accordance With Article X:1 of the GATT 1994

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

68. China's argument is based on an unsupportable reading of Article X:1. In particular, China argues that "the United States acted inconsistently with Article X:1 of the GATT by failing to publish section 1 of [the *GPX* legislation] 'promptly' in relation to its effective date of 20 November 2006."[65] This argument departs from the plain text – nowhere does Article X:1 of the GATT 1994 mention an "effective date" of the measure. More fundamentally, China misses the point of Article X:1 of the GATT 1994. As discussed below, Article X:1 of the GATT 1994 imposes procedural obligations regarding the publication of certain measures. It does not, as China proposes, impose substantive obligations about how a measure may apply to particular situations that occurred in the past.

69. A number of elements of Article X:1 of the GATT 1994 makes this clear.[66]

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[65] China First Written Submission, para. 66.

[66] Article X:1 of the GATT 1994 states:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to 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, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

70. First, the starting point of Article X:1 of the GATT 1994 is that it applies to "laws, regulations, judicial decisions, and administrative rulings of general application" pertaining to certain enumerated subjects. At the risk of stating the obvious, these law, regulations, etc. must be in existence for Article X:1 of the GATT 1994 to apply.

71. In addition to the requirement that the laws, regulations, judicial decisions, and administrative rulings of general application be in existence, Article X:1 of the GATT 1994 only applies if these types of measures have been "made effective by any [Member]." This "made effective" clause is a limitation on Article X:1 of the GATT 1994 – that is, it excludes from the scope measures that may be in existence, but have not been made effective by a Member. Also, the past tense of the term "made effective" shows that the obligation in Article X:1 of the GATT 1994 applies to measures that have been adopted at some point in the past.[67] The "made effective" clause cannot be read, as China implies, as some sort of additional, substantive obligation to the effect that measures of general application must not apply to past factual situations.

72. Although the text is clear on its face, the United States notes that a prior panel has addressed a similar issue. Namely, the panel in *EC – IT Products* took note of the Appellate Body's observations of the term "made effective" in the context of Article XX(g) of the *GATT 1994*. It stated that "the ordinary meaning of 'made effective' thus indicates that a measure is 'made effective' when it is 'operative' and, following the Appellate Body's reasoning, operative means either 'in force' or 'come into effect'."[68]

73. Similarly, in considering the term "made effective" in the context of Article XX(g) of the *GATT 1994*, the Appellate Body observed that:

> The word "effective" as relating to a legal instrument is defined as "in operation at a given time". We consider that the term "made effective", when used in connection with a legal instrument, describes measures *brought into operation, adopted, or applied*. The Spanish and French equivalents of "made effective" — namely "se apliquen" and "sont appliquées" — confirm this understanding of "made effective".[69]

[67] China states in its submission that "[w]hile Article X:1 does not specify a period of time that must elapse between publication of the measure and when it takes effect, in no event can publication be considered 'prompt' if it takes place *after* the measure has taken effect." China First Written Submission, para. 64. China's statement is plainly at odds with the text of Article X:1 of the GATT 1994, since a measure must be made effective in order for the obligation even to apply.

[68] *EC – IT Products*, para. 7.1045 (discussing *US – Gasoline* (AB), p. 19). The Appellate Body in *US – Gasoline* observed that it: "considers that the basic international law rule of treaty interpretation … that the terms of a treaty are to be given their ordinary meaning, in context, so as to effectuate its object and purpose, is applicable here, too. Viewed in this light, the ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation - may be seen to refer to such measure being "operative", as "in force", or as having "come into effect."

[69] *China – Raw Materials (AB)*, para. 356 (emphasis added).

Thus, the ordinary meaning of "made effective" confirms that the "made effective" clause in Article X:1 of the GATT 1994 is aimed at limiting the application of Article X:1 of the GATT 1994 to measures which have been adopted or brought into operation.

74. Once a measure of general obligation falls within the scope of Article X:1, the article imposes two obligations on the Member that has adopted the measure: the measure must be published (i) "promptly" and (ii) "in such a manner as to enable governments and traders to become acquainted with [it]." The United States will first address the "promptly" requirement, and – because China also raises an issue as to the "manner" of publication – will address the "manner of" publication below.

75. The plain meaning of "promptly" is "[i]n a prompt manner; without delay."[70] Because the starting point of Article X:1 of the GATT 1994 is the existence of a measure of general application, the timing issue of "promptness" or "delay" must be considered in relation to the time when the measure has come into existence and been made effective. Therefore, under the plain text of Article X:1 of the GATT 1994, a measure cannot be found to be inconsistent with the prompt publication obligation if the Member publishes the measure as soon as the measure comes into existence. It would not be possible to publish the measure with any less delay.

76. China proposes to reinterpret Article X:1 of the GATT 1994 not as a procedural requirement on publication, but instead as a substantive obligation. China's argument, however, cannot be squared with the plain text of Article X:1 of the GATT 1994.

77. On the undisputed facts of this dispute, China presents no basis for a finding that the *GPX* legislation was not published promptly. Indeed, China itself states that:

> On 6 and 7 March 2012 the House and Senate, respectively, passed Public Law 112-99, "An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". The bill was signed by President Obama on 13 March 2012 and officially published on the same date.[71]

78. Given that, as China agrees, the *GPX* legislation was published on the same day that it came into existence, China has no basis for any claim that the measure was not published "promptly" under Article X:1 of the GATT 1994.

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[70] *The New Shorter Oxford English Dictionary* at 608 (1993). *See EC – IT Products*, para. 1074 (USA-79).

[71] China First Written Submission, para. 46 (emphasis added). In the footnote to paragraph 46, China states that "P.L. 112-99 was officially published as a 'slip law' on 13 March 2012. Under U.S. law, a slip law is an official publication and constitutes legal evidence of its enactment. See 1 U.S.C. § 113. Slip laws are later compiled into United States Statutes at Large, the bound version of enacted U.S. statutes." *Id.*

C. Section 1 of the *GPX* Legislation was Published in Such a Manner As to Enable Governments and Traders to Become Acquainted with It in Accordance With Article X:1 of the GATT 1994

79. China argues that "the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries."[72] The plain meaning of "manner" is "the way in which something is done, the mode or procedure."[73] Accordingly, the obligation in Article X:1 with regard to the "manner" of publication involves how the measure is published, not the timing of publication. (The timing issue, as discussed above, is addressed by the requirement that a measure be published "promptly.")

80. China has presented no basis for a claim that the U.S. publication of the *GPX* legislation was inconsistent with the obligation in Article X:1 of the GATT 1994 regarding the manner of publication. In fact, the *GPX* legislation was published in the *United States Statutes at Large*, on the same day it was enacted. The *United States Statutes at Large* is readily available to China, Chinese traders and other members of the public.[74] Accordingly, the publication of the *GPX* legislation met the Article X:1 of the GATT 1994 obligation regarding the manner of publication.

D. Article X:1 of the GATT 1994 Does Not Address How a Measure Should be Applied Following Publication

81. Notwithstanding a lack of any textual basis, China is apparently arguing that Article X:1 of the GATT 1994 acts as a substantive obligation on the content of a measure. In particular, China argues that Article X:1 must be read so as to prohibit a measure from touching on events that have occurred prior to the publication of the measure.[75] China argument skips over any textual support, and instead relies on the theory that the panel must recognize some sort of general proposition that Members cannot adopt measures that relate to situations that occurred in the past.

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

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[72] China First Written Submission, para. 65.

[73] *The New Shorter Oxford English Dictionary* at 950 (1993) (USA-80).

[74] P.L. 112-99, 126 Sta. 265 (Mar. 13, 2012), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ99/pdf/PLAW-112publ99.pdf (CHI-1) .

[75] China First Written Submission, para. 64 (E.g., China states in its submission that "[w]hile Article X:1 does not specify a period of time that must elapse between publication of the measure and when it takes effect, in no event can publication be considered "prompt" if it takes place *after* the measure has taken effect."(emphasis in original)).

"retroactivity," and then use that supposed principle as a basis for reaching an untenable interpretation.

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

84. In fact, Article X:1 of the GATT 1994 itself recognizes that measures may affect events that occurred prior to the publication of a measure. For example, Article X:1 of the GATT 1994 applies to "judicial decisions and administrative rulings of general application." Such decisions and rulings necessarily impose legal consequences on past events, as an action must first have occurred before a judicial or administrative tribunal is able to evaluate the legality of such actions.

85. Similarly, the second sentence of Article X:1 of the GATT 1994 recognizes that a measure may be in effect before the time of publication. The second sentence of Article X:1 provides that "[a]greements affecting international trade policy which *are in force* between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published." A plain reading of this clause indicates that the drafters contemplated the fact that agreements may already have been in force prior to the treaty obligation and already have affected past events.

86. Looking further afield than the text of Article X:1 of the GATT 1994, the application of legal obligations to previous actions is embodied in international law and the parties' own legal systems.

87. With respect to international law, Article 28 of the *Vienna Convention on the Law of Treaties* states that treaty obligations may be enforced to acts or facts retroactively if such "intention appears from the treaty or is otherwise established."[76] The Appellate Body has found that Article 28 is a general principle of international law.[77] Thus, treaties concluded between sovereign nations may enter "into force" on a given date, but may apply to facts or events that occurred previous to the treaty's entry into force.

88. For example, a memorandum of understanding ("MOU") between the United States and China entered into force in January 1992.[78] Article 2 of the MOU, however, granted administrative patent protection for certain U.S. companies who were denied such protection for the period "after January 1, 1986 and before January 1, 1993."[79] Thus, even though the MOU did

[76] Vienna Convention on the Law of Treaties, Art. 28.

[77] *Brazil – Desiccated Coconut*, p. 14; *EC – Hormones*, para. 128; *EC – Sardines*, para. 200.

[78] *Memorandum of Understanding Between the Government of the People's Republic of China and the Government of the United States of America on the Protection of Intellectual Property* (Jan. 1, 1992) (USA-48).

[79] *Id.*, Art. 2 (emphasis added) (USA-48). In full, Article 2 states:

> Both Governments reaffirm that the principle of territoriality and independence of patents with regard to protection of patents as provided in the Paris Convention for the Protection of Industrial Property should be respected.

not enter into force until January 1992, the provisions within the MOU were applicable to facts that occurred years prior to the MOU's conclusion.

89. With respect to domestic law, both the legal systems of, for example, the United States and China allow for the adoption of laws that apply to past events. In the United States, this class of legal issues is often called "retroactivity, and U.S. law does not contain a general prohibition on the retroactive application of measures.[80] Similarly, China's legal system allows for the application of laws, regulations and other measures to previous actions.[81]

> The Chinese Government agrees to provide administrative protection to U.S. pharmaceutical and agricultural chemical product inventions which:
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> > (i) were not subject to protection by exclusive rights prior to the amendment of current Chinese laws;
> >
> > (ii) *are subject to an exclusive right to prohibit others from making, using or selling it in the United States which was granted after January 1, 1986 and before January 1, 1993*;
> >
> > (iii) have not been marketed in China.
>
> The owner of the exclusive right in the United States regarding such a product invention that meets the above requirements shall provide the competent Chinese authorities with an application for administrative protection including the following documents:
>
> > (1) a copy of the certificate issued by the competent authorities of the United States granting such exclusive right;
> >
> > (2) a copy of the document issued by the competent authorities of the United States for the approval for manufacturing or sale of such product; and
> >
> > (3) a copy of a contract for the manufacture and/or sale entered into between the owner of the exclusive right and a Chinese legal person (including foreign capital enterprises, joint venture enterprises, or cooperative enterprises) with respect to the manufacture and/or sale of the product in China.
>
> The competent Chinese authorities will, in accordance with published Chinese laws and regulations relating to obtaining manufacturing or marketing approval, examine such application. No special rules or additional requirements for approval will be imposed. After examination and approval, which shall occur promptly, a certificate for administrative protection, which will provide the right to manufacture or sell the subject product, will be issued to the person seeking such protection. The competent Chinese authorities will prohibit persons who have not obtained a certificate for administrative protection from manufacturing or selling the subject product during the term of administrative protection. The term of administrative protection begins from the date on which the certificate for administrative protection of the product is obtained and remains in force for seven years and six months. The above administrative protection will become available on January 1, 1993.

[80] *See Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22 (D.D.C. 1998) (USA-58). In *Thomas*, a trial court held that the National Science Foundation and its private contractor, Network Solutions, Inc., lacked authority to charge a registration fee to entities who registered Internet domain names. Within weeks of the district court's decision, Congress enacted corrective legislation designed to ratify the federal agency's previous actions. The legislation (§ 8003 of the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, Pub.L. No. 105-174, 112 Stat. 58) confirmed that registration fees collected between September 14, 1995 and March 31, 1998 were, in fact lawful "as if the same had, by prior Act of Congress, been specifically authorized and directed." *See also United States v. Heinszen*, 206 U.S. 370 (1907) (the U.S. Supreme Court upheld a 1906 Act of Congress that ratified the collection of duties in certain U.S.-controlled territories from 1898-1902) (USA-59); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974) (upholding the retroactive application of Interest Equalization Act of 1964, signed into law September 2, 1964, with an effective date of July 18, 1963) (USA-60); *Canisius College v. United States*, 799 F.2d 18 (2d Cir.

90. Although the sources of law on this issue are virtually endless, the above discussion should more than suffice to refute any proposition put forward by China that there exists some general principle of law that forbids, as China puts it, the "retroactive" application of measures. Moreover, as noted at the outset of this section, China's argument under Article X:1 of the GATT 1994 is flawed because China has no textual basis for asserting that the publication requirement in Article X:1 of the GATT 1994 imposes an obligation concerning the substantive content of measures. Article X:1 is, as the title to Article X ("Publication … of Trade Regulations") suggests, concerned with the prompt publication of certain measures, not with regulating their content.

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

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

92. To evaluate the scope of Article X:2 of the GATT 1994 for the purpose of this dispute, it is helpful to break these requirements into two parts. First, the measure of general application must be of the general type covered in Article X:2, namely, a measure effecting a duty rate or other charge on imports under an established and uniform practice, or imposing a requirement, restriction or prohibition on imports.

93. Second, the measure must be one that departs in a particular way from some prior measure of general application, that is, the measure must effect *an advance in* a duty rate or other charge on imports under an established and uniform practice, or impose a *new or more burdensome* requirement, restriction or prohibition on imports.

94. As explained in Section A below, China has not established that a measure involving countervailing duties falls within the general type of measure covered by Article X:2 of the GATT 1994. And as explained in Sections B and C below, given that the *GPX* legislation made no change in Commerce's application of countervailing duties, China cannot show that measure

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1986) (1984 provision retroactively affects approximately a four-year period, from the 1980 tax year in issue, to the year of the provision's enactment) (USA-61).

[81] Specifically, Article 84 of the Legislation Law of the People's Republic of China provides:

> Laws, administrative regulations, local regulations, autonomous regulations, separate regulations and rules shall not be retroactive, *but the regulations formulated specially for the purpose of better protecting the rights and interests of citizens, legal persons and other organizations are excepted*.

Legislation Law of the People's Republic of China, Presidential Order No. 31 (Mar. 15, 2000) (emphasis added) (USA-62). For example, in the trade remedies context, China is considering whether to apply duties to entries made prior to the initiation of an antidumping duty investigation of polysilicon imports from the United States, the European Union and Korea, as well as in the parallel countervailing duty investigation on such imports from the United States and the European Union. Li Jiabao & Du Jian, *Probe Launchd into polysilicon Imports*, CHINA DAILY (Nov. 27, 2012) (USA-63).

either effected *an advance in* a rate of duty under an established or uniform practice (Section B), or *a new or more burdensome* requirement, restriction, or prohibition on imports (Section C).

95. Finally, as addressed in Section D below, even aside from the fact that China has not demonstrated the *GPX* legislation falls within the scope of Article X:2 of the GATT, China has also not established that the measure was enforced before it was officially published.

96. Before turning to the substance of China's Article X:2 claim, it is useful to provide a general comment on the relationship between this dispute under the WTO Agreement and litigation in U.S. courts. In its first submission, China essentially repeats the arguments on "retroactivity" as presented in the *GPX* domestic litigation – in particular, the exporters in domestic litigation have argued that Commerce acted *ultra vires* pursuant to U.S. domestic law in applying the U.S. countervailing duty laws to NME imports.[82] These arguments are matters of U.S. domestic law; China has not and cannot show that they are somehow relevant or transferable to questions concerning obligations under Article X:2 of the GATT 1994.

