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UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA
(WT/DS449)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

August 27, 2013

Mr. Chairperson, members of the Panel:

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

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

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

that bind the U.S. Department of Commerce. Such propositions are contrary to common sense as well as the facts leading to this dispute.

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

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

6. Third, Article X:3(b) imposes a structural obligation to establish or maintain review procedures meeting certain criteria. The United States has met those obligations, and China has failed to prove that Article X:3(b) imposes any limitations on the ability of a legislative body to enact laws, whether or not judicial proceedings are pending.

7. The United States recalls that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its AD law, and China is not challenging that concurrent application in

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

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

I. China's Article X Claims Are Without Merit

9. The United States has provided multiple bases on which China's claims can be rejected. Thus, it would not be necessary to make findings on every distinct basis on which those claims

are flawed. However, because China expends a significant amount of effort and space attempting to read two uniquely domestic legal concepts into Article X, we will spend some time today rebutting those arguments to demonstrate that none of China's arguments withstand scrutiny. Those arguments are (1) that Commerce has acted *ultra vires*, and as a result, has violated Article X:2[1], and (2) that Articles X:1 and X:2 prohibit the "retroactive" application of domestic laws. Although China has stopped referring to these terms explicitly, it has continued to pursue them in its Second Written Submission. As the United States will explain, such concepts of domestic law play no part in evaluating consistency with Article X.

10. In addition, while neither of these concepts applies under Article X, China's arguments under Article X depend entirely on its being able to obtain findings from the Panel on these concepts. However, in doing so, China is asking the Panel to make factual findings on issues of U.S. constitutional and other domestic law issues that are unresolved and currently being litigated in U.S. courts. The Panel should avoid making findings that at this point would simply involve speculation as to the outcome of domestic legal proceedings and that are not necessary to the resolution of China's Article X claims.

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

11. When questioned by the Panel, China has previously stated that it is not challenging in this dispute whether Commerce's actions were *ultra vires*.[2] However, in its Second Written Submission, China has continued to advance its *ultra vires* claim, this time as an issue of how domestic law should be "properly determined" for purposes of a so-called "baseline" for Article X:2. Specifically, China asks the Panel to "properly determine" the domestic law that Commerce should have followed in its treatment of the imports subject to the 27 CVD

[1] China First Written Submission, para. 71 ("Article X:2 prohibits actions that are *ultra vires* by requiring governmental agencies to act within the confines of measures that have been officially published. The act of enforcing a measure of general application prior to its official publication is an act that is necessarily *ultra vires* and, as such, inconsistent with Article X:2.").
[2] China Response to Panel Question 13.

proceedings at issue in this dispute. In making this determination, China asks the Panel to find that Commerce's interpretation of the U.S. CVD law was *not* in accordance with U.S. law, as "properly determined." China argues that the determination is necessary because otherwise, "a Member could act in open disregard of its previously published measures of general application." This is nothing more than a repackaging of China's argument that Commerce's actions are *ultra vires* under U.S. law.

12. There are two fundamental problems with China's "properly determined" (or *ultra vires*) argument. First, Article X:2 does not address allegedly *ultra vires* actions by an administering agency. Thus, whether or not an administering agency's actions were *ultra vires* under domestic law is irrelevant for an evaluation of the consistency of a measure of general application with Article X:2. Second, China's argument would compel the Panel to *speculate* on the content of U.S. law and find that Commerce's interpretation was contrary to law. But the Panel has no basis under U.S. law to make such a factual finding. The legal issue of whether Commerce was prohibited from applying the U.S. CVD law to China has not been resolved or "properly determined" by U.S. domestic courts. In the absence of such a final, binding, and legally authoritative decision by the judiciary, the understanding of the U.S. CVD law by Commerce as the administering agency remains lawful and "properly determined" as a matter of U.S. law. China cannot represent that a contrary interpretation of U.S. law prior to the *GPX* legislation is a proper baseline for an Article X:2 analysis when such a conclusive or authoritative interpretation has not been made by the U.S. courts. Given that the courts have not finally spoken to the contrary and therefore Commerce's interpretation remains valid as a matter of U.S. law, the Panel has no basis under U.S. law to *substitute* its judgment for that of Commerce.

A. The Correct Approach to Article X:2 Is not to Speculate and Substitute a Judgment on Domestic Law But to Evaluate the Treatment Given to Imports Before and After the Challenged Measure

13. Article X:2 does not require nor condone speculation as to whether an administering authority "properly" interpreted domestic law or "properly" acted in accordance with domestic law. As previous panels have noted, Article X is not intended to function as a mechanism to test the consistency of a Member's actions with the Member's own domestic law.[3] The language of Article X:2 establishes that whether a measure effects an advance in the rate of duty or imposes a new or more burdensome rule or requirement must be evaluated in relation to the "imports" at issue. To state this using China's terminology, the baseline is the rate of duty or rule or requirement on imports prior to the new measure – in this case, the application of CVDs to imports from China prior to P.L. 112-99. The baseline is not a different treatment that one speculates the imports were allegedly entitled to.

