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

REPORT OF THE PANEL

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WTO AND GATT CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R / WT/DS426/R / and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
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, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Seal Products	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R and Add.1, circulated to WTO Members 25 November 2013 [adoption/appeal pending]
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Selected 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, DSR 2006:IX, p. 3915
EEC – Apples (US)	GATT Panel Report, *European Economic Community – Restrictions on Imports of Apples – Complaint by the United States*, L/6513, adopted 22 June 1989, BISD 36S, p. 135
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9

Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping and Countervailing Duties (China)	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, DSR 2011:VI, p. 3143
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, p. 10225
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, p. 2581
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
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, DSR 1997:I, p. 31

US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD	Anti-dumping
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ATC	Agreement on Textiles and Clothing
CFS Paper	US Court of International Trade, Government of the People's Republic of China v. United States, 483 F. Supp. 2d 1274 (CIT 2007)
CAFC	United States Court of Appeals for the Federal Circuit
CIT	United States Court of International Trade
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
GAO	United States Government Accountability Office
Georgetown Steel	US Court of Appeals for the Federal Circuit, Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1310 (Fed. Cir. 1986)
GPX I	US Court of International Trade, GPX Int'l Tire Corp. v. United States, 587 F. Supp. 2d 1278 (CIT 2008)
GPX II	US Court of International Trade, GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231 (CIT Sept. 18, 2009)
GPX III	US Court of International Trade, GPX Int'l Tire Corp. v. United States, 715 F. Supp. 2d 1337 (CIT Aug. 4, 2010)
GPX IV	US Court of International Trade, GPX Int'l Tire Corp. v. United States, slip op. 2010-112 (CIT Oct. 1, 2010)
GPX V	US Court of Appeals for the Federal Circuit, GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011)
GPX VI	US Court of International Trade, GPX Int'l Tire Corp. v. United States, 678 F.3d 1308 (Fed. Cir. 2012)
GPX VII	US Court of International Trade, GPX Int'l Tire Corp. v. United States, slip op. 13-2, p. 12 (CIT Jan. 7, 2013)
NME	Non-market economy
PL 112-99	US Public Law 112-99 "An act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes", 126 Sta. 265 (Mar. 13, 2012)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
The *Shorter Oxford Dictionary* (1993)	New Shorter Oxford English Dictionary, 1993 (4th edition), Volumes I and II
The *Shorter Oxford Dictionary* (2002)	New Shorter Oxford English Dictionary, 2002 (5th edition), Volumes I and II
USCBP	United States Customs and Border Protection
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the WTO

1 INTRODUCTION

1.1 Complaint by China

1.1. On 17 September 2012, China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 5 November 2012. These failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 19 November 2012, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU with standard terms of reference.[2] At its meeting on 17 December 2012, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China in document WT/DS449/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS449/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 21 February 2013, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 4 March 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr José Graça Lima
Members:	Mr Donald Greenfield
	Mr Arie Reich

1.6. Australia, Canada, the European Union, India, Japan, Russian Federation, Turkey, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] on 14 March 2013 and its timetable on 28 March 2013.

1.8. The Panel held a first substantive meeting with the parties on 2-3 July 2013. A session with the third parties took place on 3 July 2013. The Panel held a second substantive meeting with the parties on 27-28 August 2013. On 30 September 2013, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 15 November 2013. The Panel issued its Final Report to the parties on 20 December 2013.

[1] China's request for consultations, WT/DS449/1.
[2] China's request for the establishment of a panel, WT/DS449/2.
[3] WT/DSB/M/327.
[4] WT/DS449/3.
[5] See the Panel's Working Procedures in Annex A-1.

1.3.2 Preliminary ruling under Article 6.2 of the DSU

1.9. On 15 March 2013, the United States submitted to the Panel a request for a preliminary ruling with respect to the consistency of certain aspects of China's request for the establishment of a panel (panel request) with Article 6.2 of the DSU. The United States requested that the Panel issue a preliminary ruling before the filing of the first written submissions of the parties.[6] In contrast, China argued that the Panel should rule on the preliminary ruling request at a later stage of the proceedings.[7] Ultimately, the Panel decided to issue a preliminary ruling prior to the filing of the first written submissions of the parties. The Panel provided the United States with an opportunity to submit written comments on China's panel request. As neither party requested a hearing on the preliminary ruling issue, the parties were given an opportunity to submit further written comments to respond to each other's comments on the United States' request. The Panel invited the third parties to submit any written comments they might have in response to the views expressed by the parties.[8] The Panel also posed several written questions to the parties and third parties, and gave China and the United States the opportunity to submit comments on the responses received.[9]

1.10. On 7 May 2013, the Panel issued its preliminary ruling to the parties and provided a copy to the third parties, with an indication that the ruling would become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties at the interim review stage. After consulting the parties, the Panel requested the Chairperson of the DSB to circulate the ruling to the WTO membership. The ruling was circulated on 7 June 2013 as document WT/DS449/4.

2 FACTUAL ASPECTS

2.1. China identified the following measures in its panel request:

a. Sections 1 and 2 of *United States Public Law 112-99*, "*An act to apply the countervailing duty provisions of the US Tariff Act of 1930 to nonmarket economy countries, and for other purposes*" (P.L. 112-99);

b. any and all determinations or actions by the United States Department of Commerce (USDOC), the United States International Trade Commission (USITC), or United States Customs and Border Protection (USCBP) relating to the imposition or collection of countervailing duties on products imported into the territory of the United States from the People's Republic of China, where such determinations or actions were made or performed in connection with countervailing duty investigations or reviews initiated between 20 November 2006 and 13 March 2012;

c. the anti-dumping measures listed in Appendix B of its panel request, including the definitive anti-dumping duties imposed pursuant to their authority, as well as the combined effect of these anti-dumping measures and the parallel countervailing duty measures identified in Appendix A of its panel request; and

d. the failure of the United States to provide the USDOC with legal authority to identify and avoid the double remedies that are likely to result when the USDOC applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the US non-market economy methodology, in respect of investigations or periodic reviews initiated between 20 November 2006 and 13 March 2012.

[6] The United States' letter to the Panel dated 15 March 2013.
[7] China's letter to the Panel dated 19 March 2013.
[8] The European Union submitted comments on the United States' preliminary ruling request on 11 April 2013.
[9] The parties, Australia, the European Union, and Japan submitted responses to the Panel on 19 April 2013. Furthermore, on 24 April 2013 the parties provided comments on each other's responses, and on those of the third parties.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China identified a number of claims in its panel request:

a. Section 1 of P.L. 112-99, including the new Section 701(f) of the United States Tariff Act which it establishes, is inconsistent as such with Articles X:1, X:2[10], X:3(a), and X:3(b) of the GATT 1994;

b. Section 2 of P.L. 112-99 amending Section 777A of the United States Tariff Act is inconsistent as such with Article X:3(a) of the GATT 1994;

c. the United States lacks legal authority to identify and avoid double remedies in respect of certain investigations and reviews initiated between 20 November 2006 and 13 March 2012, and is thereby prevented in all such investigations and reviews, from ensuring that the imposition of countervailing duties is consistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994, and from ensuring that the imposition of anti-dumping duties in the associated anti-dumping investigations and reviews is consistent with Articles 9 and 11 of the AD Agreement and Article VI of the GATT 1994;

d. the United States failed to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012; that the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994; and that the associated anti-dumping measures in each such instance, including any anti-dumping duties collected pursuant to their authority, are inconsistent with Articles 9 and 11 of the AD Agreement and Article VI of the GATT 1994.

3.2. China subsequently indicated that it had decided to narrow the scope of its claims in this dispute.[11] Accordingly, as elaborated in the Panel's preliminary ruling and in paragraphs 7.6-7.8, China requests the Panel to find that:

a. Section 1 of P.L. 112-99, including the new Section 701(f) of the United States Tariff Act which it establishes, is inconsistent as such with Articles X:1, X:2[12], and X:3(b) of the GATT 1994;

b. the United States failed to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012; and that the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 19, and 32 of the SCM Agreement.

3.3. China further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

3.4. The United States requests that the Panel reject all of China's claims in this dispute.

[10] China further considers that all determinations or actions by the US authorities between 20 November 2006 and 13 March 2012 relating to the imposition or collection of countervailing duties on Chinese products, as described in the second paragraph under "Measures", in its panel request, including the ongoing conduct of maintaining and enforcing countervailing duty measures resulting from investigations initiated during this period, are inconsistent with Article X of the GATT 1994. In China's view, this is because, *inter alia,* these determinations and actions enforce a measure of general application prior to its official publication. (China's request for the establishment of a panel, pp. 1-2).

[11] In its letter to the Panel of 25 March 2013, China indicated that it would not pursue its claims in Parts C and D of its panel request, except for those under Articles 10, 19, and 32 of the SCM Agreement, as set forth in Part D. Moreover, in response to Panel question No. 39, China indicated that it is not pursuing its claims under Article X:3(a) of the GATT 1994.

[12] See fn. 10.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, the European Union, and Japan are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4). Canada did not make an oral statement. India, Russian Federation, Turkey, and Viet Nam did not submit written or oral statements to the Panel.

6 INTERIM REVIEW

6.1. On 15 November 2013, the Panel submitted its Interim Report to the parties. On 29 November 2013, China and the United States each submitted written requests for the review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 13 December 2013, both parties submitted comments on each other's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. References to sections and paragraph numbers in this section relate to the Interim Report, except as otherwise noted.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties.

6.4. In order to facilitate understanding of the interim review comments and changes made, the following section is structured to follow the organization of the findings section of this Report (Section 7), with the review requests of the parties, and their comments, addressed sequentially, according to the paragraph numbers that attracted comments.

6.1 Preliminary Ruling under Article 6.2 of the DSU

6.5. Regarding paragraph 7.5 of the findings section, the United States considers that the findings contained in a preliminary ruling should be set out as a part of a panel's report, rather than being incorporated by reference. The United States submits that this would be more consistent with the process for drafting and review of a panel's findings set out in Article 15 of the DSU, and would also be of considerable benefit to Members and the public as they would not need to locate and download an additional document to be able to review all of the Panel's findings.

6.6. The Panel recalls that, following consultation with the parties, we publicly circulated an 18-page preliminary ruling to the DSB as document WT/DS449/4. Paragraph 4.3 of that preliminary ruling clarified that "[t]his preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties at the interim review stage". We have reiterated in paragraph 7.5 of this Report that our preliminary ruling "forms an integral part of the present findings". Also, neither party provided comments on the substance of our preliminary ruling at the interim review stage. These considerations lead us to conclude that it is unnecessary to reproduce our preliminary ruling in this Report. Furthermore, the United States has not explained how Members or others who are able to locate and download this Report would have any difficulty in locating and downloading our preliminary ruling contained in document WT/DS449/4. Other panels have adopted the economical technique of incorporating previously-circulated preliminary rulings by reference into their reports[13], and at least one previous panel expressly declined a request to reproduce such a ruling

[13] Panel Reports, *EC – Seal Products*, para. 1.21 and fn. 18.

in its report on the grounds that it was unnecessary.[14] Based on the foregoing, we decline the United States' request that we reproduce the body of our 18-page preliminary ruling in our Report.

6.2 Measures at Issue

6.7. Regarding paragraph 7.12, the United States requests that the Panel revise this sentence to reflect the fact that the United States refers to the entirety of PL 112-99 as the "*GPX* legislation".

6.8. The Panel has revised paragraph 7.12 in accordance with the United States request.

6.9. Regarding the table at paragraph 7.15, the United States notes that the second column of the table had been left blank, and suggests that this column be numbered to correspond to the table in Exhibit CHI-24. The United States further requests that the phrase "Preliminary Determination" be added to the official name of the last two anti-dumping and countervailing proceedings.

6.10. The Panel added the missing information to this table, as suggested by the United States.

6.3 China's claim under Article X:1 of the GATT 1994

6.11. Regarding paragraph 7.23, the United States suggests inserting a reference to China's claim to capture more accurately the United States' arguments.

6.12. The Panel notes that paragraph 7.23 correctly reflects the United States' arguments. Nevertheless, the Panel accepted to add a phrase that appropriately clarifies the paragraph in question.

6.13. Regarding paragraph 7.26, the United States suggests that the Panel avoid a duplicative reference when referring to the United States legislature in the fourth sentence.

6.14. The Panel made a change to paragraph 7.26 to include in the sentence what had been inadvertently omitted and ensure consistency with paragraph 7.67.

6.15. Regarding paragraphs 7.27, 7.28 and 7.29, the United States suggests that to avoid confusion, the Panel use the word "statute" instead of "law" in paragraph 7.27, delete a reference to Section 1 as an integral part of a law in paragraph 7.28, and replace the term "statutory provision" by "law" in paragraph 7.29.

6.16. The Panel does not agree that the paragraphs in question gave rise to possible confusion, but has nonetheless made certain editorial changes to paragraphs 7.27, 7.28 and 7.29 to reflect the United States' request.

6.17. Regarding paragraph 7.31, the United States suggests deleting the second footnote in order to avoid providing an interpretation of a provision that would not appear necessary and proposes an alternative text.

6.18. The Panel deleted the footnote in question.

6.19. Regarding paragraphs 7.32, 7.83 and 7.109, the United States suggests that the Panel not use the term "WTO dispute settlement practice" in the interest of clarity and to refer instead to "panel and Appellate Body reports".

6.20. The Panel made the requested change in paragraph 7.32, and made appropriate changes to paragraphs 7.83 and 7.109.

6.21. Regarding paragraph 7.39, the United States suggests that the Panel mention that the term "nonmarket economy country" is defined in Section 771(18) of the United States Tariff Act of 1930, as amended, and that it add the definition to the first footnote of the paragraph.

[14] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 6.7.

6.22. The Panel added appropriate language to the first footnote of paragraph 7.39 to explain the term "nonmarket economy".

6.23. Regarding paragraph 7.46, the United States suggests that the Panel replace the term "rule" with the term "statutory provision" and the term "governments" with "WTO Members".

6.24. The Panel replaced the word "rule" with "provision". However, we do not find it appropriate to replace the term "Member governments", as the paragraph in question concerns Article X:1, which specifically refers in relevant part to "governments".

6.4 China's claim under Article X:2 of the GATT 1994

6.25. Regarding paragraph 7.103, the United States suggests revisions of the Panel's summary of the United States' arguments to provide further explanation of the United States' use of the term "secret", saying this would provide a more complete record of its arguments.

6.26. The Panel appropriately supplemented its summary of the United States' arguments in paragraph 7.103 on the basis of paragraph 4 of the United States' second written submission and paragraph 50 of the United States' second oral statement.

6.27. Regarding paragraph 7.112, the United States suggests that the Panel delete the word "merely" and replace it with the term "*inter alia*" to reflect more accurately its position.

6.28. China requests that the Panel reject the United States' request to modify this paragraph. According to China, the United States never identified any other purpose of Article X:2 that would distinguish it from the prompt publication requirement of Article X:1. In China's view, it would therefore be inaccurate to replace the word "merely" with "*inter alia*".

6.29. The Panel deleted the word "merely" from paragraph 7.112.

6.30. Regarding paragraphs 7.120, 7.121, 7.122 and 7.188, the United States requests that the Panel add the word "pending" in a number of instances and the word "active" in one case. The United States further suggests adding references to 20 November 2006. In relation to paragraph 7.122, the United States also argues that it would be more accurate to state that Section 1(b) "was applicable" to relevant CVD proceedings predating the publication of Section 1 rather than "applied" by US administrative agencies. The United States notes in this respect that the second sentence of paragraph 7.257 also discusses Section 1(b) and uses the word "applicable".

6.31. China submits that the Panel should reject the United States' request to modify the identified paragraphs. Section 1(b) contains neither the term "pending" nor the term "active". In China's view, the addition of these terms would therefore not more accurately reflect the language of the relevant provision. Regarding the separate comment about paragraph 7.122, China submits that the Panel should reject the United States' request to make the suggested change. China submits hat the United States has failed to explain how or why a statutory provision could "apply to" countervailing duty proceedings initiated on or after 20 November 2006 without requiring the relevant administrative agencies to "apply" the provision to these proceedings as a matter of law. China further argues that the Panel's statement in paragraph 7.122 follows directly from its analysis of the text of Section 1 in paragraph 7.120.

6.32. The Panel notes that the United States did not explain the asserted inaccuracy that in its view would make it appropriate to add the words "pending" and "active". Also, these words are not actually used in Section 1(b). Therefore, we did not make these changes to paragraphs 7.120, 7.121, 7.122 and 7.188. Moreover, a careful reading of paragraph 7.121 indicates that the suggested references to 20 November 2006 are unnecessary. As regards paragraph 7.122, we added explicit references to the relevant time-periods. While we had no difficulty deleting two parallel phrases in response to the United States' suggestion, we do not agree with the United States that it is more accurate to use the phrase "was applicable" when referring to Section 1(b). Indeed, the text of Section 1(b) uses the term "applies to". For this reason, we also modified paragraph 7.257 to use the actual statutory term there as well. As part of its comments on paragraph 7.122, the United States asserts that relevant United States administering agencies did not take any affirmative actions to apply or administer Section 1(b) to the CVD proceedings

initiated between 20 November 2006 and 13 March 2012. Even if true, however, this would not detract from our statements at, for instance, paragraphs 7.122, 7.125 or 7.188. Section 1(b) required United States administering agencies to apply the new Section 701(f). Also, the absence of "affirmative actions" would not imply that Section 701(f) has not been applied since 13 March 2012 with a view to ensuring its observance. Rather, it would indicate that in the view of the administering agencies there was no need to discontinue previous actions, or take additional actions, after Section 1(b) had entered into force.

6.33. Regarding paragraph 7.124, the United States requests that the Panel replace the phrase "relies on the fact" in the first sentence with "argues". The United States submits that Section 1 did not replace the underlying legal authority for USDOC to initiate CVD investigations from 20 November 2006 to 13 March 2012.

6.34. China submits that the Panel should reject the United States' request to modify the paragraph, because the statement in relevant part reflects a fact, not an "argument". In China's view, Section 701(f) provided the legal basis for the application of countervailing duties to imports from NME countries after 20 November 2006. China further notes that the parties disagree as to whether Section 701(a) also provided legal authority for USDOC to apply countervailing duties to imports from NME countries prior to the enactment of Section 701(f).

6.35. The Panel made appropriate changes to the first sentence of paragraph 7.124.

6.36. Regarding paragraph 7.150, the United States requests that the Panel provide a summary of the United States' explanation in response to an argument by China that the CAFC failed to vacate in *GPX V*.

6.37. The Panel added two sentences at the end of paragraph 7.150, noting, however, that the United States' position was already reflected in footnote 293.

6.38. Regarding paragraph 7.162, China requests that the Panel delete part of, or make a change to, the second sentence to avoid the appearance that it is making a finding regarding whether Section 701(a) provided a legal basis for applying CVDs to imports from NME countries. China considers that this is a contested issue of fact and that the Panel majority need not make a finding in this respect to resolve China's claim.

6.39. The United States does not support China's request to modify the second sentence of paragraph 7.162, because the sentence describes the Panel's understanding of the statutory authority for USDOC's application of United States CVD law to imports from a country, including an NME country. According to the United States, that understanding is based on the plain text of Section 701(a) of the United States' Tariff Act, which states that where USDOC determines that "a country" is providing a countervailable subsidy, a countervailing duty "shall be" imposed upon the imported merchandise.

6.40. The Panel added a reference to USDOC in the second sentence in order to clarify the sentence.

6.41. Regarding paragraph 7.163, the United States suggests that in the fifth sentence the Panel replace the term "would" with "must", as this would more accurately reflect the requirements of United States law.

6.42. The Panel made the requested change in the fifth sentence of paragraph 7.163.

6.43. Regarding paragraph 7.170, the United States suggests that the Panel delete the word "general" from the last sentence.

6.44. The Panel made the requested change in the last sentence of paragraph 7.170.

6.45. Regarding paragraph 7.174, China requests that the Panel delete part of, or make a change to, the fourth sentence in order to avoid what it views as a factually inaccurate statement regarding whether the scope of the CAFC's decision in *Georgetown Steel* was resolved prior to enactment of Section 1 of PL 112-99.

6.46. The United States does not support China's request to delete or modify the fourth sentence of paragraph 7.174. The United States considers that the Panel's statement that the disagreement over the scope of the *Georgetown Steel* ruling was not resolved is clear and accurate. According to the United States, the evidence before the Panel established that no United States court had resolved the disagreement over the scope of the *Georgetown Steel* ruling prior to the enactment of Section 1 of PL 112-99. The United States further observes that the issue was also not resolved by the CAFC's opinion in *GPX V*, because an appeal was pending when Section was enacted and a mandate was never issued for the *GPX V* opinion.

6.47. The Panel made an addition to the fourth sentence in order to enhance clarity.

6.48. Regarding paragraph 7.183, the United States suggests that the Panel add a reference in the footnote to the United States' comments on China's response to Panel question No. 96, concerning application of the Appellate Body's guidance in *US – Shrimp (Article 21.5 – Malaysia)* to the treatment of the CAFC's opinion in *GPX V*.

6.49. China submits that the Panel should reject the United States' request for a citation to its arguments about the Appellate Body report in *US – Shrimp (Article 21.5 – Malaysia)*. In China's view, if the Panel considers that the Appellate Body report in that dispute supports its reasoning, then a citation to that report is sufficient and there is no need to refer to one party's argument concerning that Appellate Body report.

6.50. The Panel does not find it appropriate to refer to the United States' arguments in a footnote that relates to the Panel's analysis. We also note that the United States' comments on China's response to Panel question No. 96 are already referenced in footnote 299.

6.51. Regarding paragraph 7.190, China requests that the Panel restate part of the final sentence. China argues that this would ensure that the Panel's statement about the lawfulness aspect is not misconstrued. China recalls that in its view USDOC's application of CVDs to imports from China prior to 13 March 2012 was unlawful in the sense that it was not in accordance with United States law as it then existed.

6.52. The United States believes that the Panel's statement in paragraph 7.190 is clear and an accurate assessment of the record, and therefore should not be modified. According to the United States, the evidence before the Panel demonstrates that USDOC's interpretation of United States' CVD law as being applicable to NME countries has been and is governing United States law. As there has been no final court decision finding that USDOC's interpretation is unreasonable or contrary to the plain text of the statute, there is no evidence demonstrating that USDOC's interpretation was unlawful.

6.53. The Panel clarified the last sentence in a manner that is consistent with paragraphs 7.165 and 7.171.

6.54. Regarding paragraph 7.203, the United States suggests insertion of the term "published" when describing the practice or interpretation of an administering agency under United States law. The United States submits that USDOC notified China and other interested parties of the application of United States CVD law to China on multiple occasions since November 2006.

6.55. China submits that the Panel should reject the United States' request for modification of this paragraph. In China's view, it would be inaccurate and misleading to suggest that USDOC had a published practice or published interpretation concerning the application of countervailing duties to imports from NME countries. China contends that the last "practice" or "interpretation" published by USDOC concerning the application of countervailing duties to imports from NME countries was and remains the statement in the preamble to its 1998 countervailing duty regulations. According to China, the Panel should not modify the paragraph to imply that that USDOC published its subsequent practice or interpretation in the same manner as its 1998 countervailing duty regulations.

6.56. The Panel made appropriate changes to the first, second and sixth sentences of paragraph 7.203 in response to the United States' request that it reflect that USDOC notified China and other interested parties.

6.57. Regarding paragraph 7.212, the United States suggests that it would be helpful to identify with greater precision the findings of the majority opinion that the dissenting panelist agrees with and those that he does not agree with.

6.58. The dissenting panelist appropriately clarified paragraph 7.212.

6.59. Regarding paragraph 7.216, the United States suggests that the dissenting panelist delete the penultimate sentence and footnote, as the United States does not agree that it did not have the authority or could not apply CVDs to NME countries prior to the enactment of Section 1.

6.60. The dissenting panelist amended the relevant sentence and footnote from paragraph 7.216.

6.61. Regarding paragraph 7.225, the United States suggests that to ensure consistency with regard to how the United States constitutional law experts relied on by the parties are referred to in the dissenting opinion, the dissenting panelist delete certain terms from the last sentence of the paragraph.

6.62. The dissenting panelist made an appropriate change to the last sentence of paragraph 7.225.

6.63. Regarding paragraph 7.226, the United States suggests that the phrase relating to USDOC in the fourth sentence be replaced by the term "Congress", because USDOC has no legal authority to enact or ensure passage of proposed legislation.

6.64. China submits that the United States' request in respect of this paragraph is unfounded and unnecessary. China considers that the dissenting panelist should therefore reject the United States' request. In China's view, the statement in question does not imply that USDOC has any legal authority to enact or ensure passage of proposed legislation. China argues that, rather, consistent with the CAFC's holding in *GPX V*, USDOC was "seeking" the enactment of new legislation to amend the Tariff Act and to have that amendment applied retroactively to ensure that the CAFC's decision did not become final.

6.65. The dissenting panelist does not consider it necessary to change the wording of paragraph 7.226. The phrase relating to USDOC does not say that USDOC enacted the proposed legislation, but only that it heeded the CAFC's advice to "seek legislative change" (these were the words of the Court). USDOC did so by turning to Congress and asking it to make this legislative change, as reflected in the Letter from the United States Secretary of Commerce and the United States Trade Representative to the Chairman of the House Ways and Means Committee (Exhibit CHI-12).

6.66. Regarding paragraph 7.228, the United States suggests that the description of its position regarding the relevant baseline for the determination of whether there has been a covered change under Article X:2 be revised to accurately reflect its position.

6.67. China submits that the statement by the dissenting panelist that the United States seeks to modify is correct, as it correctly characterizes the United States' position. China contends that the United States did take the position that it is irrelevant for purposes of Article X:2 whether USDOC's existing approach of applying countervailing duties to imports from China was consistent with United States law. China further observes that having started from the position that the consistency of USDOC's approach with United States law was irrelevant for purposes of establishing the baseline under Article X:2, the United States now, at the very end of the proceedings, seems to be taking the position that it is relevant.

6.68. The dissenting panelist made appropriate changes to the description of the United States' position on the baseline issue at the end of paragraph 7.228.

6.69. Regarding paragraph 7.239, the United States suggests that the description fails to accurately reflect the United States' response to the Panel's question and that it would therefore be more accurate to describe the other elements by adding a sentence at the end.

6.70. The dissenting panelist added a sentence toward the end of paragraph 7.239 relating to the United States' response to Panel question No. 94 and also corrected internal quotation marks.

6.5 Claim under Article X:3(b) of the GATT 1994

6.71. Regarding paragraphs 7.256 and 7.258, China requests that the Panel delete certain statements that could be construed as endorsing the United States' view that Section 1 of PL 112-99 was a "clarification" of existing United States law. China argues that such an endorsement would be inconsistent with the statements at paragraph 7.184 and 7.225 of the Report, and therefore it does not appear to be the Panel's intention to make such a finding. China also reiterates its argument that there is no evidence on record to support the United States' "clarification" theory. China requests, in the alternative, that the Panel qualify each statement to indicate that it is "the USDOC's opinion" that Section 1 "confirmed" or "re-affirmed" its prior interpretation of the statute.

6.72. The United States requests that the Panel reject China's proposed deletions or amendments to the first sentence of paragraph 7.256 or the first sentence of paragraph 7.258. The United States notes that the Panel describes the objective of the *GPX* legislation by citing to statements of the CAFC and to United States submissions to the Panel, and submits that these statements, along with the plain text of Section 1(a) of the *GPX* legislation, clearly demonstrate that the law "confirmed" and "affirmed" USDOC's interpretation of the United States CVD law. The United States observes that the objective of the *GPX* legislation was to settle or make firm whether the United States CVD law was applicable to NME countries following the issuance of the CAFC opinion in *GPX V*, a non-binding court opinion concerning USDOC's longstanding interpretation of the law, and that in response to the CAFC opinion in *GPX V*, the *GPX* legislation strengthened and supported USDOC's existing interpretation of the United States CVD law.

6.73. The Panel observes that China's comments concern our statements that Congress enacted PL 112-99 to overrule and supersede the CAFC decision in *GPX V*, "thus effectively confirming USDOC's understanding of United States CVD law", and that the objective of the legislation appears to have been to "reaffirm and continue the interpretation of United States CVD law that had been applied by USDOC since 2006". These statements were not intended to constitute findings on the contested issue of whether Section 1 was a mere "clarification" of the law, rather than a "change" to the law. To avoid any misunderstanding, we nonetheless rephrased these statements in paragraphs 7.256 and 7.258.

6.74. Regarding paragraph 7.259, the United States suggests the insertion of the term "pending" before the phrase "judicial proceedings" in the third sentence of the paragraph to more accurately reflect the language of Section 1(b) of the *GPX* legislation.

6.75. China disagrees with the United States' suggestion to add the term "pending" in paragraph 7.259 to more accurately reflect the language of Section 1(b), because Section 1(b) does not contain the term "pending".

6.76. The Panel, as indicated above in respect of the United States' requests regarding paragraphs 7.120, 7.121, 7.122, and 7.188, considers that the United States has not explained why adding the word "pending" before the phrase "judicial proceedings" would more accurately reflect the language of Section 1(b). Accordingly, the Panel has not modified paragraph 7.259 as requested by the United States.

6.77. Regarding paragraph 7.261, the United States suggests that the reference to "trade-restrictive" measures in the last sentence be changed to "trade-remedy" measures. In the United States' view, antidumping and countervailing duties are considered remedial in nature rather than trade-restrictive.

6.78. The Panel deleted the phrase "trade-restrictive" from the last sentence of paragraph 7.261.

6.6 "Double Remedies": Articles 19.3, 10 and 32.1 of the SCM Agreement

6.79. Regarding paragraphs 7.315 to 7.317, the United States argues that the language used in these paragraphs could be read as indicating the view that a panel need not conduct an objective assessment of the matter referred to it by the DSB if there are relevant prior Appellate Body reports. The United States elaborates on the multiple bases underlying its disagreement with that view, noting its view that the discussion by the Appellate Body in *US – Stainless Steel (Mexico)*

appeared to be at best *obiter dicta*, given that the Appellate Body ultimately did not find that the panel in that dispute acted inconsistently with Article 11 of the DSU. The United States requests that the Panel delete most of paragraph 7.317, and that the Panel modify paragraphs 7.318, 7.326, 7.327, 7.342, 7.343, and 7.351 by deleting the references therein to "cogent reasons".

6.80. China submits that the Panel should reject this request for review in its entirety. China notes that the Panel is undoubtedly aware of the United States' position concerning the "cogent reasons" standard articulated by the Appellate Body in *US – Stainless Steel (Mexico)*, and recalls that during the course of the Panel proceedings, the United States presented extensive argumentation in support of its position that a panel may depart from an adopted Appellate Body report if it finds the reasoning of that report to be unpersuasive. According to China, it is evident from the Interim Report that the Panel considered these arguments but did not find them to be persuasive. China submits that it is inappropriate for the United States to try to use the interim review process to re-argue an issue that was discussed in detail in its prior submissions, when the Panel has already considered and rejected the United States interpretation.

6.81. The Panel is not convinced that the Appellate Body statements that we refer to at paragraphs 7.315 to 7.317 are themselves incorrect or inappropriate, or that we have proceeded incorrectly or improperly in referring to, and taking into account, those statements. Even if these statements by the Appellate Body were not a basis for a finding by the Appellate Body that the panel in *US – Stainless Steel (Mexico)* acted inconsistently with Article 11 of the DSU, the Appellate Body made it clear that those statements were not intended to be limited in their relevance to the case before it.[15] We are also not convinced that there is any contradiction between the proposition that a panel is obliged under Article 11 of the DSU to conduct an "objective assessment" of the matter put before it, and the proposition that, in the absence of cogent reasons, a panel should not depart from an earlier finding by the Appellate Body in an adopted report when that finding concerns the very same interpretative question that is put before the panel. Accordingly, the Panel declines the United States' request that we delete most of paragraph 7.317, and we also decline its request that we delete the references to "cogent reasons" in paragraphs 7.318, 7.326, 7.327, 7.342, 7.343, and 7.351. We nonetheless made appropriate editorial changes to paragraphs 7.318 and 7.343.

6.82. Regarding paragraph 7.331, the United States requests that the Panel clarify that the statements in the second and third sentences therein constitute arguments of China and not findings of the Panel.

6.83. China submits that the Panel should reject the United States request to modify this paragraph, because contrary to the United States' request for review, the statements in question reflect undisputed facts, not "arguments of China".

6.84. The Panel modified paragraph 7.331 to make explicit that the statements in the second and third sentences therein do not constitute findings of the Panel.

