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

(WT/DS449)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
India – Patents (AB)	Appellate Body Report, *India - Patents*, adopted 16 January 1998, WT/DS50/AB/R
EC – Customs Matters (AB)	Appellate Body Report, *European Communities — Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Customs Matters	Panel Report, *European Communities — Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EC - Poultry	Appellate Body Report, *European Communities — Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011

US – Gambling (AB)	Appellate Body Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005
US - Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R
US – Underwear (AB)	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr. 1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

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USA-107	Minutes of the March 25, 2011 Meeting of the WTO Dispute Settlement Body, WT/DSB/M/294
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USA-109	*Establishment of an Import Limit for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Costa Rica*, 60 Fed. Reg. 32,653 (June 23, 1995)
USA-110	28 U.S.C. §1254
USA-111	Black's Law Dictionary (9th ed. 2009) ("precedent")
USA-112	Black's Law Dictionary (9th ed. 2009) ("*ultra vires*")
USA-113	*U.S. v. Schooner Peggy*, 5 U.S. 103, 110 (1801)
USA-114	*Ziffrin, Inc. v. U.S.*, 318 U.S. 73, 78 (2013)

I. INTRODUCTION

1. China has made valiant efforts to make simple facts opaque and straightforward WTO obligations convoluted. But the relevant facts and law are simple and straightforward in this dispute. The following facts are irrefutable:

- The United States published the *GPX* legislation on March 13, 2012, the day it was enacted.

- There is no evidence, because it was not legally possible, that any entity of the United States enforced the *GPX* legislation on March 12, 2012, or any other date prior to its publication. No person asserted or could have asserted any legal rights under that unenacted legislation.

- Prior to the enactment of the *GPX* legislation, the imports subject to 27 proceedings at issue in this dispute were already subject to the U.S. CVD law. The U.S. Department of Commerce ("Commerce") had initiated investigations and in some cases imposed duties on those imports. Following the enactment of the *GPX* legislation, Commerce's treatment of such imports did not change.

- The United States has established and maintained an independent judicial system for the prompt review and correction of administrative actions relating to customs matters, and Commerce is obliged to implement and apply decisions and orders of those courts.

2. These facts establish that China's claims under Articles X:1, X:2 and X:3(b) of the GATT 1994 are without merit. Nonetheless, China attempts to explain away these facts by offering interpretations of U.S. law that have not yet been settled by the U.S. domestic courts and interpretation of Articles X:1, X:2 and X:3(b) that are unsupported by the plain text of the obligations. As set out in this submission, China's arguments do not withstand scrutiny.

3. First, Article X:1 of the GATT 1994 requires that certain laws be promptly published when "made effective." The United States has explained that the ordinary meaning of the term "made effective" is with regards to when measures have been adopted or brought into operation. China has failed to provide a contrary explanation to the ordinary meaning of the term. Rather, China has only repeated its assertion that the *GPX* legislation was required to be published in 2006 because of the term "effective date" in Section 1(b) of the law. Again, the record is clear that the United States published the *GPX* legislation on the same day it was enacted. As such, China's claim under Article X:1 is without merit.

4. Second, the U.S. interpretation of Article X:2 makes sense of that text in its context. Consistent with the title and focus of Article X of the GATT 1994, Article X:2 links a requirement for transparency with the administration of a covered measure to ensure that a Member does not enforce (administer) a secret measure of general application before its publication (transparency). China's reading of Article X:2, on the other hand, reads into that provision words and concepts not there. But even under its approach, China has failed to prove that the *GPX* legislation falls within the scope of Article X:2. That is, China has failed to prove that the *GPX* legislation (1) is a "measure of general application", (2) is one of the types of

measure listed in Article X:2 (i.e., a "rate" of duty on imports, or a requirement, restriction or prohibition on imports), and (3) effected or imposed an applicable change to such types of measures (i.e., an "advance" in a rate of duty on imports, or a "new" or "more burdensome" requirement, restriction or prohibition on imports). Again, the record is clear that the *GPX* legislation did not change or otherwise affect Commerce's existing and well-known treatment of the imports subject to the 27 proceedings at issue in this dispute. That is, the U.S. CVD law has always applied to these imports. China's interpretations of Article X:2 regarding the so-called principle of "retroactivity" are baseless.

5. Third, China has failed to prove that the United States acted inconsistently with Article X:3(b) of the GATT 1994. China now asserts that it is a breach of Article X:3(b) for a "national legislature [to] amend existing law and direct an agency's reviewing courts to apply the new law to events and circumstances that occurred before the new law was enacted, including in respect of cases that are pending on review."[1] Article X:3(b), however, does not impose limitations on the ability of a legislative body to enact laws, whether or not judicial proceedings are pending. Article X:3(b) requires that Members establish and maintain a "judicial, arbitral or administrative tribunal[ ] or procedure[ ] for the purpose … of the prompt review and correction of administrative action relating to customs matters" and that decisions of this review system are implemented by and govern the practice of administering agencies. The United States has amply satisfied that obligation. As such, China's claim under Article X:3(b) is without merit.

6. Regarding its claim under Article 19.3 of the SCM Agreement, China's failure to make its *prima facie* case persists. China continues to make generalized allegations as to what Commerce found in the challenged sets of determinations, and it cites almost no evidence from those determinations. The *only* underlying basis for China's as-applied claims under Article 19.3 of the SCM Agreement is Commerce's purported lack of legal authority under U.S. law to account for the potential of overlapping remedies when countervailing duties are imposed concurrently with antidumping duties calculated under the alternative methodology for imports from NME countries. Despite its sweeping assertions, China's arguments lack any factual support.

7. China continues to misinterpret Article 19.3 of the SCM Agreement and simply has not addressed the U.S. interpretation or explained how it does not comport with customary rules of interpretation of public international law. Contrary to China's assertions, Article 19.3 of the SCM Agreement does not establish any requirement that administering authorities investigate and avoid overlapping remedies. Article 19.3 instead obliges Members to impose countervailing duties on a non-discriminatory basis, and in "the appropriate amounts in each case" under the rules set forth under the SCM Agreement. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should therefore be rejected.

[1] *See e.g.*, China First Written Submission, para. 100.

II. CHINA'S CLAIM UNDER ARTICLE X:1 OF THE GATT 1994 IS WITHOUT MERIT

8. The substance of China's claim under Article X:1 of the GATT 1994 is primarily premised on the purported connection between the term "made effective" in Article X:1 and the term "effective date" in Section 1(b) of the *GPX* legislation.[2] China asserts that the term "promptly" under Article X:1 must be evaluated in relation to the "effective date" in Section 1(b) rather than the date when the law was adopted.[3]

9. However, the United States explained in its First Written Submission and during the first substantive Panel meeting that the ordinary meaning of "made effective" confirms that the clause limits the application of Article X:1 of the GATT 1994 to measures that have been adopted or brought into operation.[4] Otherwise, without the existence of the law, there is nothing to apply or make effective. China has offered no explanation contrary to the ordinary meaning of this term in Article X:1. Rather, China has only repeated its assertion that the *GPX* legislation was required to be published in 2006 because of the term "effective date" in Section 1(b).[5] Such an assertion is false. The record demonstrates that the law was made effective on March 13, 2012.[6]

10. China's approach also finds no support in the *EC – IT Products* panel report. In that dispute, the panel found that the European Union "brought into effect in practice" certain amendments prior to adoption and publication.[7] That is, that the measure had been "made effective" was demonstrated by its application to produce legal effects. China has made no allegation that the *GPX* legislation had any legal effects prior to its adoption. That is, at no time before the date of enactment and publication of the law (March 13, 2012) could any person or entity in the United States rely on the *GPX* legislation to assert legal rights or consequences, and there is no evidence that any entity did apply the law prior to adoption to bring it "into effect in practice."

11. In short, Article X:1 requires that measures be published promptly upon their adoption. With respect to the measure at issue in this dispute, the United States did just that: the *GPX* legislation was published as soon as the law was enacted or brought into existence.[8] As such, China has no basis for any claim that the United States acted inconsistently with Article X:1 of the GATT 1994.

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[2] *See e.g.*, China First Written Submission, paras. 63-64.

[3] *See e.g.*, China First Written Submission, paras. 35, 42.

[4] *See* U.S. First Written Submission, paras. 71-78.

[5] *See e.g.*, China First Written Submission, para. 35 ("In no event, however, could publication be considered 'prompt' if *it took place five and a half years after* when the measure was 'made effective', as in this case") (emphasis added).

[6] *GPX* Legislation (CHI-1).

[7] *EC – IT Products*, para. 7.1046; *see* U.S. Answer to Panel Question 25, para 35.

[8] The United States has further explained the objective of the *GPX* legislation was to make clear that the scope of 701(a) of the U.S. Tariff Act (regarding application of the U.S. CVD law) includes NME countries.

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

A. Introduction and Overview

12. China's claim under Article X:2 of the GATT 1994 fails for a simple reason: the *GPX* legislation was not enforced until its publication on March 13, 2012, and there were no administrative actions by Commerce or judicial actions by the courts on March 12, or any other prior date, to the contrary. This fact is fatal to China's claim.

13. Faced with that simple and compelling fact, China attempts to significantly complicate the facts and the law relating to its Article X:2 claim. But even on China's erroneous approach, its claim fails. In order for China to establish its claim under Article X:2 of the GATT 1994, it must prove that, as a threshold issue, the *GPX* legislation falls within the scope of Article X:2. That is, China must prove that the *GPX* legislation (1) is a "measure of general application", (2) is one of the types of measure listed in Article X:2 (i.e., a "rate" of duty on imports, or a requirement, restriction or prohibition on imports), and (3) effected or imposed an applicable change to such types of measures (i.e., an "advance" in a rate of duty on imports, or a "new" or "more burdensome" requirement, restriction or prohibition on imports). China has made clear that its challenge to the *GPX* legislation is limited; it is based on that portion of the statute that is applicable to 27 proceedings that were initiated prior to the date of enactment of the legislation. China cannot establish that the challenged legislation falls within the scope of or breaches Article X:2.

14. First, because the parties have spent considerable time debating whether the *GPX* legislation effected an "advance" in a rate of duty on imports, or imposed a "new" or "more burdensome" requirement, restriction or prohibition on imports, the United States will begin its discussion on this issue. In short, China has failed to prove that the *GPX* legislation effected or imposed any change on the imports at issue in this dispute. Contrary to China's assertions, the inquiry is not whether there has been some theoretical change in U.S. law. The inquiry under Article X:2 is whether there has been an "advance" in a rate of duty or a "new" or "more burdensome" requirement, restriction or prohibition on the "imports" at issue in the dispute because of the challenged measure. The "imports" at issue are those goods that are subject to the 27 CVD orders challenged by China. China cannot prove that for these imports, the *GPX* legislation caused any of the relevant changes listed in Article X:2. That is, the law did not impose a "new" or "more burdensome" requirement, restriction or prohibition on the subject imports compared to what was in place prior to its enactment. Further, the law did not increase the CVD rates already in place for the subject imports. Indeed, the record in this dispute is clear: the United States has been applying its CVD laws to imports from China since at least 2006. As such, the *GPX* legislation cannot be said to have resulted in any new or more burdensome treatment of those imports from China, and is thus outside the scope of Article X:2.