14. Thus, the relevant question under Article X:2 is whether the challenged measure has effected or imposed a change that is listed under Article X:2 on the treatment of the imports at issue. As explained above, in this dispute, Commerce interpreted the CVD law and applied it to certain Chinese imports; there is no conclusive and authoritative interpretation by U.S. courts overturning Commerce's interpretation and directing a different treatment of those imports. Absent a contrary resolution in ongoing litigation, under U.S. law Commerce's view remains valid, and the treatment of Chinese imports remains as it was. The question whether a new measure may be labeled as a "clarification" or "change" in the Member's domestic law is, in the end, not material to this inquiry (although the United States will explain why it believes its view to be correct).

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

1. The GPX Legislation Has Not Effected an Increase in a Rate of Duty or Other Charge on Imports Under an Established and Uniform Practice Nor Has It Imposed a New or More Burdensome Requirement, Restriction or Prohibition on Imports

15. In this dispute, China cannot establish that the *GPX* legislation effected or imposed any of the changes listed under Article X:2 on the imports at issue. The *GPX* legislation did not effect an advance in a rate of duty or other charge on the imports subject to the 27 CVD proceedings under an established or uniform practice. The legislation did not itself advance any rate (or level) of duty on any imports. Moreover, as the legislation confirmed the authority to impose CVDs to China, as a practical matter the imports at issue were subject to the same CVD rates before and after the publication of the law. As China stated in its Second Written Submission, Section 1 of the GPX legislation "guaranteed that all of the countervailing duty investigations initiated on or after 20 November 2006 … would remain in place."[4] To state the obvious, to "remain in place" is for the CVD rates to "stay the same." It is not, as China continues to argue, to go from "zero" to "whatever countervailing duty rate the USDOC had established in the particular investigation at issue."[5]

16. Further, the *GPX* legislation did not impose a "new" or "more burdensome" requirement, restriction or prohibition on the imports at issue. The *GPX* legislation states that the U.S. CVD law applies to non-market economy countries. Prior to the *GPX* legislation, Commerce interpreted the U.S. CVD law as applying to China, a non-market economy, for the imports at issue. Commerce's approach was not "new" or "more burdensome" as the imports at issue had already been subject to the CVD law.

[4] China Second Written Submission, para. 31.
[5] *Id.*

2. China Has Been Notified of Commerce's Application of the U.S. CVD Law to China Since 2006

17. China's suggestion in its Second Written Submission that it failed to receive notice of the application of the U.S. CVD law to the imports at issue, stating that the "objective of Article X:2 cannot be served if governments and traders receive notice of a measure only after it has been applied in respect of their conduct."[6] The United States does not understand how China can argue that it has lacked notice of the application of the U.S. CVD law to Chinese imports. As we have explained, the fact is that China has been notified of Commerce's application of the U.S. CVD law to China since 2006. For further clarity, the United States is providing a table setting out the instances when China and other interested parties were notified of the application of the U.S. CVD law to China as USA-119. This table is compiled from the U.S. Code and notices published in the U.S. Federal Register and shows that notification was provided more than 100 times from November 2006 to March 2012.

18. It should also be noted that the plaintiffs in the *GPX* litigation presented the same arguments regarding an alleged lack of notice to support its claim that the *GPX* legislation effected an unconstitutional change of the U.S. CVD law to imports of NME countries. The U.S. Court of International Trade dismissed this argument, stating that:

> At a minimum, the parties here had notice at the time of an affirmative preliminary determination [in 2007] that Commerce would subject their imports entered thereafter to full trade remedy duties, because that is exactly what Commerce did.[7]

19. Thus, contrary to any assertion by China that it lacked notice, the court held that the Chinese traders in the dispute lacked no notice that the U.S. CVD law would not be applied to the imports at issue because Commerce had already applied such law to the imports. Similarly,

[6] China Second Written Submission, para. 110.
[7] *GPX VII* at 25.

China cannot claim that it lacked notice about the application of the U.S. CVD law to the imports at issue prior to the publication of the *GPX* legislation. To the contrary, these imports were already subject to the U.S. CVD law.

B. Professor Fallon's Statement Has Not "Ended" or Resolved Any of the Issues Pertinent to this Dispute

20. As noted, the legal issue of whether the U.S. CVD law was not applicable to NMEs like China has not been finally resolved by the U.S. domestic courts. Commerce's interpretation of U.S. law as permitting application of CVDs to China has been challenged in domestic litigation, not only in the on-going *GPX* litigation, but also in the *Wireking* case currently pending before the U.S. Federal Circuit and in 10 cases before the Court of International Trade.

21. Because the U.S. courts have not issued a final, binding, and authoritative interpretation of the U.S. CVD law, the state of U.S law has yet to be conclusively determined to be other than as Commerce has interpreted it. As such, any statement on the law would, at best, be an educated guess as to how the U.S. courts will ultimately rule on the issue, and until overturned, Commerce's interpretation remains valid. China's "speculate and substitute" approach cannot be the basis of an evaluation of whether a Member has acted inconsistently with Article X:2.