6.85. Regarding paragraph 7.340, China and the United States both note that USDOC found that only certain types of domestic subsidies, referred to by USDOC as "input subsidies", had been double counted. China and the United States both request that the Panel modify paragraph 7.340 accordingly.

6.86. The Panel modified paragraph 7.340 to reflect the parties' comments, and to harmonize the wording of this paragraph with the wording of paragraph 7.378 (on which neither party commented) and where we state that "63% of the input subsidies that the USDOC had identified had been double counted".

6.87. Regarding paragraph 7.370, the United States notes the Panel's discussion of the Preliminary Decision Memorandum in the *Drawn Stainless Steel Sinks* investigation, which confirms the Panel's analysis of other evidence on the record of the dispute. The United States submits that panels are not in a position to consider evidence that has not been submitted by a party to the

[15] The Appellate Body stated that "[s]ince we have corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, *in this case*, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU". (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 162, emphasis added).

dispute, but that Article 13 of the DSU supplies a panel with authority to request information from a party. The United States considers that the Panel is authorized under Article 13 to request a copy of the Preliminary Decision Memorandum, and the United States is therefore providing a copy of the Preliminary Decision Memorandum as Exhibit USA-126.

6.88. The Panel found it appropriate to consult the electronic version of the Preliminary Decision Memorandum that is explicitly referenced in Exhibit CHI-78, taking into account the very particular circumstances and limited purpose set forth in paragraph 7.370. While the United States provided a copy of this document as Exhibit USA-126 at the interim review stage, it has not requested that we make any change to paragraph 7.370. Insofar as the United States should be understood as having requested that we modify paragraph 7.370 so as to make reference to Exhibit USA-126, we are not convinced that such a change would be appropriate.

6.89. Regarding paragraph 7.379, the United States suggests revising the first sentence to acknowledge that the CIT decisions in *GPX II* and *GPX III* were ultimately vacated by the CAFC in *GPX VI*, but remain instructive for the Panel's analysis.

6.90. The Panel modified the first sentence of paragraph 7.379 to reflect that the CIT decisions in *GPX II* and *GPX III* were ultimately vacated, and to explain why these decisions are still instructive for the Panel's analysis of whether USDOC was taking steps to investigate and avoid double remedies during the relevant period of time.

6.7 Conclusions and Recommendation

6.91. Regarding paragraph 8.3, the United States requests that the Panel specify which measures are subject to its recommendation to avoid any ambiguity.

6.92. The Panel modified paragraph 8.3 to specify which investigations and reviews are subject to its recommendation.

7 FINDINGS

7.1 Preliminary ruling under Article 6.2 of the DSU

7.1. As noted in paragraphs 1.9 to 1.10 above, on 15 March 2013, the United States submitted a request for a preliminary ruling to the Panel with respect to the consistency of certain aspects of China's panel request with Article 6.2 of the DSU. The United States argued that Parts C and D of China's panel request, regarding USDOC's alleged failure to investigate and avoid "double remedies", fail to meet the requirement in Article 6.2 to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and, therefore, are not within the Panel's terms of reference.[16] The United States requested that the Panel issue a preliminary ruling before the filing of the parties' first written submissions.[17]

7.2. In response, China indicated that it would not pursue certain claims that were the subject of the United States' preliminary ruling request. More specifically, China indicated that it would not pursue its claims in Parts C and D of its panel request, except for those under Articles 10, 19, and 32 of the SCM Agreement as set forth in Part D of its panel request.[18] China argued that with respect to China's claims under Articles 10, 19, and 32 of the SCM Agreement, Part D is consistent with the requirements of Article 6.2 of the DSU[19], and requested the Panel to reject the United States' preliminary ruling request. China argued that the Panel should rule on the preliminary ruling request at the first substantive meeting or a later stage of the proceedings, rather than before the filing of the parties' first written submissions.[20]

7.3. The Panel ultimately decided to issue a preliminary ruling prior to the filing of the first written submissions of the parties. On 7 May 2013, the Panel issued its preliminary ruling to the parties

[16] United States' preliminary ruling request, dated 15 March 2013.
[17] The United States' letter to the Panel dated 15 March 2013.
[18] China's response to the United States' preliminary ruling request, dated 8 April 2013, paras. 1 and 10; China's letter to the Panel dated 25 March 2013, pp. 1-2.
[19] Ibid.
[20] China's letter to the Panel dated 19 March 2013.

and provided a copy to the third parties. After consulting the parties, the Panel requested the Chairperson of the DSB to circulate the ruling to the WTO membership. The ruling was circulated on 7 June 2013 as document WT/DS449/4.

7.4. As set out in further detail in its preliminary ruling, the Panel declined to rule on whether the panel request is consistent with Article 6.2 of the DSU insofar as it relates to certain claims, in the light of China's representation that it would not pursue those claims.[21] Thus, the Panel concluded that it was appropriate to limit the scope of its preliminary ruling and make findings on the consistency with Article 6.2 of the DSU only with regard to Part D of China's panel request, insofar as it specifies claims under Articles 10, 19, and 32 of the SCM Agreement. The Panel concluded that the United States had failed to establish that Part C and Part D of China's panel request, insofar as they specify claims under Articles 10, 19, and 32 of the SCM Agreement, are inconsistent with Article 6.2 of the DSU on the grounds that they do not provide a brief summary of the legal basis sufficient to present the problem clearly. In this regard, the Panel found that the general references to Articles 10, 19, and 32 contained in Part D of the panel request warrant the inference that the obligations at issue are those contained in Articles 10, 19.3, and 32.1 of the SCM Agreement, and that the United States had not established that Part D of China's panel request fails to "plainly connect" the challenged measures with those obligations. In sum, the Panel: (i) declined the United States' request that it rule on whether the panel request in its Part C and Part D, insofar as it specifies claims other than those under Articles 10, 19, and 32 of the SCM Agreement, is inconsistent with Article 6.2; and (ii) rejected the United States' request that it rule that Part D, insofar as it specifies claims under Articles 10, 19, and 32 of the SCM Agreement, is inconsistent with Article 6.2 of the DSU.

7.5. The Panel's preliminary ruling, as set forth in document WT/DS449/4, forms an integral part of the present findings.

7.2 Claims on which findings have been requested

7.6. China identified the following claims in Parts A, B, C, and D of its panel request:

a. Section 1 of Public Law (PL) 112-99 is inconsistent as such with Articles X:1, X:2[22], X:3(a), and X:3(b) of the GATT 1994;

b. Section 2 of PL 112-99, amending Section 777A of the United States Tariff Act, is inconsistent as such with Article X:3(a) of the GATT 1994;

c. the United States lacks legal authority to identify and avoid double remedies in respect of certain investigations and reviews initiated between 20 November 2006 and 13 March 2012, and is thereby prevented in all such investigations and reviews, from ensuring that the imposition of countervailing duties is consistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994, and from ensuring that the imposition of anti-dumping duties in the associated anti-dumping investigations and reviews is consistent with Articles 9 and 11 of the Anti-Dumping Agreement and Article VI of the GATT 1994; and

d. the United States failed to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012; that the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994; and that the associated anti-dumping measures in each such instance, including any anti-dumping duties collected pursuant to their authority, are inconsistent with Articles 9 and 11 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

7.7. China subsequently narrowed the scope of its claims in this dispute, as follows:

[21] Those claims include Part C of China's panel request in its entirety, and the references in Part D of the China's panel request to Articles 15 and 21 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the Anti-Dumping Agreement.

[22] See fn. 10.

a. China indicated that it was not pursuing the claim, contained in Part A of its panel request, that Section 1 of PL 112-99 is inconsistent with Article X:3(a) of the GATT 1994[23];

b. China indicated that it was not pursuing the claim, contained in Part B of its panel request, that Section 2 of PL 112-99, amending Section 777A of the United States Tariff Act, is inconsistent as such with Article X:3(a) of the GATT 1994[24];

c. China indicated that it was not pursuing the claims, contained in Part C of its panel request, that the United States lacks authority to identify and avoid double remedies in respect of certain investigations and reviews initiated between 20 November 2006 and 13 March 2012[25]; and

d. China indicated that with respect to the claims in Part D of its panel request, regarding the USDOC's alleged failure to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012, China would only pursue its claims under Articles 10, 19, and 32 of the SCM Agreement. Furthermore, the Panel, in its preliminary ruling, ruled that the general references to Articles 10, 19, and 32 contained in Part D of the panel request warrant the inference that the obligations at issue are those contained in Articles 10, 19.3, and 32.1 of the SCM Agreement.[26]

7.8. Based on the foregoing, China requests the Panel to find that:

a. Section 1 of PL 112-99 is inconsistent as such with Articles X:1, X:2[27], and X:3(b) of the GATT 1994; and

b. the United States failed to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012, and the resulting countervailing duty measures are therefore inconsistent with Articles 10, 19.3, and 32.1 of the SCM Agreement.

7.9. The United States requests that the Panel reject all of China's claims in this dispute.

7.3 Measures at issue

7.3.1 Section 1 of PL 112-99

7.10. On 13 March 2012, the United States enacted PL 112-99, entitled "An Act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". Section 1 of PL 112-99 is the measure at issue with respect to China's claims under Articles X:1, X:2, and X:3(b) of the GATT 1994.

7.11. The text of PL 112-99[28], including Sections 1 and 2 thereof, is reproduced below:

Public Law 112-99—March 13, 2012

Public Law 112-99

112th Congress

An Act

[23] China's response to Panel question No. 39.
[24] Ibid.
[25] See para. 7.2.
[26] See para. 7.4.
[27] See fn. 10.
[28] Exhibit CHI-01.

To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. APPLICATION OF COUNTERVAILING DUTY PROVISIONS TO NONMARKET ECONOMY COUNTRIES.

(a) IN GENERAL.—Section 701 of the Tariff Act of 1930 (19 U.S.C. 1671) is amended by adding at the end the following:

"(f) APPLICABILITY TO PROCEEDINGS INVOLVING NONMARKET ECONOMY COUNTRIES.—

"(1) IN GENERAL.--Except as provided in paragraph (2), the merchandise on which countervailing duties shall be imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country.

"(2) EXCEPTION.—A countervailing duty is not required to be imposed under subsection (a) on a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country if the administering authority is unable to identify and measure subsidies provided by the government of the nonmarket economy country or a public entity within the territory of the nonmarket economy country because the economy of that country is essentially comprised of a single entity.''.

(b) EFFECTIVE DATE.—Subsection (f) of section 701 of the Tariff Act of 1930, as added by subsection (a) of this section, applies to—

(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).

SEC. 2. ADJUSTMENT OF ANTIDUMPING DUTY IN CERTAIN PROCEEDINGS RELATING TO IMPORTS FROM NONMARKET ECONOMY COUNTRIES.

(a) IN GENERAL.—Section 777A of the Tariff Act of 1930 (19 U.S.C. 1677f-1) is amended by adding at the end the following:

"(f) ADJUSTMENT OF ANTIDUMPING DUTY IN CERTAIN PROCEEDINGS RELATING TO IMPORTS FROM NONMARKET ECONOMY COUNTRIES.—

"(1) IN GENERAL.—If the administering authority determines, with respect to a class or kind of merchandise from a nonmarket economy country for which an antidumping duty is determined using normal value pursuant to section 773(c), that—

"(A) pursuant to section 701(a)(1), a countervailable subsidy (other than an export subsidy referred to in section 772(c)(1)(C)) has been provided with respect to the class or kind of merchandise,

"(B) such countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind of merchandise during the relevant period, and

"(C) the administering authority can reasonably estimate the extent to which the countervailable subsidy referred to in subparagraph (B), in combination with the use of normal value determined pursuant to section 773(c), has increased the weighted average dumping margin for the class or kind of merchandise,

the administering authority shall, except as provided in paragraph (2), reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority under subparagraph (C).

"(2) MAXIMUM REDUCTION IN ANTIDUMPING DUTY.—The administering authority may not reduce the antidumping duty applicable to a class or kind of merchandise from a nonmarket economy country under this subsection by more than the portion of the countervailing duty rate attributable to a countervailable subsidy that is provided with respect to the class or kind of merchandise and that meets the conditions described in subparagraphs (A), (B), and (C) of paragraph (1).''.

(b) EFFECTIVE DATE.—Subsection (f) of section 777A of the Tariff Act of 1930, as added by subsection (a) of this section, applies to—

(1) all investigations and reviews initiated pursuant to title VII of that Act (19 U.S.C. 1671 et seq.) on or after the date of the enactment of this Act; and

(2) subject to subsection (c) of section 129 of the Uruguay Round Agreements Act (19 U.S.C. 3538), all determinations issued under subsection (b)(2) of that section on or after the date of the enactment of this Act.

Approved March 13, 2012.

7.12. The United States refers to PL 112-99 as the "GPX legislation".[29]

7.3.2 CVD investigations and administrative reviews

7.13. The measures at issue with respect to China's claims under Articles 10, 19.3, and 32.1 of the SCM Agreement include a number of CVD investigations and reviews initiated between 20 November 2006 and 13 March 2012.

7.14. China asserts that between 20 November 2006 and 13 March 2012, the United States authorities initiated a series of anti-dumping and CVD investigations and reviews that resulted in the imposition of anti-dumping duties and CVDs in respect of the same imported products from China. China asserts that in none of these investigations or reviews did the United States authorities take steps to investigate and avoid "double remedies".

7.15. The CVD investigations and reviews at issue in this dispute are specified in Appendix A to China's panel request, and again in Exhibit CHI-24. Table 1 lists these investigations and reviews and includes the parallel anti-dumping investigations and reviews. We discuss these investigations and reviews further below, in the context of addressing China's claims under Articles 10, 19.3, and 32.1 of the SCM Agreement.

[29] United States' first written submission, para. 1.

Table 1: List of Investigations and Reviews Cited by China[30]

WT/DS449/2	Exhibit CHI-24	OFFICIAL NAME	CVD	AD
1*		Coated Free Sheet Paper from the People's Republic of China	C-570-907	A-570-906
2*		Circular Welded Carbon Quality Steel Pipe from the People's Republic of China	C-570-911	A-570-910
3*		Light-Walled Rectangular Pipe and Tube from the People's Republic of China	C-570-915	A-570-916
4*		Laminated Woven Sacks from the People's Republic of China	C-570-917	A-570-914
5*		Certain New Pneumatic Off-The-Road Tires from the People's Republic of China	C-570-913	A-570-912
5a	1	Certain New Pneumatic Off-The-Road Tires from the People's Republic of China [*Administrative Review*]	C-570-913	A-570-912
6	2	Raw Flexible Magnets from the People's Republic of China	C-570-923	A-570-922
7	3	Lightweight Thermal Paper from the People's Republic of China	C-570-921	A-570-920
8	4	Sodium Nitrite from the People's Republic of China	C-570-926	A-570-925
9	5	Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China	C-570-931	A-570-930
10	6	Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China	C-570-936	A-570-935
11	7	Citric Acid and Certain Citrate Salts From the People's Republic of China	C-570-938	A-570-937
11a	8	Citric Acid and Certain Citrate Salts From the People's Republic of China [*Administrative Review*]	C-570-938	A-570-937
12	9	Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China	C-570-940	A-570-939
13	10	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China	C-570-942	A-570-941
13a	11	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China [*Administrative Review*]	C-570-942	A-570-941
14	12	Certain Oil Country Tubular Goods from the People's Republic of China	C-570-944	A-570-943
15	13	Prestressed Concrete Steel Wire Strand From the People's Republic of China	C-570-946	A-570-945
16	14	Certain Steel Grating From the People's Republic of China	C-570-948	A-570-947
17*		Wire Decking from the People's Republic of China	C-570-950	A-570-949
18	15	Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China	C-570-953	A-570-952
19	16	Certain Magnesia Carbon Bricks From the People's Republic of China	C-570-955	A-570-954
20	17	Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China	C-570-957	A-570-956
21	18	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China	C-570-959	A-570-958
22	19	Certain Potassium Phosphate Salts from the People's Republic of China	C-570-963	A-570-962
23	20	Drill Pipe From the People's Republic of China	C-570-966	A-570-965

[30] The investigations and reviews marked with an asterisk (*) are listed in Appendix A to China's panel request, but China explains, in footnote 6 of its panel request, that it excludes these proceedings from the scope of its claims under Articles 19.3, 10, and 32.1 of the SCM Agreement because (i) they are investigations that resulted in a negative injury determination by the US International Trade Commission, and therefore did not result in the imposition of anti-dumping and countervailing duties; or (ii) they were already the subject of the recommendations and rulings of the DSB in DS379.

WT/DS449/2	Exhibit CHI-24	OFFICIAL NAME	CVD	AD
24	21	Aluminum Extrusions From the People's Republic of China	C-570-968	A-570-967
25	22	Multilayered Wood Flooring From the People's Republic of China	C-570-971	A-570-970
26*		Certain Steel Wheels From the People's Republic of China	C-570-974	A-570-973
27*		Galvanized Steel Wire From the People's Republic of China	C-570-976	A-570-975
28	23	High Pressure Steel Cylinders From the People's Republic of China	C-570-978	A-570-977
29	24	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China	C-570-980	A-570-979
30	25	Utility Scale Wind Towers From the People's Republic of China [*Preliminary Determination*]	C-570-982	A-570-981
31	26	Drawn Stainless Steel Sinks From the People's Republic of China [*Preliminary Determination*]	C-570-984	A-570-983

7.4 China's claim under Article X:1 of the GATT 1994

7.16. The Panel begins its examination of the four claims of violation in respect of which China requested findings with the claim under Article X:1 of the GATT 1994. Article X:1 provides as follows:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member[31]], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

7.17. China claims that Section 1 of PL 112-99 was not "published promptly in such a manner as to enable governments and traders to become acquainted" with it. According to China, PL 112-99 is a law of "general application" pertaining to "rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports". China asserts further that Section 1 of PL 112-99 was "made effective" as of 20 November 2006. In China's view, the fact that Section 1 was not published promptly is evident from the fact that it was published nearly five and a half years after the date on which Section 1 became effective. China therefore requests the Panel to find that the United States has acted inconsistently with Article X:1.[32]

7.18. The United States submits that China's claim under Article X:1 is without merit. The United States considers that, as an initial matter, China has failed to make a *prima facie* case that Section 1 is a measure of the type listed in Article X:1. The United States further observes that PL 112-99 was published the same day that it was enacted, and that it could not have been published more promptly. In the United States' view, Article X:1 does not prohibit a measure from touching on events that have occurred prior to the publication of the measure. The United States submits, finally, that Article X:1 is directed to the publication of trade regulations to provide notice

[31] The text of Article X uses the term "contracting party" rather than "Member". Pursuant to paragraph 2(a) of the GATT 1994, however, "references to 'contracting party' in the provisions of GATT 1994 shall be deemed to read 'Member'".

[32] China's first written submission, paras. 60, 62-63 and 65-66.

and transparency to traders. The United States observes in this regard that the application of the United States CVD law to China has always been rigorously open and transparent.[33]

7.19. The Panel notes that the measure at issue is Section 1 of PL 112-99. China claims that the United States acted inconsistently with Article X:1 by failing to publish Section 1 promptly. China's claim of inconsistency is based on the first sentence of Article X:1. As may be inferred from the text of the first sentence, for the Panel to uphold China's claim, China must establish that Section 1:

a. is a "[l]aw[], regulation[], judicial decision[] [or] administrative ruling[] of general application … pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use";

b. was "made effective" by the United States; and

c. was not "published promptly in such a manner as to enable governments and traders to become acquainted" with it.

7.20. The Panel will address these three elements in the order in which they have been identified.

7.4.1 Is Section 1 a "[l]aw[] … of general application … pertaining to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports"?

7.21. The first element calls for an examination of whether Section 1 falls within the types of measure specified in Article X:1, first sentence.

7.22. China submits that PL 112-99 is a "law" of the United States pertaining to "rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports". China argues that Section 1 authorizes the application of countervailing duties, which are "rates of duty" or alternatively "other charges", to imports from NME countries. According to a response by China to a Panel question, Section 1 pertains to rates of duty or other charges because it subjects imported products to the imposition of an additional duty (or charge) if the conditions of a countervailing duty rate are met. Specifically with regard to the investigations to which Section 1 applies prior to its official publication, China argues that Section 1 increases the total duty (or charge) imposed on the imported products that are subject to the resulting orders, as it increases the CVD rate from no countervailing duty to whatever the countervailing duty rate USDOC determined in respect of each such product. In addition, China argues that PL 112-99 also imposes a "requirement", or a type of "restriction", on imports by making countervailing duties applicable to imports from NME countries. In response to a Panel question, China argues more particularly that the new Section 701(f) "requires" (i) that imports from NME countries become potentially subject to countervailing duty investigations, (ii) that importers participate in any such investigations to the extent it relates to them, and (iii) that importers pay any countervailing duty that may be imposed as a result of such investigations. China considers that the new Section 701(f)(1) is also a "restriction", to the extent that imports are actually or potentially investigated and subjected to the imposition of countervailing duties.[34] As regards the "general application" element, China submits that PL 112-99 is also a law of "general application" because it is not limited to a single import or single importer, but affects a range of products, producers, importers, and countries.[35] In response to a Panel question, China further stated that Section 1 is a measure of general application, or a provision of a law of general application.[36]

7.23. The United States contends that China fails to state which of the types of measure listed in Article X:1 is applicable to PL 112-99. In the United States' view, without satisfying this threshold

[33] United States' first written submission, paras. 63-64; oral statement at the first meeting with the Panel, para. 2; oral statement at the second meeting with the Panel, paras. 2-4.
[34] China's first written submission, para. 62; response to Panel question No. 49.
[35] China's first written submission, para. 62, referring to Panel Reports, *EC – IT Products*, para. 7.1034; and *EC – Selected Customs Matters*, para. 7.116.
[36] China's response to Panel question No. 36.

issue, China's claim under Article X:1 must fail.[37] Regarding the "general application" element, the United States in response to a Panel question accepts that Section 1 of PL 112-99 sets out a measure of general application with respect to those imports and associated proceedings that were not known at the time of enactment of the measure. However, the United States notes that Section 1 also applies to proceedings "initiated under subtitle A of title VII of that Act (19 U.S.C. 1671 et seq.) on or after November 20, 2006" through the date of enactment of the legislation. According to the United States, those proceedings were known as of the date of enactment of the measure as were the imports subject to those proceedings.[38] The United States considers that in relation to this limited and known set of imports and proceedings, which the United States understands is the basis of China's claim, it is difficult to see in what respect Section 1 is a measure of general application.[39] Moreover, again in response to a Panel question, the United States submits that, as a general matter, a measure pertaining to "rates of duty" would not appear to pertain, at the same time, to "requirements, restrictions or prohibitions" on imports, and China has not demonstrated otherwise in the case of Section 1.[40]

7.24. The Panel considers that, contrary to what the United States contends, China *has* identified the categories of measure listed in Article X:1 that in its view cover Section 1 of PL 112-99.[41] We understand China's position to be that PL 112-99 is a "law" of "general application" and that its Section 1 "pertains" to "rates of duty" on imports, or "other charges" on imports, and to "requirements" on imports, or "restrictions" on imports. Accordingly, we proceed with our analysis of China's claim.

7.4.1.1 Law

7.25. The issue we consider first is whether Section 1 falls within the category of "laws".

7.26. We first address PL 112-99. It is not in dispute between the parties that PL 112-99 constitutes a "law" within the meaning of Article X:1. We agree. PL 112-99 is, by its terms, an "Act" of the United States' legislature, enacted by the Senate and House of Representatives of the United States Congress and approved by the United States' President.[42] That PL 112-99 is a law is confirmed by the fact that it was published in the "United States *Statutes* at Large".[43]

7.27. Turning to Section 1 of PL 112-99, i.e. the measure at issue, we observe that it is a provision of a law and as such is part of a law. In our view, however, the term "laws" as it appears in Article X:1 must be construed to include the entire piece of legislation as well as any individual parts or provisions that make up these laws. Were it otherwise, Members could meet their obligations under Article X:1 by promptly publishing laws that do not contain all parts or provisions. It would also lead to the anomalous result that Article X:1 would oblige a Member to promptly publish a law once it has been made effective, but would not oblige that Member to publish any subsequent amendments to that same law. This would run counter to the basic principle of transparency and full disclosure of governmental acts affecting governments or traders that we consider inherent in Article X:1.[44]

7.28. For these reasons, we find that Section 1 falls within the category of "laws" identified in Article X:1.

[37] United States' first written submission, para. 65.
[38] The United States further asserts that for those past proceedings, the exporters subject to the associated investigations and resulting orders or determinations were also known as of the date of enactment of PL 112-99. (United States' comments on China's response to Panel question No. 129).
[39] United States' response to Panel question No. 24.
[40] United States' response to Panel question No. 49.
[41] China's first written submission, para. 62.
[42] Exhibit CHI-01.
[43] United States' first written submission, para. 80. (emphasis added)
[44] The Appellate Body in *US – Underwear* observed that Article X:2 of the GATT 1994 embodies the policy principle of promoting "full disclosure of governmental acts affecting Members and private parties and enterprises" and "transparency" (Appellate Body Report, *US – Underwear*, p. 20). As Article X:1 imposes an obligation to promptly publish the listed types of measure, we consider that the Appellate Body's observation about the policy principle underpinning Article X:2 holds true also for Article X:1. In this respect, see Panel Reports, *EC – IT Products*, fn. 1312.

7.4.1.2 Law of general application

7.29. The issue we turn to next is whether Section 1 in addition falls within the category of laws of "general application".

7.30. As an initial matter, we note that the phrase "of general application" appears in the text of Article X:1 after the listed items "laws", "regulations", "judicial decisions" and "administrative rulings". In the view of prior panels[45] as well as the parties to this dispute[46], the phrase "of general application" qualifies not just the immediately preceding item "administrative rulings", or the more encompassing phrase "judicial decisions and administrative rulings", but the entire series of items. This means that where, as in the present dispute, the category at issue is that of "laws", only laws that are "of general application" can fall within the scope of Article X:1.

7.31. Under customary rules of treaty interpretation, we are to ascertain the ordinary meaning of the terms of a treaty by reference, *inter alia*, to "their context".[47] A modifier such as "of general application" that follows a list of items may in some contexts qualify only the immediately preceding term or phrase. But we consider that it would not be in accord with contextual interpretation to assume that this would necessarily be the case in other contexts. Thus, consistent with the view of prior panels interpreting Article X:1, the relevant context may indicate that the same modifier should be interpreted so as to qualify each of the preceding terms.[48] We further observe that the term "laws" accords well with the phrase "of general application". Based on these considerations, we have no difficulty accepting that Article X:1 applies to laws of general application, provided they also fall within the subject-matter categories identified in Article X:1.

7.32. Before proceeding to examine whether Section 1 is a provision of general application, we need to address in more detail what is a provision of "general application". The ordinary meaning of the word "general", when used as in Article X:1 to refer to certain measures "of general application", is "[n]ot specifically limited in application; relating to a whole class of objects, cases, occasions, etc.".[49] The ordinary meaning of the word "class", in turn, is "[a] group of people or things having some attribute in common; a set, a category".[50] Thus, a measure of "general application" can be understood to refer to a measure that applies to a class, or a set or category, of persons, entities, situations or cases that have some attribute in common. Prior panel and Appellate Body reports afford further guidance in this respect. The panel in *US – Underwear* found a country-specific safeguard measure on cotton and man-made fibre underwear to be of "general application". It observed in this respect:

> 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.[51]

7.33. On appeal in the same dispute, the Appellate Body agreed with the panel's conclusion, stating that:

> While the restraint measure was addressed to particular, i.e. named, exporting Members, including Appellant Costa Rica …, we note that the measure did not try to become specific as to the individual persons or entities engaged in exporting the

[45] Panel Reports, *EC – Selected Customs Matters*, para. 7.116 and *EC – IT Products*, paras. 7.1016, 7.1022.
[46] China's first written submission, para. 62; United States' response to Panel question No. 37.
[47] Article 31(1) of the Vienna Convention.
[48] Panel Reports, *EC – Selected Customs Matters*, para. 7.116 and *EC – IT Products*, paras. 7.1016 and 7.1022.
[49] The *Shorter Oxford English Dictionary*, (2002), p. 1082
[50] Ibid. p. 420
[51] Panel Report, *US – Underwear*, para. 7.65.

> specified textile or clothing items to the importing Member and hence affected by the proposed restraint.[52]

7.34. Subsequently, the panel in *EC – Selected Customs Matters* stated that the types of measure covered by Article X:1 apply to "a range of situations or cases, rather than being limited in their scope of application".[53] And finally, we note that the panel in *EC – IT Products* concluded that the draft amendments to the European Community's Explanatory Notes to the Combined Nomenclature (CNENs) that were at issue in that dispute were of "general application". The panel reasoned that "the application of a CNEN is not limited to a single import or a single importer" and that the objective of CNENs was "to ensure the uniform application of the Common Customs Tariff to *all* products falling under a specific CN code…".[54]

7.35. These various statements lead us to the view that two aspects are usefully distinguished when assessing whether a law or another relevant measure is of "general application" within the meaning of Article X:1: (i) its subject-matter or content; and (ii) the persons or entities to whom it applies, or the situations or cases in which it applies. The subject-matter or content of a relevant measure may be narrowly drawn – e.g. it may regulate imports of only one or a few named products from only one or a few named countries – yet this would not preclude it being considered a measure of general application, insofar as it applies to a class of persons or entities, e.g. all those engaged in importing the product(s) concerned. The fact that a relevant measure has a narrow regulatory scope does not demonstrate that this measure is not generally applicable. As regards the second aspect, a relevant measure that applies to a class or category of people, entities, situations, or cases, that have some attribute in common would, in principle, constitute a measure of general application. In contrast, a relevant measure that applies to named or otherwise specifically identified persons, entities, situations, or cases would not be a measure of general application, but one of particular application.[55]

7.36. This interpretation accords well with the provisions of Article X:1, in particular the requirement of prompt publication and the principle of transparency that is inherent in Article X:1, as mentioned above. Article X:1 is addressed, fundamentally, to situations of rule-making and, notably in the case of judicial decisions and administrative rulings of general application, rule interpretation or rule clarification. In cases where, for example, a new rule or interpretation applies to an entire class of people or entities, *public* notice in the form of prompt publication of the relevant measure is desirable, but it is understandable that individual members of that class would not require *individual* notice thereof.

7.37. Having elucidated what is a law of general application, it is well to also explain our analytical approach. As the argument summary above makes clear, China at least initially addressed the issue of "general application" at the level of PL 112-99.[56] In the circumstances of this case, we consider it more appropriate to focus our inquiry on Section 1 of PL 112-99. If Section 1 did not contain a provision of general application, PL 112-99 would not, to that extent, fall within the scope of Article X:1, and China's Article X:1 claim would fail because it relates to Section 1. Conversely, if Section 1 did contain a provision of general application, PL 112-99 would, to that extent, fall within the scope of Article X:1, even if other parts or provisions of PL 112-99 were not of general application, and China's claim would not fail on that ground. To find otherwise would be to accept that Members can escape the requirement to promptly publish their laws of general application by incorporating them in measures that contain parts or provisions that are not of general application.

7.38. We recall that Section 1 has two subsections. Section 1(a) amends Section 701 of the United States Tariff Act of 1930 so as to provide, in a new Section 701(f), for the applicability of United States countervailing duty provisions to imports from NME countries, except in cases where the administering authority (USDOC) is unable to identify and measure subsidies provided by the government or a public entity of an NME country because the economy of that country is

[52] Appellate Body Report, *US – Underwear*, p. 20.
[53] Panel Report, *EC – Selected Customs Matters*, para. 7.116.
[54] Panel Reports, *EC – IT Products*, para. 7.1034. (Emphasis in original).
[55] We believe that when the panel in *EC – Selected Customs Matters* referred to the scope of application of measures, it was thinking of the second aspect and not the subject-matter or content of measures.
[56] Subsequently, China argued that Section 1 of PL 112-99 is the relevant measure of general application at issue (e.g. China's responses to Panel question Nos. 113 and 116; China's comments on the United States' response to Panel question No. 118).

essentially composed of a single entity. Section 1(b) provides that Section 701(f) applies to: (1) all proceedings initiated under subtitle A of title VII of the United States Tariff Act of 1930 on or after 20 November 2006; (2) all resulting actions by United States Customs and Border Protection (USCBP); and (3) all civil actions, criminal proceedings, and other proceedings before a United States Federal court relating to proceedings referred to under (1) or actions referred to under (2).