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

A. China Has Failed to Make a *Prima Facie* Case that the *GPX* Legislation is the General Type of Measure Covered By Article X:2 of the GATT 1994.

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

99. Although it is China's burden to present its case in the first instance, the United States notes that it is difficult to understand how China would intend to try to fit the *GPX* legislation within the scope of Article X:2 of the GATT 1994. First, laws involving CVDs do not "effect a an advance in a rate of duty or other charge on imports under an established and uniform practice." Unlike, for example, an ordinary customs duty, countervailing duties do not "effect"

[82] *See e.g., GPX II* (CHI-3).

(which means to "bring about" or "produce")[83] any particular "rate" or level of a CVD duty under established or uniform practice, unlike a customs tariff which sets out rates of duty. In contrast, CVD laws describe a process for determining a special CVD duty, and CVD laws themselves do not bring about or produce any particular duty rate.

100. Second, China fails to establish that the *GPX* legislation imposes a "requirement, restriction or prohibition" under Article X:2 of the GATT 1994. Rather, China asserts that the *GPX* legislation "'impos[es] a new or more burdensome requirement, restriction or prohibition on imports' in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties."[84] China's argument assumes the conclusion, and fails to explain how the *GPX* legislation imposes a requirement, restriction, or prohibition. Indeed, requirements, restrictions and prohibitions are different types of measures, and China fails even to explain which of these three China believes apply to the *GPX* legislation.

101. In short, for the reasons set out above, China has failed to make a *prima facie* case that the *GPX* legislation falls within the general type of measure covered by Article X:2 of the GATT 1994.

B. Section 1 of the *GPX* Legislation Does Not Effect An Advance in a Rate of Duty or Other Charge on Imports Under An Established and Uniform Practice

102. Even if China were to prove that the *GPX* legislation was of the general type of measure that effects a duty rate or other charge on imports under an established and uniform practice, China has not shown, and cannot show, that the *GPX* legislation effects **an advance in** a rate of duty or other import charge under an established and uniform practice.

103. China argument – that *GPX* legislation falls within the scope of Article X:2 of the GATT 1994 "in so far as it makes certain categories of imports potentially subject to the imposition of countervailing duties"[85] – is without merit. First, legislation relating to the application of the CVD law does not itself change or effect the "rate" of duty or other import charge, much less an "advance in a rate" of duty. Second, contrary to China's theory that the GPX legislation could effect an advance in the rate of duty because it *changed* the applicability of CVDs, as discussed above in Part II, the *GPX* legislation maintains the *status quo* on procedures relating to the application of CVDs to NME countries. Thus, the *GPX* legislation did not, as China puts it, make imports from NME countries *potentially* subject to the imposition of countervailing duties; these imports were *already* subject to the imposition of countervailing duties well prior to the adoption of the *GPX* legislation.

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[83] In this context, it is important to distinguish the different verb "affect" – which is not used in Article X:2. If the drafters had used the verb "to affect" (meaning "to influence"), Article X:2 of the GATT 1994 may have covered a broader range of measures.

[84] China First Written Submission, para. 76.

[85] *Id.*

104. In *EC – IT Products*, the panel observed that "'effecting an advance in a rate of duty' means that the [ ] amendments at issue are of a type that 'bring about' an 'increase' in a rate of duty."[86] The panel further explained that "it must be shown that the measure goes beyond mere influence and there must be a demonstrable link between the measures at issue and the advance."[87] The panel found that such an effect had occurred when a change in tariff classification resulted in certain goods becoming dutiable where they once were duty-free.[88] In other words, consistent with the plain text of Article X:2 of the GATT, the panel found that a covered measure must necessarily change an existing practice to bring about an increase in a rate of duty.

105. In this proceeding, Section 1 of the *GPX* legislation did not change the existing manner in which Commerce applied the U.S. CVD law to NME countries. Dating back to the determinations from the 1980s involving imports from the Soviet-bloc countries, Commerce has acknowledged that the U.S. CVD law applied to NME imports, but refrained from doing so given the inherent difficulties in identifying and measuring subsidies in those centralized command-and-control economies. By 2006, Commerce recognized that China was sufficiently distinct from such economies to permit the identification and measurement of countervailable subsidies.

106. Because there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports, Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty. Rather, Section 1 of the *GPX* legislation is Congress' statement on an existing Commerce approach.[89] Congress enacted the *GPX* legislation to end the longstanding judicial litigation regarding whether Congress intended the U.S. CVD law to apply NME countries in cases where subsidies can be identified. The *GPX* legislation confirmed that Commerce had legal authority to apply the CVD provisions of the Tariff Act of 1930 to imports from China and thus ratified Commerce's application of those provisions to China with respect to the challenged CVD measures.

107. Such an affirmation is fundamentally different than a law that changes the tariff classification or rate of a group of goods, such as what was described in *EC – IT Products*. The Oxford English Dictionary defines "rate" as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation."[90] Section 1 of the *GPX* legislation imposes no such change, advance or decrease, in the total quantity, amount or sum of CVDs. The rate remains the same as previous to the enactment of Section 1 of the *GPX* legislation.

108. Further, China's argument ignores the requirement under Article X:2 of the GATT 1994 that the initial duty rate (that is, prior to the "advance" in the rate, there must have been "an

[86] *EC – IT Products*, para. 7.1107.

[87] *Id.*, para. 7.1105.

[88] *EC – IT Products*, para. 7.1110.

[89] The legislative record states that "Commerce has always had the authority to apply countervailing duties to nonmarket economies such as China." 158 Cong. Rec. H1167 (USA-44).

[90] *The New Shorter Oxford English Dictionary* at 2481 (1993) (USA-51) (emphasis in original).

established and uniform practice."). Even if the *GPX* legislation could be considered as modifying U.S. law (which it did not), it could never be said that the situation prior to the *GPX* legislation could be described as an "established and uniform practice" not to apply CVDs to imports of China. To the contrary, as explained above, the established and uniform practice since at least 2006 was to apply CVDs to China. Moreover, even before that time, Commerce maintained procedures for applying the U.S. CVD law to any country where a countervailable subsidy (or bounty or grant) could be determined. Thus, China has not provided any basis for a finding that there existed duty rate under an established and uniform practice" which involved the non-application of CVD's to China.

109. In sum, China has provided no basis for a finding that the *GPX* Legislation effected an advance in a duty rate or other charge on imports as compared to the duty rate under an established and uniform practice.

C. Section 1 of the *GPX* Legislation Does Not Impose a New or More Burdensome Requirement, Restriction or Prohibition on Imports, or on the Transfer of Payments Therefor

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

111. Article X:2 of the GATT 1994 provides that the requirement, restriction or prohibition on imports must be "new" or "more burdensome." The Oxford English Dictionary defines "new" as "[n]ot existing before; now made or existing for the first time."[91] The term "more" as a modifier of an adjective is defined as "[i]n a greater degree; to a greater extent."[92] Thus, in order to fall within the scope of Article X:2, imports from China must face a requirement, restriction or prohibition that was not previously applied, or must have faced a burden of a greater degree or extent.

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

113. Though challenged on a number of occasions as being *ultra vires*, Commerce's decision was upheld by a number of U.S. courts. In one of those domestic cases (*CFS Paper),* China also alleged that *Georgetown Steel* prohibited Commerce from applying the U.S. CVD law to NME countries. The U.S. CIT rejected such assertions, stating "the *Georgetown Steel* court did not go

[91] *The New Shorter Oxford English Dictionary* at 1912 (1993) (USA-52).

[92] *The New Shorter Oxford English Dictionary* at 1829 (1993) (USA-53).

as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs. Rather, the *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."[93]

114. Particularly as a party to that domestic case, it is hard to understand how , China could claim that it was unaware that Commerce had the authority to apply the U.S. CVD law to China, or that the *GPX* legislation somehow changed the treatment accorded to imports from China.

115. Instead, China relies on the fact that five years following this decision and numerous CVD proceedings later, the U.S. Federal Circuit issued a contradictory opinion based on legislative silence. The only effect of this opinion, which was not final, was to provide China notice that the state of the relevant U.S. CVD law was unsettled. But as the U.S. CIT explained in assessing the impact of the *GPX V* opinion, passage of the *GPX* legislation removed any uncertainty and maintained the *status quo*: "At a minimum, the parties here had notice at the time of an affirmative preliminary determination that Commerce would subject their imports entered thereafter to full [AD and CVD] trade remedy duties, because that is exactly what Commerce did."[94] Section 1 of the *GPX* legislation does not impose any "new or more burdensome" requirements, restrictions or prohibitions. Rather, it maintains Commerce's existing approach.

116. For the above reasons, China has failed to prove that the *GPX* legislation is a "new or more burdensome" requirement, restriction or prohibition on imports under Article X:2 of the GATT 1994.

D. China Has Not Proved that the *GPX* Legislation Breaches the Obligation in Article X:2 of the GATT 1994

117. Given that the *GPX* legislation resulted in no change in the treatment of imports from China, and no change in U.S. law, the United States submits – as explained above – that the *GPX* legislation is not a measure covered by Article X:2 of the GATT 1994. Nonetheless, the United States also notes that China has failed to show that the *GPX* legislation is inconsistent with the obligation set out in Article X:2 of the GATT 1994.

118. To recall, Article X:2 of the GATT 1994 states that no measure of general application that falls within its scope "shall be enforced before such measure has been officially published." China has not explained precisely how it views the *GPX* legislation as breaching this obligation.

119. Although the United States is not in a position to respond to an argument that China has not made, the United States notes that the facts in this case do not support a contention that the *GPX* legislation is inconsistent with this obligation. In particular, the *GPX* legislation was

[93] *Gov't of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (SA-28).
[94] *GPX VII* at 25 (CHI-8).

officially published on its date of adoption, March 13, 2012. And Commerce took no action prior to that date to enforce the measure.

120. Instead of addressing the specific language of the WTO provision and the facts of this dispute, China primarily relies on the Appellate Body's findings in *US – Underwear* to support a general proposition that Article X:2 of the GATT 1994 "precludes retroactivity."[95] China's approach fails for a number of reasons. First, citation to a prior Appellate Body report does not substitute for the application of the specific language in Article X:2 of the GATT 1994 to the specific facts in this dispute. Second, a discussion focused on the general concept of "retroactivity" does not lead to any conclusion with respect any specific issue under the WTO Agreement. "Retroactivity" is not a term used anywhere in the GATT 1994. And, it is a concept that could cover a wide range of different factual patterns. Moreover, as noted in Part IV above, there is no general principle of law that prohibits the application of measures to events that occurred prior to the adoption of the measure.

121. Third, and finally, China misrepresents the Appellate Body findings in *US -Underwear*. Before addressing China's errors, it is important to set out a summary of that dispute. *U.S. – Underwear* involved a safeguard taken under the *Agreement on Textiles and Clothing* (ATC). The panel had found the safeguard breached a number of WTO obligations, including that the United States breached its WTO obligations by applying the safeguard to imports that entered after the March 1995 consultations under the ATC, but prior to the June 1995 adoption of the measure. Although the panel found in Costa Rica's favor, Costa Rica disagreed with a panel finding that the United States could have begun applying the safeguard in April 1995 (at the time a notice of consultations was published), and prior to the June 1995 adoption. Accordingly, Costa Rica appealed the issue to the Appellate Body, arguing that the safeguard could not apply to any imports prior to the June 1995 adoption of the measure.

122. The Appellate Body upheld Costa Rica's appeal. However, what China fails to point out is that, although the Appellate Body discussed both the relevant ATC provisions and Article X:2 of the GATT 1994, the Appellate Body's ruling in favor of Costa Rica was based on the ATC provision (and not Article X:2 of the GATT 1994). In fact, the Appellate Body rejected the argument that Article X:2 precluded the application of the safeguard to imports that entered prior to the June 1995 adoption of the measure.

123. China's discussion of the Appellate Body report omits the crucial distinction between findings made under the ATC, and those under Article X:2 of the GATT 1994. Most importantly, China fails to mention that the Appellate Body stated in *US – Underwear* that ""we

[95] China First Written Submission, para. 72. China also references a panel statement in *US - OCTG* that Article X:2 "precludes retroactive application of a measure." China First Written Submission, para. 69. It is unclear how the panel came to this conclusion, as it did not undertake any analysis of the treaty obligation before declaring:

> Obviously, since Article X:2 precludes **retroactive** application of a measure, compliance with this obligation, and thus questions of alleged violation, will depend on the timing of the publication of a measure, and its enforcement in particular circumstances affecting the rights of WTO Members.

US – OCTG, para. 7.181 (emphasis in original). The panel's statement is also at odds with the Appellate Body's clear interpretation of Article X:2 of GATT 1994.

are bound to observe that Article X:2 of the General Agreement, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure." Similarly, China asserts that "Article X:2 reflects what the Appellate Body has referred to as a 'presumption of prospective effect'."[96] The Appellate Body report, however, does not ascribe such a presumption to Article X:2 of the GATT 1994. To the contrary, the Appellate Body found this presumption based on the specific text of the ATC article at issue in the dispute.[97] In short, given that the current dispute involves neither a safeguard, nor claims under the ATC, the Appellate Body finding in *U.S. – Underwear* does not support China's claims.

124. For the above reasons, China has failed to prove that the *GPX* legislation (if somehow found to be within the scope of Article X:2) is inconsistent with obligation not to enforce prior to the date of official publication.

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

125. China's claim under Article X:3(b) of the GATT 1994 has no basis either in the text of the WTO Agreement, or in the facts in this dispute. China summarizes its claims as follows: "the Panel should treat decisions of U.S. courts as definitive statements of the meaning of U.S. law."[98] There are two fundamental problems with this argument. First, as discussed in Section A below, it is not based on the text of Article X of the GATT. Second, it is based on a faulty factual premise that the *GPX V* opinion was a final judicial decision on the meaning of U.S. law. As discussed in Section B below, to the contrary, *GPX V* was not a final decision (and was under appeal), and has no legal effect under the U.S. legal system.

A. China's Claim is Not Based on the Obligations Set Out in Article X:3(b) of the GATT 1994

126. China's claim under Article X:3(b) of the GATT 1994 is not based on the obligations set out in the text of the provision; accordingly, China has not presented a valid claim under Article X:3(b) of the GATT 1994.

127. China apparently would interpret Article X:3(b) of the GATT 1994 to require an administrative agency to change its practice each and every time a judicial body issues some sort of statement on the meaning of domestic law. Although Article X:3(b) of the GATT 1994 is generally addressed to the interaction between administrative agencies and judicial, arbitral and administrative tribunals, Article X:3(b) of the GATT 1994 does not contain such a requirement. Rather, it contains specific language with specific obligations; China has not shown, and cannot show, any breach of Article X:3(b) of the GATT 1994.

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[96] China's First Submission, para. 69.

[97] *US-Underwear (AB)*, p. 14 ("a presumption arises from the very text of Article 6.10 [of the ATC] that such a measure may be applied only prospectively.")

[98] China First Written Submission, para. 59.

128. Fundamentally, Article X:3(b) of the GATT 1994 sets forth requirements for the review of administrative actions. In relevant part, Article X:3(b) of the GATT 1994 prescribes the following three requirements:

i. The maintenance of judicial, arbitral or administrative tribunals or procedures;
ii. Such tribunals or procedures must be independent of the agencies entrusted with administrative enforcement; and
iii. The decisions of such tribunals 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 within a prescribed time period.

129. China has no basis for a claim that the *GPX* legislation breached any of these obligations. Under part (i), China is not challenging part the fact that the United States maintains appropriate judicial tribunals or procedures. Under part (ii), China does not challenge that such tribunals and procedures are independent of Commerce. China purports to raise a claim under part (iii), but its claim ignores the relevant text of the GATT 1994. In particular, China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government" is incompatible with part (iii).[99] The text, however, contains no such statement. Further, China argues that the United States breached Article X:3(b) by "failing to ensure" that a non-final decision of one court (*GPX V*, issued by the Federal Circuit) was implemented and that it governed the practice of Commerce. Where, as here, the record shows a series of judicial decisions, China has no basis for claiming that one of those decisions (and a non-final one that is under appeal) must govern the agency practice.[100]

130. Indeed, Article X:3(b) of the GATT 1994 expressly recognizes that an agency need not implement a judicial decision that is under appeal: it states that judicial decisions be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period."[101] Further, this language recognizes the fact that Members may want to provide for an appeal from the decisions of first instance tribunals.