15. Second, China has failed to prove that the challenged section of the *GPX* legislation at issue in this dispute – the application of Section 1(a) to the 27 CVD proceedings that were initiated prior to the enactment of the *GPX* legislation – is "of general application." The challenged section of the *GPX* legislation, which affects a defined and fixed set of proceedings

and subject imports, does not fall under the plain meaning of the term "of general application" in Article X:2 of the GATT 1994.

16. Third, China's arguments regarding the classification of the *GPX* legislation as a "rate" of duty, as well as a "requirement" and "restriction" on imports are unpersuasive.[9] As a statute reaffirming the broad scope of the U.S. CVD law, the *GPX* legislation does not establish the "rate" of the CVDs of the 27 proceedings at issue in this dispute. Those rates were already established prior to the law's enactment. Further, the law does not impose any requirement on imports subject to the 27 relevant CVD investigations. Finally, the *GPX* legislation, and CVD laws generally, are not "restrictions" on imports. CVD laws establish the framework for the application, if any, of countervailing duties.

17. In addition to the threshold issue of whether the *GPX* legislation falls within the scope of Article X:2, to prevail in its arguments, China must further prove that the plain text of Article X:2 contains an absolute prohibition on covered measures that affect events or actions prior to the official publication of the measure, or what China has argued is the so-called legal principle of "retroactivity." [10]

18. Thus, notwithstanding China's failure to establish that the *GPX* legislation as challenged by China falls within the scope of Article X:2, the United States also explains that Article X:2 of the GATT 1994 does not contain a prohibition on so-called retroactivity. The obligation does not address the issue of "retroactivity," or "backdating," or whatever other term may be used.

19. China cannot impute or import a legal concept that is not addressed in the plain text of Article X:2. [11] Article X:2 is a procedural obligation that does not discipline the substance of the covered measures. As further explained below, China's so-called principle of retroactivity does not apply to measures in the absence of a textual basis to do so.

B. The *GPX* Legislation Is Not an "Advance" in a Rate of Duty or a "New" or "More Burdensome" Requirement, Restriction or Prohibition on the Imports Subject to the 27 Proceedings at Issue in this Dispute

1. Because China's Imports Subject to the 27 Proceedings Were Already Subjected to CVD Investigations, the *GPX* Legislation Could Not Effect an "Advance" in the Rate of Duty or Impose a "New" or "More Burdensome" Requirement, Restriction, or Prohibition

20. China's argument that the *GPX* legislation effected an "advance" in a rate of duty and imposed a "new" or "more burdensome" requirement, restriction or prohibition on the imports at

[9] China does not argue that the *GPX* legislation is a "prohibition" on imports.

[10] The United States has already explained that the *GPX* legislation did not affect any past events or actions; it merely preserved the status quo.

[11] The Appellate Body has observed that the principles of treaty interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended." *India – Patents (AB)*, para. 45. *See EC – Customs Matters (AB)*, para. 83.

issue is without merit.[12] In paragraphs 97 and 102 of its Responses to Panel Questions, China mischaracterizes the U.S. argument as "Section 1 [of the *GPX* legislation] did not effect a change in U.S. law."[13] While this is a true statement, this is not the issue before the Panel.

21. Contrary to China's suggestions, the issue of whether the *GPX* legislation was a change or clarification of U.S. law has not been determined by the U.S. domestic courts in the on-going *GPX* litigation and other pending court challenges.[14] The Panel need not make a finding on this issue because even if China's suggestions were taken at face value, its claim would still fail.

22. The plain text of Article X:2 requires a determination of whether there has been an applicable change – an advance, or something new or more burdensome – "on imports." Specifically, Article X:2 states, in relevant part:

> No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge *on imports* under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition *on imports* ….

23. Thus, the terms "advance" and "new" or "more burdensome" must be evaluated in the context of the "imports" at issue. In this dispute, China has clarified that its challenge to Section 1 of the *GPX* legislation is only in respect of the 27 proceedings initiated prior to the date of enactment. Thus, the only "imports" at issue are those subject to the 27 CVD investigations listed by China in its panel request that resulted in a CVD order. Even if China is able to show that the *GPX* legislation falls within one of the types of measures listed in Article X:2, it cannot show that there has been any "new or more burdensome" change with respect to the "imports" at issue in this dispute.

24. As an example, in paragraph 73 of its Response to Panel Questions, China asserts that the *GPX* legislation effected an increase in the rates of duty for the 27 CVD orders at issue in this dispute because the rates went from "no countervailing duty to whatever duty was determined for each product."[15] This assertion rests on the factually inaccurate premise that there were no pre-existing rates of duty on these imports prior to the enactment of the *GPX* legislation. This, of course, is not true as Commerce had already established rates for the products at issue.

25. In other words, the *GPX* legislation in no way effected an advance in the CVD rates for the subject imports for each of the relevant 27 proceedings from zero to "whatever duty was determined for each product." Rather, the most that could be said of the *GPX* legislation is that it maintained the CVD rates for the subject imports for each of the 27 proceedings at "whatever duty was determined for each product" prior to the law's enactment. As the United States stated in its First Written Submission, China's argument that the *GPX* legislation subjected the imports

[12] *See e.g.*, China First Written Submission, para. 75-76; China Response to Panel Questions, para. 73.

[13] China Response to Panel Questions, paras. 97 and 102.

[14] *See* U.S. Response to Panel Questions, paras. 128-135

[15] China Response to Panel Questions, para. 73.

at issue to the possibility of a CVD investigation is contrary to the fact that the imports had already been subjected to CVD investigations.[16]

26. In making its arguments under Article X:2, China is asking the Panel to accept China's unsupported proposition that the *GPX V* opinion was "governing and controlling" law.[17] Further, China argues that the U.S. Federal Circuit found in *Georgetown Steel* that Congress must amend the U.S. CVD law in order for it to be applied to NME countries and that such a "finding" also constitutes "governing and controlling" law. Such an assertion regarding the findings of *Georgetown Steel* is not accurate. By the words of the U.S. Federal Circuit in *Georgetown Steel*, the only issue decided was "whether the economic incentives and benefits that the nonmarket economies of the Soviet Union and the German Democratic Republic have granted … constitute a 'bounty' or 'grant' …"[18] On that issue, the Federal Circuit deferred to the discretion of Commerce.[19] As such, China's so-called "findings" constituted only *dicta* by the court for "additional support" on the issue above.[20]

27. China's Article X:2 argument is based entirely on the false premise that the *GPX V* opinion had been finalized, not appealed by the United States, and is legally binding on and was implemented by Commerce. As will be explained further below, China's claims are baseless for two reasons: (1) its premise is false, and (2) China cannot admit on one hand in its Article X:3(b) arguments that Commerce did not implement the *GPX V* opinion and on the other hand argue in its Article X:2 claim that the *GPX V* opinion was implemented.

2. *GPX V* Has No Legal Effect Under U.S. Law

28. China treats *GPX V* as it were the final word of U.S. law on the issue of whether Commerce may apply the U.S. CVD law to China. As the United States has shown in its response to Question 72 from the Panel, such an assertion is erroneous.[21] The *GPX V* opinion is not a final decision of the U.S. Federal Circuit and has no legal effect under U.S. law.[22] As such,

[16] U.S. First Written Submission, para. 103.

[17] China Response to Panel Questions, para. 94.

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

[19] Specifically, the U.S. Federal Circuit found that "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." *Id.*, p. 1318.

[20] *Id.*, p. 1316. Further, the United States has explained why this *dicta* is unpersuasive in its First Written Submission. *See* U.S. First Written Submission, Appendix.

[21] U.S. Response to Panel Questions, paras. 181-183.

[22] *See, e.g.*, U.S. FRAP Rule 41 (USA-41); *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009) (USA-70); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("An appellate court's decision is not final until its mandate issues.")(USA-71); *First Gibraltar Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) ("Because the mandate is still within our control, we have the power to alter or to modify our judgment.") (USA-72).

Commerce was not obligated to implement its findings and, under U.S. law, was prohibited from such implementation.[23]

29. Contrary to China's assertions, the U.S. Federal Circuit is not the "highest federal court responsible for interpreting the Tariff Act."[24] The highest court in the United States for interpretations of all federal law, including the U.S. Tariff Act of 1930, is the U.S. Supreme Court.[25] The United States has already submitted an example of a recent U.S. Supreme Court ruling on an interpretation of Commerce's actions under the U.S. Tariff Act of 1930 in the antidumping context.[26] The U.S. Supreme Court in this decision, *Eurodif*, unanimously reversed the decision of the U.S. Federal Circuit. The United States had not exhausted its opportunity to appeal the non-final *GPX V* opinion to the U.S. Supreme Court when the U.S. Federal Circuit's decision in *GPX VI* mooted the necessity for any further appeal.

30. Further, and contrary to China's assertions,[27] the non-final *GPX V* opinion is not precedent under U.S. law. The term "precedent" is defined as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues."[28] The U.S. CIT, as the subordinate court to the U.S. Federal Circuit, is not bound to follow *GPX V*. *GPX V*'s statement on U.S. law cannot be the basis for future cases involving similar facts or issues. It has no authority to change Commerce's existing approach to the application of the U.S. CVD law to the relevant 27 proceedings.

3. China Cannot Simultaneously Claim that Commerce Did Not Implement *GPX V* for Purposes of Article X:3(b) and Claim that *GPX V* was Implemented for Purposes of Article X:2

31. China's arguments regarding a supposed change in U.S. law are internally inconsistent. On the one hand, China argues in the context of its Article X:3(b) arguments that the United States did not implement the *GPX V* opinion and that it did not "govern the practice of" Commerce in applying the U.S. CVD law. On the other hand, for the purpose of its Article X:2

[23] *Kusay v. United States*, 62 F.3d 192 (7th Cir. 1995) (USA-75).

[24] China's Responses to Panel Questions, para. 85 and 93. It is unclear to the United States why China has made this erroneous statement regarding the status of the U.S. Federal Circuit. To the extent that it is to suggest that the *GPX* litigation has concluded or a conclusive interpretation of the state of the U.S. CVD law with regard to NME countries had been made by a U.S. court, such suggestions are also erroneous and misleading.

[25] *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.

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

[27] China Response to Panel Questions, para. 162 ("*GPX V* remains a valid, precedential decision of the court concerning the meaning of the Tariff Act prior to the enactment of the *GPX* legislation").

[28] Black's Law Dictionary (9th ed. 2009) ("precedent") (USA-111). "In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts." *Id.* (*citing* William M. Lile et al., *Brief Making and the Use of Law Books* 288 (3d ed. 1914)).

claim, China treats the non-binding opinion as having already changed Commerce's treatment of the imports subject to the 27 challenged proceedings (i.e., that it governed Commerce's approach), and then proceeds to argue that the *GPX* legislation amounted to a retroactive reversal of that change.[29] China cannot have it both ways.

