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

(AB-2014-4 / DS449)

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I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Overview

1. This appeal represents both the broad ambition and narrow focus of China in relation to countervailing duties ("CVDs") imposed by the United States. The ambition of China is for the WTO to declare that the United States, alone among WTO Members, may not apply CVDs to subsidized imports from China pursuant to domestic CVD proceedings that satisfy domestic and WTO requirements. That this appeal only involves the enforcement-upon-publication obligation set out in Article X:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") is emblematic of the pursuit of these aims by any means.

2. The United States recalls that the measure being challenged by China, P.L. 112-99 ("*GPX* legislation"), was enacted in response to previous findings by the Appellate Body. The law requires that the U.S. Department of Commerce ("Commerce") investigate and ensure that antidumping duties calculated under a non-market economy ("NME") methodology are adjusted to the extent of any overlap with CVDs being simultaneously imposed. The law also confirms that CVDs shall be imposed in respect of subsidies in NMEs, except to the extent that subsidies cannot be measured because the economy is essentially comprised of a single entity.

3. Given these U.S. actions, the United States invites the Appellate Body to consider what is not, or is no longer being alleged by China. China has not alleged that the U.S. application of *any* CVDs to it is inconsistent with GATT 1994 or the *Agreement on Subsidies and Countervailing Measures* – although incongruously it is China's position that U.S. law previously prohibited the United States from applying any CVDs to it. China has not alleged that the U.S. application of CVDs to it while antidumping duties are assessed using an NME methodology is *per se* WTO-inconsistent. Nor could it given that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its antidumping law.

4. China challenges the *GPX* legislation, but no longer in its entirety. China abandoned the claim in its panel request that Section 2 of the law, mandating that Commerce investigate and avoid any overlap in remedies, was inconsistent with Article X:3(a) of the GATT 1994 (uniform, impartial, and reasonable administration). With respect to Section 1, China challenged it only to the extent that it applies to proceedings initiated prior to the date of publication of the law. That is, China did *not* challenge Section 1 to the extent it applied prospectively to proceedings on or after the date of publication.

5. And even in respect of its challenge to Section 1's application to proceedings initiated prior to the date of publication of the law, in this dispute China has now abandoned claims in its panel request that it either did not assert before the Panel (Article X:3(a) of the GATT 1994 (uniform, impartial, and reasonable administration)) or certain claims that the Panel rejected (Article X:1 of the GATT 1994 (prompt publication) and Article X:3(b) (establishment of mechanisms to ensure the prompt review and correction of administrative decisions on customs matters)).

6. The result of this successive abandonment and narrowing is that China has presented only one claim on appeal (and which became the main focus of its arguments before the Panel), under Article X:2. China would have the Panel and Appellate Body conclude that, because the *GPX* legislation establishes that it applies to ongoing proceedings or cases related to administrative proceedings initiated between November 20, 2006, and the date of publication of the law, the law was enforced prior to publication to the detriment of Chinese imports, contrary to Article X:2. But China errs; as the Panel correctly found, there is no detriment to Chinese imports from enforcement of the *GPX* legislation, which continues to apply U.S. CVD law to those imports.

7. The Panel thoroughly considered China's arguments and made extensive legal and factual findings in concluding that the *GPX* legislation did not "effect[ ] an advance in a rate of duty or other charge on imports under an established and uniform practice" and did not "impos[e] a new or more burdensome requirement, restriction or prohibition on imports" under Article X:2. In the end, the Panel's conclusions rested on a few key interpretations and facts that comport with Article X:2 and, importantly, common sense.

8. The Panel interpreted Article X:2 and found that a comparison must be made between the measure at issue and the pre-existing rates, requirements or restrictions on imports. The Panel properly conducted such an analysis and found no "advance" in a rate of duty or "new or more burdensome" restriction or requirement within the meaning of Article X:2.

9. Under both phrases in Article X:2 (an advance in rate of duty "under an established or uniform practice" and a "new or more burdensome" requirement or restriction), the Panel properly concluded that the interpretation and application of domestic law by the agency administering that law was a key consideration. As explained further below, this consideration flows from the text of Article X:2, which is addressed generally to the enforcement (administration) by Members of certain measures and also specifies that the pre-existing rate of duty must exist "under an established and uniform practice." In addition, the Panel found that, since 2006, the United States had exercised its right to apply CVDs to China and therefore had an "established and uniform practice" of application of CVDs to Chinese imports where subsidies were being conferred.

10. The Panel also concluded that the administering agency's interpretation and application of U.S. law *was* valid U.S. law as "nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law."[1] This finding was critical because the Panel also found that, under principles of U.S. constitutional law, an agency interpretation of legislation is lawful and governs unless overturned in a binding court decision applying the standard of review articulated by the U.S. Supreme Court.[2]

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[1] Panel Report, para. 7.172.

[2] Panel Report, para. 7.163 (citing to the U.S. Supreme Court decisions in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), at 316, and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), at 843) ("[U]nder United States law, even when a court reviews the interpretation of a law that underlies action taken

11. In making these key findings on pre-existing domestic law, the Panel applied the approach articulated by the Appellate Body report in *US – Carbon Steel* to examine "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." As the United States will explain, all of these sources supported the Panel's finding that pre-existing U.S. law was to apply CVDs to China, not (as China erroneously suggests) to prohibit applying CVDs to China.

12. Based on these findings, the Panel concluded that there was no breach of Article X:2 through enforcement of the *GPX* legislation. Even with respect to its application to administrative proceedings initiated prior to publication, there was no change to the detriment of Chinese imports. Prior to the *GPX* legislation, Commerce interpreted the existing U.S. CVD law as applicable to imports from China. Commerce's administration of the law resulted in rates CVDs being applied to the imports at issue. After the *GPX* legislation, Commerce continued to apply the U.S. CVD law to imports from China. The CVD rates imposed prior to the *GPX* legislation were not changed or otherwise affected by the *GPX* legislation. The Panel properly found that based on these facts, the *GPX* legislation did not cause an increase in the existing rates of CVDs nor could the *GPX* legislation impose new or additional requirements or restrictions as the U.S. CVD law was already being applied to China.

13. China's claims that the transparent and democratic U.S. legal system resulted in legislation that breached the publication and enforcement requirements of the GATT 1994 are astonishing. As explained in this submission, they are entirely dependent on the Appellate Body committing a series of interpretive errors in relation to Article X:2 and resolving issues of U.S. law contrary what would result under the U.S. legal system. The Appellate Body should reject China's appeal in all respects.

B. Summary of Key Facts as Found by the Panel and Erroneous Assertions by China

14. In its request for completion of the analysis, China engages in an extensive narrative of alleged undisputed facts; it casts its narrative of the history of the application of the U.S. CVD law to NME countries as one of a rogue agency engaged in unpublished and unlawful practices.[3] But the factual findings of the Panel as well as evidence on the record demonstrate otherwise. Incredibly, China asks the Appellate Body to ignore or "moot"[4] the Panel's findings and evidence and instead asks the Appellate Body accept its narrative in paragraphs 99-170 of its

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by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous'. This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.").

[3] China's Appellant Submission, para. 62 (arguing that the Panel's approach allowed for "imports [to be] subjected to a rate of duty that had no basis in any officially published measure of general application.").

[4] China's Appellant Submission, para. 88.

appellant submission as "undisputed facts."[5] As further explained below,[6] the United States disagrees that China's narrative is "undisputed." China's narrative advances the same arguments that were heavily contested during the proceedings before the Panel. The Panel made an objective assessment of the matter before it, including the evidence on the record and the arguments of the parties, and made findings contradicting many core assertions by China.

15. In this section, the United States presents certain key facts as found by the Panel and that controvert China's distorted narrative. As certain of these facts underlie different Panel findings, and given the length of the U.S. refutation of China's "undisputed" facts, it may be useful to summarize the relevant facts here for ease of reference. In the next section (Section I.C), the United States summarizes the Panel's interpretation and application of Article X:2 and how China's claims of error fail.

16. **Agency Practice Was to Apply the CVD Law to China Since 2006:** First, China would like the Appellate Body to ignore the fact that Commerce has been applying the U.S. CVD law to imports from China since 2006.[7] China mischaracterizes the U.S. CVD law (*i.e.,* Section 701(a) of the U.S. Tariff Act) prior to the *GPX* legislation as "not appl[icable] to imports from nonmarket economy countries,"[8] but a review of the plain text of Section 701(a) demonstrates that Commerce is obligated to impose CVDs on subsidized imports from any country. Section 701(a) of the U.S. Tariff Act states that if Commerce "determines that the government of *a country* … is providing, directly or indirectly, a countervailable subsidy… then there *shall be imposed* upon such merchandise . . . a countervailing duty."[9] It is an undisputed fact that China is a "country," and there is no language in the U.S. CVD law to exclude NME

[5] China's Appellant Submission, paras. 99-170.

[6] *See infra* Section IV.C.

[7] *Id.*

[8] China's Appellant Submission, para. 105.

[9] Section 701(a) 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--

(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. (Exhibit USA-2) (emphasis added).

countries from the requirements of Section 701(a) of the U.S. Tariff Act. Commerce refrained from applying the U.S. CVD law to China before 2006 only because it found this to be impossible, and began to apply the U.S. CVD law to China as soon as it determined (in 2006) that it was no longer impossible to do so.

17. Commerce's application was based on its lawful interpretation of Section 701(a) of the U.S. Tariff Act and its recognition that, unlike NME countries of earlier eras, China had modernized its economy to the point where Commerce could identify and measure subsidies. Each time Commerce applied the law to Chinese imports through the initiation of a CVD proceeding, and each time a determination was made as a result of Commerce's investigation or review of the imports at issue, notice was provided in the U.S. Federal Register.[10]

18. China argues that it is an undisputed fact that Section 701(a) did not apply to NME countries such as China.[11] But as the United States explains further below in Section IV.C, China's assertion is not an undisputed fact. The plain text of Section 701(a) has always stated that the U.S. CVD law applies to *any* "country." In the early 1980s, Commerce conducted CVD investigations of imports from Soviet bloc countries and found that those economies were so centralized that producers and exporters were effectively branches of the central governments. Consequently, it was not possible to identify the transfer of a subsidy from the central government to a producer or exporter.[12] After extensive domestic litigation, the U.S. Court of Appeals for the Federal Circuit ("U.S. Federal Circuit"), in an opinion known as *Georgetown Steel,* deferred to Commerce's factual findings that it was not possible to find incentives or benefits provided by the governments of those Soviet bloc countries. The U.S. Federal Circuit made clear that it based its ruling on the reasonableness of Commerce's actions.[13]

19. As China's economy evolved over the following 20 years, Commerce's analysis necessarily evolved as well. In response to a petition from domestic industry, Commerce initiated a CVD investigation on certain paper imports from China in 2006. In initiating this investigation, Commerce had to make a factual determination as to whether China's modern economy was sufficiently different from those of the Soviet-bloc states of the 1980s such that it was no longer impossible to identify subsidies in China, as the United States has found China to be an NME country for antidumping purposes. After extensive deliberation with interested parties, including China, Commerce concluded that it was possible to identify countervailable

[10] The U.S. Federal Register is the official daily journal of the U.S. Government. Exhibit USA-119, submitted during the proceedings before the Panel, provides a listing of the administrative notifications regarding the application of the U.S. CVD law to China from November 2006 to March 2012.

[11] China's Appellant Submission, paras. 101-112.

[12] *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*] (Exhibit USA-07).

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

subsidies based on the market conditions of China at that time.[14] As such, the Panel found that United States has uniformly applied the U.S. CVD law to imports from China since 2006. [15]

20. **No Court Ordered Commerce to Change Its Interpretation or Application of the CVD Law to China:** The Panel found, as a matter of fact, that no court ordered Commerce to change its interpretation of the U.S. CVD law or application of that law to China. Nonetheless, China persists in arguing that one appellate opinion demonstrates that it was unlawful for Commerce to apply the U.S. CVD law to China. China would like the Appellate Body to ignore the fact that an interim, or non-final, opinion issued by a U.S. domestic court – the *GPX V* opinion[16] – did not change Commerce's authority to apply the U.S. CVD law to imports from China.[17]

21. Commerce's finding that it was no longer impossible to apply the U.S. CVD law to China was challenged in U.S. domestic courts as part of litigation commonly referred to as the *GPX* litigation. After U.S. courts of first instance repeatedly found that Section 701(a) and *Georgetown Steel* did not preclude Commerce from applying the U.S. CVD law to imports from China,[18] the U.S. Federal Circuit stated otherwise in an opinion known as *GPX V*.

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[14] 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 [hereinafter Georgetown Steel Memorandum] (Exhibit USA-26)

[15] Panel Report, para. 7.169 ("The record shows that, in November 2006, USDOC published the initiation of a CVD investigation of CFS paper from China, and that in December 2006, it published a notice of opportunity to comment on whether the CVD law 'should now be applied to imports from the PRC'. In April 2007, USDOC published an affirmative preliminary determination in the CVD investigation of CFS paper, in which it preliminarily determined that the United States CVD law could be applied to imports from China. In October 2007, USDOC issued an affirmative final determination in the CVD investigation concerned. The record further shows that between November 2006 and March 2012, USDOC initiated 33 investigations and reviews in respect of imports from China under United States CVD law, notifying China and other parties of its application of United States CVD law to China, and that in many of those proceedings USDOC issued CVD orders. USDOC undertook those investigations and reviews, and issued those orders, even though, then as later, the United States designated China as an NME country. The United States contends that these facts reflect an established and uniform practice. For its part, China has not identified any instance pertaining to the relevant time-period in which USDOC determined that it lacked authority under domestic law to apply countervailing duties to imports from NME countries. In our view, these elements therefore support the view that between November 2006, or at least April 2007, and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country that was securely in place (established) and that did not change over time (uniform).") (internal footnotes omitted).

[16] *See GPX Int'l. Tire Corp. v. United States*, 666 F.3d 732, 739-745 (Fed. Cir. 2011) ("*GPX V*") (Exhibit CHI-6).

[17] China's Appellant Submission, para. 88 ("the Appellate Body should hold that the Panel's findings in paragraphs 7.158 to 7.186 of the Panel Report are moot and of no legal effect.").

[18] *See*, *e.g.*, *Gov't of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (Exhibit USA-28).

22. Contrary to China's assertions regarding the "undisputed" nature of the *GPX V* opinion,[19] the Panel found that the meaning and legal relevance of the *GPX V* opinion under U.S. municipal law is a heavily contested issue that is currently being litigated in more than 10 cases before U.S. federal courts.[20] The United States also presented evidence to the Panel demonstrating that the U.S. Federal Circuit's opinion was based upon a controversial and misapplied legal theory that relied upon the inaction of the national legislature, the U.S. Congress, in the wake of *Georgetown Steel*.[21]

23. Because of the ongoing nature of the GPX litigation and other U.S. domestic litigation cases, the Panel agreed with the rationale of the Appellate Body in *US – Shrimp* that it should not indulge in speculation as to the ultimate outcome of ongoing municipal litigation and should instead determine the status of municipal law "at the time" of the proceedings before the Panel.[22]

24. China's arguments in this dispute rest, in large part, on the *GPX V* opinion constituting a valid and binding source of legal authority under U.S. municipal law. However, *GPX V* has no such authority. The Panel found that as a matter of U.S. constitutional law, the *GPX V* opinion could not have changed Commerce's existing authority or practice because the *GPX V* opinion lacked a "mandate." As the Panel recognized, a "mandate" is a court-issued order that finalizes interim opinions and transfers the instructions or ruling of a U.S. federal appellate court to the court of first instance.[23] Without the issuance of a mandate, the court's interim opinion has no legal effect and is subject to change. As the Panel found:

> [W]e need not determine whether under United States law a United States court could justifiably rely on the decision in *GPX V* to establish what the law was prior to enactment of Section 1. *What matters is that USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in GPX V, be it in the GPX case itself or any other case.* As indicated, the CAFC did not issue a mandate in *GPX V* and its decision therefore never became final. Moreover, the decision in *GPX V* did not result in any order to USDOC requiring it to adjust its practice or follow the CAFC's interpretation of United States CVD law in *GPX V*. Consequently, the decision in *GPX V* in our view does not assist China in demonstrating that USDOC's practice has been judicially determined to be unlawful under United States law, such that USDOC had to change its practice of applying United States CVD law to imports from China.[24]

25. In other words, Commerce was never required to take any action because of the *GPX V* opinion that resulted in a change of applicable rates or a new or more burdensome requirement or

[19] China's Appellant Submission, paras. 152-153.

[20] Panel Report, para. 7.181, fn. 303.

[21] *See e.g.,* U.S. First Written Submission, Annex pp. 44-55.

[22] Panel Report, para. 7.182; *see US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 91-95.

[23] Panel Report, para. 7.180.

[24] Panel Report, para. 7.180 (emphasis added).

restriction. That is because before the *GPX V* opinion could become final and before the parties to the domestic litigation, including the United States, could exercise full appeal rights, Congress enacted the *GPX* legislation. Under U.S. constitutional law principles, the U.S. Federal Circuit was required to apply the law in force to pending court cases, including in the *GPX* litigation. The U.S. Federal Circuit recognized the legitimacy of Congress's actions in a subsequent opinion, *GPX VI*, which supplanted the earlier, non-final opinion in *GPX V*.[25]

26. Thus, as explained further below, the Panel appropriately found that the *GPX V* opinion does not assist China in establishing a "baseline" under Article X:2 of the GATT 1994 (*i.e.,* the situation prior to the *GPX* legislation) that Commerce was prohibited from applying the U.S. CVD law to imports from China. To the contrary, the Panel found that Commerce was never prohibited from applying the U.S. CVD law to subject imports from China, and that in fact, Commerce's application of the law resulted in the published initiations of the proceedings listed in China's request for a panel in this dispute.[26]

27. In sum, the Appellate Body should reject China's attempt to rewrite the facts of this dispute through this appeal.

C. The Panel Correctly Interpreted Article X:2 and Applied Its Understanding to the Facts

28. In this appeal, China claims that the Panel erred in findings that the *GPX* legislation did not "effect[ ] an advance in a rate of duty or other charges on imports under an established and uniform practice."[27] China further alleges that the Panel erred in finding that the *GPX* legislation did not "impos[e] a new or more burdensome requirement, restriction or prohibition on imports."[28] China's claims are without merit.