131. The United States also notes that China's arguments under its Article X:3(b) of the GATT 1994 claim – like other arguments of China in this dispute – are based not on the text of the relevant WTO the provision, but instead on other vague or irrelevant legal concepts. With respect to its Article X:3(b) claim, China's arguments are based on "general principles of due process" and the "nature of judicial review," at least in part as those legal concepts are reflected in the U.S. legal system[102] However, the issue in WTO dispute settlement is the consistency of a Member's measures with specific provisions the WTO Agreement. And, as the panel in *US - Stainless Steel Plate* noted, Article X of the GATT 1994 is not 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; that is a function reserved for each member's domestic judicial

[99] China First Written Submission, para. 85. *See id.*, paras. 100-101.

[100] China First Written Submission, Part VI.D.

[101] Article X:3(b) of the GATT 1994 (emphasis added).

[102] China First Written Submission, paras. 101, 102.

system, and a function WTO panels would be particularly ill suited to perform.[103] As noted by the *Stainless Steel Plate* panel, it is for this reason that Article X:3(b) of the *GATT 1994* requires Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.[104]

132. In addition, as part of its argumentation, China asks this Panel to accept China's view on the proper relationship between U.S. administrative agencies, the U.S. national legislature, and the U.S. Federal Circuit)(a part of the U.S. judicial branch), and to find a breach of Article X:3(b) of the GATT 1994 if – in China's view – the history of the *GPX* matter does not meet China's expectations. China's argument, however, has no merit – the plain text of Article X:3(b) of the GATT 1994 contains no such obligations.[105]

133. In sum, nothing in the text of Article X:3(b) requires an agency in a Member to implement a non-final judicial decision that is under appeal. Accordingly, China has presented no basis for a claim of a breach of Article X:3(b).[106]

B. China's Argument Under Article X:3(b) of the GATT Has No Merit Because it is Based on The Incorrect Factual Premise that *GPX V* Opinion Was a Final Decision with Legal Effect

134. China's claim fails as a matter of fact. The *GPX V* opinion was not finalized under the U.S. judicial appeals process, and was under appeal, and therefore there was no final decision to implement. Such non-binding opinions are not "decisions" under Article X:3(b) of the GATT 1994.

1. *GPX V* was not a Final Decision of the U.S. Federal Appellate Court Because no Mandate was Issued

135. China's argument is based on the premise that *GPX V* was a final decision, not subject to appeal, that had legal effect under the U.S. legal system. This premise is incorrect. A decision of a U.S. appeals court is not final until the court issues what is known as a "mandate."[107] The

[103] *US - Stainless Steel Plate*, para. 6.50.

[104] *Id.*, para. 6.64.

[105] DSU Article 3:2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

[106] The United States also notes that it does not accept China's proposition that "[i]t is evident from the context of Article X:3(b) that agencies are bound not only by the decisions of the court of first instance, but also by the decisions of any higher court that has jurisdiction to review the decisions of the court of first instance." China First Written Submission, para. 87. This dispute does not involve any final decisions by a superior court, and thus the panel need not address the correctness of China's proposition. However, China's proposition is not at all "evident." To the contrary, in *EC – Customs*, the Appellate Body stated that Article X:3(b) of the *GATT 1994* only "relates to first instance review." *EC – Customs (AB)*, para. 294 (emphasis added). And the panel in *EC – Customs* defined "first instance review to mean review by the first body or procedure to consider a decision after that decision has been taken." EC – Customs, para. 7.522, n. 895. What is explicitly required under Article X:3(b) of the GATT 1994 is that once the appeals process is concluded and jurisdiction is transferred back to the court of first instance, such decisions of the court of first instance should be implemented and govern the practice of the administering authority.

[107] *See generally* David G. Knibb, FEDERAL COURT OF APPEALS MANUAL § 34:1 (6th ed. 2007) (USA-64).

first step toward reaching a final decision is the appellate court must enter judgment in the case, which usually takes the form of an opinion.[108] This entry of judgment starts a 45-day period (in civil actions where the United States is a party, such as the *GPX* litigation) in which a party may request "a rehearing" (a technical term that includes appeals) of the case.[109] The court may extend the deadline.[110]

136. If an appeal is timely filed, the mandate is stayed.[111] Pursuant to U.S. FRAP 41, parties have two options for an appeal: a petition for rehearing or motion before the U.S. Federal Circuit or a petition for certiorari before the U.S. Supreme Court. In *GPX V*, the United States filed a timely petition for rehearing before all of the judges of the U.S. Federal Circuit, or *en banc*. An opinion of the U.S. Federal Circuit is not final and does not take effect until the mandate issues.[112]

137. The reason that federal appellate courts do not issue opinions and mandates at the same time, and instead issue the mandate only after a prescribed period, is to permit parties to seek an appeal of an opinion with which they disagree.

138. Prior to the issuance of a mandate, U.S. federal appellate tribunals have broad discretion to alter their judgments. For example, in *Alphin v. Henson*, a U.S. federal appellate tribunal held that it had the authority to alter its opinion to account for a statutory change in the calculations of attorney's fees because the mandate had not yet issued.[113] Similarly, in *First Gibraltar Bank v. Morales*, another U.S. federal appellate tribunal held that it had the authority to revise its opinion in response to a new law prior to issuance of its mandate.[114] In these and a myriad of other cases, U.S. federal appellate courts have held that they possess the authority to revise their opinions before the issuance of a mandate. [115]

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[108] U.S. FRAP Rule 36. *See also* Fed. Cir. Rule 36 (USA-65). The Court of Appeals for the Federal Circuit follows the Federal Rules of Appellate Procedure except as modified by the Federal Circuits local rules.

[109] U.S. FRAP Rule 40(a). *See also* Fed. Cir. Rule 40(b) (USA-67). Deadlines for petitions for rehearing may vary by the type of case.

[110] David G. Knibb, FEDERAL COURT OF APPEALS MANUAL § 34:1 (6th ed. 2007) (USA-64).

[111] U.S. FRAP Rule 41 (USA-41).

[112] *See Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009) (USA-70); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("An appellate court's decision is not final until its mandate issues.")(USA-71).

[113] *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (USA-97).

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

[115] *Beardsley v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("Until the mandate issues, a circuit court retains jurisdiction of the case and may modify or rescind its opinion.") (USA-71); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989) ("Where the mandate has not issued the availability of appeal has not yet been exhausted.") (USA-73); *Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1980) (referring to the lack of finality until the appellate court issues its mandate as a "well-established principle.") (USA-74); *Alphin*, 552 F.2d 1033 at 1035 ("Our control over a judgment of our court continues until our mandate has issued.") (USA-97).

139. Importantly, it is the issuance of the mandate that, if appropriate, transfers jurisdiction from the appellate court to the first instance tribunal.[116] Within the U.S. judicial system any attempt by the first instance tribunal to comply with a superior judgment prior to the issuance of a mandate is invalid, even if the superior tribunal opinion already has been issued.[117] In *Kusay v. United States*, a first instance tribunal attempted to rule on an evidentiary issue following the entry of an opinion by the appellate tribunal, but before the issuance of the appellate tribunal's mandate.[118] In invalidating the lower court's ruling on the evidentiary issue, the appellate court held that its previous opinion was not yet final because its mandate had not yet issued and, as such, the lower court's pre-mandate decision was invalid.

140. On the facts of this dispute, no mandate was issued with respect to the *GPX V* opinion. Indeed, the U.S. Federal Circuit itself noted that a mandate was never issued for *GPX V*.[119] For these reasons, the *GPX V* opinion never became a final decision with legal effect under the U.S. legal system.

2. *GPX V* is not a "Decision" Under Article X:3(b) of the GATT 1994

141. Article X:3(b) of the GATT 1994 requires that only "decisions" of the relevant tribunals be implemented. The opinion in *GPX V* has no legal effect in the U.S. legal system and therefore is not a "decision" under Article X:3(b) of the GATT 1994. The ordinary meaning of "decision", as defined by the Oxford English Dictionary, is "the action of deciding a contest, dispute, etc.; settlement, a final (formal) judgment or verdict."[120] In turn, the term "final" is defined as "putting an end to something, *spec.* to uncertainty or conflict; not to be altered; conclusive."[121] In the legal context, Ballentine's Law Dictionary similarly defines "decision" as "[t]he report of a conclusion reached, especially the conclusion of a court in the adjudication of a case or the conclusion reached in an arbitration."[122] In other words, a judicial "decision" must put an end to or conclude the tribunal's consideration of the case and result in a final judgment that is conclusive.

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[116] *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.") (USA-75; *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came.") (USA-76); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate.") (USA-77).

[117] Kusay, 62 F.3d at 194 ("Until the mandate issues, the case is 'in' the court of appeals, and any action by the district court is a nullity.") (USA-75); Zaklama v. Mount Sinai Medical Center, 906 F.2d 645, 649 (11th Cir. 1990) ("[A] district court generally is without jurisdiction to rule in a case that is on appeal, despite a decision by this court, until the mandate has issued.") (USA-78).

[118] *Kusay*, 62 F.3d at 194 (USA-75).

[119] *GPX VI*, 678 F.3d at 1311 (CHI-7).

[120] *The New Shorter Oxford English Dictionary* (1993) at p. 608 ("decision") (USA-79).

[121] *The New Shorter Oxford English Dictionary* (1993) at p. 950 ("final") (USA-92). Under U.S. law, *GPX V* was not a final and conclusive court decision. *See* 19 U.S.C. §1516a(e); *Hosiden v. United States*, 85 F. 3d 589, 591 (Fed Cir. 1996) (US-82); *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (USA-83).

[122] *Ballentine's Law Dictionary* (2010) ("decision") (USA-84).

142. As described above, the mandate for the *GPX V* opinion was never issued and the parties' right to appeal was not exhausted. Prior to the issuance of a mandate, the *GPX V* opinion was still subject to variability and change, either by the U.S. Federal Circuit or by a court of superior jurisdiction.[123] China concludes without any evidence or analysis that an appeal of the *GPX V* opinion would have been accepted by a tribunal of superior jurisdiction.[124]

143. Because the U.S. Federal Circuit never issued a final and binding decision that would have invalidated Commerce's prior application of the CVD law to China, 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 *GPX* legislation did not change the legal effect of any of the CVD measures challenged by China. Instead, the legislation affirmed that such measures were legal under U.S. law. The legislation also eliminated the need for the Federal Circuit sitting *en banc* and the U.S. Supreme Court to review the correctness of the three-judge panel's opinion in *GPX V*.

144. Further, China's argument that the "the Federal Circuit's decision in *GPX V* became the final judicial decision on the status of U.S. law prior to the enactment of [the *GPX* legislation]" is entirely unsupported by the facts.[125] China's focus on the timing of the enactment of the *GPX* legislation is irrelevant to this dispute. Article X:3(b) of the GATT 1994 does not prohibit the timing of when a piece of legislation may be enacted. In other words, Article X:3(b) of the GATT 1994 does not require a law to remain static because of pending domestic litigation. Such an interpretation of the obligation would paralyze the ability of legislatures to enact laws and is not required by Article X:3(b) of the GATT 1994.

145. Article X:3(b) of the GATT 1994 recognizes that a Member state may establish a domestic appeals process by explicitly providing that first instance tribunal decisions shall be implemented "*unless* an appeal is lodged."[126] What China labels as "plainly nonsensical"[127] is

[123] In contrast, had a mandate issued in *GPX V* and the time for which 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 U.S. separation of powers doctrine. Only when a court's decision is final and all appeals have concluded does the decision "become[ ] the last word of the judicial department with regard to the particular case or controversy". Once a decision is final, "Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (USA-85).

[124] China First Written Submission, para. 94 ("Within the U.S. system of judicial review, there were only two scenarios in which the court's decision in *GPX V* could have been reversed. First, under the U.S. FRAP, the United States (or another interested party) had the right to petition the court for rehearing of the original panel decision. In theory, this could have led the Federal Circuit to reconsider and reverse its decision. Second, whether or not a petition for rehearing had been sought, an interested party could seek review of the U.S. Federal Circuit's decision by the United States Supreme Court. This would have been done by filing a petition for certiorari with the Supreme Court. The Supreme Court's decision to review cases of this type is discretionary, and such review is rarely granted.").

[125] China First Written Submission, para. 98.

[126] Article X:3(b) of the GATT 1994 (emphasis added).

[127] China First Written Submission, para. 87.

actually the methodical process of judicial appeals; a necessary component to ensure the proper interpretation of domestic laws to domestic proceedings.

146. Because China is incorrect as a factual matter, it has no basis for its claim under Article X:3(b).[128]

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

147. In its first written submission, China claims that Commerce's determinations in the challenged investigations are inconsistent with Article 19.3 of the SCM Agreement because Commerce did not "investigate and avoid double remedies in the identified investigations."[129] China's first written submission, however, fails to provide the Panel with arguments necessary to support China's claims. China has not made a *prima facie* case for its claim under the SCM Agreement; and it erroneously interprets Article 19.3 of the SCM Agreement. As a result, its claim that the United States acted inconsistently with Article 19.3 of the SCM Agreement is baseless.

A. China Has Failed to Make a *Prima Facie* Case for Each Challenged Determination

1. China as Complaining Party Must Make Out a *Prima Facie* Case

148. China, as the complaining party in this dispute, must make a *prima facie* case for the alleged breaches of the SCM Agreement by the United States in the 31 sets of determinations identified in the panel request. Here, China has failed to make its *prima facie* case.

149. Numerous panel and Appellate Body reports have reasoned that a complaining party must set out a *prima facie* case in order for an adjudicative body to find that its claim has been made out. As the Appellate Body has explained: "A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[130] Further, a panel may not make a case for a complaining party. Rather, it is for the complaining party to make that case, and "[a] complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence."[131] China must present to the panel evidence and legal arguments in order for the panel to properly address its claim, because "when a panel

[128] For example, the U.S. Supreme Court, in a 2009 unanimous decision, reversed the U.S. Federal Circuit's analysis of certain Commerce actions under the AD law, explaining that "when [Commerce] exercises [its] 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." *United States v. Eurodif S.A.*, 555 U.S. at 316 (USA-15).

[129] China First Written Submission, paras. 126, 127(d).

[130] *EC – Hormones (AB)*, para. 104.

[131] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134

rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU."[132]

150. China fails to put forward legal arguments to make out a *prima facie* case. Instead, China merely argues that the findings of the Appellate Body in DS379 should be applied to the investigations and reviews at issue in the instant dispute.[133] As explained in more detail in the subsequent section, this line of legal reasoning is inadequate. China must present legal arguments adequate to establish the meaning of the relevant SCM Agreement provision and then apply that provision to the facts in this dispute, but it has made no real attempt to do so.

151. Rather than present the evidence necessary to support its legal claims, China makes conclusory and generalized allegations as to what Commerce found across 31 sets of determinations without even a cursory citation to a single piece of evidence.[134] To make out a *prima facie* case, China must establish the facts of each determination to demonstrate evidence adequate to make out its case under the legal theory that it advances.[135]

152. Despite the fact that China challenges 31 sets of Commerce's determinations as inconsistent with the SCM Agreement, it does not engage in the necessary case-by-case factual analysis to support its claims. Instead, China makes no mention of Commerce's determinations at all except to cite the list of challenged determinations in CHI-24.[136] It is for China, not the Panel or the United States, to identify with precision the basis for each of its "as applied" claims, and China has failed to do so.[137]

153. In *Canada – Wheat*, the Appellate Body addressed the complaining party's burden to show that a challenge measure is inconsistent with the covered agreements.[138] Although *Canada-Wheat* involved legislation (as opposed to administrative determinations at issue in this dispute), the Appellate Body's findings on the complaining party's burden is instructive:

> [I]t is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to supports its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[139]

154. Similarly, in *US – Gambling*, the Appellate Body found that the Panel erred in examining certain U.S. state laws because Antigua's "general discussion of state gambling laws" and

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[132] *US – Gambling (AB)*, para. 281.