32. In the context of its Article X:3(b) claim, China recognizes that the non-final *GPX V* opinion was not implemented by Commerce and did not govern its approach. This fact is the basis of China's challenge of Section 1(b) of the *GPX* legislation under Article X:3(b) of the GATT 1994. Specifically, Part VI(D) of China's First Written Submission discusses in detail its argument that the "United States has Fail[ed] to Ensure that the Federal Circuit's Decision in *GPX V* was '*Implemented by*', and '*Governed the Practice of*', the USDOC."[30]

33. The United States agrees that the non-binding *GPX V* opinion was never implemented by Commerce and that *GPX V* did not govern Commerce's approach to applying the U.S. CVD law. The United States has previously explained that Commerce was not required to implement the *GPX V* opinion because it was non-final and Commerce would have violated U.S. law if it did implement the opinion.[31]

34. If the *GPX V* opinion never governed the practice of Commerce, then it cannot be true, as argued by China, that the imports at issue were ever affected by the *GPX* legislation. In other words, China has conceded that the imports subject to the 27 challenged proceedings have always been subject to the U.S. CVD law, both before and after the enactment of the *GPX* legislation. Thus, the law could not have imposed a "new" or "more burdensome" requirement, restriction or prohibition on these imports. Whether or not this treatment of the subject imports is in compliance with U.S. law is an issue of an alleged *ultra vires* action that has yet to be resolved by the U.S. courts. Contrary to China's assertions, China has not prevailed in domestic litigation on the issue of whether Commerce was acting within the scope of its statutory authority in initiating the 27 CVD proceedings at issue. Further, both the United States and China agree that such a determination of an alleged *ultra vires* action is not the subject of this dispute.

35. At the first substantive Panel meeting and in its Response to Panel Questions, China clarified that it is not challenging in this dispute whether Commerce's actions were *ultra vires*. China has stated that Article X:2 does not provide for the evaluation of alleged *ultra vires* actions.[32] Further, in paragraph 120 of its Response to Panel Questions, China states that it "does not consider it directly relevant under Article X:2 whether a particular practice or requirement followed by domestic authorities was consistent with municipal law."[33]

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[29] Rather, China's sole claim under Article X:3(b) is the impermissible "legislative intervention" in the adjudication of administrative actions relating to customs matters.

[30] China First Written Submission, Part VI(D) (emphasis added).

[31] *Kusay v. United States*, 62 F.3d 192 (7th Cir. 1995) (USA-75).

[32] China Response to Panel Questions, Question 13.

[33] China Response to Panel Questions, para. 120.

36. Despite these clear statements from China, in paragraph 121 of its Response to Panel Questions, China immediately contradicts itself by stating that Commerce's actions must be evaluated on whether it was "provided for under municipal law."[34] In other words, China is asking the Panel to determine whether Commerce's actions were provided for under municipal law, or if Commerce acted in a manner that was not provided for under municipal law. Such a claim is the definition of an *ultra vires* challenge.[35] Again, China's arguments are contradictory and unsustainable. China cannot admit that Article X:2 does not provide for an evaluation of an alleged *ultra vires* action while at the same time asking the Panel to make an *ultra vires* determination under Article X:2.

37. Further, and separate from China's legal inconsistencies, as a factual clarification on this issue, it should be noted that the U.S. courts have yet to issue conclusive findings on the application of the U.S. CVD laws to NME countries. The *GPX* litigation is on-going as to a determination of the constitutionality of the *GPX* legislation and resolution of various methodological issues. Further, parallel litigation is on-going on the application of the U.S. CVD law to NME countries.[36] China cannot treat *GPX V*, a non-binding opinion, as "governing and controlling" law given the series of decisions that have been issued after the opinion in the on-going litigation.[37] Nor can China claim that the opinions of *GPX V* constitute a definitive interpretation of the implications and reach of *Georgetown Steel*, particularly when the United States and domestic parties successfully petitioned the Federal Circuit for rehearing of the *GPX V* opinion. Because the petition was granted, the United States did not have an opportunity to seek further appeal rights.

38. The issue of whether the U.S. CVD law can be applied to NME countries, including the treatment of *Georgetown Steel*, has not yet been definitively settled by the U.S. courts. Although China mischaracterizes the actual holding of *Georgetown Steel* in its response to the Panel questions,[38] its arguments regarding *Georgetown Steel* can at best be taken to demonstrate the decision is ambiguous. It must be remembered that, prior to *GPX V*, the U.S. CIT *twice* concluded that *Georgetown Steel* did not preclude application of the CVD law to NME countries.[39] At this stage of domestic litigation, the only definitive conclusion reached by the

[34] China Response to Panel Questions, para. 121.

[35] Black's Law Dictionary defines *ultra vires* as "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary (9th ed. 2009) ("*ultra vires*") (USA-112).

[36] *See e.g., Guangdong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362 (Ct. Int'l Trade 2013) (USA-46).

[37] For example, in paragraph 86 of its Response to Panel Question, China asserts that the "[*GPX V*] decision, along with the Federal Circuit's prior decision in *Georgetown Steel* which it reaffirmed, are the only valid sources of law before the Panel concerning the applicability of the countervailing duty provisions of the Tariff Act to imports from NME countries prior to the enactment of the *GPX* legislation." China Response to Panel Questions, para. 86.

[38] See China Response to Panel Questions, paras. 72-80.

[39] *See Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, 1282 (Ct. Int'l. Trade 2007) (USA-28); *GPX II* (CHI-3). Further, it should be noted that the U.S. Federal Circuit itself stated in *Georgetown Steel* that the only issue decided was "whether the economic incentives and benefits that the nonmarket economies of the Soviet Union and the German Democratic Republic have granted in connection with the export of

U.S. Federal Circuit is that Commerce is not prohibited from applying the U.S. CVD law to China.[40]

39. In sum, the *GPX V* opinion had no effect on Commerce's pre-existing approach of applying the U.S. CVD law to the imports subject to the 27 challenged proceedings. As such, China cannot claim that the *GPX V* findings were implemented for the purposes of its Article X:2 claim. The *GPX* legislation could not have imposed a "new" or "more burdensome" requirement, restriction or prohibition on these imports than what was already in place. The law's only effect was to maintain the status quo.

4. The *GPX* Legislation Did Not Effect an Advance in a Rate of Duty "Under an Established and Uniform Practice"

40. China also claims that Section 1 of the *GPX* legislation falls within the scope of Article X:2 because it effected "an advance in a rate of duty or other charge on imports under an established and uniform practice." China argues that the law "increases the countervailing duty rate from no countervailing duty to whatever countervailing duty rate the USDOC determined in respect of each such product."[41] The United States explained above that China's statement is erroneous. The *GPX* legislation in no way increased the rate of duties or other charge for the imports subject to the 27 proceedings challenged by China.

41. Further, China has failed to prove that any purported advance was with respect to "an established and uniform practice." That term indicates that there must have been an "an established and uniform practice" *prior* to the advance in a rate of duty or other charge on imports and also "an established and uniform practice" *after* the advance. Otherwise, without a "practice" before the purported advance, there would be no basis from which to evaluate the change.

42. In its Questions to the Parties, the Panel asked China in Question 56(b) what was the "practice" at issue in reference to the phrase "under an established and uniform practice" under Article X:2. China's response was:

> The "practice" to which this phrase refers appears to be the "practice" that "effect[s] an advance in a rate of duty or other charge on imports". This could be, for example, a change in a classification practice that results in the imposition of a higher rate of duty on a particular product (as in *EC – IT Products*) or a change in some other aspect of domestic law that makes certain categories of imports subject to the imposition of duties or other charges on imports to which they were not previously subject.[42]

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potash from those countries to the United States constitute a 'bounty' or 'grant' …," and, on that issue, the Federal Circuit deferred to the discretion of Commerce . *Georgetown Steel Corp. v. United States*, 801 F.2d at 1313-14.

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

[41] China Response to Panel Questions, para. 73.

[42] China Response to Panel Questions, para. 135.

43. This statement was nonresponsive. Perhaps China does not respond because the law did not result in any change in the application of the countervailing duty orders, even aside from the question of what would be the relevant established and uniform practice.

44. In sum, China has failed to prove that the *GPX* legislation effected an "advance" in a rate of duty or imposed a "new" or "more burdensome" requirement, restriction or prohibition on the imports at issue.

C. The Challenged Section of the *GPX* Legislation is Not "of General Application" under Article X:2

45. In its First Written Submission, China concludes that "P.L. 112-99 is a law 'of general application' because it affects a range of products, producers, importers, and countries."[43] Further, in its Response to Panel Questions, China asserts that "China and the United States agree that section 1 is, therefore, a measure of general application."[44] The United States does not agree with China's assertion.

46. The United States has acknowledged that for those proceedings initiated after the enactment of the *GPX* legislation, Section 1(a) of the law sets out a measure of general application for an indeterminate number or range of imports and associated proceedings. That is, the measure would be generally applied to unidentified imports and proceedings that meet the general criteria set forth in the measure. China, however, has not challenged the application of Section 1(a) of the *GPX* legislation to CVD proceedings initiated after the date of enactment of the legislation.

47. Although China has used the terms "P.L. 112-99,"[45] "Section 1 of P.L. 112-99"[46] and "Section 1(b) of P.L. 112-99"[47] interchangeably in its Article X arguments, at this stage of the proceeding China has settled on its position as to what it is challenging in this dispute. China's claim under Article X:2 relates to the part of Section 1(b)(1) that applies to proceedings that had already been initiated prior to the enactment of the *GPX* legislation, and China's claims of breach are limited to this set of proceedings. This identifiable number of proceedings and subject imports does not fall within the ordinary meaning of the term "of general application" under Article X:2 of the GATT 1994.

48. China acknowledged during the first substantive Panel meeting that it is not challenging the *GPX* legislation as a whole as being inconsistent with Article X:2 of the GATT 1994. Thus,

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[43] China First Written Submission, para. 62.

[44] China Response to Panel Questions, para. 51.

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

[46] *See e.g.,* China Response to Panel Questions, paras. 96-102.

[47] *Id.,* paras. 138-39.

in order to properly evaluate China's claims, it is useful to identify clearly what is the challenged measure and how is it alleged to breach Article X:2.

49. P.L. 112-99 is separated into two sections. Section 1 relates to the "application of countervailing duty provisions to nonmarket economy countries." Section 2 relates to the "adjustment of antidumping duty in certain proceedings relating to imports from nonmarket economy countries." China has not alleged that Section 2 is inconsistent with Article X:2 of the GATT 1994.[48]

50. Section 1 of the *GPX* legislation is further separated into two sub-sections. Section 1(a) provides the terms for the applicability of the U.S. CVD laws to proceedings involving nonmarket economy countries. Section 1(b) provides the "effective date" and defines the scope of proceedings that fall under Section 1(a). China has not alleged that Section 1(a) is inconsistent with Article X:2 of the GATT 1994. That is, China has not alleged that the affirmation of the application of the U.S. CVD laws to NME countries breaches Article X:2.

51. Section 1(b) contains 3 paragraphs defining the proceedings and actions covered by Section 1(a) of the *GPX* legislation:

> (1) all proceedings initiated under subtitle A of title VII of that Act (19 U.S.C. 1671 *et seq.*) on or after November 20, 2006;
>
> (2) all resulting actions by U.S. Customs and Border Protection; and
>
> (3) all civil actions, criminal proceedings, and other proceedings before a Federal court relating to proceedings referred to in paragraph (1) or actions referred to in paragraph (2).

52. China has not challenged all three paragraphs as inconsistent with Article X:2 of the GATT 1994. That is, China has not alleged that the section of the *GPX* legislation which applies to proceedings initiated after March 13, 2012 (the publication date of the law) is inconsistent with Article X:2. Nor has China alleged that the application of the *GPX* legislation to pending and future civil or criminal proceedings is inconsistent with Article X:2.[49]

53. Rather, China's Article X:2 challenge is only with regard to those CVD proceedings under Section 1(b)(1) that were initiated prior to the enactment of the *GPX* legislation and that resulted in an order.[50] Specifically, China has alleged that the application of Section 1(a) of the *GPX* legislation to proceedings that were initiated prior to the enactment of the law is

[48] *See* China Panel Request, Part A.