22. The United States would caution that, if the Panel were to speculate and substitute its judgment on the content of U.S. law for Commerce's interpretation, it would run a significant risk of making a factual error. That is, under the approach China urges on the Panel, the Panel may issue findings on the meaning of domestic law, even where that is not necessary to resolve the issue of WTO law before the panel, only to find later that the domestic courts have interpreted the law to mean the opposite. If so, the "baseline" for the Panel's Article X:2 findings would have been erroneous, as a matter of fact, and if such a factual finding led to a legal finding of breach, the very basis for the WTO-inconsistency would have been exposed as erroneous.

23. The United States believes its approach is simpler, and correct. The relevant inquiry required by the language of Article X:2 is the impact of the challenged measure on the imports at issue. No final, binding, and authoritative judicial opinion had established that Commerce's interpretation of U.S. CVD law and the resulting treatment of imports was contrary to law. Therefore, the impact of the *GPX* legislation on the imports at issue in this dispute is to maintain the *status quo*.

24. Despite pending domestic litigation on these issues, China asserts in its Second Written Submission that a statement by Professor Richard Fallon, submitted as CHI-83, will "put an end" to and "properly determine" two issues. The first is whether the *GPX* legislation was a clarification or change of existing law. The second is whether the *GPX V* opinion has any legal effect under U.S. law.

25. China's assertion that these two matters have "ended" or been resolved by a statement by a single U.S. law professor -- who prepared the statement on behalf of China for the sole purpose of assisting China in this dispute – has no legal basis. First, as we have explained and will explain further today, the conclusions in the statement that Professor Fallon prepared for China are incorrect. Second, under the U.S. legal system, law professors have no special or authoritative role in interpreting U.S. law. Professor Fallon does not represent the U.S. courts and his statement prepared for purpose of this dispute does not approach a substitute for a final judicial decision on these issues. Indeed, as Professor Fallon himself writes, "the judiciary is the branch of the U.S. government with ultimate authority to 'say what the law is.'"[8]

26. Nonetheless, to the extent the panel is interested in the views of U.S. law professors, the United States has requested the views of Dean John Jeffries, a noted U.S. constitutional law expert. Dean Jeffries' expert statement, submitted as exhibit USA-115, explains numerous shortcomings in Professor Fallon's statement. Dean John Jeffries is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law. From

[8] CHI-83, para. 62.

2001 to 2008, he was the Dean of the University of Virginia School of Law and before that the Associate Dean for Academic Affairs. Dean Jeffries has more than 38 years of experience teaching and writing about federal courts, constitutional law, and related fields. He has authored numerous casebooks on the U.S. federal courts, civil rights, and criminal law. The United States notes portions of Dean Jeffries' statement in the following discussion of flaws in China's and Professor Fallon's position on these issues.

1. The Issues of Whether the *GPX* legislation is a Change or Clarification of the U.S. CVD Law and the Legal Status of the *GPX V* Opinion Have Not Been Resolved by the U.S. Courts

27. In his statement for China, Professor Fallon states several times that "no issue before this panel requires the panel to take a position on any unresolved or otherwise reasonably disputable proposition of American constitutional law."[9] The United States agrees that unresolved issues of U.S. domestic law do not need to be resolved by the Panel. However, the logical consequence is that there would be no basis for China's assertion of a change in the treatment of imports. Contrary to China's assertions, the two issues addressed by Mr. Fallon are being disputed in on-going domestic litigation and remain unresolved.

28. Specifically, the U.S. Federal Circuit is currently hearing arguments from China and a Chinese trader on a case involving these exact issues. The case, *Guangdong Wireking v. United States*, involves the issue of whether section 1 of the GPX legislation constitutes a change to the CVD law.[10] The court of first instance in this case, the U.S. CIT, did not resolve this issue as it found that even if the law is found to be a change, the plaintiffs have failed to demonstrate that the law is unconstitutional.[11] The United States previously submitted the decision of the U.S. CIT in the *Wireking* case in its First Written Submission as USA-117. Thus, while China claims

[9] CHI-83, para. 39.
[10] *Guangdong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362 (Ct. Int'l Trade 2013) (USA-46).
[11] *Id.*

that Professor Fallon has put an end to whether the *GPX* legislation is a retroactive change or clarification of the U.S. CVD law, the U.S. Federal Circuit has yet to rule on the issue.

29. Further, on appeal before the U.S. Federal Circuit, the plaintiffs in the *Wireking* case have raised the issue of whether the *GPX V* opinion was an authoritative statement of the law prior to the passage of the *GPX* legislation.[12] As the United States noted in its brief to the U.S. Federal Circuit, which was filed two weeks ago, the issue was not decided by the lower court and, in any event, has no merit under U.S. law. The United States' brief to the U.S. Federal Circuit is submitted as USA-117. Thus, while China claims that Professor Fallon has put an end to the legal status of *GPX V*, the U.S. Federal Circuit has yet to rule on this issue.