[133] *See* China's First Written Submission, paras. 116-123.

[134] *See* China's First Written Submission, paras. 124-126.

[135] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134

[136] *See* China's First Written Submission, paras. 124-126.

[137] The Panel may not make China's case for it. *See Japan – Agricultural Products II (AB)*, para. 129.

[138] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

[139] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

inclusion of the measures as exhibits failed to establish its *prima facie* case with respect to those measures.[140] Therefore, it is not sufficient for China to submit only a chart with citations to those determinations it challenges and expect the Panel to discern, on its own, the relevance of those determinations to China's legal position.

2. In the Determinations, Commerce Fully Addressed Any Evidence and Arguments Relating to Allegedly Overlapping Remedies

155. Even had China actually presented the Panel with evidence and analysis in its first written submission, an examination of the 31 challenged sets of determinations would reveal that respondent parties had the opportunity to present Commerce with evidence and arguments demonstrating the existence of overlapping remedies and that Commerce fully addressed such evidence, or lack thereof. Commerce also fully addressed all arguments raised by respondent parties relevant to the issue.

156. At the time of the determinations, Commerce was willing to consider any evidence of overlapping remedies. Under Commerce's regulations, all interested parties have an opportunity, subject only to reasonable time constraints, to place on the administrative record whatever factual information they deem relevant, including factual information that may have been pertinent to the question of alleged overlapping remedies.[141]

157. For instance, in the *Coated Free Sheet Paper* final antidumping duty determination, the companion case to the *Coated Free Sheet Paper* countervailing duty investigation in which Commerce first determined that it could identify and measure countervailable subsidies in China, Commerce clarified that it had "not concluded that a double remedy could never arise as the result of parallel AD and CVD investigations in an NME country – only that neither [China or the respondent company] has demonstrated that such a double remedy will result from this investigation."[142] That is, Commerce evaluated the evidence and arguments presented and found that the allegation of overlapping remedies was not well-founded.

158. Thus, as early as 2007, Commerce signaled that it would consider any and all evidence that would support any claims of overlapping remedies. But in none of the 31 challenged sets of determinations did parties present such evidence. To the extent that parties submitted any information at all on the issue of overlapping remedies, it was in the form of theoretical economic arguments unsubstantiated with any evidence.[143]

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[140] *US – Gambling (AB)*, paras. 151-54.

[141] *See* 19 C.F.R. §§ 351.102(21) and 351.301(b)(1)-(2) (2008) (USA-86, USA-87).

[142] (*Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60,632 (Dep't of Commerce October 25, 2007)) (USA-88).

[143] Such arguments were typically based on the mistaken and unproved presumption that concurrently applied antidumping and countervailing duties against exports from NME countries fully remedied the same subsidies twice – first by the countervailing duties and a second time by inflated antidumping duties. Interested parties urged Commerce to offset against the dumping margin 100 percent of all countervailing duties imposed upon the subject merchandise in all proceedings against NME countries despite the fact that a 100 percent overlap of remedies was never once demonstrated.

159. China's submission contains absolutely no discussion of the facts at issue in the determinations made by Commerce. Even had China actually discussed the facts at issue, an examination of the facts would reveal that all interested parties had sufficient opportunity to provide evidence supporting their claims regarding overlapping remedies. But at the time of the determinations, Commerce could not properly address any claims of overlapping remedies because interested parties failed to provide sufficient evidence and presented only abstract economic theories. Therefore, China has failed to make a *prima facie* case.

B. China's Claim is Founded on an Erroneous Interpretation of Article 19.3 of the SCM Agreement

160. China's failure to make a *prima facie* case is especially striking given that China's legal claim under the SCM Agreement is limited in scope. This limited scope is in contrast to China's panel request, which had challenged 31 U.S. determinations as being inconsistent with a long list of articles from three WTO Agreements. Subsequent to the United States filing a request that the Panel find as a preliminary matter that China's panel request failed to meet the obligations of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), on March 25, 2013, China indicated that it was abandoning almost all of the claims relating to these determinations its panel request. On May 7, 2013, the Panel issued a preliminary ruling that further limited China's legal claim under the SCM agreement to Articles 19.3, 10, and 32.1.

161. China, in its first written submission, purports to argue that the United States acted inconsistently with Article 19.3 of the SCM Agreement, and as a consequence, Articles 10 and 32.1. China, however, makes no effort to interpret Article 19.3 of the SCM Agreement, or apply this provision to the facts of this dispute. Rather than engage in an analysis of the text of Article 19.3 of the SCM Agreement pursuant to customary rules of interpretation, China relies exclusively statements made in the Appellate Body report in DS379. Statements of the Appellate Body, however, are not a source of WTO obligations,[144] but instead constitute an interpretation of WTO obligations for the purpose of resolving that particular dispute.

162. Applying the customary rules of interpretation does not involve mere recitation of Appellate Body statements. As explained in detail below, when interpreted according to the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU, Article 19.3 of the SCM Agreement is a non-discrimination provision. It requires Members to levy CVDs on a non-discriminatory basis to imports from all sources. It further requires that CVDs be levied on each source in "the appropriate amounts" – that is, in amounts consistent with Article 19.3 and other rules of the SCM Agreement. China has not presented any legal

[144] Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization confers the authority to adopt interpretations of the covered agreements exclusively upon the Ministerial Conference and the General Council. *Japan – Alcohol Taxes (AB), p. 13.* Therefore, while the dispute settlement system serves to resolve a particular dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

argument that Commerce's determinations are inconsistent with Article 19.3 of the SCM Agreement, when properly interpreted. Accordingly, the Panel should reject China's claims.

1. Interpreted in Accordance with the Customary Rules of Interpretation of Public International Law, Article 19.3 of the SCM Agreement requires Members to Impose CVDs on a Non-Discriminatory Basis, in the Appropriate Amounts in Each Case

163. Article 19.3 provides, in relevant part:

> When a countervailing duty is imposed in respect of any product, 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, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

164. Article 19.3 is essentially a non-discrimination provision. Article 19.3 first requires that a "countervailing duty" be levied "on imports of such product from all sources found to be subsidized and causing injury." That is, the CVD must be levied on "all" such sources, and not just some of them.

165. Second, the text directs a Member to apply CVDs "on a non-discriminatory basis" on those imports. That is, when CVDs are levied on imports from all such sources, the Member is not to discriminate between those sources.[145] Rather, a Member will impose a CVD on all imports of a product from each Member where the importing Member finds the product to be subsidized and causing injury.[146]

166. Third, Article 19.3 sets out that CVDs levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case." The ordinary meaning of the term "appropriate" includes "specially suitable (for, to); proper, Fitting."[147] The term "case" is defined as "an instance of a thing's occurrence, a circumstance, a fact, etc."[148] In this context, the "thing" that is occurring is the levying of a CVD, which applies to a product for which the producer or exporter has received a subsidy. In the context of the main clause of Article 19.3 of the SCM Agreement, the term "the appropriate amounts in each case" suggests a requirement that CVDs be levied in the "proper" or "fitting" amounts, in each "instance" or "occurrence" of levying CVDs that otherwise satisfies

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[145] For instance, two sources found to be subsidized and causing injury could have the same subsidy rate, but an investigating authority may impose a CVD that corresponds to 100 percent of the subsidy rate for one source, but impose a CVD that corresponds to 50 percent of the subsidy rate for the other source.

[146] Any given CVD investigation may involve multiple producers or exporters and multiple countries. Article 19.3 contemplates that the importing Member may find that multiple "sources" –which can be understood as meaning multiple producers or exporters -- within a subsidizing Member's territory are being subsidized.

[147] *The New Shorter Oxford English Dictionary* (1993) at p. 103 ("appropriate") (USA-89).

[148] *The New Shorter Oxford English Dictionary* (1993) at p. 345 ("case") (USA-90).

the obligation not to discriminate between sources of a subsidized product in Article 19.3 as well.

167. Moreover, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" (rather than "in an appropriate amount" or "in appropriate amounts") is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. In the context of the SCM Agreement, it is the rules set out in the Agreement itself that provide the basis on which it can be ascertained if the amounts are "the" appropriate ones. That amount must be determined in each "instance" or "occurrence" of levying a duty on an imported product. In other words, the amount of CVDs imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

168. Furthermore, the United States notes that nothing on the face of the phrase "levied in the appropriate amounts in each case" (nor any other language in the SCM Agreement) has any tie to the question of whether or not other measures, such as *anti-dumping* duties, have been applied, nor any relation to rules outside the SCM Agreement. In relation to anti-dumping duties in particular, the Antidumping and SCM Agreements contemplate two separate remedies to address the distinct harms caused by dumped imports and subsidized imports, respectively. The AD rules generally compare prices at which a company sells products in the home market and in the export market to determine whether the price in the former exceeds the price in the latter. CVD rules, however, do not focus on company pricing decisions, but rather, on the amounts of subsidies that a company received from the government. Because of this conceptual difference, it is not surprising that the WTO Agreement treats AD and CVD measures separately. To read "in the appropriate amounts" as permitting consideration of the application of other measures or other, non-SCM Agreement rules, would convert "in the appropriate amounts" into a subjective standard, with bounds only set by the eyes of the particular interpreter.

169. Article 19.3 thus contains three distinct elements which relate to the issue of discrimination. That is, where a Member has decided to impose CVDs, Article 19.3 of the SCM Agreement requires the 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", as understood under SCM Agreement rules, for each source in relation to which a levy is imposed.[149] Importing Members cannot discriminate between sources when imposing CVDs; and more specifically, when imposing CVDs on sources found to be subsidized and causing injury, the amount of CVDs must correspond to the amount of subsidies identified.

170. In sum, the text of Article 19.3 of the SCM Agreement is a non-discrimination provision that directs Members to apply CVDs in "the appropriate amounts in each case," for all sources found to be subsidized and causing injury. The amount of the CVD to be imposed and collected will vary from one source to another depending on the amount of the subsidies involved, which

[149] See generally *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 14.125 (assimilating elements (i) and (ii)).

explains the reference to "the appropriate amounts in each case." Because each source of imports may have been subsidized to varying degrees, and CVDs may be no greater than the amount of the subsidy found to exist,[150] "the appropriate amounts" of CVDs that may be levied "in each case" under Article 19.3 are those amounts calculated for and attributable to each source as determined by the administering authority.

2. Reading Article 19.3 of the SCM Agreement in the Context of the SCM Agreement Supports the Conclusion that it Requires Members to Impose CVDs on a Non-Discriminatory Basis, in the Appropriate Amounts in Each Case

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

172. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement.

173. Article 19.1 affirms this interpretation by providing for the imposition of CVDs once "a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury."

174. Article 19.2 offers non-binding guidance to Members that would permit lesser duties to be imposed if the lesser duties would be adequate to the remove the injury to the domestic injury. The statement in 19.2 that the amount of the countervailing duty *may* be less than the full amount of the subsidy contradicts an interpretation that the "in the appropriate amounts in each case" phrase in the next article (19.3) was intended as a subjective standard – unconnected to 19.3's discrimination context – about the "appropriate" level of a countervailing duty. Article 19.3 is *mandatory* – it states that the CVD duties "shall be levied" in the appropriate amounts in each case. If this phrase was meant to be an obligation concerning any and all aspects of the level of a CVD duty, it would require Members to impose a certain level of subsidy, and would not permit the application of a *lesser* amount. But given that the preceding article specifies that a lesser amount may be applied, the drafters were clear that the mandatory requirement in Article 19.3

[150] Article 19.4 of the SCM Agreement.

did not concern a general, undefined "appropriateness," but rather the use of the phrase "the appropriate amount in each case" was aimed at the discrimination issues covered in Article 19.3.

175. Finally, Article 19.4 states, "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist calculated in terms of subsidization per unit of the subsidized and exported product." This article, like article 19.2, again suggests that the "in the appropriate amounts in each case" phrase in Article 19.3 was not intended to be a general requirement that a CVD duty must be "appropriate" in every way. Article 19.4 – unlike Article 19.3 – contains a mandatory statement about the general level of CVD duties that Members must levy. This general obligation states that the level of the CVD duty may not *exceed* a prescribed level (that is, the amount of subsidy found to exist); the article explicitly allows a Member to levy a lower amount.

176. Again, this context shows that the phrase in Article 19.3 – which requires that a Member levy CVD duties in "the appropriate amounts in each case" is not a general rule – unconnected to the nondiscrimination context of 19.3 – that applies to all aspects of the CVD duty. If it were, Article 19.3 would be inconsistent with the drafters intention (as expressed in Article 19.4) to impose an upper limit on the level of the CVD duties, but not to require the imposition of a specific amount (as expressed in Article 19.2).

i. Reading Article 19.3 in the Context of the AD Agreement Further Supports An Understanding of This Provision As Relating to Non-Discriminatory Levying of Duties on Imports From Each Source in Amounts Established under SCM Agreement Rules

177. Article 19.4 of the SCM Agreement also provides helpful context because of its similarity to comparable provisions in the AD Agreement. In particular, Articles 9.2 and 9.3 of the Antidumping Agreement contain similar language to Articles 19.3 and 19.4 of the SCM Agreement.[151] The Panel in *Argentina- Poultry Anti-Dumping Duties (Brazil)* found that Article 9.2 should be read in context of Article 9.3:

> We note that Article 9.3 contains a specific obligation regarding the amount of anti-dumping duty to be imposed, whereas Article 9.2 employs far more general language in referring to the collection of duties in "appropriate" amounts. In particular, Article 9.2 provides no guidance on what an "appropriate" amount of duty may be in a given case. In the absence of any other guidance regarding the appropriateness of the amount of anti-dumping duties, it would appear reasonable to conclude that an anti-dumping duty

[151] Article 9.2 of the AD Agreement provides, in relevant part: "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted." Article 9.3 of the AD Agreement provides, in relevant part: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

> meeting the requirements of Article 9.3 (i.e., not exceeding the margin of dumping) would be "appropriate" within the meaning of Article 9.2.[152]

178. The panel report in *EC – Salmon (Norway)* is also particularly instructive. That dispute concerned the European Communities' use of "minimum import prices" for salmon exports from Norway that were alleged to exceed normal value.[153] Norway disputed this practice under Article 9.2 of the AD Agreement. The Panel understood the term "in the appropriate amounts" in relation to the rules set out in the AD Agreement. The Panel concluded that the "appropriate" amount of ADs must be an amount that results in offsetting or preventing dumping, when all other requirements under the AD Agreement for the imposition of ADs have been fulfilled.[154]

179. The United States supports a similar interpretation for Article 19.3 of the SCM Agreement: to levy CVDs "in the appropriate amounts in each case" means to levy an amount no greater than the subsidies attributable to the subject merchandise when all other requirements for the imposition of CVDs under the SCM Agreement have been fulfilled.

180. In interpreting Article 19.3 of the SCM Agreement, the Panel in DS379 agreed with the Panel in *EC-Salmon*, and noted that the amount of countervailing duties imposed should correspond to the amount of subsidies identified: "We recall that countervailing duties are special duties that are collected for the purpose of 'offsetting' subsidies. This suggests that, applying the reasoning of the *EC – Salmon (Norway)* panel, countervailing duties are collected in the appropriate amounts insofar as the amount collected does not exceed the amount of subsidy found to exist."[155] The United States agrees with the DS379 Panel's findings.

ii. Conclusion

181. The context of Article 19.3 in the SCM Agreement and in the AD Agreement supports a reading that the binding obligations of Article 19.3 of the SCM Agreement seek to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated under SCM Agreement rules. Article 19.3 has nothing to do with demonstrating the existence or actual calculation of a subsidy. Those questions are addressed by Articles 1, 2, and 14 of the SCM Agreement. Instead, Article 19.3 concerns the ministerial and non-discriminatory application of the CVDs determined based on the already identified and valued subsidies.

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

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[152] *Argentina – Poultry Anti-Dumping Duties (Brazil) (Panel)*, para. 7.365.

[153] *EC – Salmon (Norway)*, para. 7.702.

[154] *EC – Salmon (Norway)*, para. 7.705.

[155] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para 14.128.