7.39. We commence our analysis with Section 1(a), which adds the new Section 701(f) to United States law. The introductory clause of Section 1(a) states that Section 701 is amended by adding a new subsection (f), and Section 1(a) then goes on to set out in full the text of the new subsection. The introductory clause is not addressed only to specifically identified persons or entities, but rather generally to all those who are actually or potentially interested in knowing about the amendment. As concerns the new Section 701(f), it is in one sense quite narrow in its regulatory scope. It concerns the applicability of United States' countervailing duty provisions to imports of unspecified goods from NME countries.[57] While there is no limitation on the kind of goods that fall within its scope, i.e. the potentially affected industries, Section 701(f) does not concern the applicability of countervailing duty provisions to countries other than NME countries. However, for the reason explained earlier, the mere fact that Section 701(f) concerns only imports from NME countries does not warrant the conclusion that Section 1(a) adds a measure that is of particular rather than of general application.[58] This view also draws support from the passages of the panel and Appellate Body reports in *US – Underwear* that we quoted above.[59] Furthermore, we observe that Section 701(f) does not name or otherwise specifically identify any persons or entities that engage, or are involved, in the importation (or sale for importation) of goods from NME countries and to whom it applies. By its terms, Section 701(f) applies to imports of goods from such countries generally, regardless of who imports them (or sells them for importation).

7.40. We now proceed to consider the three paragraphs of Section 1(b). Section 1(b)(1) provides that Section 701(f) applies to CVD proceedings initiated on or after 20 November. This necessarily implies that it applies to any proceedings whose initiation pre-dates the publication of PL 112-99 on 13 March 2012[60] (provided they were initiated on or after 20 November 2006) as well as to any proceedings whose initiation post-dates the publication of PL 112-99. As we understand it, Section 1(b)(1) concerns not just USDOC determinations made, or actions taken, in the context of covered proceedings, but also those made or taken by USITC. Section 1(b)(2) clarifies that Section 701(f) also applies to actions by USCBP that result from the proceedings covered by Section 1(b)(1). Any relevant actions carried out by USCBP before the publication of PL 112-99 (but not before 20 November 2006) are accordingly covered by Section 701(f) as well as any such actions undertaken after the publication of PL 112-99. Finally, Section 1(b)(3) makes clear that Section 701(f) applies to Federal court proceedings relating to the proceedings and actions identified in Sections 1(b)(1) and (2). The covered court proceedings therefore comprise any relevant court proceedings initiated either before the publication of PL 112-99 (but not before 20 November 2006) or after the publication of PL 112-99.

7.41. As we understand it, China's claim under Article X:1 arises out of the fact that Section 701(f) is to be applied by USDOC, USITC, USCBP and Federal courts to events or circumstances that occurred prior to the date of publication of Section 1 of PL 112-99, which we recall is 13 March 2012.[61] The United States considers that to the extent that Section 701(f) applies to events or circumstances that occurred prior to the date of publication of Section 1,

[57] Section 1 does not define the term "nonmarket economy country". The term is defined, however, in Section 771(18)(A) of the United States Tariff Act of 1930 as meaning "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise". (Exhibit USA-06).

[58] The United States indicated that it does not consider that application to an NME country would result in Section 1 not being a measure of general application. (United States' response to Panel question No. 36). China argued along similar lines that Section 1 is a measure of general application. (China's response to Panel question No. 36).

[59] See paras. 7.32- 7.33.

[60] It is not in dispute that PL 112-99 was published on 13 March 2012. See para. 7.86.

[61] China's request for the establishment of a panel, pp. 1-2. Hereafter, we will not separately identify USITC when referring to proceedings within the meaning of Section 1(b)(1). Our relevant references to USDOC proceedings should be understood to cover USITC determinations or actions, as appropriate.

Section 1 cannot be regarded as a measure of general application because it applies to a known and identifiable set of proceedings and imports subject to those proceedings.[62]

7.42. In examining this issue, we note that Section 1(b) does not specifically identify, by name or otherwise, any relevant individual USDOC proceedings, USCBP actions or Federal court proceedings. Nor does it specifically identify any persons or entities involved in such proceedings or directly affected by such actions. Instead, Section 1(b) identifies the covered proceedings and actions generically, referring broadly and by its express terms to "all" proceedings initiated under subtitle A of title VII of the United States Tariff Act of 1930, "all" resulting USCBP actions, and "all" associated proceedings before a Federal court. In other words, Section 1(b), in each of its three paragraphs, identifies a class of situations in which Section 701(f) applies.

7.43. We recognize that to the extent that Section 701(f) applies to proceedings initiated or actions taken before the date of publication of PL 112-99, the generic descriptions in Section 1(b) could have enabled identification of relevant individual proceedings and actions and perhaps individual persons or entities involved or directly affected, provided relevant information was accessible to Congress at the time.[63] This is ultimately a consequence of the fact that Section 1(b) brings within the scope of Section 701(f) past events and circumstances. That is to say, it is a consequence of the fact that the past is known rather than unknown.

7.44. The fact remains, however, that Section 1(b) uses broad generic descriptions to identify relevant proceedings and actions that pre-date the publication of PL 112-99. Moreover, the three paragraphs of Section 1(b) are drafted in a manner that ensures that Section 701(f) is applied comprehensively and across the board in all relevant situations – USDOC proceedings, USCBP actions and Federal court proceedings – that arose during a past period (20 November 2006 to 13 March 2012) or that arose, or will arise, subsequently, in the period beginning from the date of publication of PL 112-99. To us, these features of Section 1(b) do not suggest that Section 701(f) is concerned, insofar as it applies to past events or circumstances, with individual proceedings and actions as such, or with individual persons or entities as such, or that it selectively targets any of these. Rather, these features indicate that it is concerned with individual proceedings and actions only insofar as they are part of a comprehensive class of relevant proceedings and actions.

7.45. The United States argued at the second substantive meeting with the Panel that in keeping with China's claim, our analysis should focus on the part of Section 1(b) that concerns proceedings initiated between 20 November 2006 and 12 March 2012.[64] The United States argues in this respect that Congress could have chosen to pass, in lieu of a single law, two separate laws to address the matter of application of its CVD provisions to imports from NME countries: one whose Section 1(b) would provide that Section 701(f) applies to proceedings initiated between 20 November 2006 and 12 March 2012, and another whose Section 1(b) would be identical, except that it would provide that Section 701(f) applies to proceedings initiated on or after 13 March 2012. The United States argues that our conclusions should therefore not be based on the part of Section 1(b) that relates to proceedings initiated on or after 13 March 2012. China submits that a measure cannot be a measure of general application for some purposes (e.g. to the extent it applies to past events or circumstances) and not a measure of general application for other purposes. We note in this respect that our analysis of Section 1(b) does not hinge upon its integrated nature, i.e. the fact that it renders Section 701(f) applicable to proceedings or actions that either pre- or post-date the publication of PL 112-99. Indeed, our analysis focuses on those aspects and elements of the text of Section 1 that concern events or circumstances that pre-date the publication of PL 112-99. We do not therefore consider that the alternative legislative approach that the United States says was open to it calls into question the preceding examination of Section 1(b).[65]

[62] United States' responses to Panel question Nos. 24 and 118.

[63] We note in this respect that, for instance, information about the date of initiation of relevant USDOC proceedings appears to have been published in the United States Federal Register. (Exhibit CHI-24).

[64] United States' oral comments on China's response to Panel question No. 116.

[65] It is also worth noting that even if the United States had enacted a separate law whose Section 1(b) would provide that Section 701(f) applies only to proceedings initiated between 20 November 2006 and 13 March 2012, Section 701(f) would still not apply exclusively to a known set of persons, entities, situations, or cases. For instance, some CVD orders imposed prior to 13 March 2012 would have still remained in place after that date. Accordingly, this hypothetical Section 1(b) would not enable identification of all relevant individual proceedings or actions, or all individual persons or entities involved or directly affected, merely

7.46. As an additional matter, we note the United States' view that Section 701(f) is not of general application to the extent that it applies to events or circumstances that pre-date the publication of PL 112-99, but is of general application to the extent that it applies to events or circumstances that post-date the publication of PL 112-99. Having regard to the actual terms in which Section 1(a) and (b) have been cast, we consider that Section 1 is about rule-making, and that the new provision that it adds – the new Section 701(f) – applies to future events or circumstances as well as past ones. In the light of this, we are not persuaded that it would be appropriate to accept the curiously asymmetric result to which the United States' view leads. Moreover, we see no convincing rationale for why public notice in the form of publication would be warranted only to the extent that Section 701(f) applies to events or circumstances that post-date the publication of PL 112-99. It appears to us that persons or entities that are affected by the fact that Section 701(f) applies to past events or circumstances would likewise wish to become acquainted promptly with its terms. It is true that they could not undo any past import transactions. But they could seek a modification of Section 1 by using any political or legal means available. Also, upon becoming aware of Section 1, they might decide to discontinue any ongoing proceedings before Federal courts concerning covered USDOC proceedings or USCBP actions, or, in the case of Member governments, they might see fit to file a complaint with the WTO.

7.47. Finally, looking at all other parts of the text of PL 112-99, we see nothing there that would suggest that Section 1 contains a provision that is not of general application.

7.48. In sum, having reviewed both subsections of Section 1 as well as PL 112-99 as a whole, we find that Section 1 contains a provision of general application. That this provision applies to events or circumstances that pre-date the publication of PL 112-99 does not detract from it being a provision of general application.

7.4.1.3 Law pertaining to rates of duty, or other charges, or to requirements, or restrictions, on imports

7.49. The final issue that remains for us to consider in relation to the first element of Article X:1 is whether Section 1 falls within the type of laws that "pertain" to "rates of duty", or "other charges", or to "requirements", or "restrictions", on imports.

7.50. The text of Article X:1 separates the terms "rates of duty" and "other charges", on the one hand, and "requirements" and "restrictions" on imports, on the other hand, by the disjunctive "or". We deduce from this that a law pertaining to one of the two categories of subject-matter is subject to Article X:1, provided that it has also been made effective by a Member, as specified in the earlier part of the provision. Consequently, once a panel has determined that a law pertains to one category, it need not go on to examine whether that law pertains, at the same time, to the other.

7.51. We begin our analysis with the "rates of duty" category. The term "rates of duty" is unqualified and therefore capable of encompassing various types of duty. As is apparent from, for example, Article II of the GATT 1994, the GATT 1994 distinguishes such duties as ordinary customs duties, other duties imposed on or in connection with the importation of products, anti-dumping duties and, most pertinent to our analysis of Section 1, countervailing duties.[66] The latter term is defined in Article VI:3 of the GATT 1994 as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly, or indirectly, on the manufacture, production or export of any merchandise".[67] Also, the SCM Agreement explicitly uses the term "countervailing duty rate".[68] There is therefore no question that the term "rates of duty" includes rates of countervailing duty.

because it provides for the application of Section 701(f) to proceedings initiated between 20 November 2006 and 13 March 2012. In the light of this, the logic of the United States' own argument suggests that even with this hypothetical Section 1(b), Section 701(f) would – at least in part – be of general application.

[66] See Articles II:1(b) and II:2(b) of the GATT 1994.

[67] See also footnote 36 of the SCM Agreement.

[68] Article 19.3 of the SCM Agreement states in relevant part that "[a]ny exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter".

7.52. Article X:1 contemplates laws "pertaining" to rates of duty. The verb "pertain to" is defined, *inter alia*, as "[h]ave reference or relation to, relate to".[69] This definition indicates that Article X:1 does not seek to limit the prompt publication requirement to only those relevant measures that directly set or determine particular rates of duty. Indeed, Article X:1 does not refer, narrowly, to laws "establishing" rates of duty, but uses the broader term "pertain". To "pertain" to rates of duty, a law simply needs to have reference, or relate, to rates of duty.

7.53. With these observations in mind, we now assess whether Section 1 "pertains" to "rates of duty", as asserted by China. We observe, first, that Section 1 is entitled "Application of countervailing *duty* provisions to nonmarket economy countries".[70] Additionally, we note that Section 1(a) adds a new Section 701(f) to the United States Tariff Act of 1930. It stipulates that "the merchandise on which countervailing *duties* shall be imposed under subsection (a)"[71] includes imports from NME countries. At the same time, however, the new Section 701(f) provides that "[a] countervailing *duty* is not required to be imposed under subsection (a)"[72] on imports from NME countries, if the administering authority is unable to identify and measure subsidies provided in NME countries. As these textual elements demonstrate, Section 1 unquestionably has reference, and relates, to a particular type of "duty", specifically, countervailing duties.

7.54. Section 1 does not itself set particular "rates" of duty. But it provides a basis for the imposition of countervailing duties on imports from NME countries. That is to say, it makes clear that, in appropriate cases, greater-than-zero (positive) rates of countervailing duty may (and must) be applied to imports from NME countries.[73] In the light of this, Section 1 in our view also has reference, and relates, to "rates" of countervailing duty and thus "pertains" to such rates.

7.55. This view accords well with, and gives proper effect to, the prompt publication requirement in Article X:1. It would be incongruous to interpret Article X:1 to require prompt publication of the particular rate(s) of countervailing duty applicable to imports of a specific product from an NME country[74], but not of the law that authorizes the application of countervailing duties to imports from NME countries at rates greater than zero. Traders have a legitimate interest in becoming acquainted not just with the particular rate(s) of countervailing duty applied to imports of a specific product from NME countries, but also with the basis for applying *any* rate greater than zero to imports of that product.

7.56. For these reasons, we determine that Section 1 "pertains" to "rates of duty" within the meaning of Article X:1. In view of this affirmative determination, there is no need to go on to examine whether Section 1 also "pertains" to "requirements", or "restrictions", on imports, as China maintains.

7.4.1.4 Conclusion

7.57. Having regard to the foregoing considerations, we conclude that Section 1 meets the first element of our Article X:1 analysis. Section 1 is an integral part of a law. As such, it falls within the category of "laws". It also contains a provision that is of "general application" and "pertains" to "rates of duty".

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[69] The *Shorter Oxford English Dictionary* (2002), p. 2170.

[70] Emphasis added. In this respect, the preamble to PL 112-99 describes PL 112-99 as an Act "[t]o apply the countervailing *duty* provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". (emphasis added)

[71] Emphasis added.

[72] Emphasis added.

[73] The new Section 701(f)(1) states in relevant part that "the merchandise on which countervailing duties shall be imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country".
Section 701(f)(2) then goes on to address in what circumstances "[a] countervailing duty is not required to be imposed under subsection (a)" on a relevant class or kind of merchandise. Subsection (a) of Section 701 states that where the relevant conditions are met, "there shall be imposed upon such merchandise a countervailing duty … equal to the amount of the net countervailable subsidy".

[74] In this regard, see also the public notice requirements in Article 22.5 of the SCM Agreement.

7.4.2 When was Section 1 "made effective"?

7.58. The Panel now turns to the second element of its Article X:1 analysis, which concerns the issue whether, and if so when, the United States made Section 1 "effective".

7.59. China asserts that, by its express terms, Section 1 was "made effective" as of 20 November 2006, because Section 1(b) refers to that date as the "effective date" of this section. China argues by reference to the panel reports in *EC – IT Products* that the term "made effective" refers to when the measure became "operative", i.e. when it could have an actual effect "in practice", not the date on which it was formally promulgated or formally entered into force.[75] According to China, Section 1 became "operative" on 20 November 2006, because that is the date on which the new Section 701(f) of the United States Tariff Act came into effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries.[76]

7.60. China also considers that Article X:1 would be meaningless if it were interpreted to permit the retroactive application of Section 1 to imports that occurred prior to its publication. China refers in this connection to the report of the GATT panel in *EEC – Apples (US)*. According to China, the situation before this Panel is analogous to the backdated import quota which that panel found to be inconsistent with Article X:1.[77] China recalls that the panel in that dispute interpreted Article X:1 as prohibiting back-dated quotas and found the EEC in breach of Article X:1 "since it had given public notice of the quota allocation only about two months after the quota period had begun".[78] China submits that in the case of Section 1 of PL 112-99, the United States backdated USDOC's legal authority to conduct countervailing duty investigations in respect of imports from NME countries and did not provide public notice of this authority until more than five years after it became effective.[79]

7.61. The United States rejects China's assertion, arguing that PL 112-99 was "made effective" on the date of its enactment, i.e. on 13 March 2012.[80] The United States observes in this connection that the starting point of Article X:1 is the existence of a measure of general application: the laws, regulations, etc., to which Article X:1 applies must be in existence for the prompt publication obligation to apply. According to the United States, the "made effective" clause serves, however, to exclude from the scope of Article X:1 measures that may be in existence, but have not been made effective. The United States submits that the ordinary meaning of the "made effective" clause confirms that it is aimed at limiting the application of Article X:1 to measures that have been adopted or brought into operation.[81] On that basis, the United States considers that PL 112-99 came into existence and was made effective on 13 March 2012.[82]

7.62. The United States adds that China's view finds no support in the panel reports in *EC – IT Products*. The United States notes in this respect that at no time before the date of enactment and publication of the law (13 March 2012) could any person or entity in the United States rely on Section 1 of PL 112-99 to assert legal rights or consequences, and that there is no evidence that any entity applied Section 1 prior to its adoption to bring it into effect in practice.[83]

7.63. The United States further considers that China's claim rests on an implausible reading of Article X:1 that would require publication before the existence of a measure.[84] In the

[75] Panel Reports, *EC – IT Products*, paras. 7.1045-7.1046 and 7.1048.
[76] China's first written submission, para. 63; response to Panel question No. 18; second written submission, para. 11; oral statement at the second meeting with the Panel, para. 7 (stating that on that date the new Section 701(f) "had legal effect in practice, by supplying a statutory basis for countervailing duty investigations initiated on or after that date").
[77] China's second written submission, paras. 9 and 11.
[78] China refers to the GATT Panel Report, *EEC –Apples (US)*, para. 5.23.
[79] China's first written submission, fn. 64; second written submission, paras. 5-10.
[80] United States' responses to Panel question Nos. 25 and 92.
[81] The United States refers to Panel Reports, *EC – IT Products*, para. 7.1045; and Appellate Body Reports, *China – Raw Materials*, para. 356.
[82] United States' first written submission, paras. 70-71, 73 and 78; United States' second written submission, para. 9.
[83] United States' second written submission, para. 10. The United States also observes in this context that in the United States a draft or proposed law has no legal effect and cannot be brought into effect until adopted by Congress and signed by the President. (United States' response to Panel question No. 25).
[84] United States' first written submission, para. 62.

United States' view, Article X:1 does not prohibit a measure from touching on events that have occurred prior to its publication.[85] The "made effective" clause cannot be read as a substantive obligation to the effect that measures of general application must not apply to past factual situations.[86] According to the United States, the title to Article X – "Publication … of Trade Regulations" – suggests that Article X:1 does not impose an obligation concerning the substantive content of measures, but a procedural requirement on publication.[87] The United States further argues that the term "made effective" is used in the past tense, indicating that the relevant measures have been enacted or adopted at some point in the past. In addition, the requirement in Article X:2 that certain measures not be "enforced" before publication presumes, in the United States' view, that measures could be effective before publication, just not enforced, and that some set of other measures could be enforced before publication. The United States submits that this confirms that measures may affect events prior to their publication.[88] Finally, the United States argues that public international law and the parties' own legal systems refute any proposition that a measure may not affect events that have occurred prior to its publication.[89]

7.64. Regarding the GATT panel report cited by China, the United States submits that the panel does not provide a discussion of the interpretation of Article X:1. The United States observes that the panel's conclusions on Article X:1 regarding the use of so-called backdated quotas appear to be an afterthought to the panel's analysis of the substantive obligations of Article XIII:3 of the GATT 1947. According to the United States, without an interpretation of the requirements of Article X:1, there is no reasoning for the panel findings, and therefore no reasoning that has any persuasive value.[90]

7.65. China responds that it is hard to see how the statute was "made effective" on 13 March 2012 when the statute itself has an "effective date" of 20 November 2006. China further argues that nothing in Article X:1 refers to the "existence" of a measure as the baseline for determining whether it was published promptly. It refers, instead, to when the measure was "made effective". China submits that a measure can be "made effective" prior to the date on which the measure might be said to have "existed", "in some sense".[91]

7.66. The Panel recalls that in accordance with the terms of Article X:1 only relevant measures that have been "made effective" by a Member need to be "published promptly in such a manner as to enable governments and traders to become acquainted with them". The phrase "made effective" was the subject of a detailed interpretive inquiry by the panel in *EC – IT Products*. According to that panel, a measure of the type covered by Article X:1 has been "made effective" if it has been "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'".[92] This finding identifies two distinct types of situations in which relevant measures would be found to have been "made effective" within the meaning of Article X:1: (i) situations where the relevant measures have been formally promulgated or have formally entered into force; and (ii) situations where they have not, or not yet, been formally promulgated or formally entered into force, but have nevertheless been brought

[85] The Panel notes that the United States avoided using the term "retroactive", or "retroactivity", in the context of addressing China's claims under Article X, arguing that Article X "does not discuss the term 'retroactivity'" and that the term has different meanings in different legal systems. The United States maintains that it is therefore not in a position to determine whether PL 112-99 may be characterized as legislation that applies "retroactively". The United States explained that it preferred to refer, for example, to a measure "touching on events that have occurred prior to the publication of the measure". (United States' oral statement at the first meeting with the Panel, para. 11; response to Panel question No. 26).

[86] The United States observes in this context that Article X:1 applies to "judicial decisions and administrative rulings of general application". According to the United States, such decisions and rulings necessarily impose legal consequences on past events, as an action must first have occurred before a judicial or administrative tribunal is able to evaluate its legality. (United States' first written submission, para. 84).

[87] United States' first written submission, paras. 62, 64, 71, 76, 81, and 90. Along similar lines, the United States observes that Article X:1 does not address what facts a measure may affect, as it is a procedural, publication obligation. (United States' response to Panel question No. 93(b)).

[88] United States' oral statement at the first meeting with the Panel, para. 18.

[89] The United States refers to Article 28 of the Vienna Convention , a memorandum of understanding (MOU) between China and the United States, US court decisions, and a Chinese law. (United States' first written submission, paras. 87-89).

[90] United States' response to Panel question No. 50; comments on China's response to Panel question No. 90.

[91] China's oral statement at the first meeting with the Panel, paras. 27 and 31.

[92] Panel Report, *EC – IT Products*, para. 7.1048.

into effect, or made operative, in practice. We understand the second type of situation to concern measures that have been brought into effect *de facto* ("in practice") as distinct from measures that have been brought into effect *de jure* ("formally").[93] This interpretation ensures that Members cannot escape their prompt publication obligation by putting relevant measures into effect *de facto*, without completing all, or any, of the steps necessary to put them into effect *de jure*. We find the panel's interpretation of the phrase "made effective" persuasive for purposes of our consideration of China's claim, and we will therefore base our analysis on it.

7.67. Having elucidated the meaning of "made effective", we proceed to examine whether, and if so when, Section 1 was "made effective". It is apparent from the face of PL 112-99 that it was "enacted by the [United States] Senate and House of Representatives"[94] and that it was "approved", and thereby enacted, on 13 March 2012.[95] Furthermore, it is undisputed that PL 112-99 was published on 13 March 2012.[96] According to the United States, PL 112-99 entered into force that same day, which China has not contested.[97] Taken together, these elements support the inference that PL 112-99 was formally brought into effect on 13 March 2012. There is no evidence on the record to indicate that the United States brought PL 112-99 into effect "in practice", or *de facto*, prior to 13 March 2012. In the light of the foregoing, we conclude that PL 112-99 was indeed "made effective" by the United States, and more particularly that it was "made effective" on 13 March 2012.

7.68. The measure at issue, Section 1, is unquestionably part of PL 112-99. As emphasized by China, however, Section 1(b) sets forth a specific "effective date". Relying on Section 1(b), China submits that Section 1 was "made effective", not on 13 March 2012, but on 20 November 2006. Before addressing this argument, it is well to recall once more the content of the two subsections of Section 1. Section 1(a) "amends" United States law, "adding" a new Section 701(f) to the United States Tariff Act of 1930.[98] Section 1(b) is entitled "Effective Date". It provides that the new Section 701(f) "applies to" (i) all proceedings initiated under subtitle A of title VII of the United States Tariff Act of 1930 "on or after November 20, 2006", (ii) all resulting USCBP actions, and (iii) all proceedings before Federal courts linked to (i) or (ii).

7.69. A careful reading of the text of Section 1 thus calls attention to two issues that it is important not to conflate: first, "When was the new Section 701(f) *added* to United States law?", and second, "To which proceedings and actions does Section 701(f) *apply*?". We first consider when Section 701(f) was added to United States law. Section 1(b) does not speak to this issue. In fact, its text takes as a point of departure that Section 701(f) has been added to United States law by Section 1(a).[99] Section 1(a) does not specify any date. But Section 1 is part of PL 112-99, which entered into force on 13 March 2012. Absent an indication to the contrary in Section 1(a), we infer that Section 1(a), and with it the new Section 701(f) that it adds, formally entered into force on the same date as PL 112-99. This means that, as from that date, Section 701(f) has provided a legal basis for the United States to apply countervailing duty provisions to NME countries.

[93] The measures at issue in *EC – IT Products* – certain amendments proposed by the European Commission to the CNENs – had not been formally adopted by the European Commission at the time of review. The panel nevertheless found that the particular constellation of facts in that dispute supported the conclusion that the draft CNENs had been made effective. It noted in this context that in a number of instances, some EC member States had used the draft CNENs in making classification decisions. (Panel Reports, *EC – IT Products*, paras. 7.1065-7.1066).

[94] China stated that PL 112-99 was passed by the House and Senate, respectively, on 6 and 7 March 2012.

[95] Exhibit CHI-01; China's first written submission, para. 49; United States' first written submission, para. 51; United States' response to Panel question No. 110. China stated that 13 March 2012 is the date on which the President signed, or "approved", the bill.

[96] China's first written submission, para. 46; United States' first written submission, paras. 77-78; United States' response to Panel question No. 11.

[97] United States' responses to Panel question Nos. 11 and 92. China observed that PL 112-99 was officially published on 13 March 2012 as a "slip law" and that a slip law "constitutes legal evidence of its enactment". (China's first written submission, fn. 37).

[98] Section 1(a) states that "Section 701 of the Tariff Act of 1930 … is amended by adding at the end the following …"

[99] Section 1(b) states that "Subsection (f) of section 701 of the Tariff Act of 1930, *as added by subsection (a) of this section*, applies to …". (emphasis added)

7.70. The second issue relates to the proceedings and actions to which Section 701(f) applies. This issue is addressed in Section 1(b).[100] As is suggested by its textual elements "Effective *Date*"[101] and "applies to", Section 1(b) serves, *inter alia*, to define the temporal scope of application of Section 701(f). It makes clear that once Section 701(f) has entered into force, it applies to all relevant proceedings initiated on or after 20 November 2006, to all resulting USCBP actions, and to all proceedings before Federal courts relating to the aforementioned proceedings or actions.[102] Thus, Section 701(f) applies also to events or circumstances that pre-date its formal entry into force on 13 March 2012. Or, to put it another way and with particular reference to the title of Section 1(b) ("*Effective* Date"[103]), the new Section 701(f) produces legal effects also with regard to past events or circumstances.

7.71. It is worth recalling in respect of Section 1(b) that the mere fact that the phrase "Effective Date" bears a certain textual resemblance to the phrase "made effective" in Article X:1 is not dispositive of the characterization of Section 1(b) under WTO law.[104] Indeed, our analysis in the preceding paragraph indicates that Section 1(b) does not set forth the date on which Section 1 was formally "made effective".[105] Nor does Section 1(b) imply or otherwise document, as China suggests[106], that Section 701(f) entered into force, or became operable, "in practice" (*de facto*) on 20 November 2006 and produced legal effects as from that date in respect of proceedings and actions that occurred on or after that date. As explained, it was not until 13 March 2012 that Section 701(f) began to produce any legal effects in respect of proceedings or actions relating to the period between 20 November 2006 and 12 March 2012. Finally, we note that there is also no evidence on the record to indicate that Section 701(f) was brought into effect, in practice, at any point prior to its formal entry into force.[107]

7.72. We are therefore unable to accept China's position that 20 November 2006 is the date on which Section 701(f) was brought into effect either formally or in practice. In our view, 20 November 2006 is a date that serves to circumscribe the temporal scope of application of the new Section 701(f). More specifically, pursuant to Section 1(b), proceedings initiated on or after 20 November 2006 fall within the temporal scope of application of Section 701(f), as do any resulting USCBP actions and associated Federal court proceedings. Accordingly, 20 November 2006 is the earliest date of a covered event or circumstance in respect of which Section 701(f) produces any legal effects. This view is consistent with the text of Section 1(b), which provides that Section 701(f) "applies" to proceedings initiated on or after 20 November 2006. Furthermore, our reading of Section 1(b) gives meaning to its title ("Effective Date") in that, on our view, Section 1(b) identifies by date the proceedings or actions in respect of which it produces legal effects.

7.73. Were we to accept that 20 November 2006 is the date on which Section 1 was "made effective", we would also have to conclude that, pursuant to Article X:1, Section 1 should have been "published promptly" after that date. This, of course, would have been impossible, for Section 1 did not exist at that time. Indeed, the practical consequence of adopting China's view would render inconsistent with Article X:1 a wide range of measures that bring within their temporal scope of application events or circumstances that occurred before their entry into force. As we explain below, we consider that Article X:2 precludes enforcement of certain types of restrictive measures in respect of events or circumstances that occurred prior to their date of

[100] The United States observes in this respect that Section 1(b) defines what facts (proceedings, actions, etc.) will be affected by Section 701(f). (United States' response to Panel question No. 93(a)).

[101] Emphasis added.

[102] The United States confirmed that the term "applies to" in Section 1(b) means that Section 701(f) applies automatically with its entry into force, and that there is no need for any additional implementing act. (United States' response to Panel question No. 58).

[103] Emphasis added.

[104] See e.g. Appellate Body Reports, *China – Auto Parts*, para. 178.

[105] The United States contends that the "effective date" as that term is used in PL 112-99 does not refer to when the legislation is brought into effect, but to the universe of facts to which the legislation applies. The United States further maintains that 13 March 2012 is not an "effective date" within the meaning of PL 112-99. (United States' response to Panel question No. 93(b)).

[106] China's comments on the United States' response to Panel question No. 93.

[107] More specifically, there is no evidence that Section 701(f) was applied in practice by the relevant United States' authorities as from 20 November 2006, or any time before its formal entry into force, such that it could be inferred from such practice that Section 701(f) was *de facto* "made effective" before its formal entry into force on 13 March 2012.

publication.[108] But we see nothing in Article X:1 that prohibits Members from "making effective" measures of the type that fall within the ambit of Article X:1 and that apply to events or circumstances that occurred before their entry into force, provided such measures are promptly published. It is worth mentioning in this connection that some such measures may be remedial or otherwise non-restrictive in nature. These considerations reinforce our view that it is important, in the context of an Article X:1 inquiry, not to conflate the issue of when a relevant measure entered into force – i.e. was "made effective" within the meaning of Article X:1 – with the separate issue of its temporal scope of application, about which the text of Article X:1 says nothing.[109]

7.74. According to China, its submission that Section 1 was "made effective" on 20 November 2006 draws support, by analogy, from the adopted report of the GATT panel in *EEC – Apples (US).* The panel in that dispute concluded that the operation of a backdated EEC restriction on imports of apples in respect of, *inter alia*, the United States was inconsistent with Article X:1.[110] In support of its conclusion, the panel reasoned, in two short sentences, that Article X:1 prohibits "back-dated quotas", and that the EEC was therefore in breach of Article X:1 as "it had given public notice of the quota allocation only about two months after the quota period had begun".[111]

7.75. As the panel offered no interpretative analysis of Article X:1, it is not clear why the panel considered that Article X:1 prohibits backdated quotas. What is clear is that the panel's conclusion on the United States' Article X:1 claim is immediately preceded by an examination of another claim put forward by the United States, under Article XIII:3(c) of the GATT 1947. That Article concerns the allocation of quotas among supplying countries.[112] The panel read it together with Article XIII:3(b) of the GATT 1947, which requires that public notice be given of the total quantity or value of the product that will be permitted to be imported "during a specified future period". The panel deduced from these two provisions that "both the total quota and the shares allocated in it had to be publicly notified for a specified future period".[113] According to the panel, the requirement in Article XIII:3(c) "to promptly notify other contracting parties with an interest in supplying the product would otherwise be meaningless, as would the Article XIII:3(b) provision for supplies en route to be counted against quota entitlement".[114] The panel concluded on that basis that the allocation by the EEC of backdated quotas was inconsistent with Article XIII:3(b) and (c).[115]

7.76. We note in respect of Article X:1 that, unlike Article XIII:3(b), it does not refer to a "specified future period" of application or a specified future date of application. Nor do we see any justification for reading such a reference into the text. We consider that Article X:1 is by no means "meaningless", to use the GATT panel's term, if it does not prohibit such measures as Section 1 that apply to events or circumstances that pre-date their publication. We have already explained above that Article X:1 serves a useful purpose, including in respect of such measures.[116] Furthermore, it must be remembered that Article X:2 imposes relevant disciplines: the measures it covers may not be enforced before they have been officially published.[117] It is noteworthy that the GATT panel's interpretation of Article X:1 pays no regard to Article X:2.