29. China first claims that the Panel made an error in its legal interpretation of the term "under an established and uniform practice" under Article X:2. Specifically, China argues that the Panel erred in finding that the term "under an established and uniform practice" described or modified the relevant "baseline" of comparison for determining whether the *GPX* legislation effected an "advance" in a rate of duty on the imports at issue (in other words, Commerce's established practice since 2006) or whether it imposed a "new" or "more burdensome" requirement or restriction on those imports.[29] In China's view, the term "under an established and uniform practice" must be interpreted to describe the measure at issue (the *GPX* legislation).

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[25] *See GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1312 (Fed. Cir. 2012) ("*GPX VI*") (Exhibit CHI-7).

[26] China's asserts in fn. 52 of its appellant submission that it "does not consider it relevant whether an agency's 'practice' was 'lawful' or 'unlawful' under the domestic law of the importing Member." However, the remainder of China's appellant submission, particularly Section IV, focuses substantively on whether U.S. law prohibited Commerce from applying CVDs to imports from NME countries. That is, whether Commerce was acting "lawfully" or "unlawfully" in its administration of the U.S. CVD law.

[27] *See* China's Appellant Submission, paras. 9, 67, 176.

[28] *Id*.

[29] China's Appellant Submission, para. 22.

China claims that had the Panel used its legal interpretation, the Panel should have ignored Commerce's interpretation and application of the U.S. CVD law.[30] Instead, China argues that under its legal interpretation, the only "relevant baseline of comparison under Article X:2 consists of the rates, requirements, and restrictions applicable under the municipal law of the importing Member prior to the enforcement of the measure at issue, as set forth in published measures of general application."[31]

30. The Panel properly interpreted the term "under an established and uniform practice" based on the ordinary meaning of the text of that article and in a manner that would prevent the term from being redundant with or contradict the term "measure of general application."

31. Specifically, comparing the meaning of the terms "general application" and "established and uniform" in the context of the other words in Article X:2 demonstrates that these terms would be redundant if they both modified the measure of general application at issue. That is, the meaning of the terms "general application" and "uniform" both indicate that the measure or practice should be similarly applied to a whole class of imports rather than a specific subset of imports or traders. Thus, it would be redundant to use both the terms "general application" and "uniform" to describe the measure at issue.

32. China's reading that "established" modifies the measure of general application would also introduce a gap in time before a breach of Article X:2 could be established. In effect, China's interpretation would mean the disciplines of Article X:2 would only apply to a measure of general application after some period of application, sufficient to produce an "established" practice. China's reading, contrary to the Panel's, introduces a sort of grace period into Article X:2 during which pre-publication enforcement is permitted. Thus, the Panel did not err in finding that the term "under an established and uniform practice" describes the practice prior to the measure at issue.

33. In this dispute, the record demonstrates that such a practice was Commerce's existing application of the U.S. CVD law to imports from China. Because the *GPX* legislation did not differ from this practice, the Panel properly found that the *GPX* legislation did not cause previously established CVD rates to increase nor were new or more burdensome requirements or restrictions imposed on the imports at issue:

> [I]n respect of the relevant CVD proceedings, the new rates of countervailing duty applicable to imports from China as a consequence of Section 1 [of the *GPX* legislation], like the prior rates applicable under USDOC's established and uniform practice, were whatever rates of countervailing duty that were warranted by the application of United States countervailing duty provisions to such imports. Since the facts of the underlying CVD proceedings initiated between November 2006 and 13 March 2012 were not affected by the entry into force of Section 1, USDOC was neither required nor authorized by Section 1 to impose

[30] *See* China's Appellant Submission, para. 49.

[31] China's Appellant Submission, para. 67.

> countervailing duties at rates that differed from the rates that USDOC established in these proceedings before Section 1 entered into force.[32]

34. Further, even accepting *arguendo* China's interpretation of the term "under an established and uniform practice" as modifying the "advance" in a rate of duty, or the *GPX* legislation, the Panel did not err by considering Commerce's existing application of the U.S. CVD law in its determination of the relevant baseline. China argues that the comparison must be between a new measure of general application and a previous measure of general application. But if the new measure must establish requirements on the *practice* of an administering authority (as China says the practice must be "uniform" and "secure") in order to be a relevant measure under Article X:2, then by the same logic, the baseline of comparison should also consider the practice of the same authority administering a previous measure of general application.

35. China erroneously argues that the Panel erred by reading the requirement of "under an established and uniform practice" into the phrase "new or more burdensome requirement or restriction." China misreads the Panel's findings on this issue, as the Panel did not interpret the phrase "new or more burdensome requirement [or] restriction" as incorporating the term "under an established and uniform practice." Rather, the Panel properly determined that the comparison should be between the pre-existing requirement or restriction on imports with the requirement or restriction imposed by the measure at issue. The Panel properly interpreted this phrase to include a baseline that may encompass an administering agency's interpretation and application of law as a requirement or restriction.

36. China's tenuous interpretation of the term "under an established and uniform practice" appears to be a guise for its underlying objective of rewriting the Panel's finding that an administering authority's interpretation and application of municipal law could impose a "rate", "requirement" or "restriction" on imports. That is, under China's interpretation of Article X:2, an administering authority's interpretation and application of municipal law could never establish rates, requirements and restrictions on imports under Article X:2. Rather, only statutes or laws enacted by national legislatures could establish such rates, requirements and restrictions. Article X:2, however, does not impose such a restrictive approach to determining the rates, requirements or restrictions at issue. When China made the same arguments to the Panel, the Panel properly rejected China's interpretation of Article X:2, finding that:

> [W]e do not consider it appropriate, in the context of an analysis involving United States law, to pay no regard to a publicly known practice of agencies charged with administering a relevant requirement or restriction on imports. Indeed, Article X:2 does not indicate that account may be taken only of a relevant pre-existing requirement or restriction that is set out in explicit terms in a published measure of general application, but not of a requirement or restriction that results from, and reflects, an interpretation of such a measure adopted and publicly communicated by an administering agency.[33]

[32] Panel Report, para. 7.189.

[33] Panel Report, para. 7.203.

37. It was apparent to the Panel that China had not articulated a standard of analysis or "baseline" for Article X:2 that was based on the ordinary meaning of the treaty article in its context and in light of its object and purpose.[34] Instead, the Panel determined the proper comparison should be between the rate, requirement or restriction that was imposed on imports before and after the measure at issue, based on the totality of the evidence.

38. The Panel also properly found that the *GPX* legislation was not enforced until it was enacted on March 13, 2012. The Panel reasoned that prior to the existence of a measure, there was nothing to enforce, and no U.S. Government entity sought to apply such a non-existent measure. China argues in this appeal that the "comparison must be made as of the time of the enforcement of the measure, not as of the time of its enactment or official publication." China asserts that this timeframe is November 20, 2006. But the Panel found (and China has not contested) that there was "no evidence on the record to suggest that United States administrative agencies or courts took action prior to 13 March 2012 to enforce Section 1."[35] Thus, even on the approach of a comparison before and after enforcement of the measure of general application at issue, China's assertion that the timeframe for comparison must be November 20, 2006, is without merit.

39. Finally, the Panel did not fail to make an objective assessment of the matter before it under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). The Panel properly weighed the evidence and made factual findings based on the totality of the evidence and within its bounds as trier of fact in this dispute. After assessing this evidence, the Panel properly found that Commerce's application of the U.S. CVD law was not a breach of U.S. municipal law. The Panel came to its conclusion after properly considering the status and meaning of U.S. domestic court litigation using the approach of the U.S. legal system.

40. Further, and most evidently in its argument that the Panel failed to recognize that China had made a *prima facie* case, China disguises a complaint that the Panel failed to draw a correct legal conclusion as a failure to make an objective assessment. The Appellate Body has repeatedly communicated to parties that they should not merely take alleged legal errors and recast them as claims of error under Article 11.[36] China's arguments that the Panel failed to draw the correct legal conclusion is not an error under DSU Article 11. As such, the Appellate Body should reject China's claim to reverse all of the Panel's findings "in paragraphs 7.158 to

[34] *Vienna Convention on the Law of Treaties*, Article 31.

[35] Panel Report, para. 7.120.

[36] *See, e.g., EC – Fasteners (China) (AB),* para. 442 ("It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."); *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238 ("We also recall that a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements.").

7.186 of the Panel Report" because the Panel "did not undertake an objective assessment of the matter as required by Article 11 of the DSU."[37]

D. The Appellate Body Should Reject China's Request to Complete the Analysis

41. China's claims of error under Article X:2 of the GATT 1994 are without merit. Accordingly, the Appellate Body need not complete the legal analysis as requested by China.

42. However, should the Appellate Body choose to complete the legal analysis under Article X:2, such an analysis must be made on "the factual findings of the panel and the undisputed facts in the panel record" and there must be "sufficient basis" for it to do so.[38] Contrary to these requirements, China argues that (1) the Appellate Body should entirely disregard the factual findings of the panel, and (2) the Appellate Body should accept China's assertions in paragraphs 99 – 170 of its appellant submission as "undisputed facts" when the record of the proceedings before the Panel demonstrates that such assertions are not undisputed.

43. As further explained below in Section IV.B, the Panel made numerous findings on matters of fact that are relevant to the rates, requirements, or restrictions imposed under the *GPX* legislation and those imposed under the pre-existing U.S. CVD law (in particular Section 701(a) of the U.S. Tariff Act). Further, if the Appellate Body were to accept China's assertion that the Panel did not make any relevant factual findings, the Appellate Body has stated that in such a situation, the Appellate Body should refrain from the completing the analysis rather than making new factual findings for itself.[39]

44. China is also incorrect when it presents its assertion of the history of Commerce's application of the U.S. CVD law to NME countries as "undisputed facts." To the contrary, the United States disagrees with China's portrayal of the U.S. CVD law, Commerce's existing practice, and litigation before U.S. domestic courts. As further explained below in Section IV.C, the United States and China heavily contested whether China's assertions constituted "facts" during the proceedings before the Panel.

45. Finally, the Appellate Body should reject China's attempts to submit new evidence on appeal. Accepting such new evidence runs contrary to the Appellate Body's past position on this issue.[40]

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[37] China's Appellant Submission, para. 90.

[38] *EC – Large Civil Aircraft (AB)*, para. 1140.

[39] *See, e.g., EC – Large Civil Aircraft*, para. 1140; *see Canada – Continued Suspension (AB)*, para. 735 ("Given the numerous flaws that we identified in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis."); *US – Hot-Rolled Steel (AB)*, para. 180; *EC – Asbestos (AB)*, para. 78.

[40] *E.g., US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.

II. THE PANEL CORRECTLY FOUND THAT CHINA FAILED TO ESTABLISH THAT THE *GPX* LEGISLATION IS INCONSISTENT WITH ARTICLE X:2 OF THE GATT 1994

A. Introduction

46. Article X:2 of the GATT 1994 provides that two types of "measure[s] of general application" shall not be enforced prior to its official publication:

- A "measure of general application … effecting an advance in a rate of duty or other charge on imports under an established and uniform practice"; or
- A "measure of general application … imposing a new or more burdensome requirement, restriction or prohibition on imports."

47. With respect to the first category of measures, the Panel found that the ordinary meaning of the word "advance" when used to modify the term "in a rate" means "[a] rise in amount, value, or price."[41] Given the comparative nature of the word "advance," the Panel found that Article X:2 requires a comparison "between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice."[42]

48. Similarly, with respect to the second category of measures, the terms "new" and "more burdensome" are also comparative forms of adjectives. As such, the Panel properly determined that its analysis should be based on a comparison between the requirements and restrictions that were in place before and after the measure at issue.[43]

49. In this appeal, China does not challenge the Panel's comparative approach to determining the consistency of the *GPX* legislation with Article X:2.[44] Rather, China's claim of legal error is with respect to the relevant "baseline" used for the Panel's comparison.[45] Specifically, China claims that the Panel misinterpreted the term "under an established and uniform practice" and erred in considering Commerce's existing application of the U.S. CVD law to imports from China.[46]

50. Contrary to China's assertions, the Panel did not err in its interpretation of the term "under an established and uniform practice." Rather, the Panel correctly interpreted that phrase given its placement in the text and understood that Article X:2 is not addressed to *any* advance in a rate of duty that results from a measure of general application. China's reading of that phrase,

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[41] Panel Report, para. 7.155.

[42] *Id*.

[43] Panel Report, para. 7.200.

[44] China's Appellant Submission, para. 6.

[45] China's Appellant Submission, para. 22.

[46] China's Appellant Submission, paras. 30-40.

on the other hand, would essentially render it completely redundant of "measure of general application."

51. Nor did the Panel err in considering Commerce's administration of municipal law in its determination of the relevant baseline for the *GPX* legislation. First, the very phrase "under and established and uniform practice" directs the comparison to the application of rates of duty previously existing. Second, the previously existing rates of duty normally would result from a Member's administration of its law, and under the U.S. constitutional system, the Executive Branch's understanding and application of a statute is a valid expression of U.S. law, unless and until the administering agency is directed to change its application by a reviewing court.

52. In this section, the United States first demonstrates that the Panel's interpretation of the phrase "under an established and uniform practice" is correct, as was its application of that interpretation to the facts of this case. The United States then demonstrates that the Panel's interpretation of "new or more burdensome requirement or restriction" is also correct, as was its application in this case. Finally, the United States demonstrates that the Panel used as the timeframe for comparison the time at which the United States began to enforce the measure at issue and, therefore, properly found that the *GPX* legislation was not enforced until it was enacted or came into existence. Because China's appeal is predicated on these alleged errors of interpretation, rejection of China's interpretive claims alone results in China's appeal failing.

B. The Panel Correctly Established the Baseline of Comparison for Determining Whether the *GPX* Legislation Effected an Advance in a Rate of Duty under an Established and Uniform Practice

1. The Term "Under an Established and Uniform Practice" Modifies the Terms "Rate of Duty" and "Other Charge"

53. The Panel began its analysis for determining the baseline of whether the *GPX* legislation "effect[ed] an advance in a rate of duty or other charge on imports under an established and uniform practice" by reference to the ordinary meaning of the words used in the treaty article. Specifically, the Panel found that:

> The ordinary meaning of the word "advance", when used together with the term "in a rate", is "[a] rise in amount, value, or price". Conceptually, the term "advance in a rate" calls for a comparison of two rates of duty or charge: a new rate on imports of a particular product and a prior, initial rate on imports of that product. It is only if the new rate is higher than the prior rate that an "advance", or increase, in a rate has been effected. *In the light of this, it is clear to us that the term "under an established and uniform practice" serves to define the relevant prior rate that is to be used to establish whether or not an advance in a rate has been effected.* It follows, then, that the relevant comparison contemplated by

> Article X:2 is between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice."[47]

54. China states that the italicized sentence is "an obvious *non-sequitur*" because the relevant "baseline" "does not follow from the meaning of the term 'advance'."[48] But China misstates the Panel's logic; it is not the meaning of the term "advance" that led to the Panel's conclusion. Rather, the Panel examined "[c]onceptually, the term 'advance in a rate'," and then examined the term "under an established or uniform practice" "[i]n the light of this" understanding. Thus, far from a *non-sequitur*, the Panel interpreted the term "under an established and uniform practice" according to its ordinary meaning and in a manner that would prevent it from being redundant with or contradict the term "measure of general application."

i. The Panel Properly Interpreted the Term "Under an Established and Uniform Practice" Under Article X:2

55. The Panel found that the term "under an established and uniform practice" qualifies the phrase "advance in a rate of duty or other charge on imports." Because an advance in a rate implies a comparison of a new rate and a prior rate on imports of that product, the term "under an established and uniform practice" defines the relevant rate that was previously applicable to the imports at issue.

56. Read otherwise, there would have been no need for the term "under an established and uniform practice" in Article X:2. The obligation could simply have been written as a "measure of general application … effecting an advance in a rate of duty or other charge on imports." That is because the terms "of general application" and "established and uniform" would be redundant if they were defined the measure subject to X:2, as China would have it.

57. The Panel found that the ordinary meaning of the word "general" is defined as "[n]ot specifically limited in application; relating to a whole class of objects, cases, occasions, etc."[49] The Panel concluded that "a measure of 'general application' can be understood to refer to a measure that applies to a class, or a set or category, of persons, entities, situations or cases that have some attribute in common."[50] Read in the context of Article X:2, a measure of "general application": (1) is not limited in application; and (2) has not been previously enforced prior to its official publication.

58. With respect to the term "established and uniform," the Panel found that:

> Regarding the term "established", similarly to the panel in *EC – IT Products*, we consider that this term indicates that the practice in question has been securely in place for some time. As concerns the term "uniform", we note that the panel in

[47] Panel Report, para. 7.155 (emphasis added).

[48] China's Appellant Submission, para. 27.

[49] Panel Report, para. 7.32 (citing the *Shorter Oxford English Dictionary*).

[50] Panel Report, para. 7.22.

> *EC – Selected Customs Matters* found that the dictionary defines "uniform" as meaning "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances or at different times". A "uniform" practice, then, is one that does not change according to the time or place of importation, or depending on the traders or governments involved.[51]

Thus, the term "established and uniform" modifies the term "practice" such that: (1) the "practice" is applicable to a whole class of imports without deviation or change; and (2) the practice has already been enforced and securely in place for some time.