3. Further Context in the GATT 1994 and Negotiating History Supports the Understanding that Article 19.3 of the SCM Agreement Does Not Apply to the Concurrent Use of Antidumping and Countervailing Duties

183. There is one provision in the WTO agreement that disciplines the concurrent use of antidumping and countervailing duties on the same product, and it is not Article 19.3 of the SCM Agreement. Rather, it is Article VI:5 of the GATT 1994, and that article only applies to export subsidies. By its terms, Article VI:5 applies only to the circumstance in which a Member conducting concurrent AD and CVD proceedings on the same product finds "the same situation of dumping or *export* subsidization." Article VI:5 provides that the importing Member can impose either antidumping or countervailing duties, but not both, to address this same situation.

184. In so providing, Article VI:5 of the GATT 1994 appears to contemplate that, at least under some circumstances, an export subsidy may result in a lower price for an exported product than might otherwise be the case. Therefore, in such cases, Article VI:5 of the GATT 1994 does not allow the importing Member to impose AD duties to address the portion of the dumping margin that is presumed to be attributable to a price differential that has been caused by an export subsidy, and would therefore be remedied by imposition of countervailing duties to offset the export subsidy.

185. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping and export subsidization." Members clearly did not agree that any other circumstances warranted a restriction on the concurrent application of AD and CVD remedies. If they had, they would have provided so explicitly, as they did in the case of Article VI:5.

186. Article 15 of the Tokyo Round Subsidies Code, and the absence of a similar provision in the WTO agreements,[156] provides further evidence that the WTO Agreements do not concern the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994. Article 15, entitled "Special Situations," provided, in relevant part:

> 1. In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either

[156] Omissions must have some meaning. *See, e.g., Japan – Alcohol Taxes (AB), p. 17.*

> (a) on this Agreement, or, alternatively
> (b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

187. The note to Article VI of the GATT 1947 referenced in Article 15.1 of the Tokyo Round Subsidies Code described countries that "ha[d] a complete or substantially complete monopoly of its trade and where all domestic prices [were] fixed by the State."[157] Under Article 15 of the Tokyo Round Subsidies Code, where imports from such a country were alleged to have been causing injury by virtue of both subsidized imports and dumped imports, concurrent imposition of AD and CVD measures was not permitted. The importing signatory was required to choose which remedy it would use to address injury caused by those imports.

188. Notably, Article 15 of the Tokyo Round Subsidies Code was not carried forward, unlike numerous other Code provisions, when the Uruguay Round agreements were agreed. The texts of the WTO agreements contain no reference to the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994. The existence of a provision in the Tokyo Round Subsidies Code specifically prohibiting the concurrent application of AD and CVD measures to certain countries, followed by the disappearance of that provision in the successor SCM Agreement, demonstrates that such a prohibition no longer exists. The omission of this provision in the SCM Agreement reinforces the implication, created by the express limitation in Article VI:5 itself, that WTO Members never agreed on such a prohibition.

4. The Appellate Body's Reasoning in DS379 is Not Persuasive

189. China's legal argument under Article 19.3 relies entirely on the understanding of that provision expressed by the Appellate Body in its report in DS379. For the reasons set out below, the Panel is not bound by the Appellate Body report, particularly as the Appellate Body erred in its interpretation of Article 19.3. The United States in this submission also presents arguments not considered by the Appellate Body as Article 19.3 was not the focus of China's arguments in DS379.

190. A WTO panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. The rights and obligations of the Members flow, not from adoption by

[157] *Ad* Note 2 to Article VI:1 provides, in full: "It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of [Article VI:1 of GATT 1994], and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate." This Ad Note, added to the GATT in 1955, recognizes that an investigating authority conducting an AD proceeding may need to look beyond the exporting country to find appropriate prices for comparison with prices in the importing country. Notably, the inclusion of this provision was not accompanied by a modification—to Article VI:5 or to any other provision in the GATT—that required the offsetting of the CVD against the AD duty, or vice versa, in cases of concurrent investigations on the same product.

the DSB of panel or Appellate Body reports, but from the text of the covered agreements.[158] The DSU provides that the dispute settlement system provides clarifications of the text of existing provisions of the covered agreement through the use of customary rules of interpretation of public international law, not through the application of interpretations reached in previous reports. In another dispute, China has taken the view that a panel not only can, but must, make its own assessment of the applicability of the covered agreements in order to fulfill its role under Article 11 of the DSU.[159] The United States agrees.

191. Panel and Appellate Body reports can be taken into account to the extent that the reasoning is persuasive and applicable to the facts and circumstances before the panel. The Appellate Body itself has stated that its reports are not binding on panels.[160] While the reasoning in such reports should be taken into account, Members are free to explain why any reasoning or findings are not pertinent to the dispute at issue or not persuasive in relation to an issue of law.

192. In DS379, the Appellate Body disagreed with the legal interpretation set out by the panel and reached certain findings with respect to Article 19.3 of the SCM Agreement. The United States respectfully disagrees with these Appellate Body findings. In particular, we consider that the Appellate Body in DS379 erred in its interpretation of Article 19.3 and consider that the interpretation set out above is a correct understanding of Article 19.3 pursuant to customary rules of interpretation. Notably, China did not argue for the interpretation of Article 19.3 that the Appellate Body in DS379 adopted. In fact, China largely based it claims on Article 19.4.[161] For this reason, the United States never had an opportunity to address the interpretation adopted by the Appellate Body in DS379.

193. The Appellate Body's reasoning in DS379, and its consequent assigning of an indeterminate and subjective meaning to the phrase "in the appropriate amounts", is problematic in several ways.[162] First, despite the fact that Article 19 of the SCM Agreement is entitled "Imposition and Collection of Countervailing Duties," the Appellate Body rejected an interpretation of Article 19 of the SCM Agreement as concerned with the "[i]mposition and [c]ollection" of countervailing duties. Instead, the Appellate Body considered that Article 19 of the SCM Agreement also relates to the existence or calculation of countervailing duties. That understanding does not derive from the text. The interpretation advanced by the Appellate Body

[158] Under Article 3.2 of the DSU, "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements."

[159] Article 11 of the DSU provides that "the function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

[160] See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)* and *US – Shrimp (Article 21.5) (AB)).*

[161] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 103-125.

[162] Several prominent WTO experts who were key participants in the Uruguay Round negotiations agree. *See* Cartland, Michael, Depayre, Gérard &Woznowski, Jan. *'Is Something Going Wrong in the WTO Dispute Settlement?*, JOURNAL OF WORLD TRADE 46, No. 5 (2012): 979–1016 (USA-91).

also does not relate the phrase "in the appropriate amounts" at all to the non-discrimination obligations of Article 19.3; as explained above, by its own express terms, this is a non-discrimination provision that directs Members to apply countervailing duties on subsidized, injurious imports from all sources on a "non-discriminatory basis."

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

195. Third, the Appellate Body observed that the Panel's interpretation of "appropriate" amount under Article 19.3 of the SCM Agreement, based on Article 19.4 of the SCM Agreement, would render Article 19.3 redundant.[163] But this is incorrect. Article 19.4 of the SCM Agreement requires that CVDs not exceed the amount of subsidization found to exist; Article 19.4 does not provide instructions on how this obligation applies to specific exporters. Article 19.3 specifies that Members must apply CVDs on a non-discriminatory basis, and "in the appropriate amounts", for all sources found to be subsidized and causing injury. These are distinct obligations different from the obligation established in Article 19.4.

196. Fourth, in reaching its findings in DS379, the Appellate Body did not identify any limiting principle to provide some bounds for its interpretation of the term "in the appropriate amounts". In the absence of such a limiting principle, the phrase "in the appropriate amounts" could conceivably be used to find almost any countervailing duty not "appropriate" and therefore inconsistent with the SCM Agreement. As noted above, the purpose of WTO dispute settlement is to resolve disputes and to clarify provisions of the covered agreements. Rather than clarify the meaning of "the appropriate amounts," the Appellate Body infused that term with an indeterminate, subjective meaning reliant upon how it interpreted provisions of covered agreements other than the SCM Agreement,[164] which could have unknown or unintended consequences.

197. One consequence of the Appellate Body report in DS379 is that an exporting Member, contrary to other situations, need not demonstrate that CVDs duties are not levied in appropriate amounts in each case in the case of simultaneous AD and CVD investigations. Instead, under the Appellate Body's rationale, the burden would appear to fall on the importing Member to prove that CVDs are levied in the appropriate amounts in each case, regardless of whether the exporting Member presented evidence to indicate otherwise.

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[163] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 555.

[164] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 570-572.

198. Fifth, the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative. As an initial matter, the Appellate Body relied upon the factual findings of the Panel when it summarized the "double remedy" problem as follows:

> In the dumping margin calculation, investigating authorities compare the product's constructed normal value (not reflecting the amount of any subsidy received by the producer) with the product's actual export price (which, when subsidies have been received by the producer, is presumably lower than it would otherwise have been). The resulting dumping margin is thus based on an asymmetric comparison and is generally higher than would otherwise be the case.[165]

However, even aside from the problem that this "finding" is based on a statement that export price is "presumably" lower, this Panel should not assume the same findings of the panel in DS379 but rather should make its own objective assessment. China in this dispute has made no effort to demonstrate the existence of a double remedy in any of the 31 challenged sets of determinations or to identify evidence from any of the challenged determinations that would support the presumptive theory adopted by the Panel, and subsequently by the Appellate Body, in DS379.

199. Further, neither the Panel nor the Appellate Body in DS379, in considering the impact of domestic subsidies upon export prices, recognized that the form of the subsidy is important because some domestic subsidies give domestic producers a greater incentive to increase production than others. A production subsidy (for example, the provision of raw materials for particular products at reduced prices) reduces the unit cost of producing that merchandise and, therefore, gives the producer an incentive to increase production of that merchandise. More general subsidies (such as certain tax reduction, grants without specified conditions, or debt forgiveness) would not provide that direct incentive. A foreign producer might use a subsidy without a specified condition to modernize its plant, pay higher dividends, fund research and development, clean up the environment, make severance payments, increase the production of some other product, or waste the money. Even if a producer attempts to respond to a domestic subsidy by increasing production, it might not be able to do so, at least in the short or medium term, because of various external constraints, such as shortages in the supply of raw materials. Moreover, adding capacity takes time. The Appellate Body never considered that domestic subsidies will not necessarily result in an increase in production and, therefore, will not necessarily result in a reduction in export prices.

200. Nor did the Appellate Body in DS379 consider that, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase will result in lower export prices. If the world market price is going up, it is not

[165] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 542 (citing *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 14.69 and 14.72).

realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy

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

i. Conclusion

202. For all of these reasons, the Panel should consider the interpretation of Article 19.3 of the SCM Agreement by applying the customary rules of interpretation of public international law. As explained above, Article 19.3 of the SCM Agreement requires Members to apply CVDs on a non-discriminatory basis, and in "the appropriate amounts in each case" under the rules set out in Article 19.3 and the SCM Agreement, to imports from all sources found to be subsidized and causing injury. Article 19.3 of the SCM Agreement does not establish any requirement that authorities "investigate and avoid" overlapping remedies; and the Appellate Body's interpretation of that provision is not persuasive. Therefore, the Panel should reject China's legal arguments and find that the United States did not act inconsistently with Article 19.3 in any of the 31 challenged sets of determinations.

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

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

VIII. CONCLUSION

204. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.

ANNEX: FURTHER FACTUAL BACKGROUND ON THE APPLICATION OF THE U.S. CVD LAW TO NME COUNTRIES

1. China states in its first written submission that "the background that follows is not material to China's principal claim concerning the retroactive enforcement of Section 1 of [the *GPX* legislation]."[1] China's statement is instructive. The background provided by China has no bearing on the United States' obligations under Article X of the GATT 1994 or Articles 10, 19.3 and 32.1 of the *SCM Agreement*. Its relevance, if any, may be to the domestic *GPX* litigation currently pending in U.S. domestic courts on matters of U.S. law.

2. However, and despite its lengthy recitation, China's discussion of Commerce's application of the U.S. CVD law to imports from China is incomplete. As such, the United States is compelled to respond to China's highly selective and inaccurate statements. This section of this submission contains a complete and accurate background of the history surrounding the U.S. approach to the application of the U.S. CVD law to NME countries.

3. First, it is important that any discussion of the U.S. CVD law must begin with the plain text of the law, which China fails to provide in its background section. The plain text of the law requires that Commerce must apply countervailing duties to any country where it can identify a countervailable subsidy.

4. Second, and contrary to China's assertions, a 1986 decision by a U.S. appellate court, *Georgetown Steel*, did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the U.S. appellate court in *Georgetown Steel* deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. In other words, the U.S. appellate court simply affirmed Commerce's broad discretion to find the existence of a countervailable subsidy (or what was termed a "bounty or grant" at that time under the U.S. CVD law).

5. Third, China asserts that following the *Georgetown Steel* decision, the existing U.S. law prohibited the application of the U.S. CVD law to NME countries.[2] China's assertion fails as a matter of fact. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies.

6. Fourth, in 2006, based on a petition from a U.S. domestic industry, Commerce initiated a CVD investigation on certain Chinese imports in which it determined that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s that it was no longer impossible to identify subsidies there.

[1] China First Written Submission, para. 9.

[2] China First Written Submission, para. 16.

7. Fifth, the so-called *GPX* litigation is an on-going challenge to Commerce's approach in the U.S. domestic court system. One of the opinions issued in the middle of a string of judicial opinions in this litigation raised a differing view of what Congress intended in the U.S. CVD law. This view differed from previous court decisions and Commerce's existing application of the U.S. CVD law. The opinion, *GPX V*, however, is legally insignificant as it never became final.

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

A. Requirements of the U.S. CVD Law

9. In its elaborate analysis of the U.S. CVD regime, China never once states the actual requirements of U.S. law. In the early 1980s, when the subject of applying CVDs to exports from NME countries arose, the U.S. CVD law provided as follows:

> whenever *any country* . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the export of any article or merchandise from such country . . . then upon the importation of any such article or merchandise into the United States . . . there *shall be levied and paid* . . . a duty equal to the net amount of such bounty or grant . . . . [3]

10. In its current form, the U.S. CVD law states:

> (a) General rule
>
> If—
>
> > (1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and
> >
> > (2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that—
> >
> > > (A) an industry in the United States—

[3] Section 303 of the Tariff Act of 1930, 19 U.S.C. 1303 (1982), Pub. L. 96-39, Title I, § 101, 93 Stat. 151 (emphasis supplied) (USA-01). This language is quite similar to that in the original 1897 statute and the current U.S. statute. In 1994, the term "bounty or grant" in the statute was replaced with the term "countervailable subsidy" to conform to the Uruguay Round Agreements.

> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy. For purposes of this subsection and section 1671d (b)(1) of this title, a reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.[4]

11. The term "any country" means just what it says. Every country exporting merchandise to the United States is subject to the CVD law, with no exceptions. The absence of an exception for NME countries is not surprising. When the term "any country" was written in 1897, there were no NME countries, as such, to consider exempting. In fact, until the passage of the U.S. law at issue in this dispute, the term "NME country" has never appeared in the CVD law. It appeared only in the U.S. antidumping ("AD") law.[5]

12. NME countries are "countries"[6] and products imported from them are "merchandise." As such, where Commerce determined that a NME country was providing a "countervailable subsidy"[7] with respect to imported "merchandise," the plain language of the statute required that

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[4] 19 U.S.C. § 1671(a) (USA-02).

[5] In 1974, a new provision was added to the U.S. AD law addressing the calculation of dumping margins in "state-controlled-economy countries." Trade Act of 1974, Pub. L. 93-618 § 321, 88 Stat. 1978 2074 (USA-03). It provided that:

> if available information indicates . . . the economy of the country from which the merchandise is exported is state-controlled to an extent that sales . . . of such or similar merchandise in that country . . . do not permit a determination of foreign market value . . . the Secretary shall determine the foreign market value . . . on the basis of the normal costs, expenses, and profits [of the subject merchandise . . .

19 U.S.C. 1677(b) (USA-06). The legislative history noted that the new "state-controlled economy" provision was an amendment to the AD law. Trade Reform Act of 1973, Report of the Committee on Ways and Means, H. Rep. No. 93-571, 93rd Cong., 1st Sess., (October 10, 1973), p. 72 (USA-04). The amendment was not accompanied by any change in the U.S. CVD law or any indication in the legislative history that Congress intended any change in the application of the U.S. CVD law.