7.77. Consequently, we do not consider that the GATT panel report assists China in establishing that Section 1 was made effective on 20 November 2006.

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[108] See subsection 7.5.1.

[109] To further illustrate the importance of this conceptual distinction, assume that a relevant measure that has just entered into force provides that it applies only to events or circumstances that occur, if at all, on some future date, e.g. three years after the entry into force of the measure. If this future date of application constituted the "made effective" date for purposes of Article X:1, the Member concerned would not be required to publish the measure promptly after its entry into force. Instead, the Member could hold off publishing the measure until it has been "made effective" three years later, even though the measure plainly exists and it is therefore possible to publish it, and traders and governments would likely benefit from knowing to what requirements they, or the enacting Members' authorities, would need to conform in three years' time.

[110] GATT Panel Report, *EEC –Apples (US)*, para. 5.26.

[111] Ibid. para. 5.23.

[112] Article XIII:3(c) requires that "[i]n the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof".

[113] GATT Panel Report, *EEC –Apples (US)*, para. 5.23.

[114] Ibid. para. 5.23.

[115] Ibid.

[116] See para. 7.46.

[117] See in this respect subsection 7.5.1.

7.78. For all the reasons cited above, we thus conclude that Section 1 was "made effective" by the United States, and more particularly that both Section 1(a) (and with it the new Section 701(f)) and Section 1(b) were "made effective" on 13 March 2012 and not on 20 November 2006 or any other date prior to 13 March 2012.

7.4.3 Was Section 1 "published promptly in such a manner as to enable governments and traders to become acquainted"?

7.79. The third and final element of our Article X:1 analysis requires the Panel to consider whether, as claimed by China, Section 1 was not published promptly in such a manner as to enable governments and traders to become acquainted with it.

7.80. China argues that the appropriate reference point for determining whether a measure was "published promptly" is the date on which it was made effective.[118] China further argues that in evaluating whether a measure was published promptly, it is necessary to consider whether the measure was published in a sufficiently timely manner to enable "governments and traders to become acquainted" with the content of the measure. China notes that, as it pertains here, the ordinary meaning of the term "promptly" is "quickly" and "without undue delay".[119] In response to a Panel question, China stated that ordinarily, publication would occur prior to the date on which a measure is made effective, but that there may be circumstances, such as measures to address an emergency situation, in which a measure could be published shortly after it is made effective.[120] According to China, PL 112-99 was, however, published nearly five and a half years after the date on which it was made effective.[121] China submits that this was not "prompt" by any conceivable standard. In China's view, this conclusion is underscored by the fact that the Government of China and Chinese producers could not possibly have become acquainted with Section 1 of PL 112-99 before it took effect, since the law was not published until long after it took effect. China considers that this is inconsistent with the due process and transparency requirements that underlie all of Article X.[122]

7.81. The United States argues that Article X:1 imposes two requirements. The first is that measures be "promptly published" upon their adoption. According to the United States, the issue of "promptness" must be evaluated in relation to the time when a measure has come into existence and been made effective. In the United States' view, a measure cannot be inconsistent with the prompt publication obligation if it is published as soon as the measure comes into existence; it would not be possible to publish the measure with any less delay. The United States observes that PL 112-99 was published on the same day that it came into existence. Therefore, the United States maintains, China has no basis for any claim that the measure was not published "promptly" under Article X:1.[123]

7.82. The second requirement imposed by Article X:1 is that relevant measures be published in such a "manner as to enable governments and traders to become acquainted" with them. The United States submits in this respect that PL 112-99 was published in the "United States Statutes at Large", which is readily available to China, Chinese traders and other members of the public. The United States considers, therefore, that Section 1 was published in such a "manner as to enable governments and traders to become acquainted" with it.[124] In response to China's argument that governments and traders could not have become acquainted with Section 1 before it took effect, the United States observes that the obligation in Article X:1 regarding the "manner" of publication involves how the measure is published, not the timing of publication.[125]

[118] China's response to Panel question No. 17. China refers to Panel Reports, *EC – IT Products*, para. 7.1069 and *China – Raw Materials*, para. 7.1101.
[119] China refers to Panel Reports, *EC – IT Products*, para. 7.1074.
[120] China's response to Panel question Nos. 11 and 17.
[121] China considers that Section 1 of PL 112-99 was "made effective" on 20 November 2006, but not published until 13 March 2012. (China's second written submission, para. 2).
[122] China's first written submission, paras. 64-65.
[123] United States' first written submission, paras. 75 and 78; oral statement at the first meeting with the Panel, para. 14; second written submission, para. 11.
[124] The United States refers to "P.L. 112-99, 126 Sta. 265 (Mar. 13, 2012)", which it indicates is available at http://www.gpo.gov/fdsys/pkg/PLAW-112publ99/pdf/PLAW-112publ99.pdf.
[125] United States' first written submission, paras. 79-80.

7.83. The Panel, relying on the wording of Article X:1, agrees with the United States that a breach of that Article may arise from (i) a failure to publish a relevant measure "promptly" or (ii) a failure to publish a relevant measure in such a "manner" as to enable governments and traders to become acquainted with it. Prior panel reports indicate that the "manner" of publication relates, not to the date of publication, but to such aspects as the medium of publication or the content or quality of what is published.[126]

7.84. We understand China to raise a claim that the United States did not publish Section 1 "promptly", and not that the United States did not publish Section 1 in an appropriate "manner". China argues that its view about prompt publication is "underscored" by the fact that China and Chinese producers could not have become acquainted with Section 1, since it was not published "until long after" it took effect, which China considers was on 20 November 2006.[127] This argument, however, concerns the timing of publication, and not the "manner" of publication as a distinct issue. In any event, as explained by the United States, PL 112-99 was published in the "United States Statutes at Large" official publication series. China did not assert that this did not meet the requirement to publish Section 1 in such a manner as to enable governments and traders to become acquainted with it.[128] Furthermore, as we have determined above, Section 1 was not made effective on 20 November 2006, but on 13 March 2012. We therefore see no need to address further the issue of the manner of publication.

7.85. As regards the issue whether Section 1 was published "promptly", we agree with the panel in *EC – IT Products*, and the parties, that the "promptness" of publication, or lack thereof, must be assessed by reference to the date on which the relevant measure has been "made effective".[129] We likewise agree with the view of that panel that "promptly" as that term is used in Article X:1 means "quickly" and "without undue delay", and that whether a measure has been published "promptly" must be determined on a case-specific basis.[130] We infer from these elements that Article X:1 requires Members to publish measures falling within its ambit quickly and without undue delay, once they have been made effective.[131] This interpretation ensures that Members enable governments and traders to become acquainted with the content of these measures in a timely fashion.

7.86. Applying this interpretation to Section 1, we recall our earlier finding that Section 1 was made effective on 13 March 2012 and not, as China argues, on 20 November 2006. Moreover, it is common ground that Section 1 was published on 13 March 2012. As the date on which Section 1 was made effective and the date on which it was published coincide, we consider that Section 1 was published both quickly and without any delay, once it had been made effective.

[126] The panel in *EC – IT Products* observed in this regard that "if measures are to be published 'in such a manner as to enable governments and traders to become acquainted with them", it follows that they must be generally available through an appropriate medium rather than simply making them publicly available". (Panel Reports, *EC – IT Products*, para. 7.1084). In *Thailand – Cigarettes* (*Philippines*), the panel found that "the relevant documents referred to by Thailand do not clearly indicate a definite right to the release of guarantees for the internal taxes upon final assessment of the goods" and that in such circumstances "importers will not be able to become acquainted with the exact nature of the right they have in respect of the release of guarantees for the internal taxes within the meaning of Article X:1". (Panel Report, *Thailand – Cigarettes* (*Philippines*), para. 7.860).

[127] China's first written submission, para. 65.

[128] China stated that PL 112-99 was published as a so-called slip law on 13 March 2012, explaining that a "slip law" is (i) an "official publication" and constitutes legal evidence of its enactment and (ii) is later compiled into the United States Statutes at Large. (China's first written submission, fn. 37). China did not address when PL 112-99 was compiled into the United States Statutes at Large. The United States maintained that PL 112-99 was published in the United States Statutes at Large on 13 March 2012. (United States first written submission, para. 80).

[129] Panel Reports, *EC – IT Products*, para. 7.1069 and *China – Raw Materials*, para. 7.1101.

[130] Panel Reports, *EC – IT Products*, para. 7.1074.

[131] In our view, the promptness requirement in Article X:1 is concerned with when a measure must be published at the latest and does not therefore preclude proper publication of a measure before it has been made effective. We do not therefore suggest that where a measure had already been published by the time it was made effective, it would need to be re-published after having been made effective, provided, however, that it had been published in a manner so as to enable governments and traders to become acquainted with it and that the measure that was made effective is the same as the published measure.

7.87. In the light of the above, we conclude that Section 1 was published "promptly".[132]

7.4.4 Overall conclusion

7.88. In sum, the Panel has determined above that:

a. Section 1 is part of a "law" and contains a provision that is of "general application" and "pertains" to "rates of duty";

b. Section 1 as a whole was "made effective" by the United States on 13 March 2012; and

c. Section 1 was published "promptly", once it had been made effective.

7.89. Whereas we thus agree with China that Section 1 falls within the scope of Article X:1, we are unable to agree with China that, contrary to Article X:1, Section 1 was not published promptly. We therefore come to the overall conclusion that China has failed to establish its claim that the United States has acted inconsistently with Article X:1 in respect of Section 1.

7.5 China's claim under Article X:2 of the GATT 1994

7.90. The Panel now turns to examine China's claim of violation under Article X:2 of the GATT 1994. The text of Article X:2 provides in full that:

> 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, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

7.91. China requests the Panel to find that Section 1 of PL 112-99 is a measure of general application effecting an advance in a rate of duty and imposing a new or more burdensome requirement or restriction on imports, which the United States enforced prior to its official publication on 13 March 2012, in violation of Article X:2. China contends that the United States enforced that measure of general application in Section 1(b) of PL 112-99 by having the measure provide retroactive legal authority for the imposition and continued maintenance of countervailing duty measures on Chinese products resulting from investigations initiated between 20 November 2006 and 13 March 2012. China submits that the retroactive enforcement of Section 1 is inconsistent, on its face, with the prohibition in Article X:2 against the enforcement of a measure "before such measure has been officially published".[133]

7.92. The United States submits that China has presented no valid basis for its claim under Article X:2. The United States maintains that China has failed to prove that PL 112-99 (i) falls within the scope of Article X:2 or (ii) is somehow inconsistent with the Article X:2 obligation. In the United States' view, Section 1 is not of general application and neither effects an advance in a rate of duty nor imposes a new or more burdensome requirement or restriction on imports. The United States further contends that Section 1 was not enforced until its publication on 13 March 2012.[134]

7.93. The Panel notes that the measure taken by the United States that China alleges was enforced prior to its official publication – Section 1 of PL 112-99 – is the same measure that China said was not published promptly contrary to the requirements of Article X:1. China claims that the United States acted inconsistently with Article X:2 by enforcing Section 1 before its official publication. The text of Article X:2 indicates that, to sustain its claim, China has to establish that Section 1:

[132] As explained, China did not claim that Section 1 was not published in an appropriate "manner".
[133] China's first written submission, paras. 3 and 80; second written submission, para. 13.
[134] United States' first written submission, para. 91; first oral statement, para. 21; second written submission, paras. 12-16.

a. is a "measure of general application taken by [a Member] 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, or on the transfer of payments therefor"; and

b. has been "enforced before [it] has been officially published".

7.94. As these two elements are cumulative in nature, we need not address them in any particular order. In the specific circumstances of this proceeding, we find it appropriate to first address the second element, for three main reasons. To begin with, the parties in this dispute differ not only on whether Section 1 is a measure of the type that falls within the scope of Article X:2 (element a). They also hold starkly opposing views as to whether the United States has even engaged in the conduct that is prohibited in respect of any measure covered by Article X:2, namely enforcement of such a measure prior to its official publication (element b). In the interest of efficiency, we therefore consider this issue before any other. Another reason is that in any event we need to amplify a point that we made succinctly above[135] when examining China's claim under Article X:1, and to which we will again revert below[136] when we examine China's claim under Article X:3(b). This point, which relates to our understanding of what constitutes prohibited conduct under Article X:2, is not linked to the question of whether or not Section 1 falls within the scope of Article X:2. Finally, one member of the Panel disagrees with the majority about whether Section 1 is covered by Article X:2. It is appropriate also for that reason to address first whether Section 1 has been enforced before its official publication.

7.5.1 Has Section 1 been "enforced" before its official publication?

7.95. The Panel thus begins its analysis with an examination of whether Section 1 has been "enforced", in the sense of Article X:2, before it has been officially published.

7.96. China contends that in the context of laws and regulations, the ordinary meaning of the term "enforce" includes to "carry out effectively" and to "compel the observance of", and that a common synonym is "to apply".[137] China observes that this view finds support in the panel reports in *EC – IT Products*[138], in which the panel considered that "proof that a measure has been applied would establish that it was enforced".[139] China also refers to the dispute in *US – Underwear*, noting the Appellate Body's statement that "[t]o apply a measure is to make it effective with respect to things or events or acts falling within its scope".[140]

7.97. China recalls that, according to the Appellate Body[141], Article X:2 reflects "basic principles of transparency and due process". China argues that these principles compel the conclusion that measures of general application affecting the conduct of governments and traders should apply only in respect of actions taken after the publication of the measure. China considers that governments and traders should have a reasonable opportunity to learn about a measure, and to adjust their conduct accordingly, before that measure is enforced in respect of their conduct. In China's view, the principle of due process is necessarily offended when a statute reaches back in time and changes the law applicable to events and circumstances that have already occurred. Government and traders cannot possibly adjust their conduct in light of such a measure, since the conduct affected by the measure has already occurred. China argues that this is why "prior publication is required for all measures falling within the scope of Article X:2"[142] – "prior", that is, to the application of the measure to particular conduct or actions. China infers from this that Article X:2 "precludes retroactive application of a measure"[143] in all cases.[144] According to China,

[135] See para. 7.73.
[136] See para. 7.292.
[137] China refers to *Merriam Webster's Collegiate Dictionary*, p. 383 (Springfield: Merriam Webster, Inc., 1997) (Exhibit CHI-22); the *Shorter Oxford English Dictionary* (1993), p. 820 (Exhibit CHI-21); and *Roget's International Thesaurus*, p. 665.11 (London: Harper & Row, 1979) (Exhibit CHI-23).
[138] China refers to Panel Reports, *EC – IT Products*, para. 7.1129.
[139] China's first written submission, para. 72; second written submission, para. 93.
[140] China's first oral statement, para. 42 (referring to Appellate Body Report, *US – Underwear*, p. 14).
[141] China refers to Appellate Body Report, *US – Underwear*, p. 21.
[142] Appellate Body Report, *US – Underwear*, p. 21.
[143] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.181.

there are a variety of different ways in which a Member might apply a measure of general application prior to its official publication in violation of Article X:2. China observes that the essential inquiry in all cases is whether such a measure was applied to events and circumstances that occurred prior to its official publication.[145]

7.98. With regard to the measure at issue, China considers that a measure of general application with a retroactive effective date is, by definition, a measure that has been enforced prior to its official publication. China recalls that pursuant to Section 1(b), Section 1 "applies to all proceedings initiated under Subtitle A of title VII [of the Tariff Act] 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 [such] proceedings …". In China's view, by stating that Section 1 "applies" to events that occurred prior to 13 March 2012, it is evident on the face of the legislation that Section 1 applies on a retroactive basis. China submits that it is therefore 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.[146]

7.99. China argues that the fact that the United States has applied Section 1 prior to its official publication is confirmed by the United States having imposed countervailing duty orders on imports from China at a time when existing United States law did not permit this action, and then continuing to maintain these pre-existing orders subsequent to the official publication of the measure. China maintains that in the absence of the retroactive application of Section 1, USDOC would have been required under United States law to revoke these pre-existing orders. According to China, the fact that the United States has continued to maintain these orders subsequent to the official publication of PL 112-99 provides further evidence and confirms that the United States has applied Section 1 to events and circumstances that occurred prior to its official publication.[147]

7.100. For these reasons, China is of the view that the United States has enforced Section 1 prior to its official publication, and that the United States has enforced that measure through Section 1(b), which provides retroactive legal authority for the imposition and continued maintenance of countervailing duty measures on Chinese products resulting from investigations initiated between 20 November 2006 and 13 March 2012. China further considers that as measures that enforce Section 1 prior to its official publication, the CVD investigations initiated prior to 13 March 2012, and the resulting CVD order, are themselves inconsistent with Article X:2.[148] Thus, China contends that Section 1(b), and the countervailing duty measures for which it provides retroactive legal authority, are inconsistent with Article X:2 because they constitute the enforcement of a measure of general application prior to its official publication.[149]

7.101. The United States submits that China has not established that the measure at issue was enforced before it was officially published. The United States contends that PL 112-99 was officially published on 13 March 2012, and that USDOC or United States courts took no action prior to that date to enforce the measure.[150] The United States observes that instead of addressing the specific

[144] China also stated that Article X:2 "prohibits any set of facts in which a measure falling within its scope is applied to events that occurred prior to its official publication". (China's second written submission, para. 92).

[145] China's first written submission, paras. 69-70 and 73-74; first oral statement, para. 45; response to Panel question No. 12.

[146] China's first written submission, para. 77; oral statement at the first meeting with the Panel, paras. 4 and 42; response to Panel question No. 12; second written submission, para. 90 (stating that the United States "enforced the new Section 701(f) of the Tariff Act before its official publication"); oral statement at the second meeting with the Panel, para. 20.

[147] China's first written submission, para. 78; response to Panel question No. 19.

[148] China refers in this connection to its panel request which provides in relevant part:

> China further 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 (as described in the second paragraph under "Measures"), including the ongoing conduct of maintaining and enforcing countervailing duty measures resulting from investigations initiated during this period, are inconsistent with Article X of GATT 1994. This is because, *inter alia*, these determinations and actions enforce a measure of general application prior to its official publication. (China's request for the establishment of a panel, p. 3).

[149] China's first written submission, para. 80; response to Panel question No. 20.

[150] The United States observes that to the extent it could be considered to have "compelled the observance" of PL 112-99, this occurred after its official publication. (United States' response to Panel question No. 11).

language of the WTO provision and the facts of this dispute, China primarily relies on the Appellate Body's findings in *US – Underwear* to support a general proposition that Article X:2 precludes retroactivity.[151] The United States notes that citation to a prior Appellate Body report does not substitute for the application of the specific language in Article X:2 to the specific facts in this dispute, and that "retroactivity" is not a term used anywhere in the GATT 1994. The United States further contends that China also misrepresents the Appellate Body findings in *US – Underwear*, which related to a safeguard measure taken under the Agreement on Textiles and Clothing. According to the United States, China notably fails to mention that the Appellate Body stated that it was improper for the panel in *US – Underwear* to rely on Article X:2 to analyse the permissibility of whether a textiles safeguard could be backdated. The Appellate Body observed that "we are bound to observe that Article X:2 of the General Agreement does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure". The United States submits that the answer must lie in the relevant covered agreement. The United States recalls in this regard that in *US – Underwear*, the Appellate Body interpreted a specific article of the Agreement on Textiles and Clothing as creating a presumption that "a measure may be applied only prospectively".[152] The United States considers that, as the present dispute involves neither a safeguard, nor claims under the Agreement on Textiles and Clothing, the Appellate Body finding does not support China's claims.[153]

7.102. China disagrees with the United States' understanding of the Appellate Body Report in *US – Underwear*. According to China, the panel in that dispute had held that the application of a measure to imports that occurred prior to its official publication would be inconsistent with Article X:2. China notes that the Appellate Body considered this interpretation of Article X:2 "appropriately protective" of the basic principle of due process that Article X:2 embodies, even though the Appellate Body did not consider that the panel's finding resolved the specific issue in that dispute. China submits in this respect that the Appellate Body's statement that Article X:2 does not speak to the issue of permissibility of giving retroactive effect to a safeguard restraint measure meant only that Article X:2 did not resolve the question of whether Article 6.10 of the Agreement on Textiles and Clothing permitted the application of such a measure to imports that occurred prior to the expiration of the 60-day period for consultations mandated by that provision.[154]

7.103. The United States responds that China cannot impute or import a legal concept that is not addressed in the plain text of Article X:2. The United States contends that Article X:2 is a procedural obligation that does not discipline the substance of the covered measures. In the United States' view, China's so-called principle of retroactivity does not apply to measures in the absence of a textual basis. The United States considers that any challenge concerning whether a measure may affect events or actions that predate its enactment must be based on a treaty article other than Article X, i.e. a treaty article that imposes a substantive obligation. According to the United States, consistent with the title and focus of Article X, Article X:2 links a requirement for transparency with the administration of a measure to ensure that Members do 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, the United States submits, Article X:2 requires a Member to publish the measure in an official publication prior to its enforcement. The United States considers that this understanding flows directly from the text of Article X:2 and the Appellate Body's observation in *US – Underwear* that Article X:2 serves to promote full disclosure of governmental acts affecting Members, private persons and enterprises.[155]

[151] The United States notes that China also references a panel statement in *US – Anti-Dumping Measures on Oil Country Tubular Goods* to the effect that Article X:2 precludes retroactive application of a measure. In the United States' view, it is unclear how the panel came to this conclusion, as it did not undertake any analysis of the treaty obligation. Moreover, the United States considers that the panel's statement is at odds with the Appellate Body's interpretation of Article X:2.

[152] Appellate Body Report, *US – Underwear*, p. 14.

[153] United States' first written submission, paras. 95 and 119-123; oral statement at the first meeting of the Panel, paras. 11 and 28; response to Panel question No. 65; second written submission, para. 12; oral statement at the second meeting of the Panel, paras. 5, 46 and 49.

[154] China's first oral statement, para. 47; second written submission, para. 127.

[155] United States' second written submission, paras. 4, 17-19 and 69-71; responses to Panel question Nos.12 and 65; oral statement at the second meeting with the Panel, paras. 47 and 50.

7.104. The United States further calls attention to Article 20 of the SCM Agreement and Article 10 of the Anti-Dumping Agreement. According to the United States, they provide explicit instructions for when countervailing duties and anti-dumping duties may be levied retroactively. The United States submits that if Article X:2 had already imposed a blanket prohibition on retroactivity, as argued by China, then the Article 20 and Article 10 elements that discipline the application of countervailing duties and anti-dumping duties with respect to past entries would have been unnecessary. The United States further notes that these two provisions also include exceptions that allow for the application of countervailing duties and anti-dumping duties to entries made prior to the completion of proceedings.[156]

7.105. The Panel begins its analysis by addressing the meaning of the phrase "[n]o measure of general application … shall be enforced before such measure has been officially published", with a particular focus on the term "enforced". The verb "enforce" is defined as "carr[ied] out effectively"[157] or "[c]ompel the observance of (a law, rule, practice, etc.); support (a demand, claim, etc.) by force"[158]. The panel in *EC – IT Products* looked at the equivalent term in the Spanish version of Article X:2, which is "aplicada" and means "applied", whereas the French version uses "mise en vigueur", which the panel said means "put into application".[159] On that basis, the term "enforce" as it is used in Article X:2 may in our view be understood as meaning "apply", particularly "apply with a view to ensuring observance of a law, rule, practice, etc.".

7.106. Article X:3(b) of the GATT 1994, which is part of the context of Article X:2, refers to "agencies entrusted with administrative enforcement". The Appellate Body observed in respect of this reference that agencies that "enforce" rules are agencies that "'apply' relevant rules".[160] In our view, the term "enforcement" is used in Article X:3(b) in the same sense in which it is used in Article X:2. It is important to bear in mind, however, that Article X:3(b) qualifies "enforcement" by the adjective "administrative". Article X:2 lacks such a qualification of the verb "enforce". We consider that the term "enforce" is susceptible of an interpretation that encompasses administrative enforcement, but is not limited to it. Like administrative agencies, courts play a significant part in the enforcement of Members' domestic laws. They, too, apply measures of general application, such as laws and regulations, with a view to ensuring their observance. In the light of this, we consider that Article X:2 covers also judicial enforcement.

7.107. The panel in *EC – IT Products* expressed the view that "proof that a measure has been applied would establish that it was enforced".[161] We concur that instances of actual application may constitute proof of enforcement. By its terms, however, Article X:2 does not talk about instances of actual enforcement. Therefore, we do not consider that absence of an instance of *actual* application necessarily demonstrates lack of enforcement. As we see it, a showing that a measure of general application requires a Member's competent authorities to apply that measure may in appropriate circumstances be sufficient to demonstrate that the Member concerned is acting inconsistently with the requirement not to enforce a measure before its official publication.

7.108. As an additional matter, we observe that, conceptually, it is important to distinguish two aspects of administrative and judicial enforcement. The first relates to when an entity such as a court or administrative agency enforces a particular measure. The second relates to the question whether a particular measure is enforced in respect of past, current and/or future events or circumstances. As a linguistic and logical matter, a measure can only be "enforced" if it has first been "made effective", either formally or informally. But once a measure enters into force, agency officials and judges can apply it, if, for instance, a law so provides, in respect of events or circumstances that occurred in the past, that is to say, that occurred before the measure entered into force.

7.109. Concordant with the finding of another panel, we consider that Article X:2 addresses the first aspect by prohibiting an administrative agency or court from taking action to enforce a

[156] United States' second written submission, para. 81.
[157] Panel Reports, *EC – IT Products*, para. 7.1129.
[158] The *Shorter Oxford English Dictionary* (1993), p. 820.
[159] We note that in *US – Underwear*, the Appellate Body likewise appears to have assumed that "enforce" means "apply" when, with reference to action that would raise no concern under Article X:2, it spoke of "publishing the measure sometime before its actual application". (Appellate Body Report, *US – Underwear*, p. 20).
[160] Appellate Body Report, *Thailand – Cigarettes* (*Philippines*), para. 195.
[161] Panel Reports, *EC – IT Products*, para. 7.1129.

relevant measure of general application before it has been officially published.[162] The question this presents, then, is whether Article X:2 is also concerned with the second aspect and likewise prohibits an agency or court from enforcing a relevant measure in respect of events or circumstances that occurred before it has been officially published. To answer this question, which is not explicitly resolved by the text of Article X:2[163], we consider the immediate context of the term "enforce" in Article X:2 as well as the object and purpose of the GATT 1994 and the WTO Agreement.

7.110. By its terms, Article X:2 applies only to measures of general application "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, or on the transfer of payments therefor". What these types of measures have in common is that they are restrictive in nature, in the sense that they make the importing Member's trade regime more restrictive rather than less.[164] Having regard to the object and purpose of the GATT 1994 and the WTO Agreement, which include providing security and predictability to the multilateral trading system[165], it is understandable why Article X:2 would not permit restrictive measures of the identified kind to apply and thereby affect past trade. If it did, traders and governments might suffer actual losses or an actual reduction in profits on long-completed international transactions.[166] Also, traders and governments might be deterred from trading in the first place, because there would then be uncertainty as to the conditions of access to other Members' markets. The situation would be different in a case where a Member introduces a similar measure that is non-restrictive in nature (and, hence, not covered by Article X:2), such as a measure that lowers a rate of duty on imports. If such a measure were applied to past trade, it might turn out that some traders or governments could have realized bigger potential profits had that measure been in place from the beginning. But they would not conclude that they should have engaged in less trade than they actually did. Thus, certainly in the case of the restrictive measures falling within the scope of Article X:2, it makes sense to supplement the publication requirement laid down in Article X:1 by a prohibition on pre-publication enforcement, as this additional discipline removes a potential element of insecurity and unpredictability in relation to Members' trade regimes which could impact negatively on trade.

7.111. Consideration of the immediate context and the object and purpose of the GATT 1994 and the WTO Agreement thus supports the view that Article X:2 should be construed to prohibit the competent authorities from enforcing a measure within its scope in respect of events or circumstances that occurred before it has been officially published. We find further support for this view in the interpretative principle according to which a treaty interpreter should guard against interpretations of treaty provisions that could deprive them of any useful effect.[167] If Article X:2 only prohibited an administrative agency or a court from taking action to enforce a relevant measure prior to its official publication, a Member could instruct that agency or court to take action to enforce a law only after its official publication, but that same law could then consistently with Article X:2 provide for enforcement in respect of events or circumstances that occurred before publication. Such an interpretation of Article X:2 would put in doubt the practical significance of

[162] See Panel Reports, *EC – IT Products*, para. 7.1134 (stating that "the April 2007 CNEN amendment was enforced by at least some EC member States before its official publication in the EU Official Journal as CNEN 2008/C 112/03 on 7 May 2008").

[163] Notwithstanding this, however, the panel in *US – Underwear* found that "in so far as the [safeguard] restraint [measure] was applied to exports from Costa Rica which had taken place prior to the publication, it was implemented and therefore enforced within the meaning of Article X:2 of GATT 1994". (Panel Report, *US – Underwear*, para. 7.69).

[164] We use the term "restrictive" as a shorthand expression to refer to the measures within the scope of Article X:2. These measures are apt to impose new or additional costs or burdens on traders and governments. Moreover, Article XI:1 of the GATT 1994 indicates that duties or other charges may be viewed as restrictions.

[165] We note that along similar lines, the Appellate Body found that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994". (Appellate Body Report, *EC – Computer Equipment*, para. 82). We further note that Article 3.2 of the DSU states that the WTO dispute settlement system is a "central element in providing security and predictability to the multilateral trading system".

[166] Indeed, under this scenario, a Member could arguably increase its applied tariff rate to the bound rate and enforce that advance in a rate of duty in respect of import transactions that occurred several years ago.

[167] Appellate Body Report, *US – Gasoline*, p. 23.

the prohibition in Article X:2 against pre-publication enforcement, because this interpretation would permit a Member to do indirectly what it would not be permitted to do directly.[168]

7.112. According to the United States, Article X:2 serves to ensure that Members do not enforce "secret" measures that are of the type described in Article X:2. However, Article X:2 does not use the term "secret", and the United States itself has emphasized that a treaty interpreter should not read words into a treaty provision.[169] We note that the text of Article X:2 enjoins Members not to enforce certain measures "before" they have been officially published. In our view, the term "before" is important, in that it indicates that enforcement must in no case precede publication. In contrast, the United States' interpretation implies that as soon as a measure falling within the scope of Article X:2 is no longer secret, it may be enforced, even in respect of events or circumstances that have occurred before it has been published. As an additional matter, we observe that the United States' interpretation appears to focus on a concern – lack of transparency – that is already addressed by the prompt publication requirement in Article X:1. Indeed, secret measures that are being enforced are measures that have been made effective, either formally or informally, and that should have been promptly published.[170]

7.113. The United States further contends that Article X:2 is a procedural obligation that does not discipline the substance of the covered measures. As an initial matter, we note that the substance, or content, of a measure is plainly relevant to an Article X:2 analysis, inasmuch as it covers only measures effecting an advance in a rate of duty or other charge, or imposing a relevant new or more burdensome requirement, restrictions or prohibition on imports, or on the transfer of payments therefor. Even disregarding that, interpreting Article X:2 to prohibit relevant measures from being enforced in respect of events or circumstances that have occurred before they have been officially published does not turn that Article into an essentially substantive obligation. Indeed, under this interpretation Members remain free to determine the substantive details of their measures, e.g. the extent of an advance in a rate of duty on imports or the range of products subject to any such advance. Interpreted in this way, Article X:2 merely imposes disciplines with regard to the temporal scope of application of relevant measures. It makes clear that whatever the specific content of a relevant measure, a Member may not enforce *that* specific content in respect of events or circumstances that occurred before the official publication of the measure. We note, finally, that according to the Appellate Body, Article X:2 has "due process dimensions", in that it ensures that traders and governments have an opportunity "to protect and adjust their activities or alternatively to seek modification of such measures".[171] It is fully consistent with this observation to interpret Article X:2 to prohibit enforcement of a measure in respect of events or circumstances that have occurred before it has been published, because such a prohibition ensures that traders and governments are in a position to protect or adjust their activities and also to seek a modification of the measure.