59. The Panel's interpretation of "an established and uniform practice" gives full meaning and effect to those terms. If, as China asserts, "under an established or uniform practice" describes "how" a measure must effect a change in a rate of duty, the phrase would be redundant of the term "of general application." Specifically, the terms "general application" and "uniform" would both convey the meaning that the measure or practice should be similarly applied to a whole class of imports rather than a specific subset of imports or traders. An interpretation which reduces a key term to inutility should be avoided.[52]

60. Conversely, China's reading that "established" modifies the measure of general application would also introduce a gap in time before a breach of Article X:2 could be established that is difficult to reconcile with the requirement of Article X:2 that a measure of "general application" not be enforced prior to its official publication. As the Panel noted, the term "established" means that "the practice in question has been securely in place for some time."[53] If an "established" practice "describes *how* the measure"[54] effects an advance in a duty, that would mean a relevant advance could only result if the Member was already enforcing the measure at issue, such as to produce an "established" practice, for some time. In effect, China's interpretation would mean the disciplines of Article X:2 would only apply to a measure of general application after some period of application, sufficient to produce an "established" practice. Such a result is difficult to square, however, with an obligation which prohibits the enforcement of the measure at issue prior to its official publication. China's reading, contrary to the Panel's, introduces a sort of grace period into Article X:2 during which pre-publication enforcement is permitted.

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[51] Panel Report, para. 7.156 (internal footnotes omitted).

[52] The Appellate Body has made clear that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *US – Gasoline (AB)*, p. 21 (citing *Corfu Channel* Case (1949) I.C.J. Reports, p.24 (International Court of Justice); Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad) (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369).

[53] Panel Report, para. 7.156.

[54] China's Appellant Submission, para. 32 (emphasis in original).

61. The Panel correctly concluded that the term "under an established and uniform practice" modifies the terms "rate of duty" and "other charge," such that the relevant baseline of comparison under Article X:2 is the rate of duty or other charge established under the previous established and uniform practice. Such an interpretation is in accordance with the object and purpose of Article X:2. As the Panel explained:

> When, as Article X:2 contemplates, a rate of duty or charge is applied on imports under an established and uniform practice, such practice is liable to give rise to expectations on the part of traders and governments as to the rate of duty or charge applicable to future imports of that product. More particularly, where there is an "established and uniform" practice with regard to the applicable rate of duty or charge, economic operators are likely to rely on it when making business decisions, including production, sourcing and investment decisions. Viewed in this light, the aforementioned prohibition in Article X:2 safeguards traders and governments against the risk of basing decisions on a formerly established and uniform practice when they should no longer do so because the practice changed or was discontinued before public notice thereof was given.[55]

62. The United States agrees that an established and uniform practice could lead to a legitimate expectation that could be relied upon by a trader. Should the practice become more "restrictive,"[56] then Article X:2 requires the Member to officially publish the measure of general application prior to its enforcement. On the other hand, it would not be legitimate for a trader to rely on a one-off duty assessment or an inconsistent application of a rate of duty. Such singular transactions would not allow for a fair or equivalent comparison to a measure of general application.

63. The Panel correctly interpreted the phrase "under an established and uniform practice." Accordingly, China's appeal fails. As China's further claims of error allege an error in application of the Panel's allegedly erroneous interpretation of this phrase, China's further claims fail as a consequence as well.[57] As a result, it would not be necessary for the Appellate Body to reach further aspects of China's appeal.[58]

ii. The Panel Properly Interpreted the Term "Practice" under Article X:2 to Refer to the Application by an Administering Agency of Rates of Duty

[55] Panel Report, para. 7.157.

[56] Panel Report, para. 7.110.

[57] China's Appellant Submission, Section III.C.

[58] *Id.*, para. 71 ("*Under a proper interpretation of Article X:2*, the Appellate Body should complete the legal analysis by examining whether Section 1 of P.L. 112-99 had either (or both) of the types of effects described by Article X:2 in relation to prior U.S. municipal law, as set forth in published measures of general application.") (emphasis added).

64. In addition, the Panel gave proper meaning and effect to the word "practice" under Article X:2. In this appeal, China argues that the Panel erred by "seiz[ing] upon" the word "practice" to mean that the "baseline" for comparison under Article X:2 is the practice of a government agency.

65. But the Panel properly interpreted that term according to its ordinary meaning in its context in the phrase "an established and uniform practice" in concluding that "practice" included the actual published practice of Commerce in determining the rates of duty on the imports at issue.[59] Contrary to China's claim, the Panel's approach was more than a mere assertion that Commerce's application of the U.S. CVD law to imports from China constituted a "practice" under Article X:2. The Panel properly evaluated the evidence before it and found a discernible pattern of actions had been securely in place for some time for imports from China. That pattern was Commerce's application of the U.S. CVD law to imports from China. As the Panel found:

> The record shows that, in November 2006, USDOC published the initiation of a CVD investigation of CFS paper from China, and that in December 2006, it published a notice of opportunity to comment on whether the CVD law "should now be applied to imports from the PRC". In April 2007, USDOC published an affirmative preliminary determination in the CVD investigation of CFS paper, in which it preliminarily determined that the United States CVD law could be applied to imports from China. In October 2007, USDOC issued an affirmative final determination in the CVD investigation concerned. The record further shows that between November 2006 and March 2012, USDOC initiated 33 investigations and reviews in respect of imports from China under United States CVD law, notifying China and other parties of its application of United States CVD law to China, and that in many of those proceedings USDOC issued CVD orders. USDOC undertook those investigations and reviews, and issued those orders, even though, then as later, the United States designated China as an NME country.[60]

66. The Panel's approach is consistent with how the Appellate Body has interpreted the term "practice" in other treaty articles. For example, in *Japan – Alcoholic Beverages II*, the Appellate Body described the word "practice" as "a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern..."[61] Taken as a whole, the term "under an established and uniform practice" means a (1) "discernible pattern" of a

[59] *See also* Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China (Exhibit USA-119).

[60] Panel Report, para. 7.169.

[61] *Japan – Alcoholic Beverages II (AB)*, p. 13 (defining the meaning of "subsequent practice" under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* as "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.") *See EC – IT Products*, para. 7.558.

sequence of acts ("practice"); (2) that has "been securely in place for some time" ("established"); and (3) that "stays the same in different places or circumstances or at different times" ("uniform"). The Panel applied this understanding in examining the "practice" under Article X:2 in relation to the actions of the "agency administering the United States Tariff Act of 1930."

67. The Panel determined based on these facts that "between November 2006, or at least April 2007, and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country that was securely in place (established) and that did not change over time (uniform)."[62] Broken down into the component definitions of the term "under an established and uniform practice," the Panel found:

- Commerce's consistent and repeated application of the U.S. CVD law to China in order to determine CVD rates on the imports at issue was a "discernible pattern" or "practice" under Article X:2.

- Commerce's application of the U.S. CVD law had been "securely in place" since November 2006, or at least April 2007, and was therefore "established."

- Commerce's application of the U.S. CVD law to imports from China did not change over time, and was therefore "uniform."

68. As the Panel rightly noted, China's approach would ignore the application by the administering agency of the U.S. CVD law as irrelevant to the "established and uniform practice" against which the alleged advance in the rate of duty is compared.[63] In effect, China would read the word "practice" out of Article X:2 to be subsumed by the scope of "measure of general application." China can only achieve such a result by ignoring the grammar of Article X:2. The text uses the phrase "under an established and uniform practice" to modify "a rate of duty or other charge on imports" and thus ensures that not every advance in a rate of duty produced by a measure of general application would be subject to Article X:2. China, as previously noted, would have the measure of general application effect the advance in the duty "*under* an established and uniform practice." But if this were the aim of the provision, then the drafting should read "*through* an established or uniform practice" – that is, to indicate that it is the "advance" that is being modified and not the rate of duty or other charge.

69. And not only is China's approach contrary to grammar, it is contrary to common sense. As noted previously, a measure of general application being enforced before publication would not breach Article X:2 until the advance in a rate of duty or charge had crystallized after some time into "an established and uniform practice." Ironically, this too would prove fatal to China's claims in this dispute as, at the time China brought this dispute, the *GPX* legislation could not have been applied under an "established and uniform practice." Under U.S. law, the earliest that any entity of the United States could have enforced the *GPX* legislation was on the date of the

[62] Panel Report, para. 7.169.

[63] Panel Report, paras. 7.161-7.162.

law's enactment, on March 13, 2012.[64] China has not brought forward evidence in these proceedings to demonstrate an established and uniform practice to apply or enforce the *GPX* legislation since March 13, 2012.

iii. The Hypothetical Posed in Question 94 of the Panel Proceedings Does Not Support China's Claim

70. China argues that the Panel's interpretation of the term "under an established and uniform practice" is an "absurdity"[65] based on a hypothetical posed in Panel question 94.[66] As an initial matter, the United States does not consider this hypothetical relevant to the dispute at issue. As the United States has explained:

> [T]his hypothetical [in question 94] is distinguishable from this dispute. The U.S. law prior the *GPX* legislation has never been that Commerce is prohibited from applying the U.S. CVD law to NME countries. Thus, using this hypothetical as an analogy, there has never been a legally binding interpretation of U.S. law that the tariff rate is x%. Rather, the law has always been 2x%.[67]

71. Further, China misstates the Panel's analysis in this dispute. China argues that the "relevant baseline of comparison is *any* 'established and uniform practice' of a government agency."[68] Thus, under China's presentation of the Panel's finding, the relevant baseline could be "any" practice of Country A's customs authorities, which in the hypothetical of question 94 would be the application of a rate of 2x% when the published rate is x%.

72. Contrary to China's assertion, the Panel did not interpret Article X:2 as allowing for "any" established and uniform practice of an administering authority to serve as a relevant baseline. As the Panel stated:

> [W]e now proceed to examine *as a first step* whether prior to the enactment of Section 1 there was an established and uniform USDOC practice concerning the rates of countervailing duty applicable to imports from NME countries. Should

[64] Panel Report, para. 7.120 ("no evidence on the record to suggest that United States administrative agencies or courts took action prior to 13 March 2012 to enforce Section 1.").

[65] China's Appellant Submission, para. 60.

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

[67] U.S. Response to Panel Question No. 94, para. 18.

[68] China's Appellant Submission, para. 8 (emphasis added).

> this be the case, *we will examine as a second step whether that practice was unlawful under United States law*.[69]

73. Thus, under the hypothetical posed in question 94, a panel would have to determine first whether there was a rate of duty under an established and uniform practice and whether a newly enacted measure of general application effects an advance in that rate. As a second step, a panel may examine whether Country A's administering authority was acting in accordance with its municipal law. Thus, a panel would not have to accept "any" practice of Country A's administering authority, but may evaluate whether it was lawful based on the facts of the dispute in question 94. This type of hypothetical demonstrates that a finding under Article X:2 must be based on the totality of the evidence and the specific facts of the dispute at issue.

74. In this dispute, the Panel correctly found that Commerce's interpretation of the U.S. CVD law is the governing interpretation of the U.S. Tariff Act unless a court finds that Commerce's interpretation is unreasonable or contrary to the plain text of the U.S. Tariff Act in a final and binding judicial decision. In fact, based on its examination of U.S. constitutional law principles relating to interpretation of U.S. legislation as presented by the parties, the Panel found:

> Moreover, certainly in the case of United States law, it is appropriate to take account of any practice of an administering agency. As the United States explained, under United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous'. This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.[70]

Based on a careful consideration of the record, the Panel found that:

> [I]t is clear to us that we have no basis for concluding that USDOC's relevant practice was unlawful under United States law, because no United States court

[69] Panel Report, para. 7.168 (emphasis added).

[70] Panel Report, para. 7.163 (internal footnotes omitted) (citing to the U.S. Supreme Court decisions in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), at 316, and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), at 843)). In *Eurodif*, a case regarding Commerce's interpretation of the U.S. antidumping law, the U.S. Supreme Court unanimously overturned the ruling of the U.S. Federal Circuit because the U.S. Federal Circuit had applied the wrong legal standard. The U.S. Supreme Court found that the issue was not whether the U.S. Federal Circuit had a better interpretation of the U.S. antidumping law, but whether Commerce's interpretation was reasonable. Further, the U.S. Supreme Court made clear in the *Chevron* case that if an agency has interpreted a statute, "the court does not simply impose its own construction on the statute …. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

> ordered USDOC to cease applying United States CVD law as it stood at the time to imports from China.[71]

Accordingly, the Panel properly determined that it could consider Commerce's lawful and published application of the U.S. CVD law as the relevant baseline of comparison for its analysis under Article X:2 of the GATT 1994.

75. Furthermore, it is worth questioning why China spends so much effort elaborating its concerns with a hypothetical that does not reflect the situation in this dispute. Certainly, the United States would not agree that the Panel's approach to Article X:2 raises the concerns voiced by China, even on the simple example provided of two tariff rates. [72] But more to the point, the hypothetical presented does not reflect any interpretation and application of existing law by the agency charged with administering that law. To be more useful, the hypothetical would need to reflect the facts of this case:

- Country A's law states that if the administering agency finds that a country provides a subsidy, the agency shall impose a duty equal to the subsidy. [(1) Law: CVD = subsidy]
- The agency interprets the law to mean that, if the agency cannot measure the subsidy because the government and economic actors are effectively a single entity, then it cannot impose a duty. That interpretation is upheld by a reviewing court. [(2) Agency interpretation: CVD = subsidy, *but* if country = single entity, then CVD = ∅]
- The agency examines the facts of country X's economic development and concludes that Country X has liberalized to the point where the government and economic actors are not always effectively a single entity. [(3) Agency finding: Country X ≠ a single entity]
- Given its factual finding (3) and interpretation of law (2), the agency applies the CVD law to Country X. [(4) Agency practice: CVD = subsidy *because* Country X ≠ a single entity]
- Country A's legislature subsequently publishes an amendment to the law to reflect the agency's interpretation of pre-existing law (2) and specifies that the amendment applies to agency determinations (4). [(5) Revised law = Agency interpretation (2)]

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[71] Panel Report, para. 7.185.

[72] The United States notes that the facts described in question 94 could give rise to a number of potential WTO claims. For example, if Country A's customs authorities are collecting duties at a rate of 2x% as of January 1, they are likely applying an unwritten measure. Failure to publish such a measure would be a breach of Article X:1. Enforcing such a measure prior to publication would be a breach of Article X:2. The subsequent enactment and publication of another measure setting a duty of 2x% on June 1 would not "cure" these breaches. U.S. Response to Panel Question No. 94, paras. 15-16.

Would Country A's actions be consistent with GATT 1994 Article X:2?

76. The Panel concluded that, on these facts, there was no inconsistency with Article X:2. That result is grounded in the interpretation explained above of the term "under an established and uniform practice." There is no change (advance) in the rates of duty when agency practice (4) is reflected in the revised law (5). And even if in the abstract one could describe the revised law (5) as in some sense "retroactive" because it applies to past facts, when the agency establishes its practice (4), it is not "enforcing" the revised law (5). Rather, it is enforcing the existing law (1) according to its interpretation of that law (2).

77. This understanding comports with the Appellate Body's understanding of Article X:2 in *US – Underwear*.[73] There, the Appellate Body noted that the "essential implication" of Article X:2 is that Members and other affected parties "should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures."[74] As this corrected hypothetical demonstrates, Country A provides "authentic information" about its measures because, in enforcing its existing law (1), it puts Members and interested parties on notice of its interpretation (2), factual findings on Country X (3), and practice (4).

78. Moreover, unlike in China's hypothetical, there is no inconsistency of agency practice (4) with then-applicable law (1). And as noted above, the Panel found that under U.S. law, such an inconsistency would not arise absent a final order by a U.S. court to the agency to change its interpretation and application of the law. Thus, China's arguments relating to the alleged unfairness of the Panel's interpretation depend entirely on a different set of facts. In China's argument, the agency's interpretation (2) and application (3) are on their face unlawful – as simple as Country A applying rate 2x% when existing law sets a rate of x%. Because as the Panel found those facts do not exist in this dispute, on that basis too, China's appeal fails.

iv. The Findings in *EC – IT Products* Do Not Support China's Claim

79. China relies heavily on the panel report in *EC – IT Products* to support its proposition that the term "under an established and uniform practice" does not have "anything to do with the baseline against which a measure is to be compared to determine whether it effected an 'advance in a rate of duty or other charge on imports'."[75] That is because, China argues, the panel in *EC – IT Products* found that the term "under an established and uniform practice" modifies the measure at issue (*i.e.,* the "advance" in a rate of duty) rather than the practice that imposed the prior rate of duty (*i.e.,* the "rate of duty"). But, when read properly in its context, even the panel findings in *EC – IT Products* do not support China's position in this dispute and are consistent with the approach adopted by the Panel.

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[73] *See US – Underwear (AB)*, p. 21.

[74] *Id.*

[75] China's Appellant Submission, para. 34.

80. China made the same argument regarding *EC – IT Products* during the proceedings before the Panel, and the Panel properly rejected China's argument. The Panel found that:

> We note that the panel in *EC – IT Products* expressed the view that the phrase "under an established and uniform practice" qualifies, not the nearer antecedents "rate of duty" or "other charge on imports", but the term "advance", which it said relates to both "rate of duty", and "or other charge on imports". The panel did not further explain its view.[76]

In other words, the Panel correctly found that without an interpretation of the term "under an established and uniform practice" in relation to the word "advance" under Article X:2, there is no reasoning for the panel findings in *EC – IT Products*, and therefore no reasoning that can be persuasive for either the Panel or the Appellate Body.

81. The relevant discussion of the panel's finding in *EC – IT Products*, presented in its entirety, is as follows:

> We now turn to consider whether the phrase "under an established and uniform practice" relates to an "advance in rate of duty". If we find this to be the case, we will consider the meaning of the phrase "under an established and uniform practice" and subsequently, whether such requirement is met.
>
> We agree with the European Communities that the phrase "under an established and uniform practice" relates to an "advance in a rate of duty". In our view, the phrase "under an established and uniform practice" qualifies the term "advance", which relates to both "rate of duty", and "or other charge on imports". We are persuaded that the term "or", as used in the phrase "advance in a rate of duty *or* other charge on imports" indicates that "rate of duty" and "other charge" are subcategories of the broader category of "charge on imports", which encompasses both "dut[ies]" and "other charge[s]". This interrelation between "rate of duty" and "other charge" – both subcategories of "charges on imports" - support the view that the phrase "under an established and uniform practice" must relate to both "rate of duty" and "other charge" and that it should not be read to refer only to "other charge" only. Accordingly, we conclude that the "advance in a rate of duty" must be "under an established and uniform practice".[77]

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[76] Panel Report, para. 7.155, fn. 238.