[6] The U.S. CIT has acknowledged that the statute does not "limit[] the type of country to which Commerce is permitted to apply the CVD law . . . ." *GPX II*, 645 F. Supp. 2d at 1238 (CHI-3).

[7] In accordance with the Agreement on Subsidies and Countervailing Measures, a foreign government action must satisfy three basic requirements in order to constitute a countervailable subsidy under U.S. CVD law. The foreign

CVDs "shall be" imposed upon that merchandise. Given this directive, the United States has applied the U.S. CVD law to all governments of countries (except where this proved to be impossible), including NME countries such as China and Vietnam.

B. Commerce's Efforts to Apply the U.S. CVD Law to Certain NME Countries and the *Georgetown Steel* Decision

13. In a series of decisions taken in 1983 and 1984, Commerce determined that it could not identify countervailable subsidies in various countries of the former Soviet bloc. Commerce explained at the time that the economies of these countries were controlled by their governments to the extent that even if they attempted to provide their producers with an economic incentive to increase production, the producers would have neither the motive nor the capacity to respond.[8] In such systems, attempting to isolate a government financial contribution that gave rise to a benefit or, in the nomenclature of the time, "a bounty or grant," was essentially impossible.

14. Commerce's findings are best summarized in a preliminary determination involving a CVD investigation of carbon steel wire from Poland, in which Commerce stated that the CVD law applied to all countries, including NME countries:

> Based upon our review of the countervailing duty provisions of the Act, their legislative history, and briefs filed in the conference on novel issues . . . we believe that Congress did not exempt nonmarket economy countries from Section 303 of the Act. By its terms, that section applies to "*any* country, dependency, colony, province, or other political subdivision of government.[9]

After examining the facts in Poland, however, Commerce concluded that:

> [w]here prices and profits do not have some economic meaning, we cannot find programs like Poland's price equalization payment to confer a subsidy. Thus we preliminarily determine that Poland's price equalization payments do not confer a bounty or grant within the meaning of the Act.[10]

In the final determinations of that investigation and a parallel CVD investigation of carbon steel rod from Czechoslovakia, Commerce affirmed that the CVD law applies to imports from any

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government must make a "financial contribution," that confers a "benefit" upon the recipient, and that benefit must satisfy the "specificity" requirement. *See* 19 U.S.C. §§ 1677(5) and (5A) (USA-06).

[8] *See, e.g., Wire Rod from Czechoslovakia* (USA-7).

[9] *Carbon Steel Wire Rod from Poland; Preliminary Negative Countervailing Duty Determination*, 49 Fed. Reg. 6,768, 6,879 (Dep't of Commerce Feb. 23, 1984) (emphasis added) (USA-8); *see also Carbon Steel Wire Rod from Czechoslovakia, Preliminary Negative Countervailing Duty Determination*, 49 Fed. Reg. 6,773 (Dep't of Commerce 1984) (USA-09).

[10] *Carbon Steel Wire Rod from Poland; Preliminary Negative Countervailing Duty Determination*, 49 Fed. Reg. at 6,773 (USA-08).

country, but explained that, in NME countries, it was simply impossible to identify the transfer of a "bounty or grant" from the government to a producer or exporter.[11]

15. In sum, Commerce concluded that the essential characteristic of NMEs at that time was that there were no markets, because the governments had taken over the entire economic system. Because producers and exporters in NME countries effectively were branches of their central governments, it was impossible to conclude, in any meaningful sense, that the central governments had transferred subsidies to them.[12] Further, although Commerce's determinations cited NMEs in general, they plainly were based on the "essential characteristic" that it was simply impossible to identify subsidies in the NME countries involved in these proceedings – the Communist countries of the Soviet Bloc in the early 1980s.[13]

16. Because the U.S. CVD law mandated that CVDs "shall be applied" to subsidized imports, the exception invoked by Commerce was limited to those situations in which it was impossible to apply the law. Commerce did not have the authority to create an exception to the statutory mandate based on policy – for example, that it need not apply the CVD law in situations where that would be complex and burdensome or politically difficult. Nor did Commerce presume to have such authority. Instead, Commerce took the position that it could not be required to apply the CVD law where that would be impossible, and that it was impossible to apply the law to exports from NME countries for the reasons explained above.

17. Thus, when Commerce concluded that it could not apply the U.S. CVD law to "NME countries," the *only* rule that Commerce was applying was that the CVD law did not require the imposition of CVDs where the very identification of a subsidy was impossible. The result of applying that rule to the NME countries of that era was that the CVD law did not apply to any NME countries at that time. This did not preclude a different outcome if those facts should change. Commerce had no authority to address future fact patterns before they arose, no authority to carve out an exception to the statutory mandate on any basis other than impossibility, and did not attempt to do determine that the CVD law could never be applied to any NME

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[11] *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,371 (CHI-117); *Wire Rod from Poland* (USA-10).

[12] In those determinations, Commerce defined a subsidy as a distortion in the normal operation of market forces. Where virtually all economic activity was controlled by the central government, instead of market forces, Commerce concluded that it would be arbitrary and meaningless to examine individual actions and identify them as subsidies.

[13] The decisions carefully describe the conditions in those countries and explain how those conditions made it impossible to identify subsidies. "Based on our analysis, we have found that NME systems share certain features that make it impossible to find that a bounty or grant exists. These nonmarket features are, moreover, apparent in Czechoslovakia / Poland." *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,372 (USA-07). Commerce also observed, for example, that "Instead of being incentives or subsidies in a market sense, they are means of controlling the enterprise. This is apparently the situation in Czechoslovakia…" * * * "Thus, we have found generally for NMEs and specifically for Czechoslovakia that prices are administered and that these prices do not have the same meaning as prices in a market economy." *Id*, at 19,373. Commerce also noted, that "Most NME systems are characterized by centrally administered prices . . . . Prices in Poland are similarly controlled." Id. * * * " Instead of being incentives or subsidies in a market sense, they; are means of controlling the enterprise. This is apparently the situation in Poland . . . ." *Wire Rod from Poland*, 49 Fed. Reg. at 19,376.

country, ever. Commerce simply addressed the situation before it, which was similar across the NME countries in the world at that time.

18. These and similar determinations were challenged under U.S. domestic law, first at the U.S. Court of International Trade ("U.S. CIT"), which has jurisdiction of actions challenging Commerce's determinations under the AD and CVD law,[14] then to the U.S. Federal Circuit, which has jurisdiction of appeals from a final decision of the U.S. CIT.[15] The U.S. Federal Circuit affirmed that Commerce was not required to apply the U.S. CVD law to certain countries based on its findings regarding the Soviet-style centrally planned economies of those countries at that time in a 1986 decision, *Georgetown Steel v. United States* ("*Georgetown Steel*"). Like Commerce's underlying determinations, the *Georgetown Steel* decision plainly states that it is based on the facts in the Soviet-bloc countries under consideration. In the words of the court: "[e]ven 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."[16]

19. Thus, *Georgetown Steel* did not decide that Commerce could never apply the CVD law to exports from any country characterized as an NME. Consistent with the legal principle under U.S. law that an agency's interpretation of the statutes it administers "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous,"[17] the U.S. Federal Circuit deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. Contrary to China's assertion that Commerce held that the CVD law did not apply to NME countries "as a matter of law," the U.S. Federal Circuit simply affirmed Commerce's broad discretion to determine the existence of a bounty or grant.[18]

20. Rather than properly characterize the holding of the *Georgetown Steel* decision, China emphasizes other statements by the U.S. Federal Circuit that "Congress had taken to 'deal[] with the problem of exports by nonmarket economies through other statutory provisions,'" namely the NME provisions of the U.S. AD law.[19] However, the U.S. Federal Circuit itself identified such

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[14] *See* 28 U.S.C. §1581(c) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 {19 U.S.C. §1516a}") (USA-11); *see also* 19 U.S.C. §1516a(a)(2)(A)(i)(I) (providing for judicial review of final affirmative CVD determinations) (USA-12).

[15] *See* 28 U.S.C. §1295(a)(5) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—of an appeal from a final decision of the United States Court of International Trade") (USA-13).

[16] *Georgetown Steel* at 1316 (CHI-02).

[17] *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (USA-15). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (USA-14). 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).

[18] China First Written Submission, para. 11 (*citing Georgetown Steel* at 1310).

[19] China First Written Submission, paras. 13-15 (citing *Geogretown Steel* at 1316).

ruminations as only "[f]urther support for [its] conclusion."[20] As explained above, the issue presented under U.S. law in *Georgetown Steel* was whether Commerce reasonably interpreted the statutory term "bounty or grant" given the impossibility of identifying and measuring subsidies in the Soviet-bloc economies of that era. The excerpted passages of *Georgetown Steel* highlighted by China constitute *dicta* and therefore lack any precedential weight under U.S. law.[21]

C. Legislation after *Georgetown Steel*

21. In 1988, Congress added the term "nonmarket economy country" to the AD statute along with the "factors of production" methodology for determining normal value AD proceedings involving exports from NME countries.[22] The legislative history makes clear that these changes were made to address the problem that "[t]he current antidumping duty law and procedures as they apply to nonmarket economies do not work well."[23] The legislative history of these provisions makes no reference to the CVD law and does not suggest that the changes in the AD law had anything to do with the Federal Circuit's decision in *Georgetown Steel*.

22. In 1994, extensive changes were made to both the AD and CVD law to implement the WTO Uruguay Round Agreements.[24] The only change in the basic requirements of the CVD law discussed above was that the term "bounty or grant" was replaced with the term "countervailable subsidy," which is defined in more detail.[25] None of these changes affected the application of the CVD law to NME countries and nothing in the legislative history suggests that it did.[26]

23. Significantly, Article 15 of the Tokyo Round Subsidies Code (with its requirement that Members choose between AD and CVD remedies with respect to exports from NME countries) was dropped in the Uruguay Round WTO Agreements. Thus, when the Uruguay Round Agreements Act was passed in 1994, it was evident that both ADs and CVDs could be applied to exports from NME countries, consistent with the WTO Agreements. The Uruguay Round

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[20] *Georgetown Steel* at 1316 (CHI-02).

[21] *See Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004) (citing *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972)) (USA-16).

[22] Pub. L. No. 100-418 (USA-96).

[23] Senate Rep. No. 100-71 *Omnibus Trade Act of 1987, Report of the Committee on Finance*, June 12, 1987 at 108 (USA-18). *See also* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988), *reprinted in* 134 Cong. Rec. H2031 (daily ed. April 20, 1988) (USA-19).

[24] Uruguay Round Agreement on Subsidies and Countervailing Measures (1994).

[25] *See* 19 U.S.C. §§1671(a) (USA-02) and 1677(5)-(5a) (USA-06).

[26] A fleeting reference in the 1994 legislative history summarizing *Georgetown Steel* as being "limited to the reasonable proposition that the countervailing duty law cannot be applied to imports from nonmarket economy countries" should not be taken out of context in the way that China does. *See* China First Written Submission, para. 19. The statement merely sought to clarify that a binational panel under Chapter 19 of the North American Free Trade Agreement had misunderstood the holding of *Georgetown Steel* to require an "effects test" in determining whether a subsidy can be countervailed *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994) at 926 (USA-02).

Agreements Act did not make any changes to U.S. law to reflect this changed situation because no changes were necessary. Nor does the legislative history of the Act give any indication that the deletion of Article 15 of the Tokyo Round Subsidies Code created any question in Congress as to whether it was necessary to amend the CVD law to permit U.S. petitioners to exercise the rights enjoyed by petitioners in the other WTO Member States.

D. Commerce's Post-*Georgetown Steel* Administrative Approach

24. China states that following the *Georgetown Steel* decision, "it was clear that existing U.S. law did not permit the application of countervailing duties to imports from countries that the United States designates as non-market economies."[27] China fails to present any evidence for this conclusory statement. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies.[28] For example, in 1991 Commerce initiated certain CVD investigations of Chinese imports, but ultimately declined to complete these investigations because of the structure of the Chinese economy at that time.[29]

25. Following *Georgetown Steel*, Commerce continued its approach of not applying the CVD law to NME countries, and often described the holding of *Georgetown Steel* as being that the CVD law did not apply to exports from NME countries. Commerce would at times also explain the rationale which produced that result. For example, in the *General Issues Appendix* to the 1993 CVD investigations of certain carbon steel products from various countries, Commerce stated that "*Georgetown Steel* stands simply for the proposition that, in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place."[30] Nevertheless, Commerce did not indicate that *Georgetown Steel* created an absolute rule that the CVD law could never be applied to any NME country.

26. In June 2005, the Government Accountability Office issued a report entitled *U.S. – China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties*.[31] China places great reliance upon this report highlighting the GAOs assessment that Commerce had "two options" to apply the CVD law to China – either declare China to be a market economy

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[27] China First Written Submission, para. 16.

[28] *See e.g., General Issues Appendix*, appended to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37,225, 37,261 (Dep't of Commerce July 9, 1993) (stating that "*Georgetown Steel* stands simply for the proposition that, in a nonmarket economy, it is impossible to say that a producer has received a subsidy in the first place") (USA-21).

[29] *See e.g., Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks from the China*, 57 Fed. Reg. 10,459 (Dep't of Commerce March 26, 1992) (USA-94); *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans from China*, 57 Fed. Reg. 24,018 (Dep't of Commerce June 5, 1992) (USA-95).

[30] *General Issues Appendix*, appended to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37225, 37261 (Dep't of Commerce July 9, 1993) (USA-21).

[31] *U.S. – China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties* GAO-05-474, June 2005 ("GAO Report") (CHI-16).

country or "depart" from *Georgetown Steel*.[32] The facts are that: (1) even if the GAO report had said that, GAO reports have no status whatsoever under U.S. law and (2) the GAO never said Commerce had no ability to apply the CVD law to China as an NME.

27. First, the GAO is an advisory unit that works for Congress.[33] It has no authority to make, interpret or otherwise change U.S. law nor can it issue binding (or nonbinding) decisions. Second, as a factual matter, the GAO report merely observed that "Commerce does not have *explicit* authority to apply CVDs against NME countries."[34] It does not state that Commerce lacks such authority and is further evidence of the confusion regarding the state of U.S. law prior to the *GPX* legislation. The GAO did not offer any comprehensive analysis of the CVD law, because it is not the place of the GAO to do so. The second statement is a characterization of China's economy – that its character prevents Commerce from arriving at meaningful conclusions regarding subsidies. This characterization was not based on a comprehensive review of China's economy, such as that eventually undertaken by Commerce in the CVD investigation on coated free sheet paper ("*CFS Paper*") from China. Instead, the report simply relies upon Commerce's characterization of China's economy in 1984.[35] The report never considered the possibility that dramatic changes in China's economy might make it possible to apply the CVD law to China consistent with *Georgetown Steel.*

28. As the U.S. Federal Circuit has explained, Commerce, as the agency charged with administering the AD and CVD law, is the "master" of the AD and CVD law.[36] The U.S. Supreme Court recently underscored the point the Commerce's interpretation of the statutes it administers "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."[37] Accordingly, even if the GAO had disagreed with Commerce, it would have made no difference under U.S. law.

E. Commerce's Application of the U.S. CVD Law to China

29. In October 2006, Commerce received a petition to initiate a CVD investigation on coated free sheet paper ("*CFS Paper*") from China.[38] In accordance with its obligation under Article 13 of the *SCM Agreement*, the United States notified China that it had accepted such a petition. Consultations between the two governments were held on November 9 and 20, 2006.

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[32] China FirstWritten Submission, para 22.

[33] *See e.g.,* http://www.gao.gov/about/ (stating that its objective "is to advise Congress and the heads of executive agencies about ways to make government more efficient, effective, ethical, equitable and responsive.").

[34] GAO Report at 6 (CHI-16).

[35] GAO Report at 9 (CHI-16). At p. 3, the Report explains that "Commerce based the latter finding on its conclusion that, in such countries, government intervention in the economy is so pervasive that meaningful comparisons between subsidized and market-determined prices are not possible."

[36] *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995*)* (USA-22).

[37] *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (USA-15).

[38] *See Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea*, 71 Fed. Reg. 68,546 (Dep't of Commerce Nov. 27, 2006) ("*CFS Paper Initiation*") (USA-23).