7.114. The United States also cites Article 20 of the SCM Agreement and Article 10 of the Anti-Dumping Agreement, arguing that these provisions would be redundant if Article X:2 prohibited the enforcement of a measure in respect of events or circumstances that occurred before it was officially published. China considers that these provisions help to confirm that Article X:2 precludes the application of a measure falling within its scope to conduct that took place prior to its official publication, and that there is no question of these provisions being made redundant if Article X:2 were interpreted in the manner described by the United States.[172] Articles 20 and 10 apply to provisional measures, countervailing duties and anti-dumping duties. Even assuming that such measures fall within the scope of Article X:2 (and we make no finding in this regard), we note that Articles 20 and 10 are different from Article X:2 in that unlike the latter, which talks about enforcement of a measure before that same measure has been published, Articles 20.1 and 10.1 talk about application of a measure (e.g. a countervailing duty) after the entry into force of another measure (e.g. the preliminary or final determination). Due to these differences, it is not

[168] As also noted by China, in practical terms it does not appear to make any real difference whether a measure is applied to certain events or circumstances and only later published, or whether the measure is promptly published and then applied, consistent with its own terms, with respect to events or circumstances that occurred before its publication. (China's second written submission, para. 105).

[169] United States' second written submission, para. 78 (citing Appellate Body Report, *India – Patents (US)*, para. 45).

[170] China states along similar lines that "a measure that is *actually* being enforced is one that already has been 'made effective'". (China's second written submission, para. 107).

[171] Appellate Body Report, *US – Underwear*, p. 20.

[172] China's responses to Panel question Nos. 38 and 115.

apparent to us that Articles 20 and 10 are simply "unnecessary"[173] in view of Article X:2 as we interpret it. Furthermore, as the United States itself notes, Articles 20.2 and 10.2 stipulate important exceptions to permit the retroactive levying of countervailing duties and anti-dumping duties in certain situations. These provisions would not be redundant if Article X:2 also applied in the situations covered by Articles 20.2 and 10.2. This is because even if Article X:2 applied in these situations, the SCM Agreement and the Anti-Dumping Agreement would be *leges speciales* in relation to Article X:2. Consequently, it is the provisions of these agreements that would be applied rather than Article X:2. Furthermore, the fact that Articles 20.2 and 10.1 on an exceptional basis permit the retroactive levy of countervailing duties and anti-dumping duties does not support the conclusion that Article X:2 permits enforcement of a measure in respect of events or circumstances that have occurred before its official publication.

7.115. Finally, we turn to address the United States' arguments about the Appellate Body's interpretation of Article X:2 in *US – Underwear*. The United States considers that this Appellate Body report supports its view that Article X:2 does not prohibit the enforcement of a measure in respect of events or circumstances that have occurred before its official publication. The panel in that dispute found, in essence, that the United States was in breach of its obligations under Article X:2 and Article 6.10 of the Agreement on Textiles and Clothing because it applied a safeguard restraint measure as from 27 March 1995 in respect of imports that took place prior to the publication of the measure on 21 April 1995. The panel also observed, however, that there would have been no breach of Article X:2 or Article 6.10 if the United States had applied the measure as from 21 April 1995. The Appellate Body disagreed, however, with the latter observation.[174] It is in this context that the Appellate Body made a statement about Article X:2, which it is useful to set out in full:

> At the same time, we are bound to observe that Article X:2 of the *General Agreement*, does not speak to, and hence does not resolve, the issue of permissibility of giving retroactive effect to a safeguard restraint measure. The presumption of prospective effect only does, of course, relate to the basic principles of transparency and due process, being grounded on, among other things, these principles. But prior publication is required for all measures falling within the scope of Article X:2, not just *ATC* safeguard restraint measures sought to be applied retrospectively. Prior publication may be an autonomous condition for giving effect at all to a restraint measure. Where no authority exists to give retroactive effect to a restrictive governmental measure, that deficiency is not cured by publishing the measure sometime before its actual application. The necessary authorization is not supplied by Article X:2 of the *General Agreement*.[175]

7.116. We agree with China that the first sentence of the above statement should not be understood to make a general point about Article X:2. Rather, it makes clear that Article X:2 does not address itself to the specific issue of whether retroactive effect may be given to a "safeguard restraint measure" taken under the provisions of the Agreement on Textiles and Clothing. Consistent with this understanding, the Appellate Body later in the paragraph observes, in effect, that the Agreement on Textiles and Clothing may impose disciplines on the use of safeguard restraint measures that go further than those that Article X:2 imposes on the use of such measures.[176] If, then, the Agreement on Textiles and Clothing prohibits[177] Members from giving retroactive effect to safeguard restraint measures even in situations where Article X:2 does not, it would not be sufficient for a Member that applied such a measure to claim compliance with Article X:2 in order to avoid a finding of violation.[178] Or, as the Appellate Body put it, conduct that

[173] United States' second written submission, para. 81.
[174] Appellate Body Report, *US – Underwear,* pp. 12 and 21.
[175] Ibid. p. 21.
[176] That is why, contrary to the United States' argument, it is not illogical to say that "Article X:2 would not resolve the issue of retroactivity for a safeguard restraint measure", but would resolve the matter for other types of measure. (United States' oral statement at the second meeting, para. 49).
[177] We note that the Agreement on Textiles and Clothing is no longer in force.
[178] As mentioned earlier, in *US – Underwear*, the panel was of the view that there would have been no breach of Article X:2 or Article 6.10 if the United States had applied the measure on 21 April 1995 rather than already on 27 March 1995. The Appellate Body disagreed, saying that the panel erred in concluding that "'had [the United States] set the restraint period starting on 21 April 1995 ... it would not have acted inconsistently with GATT 1994 *or* the ATC in respect of the restraint period'". (Appellate Body Report, *US – Underwear*, p. 21, emphasis added).

is consistent with Article X:2 does not "cure" conduct that is inconsistent with the Agreement on Textiles and Clothing. Indeed, the Appellate Body in that dispute found that it was contrary to Article 6.10 of the Agreement on Textiles and Clothing to back-date the effective date of a safeguard restraint measure even in a situation where the panel had said that there would be no breach of Article X:2.[179]

7.117. Based on the foregoing observations, we consider that the Appellate Body report in *US – Underwear* does not stand for the proposition that Article X:2 permits safeguard restraint measures, and by implication other covered measures, to be applied to imports which have taken place prior to the publication of such measures. The panel in that dispute had found that this was contrary to Article X:2.[180] And the Appellate Body did not find that this conclusion on Article X:2 was in error. To the contrary, it stated that "the Panel here gave to Article X:2 ... an interpretation that is appropriately protective of the basic principle here projected", i.e. the principle of transparency and due process that allows traders and governments "to protect and adjust their activities or alternatively to seek modification of [relevant] measures".[181] In addition, we consider that the Appellate Body report does not support the United States' view that any challenge concerning whether a measure may affect events or circumstances that predate its official publication must be based on a treaty article other than Article X:2, namely one that imposes a substantive obligation. Rather, as we have explained, what the Appellate Body report indicates is that treaty articles other than Article X:2 may provide a basis for challenging a measure that provides for its application to past events or circumstances even where Article X:2 does not.

7.118. In the light of all of the above, we conclude that Article X:2 prohibits administrative agencies or courts of a Member from (i) taking action to enforce (or apply) a measure that falls within the scope of Article X:2 before it has been officially published, or (ii) enforcing (or applying) such a measure in respect of events or circumstances that occurred before it has been officially published.

7.119. Having developed an interpretation of the term "enforced" in Article X:2, we now proceed to apply it to the measure at issue, Section 1 of PL 112-99. For purposes of this part of our analysis, we will assume that Section 1 falls within the scope of Article X:2, as China asserts. We will address this matter in detail below.[182] The first issue we address here is when Section 1 was "officially published". We note that it is undisputed that Section 1 was published officially on 13 March 2012.[183] What we must examine, therefore, is whether Section 1 has been enforced, or applied with a view to ensuring its observance, before 13 March 2012.

7.120. We agree with the United States that there is no evidence on the record to suggest that United States administrative agencies or courts took action prior to 13 March 2012 to enforce Section 1. China relies, however, on Section 1(b).[184] To recall, Section 1(b) states that the new Section 701(f) "applies to" (1) all CVD proceedings initiated on or after 20 November 2006, (2) all resulting USCBP actions, and (3) all Federal court proceedings relating to (1) or (2), which include proceedings before the CIT and the CAFC relating to CVD proceedings initiated on or after 20 November 2006.[185] The United States has confirmed that Section 1(b) is directly applicable and does not require any implementing action.[186] Consequently, we understand Section 1(b) to direct

[179] Appellate Body Report, *US – Underwear*, p. 21.
[180] Panel Report, *US – Underwear*, para. 7.69.
[181] Appellate Body Report, *US – Underwear*, p. 20.
[182] See subsection 7.5.2.
[183] China's first written submission, fn. 37; United States' first written submission, paras. 80 and 119.
[184] China clarified that its claim is that, pursuant to Section 1(b), the United States enforced Section 1 prior to its official publication, and that this claim "is not in respect of particular subparagraphs of [Section 1(b)]", which we understand to mean that it concerns all three subparagraphs. (China's responses to Panel question Nos. 113 and 114). The United States observed that China failed to explain how Section 1(b)(3) gives rise to an inconsistency with Article X:2. (United States' comments on China's response to Panel question No. 114). We note, however, that China has addressed the relevance and operation of Section 1(b)(3) notably in the context of discussing the CAFC decision in *GPX VI*. See para. 7.151; and China's responses to Panel question Nos. 10 and 61(a).
[185] China's response to Panel question No. 10.
[186] The United States explained that once Section 1 was enacted, USDOC, as the administering authority of US CVD laws, was required to apply it, and that PL 112-99 required no additional implementing acts before it was applied. (United States' response to Panel question No. 58). China agrees that there was no need for further action by US authorities for Section 1 to "apply" to the identified proceedings and actions. (China's response to Panel question No. 58).

USDOC, USITC, USCBP and Federal courts to "apply" the new Section 701(f), once Section 1 has been made effective, to the identified events or circumstances that are relevant to each authority. We found previously that Article X:2 applies irrespective of whether a relevant measure is enforced by an administrative agency, such as USDOC, USITC or USCBP, or a court, such as Federal courts.

7.121. Some of the events or circumstances that fall within the temporal scope of application of the new Section 701(f) predate 13 March 2012. This is the case for all CVD proceedings initiated on or after 20 November 2006 and before 13 March 2012. The same is true for all resulting USCBP actions that predate 13 March 2012 as well as for all Federal court proceedings concerning CVD proceedings initiated between 20 November 2006 and 13 March 2012 or resulting USCBP actions taken before 13 March 2012.

7.122. It follows that Section 1(b) requires relevant United States administrative agencies to apply the new Section 701(f) in respect of all CVD proceedings initiated, and resulting USCBP actions taken, between 20 November 2006 and 13 March 2012, i.e. in respect of events or circumstances that occurred before Section 1 was published on 13 March 2012.[187] It further requires Federal courts to apply the new Section 701(f) in all judicial proceedings concerning CVD proceedings initiated, and resulting USCBP actions taken, between 20 November 2006 and 13 March 2012, i.e. in judicial proceedings concerning events or circumstances that predate the publication of Section 1.

7.123. China claims that Section 1 is inconsistent, as such, with Article X:2.[188] As Section 1(b) in our view requires United States authorities to apply the new Section 701(f) to events or circumstances that occurred before 13 March 2012, it is not necessary for China to present evidence showing that the new Section 701(f) was actually applied in this manner. We nonetheless note that the record indicates that there were, in fact, 33 CVD investigations and reviews that were initiated in the relevant period and to which Section 701(f) applied as from 13 March 2012.[189] We also note that the CAFC decision in *GPX VI* is a decision that was based on the new Section 701(f) and that concerns a CVD proceeding initiated before 13 March 2012.[190]

7.124. In addition to relying on Section 1(b), China submits that as from 13 March 2012, the United States used Section 1 as the legal basis for the initiation of CVD investigations in respect of imports from China and issuance of CVD orders on Chinese products, including for investigations initiated and orders issued between 20 November 2006 and 13 March 2012. More specifically, China seeks a finding 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 …, including the ongoing conduct of maintaining and enforcing countervailing duty measures resulting from investigations initiated during this period"[191], are inconsistent with Article X:2, because, in China's view, they enforced Section 1 prior to 13 March 2012.[192] By "US authorities", China means USDOC, USITC and USCBP.[193]

[187] China confirmed that it is not relevant to its claims that Section 1(b) "also provides a legal basis for the initiation and subsequent conduct of any countervailing duty investigation involving imports from [an NME] country initiated by the USDOC after 13 March 2012". (China's response to Panel question No. 61(a)).

[188] China's request for the establishment of a panel, p. 3.

[189] These include the 25 investigations and reviews that we address below in connection with China's claims under Articles 19.3, 10, and 32.1 of the SCM Agreement, as well as the four investigations at issue in DS379, and four investigations where no CVDs were imposed as a result of a negative injury determination. See also China's panel request, Appendix A, and the table of relevant investigations and reviews at para. 7.15.

[190] As noted by China, the CVD investigation at issue in *GPX V* and *VI* was an investigation of off-road tires from China that had been initiated on 27 November 2006. It therefore fell within the temporal scope of Section 1. (China's response to Panel question No. 61(a)).

[191] China's request for the establishment of a panel, p. 3. According to China's request for the establishment of a panel, "[s]uch determinations and actions include, *inter alia,* any determination to initiate a countervailing duty investigation, the conduct of any such investigation, any preliminary or final determination of subsidization or injury, the imposition of provisional countervailing duties, the imposition or maintenance of any countervailing duty order, the conduct of any periodic (administrative) review, any final assessment of countervailing duties made as a result of a periodic (administrative) review, and the imposition or collection of countervailing duties pursuant to any such investigations, determinations, orders, or reviews". (China's request for the establishment of a panel, fn. 2).

[192] The United States similarly indicated that, in its understanding, the proceedings referred to by China "appear simply to serve as evidence to support China's argument that Section 1 … was enforced prior to publication". (United States' comments on China's response to Panel question No. 111).

7.125. We consider that the "determinations and actions" referred to by China cannot properly be viewed as actions taken on dates prior to 13 March 2012 to enforce Section 1 before its official publication. As we have said, there is no evidence that the United States took any enforcement action, based on Section 1, prior to 13 March 2012. These determinations and actions were taken pursuant to authority which USDOC considered it had under pre-existing CVD law, not in anticipation of authority that Congress would subsequently provide in Section 1. We do agree, however, that these determinations and actions serve to demonstrate that, as from 13 March 2012, Section 701(f) has been enforced, or applied, as a legal basis for *specific* conduct of USDOC, USITC and USCBP that occurred before the aforementioned date and concerned imports from China, such as the initiation by USDOC on 27 November 2006 of an investigation of CFS paper from China.

7.126. We note that China seeks also to include "the ongoing conduct of maintaining and enforcing countervailing duty measures resulting from investigations initiated during this period". To the extent that this phrase is meant to encompass any distinct and new determinations or actions by USDOC, USITC or USCBP that occurred after 13 March 2012 (but follow different determinations or actions that occurred prior to 13 March 2012 and concern imports of the same subject product from China), we are unable to agree. Any distinct determinations and actions made or taken after 13 March 2012 do not assist China in demonstrating that Section 701(f) has been enforced before 13 March 2012.

7.127. For all these reasons, we conclude, based on Section 1(b) and relevant determinations or actions made or taken by United States authorities between 20 November 2006 and 13 March 2012 in respect of imports from China, that the United States "enforced" Section 1 (which adds the new Section 701(f) to the United States Tariff Act of 1930) before it had been officially published. Section 1 therefore meets the first element of our two-part Article X:2 inquiry.

7.5.2 Is Section 1 "[a] measure of general application taken by [a Member] 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 "?

7.128. The Panel now turns to examine whether Section 1 is a measure of the type that falls within the scope of Article X:2. This involves a two-part analysis. First, we must determine whether Section 1 is a measure of general application taken by a Member. Second, we must determine whether Section 1 effects an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposes a requirement, restriction, or prohibition, that is new or more burdensome.[194] Only if Section 1 satisfies both parts of this test, does it fall within the scope of Article X:2.

7.129. China maintains that Section 1 is "plainly" within the scope of Article X:2. In China's view, Section 1 is a "measure" of "general application", "taken by the United States" that "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[es] a new or more burdensome requirement, restriction or prohibition on imports".[195]

7.130. The United States argues that China has failed to make a *prima facie* case that PL 112-99 is the type of measure covered by Article X:2. According to the United States, China has not established that a measure involving countervailing duties falls within the general type of measure covered by Article X:2. In the present dispute, the relevant covered types of measures are either a measure of general application effecting a duty rate or other charge on imports under an established and uniform practice, or a measure of general application imposing a requirement, restriction or prohibition on imports. The United States considers that China has failed to explain how PL 112-99 falls under either category. The United States further argues that for a measure to be covered by Article X:2, it must be one that departs in a particular way from some prior measure of general application, that is, the measure must effect an advance in a duty rate or other charge on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition. The United States maintains that CVD laws provide the

[193] China's request for the establishment of a panel, p. 1.
[194] China did not assert that Section 1 imposes a new or more burdensome requirement, restriction or prohibition on the "transfer of payments" for imports.
[195] China's first written submission, paras. 75-76.

framework for determining a CVD duty. The law itself does not prescribe any particular duty rate, let alone effect an "advance" in such a rate, nor does it impose a requirement, restriction or prohibition on imports. The United States considers that imports are affected only once the separate and distinct legal process of an investigation is completed. The United States submits that PL 112-99 made no change in USDOC's application of countervailing duties, and that China cannot therefore show that it either effected an "advance" in a rate of duty under an established or uniform practice, or imposed a "new or more burdensome requirement, restriction, or prohibition" on imports.[196]

7.5.2.1 Measure of general application taken by a WTO Member

7.131. The Panel will first examine whether Section 1 is a measure of general application taken by a WTO Member.

7.132. China submits that Section 1 of PL 112-99 is a "measure of general application" taken by the United States. In China's view, PL 112-99 is a "measure of general application" because it prescribes a rule of law that is applicable to different products, producers, importers, and countries.[197]

7.133. The United States argues that China has failed to prove that the challenged section of PL 112-99 – the application of Section 1(a) to the 27 CVD proceedings that were initiated prior to the enactment of PL 112-99 – is "of general application". According to the United States, the challenged section, which affects an identifiable number of proceedings and subject imports, does not fall under the plain meaning of the term of "general application" in Article X:2. More specifically, the United States contends that China's claim under Article X:2 relates to the part of Section 1(b)(1) that applies to proceedings already initiated prior to the enactment of PL 112-99 and that had resulted in an order, and that China's claim of violation is limited to this set of proceedings. The United States considers that these 27[198] proceedings were known as of the date of enactment of PL 112-99, as were the products subject to those proceedings and the investigated parties. The United States notes that these 27 proceedings have fixed and identified subject imports, because USDOC had already initiated or conducted an investigation on the subject imports. In the United States' view, Section 1(b)(1) is not a law of "general application" as regards this limited and known set of imports and proceedings.[199]

7.134. China counters that Section 1 is the relevant measure of general application, and that Section 1 does not need to be a measure of general application in relation to a particular set of proceedings or imports. China considers that Section 1(b) is not a distinct measure, but rather evidence on the face of the statute that the new Section 701(f) was enforced before its official publication. In China's view, it cannot be the case that Section 1 is a measure of general application for some purposes, but not for other purposes. China considers that if that were the case, there could never be a violation of Article X:2, because any measure of general application could be seen as not being a measure of general application when viewed in relation to particular conduct that took place prior to its official publication. China further argues that even if Section 1(b) were deemed to apply to a known set of investigations and products, the exporters subject to the resulting countervailing duty orders would constitute an unidentified number of economic operators.[200] China notes that this is because any exporter – past, present, or future, and whether investigated or not – that exports the goods subject to the countervailing duty orders will be liable for an assessment of countervailing duties. Accordingly, China maintains, even if it were possible to view Section 1(b) as a distinct measure, it would still constitute a measure of

[196] United States' first written submission, paras. 93-94, 98 and 101; first oral statement, para. 22.
[197] China's first written submission, paras. 75-76.
[198] The United States notes that one of these CVD investigations was initiated on 27 March 2012, that is to say, after the enactment of PL 112-99. It is unclear to the United States why China included this investigation in its claim. (United States' second written submission, fn. 54).
[199] United States' response to Panel question No. 24; second written submission, paras. 15, 47, 56 and 58.
[200] China explained that within the US system, all countervailing duty determinations apply to any exporter of the subject merchandise, whether or not that exporter was individually investigated. China's response to Panel question No. 129.

general application, because the economic operators who are potentially subject to the imposition of countervailing duties under those orders are not a defined set.[201]

7.135. The United States responds that if it is appropriate to separate Section 1 from Section 2, then there also would be a basis to further separate Section 1(a) from Section 1(b). As China's claims relate to the application of Section 1(a) to those CVD proceedings that were initiated prior to the enactment of the *GPX* legislation, the United States considers that it would indeed reflect China's claim to consider the measure as actually challenged by China, and to consider the measure in respect of those proceedings initiated prior to the law's enactment from those that were initiated after the law's enactment. The United States further argues that the possibility that a CVD order may reach an unknown set of exporters in the future is irrelevant to China's claim. According to the United States, for the past proceedings that are the subject of China's claim, the exporters subject to those investigations and resulting orders or determinations were known as of the date of enactment of PL 112-99; past exporters are therefore necessarily a defined set. The United States notes, finally, that China's claims are with respect to Section 1, not each of the CVD orders on imports from China that resulted from the named CVD proceedings. The United States submits that if China had wished to support claims on each CVD order as a measure of general application, it would have had to allege that each order was enforced prior to publication.[202]

7.136. The Panel begins by recalling its earlier finding that Section 1, as an integral part of a law (PL 112-99), falls within the category of "laws" identified in Article X:1.[203] The term "measure" in Article X:2 undoubtedly encompasses "laws" as envisaged in Article X:1.[204] Indeed, Article X:1 requires certain laws to be published under Article X:1, and pursuant to Article X:2, a subset of such laws[205] may not be enforced before they have been officially published. In the light of this, Section 1, as an integral part of a law, falls within the category of "measure" as contemplated in Article X:2. Moreover, PL 112-99, being a measure taken by the United States, is a measure taken by a Member. In sum, we consider that Section 1 is part of a measure taken by a Member.

7.137. We address, next, whether Section 1 is a statutory provision of "general application". As an initial matter, we note that the identical term – "of general application" – appears in both Article X:1 and Article X:2. We agree with the panel in *EC – IT Products* that it can be presumed that the term has the same meaning in both articles, which are closely related.[206] Therefore, for purposes of our Article X:2 analysis, we adopt the same interpretation of the term "of general application" and follow the same analytical approach as we have for purposes of our Article X:1 analysis.[207]

7.138. The measure at issue in respect of China's claim under Article X:2 is Section 1, which, to recall, is the same as the measure at issue in respect of China's claim under Article X:1. For this reason, and because we adopt the same interpretation of and analytical approach to the concept of "general application", we consider that it is not necessary to repeat, in this subsection of our Report, our previous analysis of the same issue. With the necessary modifications, our earlier considerations are equally applicable in the context of China's claim under Article X:2. We therefore rely on them in support of our conclusion here.[208]

7.139. Consequently, we find that Section 1 contains a provision of general application, notwithstanding the fact that, in relevant part, it applies to events or circumstances that pre-date the official publication of PL 112-99.

[201] China's second written submission, paras. 23-24; response to Panel question No. 116; comments on the United States' response to Panel question No. 118.

[202] United States' response to Panel question No. 118; comments on China's responses to Panel question Nos. 116 and 129.

[203] See para. 7.28.

[204] We note in this connection that the parties appear to agree that measures that fall within the scope of Article X:2 also fall within the scope of Article X:1. (Parties' responses to Panel question No. 57).

[205] For instance those that effect an advance in a rate of duty or other charge on imports under an established and uniform practice.

[206] Panel Reports, *EC – IT Products*, para. 7.1097.

[207] See paras. 7.30-7.37.

[208] The relevant considerations are set out at paras. 7.38-7.47.

7.5.2.2 Measure effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a requirement, restriction, or prohibition, that is new or more burdensome

7.140. In view of the Panel's finding in the preceding subsection, the Panel must continue with its examination of whether Section 1 falls within the scope of Article X:2. Specifically, the Panel must examine whether, as China asserts, Section 1 is a measure effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, and also a measure imposing a requirement, restriction, or prohibition, that is new or more burdensome. The Panel will begin its analysis with the first possibility identified by China.

7.5.2.2.1 Whether Section 1 effects an advance in a rate of duty or other charge on imports under an established and uniform practice

7.141. China submits that Section 1 "effect[s] an advance in a rate of duty" or a "charge on imports" insofar as it makes certain categories of imports potentially subject to the imposition of countervailing duties. China maintains that this potential charge on imports is pursuant to an "established and uniform practice", because the imposition of countervailing duties (the "practice") is required in each instance ("uniform") in which the conditions set forth in the law ("established") are satisfied.[209]

7.142. China considers that in evaluating whether Section 1 advances a rate of duty the fundamental inquiry is whether it effects an advance in a rate of duty in relation to prior municipal law, properly determined as a question of fact. China submits that the relevant baseline of comparison under Article X:2 is the prior municipal law of the importing Member, as reflected in its previously published measures of general application, including judicial decisions interpreting those laws and regulations. China contends that it is on the basis of these previously published measures, including judicial decisions, that governments and traders come to understand the requirements of the municipal law of the importing Member, and develop their expectations about what law the importing Member will apply until such time as the Member publishes a superseding measure. The meaning of prior municipal law must be determined as a matter of fact, by reference to the laws themselves and the manner in which those laws have been interpreted by domestic courts. Regarding the meaning of prior United States law, China asserts that it should be understood not to have permitted the application of countervailing duties to imports from NME countries.[210]

7.143. In relation to whether Section 1 "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice", China argues that it does, not only because, in its view, it makes imports from NME countries potentially subject to the imposition of countervailing duties, but also because it provides a legal basis for the continued maintenance of a considerable number of pre-existing countervailing duty orders which, in the absence of this legislation, would have been revoked. China submits that in these instances, at a minimum, PL 112-99 has effected an advance in the duty or charge applicable to imports. According to China, the applicable countervailing duty rate went from zero – i.e. the countervailing duty rate in the absence of any legal basis to impose countervailing duties – to whatever countervailing duty rate the USDOC had established in the particular investigations at issue.[211]

7.144. The United States counters that China has failed to explain how PL 112-99 is a measure effecting a duty rate or other charge on imports under an established and uniform practice. The United States further submits that China has provided no basis for a finding that PL 112-99 effected an "advance" in a duty rate or other charge on imports as compared to the duty rate under an established and uniform practice. According to the United States, legislation relating to the application of the CVD law does not "effect" the "rate" of duty or other import charge, much less an "advance" in a rate of duty or other charge on imports. The United States argues that countervailing duties do not "effect" (which, the United States maintains, means to "bring about" or "produce") any particular "rate" or level of a CVD duty under established or uniform practice,

[209] China's first written submission, para. 76.
[210] China's response to Panel question No. 54; second written submission, paras. 14-15 and 19-20, 38, 41-43 and 55; oral statement at the second meeting with the Panel, para. 16; response to Panel question No. 95(b) and (c).
[211] China's first oral statement, para. 38; second written submission, fn. 20.

unlike a customs tariff which sets out rates of duty. In the United States' view, CVD laws describe a process for determining a special CVD duty, and CVD laws themselves do not bring about or produce any particular duty rate. The United States further argues that PL 112-99 does not establish the rate of CVDs for the proceedings at issue. The United States considers that PL 112-99 maintains the status quo and did not make imports from NME countries potentially subject to the imposition of countervailing duties; these imports were already subject to the imposition of countervailing duties well prior to the adoption of PL 112-99.[212]

7.145. As to whether PL 112-99 effected an advance in a rate of duty on imports, the United States argues that Article X:2 does not address the issue whether USDOC's approach was legally permissible under United States law. The United States submits that China's "prior municipal law" baseline would compel the Panel to speculate on the content of United States law and determine whether USDOC's interpretation was in conformity with United States law. According to the United States, the legal issue whether USDOC was prohibited from applying the United States CVD law to China has not been resolved by United States courts. The United States maintains that in the absence of a final, binding, and legally authoritative decision by the judiciary, USDOC's understanding of the United States CVD law remains lawful as a matter of United States law. In the United States' view, given that the courts have not finally spoken to the contrary and therefore USDOC's interpretation remains valid as a matter of United States law, the Panel has no basis under United States law to substitute its judgment for that of USDOC.[213]

7.146. The United States argues, in addition, that Section 1 of PL 112-99 did not change the existing manner in which USDOC applied the United States CVD law to NME countries.[214] The United States observes that dating back to the determinations from the 1980s involving imports from the Soviet-bloc countries, USDOC has acknowledged that the United States CVD law applied to NME imports, but refrained from doing so given the inherent difficulties in identifying and measuring subsidies in those centralized command-and-control economies. The United States notes that by 2006, USDOC recognized that China was sufficiently distinct from such economies to permit the identification and measurement of countervailable subsidies. In the United States' view, because there was no change to USDOC's existing approach in how it interpreted the United States CVD law with respect to imports from NME countries, Section 1 could not effect an increase in a rate of a duty. Rather, the United States maintains, Section 1 "is Congress' statement on an existing USDOC approach".[215] The United States notes that Congress enacted PL 112-99 to end the longstanding domestic litigation regarding whether Congress intended the United States CVD law to apply to NME countries in cases where subsidies can be identified. According to the United States, PL 112-99 confirmed that USDOC had legal authority to apply the CVD provisions of the United States Tariff Act of 1930 to imports from China and thus ratified its application of those provisions to China with respect to the challenged CVD measures. Specifically, the United States contends that PL 112-99 has not changed or otherwise affected any part of the CVD proceedings and orders listed in Appendix A of China's panel request. The United States notes that the CVD rates established through those proceedings remain the same as prior to the enactment of PL 112-99, that is to say, the law maintains the status quo for these orders.[216]

7.147. The United States further argues that, even if PL 112-99 could be considered as modifying United States law, it could never be said that the situation prior to PL 112-99 could be described as an "established and uniform practice" *not* to apply CVDs to imports of China. The United States observes that the established and uniform practice since 2006 was to apply CVDs to China. Moreover, even before that time, USDOC maintained procedures for applying the United States

[212] United States' first written submission, paras. 98-99, 103 and 109; second written submission, para. 16.

[213] United States' response to Panel question No. 54; oral statement at the second meeting of the Panel, para. 12.

[214] The United States notes that without a "practice" before the purported advance, there would be no basis from which to evaluate the change. (United States' second written submission, para. 41).

[215] United States' first written submission, para. 106. The United States contends that the state of US law has always been that USDOC is not prohibited from applying the US CVD law to NME countries. (United States' first oral statement, para. 29). The United States refers to the legislative record of PL 112-99, which states that "Commerce has always had the authority to apply countervailing duties to nonmarket economies such as China". (Exhibit USA-44).

[216] United States' first written submission, paras. 105-106; oral statement at the first meeting of the Panel, paras. 14 and 24; oral statement at the second meeting of the Panel, paras. 5 and 15.