[77] *EC- IT Products*, paras. 7.1115-1116 (emphasis in original). Similarly, the arguments of the parties focused on whether the term "under an established and uniform practice" qualified only the term "other charge" or both "other charge" and "rate of duty." *See EC- IT Products*, para. 7.112 ("The United States submits that the phrase 'under an established and uniform practice' does *not* relate to an 'advance in a rate of duty'. Rather, it modifies the phrase 'other charge on imports'."); para. 7.113 ("like the United States, Chinese Taipei argues that the phrase 'under an established and uniform practice' does not relate to the advance 'in rate of duty' but only to 'or other charge on imports'."); para. 7.1114 ("The European Communities argues that it is "evident' from reading Article X:2 of the GATT 1994 that the phrase 'an established and uniform practice' cannot 'be divorced' from the text 'advance in a rate of duty'. According to the European Communities, the measure cannot be considered as only qualifying and pertaining to 'other charge on imports'.").

82. Thus, when viewed in context, it is clear that the focus of the *EC – IT Products* panel's analysis was on whether the term "under an established and uniform practice" qualified only the term "other charge," or both the terms "other charge" and "rate of duty." The panel did not analyze the term "advance" in relation to "under an established and uniform practice." As such, the Panel correctly determined that the statements in *EC – IT Products* were not persuasive. And the *EC – IT Products* panel's reasoning reveals a clear and unexplained leap in logic. The relationship between "rate of duty" and "other charge" may support an interpretation that "under an established and uniform practice" applies to both terms, but there is no reason to assume, as the panel did, that this means "under an established and uniform practice" modifies the term "advance."

83. Further, and contrary to China's assertions that the "baseline" for comparison may only be "prior U.S. municipal law, as set forth in published measures of general application"[78] and may not relate to the practice of a Member in administering or enforcing its measures of general application, the panel in *EC – IT Products* determined that the baseline should be based on the totality of the evidence just as the Panel in this proceeding did. Specifically, the panel in *EC – IT Products* evaluated all of the evidence on the record, including votes in the Customs Code Committee, a statement by the Chair of the Committee, and issuance of customs decisions by EU member State customs authorities.[79] In making its finding, the panel "emphasized that we reach this conclusion on the basis of the particular circumstances of the case considered as a whole."[80]

84. China argues that if the Panel's interpretation of "under an established and uniform practice" were accepted, then the measures at issue in *EC – IT Products* (*i.e.,* certain amendments to the explanatory notes of the EC's Combined Nomenclature ("CNEN")) would not have been found to breach Article X:2. China argues this is because a panel would have been forced to use the EC's application of the CNEN amendments (*i.e.,* the measures at issue) prior to their enactment and publication as the "baseline" of whether the measures "effect[ed] an advance in a rate of duty."[81]

85. China's argument is without merit. The Panel's interpretation of the term "under an established and uniform practice" requires an evaluation of the rates that were in place *prior* to the measure at issue. Thus, were it applied to the facts in *EC – IT Products*, the approach used by the Panel would have been to evaluate the duties on imports that were imposed prior to the enforcement of the CNEN amendments.

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[78] China's Appellant Submission, para. 71.

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

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

[81] China's Appellant Submission, para. 59 ("under the interpretation of Article X:2 adopted by the Panel majority in the present dispute, the fact that EC customs authorities applied the unpublished amendments between October 2007 and May 2008 would have given rise to an 'established and uniform practice' of classifying the products in accordance with the amendments, which such 'practice' would have existed as of the time of the measure's enactment.").

86. In other words, the Panel would have used as the baseline the duty-free rates imposed by the CNEN, without amendment by the measures at issue. The Panel would then have evaluated the CNEN amendments, which made certain of these imports subject to duties, in comparison to the baseline rates. Such a comparison would have demonstrated that the CNEN amendments did effect an "advance" in the rates of duty on the imports at issue because the baseline rates were zero and the measures at issue caused an increase in these rates by stating that some of these imports could no longer be given duty-free treatment. Thus, the Panel's interpretation of the term "under an established and uniform practice" would not have "defeated"[82] the findings of the panel in *EC – IT Products* or Article X:2 itself.

87. In sum, the approach of the panel in *EC – IT Products* is not persuasive because it fails to interpret all of the terms in Article X:2. However, the result reached by the panel in that dispute corresponds to the result that would be reached under the Panel's correct interpretation. This stems from the fact that the comparison in *EC – IT Products* closely resembles that undertaken by the Panel. Thus, *EC – IT Products* does not undermine but rather tends to support the Panel's interpretation of the term "under an established and uniform practice" as indicating the baseline of comparison for the relevant rate of duty or other charge under Article X:2.

2. Even Assuming *Arguendo* that the Term "Under an Established and Uniform Practice" Modifies the Measure at Issue, the Panel Did not Err in Considering Commerce's Existing Practice as a Baseline for Comparison

88. China argues that the term "under an established and uniform practice" modifies the measure of general application at issue rather than identifying the rates of duty or other charges that serve as the baseline of comparison.[83] However, even assuming *arguendo* that the term "under an established and uniform practice" modified the measure at issue, it does not follow that the Panel made a legal error in determining what should be its baseline of comparison. The Panel properly determined that it should not ignore the practice that actually established the rates of duty on the imports at issue for purposes of making a finding on whether there is an advance in a rate of duty for purposes of Article X:2.

89. China argues that the term "under an established and uniform practice" means "that the advance in a rate of duty must be applied ('practice') in the whole customs territory ('uniform') and its application should be on a secure basis ('established')."[84] In this way, China argues, the term "under an established and uniform practice" describes "*how*"[85] the measure of general application must advance a rate of duty or other charge. Taking China's argument at face value, the term "under an established and uniform practice" describes how an administering authority should apply the measure at issue that was passed by a national legislature. That is, the

[82] China's Appellant Submission, para. 59.

[83] China's Appellant Submission, para. 68.

[84] China's Appellant Submission, para. 34 (citing *EC – IT Products,* para. 7.1120).

[85] China's Appellant Submission, para. 32 (emphasis in original).

administering authority, not the legislature, is the entity that must apply the advance throughout the whole customs territory and ensure that its practice or administration is on a secure basis.

90. China argues that the comparison must be between a new measure of general application and a previous measure of general application.[86] But if the challenged measure at issue must establish requirements on the practice of an administering authority (the practice must be uniform and secure) in order to be a relevant measure under Article X:2, then by the same logic, the baseline of comparison should also consider the practice of the same authority administering a previous measure of general application.

91. China argues that the term "under an established and uniform practice" was included in Article X:2 because "the drafters wanted to specify that this type of measure must advance a rate of duty or other charge on imports on more than a 'one-off' basis, i.e. that it must advance a rate of duty or other charge on imports in a manner that is 'established' and 'uniform'."[87] First, as noted previously, this phrase is not necessary to avoid a "one-off" change as Article X:2 only applies to measures of general application, which by nature are not "one-off". But by China's logic, the drafters would also want to avoid a comparison between the established and uniform measure at issue with a *previous* "one-off" tariff adjustment by a solitary customs authority. Thus, if the measure at issue is under an established and uniform practice, then the proper baseline should also be under an established and uniform practice.

92. In this dispute, the Panel properly determined that the established and uniform practice before the *GPX* legislation was Commerce's application of the U.S. CVD law to imports from China. After the *GPX* legislation, the Panel properly determined that the established and uniform practice was the application of the U.S. CVD law to imports from China. That is, the *GPX* legislation did not effect an advance in the rate of duty that applied to imports from China.

93. In sum, China has failed to demonstrate that even under its own proposed approach to Article X:2 that the Panel erred in considering the CVD rates determined under Commerce's application of the U.S. CVD law to China. Thus, regardless of whether the term "under an established and uniform practice" modifies the rates established under the measure at issue or those established under a prior practice, the baseline of comparison is the same. The Panel properly used as a baseline the rates established pursuant to Commerce's application of the U.S. CVD law to the imports at issue from China.

C. The Panel Correctly Established the Baseline of Comparison for Determining Whether the *GPX* Legislation Imposed a New or More Burdensome Requirement or Restriction on Imports

94. The Panel properly determined, based on the ordinary meaning of Article X:2, that "a new or more burdensome requirement or restriction on imports is one that has not previously been imposed ('new') or one that is of the nature of a burden in a greater degree, or is onerous to

[86] China's Appellant Submission, paras. 36-39.

[87] China's Appellant Submission, para. 36.

a greater extent ('more burdensome')."[88] The Panel then conducted a straightforward analysis and found that:

> To the extent that it can be properly said (and we make no finding in this regard) that in doing so, USDOC subjected imports from China to a "requirement" or "restriction", as China asserts, it is the same "requirement" or "restriction" that China says was subsequently imposed by the new Section 701(f) that Section 1 added to the United States Tariff Act of 1930. There is nothing surprising about this conclusion. Both before and following the enactment of Section 1, USDOC applied United States CVD law to imports from China as an NME country, and it did so pursuant to the same substantive and procedural provisions of United States CVD law, namely the "countervailing duty provisions" of the United States Tariff Act of 1930 to which the heading of Section 1 and its preamble refer.

95. Thus, contrary to China's arguments, the Panel did not insert the term "under an established and uniform practice" into this clause of Article X:2. Based on the plain text and context of Article X:2, the Panel properly determined that it could consider the "publicly known practice of agencies charged with administering a relevant requirement or restriction on imports."[89]

96. In the course of its arguments regarding the Panel's interpretation of the term "under an established and uniform practice," China also challenges the Panel's finding regarding the baseline of comparison for whether the *GPX* legislation imposed a "new" or "more burdensome" requirement or restriction[90] on imports. Specifically, China claims that the Panel erred by reading the requirement of "under an established and uniform practice" into the clause "imposing a new or more burdensome requirement, restriction or prohibition on imports" under Article X:2 and erred in considering Commerce's application of the U.S. CVD law to China as a baseline for determining whether a "new" or "more burdensome" requirement or restriction had been imposed on the imports at issue.[91]

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[88] Panel Report, para. 7.200.

[89] Panel Report, para. 7.203.

[90] China has not alleged that the *GPX* legislation is a "prohibition" on imports under Article X of the GATT 1994. Thus, the parties and the Panel have not interpreted or otherwise addressed this term in this proceeding.

[91] China's Appellant Submission, para. 38. In whole, China argues:

> The baselessness of the Panel majority's interpretation is further demonstrated by the fact that the phrase "under an established and uniform practice" has no textual connection to the second category of measures described by Article X:2, namely those measures of general application that "impos[e] a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". The phrase "under an established and uniform practice" relates to the first category of measures, not the second. Yet the Panel appears to have concluded, without any interpretative basis whatsoever, that the phrase "under an established and uniform practice" in the first clause of Article X:2 also serves to define the relevant baseline of comparison for the types of measures described by the second clause of Article X:2.

97. China is wrong in its reading of the Panel's interpretation of "new or more burdensome requirement or restriction" under Article X:2. Further, the Panel properly interpreted this phrase to require a baseline for comparison that may encompass an administering agency's interpretation and application of law as a requirement or restriction. Finally, the Panel's application of "new or more burdensome requirement or restriction" was not in error because the Panel correctly identified the baseline for comparison as the existing requirement or restriction as U.S. law applied and administered by Commerce.

1. The Panel Did Not Incorporate the Term "Under an Established and Uniform Practice" into the Phrase "New or More Burdensome Requirement [or] Restriction"

98. China's claim that the Panel erred by reading the phrase "under an established or uniform practice" into the phrase "new or more burdensome requirement or restriction" is without merit. China simply misreads the Panel's analysis for determining whether a "new" or "more burdensome" requirement or restriction had been imposed on the imports at issue under Article X:2.

99. Contrary to China's assertion, the Panel did not interpret the phrase "new or more burdensome requirement [or] restriction" as incorporating the term "under an established and uniform practice." Rather, the Panel properly found that the terms "new" or "more burdensome" require a comparison and that comparison should be between the prior requirement or restriction on imports with the requirement or restriction imposed by the measure at issue. Specifically, the Panel stated:

> Turning to the issue whether Section 1 imposes a "new" or "more burdensome" requirement, we note the dictionary meaning of "new", which is "not existing before" or "existing for the first time", and also that of "more", which is "in a greater degree" or "to a greater extent". The term "burdensome" is defined as "[o]f the nature of a burden, oppressive, wearisome". Taken together, these definitions indicate that a new or more burdensome requirement or restriction on imports is one that has not previously been imposed ("new") or one that is of the nature of a burden in a greater degree, or is onerous to a greater extent ("more burdensome"). *The comparative form "more burdensome" implies that the measure imposing the requirement or restriction at issue must be examined with reference to a pre-existing requirement or restriction.*[92]

100. The Panel's analysis was based on the ordinary meaning of the phrase "new" or "more burdensome" requirement or restriction. The Panel did not add or otherwise include the term "under an established and uniform practice" as a requirement for evaluating whether a "new" or "more burdensome" requirement or restriction had been imposed. Indeed, in determining whether the *GPX* legislation imposed a "new" or "more burdensome" requirement or restriction, the Panel did not examine whether prior requirements or restrictions imposed through Commerce application of U.S. law reflected an "established and uniform practice". Rather, as the baseline

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[92] Panel Report, para. 7.200 (emphasis added).

for comparison, the Panel recalled its factual finding that between March 2006, or at least April 2007, and March 21012, Commerce "applied United States CVD law as it stood at the time, and notably Section 701(a), to imports from China as an NME country, and it imposed CVDs on imports from China in various proceedings."

101. What the Panel did say about the connection between the first and second clauses under Article X:2 is that the same "analytical approach" should be used to determine whether a relevant change (*i.e.,* an "advance" in a rate of duty, or a "new" or "more burdensome" requirement or restriction) had occurred.[93] The Panel's "analytical approach" was to make a comparison between the prior, existing rate, requirement or restriction with the new rate, requirement or restriction. The Panel's use of the same analytical approach – a comparison – to evaluate both categories of measures under Article X:2 does not equate to using the same legal standard. In fact, the Panel used two distinct standards based on the ordinary meaning of Article X:2:

- In order to determine whether a measure of general application caused an "advance" in a rate of duty under an established and uniform practice, the Panel compared the rates of duty under a previous established and uniform practice with the rates established by the measure of general application.

- In order to determine whether a measure of general application imposed a "new" or "more burdensome" requirement or restriction, the Panel compared the existing requirement or restriction on imports with the requirement or restriction imposed by the measure of general application.

102. In other words, the Panel compared "rates" for the first category of measures, and compared "requirements" and "restrictions" for the second category. Under the first category, the pre-existing rate of duty must be under an established and uniform practice; the second category contains no such criterion. These two legal standards are distinct and separate.

103. Thus, China simply errs when it asserts that the Panel concluded that the phrase "under an established and uniform practice" "also serves to define the relevant baseline of comparison for the types of measures described by the second clause of Article X:2."[94] On this basis, China's claim of error in interpretation fails.

2. The Context of Article X:2 Supports the Panel's Finding to Consider Commerce's Application of the U.S. CVD Law to Imports from China

[93] Panel Report, para. 7.201. In whole, the Panel stated:

> Like the parties, we consider that the *analytical approach* used to determine whether Section 1 imposes a "new" or "more burdensome" requirement or restriction should be the same as is used to determine whether Section 1 effects an advance in a rate of duty under an established and uniform practice.

[94] China's Appellant Submission, para. 38.

104. The Panel correctly interpreted "new or more burdensome requirement or restriction" to require a comparison between the new or changed requirement or restriction and the pre-existing one. Further, the Panel properly concluded that, in particular "in the context of an analysis involving United States law" (given the Panel's findings with respect to constitutional law principles as pronounced by U.S. courts), that a requirement or restriction on imports may be assessed with reference to an administering agency's interpretation and application of domestic law.

105. China's argument is based on the flawed premise that an administering authority's application or interpretation of municipal law could never be considered a requirement or restriction. Instead, China argues that a requirement or restriction could only be imposed by laws or statutes passed by national legislatures. The Panel correctly rejected China's assertions, explaining:

> [W]e do not consider it appropriate, in the context of an analysis involving United States law, to pay no regard to a publicly known practice of agencies charged with administering a relevant requirement or restriction on imports. Indeed, Article X:2 does not indicate that account may be taken only of a relevant pre-existing requirement or restriction that is set out in explicit terms in a published measure of general application, but not of a requirement or restriction that results from, and reflects, an interpretation of such a measure adopted and publicly communicated by an administering agency.[95]

106. The Panel's reasoning is in accordance with the text and context of Article X:2. When examining what is a pre-existing "restriction" or "requirement", it is necessary to consider the treatment of imports under a Member's domestic legal regime. A relevant restriction or requirement may come about due to agency action alone, or such action may be taken to interpret and apply a legal instrument, courts may have established the meaning of such instrument, or an instrument may never have been applied. It may be necessary to examine some or all of these sources, according to domestic law principles, to ascertain whether a restriction or requirement existed. Indeed, it is precisely Commerce's application of the U.S. CVD law, and in particular Section 701(a), to Chinese imports, that led to domestic litigation and this WTO action. It is, therefore, contradictory for China to say that Commerce's application of CVDs to China represents "enforcement" of a restriction or requirement under Section 701(f) after enactment of the *GPX* legislation but that Commerce's application of CVDs to China does not represent enforcement of a restriction or requirement under Section 701(a) prior to enactment of that legislation.[96]

107. Furthermore, the immediate context of Article X:2 reflects the relevance of agency action. Article X:1 lists the measures of "general application" that fall within its scope as

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[95] Panel Report, para. 7.203.

[96] Put this way, China's argument once again is revealed to hinge on the notion that Commerce's application of CVDs to China prior to enactment of the *GPX* legislation was illegal under U.S. law. As the Panel found as a factual matter, this is incorrect as Commerce was never ordered by a U.S. court to change its interpretation and application of U.S. law to Chinese imports.