[49] Rather, such an allegation is China's claim under Article X:3(b) of the GATT 1994.

[50] In its response to Panel Question 9(a), China clarified that it was excluding from its claims the 4 CVD investigations in which the ITC made a final negative injury determination because the proceedings did not result in CVDs. As China stated, "'[i]n effect, they are moot." China Response to Panel Questions, para. 7.

inconsistent with the obligation under Article X:2 that "[n]o measure of general application … shall be enforced before such measure has been officially published."[51]

54. In its Panel Request, China states that it "considers that all determinations or actions by the U.S. authorities *between November 20, 2006 and March 13, 2012* relating to the imposition or collection of countervailing duties on Chinese products … are inconsistent with Article X of GATT 1994."[52]

55. Further, in its responses to the Panel Questions, China repeatedly identifies the proceedings at issue in this dispute: "the 27 countervailing duty investigations *initiated prior to 13 March 2012*, and the resulting countervailing duty orders."[53] China identified these 27 proceedings in Appendix A of its Panel Request as:

	CVD Investigation Name
1	Circular Welded Carbon Quality Steel Pipe from the People's Republic of China
2	Light-Walled Rectangular Pipe and Tube from the People's Republic of China
3	Laminated Woven Sacks from the People's Republic of China
4	Certain New Pneumatic Off-The-Road Tires from the People's Republic of China
4a	Certain New Pneumatic Off-The-Road Tires from the People's Republic of China [*Administrative Review*]
5	Raw Flexible Magnets from the People's Republic of China
6	Lightweight Thermal Paper from the People's Republic of China
7	Sodium Nitrite from the People's Republic of China
8	Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China
9	Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China
10	Citric Acid and Certain Citrate Salts From the People's Republic of China
10a	Citric Acid and Certain Citrate Salts From the People's Republic of China [*Administrative Review*]
11	Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China
12	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China
12a	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China [*Administrative Review*]
13	Certain Oil Country Tubular Goods from the People's Republic of China
14	Prestressed Concrete Steel Wire Strand From the People's Republic of China
15	Certain Steel Grating From the People's Republic of China

[51] China First Written Submission, para. 77 ("Because Article X:2 'precludes retroactive application of a measure', for the reasons stated above, it is clear from the measure itself that the United States has acted inconsistently with Article X:2 by enforcing a measure of general application prior to its official publication.").

[52] China Panel Request, Part A (emphasis added).

[53] China Response to Panel Questions, para. 39 (emphasis added). *See also id.*, paras. 40, 73, 99, 101.

16	Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China
17	Certain Magnesia Carbon Bricks From the People's Republic of China
18	Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China
19	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China
20	Certain Potassium Phosphate Salts from the People's Republic of China
21	Drill Pipe From the People's Republic of China
22	Aluminum Extrusions From the People's Republic of China
23	Multilayered Wood Flooring From the People's Republic of China
24	High Pressure Steel Cylinders From the People's Republic of China
25	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China
26	Utility Scale Wind Towers From the People's Republic of China
27	Drawn Stainless Steel Sinks From the People's Republic of China[54]

56. As evident from China's panel request, submissions, and statements, these 27 proceedings were known as of the date of enactment of the *GPX* legislation, as were the products subject to those proceedings. In relation to this limited and known set of imports and proceedings, Section 1(b)(1) is not a law "of general application" under the ordinary meaning of the term as used in Article X:2.

57. In *US – Underwear*, the Appellate Body upheld the panel's finding that an administrative order was "of general application" in that it "affect[ed] an *unidentified number* of economic operators."[55] In affirming the panel's finding, the Appellate Body added that:

[54] As a factual clarification, the U.S. CVD investigation on drawn stainless steel sinks from China was initiated on March 27, 2012. The date of initiation, therefore, was *after* the enactment of the *GPX* legislation, which was on March 13, 2012. It is unclear to the United States why China has included this CVD investigation in its claim regarding proceedings that were initiated prior to the enactment of the *GPX* legislation.

[55] *US – Underwear*, para. 7.65; *US – Underwear (AB)*, p. 21. In its entirety, the panel found that

> We note that Article X:1 of GATT 1994, which also uses the language "of general application," includes "administrative rulings" in its scope. The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an *unidentified* number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.

US – Underwear, para. 7.65. Because the term "of general application" is identical in Articles X:1 and X:2, which are closely related provisions, it is reasonable to consider that the term has the same meaning in both articles. *EC – IT Products*, para. 7.1097.

> While the restraint measure was addressed to particular, i.e. named, exporting Members, including Appellant Costa Rica, as contemplated by Article 6.4, ATC, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint.[56]

58. In contrast to the administrative order at issue in *US – Underwear*, the 27 proceedings at issue in this dispute have fixed and identified subject imports. In other words, in each of the 27 proceedings, Commerce had already initiated or conducted an investigation on the subject imports.

59. From another perspective, the panel in *EC –Customs Matters* found that the term "of general application" applies to those measures that "apply to a range of situations or cases, rather than being limited in their scope of application."[57] Section 1(b)(1) of the *GPX* legislation, as challenged by China, is only applicable to a limited set or scope of CVD proceedings that were initiated prior to the enactment of the *GPX* legislation.

60. China's only claim under Article X:2 is with respect to the portion of Section 1(b) that applies to proceedings that had already been initiated prior to the enactment of the *GPX* legislation. By identifying a determinate number of proceedings and subject imports, the challenged aspect of the measure is not "of general application." As such, the challenged section of the *GPX* legislation is not within the scope of Article X:2 of the GATT 1994.

D. China's Claims that the *GPX* Legislation is a "Rate" of Duty and a "Requirement" and "Restriction" on Imports are Without Merit

61. In its First Written Submission, China makes the conclusory statement that the *GPX* legislation pertains to "rates" of duties or "to requirements, restrictions or prohibitions on imports" because (1) the law "can be seen as 'rates of duty' or 'other charges … on imports'" and (1) "by making countervailing duties applicable to imports from non-market economy countries, P.L. 112-99 imposes a 'requirement' or a type of 'restriction' on imports."[58] The United States has already addressed in its First Written Submission how these conclusory statements do not satisfy China's burden to provide a *prima facie* case that the *GPX* legislation falls within any of types of measures listed in Article X:2.[59]

62. When asked to expand on its conclusions by the Panel, China makes the following arguments:

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[56] *US – Underwear (AB)*, p. 21.

[57] *EC –Customs Matters*, para. 7.116. Likewise, in *EC — Poultry*, the Appellate Body found that "Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules 'of general application'." *EC – Poultry (AB)*, para. 111.

[58] China First Written Submission, para. 62.

[59] U.S. First Written Submission, paras. 65-66.

- Section 1 of the *GPX* legislation pertains to a "rate" of duty because for the 27 CVD proceedings at issue "it increases the countervailing duty rate from no countervailing duty to whatever countervailing duty rate the USDOC determined in respect of each such product."[60]

- Section 1 of the *GPX* legislation pertains to a "requirement … on imports" in that once a CVD investigation is initiated, "importers are required to participate in the countervailing duty investigation or face the imposition of a countervailing duty determined on the basis of the facts available."[61]

- Section 1 of the *GPX* legislation pertains to a "restriction … on imports" because "[t]he fact that imported merchandise may be subject to the imposition of a countervailing duty imposes a limiting condition upon the importation of products into the United States."[62]

As explained below, China's assertions are without merit.

1. The *GPX* Legislation Does Not Pertain to a "Rate" of a Duty or Other Charge on the Imports Subject to the 27 Challenged Proceedings

63. Contrary to China's assertion, the challenged section of the *GPX* legislation does not pertain to the "rate" of CVD duties for the 27 proceedings at issue in this dispute. In its response to the Panel's Questions, China has continued to ignore the ordinary meaning of the term "rate," which is defined as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation."[63] The *GPX* legislation is a statutory provision that makes clear the scope of the application of the U.S. CVD laws. It does not pertain to the total quantity, amount or sum of any particular CVD rate and is distinguishable from measures such as tariff classifications that do pertain to the "rate" of a duty.

64. China attempts to support its claim by asserting that the *GPX* legislation resulted in the pertinent 27 CVD orders increasing from "no countervailing duty" to "whatever" CVD rate was determined for each product. Such an assertion is simply erroneous. At no point, even in the immediate aftermath of the Federal Circuit's non-final opinion in *GPX V*, were the Chinese products at issue in this dispute ever exempt from CVD rates. The CVD orders remained in place, undisturbed, and importers remained responsible for the payment of duties or estimated duties. Moreover, the *GPX* legislation in no way increased the CVD rates that were in place due to the 27 CVD orders prior to the enactment of the law. Thus, for example, the rates of the CVD order on *Kitchen Racks from China* ranged from 13.30 percent to 170.82 percent prior to the

[60] China Response to Panel Questions, para. 73.

[61] China Response to Panel Questions, para. 70.

[62] China Response to Panel Questions, para. 71.

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

GPX law.[64] These rates were unchanged following the law.[65] The same is true for each of the other 26 CVD orders.

2. The *GPX* Legislation Does Not Pertain to a "Requirement" or "Restriction" on the Imports Subject to the 27 Challenged Proceedings

65. China also has failed to show that the challenged section of the *GPX* legislation pertains to a requirement or restriction on imports subject to the 27 proceedings. China argues that Section 1 of the *GPX* legislation pertains to a "requirement … on imports" in that once a CVD investigation is initiated, "importers are required to participate in the countervailing duty investigation or face the imposition of a countervailing duty determined on the basis of the facts available."[66] Such a statement is false for the challenged imports.

66. First, a CVD proceeding is not a "requirement" on imports. That is, it does not impose requirements or conditions on the importation of goods. In a CVD proceeding, all of the reviewed goods have already entered the importing country. Consistent with the SCM Agreement, the U.S. CVD laws provide a framework for determining if these goods have been unfairly subsidized, and the extent of unfair subsidization. Further, China's argument suffers from a very basic flaw – in basing its argument on supposed "requirements" on "importers," China overlooks the fact that Article X:2 refers to requirements on "imports," not on "importers." And as a factual matter, the provisions governing the participation of importers subject to the 27 challenged proceedings were pursuant to the U.S. Tariff Act of 1930, as it existed prior to the *GPX* legislation. The *GPX* legislation did not affect the conduct of these proceedings.

67. Second, Section 1 of the *GPX* legislation is not a "restriction" on the imports subject to the 27 proceedings. China has argued that U.S. CVD laws like the *GPX* legislation impose a "limiting condition" on imports.[67] CVD laws do not restrict or limit imports, but establish the framework under which any alleged subsidies might be investigated and any resulting countervailing duties might be imposed. The laws themselves have no effect on imports.

E. Article X:2 Does Not Address the so-called Principle of "Retroactivity"

68. China asserts that the United States has never provided an interpretation of Article X:2.[68] This is incorrect. The United States has been clear about what Article X:2 is and is not.[69] First,

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[64] *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Countervailing Duty Order*, 74 Fed. Reg. 46,973 (Sept. 14, 2009) (USA-108).

[65] *Id.*

[66] China Response to Panel Questions, para. 70.

[67] China Response to Panel Questions, para. 71.

[68] China continues to argue that the United States has failed to provide an interpretation of Article X:2 that could be different from China's interpretation, which is that Article X:2 flatly prohibits retroactivity. *See e.g.*, China Response to Panel Questions, para. 21 ("the United States has failed to articulate a contrary interpretation of Article X:2 …."). While China could certainly disagree with the U.S. interpretation, it is inaccurate to state that the United States failed to provide a contrary interpretation.