30. In addition, the *GPX* litigation has not concluded. The latest opinion in these proceedings was issued by the U.S. CIT in *GPX VII*. The U.S. CIT held that the U.S. Federal Circuit had "not clearly decided" whether the *GPX* legislation was a change or clarification of the law.[13] The court assumed for the sake of argument that the law was a change of the law in order to rule on the plaintiff's constitutional claims. The court rejected the constitutional claims and remanded the proceeding to Commerce for the resolution of various methodological issues in the underlying CVD investigation. Once these issues have been resolved, the plaintiffs could appeal the U.S. CIT's decision to the U.S. Federal Circuit, and ultimately, to the U.S. Supreme Court.

31. At this point, because China has made this suggestion several times in its written submissions, it should be noted that the U.S. Federal Circuit is not the highest court for the interpretation of the U.S. Tariff Act. The highest court in the United States for interpretations of all federal law, including the U.S. Tariff Act, is the U.S. Supreme Court.[14] The United States has already submitted an example of a recent U.S. Supreme Court ruling on an interpretation of

[12] In this proceeding, the parties have referred to *GPX V* as *GPX I*.
[13] *GPX VII* at 14 (emphasis added) (CHI-8).
[14] *See* 28 U.S.C. §1254 (USA-110). The U.S. Federal Circuit, one of 13 federal appellate courts in the United States, is subordinate to the U.S. Supreme Court.

Commerce's actions under the U.S. Tariff Act in the antidumping context.[15] The U.S. Supreme Court in this decision, *Eurodif*, unanimously reversed the decision of the U.S. Federal Circuit. Thus, regardless of how the U.S. Federal Circuit may resolve the two issues discussed by Professor Fallon in his statement prepared for China, either Federal Circuit's decisions may be appealed to the U.S. Supreme Court.

32. In sum, there are two active cases pending before the U.S. courts on the issues that China asked Professor Fallon to address in his statement. Further, and contrary to China's assertions in its Second Written Submission, Professor Fallon – even though he prepared the statement on behalf of China – does not state and cannot state that the U.S. courts would find or have found that the *GPX* legislation is a change from previous law. His conclusion is only that it would be "unlikely"[16] for a court to find that the law was a legislative clarification. On the legal status of *GPX V*, he states that "a U.S. court could very plausibly regard"[17] the opinion to have binding legal effect. Such conclusions are speculative and cannot be treated as putting an end to the matter, as asserted by China.

2. Professor Fallon's Statement of U.S. Law on the Issues of Whether a Law Clarifies or Changes Existing Law and on the Legal Status of the GPX V Opinion is Incomplete

33. In addition to China's mischaracterization of Professor Fallon's statement as definitive, the statement also contains several substantive deficiencies regarding U.S. law. Specifically, the statement fails to fully explain the indicia used by U.S. courts to determine whether a new law is a clarification or change of the previous law. Further, the statement's analysis of the legal status of *GPX V* is contrary to the overwhelming weight of authority under U.S. law. The United States will briefly address these issues below.

[15] *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (USA-15).
[16] CHI-83, para. 46.
[17] CHI-83, para. 53.

First, on the issue of whether the *GPX* legislation is a change or clarification of the law, China's submission states that the *GPX* legislation "bears none of the indicia that the courts have treated as crucial hallmarks of merely clarificatory legislation." In making this statement, Professor Fallon's statement fails to provide the indicia that the courts have used to determine whether a law is a change or clarification.[18] Rather, the statement focuses on whether there is "an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law."[19] This indication, in Professor Fallon's opinion, is one of the "most important" indicia.

34. This is incorrect. Several U.S. federal appellate courts have come to the opposite conclusion. In 2008, a U.S. federal appellate court (the U.S. Court of Appeals for the Third Circuit) in the case *Levy v. Sterling Holding Company* stated that it "did not consider an enacting body's description of an amendment as a 'clarification' of the pre-amendment law to necessarily be relevant to the judicial analysis."[20] The *Levy* case is submitted as USA-116. Such a conclusion was also reached by the U.S. Courts of Appeals for the Fourth and Eleventh Circuits in decisions previously submitted as USA-56 and USA-57.[21]

35. After surveying U.S. case law on the issue, the Court of Appeals in *Levy* found that there is "no bright-line test" to determine whether a law or regulation "clarifies" the existing law. The court, however, found that there were four factors that were "particularly important" to the determination: (1) whether the text of the old law was ambiguous; (2) whether the new law resolved, or at least attempted to resolve, that ambiguity; (3) whether the new law's resolution of the ambiguity is consistent with the text of the old law; and (4) whether the new law's resolution