CVD law to any country where a countervailable subsidy (or bounty or grant) could be determined.[217]

7.148. China disagrees with the contention by the United States that Congress was merely clarifying existing law or resolving confusion in ongoing litigation. China considers that the proposition that PL 112-99 did not effect a substantive change in United States law is refuted both by the plain language of the statute itself and by the facts and circumstances leading up to its enactment. China notes that PL 112-99 is entitled "an act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries". China argues that if the purpose of the act is "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries", it must be the case that those provisions previously did not apply to NME economy countries. China further contends that it is the new Section 701(f), not the old Section 701(a), that creates the legal basis for the imposition of countervailing duties on imports from NME countries. China considers that if the statute was merely restating the law that already existed, then there would have been no need for Congress to make the new law retroactive to a specific date in the past. China adds that it is no coincidence that PL 112-99 is commonly referred to as the "GPX legislation". This is because, according to China, the purpose of PL 112-99 was to change the law in response to the CAFC's holding in *GPX V*.[218]

7.149. China observes that the CAFC's decision in *GPX V* held that what the United States tries to characterize as the "status quo" was, in fact, inconsistent with United States law as it then existed. China notes that the CAFC ruled that the United States Tariff Act of 1930 did not permit the application of countervailing duties to imports from NME countries. In China's view, this "ruling of law" constitutes the relevant status quo prior to the enactment of PL 112-99, not USDOC's prior interpretation of its authority, which the CAFC had considered and found to be incorrect. China asserts that the CAFC's decision in *GPX V* is a published, precedential decision of a United States court. China notes that the decision is bound in the official reports of the United States courts of appeals, notwithstanding the repeated attempts by the United States to have the CAFC "vacate" this decision, which the court has declined to do. China considers that *GPX V* is therefore a valid statement of United States law as it existed prior to the enactment of the statute at issue in this dispute.[219]

7.150. The United States counters that the opinion of the CAFC in *GPX V* never became final or legally binding on USDOC, and it therefore could not be implemented by USDOC.[220] The United States notes that a "mandate" is required to finalize a United States appellate court opinion, and that the CAFC itself stated that a mandate was not issued for the *GPX V* opinion because the case was still under appeal.[221] Therefore, the United States maintains, *GPX V* was not a final decision and has no legal effect under United States law, and the CIT, as the court of first instance, could not direct its implementation prior to the CAFC's issuance of a mandate.[222] The United States notes that prior to the issuance of a mandate, the *GPX V* opinion was still subject to change. The United States explains that such changes could be made by either the three-person panel of the CAFC that heard the *GPX V* case, the CAFC sitting *en banc*, or the United States Supreme Court.[223] In *GPX V*, the United States filed a timely petition for rehearing before the CAFC

[217] United States' first written submission, para. 108; response to Panel question No. 56(b). According to the United States, prior to the enactment of Section 1, USDOC applied the US CVD law to imports from NME countries subject to an impossibility (or "single entity") exception, that is to say, an exception applicable in the event that USDOC found it impossible to identify and measure countervailable subsidies in the NME country concerned. (United States' comments on China's response to Panel question No. 97).

[218] China's first oral statement, paras. 9, 11-12, 14 and 36; second written submission, para. 52.

[219] China's first oral statement, paras. 16 and 20; second written submission, para. 84.

[220] The United States further observes that the non-final *GPX V* opinion is not precedent under US law. According to the United States, the statement by the CAFC in *GPX V* on US law cannot be the basis for future cases involving similar facts or issues; it has no authority to change USDOC's existing approach to the application of the US CVD law to the relevant 27 proceedings. (United States' second written submission, para. 30).

[221] The United States refers to *GPX VI* (Exhibit CHI-07), p. 1311.

[222] The United States draws attention to the fact that a US appellate court held that it was improper for a court of first instance to implement the appellate court's opinion prior to the issuance of the mandate. The US appellate court explained that "[u]ntil the mandate issues, the case is 'in' the court of appeals, and any action by the district court [or the court of first instance] is a nullity". (*Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995); Exhibit USA-75).

[223] The United States observes that there is established jurisprudence of US appellate courts changing their opinions prior to the issuance of the mandate, either because of a clarification of the law or facts. The

sitting *en banc*.[224] According to the United States, this means that the proceedings in that case had not concluded and that the United States had not exhausted its rights to appeal. The United States notes that in the subsequent final decision, in *GPX VI*, the CAFC found that USDOC was not prohibited from applying the United States CVD law to China. The United States notes that a mandate was issued for this decision in *GPX VI*. Further, in response to China's arguments about the CAFC's failure to vacate the decision in *GPX V*, the United States contends that regardless of whether a decision is formally vacated, the original decision of a United States appeals court loses any effect when an appeals court grants a rehearing. The United States also points out that the CAFC granted a motion by the United States and amended its judgment in *GPX VI* to state that the judgment of the CIT was vacated.[225]

7.151. China responds that in *GPX VI*, the CAFC began its decision by reiterating its prior holding in *GPX V* that the United States Tariff Act did not permit the application of countervailing duties to imports from NME countries.[226] China notes that the court then observed, however, that Congress had subsequently "enacted legislation to apply countervailing duty law to NME countries".[227] China notes that the court explained that this new legislation "applies retroactively" to countervailing duty investigations initiated on or after 20 November 2006, including any appeals in Federal courts relating to those investigations.[228] Therefore, China contends, the CAFC applied the new law retroactively to alter the outcome of the case, without casting any doubt upon its decision in *GPX V* as a valid interpretation of the prior law.[229]

7.152. China further states that the Panel should not accept the United States' characterization of what United States law meant prior to the enactment of PL 112-99, when the CAFC has already considered those arguments and found them unpersuasive. China submits that the meaning of United States law is not a matter for the Panel to resolve through its own interpretation, but rather a fact to be discerned from the laws themselves and from the manner in which those laws have been interpreted by the United States courts. China argues that like prior panels, the Panel should take notice of the fact that "under the US legal system, the judicial branch of the government is the final authority regarding the meaning of federal laws".[230] In China's view, the CAFC's decisions in *GPX V* and *GPX VI* establish the "determinative meaning"[231] of United States law both before and after Congress enacted the legislation at issue in this dispute. China maintains that United States law is not synonymous with USDOC's treatment of imports from China.[232]

7.153. The United States responds that the issue of whether PL 112-99 was a change or clarification of United States law has not been determined by the United States courts in the ongoing *GPX* litigation or other pending court challenges. The United States submits that 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. The United States argues that, contrary to China's assertions, the inquiry under Article X:2 is not whether there has been some theoretical change in United States law; the correct approach is to evaluate the treatment given to imports before and after the challenged measure. According to the United States, the text of Article X:2 itself indicates that the issue is whether there has been an advance in a rate of duty "on imports". The United States therefore considers that the term "advance" must be evaluated in the context of the "imports" at

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United States refers to, for instance, *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009) (Exhibit USA-70); and *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (Exhibit USA-71). The United States notes, by way of example, that a US appellate court in *First Gibraltar Bank v. Morales* held that "[b]ecause the mandate is still within our control, we have the power to alter or to modify our judgment". (*First Gibraltar Bank v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995); Exhibit USA-72). The United States points out that the court went on to significantly alter its original opinion based on a clarifying law that had been enacted while the case was pending on appeal.

[224] The United States filed its petition for rehearing on 5 March 2012. Congress enacted PL 112-99 on 13 March 2012, and on 9 May the CAFC granted the United States' petition for a rehearing. (United States' first written submission, annex paras. 54, 56 and 63).

[225] United States' first oral statement, paras. 15 and 32-37; response to Panel question No. 54; second written submission, paras. 27-28; response to Panel question No. 120.

[226] China refers to *GPX VI* (Exhibit CHI-07), p. 1310.

[227] *GPX VI* (Exhibit CHI-07), p. 1310.

[228] Ibid.

[229] China's first oral statement, para. 19; second written submission, para. 86.

[230] Panel Report, *US – 1916 Act (EC)*, para. 2.14.

[231] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.154.

[232] China's oral statement at the first meeting with the Panel, paras. 21-22; oral statement at the second meeting with the Panel, para. 14.

issue. The United States submits that the correct "baseline" is the rate of duty on imports prior to the new measure. The United States notes that the "imports" at issue are those subject to the CVD investigations listed by China in its panel request that resulted in a CVD order. The United States submits that PL 112-99 did not increase the CVD rates already in place for the subject imports; the most that could be said of PL 112-99 is that it maintained the CVD rates at whatever rate was determined for each product prior to its enactment. The United States adds that at no point, even in the immediate aftermath of the CAFC's opinion in *GPX V*, were the Chinese products at issue in this dispute ever exempt from CVD rates, as the CVD orders remained in place, undisturbed.[233]

7.154. The Panel begins by addressing the meaning of the phrase "measure … effecting an advance in a rate of duty or other charge on imports under an established and uniform practice". We note that the panel in *EC – IT Products* interpreted the first part of that phrase – "effecting an advance in a rate of duty or other charge on imports" – to mean "of a type that 'bring[s] about an 'increase' in a rate of duty [or other charge on imports]".[234] We concur. We also agree with that panel that the remaining part of the phrase in question – "under an established and uniform practice" – "must relate to both 'rate of duty' and 'other charge' and that it should not be read to refer to 'other charge' only".[235]

7.155. The ordinary meaning of the word "advance", when used together with the term "in a rate", is "[a] rise in amount, value, or price".[236] Conceptually, the term "advance in a rate" calls for a comparison of two rates of duty or charge: a new rate on imports of a particular product and a prior, initial[237] rate on imports of that product. It is only if the new rate is higher than the prior rate that an "advance", or increase, in a rate has been effected. In the light of this, it is clear to us that the term "under an established and uniform practice" serves to define the relevant prior rate that is to be used to establish whether or not an advance in a rate has been effected. It follows, then, that the relevant comparison contemplated by Article X:2 is between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice.[238]

7.156. Regarding the term "established", similarly to the panel in *EC – IT Products*, we consider that this term indicates that the practice in question has been securely in place for some time.[239] As concerns the term "uniform", we note that the panel in *EC – Selected Customs Matters* found that the dictionary defines "uniform" as meaning "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances or at different times".[240] A "uniform" practice, then, is one that does not change according to the time or place of importation, or depending on the traders or governments involved.

7.157. Our interpretation of the phrase "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice" accords well with its immediate context, in particular the prohibition in Article X:2 against "enforcement" of a measure effecting an advance in a rate before its official publication. When, as Article X:2 contemplates, a rate of duty or charge is applied on imports under an established and uniform practice, such practice is liable to give rise to expectations on the part of traders and governments as to the rate of duty or charge applicable to future imports of that product. More particularly, where there is an "established and uniform" practice with regard to the applicable rate of duty or charge, economic operators are likely to rely on it when making business decisions, including production, sourcing and investment decisions.

[233] United States' second written submission, paras. 14, 21-25 and 64; response to Panel question No. 54; oral statement at the second meeting of the Panel, paras. 13-14; response to panel Question No. 95(a).

[234] Panel Reports, *EC – IT Products*, para. 7.1107.

[235] Ibid. para. 7.1116. The parties, likewise, appear to agree that the phrase "under an established and uniform practice" modifies also the term "rate of duty". (Parties' responses to Panel question No. 127).

[236] The *Shorter Oxford English Dictionary* (2002), p. 31.

[237] The United States uses the term "initial duty rate". (United States' first written submission, para. 108).

[238] We note that the panel in *EC – IT Products* expressed the view that the phrase "under an established and uniform practice" qualifies, not the nearer antecedents "rate of duty" or "other charge on imports", but the term "advance", which it said relates to both "rate of duty", and "or other charge on imports". The panel did not further explain its view. (Panel Reports, *EC – IT Products*, para. 7.1116).

[239] Panel Reports, *EC – IT Products*, para. 7.1119 (indicating that "established" entail an element of duration and that the dictionary defines "established" as meaning, *inter alia*, "set up on a permanent or secure basis").

[240] Panel Report, *EC – Selected Customs Matters*, para. 7.123.

Viewed in this light, the aforementioned prohibition in Article X:2 safeguards traders and governments against the risk of basing decisions on a formerly established and uniform practice when they should no longer do so because the practice changed or was discontinued before public notice thereof was given. Indeed, the prohibition means that traders and governments can rest secure in the knowledge that no adverse "change in practice" will occur, in the sense that no new restrictive measure or practice will be "enforced", or applied, until and unless public notice is given (in the form of official publication) of the relevant measure effecting such change.[241]

7.158. There is one additional issue that is presented by the term "under an established and uniform practice" and that arises in the dispute before us. The issue was raised notably by China.[242] It concerns whether, for purposes of an analysis under Article X:2, a distinction should be made between, on the one hand, established and uniform practices that are lawful under the domestic law of the importing Member and, on the other hand, practices of the same type that are unlawful under the domestic law of that Member.

7.159. As both parties have presented argument and evidence regarding whether USDOC's practice prior to enactment of Section 1 was lawful under United States law, we will proceed on the basis that it is potentially relevant, and at a minimum not inappropriate[243], to address this issue for purposes of an analysis under Article X:2. It is only if we find that said practice was unlawful that we would need to determine whether or not that practice can nonetheless be relied on for purposes of our analysis under Article X:2. We will revert to this matter below, as appropriate, once we have completed our examination of USDOC's practice.

7.160. China argues that in evaluating whether Section 1 effected an advance in a rate of duty on imports under an established and uniform USDOC practice, the relevant baseline of comparison is the prior municipal law of the United States, properly determined as a question of fact. According to China, it is by reference to the relevant United States laws themselves and the manner in which those laws have been interpreted by United States courts that we should determine whether there has been an advance in a rate of duty. The United States rejects what it terms China's "speculate and substitute" baseline, arguing that China is asking the Panel to determine whether USDOC acted in a manner that was not provided for under municipal law. The United States considers that the relevant question under Article X:2 is whether there has been a relevant change to the treatment of imports, and not whether an administering authority "properly" interpreted domestic law or "properly" acted in accordance with domestic law. In the United States' view, the Panel should not substitute its own judgment on domestic law for that of USDOC.[244] The United States further contends that China's "prior municipal law" approach also "would not make sense". According to the United States, this approach would mean, for example, that if domestic law requires a particular rate of duty, but a lower rate has been mistakenly applied, then an increase in the rate to the required level would not amount to an "advance" in a rate of duty and would not be subject to the requirements of Article X:2.[245]

7.161. In our view, it is neither necessary nor appropriate to follow the "prior municipal law" approach advocated by China. China is in effect asking us to put to one side, from the beginning, the practice of USDOC – followed since 2006 or at least 2007[246] – of applying CVDs to imports

[241] The Appellate Body stated along similar lines that "Members and other persons affected, or likely to be affected, by governmental measures [falling within the scope of Article X:2] 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". (Appellate Body Report, *US – Underwear*, p. 21).

[242] See e.g. China's second written submission, para. 18.

[243] The United States initially noted that Article X:2 does not address the issue whether USDOC's practice was permissible under US law. It subsequently indicated, however, that whether a measure effects an advance in a rate of duty under an established and uniform practice "would necessarily be determined by considering the entire record" and the "totality of the evidence". In this context, the United States also addressed "the state of law" in the United States prior to the enactment of Section 1. (United States' responses to Panel question Nos. 94 and 95(a) and (c); comments on China's responses to Panel question Nos. 95 and 96).

[244] United States' second written submission, para. 36; oral statement at the second meeting with the Panel, paras. 12-13 and 21; and comments on China's response to Panel question No. 95.

[245] United States' response to Panel question No. 54.

[246] November 2006 is the date on which USDOC initiated a CVD investigation of CFS paper from China, indicating its intent to determine whether US CVD law could be applied to imports from China; April 2007 is the

from NME countries. China would then have us consider the published text of relevant United States laws and such judicial decisions as may exist to shed light on their meaning, and make a determination on that basis as to the rate(s) applicable under prior United States law to imports from NME countries. It appears peculiar to us, however, to use as an analytical point of departure anything other than the practice of USDOC as the primary agency administering the United States Tariff Act of 1930. This is because the text of Article X:2 directs us to compare any new, changed rates of duty with the rates of duty under a prior established and uniform practice.[247]

7.162. Even assuming that our analysis could properly focus on determining what was required under United States law before Section 1 entered into force, such determination would need to be based, in keeping with Appellate Body guidance, on "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".[248] However, China has offered virtually no specific analysis of the text of Section 701(a) of the United States Tariff Act of 1930, which we understand was relied on by USDOC as the legal basis for applying CVDs to imports from any country, including NME countries, before the new Section 701(f) came into force.[249] Instead China referred us to the text of Section 1, the measure that China says effected an advance in a rate of duty.[250] It is not apparent to us that the analysis should focus, not on the actual text of Section 701(a) and the meaning and effect that may permissibly be given to it, but on indirect inferences that might be drawn from a subsequent enactment of Congress, Section 1 of PL 112-99.[251]

7.163. Furthermore, the above-quoted statement of the Appellate Body indicates that "evidence of consistent application" of a law may be taken into account, as appropriate, in determining what that law requires. An established and uniform practice of an agency reflecting an interpretation of a law which that agency administers would undoubtedly be "evidence of consistent application" of that law. Moreover, certainly in the case of United States law, it is appropriate to take account of any practice of an administering agency.[252] As the United States explained, under United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency's interpretation of the law "governs in the absence of

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date on which USDOC made an affirmative preliminary determination that US CVD law could be applied to imports from China. (Exhibit USA-119).

[247] China rejects the United States' arguments based on the existing USDOC approach, saying that it "completely disconnect[s]" USDOC's "treatment of trade-related conduct" (i.e. its practice) from US law. (China's second written submission, para. 72; response to Panel question No. 95(b)). However, it seems to us that in view, *inter alia*, of the wording of Article X:2 it could be said, with no less justification, that China's approach disconnects the issue of what prior United States law permitted from USDOC's actual treatment of trade-related conduct.

[248] Appellate Body Report, *US – Carbon Steel,* para. 157.

[249] We note that China itself stated that "the relevant comparison is between the Tariff Act as it existed prior to the enactment of Section 1 of P.L. 112-99 and the Tariff Act as it existed following the enactment and official publication of this new provision". (China's second written submission, para. 49).

The United States observed that USDOC's practice was based on Section 701(a) of the United States Tariff Act of 1930, which states that "if the administering authority determines that the government *of a country* … is providing, directly or indirectly, a countervailable subsidy" (emphasis added) and an industry is materially injured by reason of imports of that merchandise, "then there shall be imposed upon such merchandise a countervailing duty…". (United States' response to Panel question No. 64(a) and Exhibit USA-119). The United States contends that the term "country" in the CVD law is not limited to countries with market economies; it refers to all countries. The United States further observes that the term "nonmarket economy" did not appear in the CVD law prior to enactment of Section 1. (United States' first written submission, para. 62).

[250] China's oral statement at the second meeting of the Panel, para. 17. China stated that, in its view, Section 1 would be sufficient, on its face, to establish that it is a measure of general application that advanced a rate of duty. (China's second written submission, para. 56). Although China contends that it has presented a prima facie case that Section 1 effects an advance in a rate of duty based on its text, China has provided and discussed relevant "pronouncements of domestic courts". We will revert to these further below, as necessary.

[251] It should be mentioned in this connection that the parties fundamentally disagree about the nature and effect of Section 1. Whereas China understands Section 1 to have changed pre-existing law, the United States considers that it merely clarified pre-existing law. It is only on the former view, i.e. China's view, that it might conceivably be inferred from Section 1 that it permits or requires what prior US law did not permit or did not require.

[252] E.g., supplemental expert report of Professor Richard Fallon, para. 18 (Exhibit CHI-124) (stating that "agencies often have the function of interpreting laws enacted by Congress").

unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous".[253] This means that, within these limits, a reviewing United States court must defer to the agency's interpretation rather than impose its own interpretation.[254] Consequently, it is clear that even were we to follow China's "prior municipal law" approach, it would be improper, certainly when ascertaining the meaning of United States law, to disregard from the outset an established and uniform practice by USDOC that reflects the latter's interpretation of Section 701(a). Any such practice would need to be given due weight in our factual analysis.[255] This would be required to correctly establish the meaning of United States law as a matter of fact, and would not amount to "defer[ring] to the assertions by the United States about the meaning of its own municipal law".[256]

7.164. As a final consideration concerning China's "prior municipal law" approach, we observe that, in accordance with Article X:3(b) of the GATT 1994[257], it is the role of domestic "judicial, arbitral or administrative tribunals", and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law. In contrast, under China's approach, a WTO panel might very well find that what a Member's law requires is not what an administering agency of that Member considers it requires. In so doing, a WTO panel would end up taking a position, either expressly or in effect, about the conformity of an agency practice with "prior municipal law" as determined by that panel. We do not mean to suggest that this would never be necessary or justifiable in the context of an examination of a claim based on the WTO Agreement. But we consider that panels should not needlessly venture into the domestic law arena.[258] We are not persuaded that there is any need to do so in the present dispute.

7.165. In view of our misgivings about China's "prior municipal law" approach, we adopt a different approach to establishing whether USDOC's practice was lawful before enactment of Section 1. This involves examining whether a relevant agency practice has been judicially determined to be unlawful by a domestic court, including, where an appeal is lodged, a domestic court of superior jurisdiction, such that the practice needed to be either discontinued or appropriately changed. Absent a determination of this kind, the agency practice should be regarded as presumptively lawful, unless the domestic law of the Member concerned precludes this presumption.

7.166. This approach sits comfortably with Article X:3(b). It states that "decisions" of domestic courts must "be implemented by, and … govern the practice of, … agencies ['entrusted with

[253] *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) at 316 (citations omitted) (Exhibit USA-15). See also United States' responses to Panel question Nos. 28 and 117.

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

[255] Notwithstanding this, China rests its claim on only "two sources of law: the terms of the measure itself in relation to the prior version of the statute that it amends, and the meaning of prior municipal law as established by the pronouncements of domestic courts on the meaning of that law". (China's second written submission, para. 48).

[256] China's response to Panel question No. 96. It is useful in this context to note also the following statement by the panel in *US – 1916 Act* (*EC*): "[W]e consider that we should not limit ourselves to an analysis of the text of the 1916 Act [the US statute at issue in that dispute] in isolation from its interpretation by US courts or other US authorities, even if we were to find that text to be clear on its face. If we were to do so, we might develop an understanding of that law different from the way it is actually understood and applied by the US authorities. This would be contrary to our obligation to make an objective assessment of the facts of the case, pursuant to Article 11 of the DSU". (Panel Report, *US – 1916 Act* (*EC*), para. 6.48).

[257] Article X:3(b) requires Members to maintain or institute judicial, arbitral or administrative tribunals for the purpose of the prompt review and correction of administrative action relating to customs matters.

[258] We note that prior panels expressed similar views. See e.g. Panel Reports, *US – Stainless Steel (Korea)*, para. 6.50 (footnote omitted) (stating that "the WTO dispute settlement system … was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*"); *US – Hot-Rolled Steel*, para. 7.267 (observing that "[s]ome of Japan's arguments concerning the alleged lack of uniform, impartial, and reasonable administration of the US anti-dumping law assert that USDOC made different decisions in this case than it has made in other cases, or that the decisions were in violation of controlling US legal authority. It is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation"); and *EU – Footwear* (*China*), para. 7.858 (stating that "we agree that whether or not EU law requires an explanation of a change in methodology is irrelevant to our analysis, as it is not our role to enforce EU law").

administrative enforcement'] unless an appeal is lodged with a court … of superior jurisdiction within the time prescribed". Thus, once a judicial determination has been made that a particular agency practice is unlawful, the agency may no longer follow that practice. Interpreting Article X:3(b) *a contrario* supports the further inference that in situations where there is no such judicial determination that governs the practice of an agency, it is in principle the agency's own practice that governs, unless the domestic law of the Member concerned indicates otherwise. This interpretation is reinforced by the reference in Article X:3(b) to agencies "entrusted with administrative enforcement". Indeed, such agencies can effectively discharge their mandated function of "administrative enforcement" only if their practice is permitted to govern absent a binding judicial determination that it is unlawful. Contextual considerations therefore lend strength to the view that a relevant agency practice should be considered presumptively lawful under domestic law until and unless there is a binding domestic court decision to the contrary or domestic law precludes this presumption.[259]

7.167. China appears to consider that an analytical approach other than its "prior municipal law" approach would open the door to Members evading the prohibition laid down in Article X:2. Specifically, China maintains, a Member could then act in open disregard of its previously published measures of general application, subsequently adopt and publish a new measure of general application that expressly applies to conduct occurring prior to its official publication, and avoid being found in breach of Article X:2 because the new measure is substantively the same as its pre-existing practice.[260] In our view, this hypothetical scenario does not establish that the approach we have said we will follow will effectively convert the prohibition in Article X:2 into a nullity.[261] The only thing that China's hypothetical scenario establishes is the significance of Article X:3(b), which enjoins Members to maintain procedures for the prompt review and, where appropriate, correction of administrative action relating to customs matters. Article X:3(b) serves precisely as a deterrent or corrective to Members taking administrative action "in open disregard" of their published measures of general publication.

7.168. With these general considerations in mind, we now proceed to examine as a first step whether prior to the enactment of Section 1 there was an established and uniform USDOC practice concerning the rates of countervailing duty applicable to imports from NME countries. Should this be the case, we will examine as a second step whether that practice was unlawful under United States law.

7.169. The record shows that, in November 2006, USDOC published the initiation of a CVD investigation of CFS paper from China, and that in December 2006, it published a notice of opportunity to comment on whether the CVD law "should now be applied to imports from the PRC".[262] In April 2007, USDOC published an affirmative preliminary determination in the CVD investigation of CFS paper, in which it preliminarily determined that the United States CVD law could be applied to imports from China.[263] In October 2007, USDOC issued an affirmative final determination in the CVD investigation concerned.[264] The record further shows that between November 2006 and March 2012, USDOC initiated 33 investigations and reviews in respect of imports from China under United States CVD law, notifying China and other parties of its application of United States CVD law to China[265], and that in many of those proceedings USDOC

[259] We note in passing that a measure by a Member would similarly be regarded as presumptively lawful under WTO law absent a DSB ruling to the contrary. The Appellate Body has confirmed, for instance, that "a responding Member's law will be treated as WTO-*consistent* until proven otherwise". (Appellate Body Report, *US – Carbon Steel*, para. 157; original emphasis).

[260] China's second written submission, para. 16; response to Panel question No. 54.

[261] We find questionable the premise of China's scenario – an agency openly and knowingly disregarding published measures of general application of the Member concerned. In our view, perhaps a more realistic scenario would be one in which it is debatable whether there has actually been any departure by an agency from such measures. In other words, there may be disagreement between the agency and interested parties regarding the correct interpretation of the underlying measures.

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

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

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

[265] Exhibit USA-119 (listing notifications from November 2006 to March 2012).

issued CVD orders.[266] USDOC undertook those investigations and reviews, and issued those orders, even though, then as later, the United States designated China as an NME country. The United States contends that these facts reflect an established and uniform practice. For its part, China has not identified any instance pertaining to the relevant time-period in which USDOC determined that it lacked authority under domestic law to apply countervailing duties to imports from NME countries. In our view, these elements therefore support the view that between November 2006, or at least April 2007[267], and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country that was securely in place (established) and that did not change over time (uniform).

7.170. We further consider that this USDOC practice constituted a practice regarding "rates of duty" applicable to imports from China as an NME country. This is because under this practice, the rates of countervailing duty applicable to imports from China were whatever rates of countervailing duty that were warranted, in cases where countervailable subsidies could be determined, by the application of United States CVD law to such imports.[268]

7.171. Having determined that prior to the enactment of Section 1 there was an established and uniform USDOC practice concerning the rates of countervailing duty applicable to imports from China as an NME country, we proceed to examine whether that practice was unlawful under United States law, as China contends. Consistent with the approach we set out above, we will thus consider whether the relevant USDOC practice[269], or the interpretation of United States CVD law on which it is based, has been determined to be unlawful by a United States court, including, where an appeal was lodged, a United States court of appeals (such as the CAFC) or the United States Supreme Court, such that the practice needed to be changed. We add in this respect that the United States has confirmed that, in the absence of a United States court decision that would govern the practice of USDOC, it is USDOC's own practice or interpretation that governs under United States law.[270]

7.172. The parties have extensively discussed various relevant decisions by United States courts, specifically the CIT, which is a first-instance Federal court, and the CAFC.[271] Those decisions arose from USDOC actions relating to the application of United States CVD law to imports from China. Among the decisions that prompted the most discussion were the decisions in *Georgetown Steel* (CAFC), *CFS Paper* (CIT), as well as a series of decisions emanating from the so-called *GPX* litigation, and particularly the decisions in *GPX I* (CIT), *II* (CIT), *V* (CAFC) and *VI* (CAFC). The parties have offered divergent views as to the holdings in some of these court decisions, or their legal import. Significantly, however, neither party contends, and nothing in the record indicates,

[266] The 33 investigations and reviews include the 25 investigations and reviews that we address in connection with China's claims under Articles 19.3, 10, and 32.1 of the SCM Agreement, as well as the four investigations at issue in DS379, and four investigations where no CVDs were imposed as a result of a negative injury determination. See also China's request for the establishment of a panel, Appendix A, and the table of relevant investigations and reviews at para. 7.15.

[267] In April 2007, USDOC made a preliminary affirmative determination that US CVD law as it then existed could be applied to imports from China. (Exhibit USA-119).

[268] We determined above that countervailing duties are duties for purposes of Article X:1. The same holds true for Article X:2. We also note that Section 701(a) of the United States Tariff Act of 1930 states that where the relevant conditions are met, "there shall be imposed upon such merchandise a countervailing duty … equal to the amount of the net countervailable subsidy".

[269] We use the term "relevant practice" hereafter to refer to the established and uniform practice followed by USDOC between at least April 2007 and March 2012 in respect of applying countervailing duties to imports from NME countries.

[270] Specifically, the United States observed that "under recognized principles of U.S. law, Commerce's interpretation of the U.S. CVD law is *presumed* to be the governing interpretation of the U.S. Tariff Act until and unless a court finds that Commerce's interpretation is unreasonable or contrary to the plain text of the statute in a final and binding decision". (United States' response to Panel question No. 95(a) (emphasis added), referring to the previously mentioned United States Supreme Court decisions in *Chevron* and *Eurodif*). See also United States' comments on China's responses to Panel question Nos. 91, 95 and 96; expert report of Dean John Jeffries, para. 27 (Exhibit USA-115) (noting that "there is no debate that interpretations of statutes by the administrative agencies tasked to implement them are binding and have legal effect until and unless they are reversed or overturned by a court"); and expert report of Professor Richard Fallon, paras. 19-20 (Exhibit CHI-83) (stating that agencies' interpretation sometimes get "*Chevron* deference" and that "ultimate responsibility to determine whether agencies have acted lawfully, including in their interpretation of vague statutes, always remains with the judicial branch").

[271] China's first written submission, paras. 10-57; United States' first written submission, paras. 24-61. There apparently have not yet been any directly relevant decisions of the United States Supreme Court.

that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law. Nor has either party asserted that there are any other United States court decisions that resulted in such orders.[272]

7.173. Thus, there is no evidence that up until the time of our review of China's claim the relevant USDOC practice has been determined unlawful by a United States court, either at first instance or following appeal(s), such that USDOC would have been required to change its practice or interpretation of United States CVD law.[273] In fact, in the 33 investigations and reviews cited by China, USDOC proceeded on the basis, since at least April 2007, that it had the authority to apply United States CVD law to imports from NME countries. It is altogether implausible that USDOC would have been able to do so in the face of a court order to the contrary. As the United States explained, if an administrative agency did not comply with a court order, it would be subject to severe sanctions.[274] China similarly referred us to a decision by a United States court of appeals which stated that "once a court has issued a legal ruling on a dispute, the Board [i.e. the National Labour Relations Board as one particular administrative agency] is bound to follow the court's judgment unless and until it is reversed by the Supreme Court".[275] According to China, USDOC is similarly bound by the CAFC's decisions "not just in the specific case decided, but also in relation to other cases that raise the same issue of law".[276]

7.174. Despite the fact that these court decisions did not require USDOC to change or discontinue its relevant practice, it is useful briefly to address them. We start with the 1986 CAFC decision in *Georgetown Steel*, in which the CAFC upheld USDOC's decision not to apply CVD measures to NME countries.[277] The parties agree that this decision was a final, unappealed decision, and was governing and controlling under United States law.[278] However, the scope of the CAFC holding in *Georgetown Steel* was the subject of disagreement in the United States throughout the period 2006-2012[279], and that disagreement was not resolved prior to the enactment of Section 1 by any

[272] In response to a question from the Panel, the United States noted that "Commerce has never been ordered or otherwise required by a U.S. court to change its approach of applying the U.S. CVD law to NME countries on the grounds that such an approach was based on an incorrect interpretation of the law". (United States' response to Panel question No. 130; see also response to Panel question No. 95(a); comments on China's response to Panel question No. 91). The United States nonetheless drew attention to the fact that in one case, *GPX III*, USDOC was initially ordered by the CIT not to apply United States CVD law to certain imports from China due to a concern about the potential for overlapping anti-dumping and countervailing duty remedies. Specifically, the CIT stated that "Commerce failed to comply with the court's remand instructions. Commerce must forego the imposition of the countervailing duty law on the nonmarket economy ('NME') products before the court because its actions on remand clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs". (*GPX III* (Exhibit CHI-04), pp. 6-7). The United States added that this order was vacated on appeal by the CAFC. (United States' response to Panel question No. 130).

[273] The United States notes in this regard that "there is no conclusive and authoritative interpretation by U.S. courts overturning Commerce's interpretation and directing a different treatment of those imports [from China]". (United States' oral statement at the second meeting with the Panel, paras. 14 and 23). The legal opinion submitted by the United States observes that USDOC had the authority to apply the CVD provisions to imports from China unless and until a Federal court said otherwise and was affirmed in a final decision on appeal. The opinion adds that this has not happened. (Expert report of Dean John Jeffries, para. 29 (Exhibit USA-115)).