Article X:2 is directed to ensuring a link between transparency and administration of a measure. For the set of measures of general application covering the subject matters in Article X:2, Members are not to enforce such measures before publication. That is, a Member cannot begin enforcing (administering) a measure of general application before publishing it (providing transparency). Understood in this way, Article X:2 fits within the scheme of Article X and provides a link between Article X:1, which covers prompt publication of certain measures, and Article X:3(a), which sets certain standards for administration of those measures.

69. The United States has also been clear on what Article X:2 is not. Article X:2 does not address the issue of the application of measures to events or actions that predate its enactment. Thus, any challenge of whether a measure may affect such events or actions must be based on a treaty article imposing a substantive obligation. Just as Article X:2 does not address the content or scope of a measure of general application, notably, neither do Article X:1 or Article X:3(a).

70. The Appellate Body has observed that Article X does not address the "substantive content" of measures.[70] This observation that Article X does not discipline the content or scope of measures is reinforced by the very title of Article X, "Publication and Administration of Trade Regulations." China cannot impute into such obligations requirements on the scope and content of covered measures. In other words, Article X:2 cannot be interpreted as a substantive obligation to prohibit so-called "retroactive effect" for all measures of general application, as proposed by China.

71. For measures that do fall within its scope[71], Article X:2 links transparency and administration of a measure 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. For those changes, Article X:2 requires a Member to publish the measure in an official publication prior to its enforcement.

72. The Appellate Body has observed 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 of domestic or foreign nationality."[72] China and other interested parties had full knowledge of the *GPX* legislation upon enactment and prior to its enforcement; Congressional consideration of the legislation was also widely publicized. Furthermore, the U.S. legal system does not lack for disclosure.

73. The Appellate Body further observed that such disclosure allows interested parties to "protect and adjust their activities or alternatively seek modification of such measures."[73] That is, disclosure of measures covered by Article X:2 allows interested parties to either:

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[69] *See e.g.,* U.S. Response to Panel Questions, paras. 4-9, 60, 101, 140; U.S. First Written Submission, Part IV(D).

[70] *EC – Poultry (AB)*, para. 115.

[71] *See above* Parts III(B), (C) and (D).

[72] *US – Underwear (AB)*, p. 21.

[73] *Id*. In full, the Appellate Body stated:

- Protect and adjust their activities; *or*

- Seek modification of such measures.

74. In paragraph 19 of its Response to Panel Questions, China cites to this language and then argues that this statement should be interpreted as prohibiting any measures that do not allow interested parties to "adjust their activities." Specifically, China states:

> This essential purpose of Article X:2 cannot be satisfied if a measure is applied in respect of actions or conduct that have already occurred at the time the measure is officially published. By that point, the relevant conduct or action has already taken place, and it is too late for governments and traders to take this measure into account in deciding whether to engage in that particular conduct or action.[74]

75. In other words, China cites the Appellate Body's language as support for its claim that Article X:2 prohibits so-called "retroactivity" because interested parties must be able to take into account the measure before deciding whether to adjust their activities. In China's view, Article X:2 prohibits any type of enforcement of a measure in which interested parties are not given the opportunity to adjust their activities.

76. China's understanding of the Appellate Body's observations in *US – Underwear* is incorrect and misleading. In making its argument, China has disregarded the alternative objective of providing disclosure to interested parties under Article X:2 as identified by the Appellate Body: "alternatively [interested parties may] seek modification of such measures."[75]

77. For example, a measure may affect events or actions prior to the publication of the measure. Interested parties in this scenario could not adjust their activities in relation to these prior events or actions. However, disclosure of the measure would enable them to seek modification of the measure. In other words, to "seek modification of such measures" contemplates that a measure may affect events or actions prior to its publication and not be inconsistent with Article X:2. Thus, contrary to China's assertions, neither the Appellate Body's statement in *US – Underwear* nor the plain text of Article X:2 prohibits the enactment of a measure that may affect events or actions prior to the measure's publication.

> Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, 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. We believe that the Panel here gave to Article X:2, *General Agreement*, an interpretation that is appropriately protective of the basic principle there projected.

[74] China First Written Submission, para. 19.

[75] *US – Underwear (AB)*, p. 21.

78. Article X:2 is silent on matters relating to the substance of a measure. China argues that the Panel should read into this silence an implied absolute prohibition on so-called "retroactivity."[76] However, Article X:2 cannot be interpreted to contain such a prohibition. The Appellate Body has observed that:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[77]

In short, when actions are prohibited by a WTO agreement, the prohibition can be found in the text of the provision.

79. In addition, to the extent that China relies on the Appellate Body's statement that Article X:2 embodies "due process" principles[78], this general statement serves not to support China's claims, but to further refute them. "Due process" is a principle of procedural fairness; it generally does not address the substantive contents of laws. One of the fundamental objectives of due process is to provide notice to interested parties, so that they can be heard.[79] On the matters subject to this dispute, China had both notice and an opportunity to be heard, in full.

80. In particular, China repeatedly received notice, beginning at least since 2006, if not earlier, that the United States was applying the U.S. CVD law to China. And, China has had ample opportunities to be heard. China and/or Chinese exporters have raised this issue in administrative proceedings before Commerce and in U.S. courts repeatedly. And they continue to do so. Indeed, it is hard to imagine any Member giving exporters a greater opportunity to be heard regarding the application of domestic laws to imports. To be sure, as noted above, the question in any dispute under the DSU is not whether some general principle not contained in the agreement text (be it "retroactivity" or "due process") has been respected. Rather, the pertinent question is whether a Member's measure is consistent with a specific, textual obligation. But if China would like to discuss general principles of "due process," it has no basis for any complaints.

81. The United States also notes that Article 20 of the SCM Agreement and Article 10 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") are instructive to further show that China's Article X:2 argument has no legitimate basis in the text of the agreement. These provisions of the AD and SCM Agreement

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[76] See China First Written Submission, Part V (The Retroactive Application of Section 1 of P.L. 112-99 Is Inconsistent with Article X:2 of the GATT 1994).

[77] *India – Patents (AB)*, para. 45. *See also EC – Customs Matters (AB)*, para. 83.

[78] *See e.g.*, China Response to Panel Questions, para. 18.

[79] *See e.g.*, Appellate Body Report, *US – Carbon Steel*, para. 126 (discussing the objective of "due process" in providing notice regarding the nature of a party's claim in a panel request).

provide explicit instructions for when countervailing duties and antidumping duties may be levied retroactively. If Article X:2 of the GATT 1994 had already imposed a blanket prohibition on so-called "retroactivity," as argued by China, then the elements of Article 20 of the SCM Agreement and Article 10 of the AD Agreement that discipline the application of AD and CVD duties with respect to past entries would have been unnecessary. Furthermore, these two provisions also include exceptions that allow for the application of AD and CVD duties to entries made prior to the completion of proceedings.[80]

82. If Article X:2 had in fact prohibited all such applications to events or actions preceding publication, then Article 20 of the SCM Agreement and Article 10 of the AD Agreement would have had the effect of extending the scope of application of countervailing duties and antidumping duties – or in China's terms, permitted them to be "retroactive". Those provisions also would have been in conflict with Article X:2 and would have needed to have provided for an exception from that Article. The thought that through the AD and SCM Agreements Members agreed to remove existing restrictions on the scope of AD and CVD duties would be, to understate the matter, a surprise to most observers of the WTO system.

83. Finally, the United States would note the irony of China's over-reliance on the general, undefined concept of "retroactivity." If there is any legitimate issue of "retroactivity" in this dispute, it arises with respect to the result sought by China. The United States has been applying CVD laws to imports from China since at least 2006. China now seeks to have the Panel find that such application of U.S. law was impermissible, thereby erasing years of CVD proceedings. In essence, it is China – and not the United States – that seeks a retroactive change in U.S treatment of imports from China.

84. In summary, Article X:2 does not address the issue of retroactivity. Previous Appellate Body and panel proceedings have looked to an article imposing a substantive obligation in order to evaluate whether a measure may affect events or actions prior to the enactment of the measure.[81] Such an approach is consistent with the plain text of Article X:2 of the GATT 1994. China has not made an allegation that Section 1 of the *GPX* legislation has breached a substantive obligation of the covered agreements, and its claim under Article X:2 is baseless.

IV. CHINA'S CLAIMS UNDER ARTICLE X:3(B) OF THE GATT 1994 ARE UNSUPPORTED BY THE PLAIN TEXT OF THE OBLIGATION

85. During the first substantive Panel meeting, China made clear that it is not alleging that the *GPX V* opinion should have been implemented by Commerce. That is, China now explains that is not asking the Panel to undertake an evaluation of the consistency of one judicial proceeding to the requirements of Article X:3(b). The United States agrees that this is not a proper use of Article X:3(b).

[80] *See* Article 20.2 of the SCM Agreement; Article 10.2 of the AD Agreement.

[81] *See e.g., US – Underwear (AB)*; *EC – IT Products*.

86. As opposed to arguments regarding a supposed obligation to implement the *GPX V* opinion, China now appears to raise a broader and potentially new claim[82], seemingly asking the Panel to find that Article X:3(b) imposes restrictions on national legislatures to define the scope of duly enacted legislation if there is pending or on-going litigation that may interpret a related provision of law. Nothing in the text of the GATT 1994 supports China's argument.

87. Specifically, China argues that it is a breach of Article X:3(b) for a "national legislature [to] amend existing law and direct an agency's reviewing courts to apply the new law to events and circumstances that occurred before the new law was enacted, including in respect of cases that are pending on review."[83] Further, China states in its Response to Panel Questions that "[a]n intervention by the national legislature to change the applicable law retroactively and thereby direct the outcome of an appeal is not among the exceptions set forth in Article X:3(b)."[84] As such, China argues that such an "intervention" is inconsistent with Article X:3(b).

88. China's claim is without merit for the following reasons:

- Article X:3(b) does not impose any limitations on the ability of a legislative body to enact laws. That is, Article X:3(b) does not prohibit Congress from enacting legislation which is applied to a pending court decision.

- The United States has not acted inconsistently with Article X:3(b). The United States maintains an independent judiciary for the review and correction of administrative actions related to customs matters.

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

89. China's reformulated claim under Article X:3(b) is based exclusively on the actions of "the national legislature." Article X:3(b), however, does not speak to, and therefore does not impose, any limitations on the ability of a national legislature to enact legislation or how that legislation may be applied.

90. Article X:3(b) requires Members to establish and maintain a "judicial, arbitral or administrative tribunal[ ] or procedure[ ] for the purpose … of the prompt review and correction of administrative action relating to customs matters." No additional requirements are imposed for this review and correction mechanism aside from the following:

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[82] The United States also notes that, to the extent China intends its reformulated Article X:3(b) claim to extend beyond the specific measures identified in its Panel Request to the structure of the U.S. judicial system, such a claim would not be within the terms of reference in this dispute. If China had sought to raise some sort of claim that the U.S. judicial system was inconsistent with a WTO obligation, the Panel Request would have needed to identify the U.S. judicial system as a specific measure at issue. *See* DSU Art. 6.2 (providing that the panel request must "identify the specific measure at issue"; DSU Art. 7.1 (providing that under standard terms of reference, a panel is to examine the matter referred to the DSB in the panel request).

[83] *See e.g.,* China First Written Submission, para. 100.