[18] CHI-83, para. 41.
[19] *Id.*
[20] *Levy v. Sterling Holding Company*, 544 F.3d 493 (3rd Cir. 2008) (USA-116).
[21] *See e.g., Piambra Cortes v American Airlines*, 177 F.3d 1272 (11th Cir. 1999) (USA-56) (stating "[a] significant factor in determining whether a statutory amendment applies retroactively is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted; if such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law."); *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004) (USA-57) (stating In determining whether a statutory amendment clarifies or changes an existing law, a court looks to statements of intent made by the legislature that enacted the amendment.").

of the ambiguity is consistent with the agency's prior treatment of the issue.[22] The court noted in its explanation of these factors that it did not "take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification."[23] The court reasoned that "one could posit that quite the opposite was the case – that the new language was fashioned to clarify the ambiguity made apparent by the case law."[24]

36. Based on these four factors, it would not be "unlikely," as Professor Fallon opines, that the U.S. Federal Circuit may find the *GPX* legislation to be a clarification of the law. The court could likely find that the *GPX* legislation is consistent with the text of the law. That is, the *GPX* legislation is consistent with the pre-existing language of the law that states that countervailing duties "shall be imposed" if Commerce finds a countervailable subsidy. On the fourth factor, the *GPX* legislation is consistent with Commerce's prior treatment of the issue. That is, prior to the GPX legislation, Commerce has applied the U.S. CVD law to NME countries. Taken as a whole, based on the criteria established by U.S. federal appellate courts, the United States does not consider that the U.S. Federal Circuit would be "unlikely" to find the *GPX* legislation is a clarification of the law. The issue remains unresolved.

37. Second, regarding the issue of the legal status of *GPX V*, China's reliance on Professor Fallon's statement in no way advances China's argument. Rather, this is just a repackaging of China's argument from the outset of the litigation. Moreover, when one examines what the statement prepared on behalf of China actually says, the statement in fact undercuts China's argument. Specifically, Professor Fallon states that:

> Because the Federal Circuit did not vacate its opinion in *GPX V*, a U.S. court could *very plausibly* regard that opinion as having established and as continuing

[22] *Levy v. Sterling Holding Company*, 544 F.3d 493 (3rd Cir. 2008) (USA-116).
[23] *Id.*
[24] *Id.*

to establish that Section 701(a) of the Tariff Act, prior to its amendment by P.L. 112-99, did not apply to nonmarket economy countries.[25]

38. This statement recognizes that the issue of the legal status of *GPX V* is a matter to be considered by **another** U.S. court. Further, what the statement says is that this other U.S. court "plausibly" could take the position China advances. Although the United States disagrees, this statement – even if credited – indicates that this other U.S. court likewise could plausibly take the contrary position. In any event, no court has reached such a conclusion in a final, binding, and authoritative decision. As the United States has already noted, a statement that a court could "very plausibly" so conclude is far from a definitive declaration regarding the state of the U.S. CVD law prior to the *GPX* legislation.

39. Further, as explained by Dean Jeffries[26], the opinion stated by Professor Fallon in the exhibit prepared for China is contrary to the overwhelming weight of authority under U.S. law. Specifically, it is contrary to recent decisions of the U.S. federal appellate courts explicitly holding that an appellate decision is not final until the mandate has issued. More importantly, it is contrary to the Federal Circuit's own decision in *GPX VI*, in which it stated that "an appellate court's decision is not final until its mandate issues."[27] There is thus no need to speculate as to whether *GPX V* could "plausibly" be regarded as legally binding. The same panel of judges that decided *GPX V* made clear that it cannot.

40. Dean Jeffries explains that the U.S. Federal Circuit's position that the grant of rehearing suspended any legal effect of *GPX V* accords with settled law.[28] Under U.S. law, when a panel grants rehearing, its original decision loses any effect. Further, U.S. law is clear that until the appellate court issues its mandate, its opinion is not law of the case and is not binding on either the parties or the lower court.

[25] CHI-83, para. 53.
[26] Statement of Dean John Jeffries, para. 7 (USA-115).
[27] *Id.*
[28] *Id.*, para. 10.

41. China and the statement that Professor Fallon prepared for China appear to place significant value on the U.S. Federal Circuit failing to vacate the *GPX V* opinion. They, however, present no U.S. case law to establish that the failure to vacate a decision overrides the principles of finality of a mandate. Further, regardless of whether a decision is formally vacated, U.S. law is clear that when a panel grants rehearing, its original decision loses any effect. As Senior Judge Richard Arnold of the U.S. Court of Appeals for the Eight Circuit wrote, "The first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated."[29]

42. Further, U.S. law establishes that the lower court's judgment remains the law of the case pending a rehearing by the appellate court even if the appellate court's original first decision reversed the lower court. On this point, Dean Jeffries explains a point that Professor Fallon overlooks in his statement. On June 4, 2012, in response to a motion by the United States, the Federal Circuit amended its final judgment in *GPX VI* "to state that the judgment of [the U.S. CIT] is vacated."[30] The U.S. Federal Circuit then remanded the case to the U.S. CIT for further proceedings consistent with its *GPX VI* decision.