"[l]aws, regulations, judicial decisions and *administrative rulings* of general application." In *EC – IT Products*, the panel found that:

> A "ruling" is "the action of governing or exercising authority, the exercise of government, authority, control, influence" or "an authoritative pronouncement". The adjective "administrative" indicates that it is a ruling from an administrative body.[97]

108. Thus, the ordinary meaning of the term "administrative ruling" would include Commerce's application of the U.S. CVD law to imports from China and the resulting determinations because (1) Commerce is an administrative body of the United States, and (2) Commerce's interpretation and application are the exercise of government authority or control, and authoritative pronouncements on U.S. law (unless and until overturned by a final court decision).[98] As Commerce's interpretation and application of the U.S. CVD law could fall within the scope of Article X:1, this too reinforces that it would not be appropriate to exclude Commerce's application from Article X:2 in inquiring into a pre-existing restriction or requirement that may result from enforcement of a measure of general application.

D. The Panel Used as the Timeframe for Comparison the Time at Which the United States Began to Enforce the Challenged Measure and Properly Found that the Measure Was Not Enforced until Enacted

109. China argues that the Panel erred in determining the timeframe for comparison of whether the *GPX* legislation caused an applicable change (i.e., an "advance" in a rate of duty, or a "new" or "more burdensome" requirement or restriction). Specifically, China argues that the "comparison must be made as of the time of the enforcement of the measure, not as of the time of its enactment or official publication."[99] China asserts that the time that the *GPX* legislation was first enforced was November 20, 2006.[100] The Panel, however, found (and China has not contested) that there was "no evidence on the record to suggest that United States administrative

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[97] *EC – IT Products*, para. 7.1025. The panel observed that "[s]ubstantively, and when read as a whole within the context of Article X:1, the phrase 'laws, regulations, judicial decisions and administrative rulings' reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders." *Id.*, para. 7.1026.

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

[99] China's Appellant Submission, para. 171.

[100] China's Appellant Submission, para. 172.

agencies or courts took action prior to 13 March 2012 to enforce Section 1."[101] Thus, even on the approach of a comparison before and after enforcement of the measure of general application at issue, China's assertion that the timeframe for comparison must be November 20, 2006, is without merit.

110. The Panel found that prior to the existence of a measure, there was nothing to enforce, and no U.S. Government entity sought to apply such a non-existent measure. In reaching this conclusion, the Panel rejected China's argument that the law was "enforced" on November 20, 2006, because it "applied" to determinations and actions that predate the enactment of the *GPX* legislation. The Panel reasoned:

> We consider that the "determinations and actions" referred to by China cannot properly be viewed as actions taken on dates prior to 13 March 2012 to enforce Section 1 before its official publication. As we have said, there is no evidence that the United States took any enforcement action, based on Section 1, prior to 13 March 2012. These determinations and actions were taken pursuant to authority which USDOC considered it had under pre-existing CVD law, not in anticipation of authority that Congress would subsequently provide in Section 1.[102]

111. During the proceedings before the Panel, China argued that the *GPX* legislation was the sole legal basis for the initiation of CVD investigations on imports from China from November 20, 2006 through March 13, 2012. China argued this legal basis served as evidence of Commerce's "enforcement" of the *GPX* legislation prior to its date of enactment or existence. The Panel rejected China's argument based on evidence on the record demonstrating that Commerce did not initiate the CVD proceedings at issue (*i.e.,* those from November 20, 2006 and March 13, 2012) based on the *GPX* legislation. That is, Commerce did not initiate a CVD proceeding on imports from China in 2006 using or anticipating a law that would come into existence six years later. Rather, Commerce's initiation of CVD proceedings during this period was based on its interpretation and application of the U.S. CVD law, or Section 701(a) of the U.S. Tariff Act.[103]

112. Further, China's citation to the Panel's findings regarding the time of the "enforcement" of the *GPX* legislation does not support its claim. Specifically, China states that "[t]he Panel found that the United States enforced Section 1 of the *GPX* legislation in respect of events or circumstances that occurred prior to its official publication on 13 March 2012, and that the date of enforcement of this measure was 20 November 2006."[104] China cites to paragraph 7.122 of

[101] Panel Report, para. 7.120.

[102] Panel Report, para. 7.125.

[103] Panel Report, para. 7.125 ("These determinations and actions were taken pursuant to authority which USDOC considered it had under pre-existing CVD law, not in anticipation of authority that Congress would subsequently provide in Section 1.").

[104] China's Appellant Submission, para. 172.

the Panel Report in support of its argument. Paragraph 7.122 of the Panel Report states, in relevant part:

> It follows that Section 1(b) requires relevant United States administrative agencies *to apply* the new Section 701(f) in respect of all CVD proceedings initiated, and resulting USCBP actions taken, between 20 November 2006 and 13 March 2012, i.e. in respect of events or circumstances that occurred before Section 1 was published on 13 March 2012.[105]

113. The statement by the Panel in paragraph 7.122 regarding the "events and circumstances" *to which* the *GPX* legislation applied is not a finding regarding the time at which U.S. authorities enforced or applied the law. As quoted above, the Panel found that "there is no evidence on the record to suggest that United States administrative agencies or courts took action prior to 13 March 2012 to enforce Section 1 [of the *GPX* legislation].[106] The Panel reasoned that "[a]s a linguistic and logical matter, a measure can only be 'enforced' if it has first been 'made effective', either formally or informally."[107] The Panel found that the *GPX* legislation was 'made effective' under Article X:1 of the GATT 1994 on March 13, 2012.

114. Contrary to China's assertion, the Panel did not find that the *GPX* legislation was enforced on November 20, 2006. It properly found that no actions were taken by the United States to enforce (apply) the *GPX* legislation prior to March 13, 2012. Thus, even under China's approach that the baseline for comparison should be as of the time of enforcement of the challenged measure of general application, that date would be March 13, 2012. China simply confuses the events to which a measure may apply with the time from which the measure is enforced.

III. THE PANEL ACTED CONSISTENTLY WITH ARTICLE 11 OF THE DSU

115. China argues that the Appellate Body should reverse all of the Panel's findings "in paragraphs 7.158 to 7.186 of the Panel Report" because the Panel "did not undertake an objective assessment of the matter as required by Article 11 of the DSU."[108] Specifically, China argues that the Panel acted inconsistently by failing to properly evaluate the meaning of municipal law.[109] China further argues that the Panel "failed to acknowledge that China had established a *prima facie* case."[110] China's claims under Article 11 of the DSU are without merit.

116. First, China fails to establish that the Panel's appreciation of the evidence amounts to a failure to make an objective assessment of the facts. To the contrary, the Panel weighed the evidence and made factual findings regarding the legal instruments at issue, actions taken by the

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[105] *Id*. (citing Panel Report, para. 7.122) (emphasis added).

[106] Panel Report, para. 7.120.

[107] Panel Report, para. 108.

[108] China's Appellant Submission, para. 90.

[109] China's Appellant Submission, paras. 93-94.

[110] China's Appellant Submission, para. 96.

U.S. agency charged with interpreting and applying that law, judicial pronouncements concerning the role of an administering agency in construing the law and role of a reviewing court, and the outcome of relevant judicial proceedings that were well within its bounds as trier of fact in this dispute. After assessing this evidence, the Panel properly found that Commerce's application of the U.S. CVD law was not a breach of U.S. municipal law. The Panel came to its conclusion after properly considering the status and meaning of U.S. domestic court litigation using the approach of the U.S. legal system.

117. Second, and most evidently in its argument that the Panel failed to recognize that China had made a *prima facie* case, China in large measure dresses a complaint that the Panel failed to draw a correct legal conclusion as a failure to make an objective assessment. The Appellate Body has repeatedly communicated to parties that they should not merely take alleged legal errors and recast them as claims of error under Article 11.[111] China's arguments that the Panel failed to draw the correct legal conclusion is not an error under DSU Article 11.

A. The Panel Did Not Fail to Make an Objective Assessment of the Facts When It Found that Commerce's Application of the U.S. CVD Law was not a Breach of U.S. Municipal Law

118. Having properly determined that it could consider Commerce's existing application of the U.S. CVD law to imports from China for purposes of determining whether the *GPX* legislation effected an advance in a rate of duty or a new or more burdensome restriction or requirement, the Panel then addressed China's argument that Commerce's existing practice was illegal under U.S. law.[112] China argued that because Commerce's application of the U.S. CVD law breached U.S. municipal law, it could not be considered a baseline of comparison under Article X:2. In this appeal, China once again asserts that the baseline used by the Panel was unlawful as a matter of U.S. law, and therefore should not have been considered by the Panel in its analysis of the *GPX* legislation under Article X:2.[113]

119. The Panel did not exclude that the inconsistency of an agency's action with municipal law could be relevant to the comparison under Article X:2. However, the Panel considered that the practice of the primary agency administering the existing U.S. CVD law would be an appropriate point of departure.[114] And the Panel considered that, even on China's approach of

[111] *See, e.g., EC – Fasteners (China) (AB),* para. 442 (“It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.”); *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238 (“We also recall that a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements.”).

[112] *See* Panel Report, para. 7.168.

[113] *See* China's Appellant Submission, para. 117.

[114] Panel Report, para. 7.161.

considering "what was required under United States law before Section 1 entered into force," the Panel would need to base its findings on (quoting the Appellate Body report in *US – Carbon Steel*) "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[115] The Panel drew on all of these sources.[116] The Panel found that "evidence of consistent application" of the U.S. CVD law would be highly probative.[117] Further, the Panel reviewed relevant judicial opinions and found the pronouncements of the U.S. Supreme Court on the constitutional law principles guiding review of agency interpretation of legislation to be significant in the weight accorded to agency interpretation under U.S. law.[118] China has alleged no factual error either in the Panel's factual findings related to the agency's "consistent application of such laws" or related to U.S. constitutional principles relevant to agency interpretation of that law and judicial review of such interpretations.

120. China argues that the Panel failed to apply the approach described by the Appellate Body in *US – Carbon Steel* to determine the meaning of U.S. municipal law.[119] During the proceedings before the Panel, China characterized this approach as "prior municipal law, properly determined as a question of fact."[120] China argues that the Panel's failure to apply a correct legal standard as part of its findings concerning municipal law "would constitute an error of law under Article 11."[121] But as noted above, the Panel did apply the approach of *US - Carbon Steel* and examined and made factual findings under its elements. Thus, China's Article 11 error relating to an alleged failure to apply the "correct" standard for determining the meaning of municipal law fails because the Panel applied the standard asserted by China as correct.

B. The Panel Did Not Fail to Examine the Text of the Relevant Legal Instrument

121. China also argues that the Panel's determination of prior U.S. municipal law (*i.e.,* Commerce interpretation and application of U.S. CVD law in relation to imports from China was lawful because under U.S. law an agency interpretation is lawful unless overturned in a binding court decision under the standard of review articulated by the U.S. Supreme Court) is a legal error under Article 11 of the DSU because the Panel allegedly failed "to examine the text of the relevant legal instruments."[122] This assertion is demonstrably erroneous.

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[115] Panel Report, para. 7.162.

[116] *See, e.g., id*., paras. 7.162, 7.163, 7.179.

[117] *Id.*, para. 7.163.

[118] *Id.* (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) at 843 (Exhibit USA-14)).

[119] China's Appellant Submission, par. 73.

[120] Panel Report, para. 7.142.

[121] China's Appellant Submission, para. 93.

[122] China's appellant submission, para. 94.

122. First, the Panel examined the text of the relevant provisions repeatedly in its report.[123] This is despite the fact that China did not engage on the meaning of the "text" of the *existing* U.S. CVD law, which would have been most relevant for determining the baseline for comparison under China's approach, but rather sought to have the Panel draw inferences as to its meaning from *another* instrument, the *GPX* legislation.[124] In fact, as set out below, the text of the existing U.S. CVD law (Section 701(a)) did not support the conclusion China wished to draw from it; despite China's emphasis in this appeal on an evaluation of the text, and despite China's heavily reliance on an interpretation of U.S. appellate court during the proceedings before the Panel. But the Panel found that this court decision never became final, and the U.S. administering agency was never ordered to change its interpretation and application of the U.S. CVD law.

123. Following the guidance provided by the Appellate Body in *US – Carbon Steel*, the Panel understood that any assessment of the text should be supported "as appropriate" by reference to consistent application of the law and pronouncements of domestic courts.[125] As noted, the pronouncements of the U.S. Supreme Court[126], which China ignores in its appellant submission, speak directly to the relationship between these elements. Contrary to China's arguments, it would have been legally erroneous for the Panel not to examine these elements, make findings as to their relationship under U.S. law, and make findings on the meaning of municipal law accordingly. Thus, the Panel not only applied the "correct standard" asserted by China for determining the meaning of municipal law, it applied that standard correctly and not according to the selective and legally erroneous approach advocated by China.

124. China's arguments in this appeal relating to the text of the *GPX* legislation fail to place that text in its appropriate context and rely on inferences that are neither necessary nor persuasive. Specifically, China argues that when the *GPX* legislation is read in relation to Section 701(a) of the U.S. Tariff Act, "it must be the case that those provisions previously did not apply to nonmarket economies, at any point in time. Otherwise, it would not have been necessary for Congress to enact new legislation for this purpose."[127] China's assertion, however, is not the only or most logical conclusion for the purpose of the *GPX* legislation. In relevant part, the *GPX* legislation states that "the merchandise on which countervailing duties shall be imposed under [Section 701(a)] includes a class or kind of merchandise imported, or sold (or

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[123] *See, e.g.,* Panel Report, paras. 7.162, 7.204.

[124] *Id.*, para. 7.162 ("However, China has offered virtually no specific analysis of the text of Section 701(a) of the United States Tariff Act of 1930, which we understand was relied on by USDOC as the legal basis for applying CVDs to imports from any country, including NME countries, before the new Section 701(f) came into force. Instead China referred us to the text of Section 1, the measure that China says effected an advance in a rate of duty. It is not apparent to us that the analysis should focus, not on the actual text of Section 701(a) and the meaning and effect that may permissibly be given to it, but on indirect inferences that might be drawn from a subsequent enactment of Congress, Section 1 of PL 112-99.").

[125] *US – Carbon Steel (AB)*, para. 157.

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

[127] China's Appellant Submission, para. 104.

likely to be sold) for importation, into the United States from a nonmarket economy country."[128] For reference, Section 701(a) states, in relevant part, that:

> [If] the administering authority determines that the government of a country … is providing, directly or indirectly, a countervailable subsidy … 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.[129]

125. As the United States explained to the Panel, because of the use of the word "shall," Commerce applied the U.S. CVD law to all governments (except where this proved to be impossible), including NME countries such as China and Vietnam.[130] Notably, the text of 701(a) does not even mention NME countries so that it is difficult to sustain the notion that the text of Section 701(a) could necessarily prohibit the application of CVDs to "NMEs." Because Section 701(a) contains no reference to NMEs, the U.S. Congress clarified the provision by enacting the *GPX* legislation to eliminate any ambiguities.[131]

126. Weighing the evidence before it, the Panel rejected China's argument that the only conclusion that could be reached from a reading of the *GPX* legislation in relation to Section 701(a) is that Commerce was prohibited from applying the U.S. CVD law to NME countries such as China prior to the *GPX* legislation. To the contrary, the Panel made a finding of fact that based on the U.S. legal system, Commerce's application of the U.S. CVD law has never been unlawful and constituted binding U.S. municipal law prior to the existence or enactment of the *GPX* legislation. Specifically, the Panel found that:

> [I]t is clear to us that we have no basis for concluding that USDOC's relevant practice was unlawful under United States law, because no United States court ordered USDOC to cease applying United States CVD law as it stood at the time to imports from China. To the contrary, the evidence before us suggests that this practice was presumptively lawful under United States law, as USDOC's interpretation of United States CVD law governed in the absence of a binding judicial determination indicating otherwise. This finding obviates the need for further analysis of whether we could rely on that practice in our Article X:2 inquiry if a United States court had determined it to be unlawful.[132]

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[128] Section 1 of the *GPX* legislation (Exhibit CHI-1).

[129] Section 701(a) of the U.S. Tariff Act (Exhibit USA-2) (emphasis added).

[130] U.S. First Written Submission, para. 22.

[131] The United States supported its argument with evidence of other statutes passed by the U.S. Congress that were meant to clarify rather than change the law when ambiguities arose in the original law. *See e.g., Beverly Community v. Belshe*, 132 F.3d at 1266 (USA-55). The case involved the statutory clarification of existing law on payments for the healthcare of low income individuals. The U.S. appellate court found that it should apply the new clarifying law to the pending court case, stating that "[g]iven the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [a law] is worthy of real deference."

[132] Panel Report, para. 7.185.

127. Further, the Panel rejected China's argument that the U.S. Federal Circuit decision in *Georgetown Steel* clearly held that Commerce had been prohibited from applying the U.S. CVD law to NME countries since the late 1980s. As the Panel found:

> We are not persuaded that the decision in *Georgetown Steel* demonstrates that USDOC's practice, since at least April 2007, of applying United States CVD law to imports from China had, in effect, been judicially determined to be unlawful under United States law well before USDOC developed the practice. USDOC clearly considered its practice to be consistent with the *Georgetown Steel* decision. Also, the CIT, being a first-instance court required to follow the CAFC's decisions, concluded on at least three occasions that the holding in *Georgetown Steel* was at the very least "ambiguous".[133]

128. In other words, the Panel has already made factual findings that Commerce's application of the U.S. CVD law was not only lawful under U.S. law, but is the governing U.S. municipal law under the U.S. legal system as "neither party contends, and nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law."[134] China has not alleged that the Panel's findings in relation to U.S. Supreme Court decisions on statutory interpretation and the role of an administering agency in interpreting the law are erroneous. The Panel applied those U.S. Supreme Court pronouncements in reviewing the meaning of existing U.S. law and the weight to be given to the consistent interpretation of that law by an administering agency.[135] As such, the Appellate Body should reject China's attempt to reverse the Panel's factual findings and to make factual findings of its own under the guise of Article 11 of the DSU.