[84] China Response to Panel Questions, para. 165.

- The tribunal or procedures must be "independent of the agencies entrusted with administrative enforcement"; and

- The "decisions" issued from the tribunal or procedures "shall be implemented by, and shall govern the practice of," the administering agency unless certain criteria are met.

91. Outside of these two requirements, Article X:3(b) does not dictate how a tribunal or procedures must review and correct an administrative action relating to customs matters. That is, Article X:3(b) does not prescribe what sources of law a tribunal may examine in making a decision on the merits of such proceedings. Nor does Article X:3(b) impose obligations on national legislatures when there is pending litigation on an issue of law under consideration by the legislature. In short, Article X:3(b) does not prohibit tribunals from taking account of legislative activities, and does not limit the ability of national legislatures to enact laws.

92. Despite the plain text of Article X:3(b), China is asking the Panel to decide the merits of the on-going *GPX* litigation by making a definitive conclusion on unsettled U.S. law (i.e., that the United States is prohibited, as a matter of U.S. law, from applying the U.S. CVD law to China). Further, China is asking the Panel to find that U.S. courts are prohibited from ever applying newly enacted laws to pending court cases, even though such application is a fundamental principle of U.S. law.[85]

93. China's support for its Article X:3(b) claims is based on a fundamental misunderstanding of the requirements of the obligation. Specifically, China argues that "there are two circumstances described in Article X:3(b) in which an agency is not required to implement, and be governed in its practice by, a decision of a reviewing court."[86] Outside of these two circumstances, China argues that all other actions related to a pending court proceeding is "exogenous"[87], and therefore, prohibited by Article X:3(b).

94. China's argument, however, is unsupported by the principles of treaty interpretation. As the Appellate Body has observed, these principles "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[88]

95. Applying those principles here, where the plain text of Article X:3(b) does not impose a limitation on national legislatures, China cannot impute one.

96. The United States also notes that such an interpretation would result in unreasonable and extreme outcomes. For example, a national legislature may mistakenly set a tariff rate for

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[85] *First Gibraltar Bank ESB v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) (USA-72). *See, e.g., U.S. v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (USA-113); *Ziffrin, Inc. v. U.S.*, 318 U.S. 73, 78 (2013) ("A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law.") (USA-114).

[86] China First Written Submission, para. 99.

[87] *Id.*, para. 100.

[88] *India – Patents (AB)*, para. 45. *See EC – Customs Matters (AB)*, para. 83.

certain imports at 100 percent as a typographical error, when the rate should have been 10 percent. When 100 percent tariffs are collected by the customs authority, importers immediately challenge the over collection in domestic courts. Under China's interpretation of Article X:3(b), the court could not apply a legislative clarification or change of the rate to its intended 10 percent rate because the case was pending in domestic courts. However, for those importers that waited until after the legislative clarification or change, the courts could apply the lower rate.

97. Article X:3(b) does not require such an outcome nor did it restrict Congress from enacting the *GPX* legislation. As such, China's claim under Article X:3(b) must fail.

B. The United States Has Acted Consistently with Article X:3(b) of the GATT 1994 By Establishing a Judicial Review Mechanism That Is Independent of Administering Agencies, and the Decisions of Which Are Implemented by and Govern the Practice of Such Agencies.

98. China argues that the actions of the U.S. Federal Circuit in following established U.S. law to apply the *GPX* legislation to a case that was pending before the court was a violation of Article X:3(b). Specifically China states that "[a]n intervention by the national legislature to change the applicable law retroactively and thereby direct the outcome of an appeal is not among the exceptions set forth in Article X:3(b)."[89] Such an assertion has ramifications far beyond the judicial proceeding raised by China in this dispute in its Panel Request (*GPX V*). China's claim now suggests that the legal system of Members with respect to the review of customs matters would be flawed if a Member's legislature could carry out their role and enact laws while litigation is pending. But nowhere have Members agreed to this, and we are doubtful WTO Members with their disparate legal systems could abide by such a radical intrusion into the relationship between their legislatures and judiciaries (or other review mechanisms).

99. Further, with respect to what Article X:3(b) does say, the United States has long established and maintained an appropriate structure for the review of customs matters that is independent from the administering authority. The final decisions from this review structure are duly implemented and govern the practice of the administering authority unless the exceptions set forth in Article X:3(b) are met.

100. The United States has explained that Article X:3(b) imposes an obligation regarding the structure or framework of a judicial review system. The Appellate Body in *EC – Customs Matters* similarly observed that:

> [W]e are of the view that Article X:3(b) of the GATT 1994 requires a WTO Member to establish and maintain independent mechanisms for prompt review and correction of administrative action in the area of customs administration.[90]

101. 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

[89] China Response to Panel Questions, para. 165.

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

customs matters. The *GPX* litigation amply demonstrates that independence, and the numerous implementing actions by Commerce in relation to antidumping and countervailing duty litigation amply demonstrates that final court decisions are implemented by and govern the practice of Commerce. As such, China has failed to prove that the United States has acted inconsistently with Article X:3(b).

V. CHINA HAS NOT ESTABLISHED EITHER A FACTUAL BASIS OR A LEGAL BASIS FOR ITS CLAIM UNDER ARTICLE 19.3 OF THE SCM AGREEMENT

102. As the United States explained in its first written submission, China has failed to make a *prima facie* case with respect to its claims under Article 19.3 of the SCM Agreement. As explained in Section A below, several months later and after additional oral and written submissions, China's failure to make a *prima facie* case persists. The express basis for China's as-applied claims under Article 19.3 of the SCM Agreement – that Commerce lacked legal authority to account for overlapping remedies in the challenged determinations – is unsubstantiated by any of the challenged determinations that China only recently provided to the Panel as evidence. In none of the challenged determinations did Commerce ever state that it lacked legal authority to address the potential problem of overlapping remedies. As a result, China retreats further into its unwarranted reliance on certain findings in the Appellate Body report in DS379 in an attempt to make its *prima facie* case regarding the specific facts of the proceedings at issue in this dispute.

103. As explained in Section B below, China continues to misinterpret Article 19.3 of the SCM Agreement in several ways. Consequently, in addition to the fact that there is no factual basis for China's claims, China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should therefore also be rejected. China has not addressed the U.S. interpretation of Article 19.3 and explained how this interpretation is incorrect under customary rules of interpretation of public international law.

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

104. As detailed at length in the U.S. First Written Submission, China, as the complaining party in this dispute, has the burden to make a *prima facie* case for the alleged breaches of the SCM Agreement by the challenged determinations.[91] Despite having multiple opportunities to do so, China has yet to satisfy that burden. Because of this failure to meet a fundamental prerequisite of WTO dispute settlement, China's challenges to these U.S. determinations cannot stand.

[91] *See, e.g., EC – Hormones (AB)*, para. 104; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134; *US – Gambling (AB)*, paras. 151-154, 281; *Japan – Agricultural Products II (AB)*, para. 129; *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

1. China Still Has Not Demonstrated How the Challenged Determinations Are Inconsistent With Article 19.3 of the SCM Agreement

105. China continues to rely on unsupported assertions and other shortcuts instead of meeting its burden to make its *prima facie* case.[92] Although this approach may be expedient for China, it is not sufficient to establish a *prima facie* case.

106. "A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence."[93] China must therefore present to the Panel evidence and legal arguments in order for the Panel to properly address its claim, because when a panel makes findings "on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU."[94] In other words, the complaining party must present the evidence and arguments to support each of its claims, and a panel should refrain from making a case for the complaining party.[95]

107. Despite the fact that China challenges dozens of Commerce determinations as inconsistent with the SCM Agreement, it still has not engaged in the necessary case-by-case factual analysis to support its claims. The shortcomings in China's approach are exacerbated by the fact that China is making "as applied" allegations. By definition, an "as applied" challenge involves an examination of the relevant facts at issue. Yet, here, China contends that it "does not have to demonstrate" its case[96] – despite challenging dozens of Commerce determinations on an "as applied" basis. It is for China, not the Panel, to identify with precision the basis for each of its "as applied" claims, and China has failed to do so.[97]

108. In addition to asking the Panel to make its case for it, China also repeatedly asks the United States to do the same thing. The United States emphasizes that China, not the United States, is the complaining party in this case. Yet China acts as if the United States has the burden of making China's case for it.

109. China, for instance, asserts that the United States "has provided no basis at all for the Panel to reach a different factual finding than the uncontested factual finding of the panel in DS379."[98] China fails to recognize that it, *as the complaining party*, has the obligation to demonstrate that the evidence underlying each of the determinations at issue here dictates same factual findings for these determinations as the panel made for the determinations in DS379, which were, in turn, the predicate for the Appellate Body's legal analysis in DS379

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[92] U.S. First Oral Statement, para. 42.

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

[94] *US – Gambling (AB)*, para. 281. U.S. First Oral Statement, para. 44.

[95] U.S. First Written Submission, para. 149.

[96] China Response to Panel Questions Following First Panel Meeting, para. 61.

[97] *See Japan – Agricultural Products II (AB)*, para. 129.

[98] China Response to Panel Questions Following First Panel Meeting, para. 169

(notwithstanding the separate question of whether the Panel must or should follow the approach of the Appellate Body report in DS379). By not discussing the relevant evidence from the challenged determinations in any meaningful detail, China has failed to satisfy that burden.

110. As the panel in *US – Upland Cotton* observed, "We see no basis in the text of the DSU as it currently stands for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute."[99]

111. China also has posed a series of questions that it expects the United States to answer for it.[100] In posing these questions, China ignores the fact that it, and not the United States, has the burden of addressing these issues and presenting sufficient evidence and argument to satisfy its burden of making a *prima facie* case. The rhetorical device of posing questions to a responding party does not change the burden on the complaining party to make out its case.

112. China has engaged in only scant discussion of the facts at issue in the challenged determinations. An examination of the facts would reveal not only that all interested parties had a sufficient opportunity to provide evidence supporting their claims regarding overlapping remedies, but also that Commerce addressed all arguments raised by interested parties in full. Because interested parties failed to provide any positive evidence to substantiate their claims of overlapping remedies, Commerce did not make any adjustment or offset in the challenged determinations.[101] This may help explain why China has chosen to avoid discussion of the actual facts of the challenged determinations.

2. China Has Not Established that Commerce Lacked Legal Authority to Address Overlapping Remedies

113. Instead of attempting to make its case through a careful examination and explication of each challenged determination, China resorted to a shortcut. China has argued that it need not do more to establish a breach under Article 19.3 of the SCM Agreement than to point to Commerce's purported lack of legal authority under U.S. law to account for the potential of overlapping remedies when countervailing duties are imposed concurrently with antidumping duties calculated under the alternative methodology for imports from NME countries. As discussed below, China has not shown any evidentiary basis for its assertion that Commerce lacks legal authority to account for any alleged double counting.

114. This notion is the centerpiece of China's entire argument. In its first written submission, for example, China identified the problem as follows: "It is now evident that the USDOC failed to investigate and avoid double remedies in these investigations and reviews because it had no authority under U.S. law to do so."[102] In its opening statement at the first Panel meeting, China

[99] *US-Upland Cotton (Panel)*, para. 7.962.

[100] *See* China First Panel Meeting Opening Statement, para. 72; China Response to Panel Questions Following First Panel Meeting, para. 188.

[101] *See* U.S. Response to Panel Questions Following First Panel Meeting, paras. 200-206.