30. On November 27, 2006, Commerce published the initiation of the CVD investigation on CFS from China in the U.S. Federal Register. In the publication, Commerce stated:

> Application of the Countervailing Duty Law to the PRC
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> Petitioner contends that there is no statutory bar to applying countervailing duties to imports from the PRC or any other non-market economy country. Citing Georgetown Steel, petitioner asserts that the court deferred to the Department's conclusion that it did not have the authority to conduct a CVD investigation, but did not affirm the notion that the statute prohibits the Department from applying countervailing duties to NME countries. See Petition, Part I, at 8 (citing *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (*Georgetown Steel*)). Petitioner further argues *Georgetown Steel* is not applicable as the countervailing duty law (section 303 of the Tariff Act of 1930) involved in the court's decision has since been repealed and the statute has been amended to provide an explicit definition of a subsidy. See section 777(5) of the Act. In addition, petitioner argues that the Chinese economy is entirely different from the economies investigated in *Georgetown Steel* and the Department should not have any special difficulties in the identification and valuation of subsidies involving a non-market economy, such as the PRC, that would not arise in a market economy countervailing proceeding.
>
> Finally, petitioner contends that the PRC's accession to the World Trade Organization (WTO) allows the Department to investigate countervailing duties in that country. Petitioner notes that the WTO Subsidies and Countervailing Measures Agreement (*SCM Agreement*), similar to U.S. law, permits the imposition of countervailing duties on subsidized imports on member countries and nowhere exempts non-market economy imports from being subject to the provisions of the *SCM Agreement*. As the PRC agreed to the *SCM Agreement* and other WTO provisions on the use of subsidies, petitioner argues the PRC should be subject to the same disciplines as all other WTO members.
>
> Petitioner has provided sufficient argument and subsidy allegations (see "Initiation of Countervailing Duty Investigations") to meet the statutory criteria for initiating a countervailing duty investigation of CFS paper from the PRC. Given the complex legal and policy issues involved, and on the basis of the Department's discretion as affirmed in *Georgetown Steel*, the Department intends during the course of this investigation to determine whether the countervailing duty law should now be applied to imports from the PRC. The Department will invite comments from parties on this issue.[39]

[39] *CFS Paper Initiation*, 71 Fed. Reg. at 68,549 (USA-23).

Subsequently, in December 2006, Commerce published a Notice of Opportunity to Comment on whether the current economic situation in China now warranted the application of the U.S. CVD law to an NME country.[40] China, along with several other interested parties, submitted comments through this process.[41]

31. On April 9, 2007, Commerce published the affirmative preliminary determination in the CVD investigation of *CFS Paper* from China in the U.S. Federal Register. The publication states that

> Informed by those comments [from the December 2006 Notice of Opportunity to Comment] and based on our assessment of the differences between the PRC's economy today and the Soviet and Soviet-style economies that were the subject of Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986), we preliminarily determine that *the countervailing duty law can be applied to imports from the PRC*. Our analysis is presented in a separate memorandum.[42]

32. The analysis referenced in the publication, which is available on Commerce's official website[43], goes on to explain in detail that Commerce's decision was based on the fact that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s in that it was no longer impossible to identify subsidies there. As Commerce stated:

> In sum, the nature of Soviet-style economies in the mid 1980s made it impossible for the Department to apply the CVD law. To determine that a countervailable subsidy had been bestowed, the Department needed to establish that (a) the NME had bestowed a "bounty or grant" on a producer; and (b) that grant was specific. The Soviet –style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In such a situation, subsidies could not be separated out from the amalgam of government directives and controls.
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> * * *
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> The current nature of China's economy does not create these obstacles to applying the statute. As noted above, private industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. . . . . The role of central planners is vastly smaller. . . . The Department has determined in recent years

[40] *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (Dep't of Commerce Dec. 15, 2006) (USA-24).

[41] *Application of the Countervailing Duty Law to Imports From the People's Republic of China: Request for Comment*, 71 Fed. Reg. 75,507 (Dep't of Commerce Dec. 15, 2006) (USA-24).

[42] *Coated Free Sheet Paper from the People's Republic of China: Amended Affirmative Preliminary Countervailing Duty Determination*, 72 Fed. Reg. 17,484, 17,486 (Dep't of Commerce Apr. 9, 2007) (Preliminary Determination) (emphasis added) (USA-25).

[43] Memorandum for David M. Spooner from Shauna Lee-Alaia, et al, *Countervailing Duty Investigation of Coated Free Sheet Paper from the Peoples's Republic of China* – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, March 29, 2007, available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf (USA-26).

> that many more companies' export activities are independent from the PRC government in comparison with the early-to- mid-1990s.
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> * * *
>
> Given these developments, we believe that it is possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer . . . . Because we are capable of applying the necessary criteria in the CVD law, the Department's policy that gave rise to the *Georgetown Steel* litigation does not prevent us from concluding that the PRC Government has bestowed a countervailable subsidy upon a Chinese producer. [44]

33. In sum, by 2007, producers and exporters in China were sufficiently distinct from the government of China to permit a rational determination that the government had transferred a subsidy to them. Thus, contrary to China's assertion that the change was a policy decision, Commerce simply applied its longstanding policy – of not applying the CVD law where it was impossible to do so – to the new situation in China, which was that it was no longer impossible to apply the CVD law.

34. On October 25, 2007, Commerce issued an affirmative final determination in the CVD investigation of *CFS Paper* from China.[45] Dissatisfied with Commerce's findings, China and certain Chinese respondents in *CFS Paper* 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:

> …it 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.[46]

35. 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:

> . . . the *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.[47]

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[44] *Id.,* pp. 9-10 (emphasis in original) (USA-26).

[45] *Coated Free Sheet Paper from the PRC: Final Affirmative CVD Determination*, 72 Fed. Reg. 60,645 (Dep't of Commerce Oct. 25, 2007) (USA-27).

[46] *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (USA-28).

[47] *Government of the People's Republic of China* , 483 F. Supp. 2d at 1282 (USA-28).

Because the U.S. International Trade Commission eventually concluded that imports of *CFS Paper* from China were not injuring the U.S. industry, Commerce did not enter a CVD order against these imports.[48]

36. Consistent with the court's affirmation of Commerce's broad discretion, Commerce continued its approach to apply the U.S. CVD law to China.

F. *GPX* Litigation

1. GPX I

37. One year later, the U.S. CIT once again had the opportunity to consider whether the U.S. CVD law could be applied to China. The underlying CVD investigation at issue, along with a parallel AD investigation, involved certain off-the-road tires ("OTR") from China.[49] Following Commerce's affirmative findings in those proceedings, on September 9, 2008, one of the respondents, GPX, filed complaints challenging Commerce's AD and CVD determinations, as well as a motion for a preliminary injunction preventing Commerce from collecting estimated duties while the litigation proceeded. Specifically, GPX argued that *Georgetown Steel* prevented the application of CVDs to any country classified as an NME country, so that the collection of deposits of estimated CVDs on its exports was *ultra vires* and would cause it irreparable harm.

38. On November 12, 2008, the U.S. CIT denied GPX's motion for a preliminary injunction ("*GPX I*"), 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.[50]

[48] *See Coated Free Sheet Paper From China, Indonesia, and Korea*, U.S. International Trade Commission, 72 Fed. Reg. 70,892 (Dec. 13, 2007) (USA-29).

[49] *Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, Certain New Pneumatic Off-the-Road Tires form the People's Republic of China*, 73 Fed. Reg. 40,480 (Dep't of Commerce July 15, 2008) (USA-30). *See Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, Certain New Pneumatic Off-the-Road Tires form the People's Republic of China*, 73 Fed. Reg. 51,624 (Dep't of Commerce Sept. 4, 2008) (USA-31). These determinations were two of the determinations that were the subject of DS379.

[50] *GPX I*, 587 F. Supp. 2d at 1289-90 (USA-93).

As such, the U.S. CIT found that *Georgetown Steel* should be read as deciding that Commerce's interpretation did not conflict with the statute.[51] Once again, the court of first instance found that Commerce was not prohibited from applying the U.S. CVD law to China.

2. GPX II

39. On September 18, 2009, the U.S. CIT issued a decision ("*GPX II*") rejecting GPX's argument that *Georgetown Steel* prevented Commerce from applying the U.S. CVD law to a NME country, stating:

> 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.[52]

In other words, for the third time in less than two years, the U.S. CIT found that "Commerce is not barred by statutory language from applying the CVD law to imports from the PRC . . . ."[53]

40. The U.S. CIT did accept GPX's fallback argument that, where Commerce is applying AD duties to China calculated under the special NME methodology, the application of CVDs to those same exports may have a "substantial potential" to create an impermissible double remedy for the subsidies countervailed.[54] The U.S. CIT held that "if Commerce now seeks to impose CVD remedies on the products of NME countries . . . Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur."[55] The U.S. CIT thus remanded the matter to Commerce to determine if such "a reasonably accurate way" was possible.[56]

3. GPX III and IV

41. On the initial remand from the U.S. CIT, Commerce determined that it had three options to comply with the Court's order: (1) refrain from applying the CVD law to imports of the subject merchandise; (2) apply the market economy provisions of the AD law to Chinese OTR

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[51] *Id.*, 587 F. Supp. 2d at at 90 (USA-93). The U.S. CIT denied the plaintiffs' motion for reconsideration on December 30, 2008. *Rehearing denied*, 593 F.Supp. 2d 1389. The court explained that: "There is now guidance on how to proceed in such a situation, that is *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 [add'l. citations omitted] (2005). *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. . . ."

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

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

[54] *Id.* at 13-24 (CHI-3). In reaching this conclusion, the U.S. CIT never identified a specific provision of U.S. law that Commerce supposedly violated.

[55] *Id*. at 19 (CHI-3).

[56] *Id.* at 24(CHI-3).

tires in particular, or China, in general; or (3) offset the CVDs on the subject merchandise against ADs on that merchandise. Although Commerce considered all three options to be inconsistent with the domestic statute, Commerce adopted the third option as the "least objectionable," because it would "create less confusion than not applying the CVD law or than affording either China or Starbright [one of the respondents] market treatment."[57] As such, Commerce offset GPX's CVD cash deposit rate against GPX's AD cash deposit rate.[58]

42. GPX then challenged Commerce's remand determination ("*GPX III*"). In *GPX III*, the U.S. CIT ruled that Commerce's determination was insufficient, and again remanded the proceeding to Commerce. Based entirely on its rationale of a likely double remedy, the court ordered Commerce not to apply the CVD law to the specific imports at issue in the litigation, so long as it continued to treat China as an NME country in the AD proceeding.[59]

43. Commerce complied with the order in *GPX III* and the U.S. CIT affirmed Commerce's redetermination in *GPX IV*.[60] The United States and domestic interested parties then appealed to the U.S. Federal Circuit, the court of superior jurisdiction over the U.S. CIT.

4. GPX V

44. Though the parties appealed the U.S. CIT's decision, the U.S. Federal Circuit never reached the issue of double remedies, because it concluded that Commerce could not apply the CVD law to China, as long as China was classified as an NME country. The U.S. Federal Circuit reasoned that, in "amending and reenacting the trade laws in 1988 and 1994, Congress adopted the position that the [CVD] law does not apply to NME countries."[61] In other words, the rationale of the U.S. Federal Circuit was based not on the plain text of the statute—which unambiguously provided that Commerce "shall" apply CVD law to all countries—but rather on the Court's interpretation of the legislative intent of Congress subsequent to the *Georgetown Steel* decision. Such a decision was a misinterpretation of the CVD law[62] and an overbroad interpretation of *Georgetown Steel*.

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[57] *See* Final Results of Redetermination Pursuant to Remand of *GPX International Tire Corporation* v. United States, Consol. Court No. 08-00285, Slip Op. 09-103, U.S. Department of Commerce (Apr. 26, 2010), p. 9 (USA-32).

[58] *Id.*, p. 11 (USA-32).

[59] *GPX III* at 28 (CHI-4).

[60] *GPX IV* (CHI-5).

[61] *GPX V* (CHI-5).

[62] As explained above, the application of CVDs to subsidized merchandise exported to the United States is mandatory where U.S. petitioners have satisfied the conditions for relief under the statute. The term "country" in the CVD law is not limited to countries with market economies. It refers to all countries. The term "nonmarket economy country" did not appear in the CVD law prior to enactment of the *GPX* legislation, so that the classification of a country as an NME, *per se*, country has no necessary consequence under the CVD law. The only statutory consequence of being classified as an NME country is that, in calculating dumping margins, Commerce must base normal value on the nonmarket economy methodology set forth in 19 U.S.C. §1677b(c). Commerce did not conclude (and lacked statutory authority to conclude) that it would never be possible to apply the CVD law to any NME country that might exist at some future date.

45. Contrary to the findings of the lower court that the *Georgetown Steel* decision deferred to the discretion of the administering authority, the U.S. Federal Circuit in *GPX V* interpreted *Georgetown Steel* as standing for the proposition that there could never be a country treated as a NME under the AD law in which it would be possible to identify subsidies. The U.S. Federal Circuit concluded that, by remaining silent about the issue, Congress "legislatively ratified" precisely this overbroad interpretation of *Georgetown Steel*.

46. While the U.S. Federal Circuit did not dispute Commerce's interpretation of the CVD law directly, it rendered Commerce's interpretation of the law irrelevant by concluding that Congress had effectively amended the CVD law to override it. A review of the court's discussion of the legislative history in 1984, 1988, and 1994 demonstrates that the court's reading of congressional intent was erroneous.

47. First, the U.S. Federal Circuit found that, in 1984, after hearing testimony from Commerce officials that the CVD law could not be applied in NME countries, Congress enacted "other changes" to the trade laws, "but rejected provisions that would have affected trade remedies on NME imports."[63] This shows nothing other than that Congress declined to change the law in a manner that would have attempted to force Commerce to do what Commerce had determined to be impossible. The U.S. Federal Circuit also noted that the United States had argued in *Georgetown Steel* that "the 1984 legislative history demonstrated 'Congressional ratification of and acquiescence in [Commerce]'s interpretation."[64] The Federal Circuit acknowledged that it had not, in fact, accepted the Government's ratification argument in *Georgetown Steel*, stating only that Congress' actions gave "no indication . . . that Congress intended or understood that the [CVD] law would apply."[65] Equally, Congress gave no indication that it intended or understood that Commerce had concluded that the CVD law could never be applied to any country classified as an NME country under any circumstances.

48. Acknowledging that the 1984 legislative history was not conclusive, the Federal Circuit found that the 1988 and 1994 legislative histories clearly spoke to Congressional intent. In 1988, Congress passed the passed the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"), which was vetoed by President Reagan and never became law.[66] The court noted, however, that the House bill that later became the act contained a provision stating that the CVD law applied to any NME country "to the extent that" Commerce could identify and value subsidies in that country.[67] This provision was rejected in the House-Senate conference, in favor of retaining the then-present law, which the conference report described as being the holding of *Georgetown Steel* that the CVD law did not apply to exports from NME countries.[68] The U.S. Federal

[63] *GPX V* at 741 (CHI-6).

[64] *Id.*

[65] *Id*.

[66] *Id.*at 742, citing Message from the President of the United States Transmitting His Veto of H.R. 3, H.R. Doc. 100-200 (1988).

[67] *Id.* at 741.

[68] *Id.* at 742.

Circuit concluded that "Congress' rejection of the very language that would have achieved the result the Government seeks here weighs heavily against the Government's interpretation" that the proposed language was a clarification that was not actually necessary.[69]

49. There are two problems with the Federal Circuit's analysis. First, Congress' failure to enact a particular law does not establish that Congress adopted the converse of that law. If that were true, Congress could be found to have adopted hundreds of new laws each year through such converse implications, with consequences too complex and remote to identify, still less untangle. The Federal Circuit's reliance on the failure of the 1988 Act is particularly perilous given that the Federal Circuit did not analyze how the law, at the time of the proposed 1988 amendment, would have treated the new types of NME regimes. In fact, Congress itself never considered (and may not have imagined) what new types of NME regimes might arise in the future or whether it might be possible to identify subsidies in such countries. The court ignored these difficulties, as well as other competing inferences, such as that the House bill may have been intended to clarify or affirm Commerce's authority to apply the CVD law to NMEs, where possible, and that the proponents of the clarification were simply not willing to trade enough to secure the passage of language that they thought could be unnecessary.[70]

50. Second, the passage cited by the court is not actually part of the legislative history of the CVD law. In concluding that Congress ratified the holding of *Georgetown Steel*, the decision relies heavily upon a statement made in a conference report that, in the court's view, described the "present law" as the "holding of *Georgetown Steel.*"[71] However, Section 2 of the 1988 Act expressly delineates those portions of the conference report that constitute the legislative history of the 1988 Act, and those sections do *not* include the statement upon which the *GPX V* decision relied.[72] Thus, the U.S. Federal Circuit's reliance upon this material as legislative history was in error.