43. As Dean Jeffries explains, this is significant because the U.S. CIT's decision held that Commerce lacked authority to apply the U.S. CVD law to China.[31] The U.S. Federal Circuit in *GPX V* initially upheld the U.S. CIT's decision, although on alternative grounds. But because the U.S. Federal Circuit granted rehearing and *GPX V* never became final, the lower court's decision remained in effect. Accordingly, when the U.S. Federal Circuit issued its decision in *GPX VI*, it was necessary for it to vacate the CIT's decision. In doing so, the U.S. Federal Circuit eliminated any judicial impediment to Commerce's existing approach of applying the U.S. CVD law to China. As Dean Jeffries explains, it would make no sense, as a matter of either

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[29] *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 33 (explaining that "[w]hy don't judges like petitions for rehearing? The answer should be obvious: People don't like to be told that they are wrong. Once in a great while, however, people, including judges, can be brought to admit that they were wrong.") (USA-118). The U.S. Court of Appeals for the Eight Circuit, along with the U.S. Federal Circuit, is one of the 13 federal appellate courts in the United States.

[30] Statement of Dean John Jeffries, para. 22 (USA-115).

[31] *Id.*

logic or law, for the U.S. Federal Circuit to have vacated the U.S. CIT's decision if *GPX V*, which initially affirmed that decision, was actually final and binding.[32] Given these other considerations under U.S. law, Professor Fallon's statement regarding the status of *GPX V*, including his analysis of the effect of *GPX VI*, cannot be treated as a definitive statement of U.S. law.

C. Conclusion

44. In sum, despite agreement by both parties that issues of domestic law need not be resolved by this Panel, China has nonetheless asked the Panel to resolve issues of unsettled U.S. law. China states that it is "immaterial" to Article X:2 whether the *GPX* legislation is a change or clarification of the law, but nevertheless asks the Panel to conclude that the *GPX* legislation changed the law, as a purported basis for finding that the legislation imposed a "new" or "more burdensome" requirement, restriction or prohibition on imports from China. But China has not shown how the law, regardless of its status under U.S. law, changed the treatments of imports from China at the border.

45. In other words, the U.S. CVD law has always applied to these imports. Had the *GPX V* opinion become final and Commerce implemented this final decision by revoking the CVD orders on the 27 proceedings at issue, then it could be argued that the imports at issue were at some point not subject to the U.S. CVD law. Despite China's assertions, none of these events happened. That is, the *GPX V* opinion did not become final. Commerce was not ordered to and could not have implemented *GPX V*. Because these facts are undisputable, China's arguments on a relevant change under Article X:2 are unsupportable. Under Article X:2, it is clear that the *GPX* legislation has not effected or imposed any of the applicable changes required by the treaty obligation and is not within its scope.

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

[32] *Id.*

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

47. In its Second Written Submission, China states that "it is impossible to discern from the U.S. arguments how its proposed interpretation of Article X:2 would render it distinct from Article X:1."[33] On this question, the United States also has been clear. Article X:2 is directed at ensuring a link between Article X:1, which addresses prompt publication of certain measures, and Article X:3(a), which establishes certain standards for the administration of those measures. That is, Article X:2 states that a Member cannot begin enforcing or administering certain types of measures of general application until it is published.

48. What Article X:2 is not meant to address is the "substantive content" of measures. For example, Article X:2 neither permits nor prohibits the application of countervailing duties to non-market economy countries. Similarly, Article X:2 neither permits nor prohibits the application of a measure to events or actions that predate its enactment. As such, a Member must look to a substantive obligation to pursue a claim on the substantive content of a measure.

49. As the United States explained in its first submission, the Appellate Body report in *US – Underwear* – which China initially relied upon – in fact undercuts China's Article X:2 argument. In its Second Written Submission, China attempts to refute this, but China has not done so. The Appellate Body was clear; it stated that "we are bound to observe that Article X:2 of the General Agreement, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure." China attempts to twist this clear statement by arguing that the phrase "to a safeguard restraint measure" was somehow meant as a

[33] China Second Written Submission, para. 107.

limitation. But the reason the Appellate mentioned a safeguard was that the *US – Underwear* case involved a safeguard. Here, the measure at issue is a countervailing duty. China cannot explain why Article X:2 would not resolve the issue of retroactivity for a safeguard restraint measure, but yet would resolve the matter for a countervailing duty measure. Rather, the Appellate Body's observation for a safeguard measure would be equally applicable to other measures that are covered by Article X:2.

50. Further, China has stated its disagreement with the fact that Article X:2 is meant to ensure that Members would not enforce a secret measure on imports effecting an advance in a rate of duty or imposing a new or more burdensome requirement, restriction or prohibition. This understanding, however, flows directly from the plain text of Article X:2 and the Appellate Body's observation in *US – Underwear* that the fundamental importance of Article X:2 is to "promot[e] full disclosure of governmental acts affecting Members and private persons and enterprises, whether domestic or foreign nationality."[34] In this dispute, China and other interested parties had full notice of the *GPX* legislation upon enactment, and Congress' consideration of the legislation was well publicized. Further, as explained above, China and Chinese traders have been aware since at least 2007 that the U.S. CVD law applied to China because Commerce has applied countervailing duties to Chinese imports since then.