[274] United States' response to Panel question No. 14. The United States observed in this regard that "officials of the Department [of Commerce] may be held in contempt of court, and even jailed, if they were to fail to carry out such decisions [of reviewing courts]". (United States' oral statement at the first meeting of the Panel, para. 3).

[275] *Vincent Indus. Plastics Inc. v. N.L.R.B.*, 209 F.3d 727 (D.C. Cir. 2000) at 739 (Exhibit CHI-82).

[276] China's response to Panel question No. 69. China further stated that there are a variety of legal means available to interested parties to compel USDOC to comply with a CAFC decision. More specifically, China mentioned that interested parties can file suit directly in the CIT, seeking a judicial order requiring the USDOC to take any necessary steps on the basis of the binding precedent set by the CAFC decision. (China's second written submission, fn. 20).

[277] Exhibit CHI-02.

[278] Parties' responses to Panel question No. 51.

[279] We note that the disagreement over the scope of the holding in *Georgetown Steel* actually predates this period. For example, a 2005 GAO Report submitted by China states that "[s]ome legal experts have taken the position that *Georgetown Steel* merely upheld Commerce's decision that it could not apply CVD law to NME countries, and that Commerce could therefore change its policy so long as the change could be defended as reasonable". (Exhibit CHI-16, p. 15).

decision of a United States court that was final, non-appealable, and governing and controlling under United States law. Throughout this period, USDOC interpreted the CAFC decision in *Georgetown Steel* as affirming USDOC's discretion to determine whether to apply countervailing duties to imports from NME countries, and not as a broader holding that United States CVD law did not apply to imports from NME countries. USDOC's interpretation of *Georgetown Steel* was reflected in the notice of initiation[280] and preliminary determination[281] in the *CFS Paper* investigation that was initiated in 2006. Also, USDOC reiterated its interpretation of *Georgetown Steel* in a series of subsequent CVD determinations over the period 2006-2012.[282]

7.175. China also referred to the final countervailing duty regulations issued by USDOC to conform to the results of the Uruguay Round of multilateral trade negotiations, which date from November 1998. There, USDOC referred to its past practice of "not applying the CVD law to non-market economies". It went on to say that the CAFC "upheld this practice" in *Georgetown Steel*, and noted that USDOC intended to continue to follow this practice.[283] In our view, the countervailing duty regulations from 1998 do not detract from what we have said about the holding in *Georgetown Steel*. As explained, that decision has been understood by USDOC to have left it within its discretion to determine whether in a given case United States CVD law could be applied to particular imports from NME countries.

7.176. In *CFS Paper*, the CIT appeared to accept USDOC's interpretation of *Georgetown Steel*, stating that "the *Georgetown Steel* court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs".[284] Subsequently, in *GPX I*, the CIT stated that it was "not clear" whether *Georgetown Steel* "was deferring to a determination of Commerce based on ambiguity in the statute or whether the Court held that there was only one legally valid interpretation of the statute"; the CIT further stated that "in a case of this type of ambiguity, that is, when we are not sure what the court meant", United States Supreme Court precedent established that "we are to read the case as deciding that the agency determination at issue did not conflict with the statute, not that a new agency reading, not before the court at the time, must be rejected".[285] Furthermore, in *GPX II*, the CIT recalled that "[t]he court previously noted that the leading case upholding Commerce's

[280] *CFS Paper Initiation*, 71 Fed. Reg. at 68,549 (USA-23) (stating that "[g]iven the complex legal and policy issues involved, and on the basis of the Department's discretion as affirmed in *Georgetown Steel*, the Department intends during the course of this investigation to determine whether the countervailing duty law should now be applied to imports from the PRC.")

[281] *Coated Free Sheet Paper from the People's Republic of China: Amended Affirmative Preliminary Countervailing Duty Determination*, 72 Fed. Reg. 17,484, 17,486 (Dep't of Commerce Apr. 9, 2007) (Preliminary Determination) (emphasis added) (USA-25) (concluding that "based on our assessment of the differences between the PRC's economy today and the Soviet and Soviet-style economies that were the subject of *Georgetown Steel Corp*. v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986), we preliminarily determine that the countervailing duty law can be applied to imports from the PRC.")

[282] See e.g. Issues and Decision Memorandum for the Final Results in the Countervailing Duty Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China (April 26, 2011) (Exhibit CHI-27), pp. 5-6 (concluding that "[t]he *Georgetown Steel* Court did not hold that the statute prohibited application of the CVD law to NMEs, nor did it hold that Congress spoke to the precise question at issue. Instead, as explained above, the Court held that the question was within the discretion of the Department.") See also Exhibit CHI-28, pp. 12-13; Exhibit CHI-29, pp. 31-32; Exhibit CHI-31, pp. 33-34; Exhibit CHI-32, p. 61; Exhibit CHI-33, pp. 33-34; Exhibit CHI-34, pp. 38-39; Exhibit CHI-35, pp. 24-25; Exhibit CHI-36, p. 26; Exhibit CHI-38, pp. 35-37; Exhibit CHI-39, pp. 51-52; Exhibit CHI-40, pp. 30-31; Exhibit CHI-41, p. 16; Exhibit CHI-42, pp. 26-27; Exhibit CHI-43, pp. 43-44; Exhibit CHI-44, p. 34; Exhibit CHI-46, p. 43; Exhibit CHI-47, pp. 46-47; Exhibit CHI-48, pp. 31-32.

[283] Countervailing Duties: Final Rule, 63 Fed. Reg. 65348, 65360 (USDOC Nov. 25, 1998) (Exhibit CHI-14).

[284] *CFS Paper* (Exhibit USA-28), p. 1282 (stating that "[a]lthough Plaintiffs allege that '[t]he CAFC has definitively ruled that the CVD law was not intended to be applied against NMEs' (Pls.' Prelim. Inj. Mem. 14), the *Georgetown Steel* court did not go as far as Plaintiffs claim and find that the countervailing duty law is not applicable to NMEs, *Georgetown Steel,* 801 F.2d at 1318. Rather, the *Georgetown Steel* court only affirmed Commerce's decision not to apply countervailing duty law to the NMEs in question in that particular case and recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs. *Id.*"). The CIT also stated that "it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs. Nothing in the language of the countervailing duty statute excludes NMEs". (Ibid.)

[285] *GPX I* (Exhibit USA-93), pp. 1289-1290, citing *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

decision not to apply CVD remedies to imports from an NME country, *Georgetown Steel Corp. v. United States,* 801 F.2d 1308 (Fed.Cir.1986), is ambiguous".[286]

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

7.178. China also finds significant the 2011 CAFC decision in *GPX V*.[287] There, the CAFC held that, contrary to USDOC's practice, it was not in accordance with United States law for USDOC to apply United States CVD law to imports from NME countries, including China.[288] However, the CAFC issued no "mandate" in that proceeding.[289] The reason why the CAFC did not issue a mandate is that following a request by the United States Government, the CAFC granted a rehearing.[290] When Section 1 was enacted, the rehearing of the case was still pending. A mandate was finally issued in the *GPX VI* decision.[291] Relying on United States Supreme Court precedent[292], the CAFC in *GPX VI* based its decision on the new Section 1, even though the case was still pending on appeal at the time Section 1 entered into force.

7.179. In the United States' view, the fact that the CAFC issued no mandate means that the decision never became final[293] and was of no binding legal effect.[294] The United States considers

[286] *GPX II* (Exhibit CHI-03), p. 1237. The court also observed that it "cannot say from the statutory language alone that Commerce does not have the authority to impose CVDs on products from an NME-designated country". (Ibid. p. 1240).

[287] We use the term "decision" in connection with the *GPX V* case in the knowledge that the CAFC decision did not become final. In using that term, we express no view as to whether the CAFC decision in *GPX V* constitutes a court "decision" within the meaning of Article X:3(b) of the GATT 1994. The United States has explained that in United States legal parlance, the terms "opinion" and "decision" are often used interchangeably. (United States' response to Panel question No.76).

[288] *GPX V* (Exhibit CHI-06), p. 745.

[289] *GPX VI* (Exhibit CHI-07), p. 1312; expert report of Professor Richard Fallon, para. 54 (Exhibit CHI-83); expert report of Dean John Jeffries, para. 8 (Exhibit USA-115). The mandate documents the finality of a court's determination and remands the case to a lower court for further proceedings. (Expert report of Professor Richard Fallon, para. 54 (Exhibit CHI-83)). The United States explained that the reason why Federal appellate courts do not issue opinions and mandates at the same time is to permit parties to seek an appeal of an opinion with which they disagree. The United States further explained that if an appeal is filed, the mandate is stayed. (United States' response to Panel question No. 27).

[290] Referring to applicable Federal regulations, the legal expert opinion submitted by China indicates that the timely filing of a petition for rehearing *en banc* or by the same panel of judges stays the mandate until disposition of the petition, except where the court orders otherwise. (Expert report of Professor Richard Fallon, fn. 120 (Exhibit CHI-83)). In *GPX VI*, the rehearing was not conducted by the CAFC *en banc*, as originally requested by the United States Government, but by the same three-judge panel that heard the *GPX V* case. (China's response to Panel question No. 68; second written submission, para. 83; expert report of Professor Richard Fallon, paras. 13 and 50 (Exhibit CHI-83); United States' response to Panel question No. 68; oral statement at the second meeting with the Panel, para. 39).

[291] *GPX VI* (Exhibit CHI-07), para. 1313.

[292] *Plaut v. Spendthrift Farm*, *Inc.*, 514 U.S. 211, 226 (1995) (Exhibit USA-85).

[293] The United States notes that at the time Section 1 was enacted, the right of the parties to the *GPX* case to appeal had not been exhausted. (United States' responses to Panel Nos. 15(b) and 97(b)). The United States explained in this respect that if there had been no rehearing before the CAFC and the CAFC decision in *GPX V* had become final, the parties would have had 90 days from the date the decision was issued, which was on 19 December 2011, to file a petition asking the United States Supreme Court to review the decision. (United States' response to Panel question No. 72).

[294] United States' responses to Panel question Nos. 15(c) and (e) and 27. The legal expert opinion submitted by the United States points out, correctly, that the same panel of CAFC judges that heard the *GPX V* case subsequently conducted a rehearing of the case in *GPX VI*, and there, the CAFC relied on a decision of another United States court of appeals which stated that an appellate court's decision is not final until its mandate has been issued. (Expert report of Dean John Jeffries, paras. 7 and 9 (Exhibit USA-115); *GPX VI* (Exhibit CHI-07), p. 1312 (referring to *Beardslee v. Brown*, 303 F.3d 899, 901 (9th Cir. 2004)).

that the decision in *GPX V* has therefore no legal status under United States law.[295] The legal expert opinion submitted by China accepts that the decision in *GPX V* was not final during the subsequent pendency period for rehearing *en banc*, and that it did not conclusively determine the rights and obligations of the parties in that case.[296] The same opinion also refers to two United States court of appeals decisions whose correctness it describes as "reasonably disputable", however. The legal expert opinion argues that in view of these court of appeals decisions and the fact that the decision in *GPX V* was not vacated[297], a United States court could "very plausibly regard" the decision in *GPX V* as having established and continuing to establish that Section 701(a) of the United States Tariff Act of 1930, prior to the enactment of PL 112-99, did not apply to imports from NME countries.[298] Ultimately, though, the opinion seeks to advance a "much narrower conclusion", which is that the CAFC in *GPX VI* – the decision that the CAFC issued after granting and conducting a rehearing of the *GPX V* case – "permissibly relied on the analysis in *GPX V* to help it establish the prior state of the law" for purposes of determining whether Section 1 improperly interfered with the judicial function.[299]

7.180. For purposes of our analysis, we need not determine whether under United States law a United States court could justifiably rely on the decision in *GPX V* to establish what the law was prior to enactment of Section 1.[300] What matters is that USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in *GPX V*, be it in the *GPX* case itself or any other case. As indicated, the CAFC did not issue a mandate in *GPX V* and its decision therefore never became final. Moreover, the decision in *GPX V* did not result in any order to USDOC requiring it to adjust its practice or follow the CAFC's interpretation of United States CVD law in *GPX V*.[301] Consequently, the decision in *GPX V* in our view does not assist China in demonstrating that USDOC's practice has been judicially determined to be unlawful under United States law, such that USDOC had to change its practice of applying United States CVD law to imports from China.

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[295] United States' response to Panel question No. 75(b). The United States considers that the decision in *GPX V* is not authoritative or precedential. According to the United States, the undisputed failure by the CAFC to vacate its decision in *GPX V* does not mean that that decision is authoritative or precedential. The Panel notes in this regard that the concept of "vacation" under United States law relates to whether a court should withdraw an earlier opinion of the same or a lower court. (Expert report of Professor Richard Fallon, para. 51 (Exhibit CHI-83)). The United States submits that, regardless of whether a decision is formally vacated, when a panel of appellate court judges grants a rehearing, the original decision loses any effect. (United States' responses to Panel question Nos. 97(b) and 120; second written submission, para. 30; oral statement at the second meeting with the Panel, para. 41). The legal expert opinion submitted by the United States observes along similar lines that although the CAFC did not vacate its decision in *GPX V*, the history of the case supports the conclusion that the decision in *GPX V* was rendered inoperative and lost any effect when the CAFC granted a rehearing. (Expert report of Dean John Jeffries, paras. 10 and 15-16 (Exhibit USA-115) (referring to *Key Enters. Of Del., Inc. v. Venice Hosp.*, 9 F.3d 893, 898 (11th Cir. 1993)).

[296] Supplemental expert report of Professor Richard Fallon, para. 10 (Exhibit CHI-124).

[297] Expert report of Professor Richard Fallon, para. 53 (Exhibit CHI-83).

[298] Ibid. paras. 53-56 (referring to *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983) and *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995); supplemental expert report of Professor Richard Fallon, para. 10 (Exhibit CHI-124). The legal expert opinion submitted by China also indicates that it is not "asserting that *GPX V* had of its own force attained the status of a generally binding precedent prior to the issuance of the [CAFC's] decision in *GPX VI*". (Supplemental expert report of Professor Richard Fallon, para. 10 (Exhibit CHI-124)).

[299] Supplemental expert report of Professor Richard Fallon, para. 11 (Exhibit CHI-124). Relying on another decision of a United States court of appeals, the legal opinion submitted by China also states that a court can take note "of even a formally vacated opinion for the limited purpose of identifying what the prior law was in order to gauge the effect of a newly enacted statute in changing or not changing the prior law". (Supplemental expert report of Professor Richard Fallon, para. 12 (Exhibit CHI-124) (referring to *City of Chicago v. U.S. Dep't of the Treasury*, 423 F.3d 777 (7th Cir. 2005); China's response to Panel question No. 96).

[300] We also need not determine whether the CAFC in *GPX VI* relied on its decision in *GPX V* to establish the prior state of the law in the United States. See para. 7.184. The legal expert opinions submitted by the parties come to different conclusions in this regard. (Expert report of Professor Richard Fallon, paras. 57-58 (Exhibit CHI-83) (arguing that the CAFC in *GPX VI* reasserted its holding in *GPX V*); expert report of Dean John Jeffries, para. 18 (Exhibit USA-115) (arguing that the CAFC in *GPX VI* did not reassert its holding in *GPX V*)).

[301] The United States confirmed this, stating that "Commerce was not ordered to and could not have implemented *GPX V*" and that the "*GPX V* opinion never altered Commerce's approach of applying U.S. CVD law to the imports at issue – the Federal Circuit never ordered Commerce to do or change anything in relation to those imports". The United States further stated that the decision in *GPX V* "cannot be the basis for future cases involving similar facts or issues". (United States' oral statement at the second meeting with the Panel, para. 45; comments on China's response to Panel question No. 96; and second written submission, para. 30).

7.181. Given that at the time of our review we have been made aware of no final court decision determining that USDOC's relevant practice or interpretation was unlawful and requiring USDOC to change its relevant practice, there is, under our analytical approach, neither a need nor a justification for speculating about what the CAFC on rehearing the case would have concluded regarding the lawfulness of USDOC's relevant practice, if Section 1 had not been enacted.[302] Nor will we try to anticipate the conclusion of ongoing judicial proceedings in the United States that may have a bearing on this question.[303]

7.182. We observe that the panel in *US – Shrimp (Article 21.5 – Malaysia)* was confronted with a similar situation. In that dispute, the question was whether the panel should have taken account of the fact that a United States CIT decision, of which it had taken note in its findings, was under appeal at the time of the panel's review. The Appellate Body stated in this respect that:

> It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".[304]

[302] China submitted a letter of 18 January 2012 from the US Secretary of Commerce and the US Trade Representative (USTR) to a Ranking Member of the House Ways and Means Committee wherein USDOC and USTR offered to "work with the Congress to enact specific legislation that would remedy the court's flawed ruling [in *GPX V*]". (Exhibit CHI-12). China suggested that the letter indicates that, absent corrective legislative action, "Commerce will be required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries, including 24 existing CVD orders on imports from China and Vietnam, as well as five pending investigations and two recently filed petitions". (Exhibit CHI-12). However, what the letter actually says is that "absent legislation, should the decision of the court [in *GPX V*] become final", Commerce would be required to revoke the relevant orders. In our view, the letter does not permit the inference that the United States' Government was of the view that a further appeal – before the CAFC in the form of a rehearing, or the United States Supreme Court – was highly unlikely to be granted or, even if a further appeal were granted, was virtually certain to be unsuccessful, and that the only option to prevent the decision in *GPX V* from becoming binding was a legislative override. In fact, the letter states, to the contrary, that judicial options were among those being reviewed because "we believe the court's decision misreads the CVD statute, precedent, and Congressional intent and historic bipartisan support of strong CVD laws. Notwithstanding the strength of our legal position, prompt legislative action is necessary to clarify the law and avoid harm from injurious, subsidized goods". (Exhibit CHI-12). We further recall that a petition for rehearing *en banc* was, of course, filed with the CAFC.

China submitted another letter, dated 5 March 2012, from the Director of the Congressional Budget Office to the Chairman of the House Ways and Means Committee. In it, the CBO explained that, "[a]s a result of the Federal Circuit's decision [in *GPX V*], CBO updated its projections of revenues under current law to reflect the expectation that the Department of Commerce will stop imposing countervailing duties on goods imported from nonmarket economies." (Exhibit CHI-13). It is sufficient to note in this respect that the United States' Government filed a petition for rehearing with the CAFC on the same day. (Exhibit USA-43). It may be inferred from this that the competent services of the United States' Government were not of the view that it was inevitable that revenues from the imposition of countervailing duties on imports from NME countries would decrease as a result of the decision in *GPX V*.

[303] The United States pointed out that the *GPX* litigation is ongoing as to the determination of the constitutionality of PL 112-99 and resolution of various methodological issues. The United States further observed that USDOC's interpretation of United States law as permitting application of CVDs to China has been challenged, for instance, in *Guangdong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362 (Ct. Int'l Trade 2013) (Exhibit USA-46), which is pending in the CAFC, and in ten cases still pending in the CIT. Finally, the United States noted that the issue whether the decision in *GPX V* was an authoritative statement of the law prior to the passage of PL 112-99 had been raised by the plaintiffs before the CAFC in the pending *Wireking* appeal. (United States' second written submission, para. 37; oral statement at the second meeting with the Panel, paras. 20, 28-30; response to Panel question No. 96; comments on China's response to Panel question No. 91).

[304] Appellate Body Report, *US – Shrimp* (*Article 21.5 – Malaysia*), para. 95. The Appellate Body also stated that "[i]n response to our questions at the oral hearing, the United States confirmed that the Department of State has *received no order from the CIT to change its practice*, and, therefore, the Department of State continues to apply the Revised Guidelines as before". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 94 (emphasis added)).

7.183. Consistent with this guidance, our examination of the question of the lawfulness of the relevant USDOC practice takes account of the status of United States law in respect of this question, up until the time of our review of China's claim.[305]

7.184. The parties' submissions go into some detail about whether Section 1 simply confirmed, and made more explicit, what United States CVD law already provided (if correctly interpreted), or whether it added something that United States CVD law did not already contain.[306] The former view is supported by the United States; the latter view by China. In our view, it is not necessary to address, let alone to try to resolve, this issue which is still being litigated before United States courts.[307] Even assuming that Section 1 added something to United States CVD law that it did not already contain[308], and that it could be inferred from this that USDOC's relevant practice rested on an incorrect interpretation of United States CVD law as it stood at the time, this would not detract from the fact that, up until our review of China's claim, USDOC was not ordered by a United States court to modify or discontinue its relevant practice or interpretation.

7.185. In the light of the foregoing, it is clear to us that we have no basis for concluding that USDOC's relevant practice was unlawful under United States law, because no United States court ordered USDOC to cease applying United States CVD law as it stood at the time to imports from China. To the contrary, the evidence before us suggests that this practice was presumptively lawful under United States law, as USDOC's interpretation of United States CVD law governed in the absence of a binding judicial determination indicating otherwise. This finding obviates the need for further analysis of whether we could rely on that practice in our Article X:2 inquiry if a United States court had determined it to be unlawful.

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

7.187. The issue we turn to examine next is whether Section 1 effected an "*advance* in a rate of duty or charge on imports under an established and uniform practice".[309] We recall at the outset our view that Section 1 relates to countervailing duties and that the term "duty" in Article X:2 covers countervailing duties. We further recall our finding above[310], in the context of our analysis of China's claim under Article X:1, that Section 1 pertains to "rates of duty". Accordingly, we must determine whether Section 1 has brought about ("effected") an increase ("advance") in rates of countervailing duty on imports from China as an NME country, relative to the rates of countervailing duty applicable to such imports under USDOC's prior established and uniform practice.

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[305] The Appellate Body in *US – Shrimp* (*Article 21.5 – Malaysia*) stated that "[r]ightly, when examining the United States measure, the Panel took into account the status of municipal law at the time". (Appellate Body Report, *US – Shrimp* (*Article 21.5 – Malaysia*), para. 94).

[306] E.g. China's second written submission, paras. 52 and 63-68; expert report of Professor Richard Fallon, paras. 26-46 (Exhibit CHI-83) and supplemental expert report of Professor Richard Fallon, paras. 15-26 (Exhibit CHI-124); United States' oral statement at the second meeting with the Panel, paras. 33-36; comments on China's response to Panel question No. 97; expert report of Dean John Jeffries, paras. 19 and 24-29 (Exhibit USA-115).

[307] Neither party suggested that this issue is a material one. China indicated that it does not consider the "change" versus "clarification" issue to be material. According to China, these characterizations are "nothing more than labels"; what matters, in its view, is whether Section 1 had the effects described in Article X:2. (China's response to Panel question No. 52; second written submission, paras. 60-61). The United States similarly states that "[t]he question whether a new measure may be labelled as a 'clarification' or 'change' in the Member's domestic law is, in the end, not material to this inquiry [regarding whether the challenged measure has effected or imposed a change that is listed in Article X:2 on the treatment of the imports at issue]" and "is at best an academic exercise that does not help resolve the dispute". (United States' statement at the second meeting, para. 14; comments on China's response to Panel question No. 97; and responses to Panel question Nos. 52 and 119).

[308] The parties disagree, for instance, about whether the so-called "single entity" exception in Section 1 was already contained in United States CVD law prior to the enactment of Section 1. (China's response to Panel question No. 91; United States' comments on China's response to Panel question No. 91).

[309] Emphasis added.

[310] See para. 7.56.

7.188. To reiterate, the new Section 701(f), which is added by Section 1(a) of PL 112-99, provides that, except in cases where countervailable subsidies cannot be identified or measured, countervailing duties must be imposed on imports from NME countries. Section 1(b) then provides that Section 701(f) applies to (i) all USDOC CVD proceedings initiated on or after 20 November 2006, (ii) all resulting USCBP actions, and (iii) all Federal court proceedings relating to (i) or (ii). This means that as a consequence of Section 1(a), and the new Section 701(f) which it adds, USDOC as from 13 March 2012 was required to impose, in all CVD proceedings involving NME countries that were initiated between 20 November 2006 and 13 March 2012, countervailing duties, if any, at the rates that were warranted by the application of (pre-existing) United States countervailing duty provisions to the imports at issue in each proceeding. It also means that in respect of any duties imposed at rates determined by USDOC, USCBP was required to take any resulting actions, and that Federal courts likewise were required to uphold any rates of duty lawfully imposed under United States countervailing duty provisions by USDOC in the context of relevant proceedings.

7.189. Having addressed the content of Section 1, we can proceed to compare the new rates of duty on imports of NME products resulting from Section 1 with the prior rates applicable under USDOC's established and uniform practice. In undertaking this comparison, it is important to remember that the United States countervailing duty provisions that the new Section 701(f) requires to be applied are the exact same United States countervailing duty provisions that USDOC applied to imports from China before the entry into force of Section 1. Hence, in respect of the relevant CVD proceedings, the new rates of countervailing duty applicable to imports from China as a consequence of Section 1, like the prior rates applicable under USDOC's established and uniform practice, were whatever rates of countervailing duty that were warranted by the application of United States countervailing duty provisions to such imports. Since the facts of the underlying CVD proceedings initiated between November 2006 and 13 March 2012 were not affected by the entry into force of Section 1, USDOC was neither required nor authorized by Section 1 to impose countervailing duties at rates that differed from the rates that USDOC established in these proceedings before Section 1 entered into force. Indeed, neither party suggested that following the entry into force of Section 1, USDOC proceeded to change any of the rates established in the context of the relevant CVD proceedings. It follows from these considerations that, in respect of the relevant CVD proceedings, Section 1 did not bring about an increase, and thus did not effect an advance, in rates of countervailing duty on imports from China as an NME country.

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

7.191. For all the above reasons, we conclude that China has not established that Section 1 is a provision "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice".

7.5.2.2.2 Whether Section 1 imposes a new or more burdensome requirement, restriction, or prohibition

7.192. As the Panel does not agree with China that Section 1 is a provision "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice", it is necessary to examine whether Section 1 nevertheless falls within the scope of Article X:2 because it "imposes a new or more burdensome requirement, restriction or prohibition on imports". China considers that it does; the United States considers that it does not.

7.193. China contends that PL 112-99 "impos[es] a new or more burdensome requirement, restriction or prohibition on imports" insofar as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties. China notes that Section 1 of PL 112-99 amends section 701 of the United States Tariff Act to add a new subsection (f), the express purpose of which is "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries".

According to China, an act that "applies" countervailing duties to a particular class of imports is, without question, one that "impos[es] a new or more burdensome requirement, restriction or prohibition on imports". In China's view, being subject to CVD investigations and procedures, as well as the actual imposition of countervailing duties, is a "requirement" or "restriction" on imports.[311]

7.194. China further submits that this requirement or restriction is "new" and "more burdensome". According to China, this is evident not only from the text of the statute itself, but from the fact that this provision was enacted in direct response to the CAFC's holding in *GPX V*. China argues that the new subsection 701(f) that the statute creates was plainly intended to establish a new rule of law in response to the CAFC's decision that existing United States law did not permit the application of countervailing duties to imports from NME countries. China submits that it is this new rule of law that has been applied, and is being applied, to maintain the countervailing duty orders issued by Commerce prior to the enactment of this legislation. China therefore considers that Section 701(f) "impos[es] a new or more burdensome requirement, restriction or prohibition on imports", and that it is this new provision of law that provides the legal basis for the imposition and continued maintenance of countervailing duty orders on products from China. According to China, going from a situation in which imports were not subject to countervailing duty procedures to a situation in which they are subject to countervailing duty procedures is, without question, "new" and "more burdensome".[312]

7.195. The United States observes that requirements, restrictions and prohibitions are different types of measures, and that China fails to explain which of these three types China believes apply to PL 112-99, and how PL 112-99 imposes a requirement, restriction, or prohibition. In the United States' view, PL 112-99 does not impose any requirement on imports subject to the relevant CVD investigations involving imports from China. The United States argues that CVD laws generally are not "restrictions" on imports; they establish the framework for the application, if any, of countervailing duties. The United States further argues that a CVD proceeding is not a "requirement" on imports, as it does not impose requirements or conditions on the importation of goods. The United States points out that in a CVD proceeding, all of the reviewed goods have already entered the importing country. The United States also considers, more specifically, that Section 1 of PL 112-99 is not a "restriction" on the imports subject to the CVD proceedings at issue. The United States submits that CVD laws do not restrict imports, but establish the framework under which any alleged subsidies might be investigated and any resulting countervailing duties might be imposed.[313]

7.196. The United States considers, in addition, that China cannot show that PL 112-99 is "new" or "more burdensome" as compared to the situation faced by imports from China prior to the adoption of the measure at issue. The United States notes that the term "new" is defined as "not existing before" or "existing for the first time"[314], and that the term "more" is defined as "in a greater degree" or "to a greater extent"[315]. Thus, the United States maintains, to fall within the scope of Article X:2, imports from China must face a requirement, restriction or prohibition that did not previously exist prior to the enactment of PL 112-99, or face a burden that is of a greater degree than prior to PL 112-99.[316]

7.197. In the United States' view, Section 1 of PL 112-99 was neither a change in the law, nor did it result in any change in the treatment of imports from China. Rather, the legislation reaffirmed USDOC's interpretation of existing law for the purposes of resolving confusion in ongoing litigation. The United States observes that prior to the law's enactment, USDOC acted pursuant to its reasonable interpretation of the United States Tariff Act of 1930 to apply the United States CVD law to China when it could identify a countervailable subsidy in China, and so imports from China were already subject to the United States CVD law. Thus, according to the United States, PL 112-99 did not impose any condition that had not existed before, nor did it impose a greater degree of burden on such imports. The United States also notes that none of the CVD proceedings cited in China's panel request have been disturbed by PL 112-99. The United States submits that PL 112-

[311] China's first written submission, para. 76; first oral statement, para. 39; response to Panel question No. 49; second written submission, para. 32.
[312] China's first oral statement, paras. 40-41; second written submission, para. 32.
[313] United States' first written submission, para. 100; second written submission, paras. 16 and 66-67.
[314] The *Shorter Oxford English Dictionary* (1993), p. 1912.
[315] Ibid. p. 1829.
[316] United States' first written submission, paras. 110-111; first oral statement, para. 25.

99 instead simply maintained the status quo for USDOC's existing approach and the existing CVD orders. The United States submits that, for these reasons, Section 1 does not impose any "new or more burdensome" requirements, restrictions or prohibitions, but rather maintains USDOC's existing approach.[317]

7.198. The Panel notes that Section 1 falls within the scope of Article X:2 only if two distinct conditions are met: (i) Section 1 must impose a "requirement" or "restriction"[318] on "imports" and (ii) such requirement or restriction as it imposes must be "new" or "more burdensome". For purposes of assessing China's Article X:2 claim, it is convenient to begin our review with the second condition.

7.199. China argues that Section 1 subjects imports from NME countries to CVD investigations and procedures and to the actual imposition of CVDs. According to China, Section 1 therefore imposes a "requirement" or "restriction" on imports. To examine whether the second condition mentioned in the preceding paragraph is met, we will assume for the sake of argument that China is correct in its view that Section 1 imposes either a "requirement" or a "restriction" on "imports" within the meaning of Article X:2 because it subjects imports from NME countries to CVD investigations and procedures and to the imposition of CVDs.

7.200. Turning to the issue whether Section 1 imposes a "new" or "more burdensome" requirement, we note the dictionary meaning of "new", which is "not existing before" or "existing for the first time", and also that of "more", which is "in a greater degree" or "to a greater extent".[319] The term "burdensome" is defined as "[o]f the nature of a burden, oppressive, wearisome".[320] Taken together, these definitions indicate that a new or more burdensome requirement or restriction on imports is one that has not previously been imposed ("new") or one that is of the nature of a burden in a greater degree, or is onerous to a greater extent ("more burdensome"). The comparative form "more burdensome" implies that the measure imposing the requirement or restriction at issue must be examined with reference to a pre-existing requirement or restriction.

7.201. Like the parties, we consider that the analytical approach used to determine whether Section 1 imposes a "new" or "more burdensome" requirement or restriction should be the same as is used to determine whether Section 1 effects an advance in a rate of duty under an established and uniform practice. Otherwise, Members' obligations under Article X:2 with regard to enforcement of tax measures[321] and enforcement of regulatory measures could be different in scope, because, for instance, a tax measure might fall within the scope of Article X:2 when a comparable regulatory measure would not.