51. While embracing faint implications of the selected legislative history, the U.S. Federal Circuit seemed unmoved by Congress's explicit support for Commerce's application of CVD law to China. First, the U.S. Federal Circuit ignored the U.S. Congress's appropriation in 2000

[69] *Id.* at 743 (quotation omitted).

[70] *See Pension Benefit Guar. Corp. v LTV Corp.*, 496 U.S. 633, 650 (1990) (" '[S]everal equally tenable inferences' may be drawn from [congressional] inaction, 'including that existing legislation already incorporated the offered change.'") (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)) (USA-33).

[71] *GPX V* at 742 (citing H.R. Rep. No. 100-576, at 628 (1988)).

[72] Section 2 of the 1988 Act specifies that certain portions of the conference report of a prior bill vetoed by the President, H.R. 3 of the 100th Congress, shall be treated as the legislative history of the 1988 Act. Omnibus Trade and Competitiveness Act of 1988, § 2, Pub. L. No. 100-418, 102 Stat. 1107 (USA-96). Thus, only the portions of the conference report with "the same numerical or alphabetical designation" as the 1988 Act are the legislative history of that Act. *Id.* Although *GPX V* addresses Section 2 of the 1988 Act, it did not analyze the numerical or alphabetical designations of the conference report to determine what statements constitute the legislative history of the Act. *See GPX V*, 666 F.3d at 742. Such an analysis demonstrates that the statement in the conference report relied upon in *GPX V* does not share an alphabetical or numerical designation with any provision of the 1988 Act. *See* H.R. Rep. No. 100 576, at 628 (1988) (USA-19). Thus, the statement made under those designations does not constitute part of the legislative history of the 1988 Act, and the U.S. Federal Circuit's reliance upon this statement as legislative history is contrary to Section 2 of the 1988 Act.

of funding for Commerce to defend "countervailing duty measures with respect to products of [China]" before the World Trade Organization.[73] The U.S. Federal Circuit dismissed this appropriation by suggesting that "Congress intended Commerce to apply the [CVD] law to China only if Commerce found either that China was no longer an NME country or that China had a market-oriented industry."[74] The court, however, cited no support for this proposition, other than a statement by the United States Trade Representative published in the *Congressional Record*, which by its very nature does not speak to the understanding of Congress and, by the court's own admission, is at odds with floor statements by actual members of Congress that contemplated application of the CVD law to China.[75] The U.S. Federal Circuit also cited to Commerce's determination in *Sulfanilic Acid from Hungary*,[76] to discount the force of the 2000 legislation, but any findings with respect to Hungary in 2000 have no bearing on whether Commerce is able to identify subsidies in present-day China.

52. Similarly, the U.S. Federal Circuit ignored the fact that, after Commerce determined that it could apply the U.S. CVD law to China in 2006, Congress explicitly appropriated funds for Commerce to continue that practice. For example, legislative history for Commerce's fiscal year 2008 budget acknowledged acknowledged that Commerce "recently decided to apply, for the first time, the CVD law to China, a non-market economy," prompting the Senate to authorize additional funding in recognition of the increased agency workload.[77] Beginning in FY 2010, Commerce's budget included specific funding for the "China Countervailing Duty Group," which was "established in fiscal year 2009 to accommodate the workload that has resulted from the application of the [CVD] law to imports from [NME] countries."[78] These actions do not show that Congress first ratified an overbroad reading of *Georgetown Steel*, and later rescinded that ratification. Rather, they indicate that Congress deferred to Commerce's judgment that it was impossible to apply the CVD law to the Soviet-bloc economies of the 1980s and similarly deferred to Commerce's conclusion that, more than twenty years later, it was no longer impossible to apply the CVD law to China.

53. The United States had two options to seek further judicial review of the decision in *GPX V*. It could have petitioned the U.S. Federal Circuit for a rehearing.[79] It could have also appealed the decision to the U.S. Supreme Court, the highest court in the United States.[80]

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[73] 22 U.S.C. § 6943(a)(1) (USA-34).

[74] *GPX V* at 744 (CHI-6).

[75] *GPX V* at 744 (citing 146 Cong. Rec. 17,509 (2000) (statement of Sen. Byrd)).

[76] *Final Affirmative Countervailing Duty Determination: Sulfanilic Acid from Hungary*, 67 Fed. Reg. 60,223 (Dep't of Commerce Sept. 25, 2002) ("*Sulfanilic Acid from Hungary*") (USA-35).

[77] S. Rep. No. 110-124, at 12 (2007) (USA-36).

[78] Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3034, 3113 (2009) (USA-37); H.R. Rep. No. 110-124, at 10-11 (2009) (USA-38); *see also* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, 125 Stat. 552, 591 (2011) (appropriating funds to the China Countervailing Duty Group at Commerce for FY 2012) (USA-39).

[79] U.S. Federal Rules of Appellate Procedure ("FRAP") 35 (USA-40).

[80] U.S. FRAP 41 (USA-41).

Because of the shortcomings identified above, *GPX V* was an ideal candidate for both options.[81] As explained below, however, the United States was never able to pursue an appeal to the U.S. Supreme Court, because the U.S. Congress acted to overturn the *GPX V* decision.

54. On March 5, 2012, the United States filed a petition for rehearing, e*n banc* in *GPX V* on the grounds that the decision: (1) rejected Commerce's reasonable interpretation that the statute mandated the application of CVDs where that was not impossible; (2) relied upon an overly broad putative reading of *Georgetown Steel*; and (3) relied upon the supposed "ratification" of this overly broad reading of *Georgetown Steel* by Congress, despite the lack of any evidence that Congress intended any such ratification and the fact that some of the putative "legislative history" pertained to proposals that never became law.[82]

55. Under the U.S. federal rules of appellate procedure, the timely filing of this petition meant that the U.S. Federal Circuit's decision in *GPX V* was not final and appealable. The petition stayed the issuance of the mandate until the petition was either granted or denied.[83] An appellate court's decision is not final until its mandate issues.[84]

5. *GPX* Legislation

[81] In its most recent review of a U.S. Federal Circuit decision under the AD law (reversing that decision by nine votes to zero), the U.S. Supreme Court explained that:

> The issue is not whether, for purposes of [the AD law] the better view is that a SWU contract is one for the sale of services, not goods. The statue 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.

United States v. Eurodif S.A., 555 U.S. at 316 (USA-15). In *GPX V*, not only is there no "unambiguous statutory language to the contrary" of Commerce's interpretation of the CVD law, there is unambiguous language that is perfectly consistent with Commerce's interpretation. Similarly, Commerce did not resolve any statutory language that was "ambiguous." The meaning of "subsidy" (formerly "bounty or grant") is relatively clear. Commerce's determination was a factual one that it was no longer impossible to identify a subsidy in China. *See also City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 (USA-42).

[82] Corrected Petiton for Rehearing En Banc of Defendant-Appellant, United States, Fed. Cir. 2011-1107, - 1108, - 1109 (March 5, 2012) (USA-43).

[83] US FRAP 41(b) (USA-41).

[84] As further explained below, within the U.S. judicial system, at least two events must occur before an opinion by U.S. federal appellate court, which includes the U.S. Federal Circuit, has binding legal effect. First, the appellate court must enter judgment in the case, which usually takes the form of an opinion. This entry of judgment starts a certain period of time in which a party may request a rehearing of the case. Second, if no party files a petition for rehearing during this period the appellate court will issue a "mandate" seven days after the expiration of the deadline for filing a petition for rehearing. The opinion is not final and does not take effect until the mandate issues. If a petition for a rehearing is filed, however, the mandate is stayed until the petition is granted or denied. No mandate was issued for *GPX V*.

56. On March 13, 2012, after the petition for rehearing was filed, but before the U.S. Federal Circuit had a chance to rule on that petition, Congress enacted the *GPX* legislation. The *GPX* legislation not only makes explicit that the CVD law is applicable to NME country exports going forward, but makes explicit that the law had always applied to such exports, as Commerce maintained throughout the *GPX* litigation.

57. Section 1 of the *GPX* legislation, "Application of Countervailing Duty Provisions to Nonmarket Economy Countries," provides that, "In General -- . . . the merchandise on which countervailing duties shall be imposed under [the CVD law] includes [merchandise] from . . . nonmarket economy countr[ies]." Specifically, Section 1 of the *GPX* legislation is reflected in U.S. law as:

> (f) Applicability to proceedings involving nonmarket economy countries
>
> (1) In general
>
> Except as provided in paragraph (2), the merchandise on which countervailing duties shall be imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country.
>
> (2) Exception
>
> A countervailing duty is not required to be imposed under subsection (a) on a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country if the administering authority is unable to identify and measure subsidies provided by the government of the nonmarket economy country or a public entity within the territory of the nonmarket economy country because the economy of that country is essentially comprised of a single entity.[85]

58. The structure of the legislation closely parallels Commerce's longstanding interpretation of the statute. First, it makes explicit that the general rule that the CVD law applies to imports from all countries includes NME countries. Second, it recognizes the exception to this general rule made by Commerce in the 1980s – that Commerce is not obligated to apply the law where it is "unable" to do so. Finally, the Act explains what is meant by Commerce being "unable" to apply the CVD law to an NME country in language that tracks Commerce's explanation in the *CFS Paper* investigation.

[85] 19 U.S.C. § 1671(f) (USA-02).

59. In order to eliminate any doubt that the *GPX V* misread the existing state of the law and therefore should not apply to any current CVD proceeding, the *GPX* legislation explicitly makes these provisions applicable "all proceedings initiated under [the CVD law] on or after November 20, 2006," which corresponds to the date on which the *CFS Paper* CVD investigation was initiated. This is the date on which the *CFS Paper* CVD investigation was initiated.[86] In short, Congress made it explicit that the U.S. CVD law should be administered in accordance with Commerce's interpretation, not that of the U.S. Federal Circuit in *GPX V*.

60. Although there is no official legislative history of the *GPX* legislation, several congressmen spoke about the legislation as reflected in the record of the debate in the House of Representatives.[87] Nineteen representatives spoke in favor of the legislation. Together, they made explicit that Commerce had always had the authority to apply the CVD law to NME countries, except where that was impossible. In floor statements, the representatives characterized the U.S. Federal Circuit's decision in *GPX V* as "erroneous," "flawed," "wrong[]" or "faulty;"[88] in the words of one representative, *GPX V* was based on a "deeply flawed assessment of Congressional intent," and the legislation was repeatedly described as reaffirming and continuing Commerce's application of the CVD law to NME countries.[89] Not a single word of dissent to this perspective was expressed.

61. Finally, it should be emphasized that the *GPX* legislation does not overturn the decision of the Federal Circuit in *Georgetown Steel*. Quite to the contrary, it confirms Commerce's longstanding interpretation that the CVD law applies to all countries, with the exception, fashioned by Commerce and accepted by the Federal Circuit in *Georgetown Steel,* that Commerce is not required to apply the law where that is impossible.

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[86] *See CFS Paper Initiation* (USA-23).

[87] There was no debate in the Senate, where the bill was passed by unanimous consent.

[88] *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."

[89] *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."

6. GPX VI

62. Following the passage of the *GPX* legislation, the U.S. Federal Circuit ordered the parties to submit briefs describing the impact of the new legislation upon the case.[90] The United States responded that the legislation rendered *GPX V* moot, by affirming Commerce's longstanding view that, where the statutory conditions for relief have been satisfied, Commerce must apply CVDs to all countries, except to those countries in which it is impossible to identify subsidies.

63. On May 9, 2012, the U.S. Federal Circuit granted the United States' petition for a rehearing, acknowledging that Congress "sought to overrule our decision in *GPX* [*V*]."[91] The court also agreed that *GPX V* had been overturned before it had become final, explaining:

> This case [*GPX V*] was still pending on appeal when Congress enacted the new legislation, *as our mandate had not yet issued*. … [N]o issue is raised by the fact that our decision in *GPX* had issued prior to enactment of the new legislation because this case remained pending on appeal.[92]

A mandate was issued for the court's decision in *GPX VI*.[93] As such, the U.S. Federal Circuit transferred jurisdiction back to the U.S. CIT to rule on a challenge that the *GPX* legislation was inconsistent with the U.S. constitution.[94]

64. As a result of these events, the opinion of the U.S. Federal Circuit in *GPX V* never became final. As the U.S. Federal Circuit explained, "this case was still pending on appeal when Congress enacted the new legislation, as our mandate had not yet issued."[95] Moreover, the *GPX* legislation ensured that *GPX V* would never have any effect under U.S. law, so that there would have been no basis for an appeal, even if the decision had become final.[96] Accordingly, *GPX V* is not a binding precedent under U.S. law.

7. GPX VII

On January 7, 2013, the U.S. CIT rejected the constitutional claims raised by the respondents. In reaching its decision, the court noted the dispute as to whether the new legislation "clarified" what had always been the state of the CVD law or was a retroactive change in that law, as follows:

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[90] *See GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012) ("*GPX VI*") (CHI-7).

[91] *See id.* at 1311 (CHI-7).

[92] *GPX VI* at 1312 (CHI-7).

[93] *Id.* (CHI-7).

[94] *GPX VI* at1313 (CHI-7).

[95] *See GPX VI* at 1312, citing *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (USA-71); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977).

[96] In U.S. legal terminology, there was no remaining "case or controversy," to support an appeal to the Supreme Court. *See Davis v. Federal Election Commission*, 554 U.S. 724, 732 (2008) (federal courts restricted to "the resolution of cases and controversies") (USA-45).

> Thus, only the basic question remains as to whether Section 1 which because of its clear retrospectively 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. [97]

Although the court did observe, in *dicta*, that "the Government's view of a simple clarification is not easily extracted from the tangled history of this case,"[98] the court explicitly declined to decide that issue, noting that the Federal Circuit had not done so. Thus, contrary to China's assertions,[99] there is no judicial authority to the contrary of Commerce's interpretation that the CVD law has always applied to exports from any country, except in countries where it is impossible to identify a subsidy.

65. In addition, the U.S. CIT rejected the argument that respondents were deprived of their due process rights by Commerce's decision to apply the U.S. CVD law to NME countries. The court stated:

> At a minimum, the parties here had notice at the time of an affirmative preliminary determination [in 2007] that Commerce would subject their imports entered thereafter to full trade remedy duties, because that is exactly what Commerce did.[100]

66. Having rejected the respondent's constitutional claims, the U.S. CIT remanded the proceeding to Commerce for the resolution of several substantive issues concerning the application of CVDs to the OTR proceedings. The proceeding remains ongoing.[101]

67. At a minimum, the *GPX* litigation evidences a conflict in the interpretation of the law previous to the *GPX* legislation. While Commerce's clear interpretation of the U.S. CVD law was upheld by several judicial tribunals, the U.S. Federal Circuit issued a different interpretation in *GPX V*. Recognizing the court's mistake, Congress acted quickly to resolve the ambiguity and to make clear the requirements of the law before the *GPX V* opinion could take effect. Such

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[97] *GPX VII* at 14 (emphasis added) (CHI-8).

[98] *Id.* at 12 (CHI-8).

[99] China First Written Submission, paras. 56-57

[100] *GPX VII* at 25.

[101] Subsequent to *GPX VII*, the U.S. CIT again upheld the constitutionality of the *GPX* legislation on similar grounds as in *GPX VII* in litigation arising from Commerce's CVD investigation on certain kitchen appliance shelving and racks from China. *See Guangdong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362, 1369-1376 (Ct. Int'l Trade 2013) (USA-46). That decision has been appealed by the Chinese respondent company and is pending before the U.S. Federal Circuit.

actions have been found to be in accordance with U.S. due process requirements and likewise meet the United States' WTO obligations.