51. In sum, China's arguments that Article X:2 prohibits so-called "retroactivity" and its flawed understanding of Article X:2 are baseless and must be rejected.

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

52. In its Second Written Submission, China continues to argue that "the intervention by the U.S. Congress in ongoing judicial proceedings" is inconsistent with Article X:3(b).[35] As the United States has explained, nothing in the text of Article X:3(b) supports China's argument.

[34] *US – Underwear (AB)*, p. 21.
[35] China Second Written Submission, paras. 139-142.

That is, Article X:3(b) does not impose any limitations on the ability of a legislative body to enact laws altering the substantive content of the law.

53. Rather, Article X:3(b) imposes an obligation regarding the structure or framework of a judicial review system. As the Appellate Body observed in *EC – Customs*, Article X:3(b) "requires a WTO Member to establish and maintain independent mechanisms for prompt review and correction of administrative action in the area of customs administration."[36] The panel in *Thailand – Cigarettes* further confirmed that Article X:3(b) addresses the "systemic" obligation to establish and maintain such a review mechanism and that such an obligation is of a "normative nature."

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

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

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

A. China Relies on the Appellate Body Findings in DS379, Which Are Unpersuasive

[36] *EC – Customs Matters (AB)*, para. 303.

56. First, China continues to rely on the Appellate Body report in DS379. China also argues that the United States has failed to provide "cogent reasons" to depart from the Appellate Body report in DS379. [37] But one example of a "cogent reason" to depart from Appellate Body findings is where Appellate Body findings are not persuasive. As detailed at length in our submissions, the Appellate Body findings in DS379 are legally erroneous and therefore cannot be persuasive.[38]

57. The United States will not repeat all of its arguments, but it emphasizes that, on its face, Article 19 of the SCM Agreement is concerned with the "[i]mposition and [c]ollection" of countervailing duties, not with the existence or calculation of countervailing duties. Article 19.1 establishes the conditions when a Member may impose a countervailing duty. Article 19.3 establishes that duties shall be levied in a non-discriminatory fashion in the appropriate amounts in each case. Article 19.4 establishes that a duty may not be levied in excess of the subsidy determined to exist. Thus, Article 19 does not relate to an obligation to investigate.

58. Article 19.3 of the SCM Agreement requires the Member to levy duties (i) on imports from all sources found to be subsidized and causing injury, (ii) on a non-discriminatory basis on imports from those sources, and (iii) "in the appropriate amounts." Importing Members cannot discriminate between sources when imposing CVDs. The Appellate Body's interpretation goes far beyond the principles of non-discrimination and, as already noted, imposes an investigative function not reflected in that Article.

59. Article 19.3 of the SCM Agreement seeks to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not

[37] China Second Written Submission, paras. 168-175.
[38] U.S. First Written Submission, paras. 189-201; U.S. Second Written Submission, paras. 137-145.

correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's arguments should be rejected.

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

B. China Errs in Its Interpretation of Article 19.3 of the SCM Agreement

61. Second, in the rare instances in which China offers its own interpretation of Article 19.3, the interpretation is flawed, and unsupported by the text of the covered agreements. China, for example, errs when it argues that original investigations are subject to Article 19.3. "Levy" is defined under footnote 51 of the SCM Agreement as "the definitive or final legal assessment or collection of a duty or tax." In the U.S. system, the "definitive or final legal assessment or collection of a duty or tax" does not occur until the review stage. The obligation in Article 19.3 on its own terms applies to the levying of duties, which does not result from investigations in the U.S. system.[39]

62. Yet, China ignores this straightforward interpretation of Article 19.3, instead arguing that Article 19.3 applies in any instance in which a countervailing duty is imposed, "which includes

[39] U.S. Response to Panel Questions Following First Panel Meeting, paras. 44-45, 211.

both original investigations and administrative reviews."[40] This interpretation is wrong, and reflects a fundamental misunderstanding of the covered agreements.

C. China's Failure to Make A Prima Facie Case Persists

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

64. China refuses to analyze the specific facts of each determination. For instance, the appropriate inquiry is whether the imposition of countervailing duties in conjunction with antidumping duties determined in accordance with the NME methodology resulted in overlapping remedies for the same subsidies in each of the challenged determinations in this dispute. China, however, avoids the question before this Panel and instead relies upon the panel's finding in DS379 to assert that the imposition of countervailing duties in conjunction with antidumping duties determined in accordance with the NME methodology is "likely" to result in overlapping remedies for the same subsidies.[41]

65. Consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[42] The Panel should address the arguments that the parties have put before it here.