C. The Panel Did Not Fail to Make an Objective Assessment of the Matter Before It By Considering the Status and Meaning of U.S. Domestic Litigation Using the Approach of the U.S. Legal System

129. The Panel acted in full compliance with its requirements under Article 11 of the DSU to make "an objective assessment of the matter before it."[136] The fact that China disagrees with how the Panel weighed the evidence before it or rejected China's arguments does not rise to a

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[133] Panel Report, para. 7.177. The Panel also cited to a holding by the U.S. CIT that:

> In *CFS Paper*, the CIT appeared to accept USDOC's interpretation of *Georgetown Steel*, stating that "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".

Id., para. 7.176.

[134] Panel Report, para. 7.172.

[135] Panel Report, para. 7.163.

[136] *US — Continued Zeroing (AB)*, para. 331 ("Article 11 requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence.").

breach of Article 11 of the DSU.[137] As the Appellate Body stated in *US – Gambling (AB)*, the "[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts."[138]

130. In short, the determination of whether a municipal law or action is unlawful under a Member's domestic legal system municipal must be based on an examination of the status and meaning of those actions within the municipal legal system itself. As the Panel reasoned:

> [W]e observe that, in accordance with Article X:3(b) of the GATT 1994, it is the role of domestic "judicial, arbitral or administrative tribunals", and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law.[139]

131. To the extent that China considers that the meaning of U.S. municipal law "[f]ollowing customary principles of international law"[140] or under the Appellate Body's approach in *US – Carbon Steel* would produce a different outcome than an approach applying principles of statutory interpretation under U.S. municipal law, the United States would disagree and sound a note of caution. First, as recognized by the Panel, the approach of *US – Carbon Steel* would require reference to evidence of the consistent application of laws and relevant pronouncements of domestic courts whenever appropriate.

132. Second, to the extent China is asserting the Panel and Appellate Body must follow a different approach to interpret the provisions of Section 701(a) of the Tariff Act in relation to Commerce's application of the U.S. CVD law under a different standard than what would be used by a U.S. court, China's approach would produce an erroneous interpretation and result. The very aim of the comparison, under China's approach, is to determine whether existing U.S. CVD law would produce a different rate of duty or restriction or requirement than the new measure of general application would. That is a question of U.S. domestic law and can logically only be answered using the approach of the U.S. legal system.[141]

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[137] *Chile — Price Band System (Article 21.5 — Argentina) (AB)*, para. 229 (stating that Article11 "includes the discretion to identify which evidence the panel considers most relevant in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case. A panel does not commit error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.").

[138] *US – Gambling (AB)*, para. 330.

[139] Panel Report, para. 7.164.

[140] China's Appellant Submission, para. 73 (arguing that "…the threshold issue is whether there are sufficient factual findings of the Panel or undisputed facts on the panel record that will allow the Appellate Body to *establish this baseline of prior municipal law* and apply a correct interpretation of Article X:2 to those facts.") (emphasis added).

[141] Under the U.S. legal system, as the Panel found, an agency's interpretation of a statute is governing law unless a U.S. domestic court finds that the agency's interpretation is an unreasonable understanding of ambiguous text or contrary to the unambiguous text of the statute. In other words, a court cannot supplant an agency's interpretation of a statute with the court's interpretation simply because it believes it has the better interpretation. *See e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (Exhibit USA-14) ("a court may not

133. China has pointed to certain domestic litigation, but these references do not support its arguments nor demonstrate a failure by the Panel to make an objective assessment. The United States notes that, in instances when the Appellate Body previously has been asked to determine the lawfulness of a municipal law or action under the Member's own legal system, it has relied on the panel's factual findings of "the status of municipal law at the time" rather than engage in speculation as to the properness or outcome of domestic litigation.

134. For example, in proceedings under Article 21.5 of the DSU in *US – Shrimp*, the Appellate Body was asked to evaluate whether a measure that had previously been found WTO-consistent had become inconsistent with the WTO obligation as a result of a declaratory ruling by a U.S. domestic court. The Appellate Body found that the panel had not erred in refusing to speculate as to the eventual outcome of the U.S. domestic litigation and to instead base its analysis on the status of municipal law and actions of the administering authority at the time of the proceedings.[142] Specifically, the Appellate Body found:

> Rightly, when examining the United States measure, the Panel took into account the status of municipal law at the time. … [T]he United States confirmed that the Department of State has received no order from the CIT to change its practice, and, therefore, the Department of State continues to apply the Revised Guidelines as before. Malaysia has not shown otherwise. There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The Turtle Island case has been appealed and could conceivably go as far as the Supreme Court of the United States. *It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded*, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".[143]

135. The same reasoning applies to the facts of this dispute. China would have the Panel and Appellate Body speculate as to the ultimate outcome of domestic litigation regarding the

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substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (Exhibit USA-15); *City of Arlington, Texas v. Federal Communications Commission*, Supreme Court Slip Op. May 20, 1013 (Exhibit USA-42) ("When a court reviews an agency's construction of a statute the agency administers, it is confronted with two questions. First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[142] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 91-95.

[143] *Id.*, paras. 94-95 (emphasis added).

lawfulness of Commerce's application of the U.S. CVD law under U.S. municipal law prior to the *GPX* litigation.[144] However, evidence on the record and the Panel's factual findings demonstrate that the domestic litigation is ongoing, particularly as the U.S. judicial appeals process had not concluded.[145] The Panel cited to *US – Shrimp* when it found that:

> Given that at the time of our review we have been made aware of no final court decision determining that USDOC's relevant practice or interpretation was unlawful and requiring USDOC to change its relevant practice, there is, under our analytical approach, neither a need nor a justification for speculating about what the CAFC on rehearing the case would have concluded regarding the lawfulness of USDOC's relevant practice, if Section 1 had not been enacted. Nor will we try to anticipate the conclusion of ongoing judicial proceedings in the United States that may have a bearing on this question.[146]

136. Finally, in *China – Publications and Audiovisual Products*, the Appellate Body observed that "[w]here, for instance, a panel resorts to evidence of how a municipal law has been applied, the opinions of experts, administrative practice, or pronouncements of domestic courts, the panel's findings on such elements are more likely to be factual in nature, and the Appellate Body will not lightly interfere with such findings."[147] In this dispute, China's focus is not about the text of the *GPX* legislation, but about the lawfulness of agency application of existing U.S. CVD law to imports from China prior to the enactment of the *GPX* legislation.[148] Given the factual nature of these findings, the Appellate Body should decline to interfere with the Panel's findings regarding the baseline of comparison for the *GPX* legislation.

IV. THE APPELLATE BODY SHOULD DECLINE CHINA'S REQUEST TO COMPLETE THE ANALYSIS

137. In its final effort to reverse the Panel's findings on Article X:2 of the GATT, China argues that the Appellate Body should complete the analysis of the relevant issues.[149] China acknowledges that such an analysis must be made on "the factual findings of the panel and the undisputed facts in the panel record" and there must be "sufficient basis" for it to do so.[150] Despite such an acknowledgement, China ignores these requirements and instead argues that:

- The Appellate Body should entirely disregard the factual findings of the panel. This is because, China argues, "[t]he Panel majority in this dispute made no

[144] China's Appellant Submission, para. 99.

[145] Panel Report, para. 7.181, fn. 303; U.S. Response to Panel Question No. 96, para. 31; Exhibit USA-117, pp. vii-viii.

[146] Panel Report, para. 7.181.

[147] *China – Publications and Audiovisual Products (AB)*, para. 177.

[148] *See, e.g.,* Panel Report, para. 7.180, fn. 300.

[149] China's Appellant Submission, para. 70.

[150] *Id.*

findings concerning the relationship between Section 1 of the P.L. 112-99 (the measure that is the subject of China's challenge under Article X:2) and the rates, requirements, and restrictions that were applicable to imports from China pursuant to published measures of general application prior to the enforcement of Section 1."[151]

- The Appellate Body should accept China's summary of the "facts" in paragraphs 99 – 1170 of its appellant submission as undisputed and an accurate description of the history of Commerce's application of the U.S. CVD law to NME countries, such as China.

138. Both of China's arguments are without merit. As the United States will explain further below:

- The Panel's findings of fact under Article X:2 were focused on the "relationship" between the *GPX* legislation and the prior rates, requirements, and restrictions that were applicable to imports from China. As the United States explained above, the fact that China disagrees with the Panel does not mean that the Appellate Body should reverse or ignore the Panel's factual findings. Further, if the Appellate Body were to accept China's assertion that the Panel did not make any relevant factual findings, the Appellate Body should refrain from completing the analysis and rather than making new factual findings for itself.

- China is incorrect when it presents its summary of the history of Commerce's application of the U.S. CVD law to NME countries as "undisputed facts." To the contrary, the United States disagrees with China's portrayal of the U.S. CVD law, Commerce's existing practice, and litigation before U.S. domestic courts.

A. Standard for Completing the Legal Analysis of Relevant Issues

139. Article 17.13 of the DSU states that the "Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." The Appellate Body has found that in certain appeals, if it has reversed a panel's finding pursuant to Article 17.13 of the DSU, it "may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties."[152] In order to "complete the legal analysis," however, the Appellate Body has stated that:

> It is well settled that the Appellate Body will be in a position to complete the legal analysis if it has before it sufficient factual findings of the panel or undisputed facts on the panel record.[153]

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[151] China's Appellant Submission, para. 77.

[152] *Australia – Salmon (AB)*, para. 117.

[153] *EC – Selected Customs Matters (AB)*, para. 278; *Australia – Salmon (AB)*, para. 118; *Canada – Autos (AB)*, para. 145 ("In *Australia — Salmon,* we stated that where we have reversed a finding of a panel, we should attempt to

140. In other words, if there are insufficient factual findings of a panel or the relevant facts are disputed, then the Appellate Body should not complete the legal analysis. For example, in *EC – Large Civil Aircraft*, the Appellate Body found that:

> We note that the Appellate Body has exercised restraint in deciding whether to complete the legal analysis in past disputes. The Appellate Body has emphasized that it can complete the analysis only if the factual findings by the panel, or the undisputed facts on the panel record, provide a sufficient basis for the Appellate Body to do so. Where this has not been the case, the Appellate Body has declined to complete the analysis.[154]

B. The Panel's Findings on the Baseline of Comparison for Article X:2 of the GATT 1994 Could Assist the Appellate Body in Completing its Legal Analysis

141. China argues that the Panel made no relevant findings about the baseline of comparison because "[t]he Panel majority in this case was not concerned with how the rates, requirements, or restrictions established by the measure at issue related to the rates, requirements, and restrictions that applied to affected imports prior to the enforcement of the measure, or even prior to its enactment."[155] China's assertion is without merit.

142. The Panel made numerous findings on matters of fact that are relevant to the rates, requirements, or restrictions under the *GPX* legislation and those under existing U.S. CVD law (in particular Section 701(a)). Such findings include, but are not limited to, the following:

A. "We agree with the United States that there is no evidence on the record to suggest that United States administrative agencies or courts took action prior to 13 March 2012 to enforce Section 1."[156]

B. "We consider that the 'determinations and actions' referred to by China cannot properly be viewed as actions taken on dates prior to 13 March 2012 to enforce Section 1 before its official publication. As we have said, there is no evidence that the United States took any enforcement action, based on Section 1, prior to 13 March 2012. These determinations and actions were taken pursuant to authority which USDOC considered it had under pre-existing CVD law, not in

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complete a panel's legal analysis 'to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record'.").

[154] *EC – Large Civil Aircraft (AB)*, para. 1140; *see Canada – Continued Suspension (AB)*, para. 735 ("Given the numerous flaws that we identified in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis."); *US – Hot-Rolled Steel (AB)*, para. 180; *EC – Asbestos (AB)*, para. 78.

[155] China's Appellant Submission, para. 86.

[156] Panel Report, para. 7.120.

anticipation of authority that Congress would subsequently provide in Section 1."[157]

C. "China has offered virtually no specific analysis of the text of Section 701(a) of the United States Tariff Act of 1930, which we understand was relied on by USDOC as the legal basis for applying CVDs to imports from any country, including NME countries, before the new Section 701(f) came into force. Instead China referred us to the text of Section 1, the measure that China says effected an advance in a rate of duty. It is not apparent to us that the analysis should focus, not on the actual text of Section 701(a) and the meaning and effect that may permissibly be given to it, but on indirect inferences that might be drawn from a subsequent enactment of Congress, Section 1 of PL 112-99."[158]

D. "Furthermore, the … statement of the Appellate Body indicates that 'evidence of consistent application' of a law may be taken into account, as appropriate, in determining what that law requires. An established and uniform practice of an agency reflecting an interpretation of a law which that agency administers would undoubtedly be 'evidence of consistent application' of that law. Moreover, certainly in the case of United States law, it is appropriate to take account of any practice of an administering agency. As the United States explained, under United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous'. This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation. Consequently, it is clear that even were we to follow China's 'prior municipal law' approach, it would be improper, certainly when ascertaining the meaning of United States law, to disregard from the outset an established and uniform practice by USDOC that reflects the latter's interpretation of Section 701(a). Any such practice would need to be given due weight in our factual analysis."[159]

E. "The record shows that, in November 2006, USDOC published the initiation of a CVD investigation of CFS paper from China, and that in December 2006, it published a notice of opportunity to comment on whether the CVD law 'should now be applied to imports from the PRC'. In April 2007, USDOC published an affirmative preliminary determination in the CVD investigation of CFS paper, in which it preliminarily determined that the United States CVD law could be applied to imports from China. In October 2007, USDOC issued an affirmative final determination in the CVD investigation concerned. The record further shows that between November 2006 and March 2012, USDOC initiated 33

[157] Panel Report, para. 7.125.

[158] Panel Report, para. 7.162 (internal footnote omitted).

[159] Panel Report, para. 7.163 (internal footnote omitted).

investigations and reviews in respect of imports from China under United States CVD law, notifying China and other parties of its application of United States CVD law to China, and that in many of those proceedings USDOC issued CVD orders. USDOC undertook those investigations and reviews, and issued those orders, even though, then as later, the United States designated China as an NME country. The United States contends that these facts reflect an established and uniform practice. For its part, China has not identified any instance pertaining to the relevant time-period in which USDOC determined that it lacked authority under domestic law to apply countervailing duties to imports from NME countries. In our view, these elements therefore support the view that between November 2006, or at least April 2007, and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country that was securely in place (established) and that did not change over time (uniform)."[160]

F. "The parties have offered divergent views as to the holdings in some of these court decisions, or their legal import. Significantly, however, neither party contends, and nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law. Nor has either party asserted that there are any other United States court decisions that resulted in such orders."[161]

G. "[T]here is no evidence that up until the time of our review of China's claim the relevant USDOC practice has been determined unlawful by a United States court, either at first instance or following appeal(s), such that USDOC would have been required to change its practice or interpretation of United States CVD law. In fact, in the 33 investigations and reviews cited by China, USDOC proceeded on the basis, since at least April 2007, that it had the authority to apply United States CVD law to imports from NME countries. It is altogether implausible that USDOC would have been able to do so in the face of a court order to the contrary. As the United States explained, if an administrative agency did not comply with a court order, it would be subject to severe sanctions. China similarly referred us to a decision by a United States court of appeals which stated that 'once a court has issued a legal ruling on a dispute, the Board [i.e. the National Labour Relations Board as one particular administrative agency] is bound to follow the court's judgment unless and until it is reversed by the Supreme Court'. According to China, USDOC is similarly bound by the CAFC's decisions 'not just in the

[160] Panel Report, para. 7.169 (internal footnote omitted).

[161] Panel Report, para. 7.172 (internal footnote omitted).

specific case decided, but also in relation to other cases that raise the same issue of law'."[162]

H. "We are not persuaded that the decision in *Georgetown Steel* demonstrates that USDOC's practice, since at least April 2007, of applying United States CVD law to imports from China had, in effect, been judicially determined to be unlawful under United States law well before USDOC developed the practice. USDOC clearly considered its practice to be consistent with the *Georgetown Steel* decision. Also, the CIT, being a first-instance court required to follow the CAFC's decisions, concluded on at least three occasions that the holding in *Georgetown Steel* was at the very least 'ambiguous'. Finally, at the time that Section 1 was enacted, there was no final court decision determining that USDOC's interpretation of *Georgetown Steel* was impermissible. In these circumstances, we have no basis upon which to find that USDOC's interpretation of *Georgetown Steel* was incorrect as a matter of United States law."[163]

I. "USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in *GPX V*, be it in the *GPX* case itself or any other case. As indicated, the CAFC did not issue a mandate in *GPX V* and its decision therefore never became final. Moreover, the decision in *GPX V* did not result in any order to USDOC requiring it to adjust its practice or follow the CAFC's interpretation of United States CVD law in *GPX V*. Consequently, the decision in *GPX V* in our view does not assist China in demonstrating that USDOC's practice has been judicially determined to be unlawful under United States law, such that USDOC had to change its practice of applying United States CVD law to imports from China."[164]

J. "Given that at the time of our review we have been made aware of no final court decision determining that USDOC's relevant practice or interpretation was unlawful and requiring USDOC to change its relevant practice, there is, under our analytical approach, neither a need nor a justification for speculating about what the CAFC on rehearing the case would have concluded regarding the lawfulness of USDOC's relevant practice, if Section 1 had not been enacted. Nor will we try to anticipate the conclusion of ongoing judicial proceedings in the United States that may have a bearing on this question."[165]

K. "[I]t is clear to us that we have no basis for concluding that USDOC's relevant practice was unlawful under United States law, because no United States court ordered USDOC to cease applying United States CVD law as it stood at the time to imports from China. To the contrary, the evidence before us suggests that this

[162] Panel Report, para. 7.173 (internal footnote omitted).

[163] Panel Report, para. 7.177 (internal footnote omitted).

[164] Panel Report, para. 7.180 (internal footnote omitted).