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

characterized as an "undisputed fact" the assertion that "Commerce had *no legal authority* to do *anything* to address the problem of double remedies in these investigations."[103] In its written responses to questions following the first Panel meeting, China again asserted: "When the issue of double remedies was raised in a countervailing duty investigation, the USDOC consistently took the position that it lacked authority under the Tariff Act to identify and avoid double remedies in this context."[104]

115. China presents no evidence in support of these sweeping assertions. In particular, as discussed in subsection (i) below, China has not identified any statement by Commerce in any of the challenged determinations in which Commerce stated that it lacked legal authority under U.S. law to address the potential of overlapping remedies arising from concurrent imposition of countervailing duties and antidumping duties upon imports from NME countries. Indeed, China cannot identify such a statement because no such statement exists: Commerce has never stated that it lacked the authority to address the issue of overlapping remedies. In addition, as discussed in subsection (ii) below, China's reliance on certain alleged findings *in US - Anti-Dumping and Countervailing Duties (China)* is misplaced. Not only can China not simply rely on findings in another dispute, but the alleged findings on a lack of authority are not even supported by the record of that dispute. As China has identified no other basis to support its assertion that Commerce lacks legal authority, China has failed to establish this fact, and China's claim fails for this basis as well.

i. The Record Contains No Factual Support for China's Assertions

116. Exhibits USA-99 and USA-100 demonstrate China's failure to establish that Commerce lacked authority to address overlapping remedies. The United States has explained that in these determinations by Commerce it never stated that it lacked authority under U.S. law to address the potential of overlapping remedies arising from the concurrent application of countervailing and antidumping duties to imports from NME countries. If that were the case, Commerce would have simply responded to China and Chinese respondents by invoking that lack of authority. Instead, Commerce engaged in a full response to the evidence and arguments relating to allegedly overlapping remedies that China and Chinese respondents presented.[105] While China introduced submitted Exhibits CHI-27 through CHI-78 with its answers to questions, China does not point to or discuss the relevant portions of these determinations (with two exceptions, discussed below) to attempt to establish that Commerce stated it lacked legal authority. Thus, these bare exhibits do not satisfy China's burden to support its assertions.

117. The minimal evidence China cites does not substantiate its claim that Commerce lacked authority to account for the potential of overlapping remedies.[106] China, for instance, cites a

[103] China First Panel Meeting Opening Statement, para. 68 (original emphasis).

[104] China Response to Panel Questions Following First Panel Meeting, para. 183 (citation omitted).

[105] *See, e.g.*, *Certain Kitchen Appliance Shelving and Racks (AD)*, pp. 8-17 (USA-99).

[106] *See* China Response to Panel Questions Following First Panel Meeting, paras. 174-75, ft. 103.

statement from the final countervailing duty determination of kitchen appliance and shelving racks from China, at Exhibit USA-100, in which Commerce indicated that China and the Chinese respondents "have not cited to any statutory authority that would allow us to terminate this CVD investigation to avoid the alleged double remedy or to make an adjustment to the CVD calculations to prevent an incidence of an alleged double remedy."[107] China misconstrues this statement.

118. Contrary to China's assertions, that statement does not represent any conclusion with respect to Commerce's legal authority. First, the context of this statement is that it involved a discussion of whether any such adjustment would be made on the antidumping side or CVD side of concurrent proceedings. In this context, Commerce was explaining its view that the most appropriate mechanism would be through the methodologies used in the antidumping proceeding. Second, even with respect to the CVD side, Commerce's statement is factual – the respondent had not "cited to any statutory authority" regarding CVD proceedings – but does not represent a legal conclusion on the behalf of the authority. And it is notable that this statement was made in response to the argument of China and the Chinese respondents that Commerce was *compelled* to terminate the countervailing duty investigation. Commerce reasonably concluded there was no express legal authority that would have compelled it to do so.

119. In particular, Commerce went on to address China's concerns in the companion antidumping duty investigation of kitchen appliance and shelving racks from China.[108] Under Commerce's regulations, interested parties had the opportunity to submit evidence relevant to the question of overlapping remedies[109] including, but not limited to, data about the relationship between input costs and prices that would only be in respondents' possession. However, the Chinese government and respondents failed to provide such factual information. Instead, China and the Chinese respondents relied upon theoretical economic arguments that concurrent application of countervailing duties and antidumping duties calculated pursuant to the alternative NME methodology automatically resulted in a 100 percent overlap of remedies in every instance. Commerce considered these arguments, and responded in full.[110]

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[107] *Certain Kitchen Appliance Shelving and Racks (CVD)*, p. 36 (USA-100). Commerce made a similar statement in the countervailing duty determinations for lightweight thermal paper (CHI-29), circular welded carbon quality steel line pipe (CHI-32), and multilayered wood flooring (CHI-48). See, e.g., CHI-29, p. 70; CHI-32, p. 63; CHI-48, p. 35.

[108] It is logical that any adjustment to avoid an overlapping remedy would be best done in the context of an antidumping duty proceeding. In determining how best to address the issue of overlapping remedies, it must be remembered that countervailing duties are intended to offset injurious subsidization by governments whereas antidumping duties are intended to offset injurious pricing by individual companies. Furthermore, the operating premise behind the theory of overlapping remedies is that antidumping duties calculated pursuant to the alternative NME methodology have the potential to capture subsidization to some degree, in part because of the presumed effect of subsidies on prices. Thus, while it might be conceivable to envision subsidies affecting prices, it is not conceivable to envision prices affecting subsidies. For those reasons, the more fulsome discussion of the overlapping remedies issue by Commerce has tended to take place in the context of antidumping duty proceedings.

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

[110] *See, e.g., Certain Kitchen Appliance Shelving and Racks (AD)*, pp. 12-17 (USA-99).

120. Notably, Commerce never stated in the antidumping duty determination for kitchen appliance shelving and racks from China that it lacked legal authority to address the potential of overlapping remedies. In fact, Commerce acknowledged that "the statute is silent with respect to this issue" and that the matter was likely left to "the Department's discretion."[111] Commerce then proceeded to address the arguments of China and Chinese respondents before concluding that they failed to submit "any evidence to support their claims."[112]

ii. China's Reliance on the Appellate Body report in DS379 as Evidence is Misguided

121. China also attempts to address its evidentiary deficit by citing to an excerpt from the Appellate Body report in DS379. This effort is unavailing. First, the Appellate Body statement only relates to the CVD side of concurrent AD and CVD proceedings, and in fact was not supported by the record in DS379. Further, a statement in a report in a different dispute does not constitute evidence with respect to the proceedings at issue here.

122. China relies on the Appellate Body's statement that "{Commerce} had no statutory authority to make adjustments in the context of countervailing duty investigations."[113] China's reliance on the Appellate Body statement is misplaced. The Appellate Body assumes that no adjustments means no statutory authority and therefore the investigating authority cannot conclude the duty is in the appropriate amounts. But neither the panel nor the Appellate Body in DS379addressed whether Commerce had authority through other means to account for potentially overlapping trade remedies, for example, by making an adjustment to the dumping margin in the separate antidumping investigation. As noted above, an appropriate mechanism to make an adjustment would be through the methodologies used in an antidumping proceeding. Logically, if there is a concern with overlapping remedies but one of those remedies is adjusted, there is no basis to assume that a concern is raised.

123. The Appellate Body report in DS379 did not cite any findings in the panel report to support the factual statements on which China relies. Instead, the panel report notes that, in the context of the anti-dumping investigations, the United States had rejected China's suggestion that Commerce had made any broad statement as to whether it lacked legal authority.[114] Indeed, when the DSB met to consider the DS379 reports, the United States noted to the DSB that this particular Appellate Body statement was unsupported by the record in the dispute.[115]

124. In fact, the panel in DS379 was presented with an "as such" claim, defined by China as the "failure of the United States to provide sufficient legal authority for Commerce to avoid the

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[111] *Id.* at 8.

[112] *Id.* at 10.

[113] *See* China Response to Panel Questions Following First Panel Meeting, para. 174 (quoting *US – Anti-Dumping and Countervailing Duties (AB)*, para. 604).

[114] *US – Anti-Dumping and Countervailing Duties (Panel)*, para. 14.16.

[115] Minutes of the March 25, 2011 Meeting of the WTO Dispute Settlement Body, para. 101, WT/DSB/M/294. (USA- 107).

imposition of double remedies for the same alleged acts of subsidization when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product."[116] The panel never reached the merits of that claim, however, upon concluding that China's "as such" claim was outside of the panel's terms of reference, because China failed to identify it in its request for consultations.[117] China did not appeal that aspect of the panel report in DS379. For that reason, China is categorically wrong to suggest that the question of Commerce's legal authority was resolved by the Appellate Body in DS379.

125. Also, instead of making its own case, China is attempting to argue that the Panel should automatically apply findings from a previous dispute. The Appellate Body in DS379 stated that "{Commerce} had no statutory authority to make adjustments in the context of countervailing duty investigation," but China makes no effort in this dispute to prove that Commerce did not in fact have statutory authority. China thus makes the same mistake as the complainant in *US-Upland Cotton.* There, as noted above, the panel found that: "We see no basis in the text of the DSU as it currently stands for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute."[118]

3. Conclusion

126. China has steadfastly avoided any meaningful discussion of the relevant facts of the determinations that China claims are inconsistent with U.S. obligations under Article 19.3 of the SCM Agreement. Rather than present evidence from each of the challenged determinations necessary to support its claims under Article 19.3 of the SCM Agreement, China continues to make conclusory and generalized allegations as to what Commerce found in those determinations and cites almost no evidence from those determinations.[119]

127. In sum, China rests its as-applied claims on the challenged determinations under Article 19.3 of the SCM Agreement on Commerce's purported lack of legal authority under U.S. law to account for the potential of overlapping remedies when countervailing duties are imposed concurrently with antidumping duties calculated under the alternative methodology for imports from NME countries. Despite its sweeping assertions, China has yet to establish as an evidentiary matter that Commerce lacked such authority. China's theory of the case 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.

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[116] *US – Anti-Dumping and Countervailing Duties (Panel)*, para. 14.11

[117] *See id.*, paras. 14.36-14.42

[118] *US-Upland Cotton*, para. 7.962. China's efforts in its answers to panel questions to distinguish its approach in this dispute from *US-Upland Cotton* are unavailing. China Response to Panel Questions Following First Panel Meeting, paras. 190-193.

[119] U.S. First Written Submission, para. 151. U.S. First Oral Statement, para. 41.

B. China Continues to Misinterpret Article 19.3 of the SCM Agreement

128. Article 19.3 of the SCM Agreement provides that, when imposing a countervailing duty, "such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury." China continues to misinterpret this provision in several ways.

129. China continues to rely on the Appellate Body report in DS379, which is unpersuasive. As detailed extensively by the United States in its written responses to questions following the first Panel meeting,[120] a panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. The United States will not repeat those arguments here except to note that, although panel and Appellate Body reports can be taken into account to the extent that the reasoning is persuasive and applicable to the facts and circumstances before a subsequent panel, the rights and obligations of the Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements.[121] As explained above, China has yet to establish that the reasoning of the Appellate Body report is persuasive or that its reading of Article 19.3 makes sense under customary rules of interpretation. Nor has China established that the Appellate Body's interpretation would in fact be applicable to the facts in this dispute.