[40] China Response to Panel Questions Following First Panel Meeting, para. 46.
[41] China Second Written Submission, paras. 157-167.
[42] U.S. First Written Submission, para. 190; U.S. Response to Panel Questions Following First Panel Meeting, 64-72.

66. As noted, for many reasons it cannot be presumed that overlapping remedies exist.[43] If it cannot be presumed that overlapping remedies will occur, then there is no basis to presume that duties levied in an amount equal to the subsidy found to exist will not be appropriate, even under the Appellate Body's flawed approach of finding a countervailing duty not to be in an appropriate amount to the extent of any overlap.[44]

67. China makes no effort to demonstrate the existence of an overlapping remedy in any of the challenged determinations or to identify evidence from any of the challenged determinations that would support the theory adopted by the panel in DS379. In making as-applied challenges, China cannot simply rely on factual findings from a prior dispute.[45] China has provided no basis for this Panel to find that the imposition of countervailing duties in conjunction with antidumping duties determined in accordance with the NME methodology resulted in overlapping remedies for the same subsidies in any of the challenged determinations here. The Panel should not accept China's invitation to take short cuts and the Panel cannot make China's case for it.

68. In another example of a shortcut, China argues that Commerce's determinations in the *Kitchen Shelving* investigation are "carbon copies" of its determinations in the DS379 investigations.[46] China asserts that *Kitchen Shelving* and the DS379 determinations are identical, but it then fails to make any actual comparison between the *Kitchen Shelving* and DS379 determinations. China's failure to make a *prima facie* case persists.

69. The United States will not make China's case for it, but it will note that to the extent Commerce's responses in these determinations are similar, it is because China and Chinese respondents made the same argument in every case and failed to present any evidence in any of the cases. China and Chinese respondents decided not to substantiate their claims of an

[43] U.S. First Written Submission, paras. 199-201.
[44] U.S. Response to Panel Questions Following First Panel Meeting, para. 50.
[45] U.S. Second Written Submission, para. 107.
[46] China Second Written Submission, para. 177.

overlapping remedy with actual evidence. Instead, China and Chinese respondents relied on an unsupported economic theory that concurrent application of antidumping and countervailing duty remedies would result in an automatic, 100 percent overlap of remedies. For instance, China and Chinese respondents argued that "the NME AD methodology already captures all subsidies, and application of a CVD remedy on the same products penalizes respondents for the identical subsidies already accounted for in the AD calculation."[47] The only four determinations that China has cited so far in this dispute, CHI-29, CHI-32, CHI-48, USA-100, demonstrate this point.[48]

D. Commerce Fully Addressed Any Evidence and Arguments Relating to Allegedly Overlapping Remedies

70. Fourth, China unduly ignores the record in this dispute in asserting that "it is not enough for the investigating authority to 'fully consider[] the factual evidence and arguments made by respondent parties' if the investigating authority never solicits relevant evidence in the first place."[49] But in fact, Commerce requested public comment in 2006 on the applicability of CVD law to China, and China, in addition to other parties, presented their views.[50] And in 2007, Commerce further indicated that it would consider any and all evidence that would support any claims of overlapping remedies.[51] Thus, Commerce solicited the views of respondents; it evaluated these views; and it offered its conclusions based on the arguments presented. To the extent Article 19.3 entails a duty to investigate, Commerce met this standard.

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[47] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (July 20, 2009) (USA-100), p. 31.

[48] *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China (September 25, 2008) (CHI-29), p. 70; Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation of Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China (November 17, 2008) (CHI-32), p. 63; Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Multilayered Wood Flooring From the People's Republic of China (October 11, 2011) (CHI-48), pp. 21-23, 27-30; Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (July 20, 2009) (USA-100), pp. 30-34.

[49] China Second Written Submission, para. 179.

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

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

71. China would blame Commerce for the fact the respondents in these determinations did not substantiate their claims with positive evidence. Under Commerce's regulations, all interested parties had an opportunity to place on the administrative record whatever factual information they deemed relevant, including factual information that may have been pertinent to the question of alleged overlapping remedies.[52] That information would only be in the possession of respondent parties, and those parties, not Commerce, would be in the best position to know what information to place on the record to substantiate their claims of overlapping remedies.

72. So in sum, relying on a faulty Appellate Body report, China misinterprets Article 19 of the SCM Agreement, because Article 19.3 does not establish any requirement that administering authorities investigate and avoid overlapping remedies. To the extent Article 19.3 includes any requirement for administering authorities to investigate overlapping remedies, Commerce met this standard. China's argument lacks any factual support, and China has still failed to make its prima facie case with respect to its claims under Article 19.3 of the SCM Agreement. Therefore, China's arguments with respect to Article 19.3 fail.

73. In conclusion, the United States thanks the Panel for its time and attention and welcomes any questions you might have.

[52] 19 C.F.R. §§ 351.102(21) (2008) (USA-86); 19 C.F.R. § 351.301(b) (2008) (USA-87).