[165] Panel Report, para. 7.181 (internal footnote omitted).

practice was presumptively lawful under United States law, as USDOC's interpretation of United States CVD law governed in the absence of a binding judicial determination indicating otherwise. This finding obviates the need for further analysis of whether we could rely on that practice in our Article X:2 inquiry if a United States court had determined it to be unlawful."[166]

L. "Based on the evidence before us, we thus come to the conclusion that between November 2006, or at least April 2007, and March 2012 there was an established and uniform practice by USDOC regarding 'rates of duty' applicable to imports from China as an NME country, and that there is no basis on which to find that, under United States law as it stood at the time, USDOC could not lawfully develop and maintain that practice of applying rates of countervailing duty to imports from China."[167]

M. "Our finding that Section 1 did not effect an advance in a rate of duty is based on the fact that this provision maintained the same rates of duty that were already applied, pursuant to USDOC's established and uniform practice, prior to the enactment of Section 1. Our finding is the same irrespective of whether or not we conduct an assessment of the lawfulness of that practice under United States law, because there is no evidence in the record demonstrating that this practice was found to be unlawful, such that the practice needed to be discontinued or changed before Section 1 was enacted."[168]

N. "[F]rom at least 2007 and on the basis of the published United States CVD law then in force, USDOC subjected imports from China as an NME country to CVD proceedings and imposed CVD duties on such imports. To the extent that it can be properly said (and we make no finding in this regard) that in doing so, USDOC subjected imports from China to a 'requirement' or 'restriction', as China asserts, it is the same 'requirement' or 'restriction' that China says was subsequently imposed by the new Section 701(f) that Section 1 added to the United States Tariff Act of 1930. There is nothing surprising about this conclusion. Both before and following the enactment of Section 1, USDOC applied United States CVD law to imports from China as an NME country, and it did so pursuant to the same substantive and procedural provisions of United States CVD law, namely the 'countervailing duty provisions" of the United States Tariff Act of 1930 to which the heading of Section 1 and its preamble refer."[169]

143. In sum, it is clear that the Panel made findings of fact based on the totality of the evidence on the record and not from an alleged erroneous interpretation of Article X:2, as argued by China. To give but one example, it is unclear how an interpretation of Article X:2, even

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[166] Panel Report, para. 7.185.

[167] Panel Report, para. 7.186.

[168] Panel Report, para. 7.190.

[169] Panel Report, para. 7.204 (internal footnotes omitted).

under China's proposed approach, could have any impact on the finding of fact that "USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in *GPX V*, be it in the *GPX* case itself or any other case."[170] That is, should the Appellate Body accept China's argument that an "established and uniform" practice qualifies the *GPX* legislation as the challenged measure of general application, it would not change the fact that Commerce was not required to change its application of the U.S. CVD law as a consequence of any U.S. court decision. Such an example demonstrates that China's wholesale dismissal of all of the findings in paragraphs 7.158 to 7.186 of the Panel Report is unsupported by the evidence of the Panel proceeding.

144. However, if the Appellate Body were to agree with China that the Panel did not make *any* relevant findings that could assist in completing the legal analysis, then the Appellate Body should not complete the analysis. As explained further below, this is because the summary of the "facts" presented by China in its appellant submission is not undisputed. The Panel record clearly demonstrates that the United States disputes China's account of the history of Commerce's application of the U.S. CVD law to NME countries such as China.

145. In situations where there are no relevant panel findings or there are disputed facts, the Appellate Body has held that it should not complete the legal analysis.[171] Similarly, the Appellate Body should reject China's request to complete the analysis even if it were to accept China's argument that the Panel did not make any factual findings on Article X:2. Without the Panel's factual findings and in light of the highly contested nature of the facts of this dispute, the Appellate Body would not have a sufficient basis to complete the legal analysis.

C. The Facts Presented by China in its Appellant Submission are Disputed

146. China alleges that its account of the history of Commerce's application of the U.S. CVD law to imports from NME countries in paragraphs 99 – 170 of China's appellant submission are "undisputed facts."[172] China further argues that the Appellate Body should complete the legal analysis using China's proposed interpretation of Article X:2 based on the statements in these paragraphs.[173]

147. The United States does not agree that China's statements in paragraphs 99 – 170 of its appellant submission are "undisputed facts." The ordinary meaning of the word "undisputed" is "[n]ot argued with; [n]ot called into question."[174] The Appellate Body has also observed that

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[170] Panel Report, para. 7.180.

[171] *EC – Large Civil Aircraft*, para. 1140; *see Canada – Continued Suspension (AB)*, para. 735 ("Given the numerous flaws that we identified in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis.").

[172] *See, e.g.*, China's Appellant Submission, para. 99 ("China will proceed to demonstrate that, based on undisputed facts in the panel record, Section 1 of P.L. 112-99 effected an advance in a rate of duty or other charge on imports under an established and uniform practice, and imposed a new or more burdensome requirement or restriction on imports.").

[173] *Id.*

[174] *Shorter Oxford English Dictionary* (1993 edition), p. 3478.

"undisputed" facts are "uncontested" facts.[175] Thus, "undisputed facts" apply to those facts or evidence that the parties to a dispute do not argue with, or do not call into question, or do not contest. As the United States explains further below, the statements made by China in paragraphs 99 – 170 of its appellant submission have been called into question by the United States. That is, the United States and China heavily contested whether China's statements constitute "facts" during the proceedings before the Panel. As the United States explained in Section IV.B above, the Panel already made findings on these contested statements and correctly determined that based on its findings of fact, the *GPX* legislation is not inconsistent with Article X:2 of the GATT 1994.

148. However, because China continues to mischaracterize certain facts and omit others that were on the record in the proceedings before the Panel, the United States is compelled to respond to China's assertions in paragraphs 99 – 170 of China's appellant submission.

1. China's Characterization of the U.S. CVD Law Is Not an Undisputed Fact

149. As China notes, any discussion of the U.S. CVD law must begin with the plain text of the law.[176] The relevant U.S. CVD law prior to the *GPX* legislation is Section 701(a) of the U.S. Tariff Act, which 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.[177]

150. China asserts that the U.S. Tariff Act "did not previously provide" for the application of the U.S. CVD law to imports from NME countries,[178] but that assertion is erroneous and contradicted by the plain text of the statute. The unambiguous language of Section 701(a) states that every "country" exporting merchandise to the United States is subject to the CVD law, with no exceptions.

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[175] *US – Upland Cotton (AB)*, para. 693.

[176] China's Appellant Submission, para. 101.

[177] 19 U.S.C. § 1671(a) (Exhibit USA-2) (emphasis added).

[178] China's Appellant Submission, para. 104.

151. In other words, NME countries are "countries"[179] and products imported from them are "merchandise." As such, where Commerce determined that a NME country was providing a "countervailable subsidy" with respect to imported "merchandise," the plain language of Section 701(a) required that CVDs "shall be" imposed upon that merchandise." Based on this requirement, the United States has applied the U.S. CVD law to all governments of countries, including NME countries such as China and Vietnam, except where this proved to be impossible.[180]

2. China's Characterization of a 1986 U.S. Domestic Court Opinion Is Not an Undisputed Fact

152. To support its interpretation of municipal law with respect to the application of the U.S. CVD law to imports from NME countries, China places considerable emphasis on the opinion of the U.S. Court of Appeals for the Federal Circuit ("U.S. Federal Circuit") in *Georgetown Steel*.[181] However, China's characterization of the *Georgetown Steel* opinion contains erroneous and exaggerated statements.

153. The *Georgetown Steel* opinion arises out of a series of decisions made by Commerce in 1983 and 1984 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.[182] In such systems, attempting to isolate a government financial contribution that gave rise to a benefit was essentially impossible.

154. Commerce's findings are summarized in a 1984 preliminary determination involving a CVD investigation of carbon steel wire from Poland, in which Commerce stated its interpretation "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."[183] In the final determinations of that investigation and a parallel CVD

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[179] The U.S. Court of International Trade 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) (Exhibit USA-93).

[180] The United States considers China to be an NME country under the U.S. antidumping law. *See* 19 U.S.C. § 1677(18) (Exhibit USA-6).

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

[182] *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*] (Exhibit USA-7).

[183] *Preliminary Negative Countervailing Duty Determination: Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 6,768, 6,769 (Dep't of Commerce Feb. 23, 1984) (original emphasis) (Exhibit 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). In the final determinations of these proceedings, 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. *Wire Rod from Czechoslovakia,* 49 Fed. Reg. at 19,371 (Exhibit USA-7); *Final Negative*

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.[184]

155. In other words, Commerce concluded that the essential characteristic of NMEs at that time was that there were no markets *per se*, because the governments of the NME countries 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.

156. 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. Thus, and contrary to China's assertion, at no time did Commerce state that it was precluded "as a matter of law" from applying the CVD law to imports from NME countries.[185] As a matter of U.S. municipal law, Commerce did *not* have the authority to create an exception to the law enacted by the U.S. Congress based on *policy* considerations such as the complexity or political implications of applying the U.S. CVD law to imports from NME countries. Nor did Commerce presume to have such authority. Instead, during the time period of the *Georgetown Steel* opinion (*i.e.,* the 1980s), Commerce determined that it could not apply the CVD law because it was impossible to identify a subsidy based on the characteristics of the NME countries at that time. Commerce's factual basis for not applying the U.S. CVD law to certain Soviet-bloc countries did not preclude a different outcome should the facts change or be different.

157. Commerce's findings were subsequently challenged in U.S. domestic courts. In 1986, the U.S. Federal Circuit in *Georgetown Steel* affirmed Commerce's interpretation and decision to not apply the U.S. CVD law to certain Soviet-style centrally planned economies. 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."[186]

Countervailing Duty Determination: Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19,374, 19,375–76 (Dep't of Commerce May 7, 1984) [hereinafter *Wire Rod from Poland*] (Exhibit USA-10).

[184] *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,371 (Exhibit 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 May 7, 1984) [hereinafter Wire Rod from Poland] (Exhibit USA-10).

[185] China's Appellant Submission, para. 136. Importantly, China does not cite to an actual determination by the administering authority to attribute that position to Commerce, but to the *Georgetown Steel* opinion. China's Appellant Submission, para. 136, n.90. In turn, the *Georgetown Steel* opinion cites to *Wire Rod from Czechoslovakia* in attributing that position to Commerce. *Georgetown Steel*, 801 F.2d at 1310 (Exhibit CHI-2) (citing *Wire Rod from Czechoslovakia*, 49 Fed. Reg. at 19,374 (Exhibit USA-7)). However, *Wire Rod from Czechoslovakia* makes no such statement or holding. 49 Fed. Reg. at 19,374 (Exhibit USA-7).

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

158. China incorrectly argues that *Georgetown Steel* stood for the conclusion that the U.S. CVD law does not apply to NME countries as a matter of statutory interpretation.[187] To the contrary, the U.S. Federal Circuit applied an established U.S. constitutional law principle called the *Chevron* doctrine that an administering authority's interpretation of a law "governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."[188] Had the U.S. Federal Circuit made a finding that Commerce was prohibited from applying the U.S. CVD law to NME countries as a matter of statutory interpretation, it would not have issued a finding based on the *Chevron* doctrine, as the statutory language would have been "unambiguous." That is, the fact that the U.S. Federal Circuit deferred to Commerce's finding as "reasonable" indicates that it was not unambiguous that the statute prohibited the application of the U.S. CVD law to NME countries.[189]

159. The Panel similarly cited to the *Chevron* doctrine as a principle of U.S. constitutional law in finding that it should not ignore Commerce's application of the U.S. CVD law in determining the rates, requirements or restrictions imposed on imports prior to the *GPX* legislation.[190] Further, on the issue of *Georgetown Steel*, the Panel found that

> [Y]ears of litigation before the United States courts over this issue [the meaning of *Georgetown Steel*] ensued. On at least three occasions, the CIT [a U.S. domestic court of first instance] decided that the applicable United States law and

[187] China's Appellant Submission, para. 137 ("In its 1986 decision in *Georgetown Steel*, the Federal Circuit reviewed the history and purpose of the U.S. trade remedy laws and concluded that the countervailing duty provisions of these laws do not apply to imports from nonmarket economy countries.").

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

[189] *Georgetown Steel*, 801 F.2d at 1318 (Exhibit CHI-2) (citing *Chevron*, 467 U.S. at 842-45 (Exhibit USA-14)). Specifically, the U.S. Federal Circuit concluded that, "the agency administering the countervailing duty law has broad discretion in determining the existence of a 'bounty' or 'grant' under that law. We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion."

[190] Panel Report, para. 7.163 ("certainly in the case of United States law, it is appropriate to take account of any practice of an administering agency. As the United States explained, under United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law 'governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous'. This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.").

the CAFC decision in *Georgetown Steel* were "ambiguous" regarding whether United States CVD law could be applied to imports from China.[191]

160. Thus, contrary to China's assertions, both the United States and the Panel have stated that it is not an "undisputed fact" that Commerce could not apply the CVD law to NME countries "as a matter of law" under *Georgetown Steel*.

161. Rather than properly characterize the holding of the *Georgetown Steel* ruling, China emphasizes other statements made by the U.S. Federal Circuit that constitute *dicta* and therefore lack any precedential weight under U.S. law.[192] For example, China cites to a passage in *Georgetown Steel* that states, "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.[193] However, the U.S. Federal Circuit itself identified such ruminations as only "[f]urther support for [its] conclusion."[194]

162. In sum, the Appellate Body should not accept China's assertions regarding the *Georgetown Steel* as "undisputed facts."

3. China's Characterization of the Legislation and Commerce's Administration of the CVD Law after *Georgetown Steel* Are Not Undisputed Facts

163. In further support of its position that Commerce lacked authority under municipal law to apply the CVD law to imports from NME countries prior to enactment of the *GPX* legislation, China mistakenly relies on various legislative initiatives following *Georgetown Steel* that do not establish conclusive or undisputed facts.[195] For example, the United States disagrees with China's characterization of the Omnibus Trade and Competitiveness Act of 1988.[196] In this law, 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.[197] 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."[198] The legislative history of these provisions makes no

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[191] Panel Report, para. 7.254.

[192] *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)) (Exhibit USA-16).

[193] China's Appellant Submission, paras. 138-140 (citing *Georgetown Steel*, 801 F.2d at 1316 (Exhibit CHI-2)).

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

[195] China's Appellant Submission, paras. 141-143.

[196] *Id.*

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

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

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*, as alleged by China.[199]

164. In 1994, extensive changes were made to both the AD and CVD law to implement the WTO Uruguay Round Agreements. The only change in the basic requirements of the CVD law was that the term "bounty or grant" was replaced with the term "countervailable subsidy," which is defined in more detail.[200] China nonetheless takes out of context a fleeting reference in the 1994 legislative history that summarizes *Georgetown Steel* as being "limited to the reasonable proposition that the countervailing duty law cannot be applied to imports from nonmarket economy countries."[201] However, the statement of administrative action accompanying the legislation demonstrates that the reference was meant to clarify an interpretation by a binational panel under Chapter 19 of the North American Free Trade Agreement that the holding of *Georgetown Steel* required a so-called "effects test" in determining whether a subsidy may be countervailed.[202]

165. Rather than *Georgetown Steel* establishing "[t]he inapplicability of the U.S. countervailing duty laws to imports from NME countries" as contended by China,[203] Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because Commerce continued to consider that the structure of the NME countries of the time made it impossible to identify countervailable subsidies.[204] In certain instances following *Georgetown Steel*, Commerce described in shorthand terms the holding of *Georgetown Steel* as being that the CVD law did not apply to exports from NME countries. This shorthand was based on the 1986 understanding of the nature of NMEs, which explains the references in the preamble to Commerce's regulations and a determination involving sulfanilic acid from Hungary cited by China.[205] As described below, Commerce eventually came to reassess the

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[199] China's Appellant Submission, para. 141.

[200] *See* Section 701(a) of the U.S. Tariff Act (Exhibit USA-2).

[201] China's Appellant Submission, para. 143.

[202] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), at 926 (Exhibit USA-2).

[203] China's Appellant Submission, para. 143.

[204] *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") (Exhibit USA-21). 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. *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) (Exhibit USA-94); *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From China*, 57 Fed. Reg. 24,018 (Jun. 5, 1992) (Exhibit USA-95).

[205] China's Appellant Submission, para. 144. China's appellant submission fails to distinguish between Commerce's actual regulations and the preamble in promulgating such regulations, where the reference to *Georgetown Steel* can be found. *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,360 (Dep't of Commerce Nov. 25, 1998) (Exhibit CHI-14); *see also Final Affirmative Countervailing Duty Determination; Sulfanilic Acid from Hungary*, 67 Fed. Reg.

nature of certain current NME counties. Commerce has never, however, indicated that *Georgetown Steel* created a steadfast rule that the CVD law could never be applied to any NME country.

4. China's Characterization of Commerce's Application of the U.S. CVD Law to China Is Not an Undisputed Fact

166. China argues that Commerce initiated a CVD investigation on coated free sheet paper ("CFS paper") from China "[n]otwithstanding this inconsistency with existing U.S. law…."[206] The United States disagrees that Commerce's initiation of a CVD investigation on CFS paper from China was unlawful under U.S. law.

167. In October 2006, Commerce received a petition to initiate a CVD investigation of CFS paper from China.[207] Following consultations with the government of China, Commerce on November 27, 2006, published notice of the initiation of the CVD investigation on CFS paper from China. 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.[208]

168. Subsequently, in December 2006, Commerce, as the administering authority of the U.S. CVD law, 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 a NME country.[209] China, along with several other interested parties, submitted comments through this process.

169. Soon after initiation of the CVD investigation on CFS paper, China and certain Chinese respondents brought an action in the U.S. Court of International Trade ("U.S. CIT"), the U.S.

60,223 (Dep't of Commerce Sept. 25, 2002), and accompanying Issues and Decision Memorandum at pp. 13-15 (Exhibit CHI-15)

[206] China's Appellant Submission, para. 149.

[207] *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*") (Exhibit USA-23).

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

[209] *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) (Exhibit USA-24).

court of first instance to review U.S. AD and CVD issues,[210] 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.[211]

170. Contrary to China's assertion that the CFS paper investigation "ran contrary to the holding in *Georgetown Steel*,"[212] the U.S. CIT 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.[213]

171. On April 9, 2007, Commerce published the affirmative preliminary determination in the CVD investigation of CFS paper from China. The publication states:

> 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.[214]

172. That memorandum[215] explains 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

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[210] *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}") (Exhibit USA-11). *See also* 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") (Exhibit USA-13).

[211] *Gov't of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (emphasis added) (Exhibit USA-28).