130. The Appellate Body's reasoning in DS379 is flawed.[122] Nowhere does Article 19.3 of the SCM Agreement contain an obligation that would require an administering authority to engage in any sort of investigative function. On its face, and as reflected in its title, Article 19 of the SCM Agreement is concerned with the function involving 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 all cases. 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.[123]

131. The Appellate Body report in DS379 also fails to recognize that Article 19.3 of the SCM Agreement is first and foremost a non-discrimination provision.[124] 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.[125] The Appellate Body's interpretation goes far beyond the principles of

[120] *See* U.S. Response to Panel Questions Following First Panel Meeting, paras. 64-72.

[121] U.S. First Written Submission, para. 189-191.

[122] U.S. First Written Submission, paras. 193-201. *See, e.g.*, Cartland, Michael, Depayre, Gérard &Woznowski, Jan. '*Is Something Going Wrong in the WTO Dispute Settlement?*, JOURNAL OF WORLD TRADE 46, No. 5 (2012): 979–1016 (USA-91).

[123] *See* U.S. Response to Panel Questions Following First Panel Meeting, paras. 79-82.

[124] *See*; U.S. Response to Panel Questions Following First Panel Meeting, paras. 74-78.

[125] *See* U.S. First Written Submission, paras. 163-182.

non-discrimination and, as already noted, imposes an investigative function not reflected in that Article. China has done nothing to demonstrate that this reading is flawed in any respect.

1. China Errs in Interpreting Article 19.3 of the SCM Agreement

132. China errs when it argues that investigations are subject to Article 19.3. China ignores the text of the SCM Agreement in conflating investigations and reviews for purposes of assessing its claim under Article 19.3. [126] "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.[127]

133. Article 19.3 addresses the levying of duties and does not set out the issues to be investigated as part of an investigating authority's determination whether to impose a countervailing duty. The issues to be investigated are set out elsewhere. Specifically, the SCM Agreement calls for "an investigation to determine the existence, amount, degree and effect of any alleged subsidy" (Article 11.1). In turn, the existence and amount of a subsidy are to be investigated and determined by reference principally to the provisions of Articles 1.1 and 14.

134. It is telling that in China's response to the Panel's question on the relevance of the difference between investigations and reviews for Article 19.3 that China's answer subtly elides the two. In the first paragraph, China says that Article 19.3 applies in any instance in which a countervailing duty is imposed, "which includes both original investigations and administrative reviews."[128] This is incorrect. In the U.S. system, the investigation results in a determination whether to impose a definitive countervailing duty (the circumstance set out in the introductory clause of Article 19.1). An administrative review is a proceeding to determine retrospectively the level of duty to be applied. It is this proceeding that results in levying of duties that is the subject of Article 19.3.

135. In the second paragraph, China then addresses administrative reviews explains that an administrative review establishes the amount to be collected for the period under review and concludes: "Accordingly, in both an original investigation and an administrative review, the USDOC has an affirmative obligation under Article 19.3 … to ensure that it is imposing countervailing duties 'in the appropriate amount.'"[129] But there is nothing "according" between these two sentences. The first sentence correctly states that an administrative review "establishes the final amount of countervailing duties to be collected", the subject of the obligation in Article 19.3. But China has not established that an original investigation "establishes the final amount of countervailing duties to be collected" because in the U.S. system, it does not. Thus, had China accurately addressed the Panel's question and the differences between these proceedings, it

[126] *See* China Response to Panel Questions Following First Panel Meeting, paras. 46-47.

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

[128] *See* China Response to Panel Questions Following First Panel Meeting, para. 46.

[129] *See* China Response to Panel Questions Following First Panel Meeting, para. 47.

would have conceded that any purported obligation to investigate the appropriate amounts of duties to be levied would apply in the context of administrative reviews (in which duties to be levied are at issue) and not in the context of investigations (in which duties to be levied are not at issue). For this reason, all of China's claims in respect of countervailing duty investigations fail.

136. China commits a similar error when it argues that preliminary determinations are subject to Article 19.3.[130] Based on the definition of "levy" contained in footnote 51 of the SCM Agreement, there can be no countervailing duty order, and thus no collection or imposition of duties, without final determinations of subsidization by Commerce and injury by the ITC. Therefore, a preliminary determination cannot be found inconsistent with Article 19.3 as a preliminary determination does not "levy" a countervailing duty.[131]

C. The United States Presents New Arguments Not Considered by the Appellate Body

137. As noted in the first written submission and the U.S. answers to panel questions, the Appellate Body did not benefit from the full argumentation of the parties before reaching its conclusions in DS379.[132]

138. For example, the Appellate Body misconstrued Article 19.3 in articulating a duty for an authority to engage in an investigative function. To find a duty to investigate residing in Article 19.3, the Appellate Body in DS379 states that it relied on its findings in *US – Countervailing Measures on Certain EC Products* to draw a parallel between GATT 1994 Article VI:3, and Articles 19.3 and 19.4 of the SCM Agreement on the other hand.[133] But as noted, no parallel exists between Article VI:3 and Article 19.3. Article VI:3 presupposes that the bounty or subsidy has been "determined,", and may be understood to require a determination before levying of a duty. Article 19.3 does not contain any equivalent language.[134]

139. The Appellate Body also misconstrued the findings in *US – Countervailing Measures on Certain EC Products*. There, the Appellate Body did not analyze Article VI:3 in isolation, as it does in DS379. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body analyzed Article VI:3 in conjunction with a host of other articles, including Articles 1.1, 10, 19.1, 19.4, 21.1 of the SCM Agreement, to find a duty on investigating authorities to ascertain the precise amount of a subsidy under Article VI:3.[135]

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[130] *See* China Response to Panel Questions Following First Panel Meeting, paras. 194-195.

[131] *See* U.S. Response to Panel Questions Following First Panel Meeting, para. 211.

[132] *See* U.S. First Written Submission, para. 192; U.S. Response to Panel Questions Following First Panel Meeting, paras. 46-48.

[133] *US – Anti-Dumping and Countervailing Duties (AB)*, para. 601.

[134] U.S. Answers to Panel Questions, para. 81.

[135] *US – Countervailing Measures on Certain EC Products*, para. 139. *US – Countervailing Measures on Certain EC Products*, para. 139. ("In considering these arguments, we begin by recalling that, under Article 1.1 of the SCM Agreement, a 'subsidy' is 'deemed to exist' only if a 'financial contribution' confers a 'benefit'. Also, under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain products under investigation. In furtherance of this obligation, Article 10 of the SCM Agreement provides that Members must

140. In particular, the Appellate Body interpreted Article VI:3 using Article 19.4 of the SCM agreement as context. Article VI:3 contains language similar to Article19.4 of the SCM Agreement, in that Article VI:3 requires that CVDs imposed upon imported merchandise "not exceed the estimated bounty or subsidy determined to have been granted." Article 19.4 requires that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist"." Each article implies a process that leads to a determination or finding.

141. By contrast, the Appellate Body in DS379 viewed the *US – Countervailing Measures on Certain EC Products* analysis without any context, and drew false parallels as a result. Nothing in Article 19.3 requires an investigating authority to determine or investigate the amount of the subsidy before levying a duty. These arguments were not presented in DS379.

1. The Appellate Body's Reasoning in DS379 Was Not Based on the Arguments of the Parties

142. The reasoning of the Appellate Body strayed far afield from the arguments presented by the parties in DS379. China urges the Panel to review the summaries of the parties' arguments in DS379 and contends that it "advocated *precisely* the interpretation of Article 19.3 of the SCM Agreement that the Appellate Body adopted."[136] Despite China's reliance on italics, a review of the Appellate Body report shows otherwise.

143. The path the Appellate Body followed to reach its conclusions departed significantly from the arguments made by the parties. First, in DS379, Article 19.4 of the SCM Agreement was the primary focus of the parties in their submissions before the Appellate Body.[137] To the extent Article 19.3 was addressed, it was in response to the DS379 panel's reasoning, which relied in large part on the panel report in *EC – Salmon (Norway)* to conclude that countervailing duties are collected "in the appropriate amounts insofar as the amount collected does not exceed the amount of the subsidy found to exist."[138] The arguments before the Appellate Body in

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'ensure' that duties levied for the purpose of offsetting a subsidy are imposed only 'in accordance with' the provisions of Article VI:3 of the GATT 1994 and the SCM Agreement. Moreover, Article 19.4 of the SCM Agreement, consistent with the language of Article VI:3 of the GATT 1994, requires that '[*n]o countervailing duty* shall be levied on any imported product in excess of the amount of the subsidy *found to exist'*. (emphasis added) Finally, Article 21.1 of the SCM Agreement provides that '[a] countervailing duty shall remain in force *only as long as and to the extent necessary* to counteract subsidization which is causing injury.' (emphasis added) In sum, these provisions set out the obligation of Members to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority. These obligations apply to original investigations as well as to administrative and sunset reviews covered under Article 21 of the SCM Agreement.").

[136] China First Panel Meeting Opening Statement, para. 66 (original emphasis) (citing*US – Anti-Dumping and Countervailing Duties (AB)*, paras. 122-123, 217-19.

[137] *Compare US – Anti-Dumping and Countervailing Duties (AB)*, paras. 108-121, 211-16, *with id*. paras. 122-123, 217-19.

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

DS379 concerning Article 19.3 primarily related to the panel's interpretation in *EC – Salmon (Norway)* of the phrase "appropriate amounts."[139]

144. Although the Appellate Body in DS379 did address *EC – Salmon (Norway)* in its report, its analysis and reasoning went far beyond what was argued by the parties. For instance, the Appellate Body relied on Article 19.2 as context to interpret Article 19.3 despite the fact that no party in that dispute made such an argument.[140] It did the same in relying upon Articles 21.1 and 32.1 of the SCM Agreement as context, although no parties raised these arguments before the panel or the Appellate Body.[141]

145. The textual analysis and other explanations put forward by the United States in this dispute – including that Article 19.3 is first and foremost a non-discrimination provision concerned with the limited function of imposing and collecting countervailing duties that in no way imparts an obligation to investigate – were not considered by the Appellate Body in DS379.[142] In fact, this dispute represents the first opportunity the United States has had to address rationales first introduced by the Appellate Body in DS379, and not argued by China, to support its flawed interpretation of Article 19.3 of the SCM Agreement.

D. Conclusion

146. As explained, Article 19.3 of the SCM Agreement does not establish any requirement that administering authorities investigate and avoid overlapping remedies. Article 19.3 instead obliges Members to impose countervailing duties on a non-discriminatory basis, and in "the appropriate amounts in each case" under the rules set forth in Article 19.3 and other provisions of the SCM Agreement, to imports from all sources found to be subsidized and causing injury. Once Article 19.3 of the SCM Agreement is properly understood in that way, the Appellate Body's interpretation of that provision is no longer persuasive and should not be followed in these proceedings.

147. 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 under the rules of the SCM Agreement. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should be rejected and the United States respectfully requests the Panel to find that the United States did not act inconsistently with Article 19.3 in the challenged determinations.

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[139] *US – Anti-Dumping and Countervailing Duties (AB)*, paras. 122-123, 217-219.

[140] *See, e.g., id.*, paras. 557-58.

[141] *See, e.g., id.*, paras. 558, 561

[142] *See* U.S. Response to Panel Questions Following First Panel Meeting, paras. 46-48.

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

148. As previously noted by the United States, the sole basis for China's claims under Articles 10 and 32.1 of the SCM Agreement derives from China's contention that the United States acted inconsistently with Article 19.3 of the SCM Agreement.[143] Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement must also fail.

VII. CONCLUSION

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

[143] *See id.*, para. 203.