[212] China's Appellant Submission, para. 149.

[213] *Id.* at 1282.

[214] *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) (Exhibit USA-25).

[215] 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*

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 <u>because they were so integrated as to constitute, in essence, one large entity</u>. 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. [216]

173. Commerce thus determined that 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. Accordingly, Commerce followed the statutory requirement of Section 701(a) of the U.S. Tariff Act by applying the CVD law to Chinese imports of CFS paper. On October 25, 2007, Commerce issued an affirmative final determination in the CVD investigation of CFS paper from China.[217] Commerce has since continued to apply the U.S.

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 [hereinafter Georgetown Steel Memorandum](Exhibit USA-26).

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

[217] *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) (Exhibit USA-27). 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. *See Coated Free Sheet Paper From China, Indonesia, and Korea*, U.S. International Trade Commission, 72 Fed. Reg. 70,892 (Dec. 13, 2007) (Exhibit USA-29).

CVD law to subsidized Chinese imports, providing administrative notice to the government of China and Chinese producers/exporters in each and every instance.[218]

5. China's Characterization of the *GPX* Litigation Is Not an Undisputed Fact

174. The issue of whether the U.S. CVD law could be applied to China returned to U.S. domestic courts in the *GPX* litigation. Specifically, one of the respondents in a CVD investigation on certain Chinese imports 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.[219]

As such, the U.S. CIT as the court of first instance again found that *Georgetown Steel* should be read as deciding that Commerce's interpretation did not conflict with the statute.[220] In a subsequent opinion, the U.S. CIT reaffirmed that "Commerce is not barred by statutory language from applying the CVD law to imports from the PRC . . . ."[221]

175. On appeal, the U.S. Federal Circuit concluded in *GPX V* 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 reasoned that, in "amending and reenacting the trade laws in 1988 and 1994, Congress

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[218] Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China (Exhibit USA-119). As part of the ongoing *GPX* litigation, the U.S. CIT rejected 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. In the words of the court, "At a minimum, the parties here had notice at the time of an affirmative preliminary determination [involving CFS paper from China in 2007] that Commerce would subject their imports entered thereafter to full trade remedy duties, because that is exactly what Commerce did." *GPX Int'l. Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1315 (Ct. Int'l Trade 2013) (Exhibit CHI-8).

[219] *GPX Int'l. Tire Corp. v. United States,* 587 F. Supp. 2d 1278, 1289-90 (Ct, Int'l Trade 2008) (*GPX I*) (Exhibit USA-93).

[220] *Id.* p.1290 (Exhibit 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) (Exhibit USA-93).

[221] *GPX Int'l. Tire Corp. v. United States* , 645 F. Supp. 2d 1231, 1234 (Ct. Int'l Trade 2009) (Exhibit CHI-3).

adopted the position that the [CVD] law does not apply to NME countries."[222] 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 as evidenced by legislative history subsequent to *Georgetown Steel*. Such a decision was a misinterpretation of the CVD law and an overbroad interpretation of *Georgetown Steel*, and it was appealed by the United States to the full court en banc in accordance with the U.S. Federal Circuit's procedural rules.[223] The United States also had the option of appealing the *GPX V* opinion to the U.S. Supreme Court, the highest court in the United States.[224]

176. China's appeal rests largely on the understanding that *GPX V* constitutes an authoritative statement of U.S. law.[225] That understanding was shown to be incorrect during the proceedings before the Panel because the *GPX V* opinion never became final. As explained in great detail in the expert opinion of Dean John C. Jeffries, Jr., within the U.S. judicial system, a "mandate" must be issued before an opinion of the U.S. Federal Circuit has binding legal effect.[226] Accordingly, an opinion of the U.S. Federal Circuit is not final and does not take effect until the mandate issues.

177. It is uncontested that no mandate ever issued in conjunction with *GPX V*. Following the issuance of the *GPX V* opinion, the United States filed a petition for rehearing en banc on March 5, 2012, thereby staying the mandate.[227] China ignores the lack of a mandate attaching to *GPX V*, mentioning it just once and dismissing it as primarily a ministerial act.[228] The timely filing of the petition for rehearing en banc, however, meant that the U.S. Federal Circuit's opinion in *GPX V* was not final and remained subject to further appeal. While the petition for rehearing en banc was pending and before a mandate could be issued, Congress acted to overturn the *GPX V* opinion.

178. Importantly, the meaning of the *GPX V* opinion was heavily contested during the proceedings before the Panel. The United States and China disputed all of the issues that China summarized in its appellant submission. The Panel recognized the heavily contested nature of the *GPX V* opinion, but certain uncontroverted facts regarding its lack of finality and lack of any order to Commerce resulting from that opinion, stating that:

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

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

[224] U.S. Federal Rules of Appellate Procedure ("FRAP") 41 (Exhibit USA-41).

[225] China's Appellant Submission, paras. 152-162.

[226] Statement of Dean John C. Jeffries, Jr. (Exhibit USA-115). *See also 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); FRAP 41(c) (Exhibit USA-41); *Carver v. Lehman*, 558 F.3d 869, 878–79 (9th Cir. 2009) (recognizing that a decision for which no mandate issued had no controlling force) (Exhibit USA-70). David G. Knibb, FEDERAL COURT OF APPEALS MANUAL § 34:1 (5th ed. 2007) (Exhibit USA-64).

[227] U.S. FRAP 41(b) (Exhibit USA-41)

[228] China's Appellant Submission, para. 159.

> For purposes of our analysis, we need not determine whether under United States law a United States court could justifiably rely on the decision in *GPX V* to establish what the law was prior to enactment of Section 1. What matters is that USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in *GPX V*, be it in the *GPX* case itself or any other case. As indicated, *the CAFC did not issue a mandate in GPX V and its decision therefore never became final*. Moreover, *the decision in GPX V did not result in any order to USDOC requiring it to adjust its practice or follow the CAFC's interpretation* of United States CVD law in *GPX V*. Consequently, the decision in *GPX V* in our view does not assist China in demonstrating that USDOC's practice has been judicially determined to be unlawful under United States law, such that USDOC had to change its practice of applying United States CVD law to imports from China.[229]

179. Thus, the Appellate Body should reject China's characterization of the meaning of the *GPX V* opinion as an "undisputed fact."

6. China's Characterization of the *GPX* Legislation Is Not an Undisputed Fact

180. On March 13, 2012, after the United States filed its petition for rehearing en banc with the U.S. Federal Circuit, but before the U.S. Federal Circuit had a chance to rule on that petition, Congress enacted the *GPX* legislation. Contrary to China's suggestion that "[t]he only conceivable purpose for making a statutory amendment retroactive is to change the law as it existed in the past,"[230] Congress enacted the *GPX* legislation to provide a definitive statement of its intent to resolve that ambiguity created by the *GPX V* opinion. Section 1 of the *GPX* legislation is reflected in U.S. law at Section 701(f) of the U.S. Tariff Act as follows:

> (f) Applicability to proceedings involving nonmarket economy countries
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> (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

[229] Panel Report, para. 7.180.

[230] China's Appellant Submission, para. 109.

> the territory of the nonmarket economy country because the economy of that country is essentially comprised of a single entity.[231]

181. Although Section 701(a) is clear on its face, because it does not contain an explicit reference to NMEs, the U.S. Congress clarified the provision by enacting the *GPX* legislation to eliminate the ambiguity. 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.

182. 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]."[232] The Act excludes from this requirement merchandise from 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]."

183. China characterizes Section 1 of the *GPX* legislation as a change to U.S. municipal law, but its arguments are without merit. For instance, China proclaims that "it would not have been necessary for Congress to enact new legislation" if Commerce always had the authority to apply the U.S. CVD law to NME countries.[233] However, the *GPX V* opinion demonstrated that the court did create an ambiguity as to the application of the U.S. CVD law. The U.S. Congress therefore sought to clarify and confirm the applicability of the CVD law in an attempt to resolve the uncertainty or ambiguity.

184. China also highlights the use of the phrase "shall be imposed" in Section 1(a) of the *GPX* legislation to suggest that the legislation changed the state of the law.[234] However, that same language is found in Section 701(a) of the Tariff Act with respect to CVDs to be applied by the administering authority to subsidized imports from any "country."[235] China fails to acknowledge that there is no exception to this requirement for NME countries.

185. Further, and contrary to China's contentions, the structure of the *GPX* legislation also supports an interpretation that Congress was merely confirming that Commerce was acting within the bounds of its statutory authority in its prior administration of the CVD law.[236] The structure of the legislation closely parallels Commerce's longstanding interpretation of the statute. First, it makes explicit the general rule that the U.S. CVD law applies to imports from all

[231] 19 U.S.C. § 1671(f) (Exhibit USA-2).

[232] Section 1 of the *GPX* legislation (Exhibit CHI-1).

[233] China's Appellant Submission, para. 104.

[234] China's Appellant Submission, para. 105.

[235] Section 701(a) of the U.S. Tariff Act (Exhibit USA-2).

[236] China's Appellant Submission, paras. 106-107.

countries including 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.[237]

186. In order to eliminate any doubt that the *GPX V* opinion 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 to "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.[238] In short, Congress made clear that the U.S. CVD law should be administered in accordance with Commerce's interpretation of Section 701(a) of the Tariff Act.

187. This proper understanding of the U.S. CVD law is confirmed by the legislative history of the *GPX* legislation, which China completely ignores in its appellant submission. Several Members of the U.S. House of Representatives spoke about the legislation during the floor debate.[239] 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;"[240] 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.[241]

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[237] *Compare* GPX Legislation, section 1 (CHI-1) ("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*.) (emphasis supplied) *with* Georgetown Steel Memorandum, p.10 (Exhibit USA-26) ("Similarly, in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test.").

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

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

[240] *See* Cong. Rec. H1166 (Mar. 6, 2012) (Exhibit 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.

[241] *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

188. Finally, it should be noted that the *GPX* legislation does not overturn the decision of the U.S. Federal Circuit in *Georgetown Steel*, but is completely consistent with it. Section 1 of the *GPX* legislation 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.

189. 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*]."[242] 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.[243]

As explained by Dean Jeffries and supported by numerous sources of U.S. legal authority, the grant of rehearing by the U.S. Federal Circuit under U.S. law suspends any legal effect of the *GPX V* opinion.[244]

190. Unlike *GPX V*, the mandate was issued for the *GPX VI* opinion, thereby establishing it as a final judgment of the U.S. Federal Circuit. The mandate transferred legal jurisdiction back to the U.S. CIT to rule on a challenge that the *GPX* legislation was inconsistent with the U.S. Constitution.[245]

191. In sum, despite China's reliance on the opinion of the U.S. Federal Circuit in *GPX V*, that opinion never became final, and as the Panel found, Commerce was never ordered to follow the opinion of *GPX V* or to change its existing application of the U.S. CVD law.[246] Thus, it is not an undisputed fact, as argued by China, that *GPX V* is binding precedent as to the state of U.S. law. As such, it cannot serve as the basis for China's appeal of the panel report, even if the Appellate Body were inclined to grant China's request to complete the analysis of the Panel.

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

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

[243] *Id.* at 1312.

[244] Statement of Dean John C. Jeffries, Jr. (USA-115). *See also* David C. Knibb, Federal Court of Appeals Manual § 34.7 (6th ed. 2013) (Exhibit USA-64) ("When a panel grants rehearing, its original decision loses any effect.").

[245] *Id.* at 1312-13. The U.S. CIT subsequently rejected the constitutional claims raised by the respondents, but explicitly declined to decide the issue of whether the *GPX* legislation was a "clarification" or "change" of the law.

[246] Panel Report, para. 7.181.

D. The Appellate Body Should Not Consider China's Newly Submitted Evidence

192. Further, given the Appellate Body's repeated statements that it will not consider new facts on appeal[247], the Appellate Body should reject China's attempt to introduce new evidence in the form of a non-final judicial opinion issued by the U.S. Federal Circuit in *Guangdong Wireking Housewares & Hardware Co. Ltd. v. United States* ("*Guangdong Wireking*").

193. Specifically, China states that the Appellate Body should consider the U.S. Federal Circuit's non-final opinion in *Guangdong Wireking* despite acknowledging that "the Federal Circuit's decision in *Wireking* was issued after the issuance of the Panel Report in this dispute, and therefore does not constitute part of the panel record."[248] China also fails to submit the full *Guangdong Wireking* opinion as an exhibit in its submission.

194. Nonetheless, China argues that it could be "appropriate" for the Appellate Body to consider the new evidence because: (1) "this decision is publically available"; and (2) the Panel explicitly referred to the ongoing *Wireking* litigation as a reason for not resolving 'whether the decision in *GPX V* was an authoritative statement of the law prior to the passage of PL 112-99'."[249]

195. With respect to China's first argument – that the *Guangdong Wireking* opinion was publicly available – the Appellate Body previously considered the same argument in *US – Offset Act (Byrd Amendment)*. In that dispute, Canada alleged that certain documents in a footnote of a U.S. submission were not part of the panel record, even though they were publicly available, and thus, should not be considered by the Appellate Body. The United States did not dispute that these documents were not part of the panel record. The Appellate Body found that it could not consider the new evidence, stating that:

> Article 17.6 is clear in limiting our jurisdiction to issues of law covered in panel reports and legal interpretations developed by panels. We have no authority to consider new facts on appeal. The fact that the documents are "available on the public record" does not excuse us from the limitations imposed by Article 17.6. We note that the other participants have not had an opportunity to comment on those documents and, in order to do so, may feel required to adduce yet more evidence. We would also be precluded from considering such evidence.[250]

[247] *See, e.g.*, *US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.

[248] China's Appellant Submission, para. 162.

[249] *Id.*

[250] *US – Offset Act (Byrd Amendment) (AB)*, para. 222. Similarly, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body agreed with the United States that e-mails submitted by the EC as part of the EC's appellant submission was not part of the record of the panel proceedings, and as such, could not be considered by the Appellate Body. *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.

196. The same reasoning applies to China's current request with respect to the non-final *Guangdong Wireking* opinion. The United States does not dispute that the *Guangdong Wireking* opinion was not part of the record of the Panel proceedings. It is therefore undisputed that the opinion is new evidence. As such, the Appellate Body should not consider the evidence based on the limitation of Article 17.6 of the DSU. The fact that the opinion may be publicly available does not excuse or expand the jurisdictional limits of Article 17.6.

197. China's second argument – that the Panel referenced the ongoing *Guangdong Wireking* litigation in the Panel Report – also fails to excuse or expand the jurisdictional limits of Article 17.6. In advancing this argument, China appears to claim that possible resolution of the *Guangdong Wireking* litigation would reverse the Panel's decision to abstain from interpreting the meaning of *GPX V* under U.S. constitutional law. The Panel's footnote reference to the *Guangdong Wireking* litigation does not state or imply such a conclusion. Specifically, footnote 303 of the Panel Report states, in relevant part:

> The United States pointed out that the *GPX* litigation is ongoing as to the determination of the constitutionality of PL 112-99 and resolution of various methodological issues. The United States further observed that USDOC's interpretation of United States law as permitting application of CVDs to China has been challenged, for instance, in *Guangdong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362 (Ct. Int'l Trade 2013) (Exhibit USA-46), which is pending in the CAFC, and in ten cases still pending in the CIT.

198. In referencing the *Guangdong Wireking* litigation, the Panel was citing an example from the United States about the extent and complexities of the domestic litigation involving the *GPX* legislation. Thus, far from resolving the issue, the Panel's statement demonstrates that the domestic litigation is ongoing in the *GPX* cases, as well as ten cases pending before the court of first instance.

199. Importantly, the *Guangdong Wireking* litigation itself is on-going. The United States is currently considering whether to seek a petition for a rehearing by the panel or en banc of the *Guangdong Wireking* opinion. The opinion cited by China as new evidence is not a final, binding U.S. judicial decision, as the "mandate" has not yet been issued for this opinion.[251] In footnote 124 of its appellant submission, China attempts to minimize the legal importance of a "mandate" under U.S. law, as it did during the Panel proceedings, by stating "[i]n U.S. appellate practice, a 'mandate' is a ministerial action of the court that transfers the case under appeal back to the lower court for further proceedings."

200. As explained above, the United States refuted China's assertion with evidence of U.S. law demonstrating that a mandate is essential for the opinion of a U.S. court to become final and legally binding. The Panel similarly found that "[t]he mandate documents the finality of a

[251] On April 28, 2014, the U.S. Federal Circuit granted a stay in the issuance of a mandate until July 1, 2014 to allow the parties additional time to consider their appeal options.

court's determination and remands the case to a lower court for further proceedings."[252] The Panel made its finding on the significance of a "mandate" in relation to the *GPX V* opinion, finding that "the CAFC did not issue a mandate in *GPX V* and its decision therefore never became final."[253] Before the issuance of a mandate, U.S. federal appellate tribunals have broad discretion to alter their judgments.[254] Thus, the *Guangdong Wireking* opinion by the U.S. Federal Circuit is not a final, binding decision of a U.S. court. It is subject to appeal and other avenues of change until the mandate has been issued.

201. For these reasons, China's effort to introduce new evidence in this appeal should be rejected. Proffering such evidence is contrary to the limitation in Article 17.6 limiting appeals to issues of law and legal interpretation, and as a consequence the Appellate Body has previously stated that it would not accept such evidence during an appellate proceeding.

V. CONCLUSION

202. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject the claims of error listed in China's Notice of Appeal and dismiss China's appeal in all respects. China has failed to demonstrate any errors by the Panel or that the United States, in enforcing the *GPX* legislation, has acted inconsistently with GATT 1994 Article X:2. To the contrary, the United States has given interested parties all notice due that the U.S. CVD law could be applied where appropriate to Chinese imports.

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[252] Panel Report, para. 7.189, fn. 289.

[253] *Id.,* para. 7.180.

[254] 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. *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (Exhibit USA-97). 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. *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.") (Exhibit USA-72). In these and numerous other cases, U.S. federal appellate courts have held that they possess the authority to revise their opinions before the issuance of a mandate. *See, e.g.*, *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.") (Exhibit 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.") (Exhibit 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.") (Exhibit USA-74).