7.202. China submits that the Panel should follow its suggested "prior municipal law" approach.[322] We have explained above when examining whether Section 1 effected an advance in a rate of duty under an established and uniform practice why we are not persuaded by China's approach. For essentially the same reasons, it is in our view neither necessary nor appropriate to follow China's approach to conduct a proper analysis of whether a "new" or "more burdensome" requirement or restriction has been imposed.[323]

7.203. Thus, and recalling also the reference to an established and uniform practice in the part of Article X:2 that relates to advances in rates of duty, we do not consider it appropriate, in the context of an analysis involving United States law, to pay no regard to a publicly known practice of agencies charged with administering a relevant requirement or restriction on imports. Indeed, Article X:2 does not indicate that account may be taken only of a relevant pre-existing requirement or restriction that is set out in explicit terms in a published measure of general application, but not of a requirement or restriction that results from, and reflects, an interpretation of such a measure adopted and publicly communicated by an administering agency. Furthermore,

[317] United States' first written submission, paras. 113 and 115; oral statement at the first meeting with the Panel, para. 26; oral statement at the second meeting with the Panel, para. 16.
[318] China does not contend that Section 1 is a "prohibition" on imports within the meaning of Article X:2.
[319] See the United States' argument at para. 7.196.
[320] The *Shorter Oxford English Dictionary* (2002), p. 308.
[321] We note that, for instance, ordinary customs or countervailing duties on imports are ultimately taxes on imports.
[322] See paras. 7.142 and 7.160.
[323] See notably paras. 7.163 and 7.164.

Article X:2 is concerned, in relevant part, not with new or more burdensome requirements or restrictions *per se*, but with the "enforcement", or application, of the measure imposing them. In the light of this, it would be counterintuitive to proceed on the basis that it is irrelevant for analytical purposes how a measure containing a relevant pre-existing requirement or restriction has actually been applied. We agree that traders and governments develop expectations regarding any applicable requirements or restrictions on imports by taking into account a Member's published measures.[324] But we are unable to accept any notion that they develop their expectations without regard for the actual practice that is publicly known to have been adopted under those published measures by administering agencies such as USDOC.[325] Finally, as regards the issue, raised by China, whether USDOC lawfully applied a particular requirement or restriction that it considered was imposed under Section 701(a) before the enactment of Section 1, we once again proceed on the basis that it is potentially relevant and not inappropriate to address this issue. We also follow the same approach to establishing whether USDOC's practice prior to Section 1 was lawful under United States law.[326]

7.204. We recall our earlier finding that between November 2006, or at least April 2007, and March 2012, USDOC applied United States CVD law as it stood at the time, and notably Section 701(a), to imports from China as an NME country, and it imposed CVDs on imports from China in various proceedings.[327] This indicates that as from at least 2007 and on the basis of the published United States CVD law then in force, USDOC subjected imports from China as an NME country to CVD proceedings and imposed CVD duties on such imports. To the extent that it can be properly said (and we make no finding in this regard) that in doing so, USDOC subjected imports from China to a "requirement" or "restriction", as China asserts, it is the same "requirement" or "restriction" that China says was subsequently imposed by the new Section 701(f) that Section 1 added to the United States Tariff Act of 1930. There is nothing surprising about this conclusion. Both before and following the enactment of Section 1, USDOC applied United States CVD law to imports from China as an NME country, and it did so pursuant to the same substantive and procedural provisions of United States CVD law, namely the "countervailing duty provisions" of the United States Tariff Act of 1930 to which the heading of Section 1 and its preamble refer.[328]

7.205. As concerns the issue whether USDOC's practice was lawful under United States law, there is no need to repeat here what we have said above regarding the same issue.[329] It is sufficient to recall what we have concluded, which is that the evidence before us suggests that USDOC's relevant practice was presumptively lawful under United States law.[330] Thus, we need not examine whether we could rely for purposes of our Article X:2 analysis on a "requirement" or "restriction" if a United States court had determined its application by USDOC to be unlawful.

7.206. In the light of the foregoing, we consider that Section 701(f) does not impose a "requirement" or "restriction" on imports from China as an NME country that was not previously imposed on such imports by USDOC under its prior practice, since at least April 2007, of applying United States CVD law to imports from China. It follows that Section 701(f), and by extension Section 1, does not impose any "new" or "more burdensome" "requirement" or "restriction" on imports from China.

7.207. Having thus found that China has not demonstrated that Section 1 imposes a "new" or "more burdensome" requirement or restriction even if we accept China's contention regarding why and how Section 1 imposes a "requirement" or "restriction", it is unnecessary to go on and determine whether China is in fact correct in arguing that Section 1 imposes a "requirement" or "restriction" within the meaning of Article X:2. It is clear already at this juncture that Section 1 does not fall within the category of measures of general application "imposing a new or more burdensome requirement [or] restriction".

[324] See China's argument at para. 7.142.

[325] It is not apparent to us, for instance, how at least from April 2007 traders and governments could have expected anything other than that, absent a court order to the contrary, USDOC would normally continue its changed practice with regard to application of US CVD law to imports from China as an NME country.

[326] See paras. 7.159 and 7.165.

[327] See para. 7.169; Exhibit USA-119.

[328] We recall in this context that neither party suggested that following, and in response to, the entry into force of Section 1, USDOC proceeded to change any aspect of the CVD proceedings at issue that were initiated between 20 November 2006 and 13 March 2012. See also para. 7.189.

[329] See paras. 7.172-7.185.

[330] See para. 7.185.

7.208. For all these reasons, we conclude that China has not established that Section 1 is a provision "imposing a new or more burdensome requirement, restriction or prohibition on imports".

7.5.2.3 Conclusion

7.209. Having regard to the foregoing, the Panel concludes that Section 1 does not meet the second element of its Article X:2 analysis. Although Section 1 contains a measure of general application taken by the United States, we are unable to agree with China that Section 1 falls within the scope of Article X:2. This is because we are not persuaded that Section 1 contains a provision that (i) effects an advance in a rate of duty or other charge on imports under an established and uniform practice, or (ii) imposes a new or more burdensome requirement, restriction or prohibition on imports.

7.5.3 Overall conclusion

7.210. In sum, the Panel has determined the following:

a. Section 1 has been "enforced" before its official publication through Section 1(b) and relevant determinations or actions made or taken by the United States between 20 November 2006 and 13 March 2012 in respect of imports from China;

b. Section 1 is part of a United States law, and hence a "measure" taken by the United States, and contains a provision that is of "general application"; but

c. Section 1 does not effect an "advance" in a rate of duty or other charge on imports under an established and uniform practice, nor does it impose a requirement, restriction, or prohibition, on imports that is "new or more burdensome".

7.211. Whereas we thus agree with China that Section 1 has been enforced before its official publication, we are ultimately unable to agree with China that the prohibition laid down in Article X:2 against pre-publication enforcement covers Section 1. We therefore come to the overall conclusion that China has failed to establish its claim that the United States has acted inconsistently with Article X:2 in respect of Section 1.

7.5.4 Dissenting opinion

7.212. I agree with my fellow panelists that Section 1 of PL 112-99 is a measure of "general application" (as explained in subsection 7.5.2.1 above), and that it was "enforced" before it was officially published (as explained in subsection 7.5.1). However, my understanding of whether Section 1 of PL 112-99 "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[es] a new or more burdensome requirement, restriction or prohibition on imports" differs from that of the majority opinion of my fellow panelists. I therefore do not agree with the findings and conclusions in subsections 7.5.2.2.1, 7.5.2.2.2, 7.5.2.3 and 7.5.3 (specifically the conclusions set out in paragraph 7.210c)).

7.213. My analysis starts with ascertaining the meaning of "effecting". In this regard I note that dictionaries define this term as "to bring about, produce as a result, cause, accomplish".[331] I, like the majority opinion, also agree with the panel in *EC – IT Products* which interpreted the first part of that phrase – "effecting an advance in a rate of duty or other charge on imports" – to mean "of a type that 'bring[s] about an 'increase' in a rate of duty [or other charge on imports]".[332] Hence, we have to examine whether Section 1 of PL 112-99 caused or brought about an increase in a rate of duty or other charge on imports. We will also have to examine whether it imposed "a new or more burdensome requirement, restriction or prohibition on imports."

[331] E.g. *Webster New World College Dictionary* (3rd Ed.) p. 432. See also Panel Reports, *EC – IT Products*, para. 7.1103 (referring to the *Merriam-Webster Online Dictionary*), and Appellate Body Report, *US – Upland Cotton*, para. 435 (referring to The *Shorter Oxford English Dictionary* in the context of observing that "Article 6.3(c) [of the SCM Agreement] does not use the word 'cause'; rather, it states that 'the effect of the subsidy is ... significant price suppression'. However, the ordinary meaning of the noun 'effect' is '[s]omething ... caused or produced; a result, a consequence'.")

[332] Panel Reports, *EC – IT Products*, para. 7.1107.

7.214. Such an examination must start with the legislative measure at issue, namely PL 112-99. In this regard, the Appellate Body has instructed panels examining the meaning of domestic law implicated in a WTO dispute to start with "the text of the relevant legislation or legal instruments", and for further support, in appropriate cases, to examine "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[333] In the specific context of the comparison required by Article X:2, this entails a comparison of the measure at issue with the prior municipal law (if any) that it replaces, amends, or otherwise supersedes. In this case, the relevant comparison is between the United States Tariff Act as it existed prior to the enactment of Section 1 of PL 112-99 and the United States Tariff Act as it existed following the enactment and official publication of this new provision.

7.215. PL 112-99 is entitled "an act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries". Section 1 of the law, which is at issue here, is entitled "Application of Countervailing Duty Provisions to Non-Market Economy Countries". The section adds a subsection (f) to section 701 of the United States Tariff Act of 1930, providing that, except for a certain exception, "the merchandise on which countervailing duties *shall be* imposed under subsection (a) includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from a nonmarket economy country."[334] This is a new provision that did not previously exist in the United States Tariff Act of 1930. This legislation from 2012 then goes on and provides in subsection 1(b) that this new provision shall apply to all CVD proceedings "initiated on or after November 26, 2006."

7.216. It is therefore readily apparent from the text of the legislation itself that what Section 1 of PL 112-99 did was "to apply the countervailing duty provisions of the US Tariff Act of 1930 to nonmarket economy countries" and to do so in relation to events that occurred before its official publication. It is also readily apparent from the text of the law that prior to its enactment, the United States Tariff Act of 1930 did not apply to nonmarket economy countries. Otherwise, what was the purpose of the legislation if those provisions already "applied" to imports from those countries? Section 1 of PL 112-99 thus effects an "advance in duties", namely an increase in countervailing duties that can be applied – and that were applied in practice – to imports from NMEs, in that previously no such duties could be applied (an effective rate of zero) and following the new law CVDs can and must be applied at the rates duly determined by USDOC. I note in this regard how the United States itself characterized the effect of this law in a Letter Brief in Response to Court Order dated March 23, 2012: "the new statute requires that Commerce apply CVDs to imports from NMEs, including China".[335] And this new amendment to the law was made effective from a date preceding the official publication of the amendment by several years.

7.217. PL 112-99 also imposed "a new or more burdensome requirement …. on imports". Being subject to CVD investigations is definitely a "requirement" that is imposed on imports. It is well known to anybody involved in this field that importers and exporters of the products under a CVD investigation are required to respond to lengthy questionnaires sent to them by the administering authorities of the importing country and to present documents and other relevant evidence requested by such authorities.[336] If they refuse access to such documents, they run the risk that the administering authorities will base their determinations "on the basis of the facts available".[337] Such importers and exporters will usually need to retain legal and professional counsel to represent them in the CVD proceedings, to prepare responses and to appear in the various hearings scheduled by the authorities, all of which obviously imposes a significant financial burden. This requirement is "more burdensome" than being exempt from CVD proceedings, and it is also "new" to the extent that it did not exist in the absence of PL 112-99. Having said that, however, one should stress that under Article X:2 the requirement needs to be either "new" or "more burdensome", and does not have to fulfill both of these conditions in order to fall under the provision.

7.218. The new subsection 701(f)(2) of the United States Tariff Act of 1930 created by Section 1(a)(2) of PL 112-99 establishes an "exception" from the imposition of countervailing

[333] Appellate Body Report, *US – Carbon Steel*, para. 157.
[334] Exhibit CHI-01. (emphasis added)
[335] Exhibit CHI-10, p. 2.
[336] See Article 12 of the SCM Agreement.
[337] Article 12.7 of the SCM Agreement.

duties for imports from countries in respect of which USDOC is "unable to identify and measure subsidies … because the economy of that country is essentially comprised of a single entity". No such exception previously existed anywhere in the United States Tariff Act of 1930. If the general countervailing duty provisions of the United States Tariff Act of 1930, as set forth in Section 701(a), previously applied to imports from nonmarket economy countries, then this new exception would have been the only substantive change that was required. In that case, the United States Congress could simply have enacted the exception created by Section 1(a)(2) and codified it under Section 701(a). Instead, the United States Congress enacted a new subsection, 701(f), aimed at applying the countervailing duty provisions of the United States Tariff Act of 1930 to imports from NME countries, and it codified the exception in this new subsection. This reconfirms the above conclusion that the application of CVDs to imports from NME countries is an entirely new subject under the United States Tariff Act of 1930. The new Section 701(f) establishes an affirmative rule (the duty to apply countervailing duties to imports from NMEs) and an exception to that rule, all in its own subsection.

7.219. In an attempt to rebut this conclusion, the United States argues that Section 1 of PL 112-99 was nothing more than a "clarification" of the United States Tariff Act of 1930 as it always existed. It was a law that "confirmed" that USDOC always had the legal authority to apply the countervailing duty provisions of the United States Tariff Act of 1930 to imports from NMEs.[338] China disputes this assertion and argues that there is no basis whatsoever in the text of the legislation itself or in any of the surrounding circumstances to support this assertion.

7.220. It is questionable whether the United States assertion regarding the clarifying nature of PL 112-99 is capable of changing the conclusion that this is legislation "effecting an advance in a rate of duty". Even assuming, *arguendo,* that PL 112-99 only clarified the law, it did have the effect – in the words of the United States – of "superseding" the decision of the Federal Circuit, in *GPX V* "by amending … the CVD statute such that it expressly, and retroactively, requires Commerce to impose CVDs to NME imports".[339] Since the CAFC, in *GPX V* had found that USDOC did not have the authority to impose CVDs on NME countries, and if this ruling had become binding – again in the words of the United States – "Commerce [would have been] required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries"[340], the new legislation clearly had an effect on these CVD orders. Its effect was to enable the continued imposition of the CVD duties that had originally been imposed before the official publication of the law, including on products imported before such publication. Furthermore, even according to the United States' position, while USDOC had the authority to impose CVDs on products from NME countries, they certainly were not *required* to do so.[341] That situation was changed by PL 112-99 which imposed an obligation to do so ("countervailing duties shall be imposed") and applied it retroactively to proceedings initiated on or after 20 November 2006.

7.221. In any case, I do not find the United States' assertion about the clarifying nature of PL 112-99 persuasive. I reach this conclusion after having followed the Appellate Body's instruction to examine "evidence of the consistent application of [United States CVD laws], the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[342]

7.222. Starting with evidence of the consistent application of United States CVD laws, I note the pronouncement of USDOC itself in its countervailing duty regulations, as published in the Federal Register in 1998, about its practice:

> In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986). See also GIA at 37261. We intend to continue to follow this practice. Where the Department determines that a change in

[338] See e.g. United States' first written submission, paras. 56, 106; United States' responses to Panel question No. 26, para. 37; Panel question No. 58, para. 151; Panel question No. 64(a), para. 154.

[339] Defendant-Appellant United States' Motion to Recall and Amend (May 21, 2012) (Exhibit CHI-26), p. 3.

[340] Letter from the Secretary of Commerce and the U.S. Trade Representative to the Chairman of the House Ways and Means Committee (January 18, 2012) (Exhibit CHI-12).

[341] See para. 7.215.

[342] Appellate Body Report, *US –Carbon Steel*, para. 157.

> status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.[343]

If Section 1 of PL 112-99 was merely a clarification of existing law, which did not change United States law or make it stricter towards imports from NMEs, this would mean that USDOC was always under an obligation to impose CVDs on subsidized goods from NMEs. That this was not the case can be seen clearly from the above pronouncement by USDOC. Clearly, if USDOC was under such a legal obligation it could not have followed a "practice of not applying the CVD law to non-market economies."

7.223. I now proceed to examine "the pronouncements of domestic courts on the meaning of [United States CVD] laws", prior to the passing of PL 112-99. I start my examination with the judgment of the CAFC, in *Georgetown Steel Corp. v. United States*.[344] In this case, the appellant challenged USDOC's position that it was not authorized under United States law to impose CVDs on imports from NME countries because the relevant section in the United States Tariff Act of 1930 did not apply to such imports. As explained by the court in its opening statement:

> The substantive issue in this case, here on appeal from the Court of International Trade, is whether the countervailing duty provisions in section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982), apply to alleged subsidies granted by countries with so-called nonmarket economies for goods exported to the United States. The International Trade Administration of the Department of Commerce (Administration) held that section 303 does not apply to nonmarket economies.[345]

It is hence clear that USDOC itself did not consider itself at the time authorized to apply CVDs on NMEs. This is so, because if the countervailing duty provisions of United States law, as it then was, did not apply to NMEs, that means that USDOC had no legal authority to impose such duties on NMEs. The court then went on to define the legal question that it had to rule on:

> In other words, we must determine, as best we can, whether when Congress enacted the countervailing duty law in 1897 it would have applied the statute to nonmarket economies, if they then had existed.[346]

The court reached the conclusion that Congress would not have done so, and in the many years that passed since 1897 never wanted to do so (i.e., apply CVD law to NMEs):

> Further support for our conclusion is furnished by the more recent actions of Congress in dealing with the problem of exports by nonmarket economies through other statutory provisions. Those statutes indicate that Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of those statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply.[347]

The court then discussed the 1974 amendments to the CVD laws and noted:

> There is no indication, however, that in doing so Congress intended to change the scope of that law or believed that it covered nonmarket economies. If Congress had so intended or believed, it is curious that the legislature gave no such indication, particularly in view of the specific changes it made in the antidumping law to deal with the problem.[348]

[343] Countervailing Duties: Final Rule, 63 Fed. Reg. 65348, 65360 (USDOC Nov. 25, 1998) (Exhibit CHI-14).
[344] *Georgetown Steel* (Exhibit CHI-02).
[345] Ibid. p. 1309.
[346] Ibid. p. 1314.
[347] Ibid. p. 1316.
[348] Ibid.

The court concluded its analysis with the following statement:

> Congress … has decided that the proper method for protecting the American market against selling by nonmarket economies at unreasonably low prices is through the antidumping law. This law is designed to protect domestic industry from injury resulting from the sale in the United States of foreign merchandise that is priced below its fair value, and provides a remedy therefor in 19 U.S.C. § 1677b(c). If that remedy is inadequate to protect American industry from such foreign competition — a question we could not possibly answer — it is up to Congress to provide any additional remedies it deems appropriate.[349]

This judgment is a final and binding decision, and as can be seen by the pronouncement of USDOC published in the Federal Register,[350] USDOC itself saw it as such and based its practice of not applying CVDs on imports from NMEs on this judgment. Indeed, the parties agree that this decision was a final, unappealed decision, and was governing and controlling under United States law.[351]

7.224. Several years later, the CAFC, was again seized with the same issue, this time in a challenge against USDOC, which had decided to change its practice and to conduct CVD proceedings against imports from China, notwithstanding that the United States continued to designate China as an NME country. USDOC did so, starting from 2006, although the relevant CVD legislation had not been changed yet by Congress. In its judgment in *GPX V*[352] from 2011, the Court of Appeals confirmed its previous judgment in *Georgetown Steel* and held:

> [W]e find that when amending and reenacting countervailing duty law in 1988 and 1994, Congress legislatively ratified earlier consistent administrative and judicial interpretations that government payments cannot be characterized as "subsidies" in a non-market economy context, and thus that countervailing duty law does not apply to NME countries.[353]

It went on to hold:

> We thus find that in amending and re-enacting the trade laws in 1988 and 1994, Congress adopted the position that countervailing duty law does not apply to NME countries. Although Commerce has wide discretion in administering countervailing duty and antidumping law, it cannot exercise this discretion contrary to congressional intent. We confirm the holding of the Trade Court that countervailing duties cannot be applied to goods from NME countries.

Hence, the CAFC rejected the argument by the United States administration that the United States Tariff Act permitted USDOC to impose countervailing duties on imports from nonmarket economy countries if it was "possible to identify a subsidy" in such countries. The court concluded by stating that if USDOC wished to impose countervailing duties on imports from NME countries, "the appropriate approach is to seek legislative change".[354] It was on this background that the United States authorities did in fact turn to Congress and requested it to adopt PL 112-99, which as noted above is entitled "an act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries".

7.225. It should be noted that these are two judgments by the most superior courts in the United States ever to examine this issue. They have both ruled loud and clear that prior to the passing of PL 112-99, United States countervailing duty law did not apply to imports from NMEs. Also the CIT had previously ruled in several decisions that USDOC could not impose CVDs on products from China.[355] We can therefore safely conclude that PL 112-99 did not "clarify" an

[349] *Georgetown Steel* (Exhibit CHI-02), p. 1318.
[350] See fn. 343.
[351] Parties' responses to Panel question No. 51.
[352] *GPX V* (Exhibit CHI-06).
[353] Ibid. p. 734.
[354] Ibid. p. 745.
[355] To be precise: the United States Court of International Trade had initially determined that USDOC's imposition of CVDs was based on an unreasonable interpretation of the United States Tariff Act of 1930, as amended, unless USDOC developed a methodology to ensure that goods covered by concurrent AD and CVD

existing legal situation, but rather changed the law from one under which countervailing duties could not be imposed on imports from NMEs to one where USDOC not only could, but also is obliged to do so. This conclusion is also confirmed by the opinion of the legal expert Prof. Richard Fallon.[356]

7.226. The majority opinion attributes significant weight to the fact that the Court of Appeals' decision in *GPX V* never became a final binding judgment and that "USDOC [never] received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law.[357] In my opinion, whether the *GPX V* decision became final or not is immaterial. It was never overturned by a higher United States court. Rather, it was prevented from becoming final through the actions of USDOC, which heeded the advice of the court "to seek legislative change". To claim that no change has occurred - after "a legislative change" was sought and effected - is a contradiction in terms. The significance of the *GPX V* decision is that it provides us with an authoritative interpretation of what United States law was prior to the enactment of PL 112-99. The United States agrees that the *Georgetown Steel* decision by the CAFC was a final and binding judgment, but argues that this decision is ambiguous and can be interpreted to support USDOC's practice between 2006 and 2012. But who could be more authorized to interpret the meaning of this judgment by the CAFC than the CAFC itself? In fact, the United States has not presented us with any other United States court decision, especially not by a United States court at a similar or higher level that upheld USDOC's practice of applying CVDs on products from China before the enactment of PL 112-99. Not even in the expert opinion submitted by the United States, written by Prof. John Jeffries[358], can one find any support to the clarification theory advanced by the United States. The facts of this case therefore lead to the inevitable conclusion that it was PL 112-99 that enabled the imposition of CVDs on products from China.

7.227. I have thus concluded that the effect of PL 112-99 was to authorize and obligate the imposition of CVDs on imports from NMEs and that this was done retroactively on proceedings initiated on or after 20 November 20 2006. This reconfirms my previous conclusion that Section 1 of PL 112-99 effects an "advance in duties", namely an increase in countervailing duties that can be applied – and that were applied in practice – to NMEs, in that previously no such duties could be applied (an effective rate of zero) and following the new law, CVDs can be applied at the rates duly determined by USDOC. Since this advance was effected prior to the official publication of PL 112-99 (namely in relation to proceedings initiated on or after 20 November 20 2006, although the official publication was in 2012), it amounts to a violation of Article X:2.

7.228. In the course of the pleadings, the parties have devoted considerable attention to the question of what the relevant baseline of comparison is under Article X:2 in order to determine whether a certain measure of general application advances (i.e., increases) a rate of duty. In other words: to what does one compare the new rate of duty, effected by the measure, in order to determine whether it amounts to "an advance"? China considers the relevant baseline to be *prior municipal law of the importing Member, properly determined as a question of fact*.[359] China submits that this law should be determined based on how it is reflected in the importing Member's previously published measures of general application, including judicial decisions interpreting those laws and regulations. The United States, in contrast, considers the relevant baseline to be the existing approach followed by the administrative agency, provided that it is "a measure of general application".[360] The United States notes, however, that there is no singular approach to determine

orders would not be subject to overlapping remedies. (*GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1251 (CIT 2009) ("*GPX II*")). Upon remand, USDOC informed the court that it did not have a method for identifying any overlapping remedies, and therefore, it decided under protest to offset AD rates by the calculated CVD rates. (*GPX Int'l Tire Corp v. United States*, 715 F. Supp. 2d 1337, 1345 (CIT 2010) ("*GPX III*")). Because this was considered by the court to be contrary to law and rendered the CVD investigation and resulting duties meaningless, the court ordered USDOC to forgo the imposition of CVDs in the case at hand. (Ibid. p. 1354.) Under protest again, USDOC complied, and the CIT issued final judgment sustaining that determination. (*GPX Int'l Tire Corp. v. United States*, Slip Op. 10–112, 2010 WL 3835022 (CIT Oct. 1, 2010) ("*GPX IV*")). This decision was appealed to the CAFC. The CAFC's decision on appeal is discussed in the text above.

[356] Expert report of Professor Richard Fallon (Exhibit CHI-83).
[357] See para. 7.172.
[358] Expert report of Dean John Jeffries (Exhibit USA-115).
[359] China's second written submission, para. 20.
[360] United States' response to Panel question No. 95, para. 19.

the relevant baseline for an Article X:2 analysis that must be followed in each and every dispute. According to the United States, the determination should be based on the totality of the evidence of how the imports were treated before and after the publication of the measure at issue.[361]

7.229. My own view on the proper baseline is somewhat different from both of these suggestions. Rather, I am of the opinion that in order to determine whether "a measure of general application" has "effect[ed] an advance in a rate of duty or other charge on imports", we need to compare the rate of duty effected by such measure to the rate that would exist in its absence.[362] This is how we would ascertain the "effect" of the measure. Applied to our case, this would entail a comparison of the rate (or rates) of duty introduced by Section 1 of PL 112-99 to the rate (or rates) of duty that would exist if Section 1 of PL 112-99 had not been passed by the United States Congress. This is so, because whenever one is examining what a certain measure "caused" or "brought about", one compares the situation introduced by such a measure to the situation that would exist in its absence. Thus, if one says, for instance, that "the latest amendment of the tax legislation effected an increase in the tax rate", it means that if it was not for the latest amendment of the tax legislation, the tax rate had not been increased. This is in line with the general principle of ascertaining causation in law which is based on the "but for" principle, or in its Latin term *causa sine qua non*.[363]

7.230. In order to apply this test to the facts of this case, we need to ask ourselves what would have happened if the United States Congress had refused to pass PL 112-99, or if for any other reason Section 1 of PL 112-99 had not become a binding law within the United States legal system. The answer to this question is quite apparent and was provided by the United States Secretary of Commerce and the United States Trade Representative in their letter to Congress explaining the importance of passing PL 112-99. In this letter, dated 18 January 2012, they write:

> [a]bsent legislation, should the decision of the court [in *GPX V*] become final, Commerce will be required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries, including 24 existing CVD orders on imports from China and Vietnam, as well as five pending investigations and two recently filed petitions.[364]

7.231. In other words, absent legislation the decision of the CAFC in *GPX V* was likely to become final, and in such case USDOC would be required to revoke all CVD orders and terminate all CVD proceedings involving non-market economy countries, including those covered by this dispute. Thus, the rates of those countervailing duties would go from whatever rates they were set at by USDOC in each of the investigation at issue to zero (i.e. the countervailing duty rate in the absence of any legal basis to impose countervailing duties). But since Congress did in fact pass PL 112-99, the existing CVDs were legalized retroactively and did not have to be revoked. Thus the effect of PL 112-99 was to maintain countervailing duties on imports from NMEs that otherwise would have had to be revoked. PL 112-99 thus caused an increase, i.e., "an advance", in these duties from zero to certain rates that were higher, and in most cases significantly higher, than zero.

7.232. This effect can also be seen clearly from what happened when the case was brought back to the CAFC, following the passage of PL 112-99. When the United States motioned the CAFC to

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[361] Ibid.

[362] China appears to allude to this approach in its response to Panel question No. 52. In the context of responding to the United States assertion that Section 1 was merely a "clarification", China states that "within this narrative, however, the United States cannot help but admit that the enactment of P.L. 112-99 had a substantive effect – to 'affirm' the USDOC's 'approach' and to ensure that the United States Tariff Act would be applied 'in accordance with Commerce's interpretation, not that of the U.S. Federal Circuit in *GPX V*'. In so doing, section 1 of P.L. 112-99 ensured that 27 countervailing duty investigations in respect of Chinese products could now be considered lawful and that the resulting countervailing duty orders imposed on Chinese products would remain in place, when otherwise the USDOC would have been required to revoke these orders in accordance with the Federal Circuit's decision in *GPX V*." (China's response to Panel question No. 52, para. 101).

[363] *Black's Law Dictionary* (5th Ed.), p. 1242. See also *Stroud's Judicial Dictionary of Words and Phrases* (8th ed.), p. 881, entry "effect": "The 'effect' of a cause, is anything which would not have happened but for that cause".

[364] Letter from the Secretary of Commerce and the United States Trade Representative to the Chairman of the House Ways and Means Committee (January 18, 2012) (Exhibit CHI-12).

amend and repeal its previous judgment, it described the effect of PL 112-99 as: "superseding" the decision of the Federal Circuit in *GPX V* "by amending … the CVD statute such that it expressly, *and retroactively*, requires Commerce to impose CVDs to NME imports".[365] Hence, USDOC itself described PL 112-99 as effecting a change in United States CVD law and introducing a new requirement that "retroactively requires Commerce to impose CVDs to NME imports". Clearly, a retroactive imposition of duties, that is, one that takes effect prior to its official publication, is precisely what Article X:2 prohibits.[366]

7.233. In response to this motion, the Court of Appeals issued its decision on rehearing in which it considered the implications of PL 112-99. The Court noted that Section 1 of this new law "applies retroactively" to "(1) all proceedings initiated under subtitle A of title VII of [the Tariff Act of 1930] on or after November 20, 2006; (2) all resulting actions by United States Customs and Border Protection; and (3) all civil actions, criminal proceedings, and other proceedings before a Federal court relating to [those] proceedings."[367] The court then went on to note the ruling of the United States Supreme Court *Plaut v. Spendthrift Farm, Inc.*[368] according to which "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." On this basis, the Court of Appeals held that it was required to apply the new law retroactively, even though the court had previously held in *GPX V* that the United States laws in effect at the time of the underlying countervailing duty investigation did not allow USDOC to apply countervailing duties to imports from NME countries.[369] Hence, the Court in effect overturned its own decision which would have led to, as explained by the United States Secretary of Commerce and the United States International Trade Representative,[370] a revocation of all CVD orders and termination of all CVD proceedings involving NMEs. It is undisputed that it was PL 112-99 that effected this change in the Court's ruling, the result of which was to prevent such a revocation. Thus, in effect, PL 112-99 authorized the imposition of countervailing duties on products that had already been imported into the United States prior to the official publication of the law, and retroactively legalized CVD proceedings that had taken place in the approximately five-year period preceding this official publication (i.e., between 20 November 2006 and 13 March 2012). In my view this clearly amounts to an advance, i.e., an increase, in the rates of countervailing duties, and one which is effected before PL 112-99 was officially published. As explained above,[371] it also amounts to "imposing a new or more burdensome requirement … on imports".

7.234. In reaching this conclusion I am guided by the holding of the Appellate Body in *US – Underwear*.[372] There the Appellate Body explained the nature and objective of Article X:2:

> 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.

7.235. When an amendment of a law is applied retroactively, that is, to events and importations of goods that occurred before the adoption and official publication of this amendment, and when such amendment imposes "a restraint, requirement or other burden" (such as the application of CVD procedures and countervailing duties), Member States and persons affected by such measures (for instance, exporters and importers) do not have a reasonable opportunity to acquire

[365] Defendant-Appellant United States' Motion to Recall and Amend, p. 3 (May 21, 2012) (Exhibit CHI-26). (emphasis added)
[366] See e.g. Appellate Body Report, *US – Underwear*, p. 21 and the discussion below, para. 7.223.
[367] *GPX VI* (Exhibit CHI-07), p. 1310.
[368] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).
[369] As explained above in para. 7.223 of this opinion.
[370] Letter from the Secretary of Commerce and the United States Trade Representative to the Chairman of the House Ways and Means Committee (January 18, 2012) (Exhibit CHI-12).
[371] See para. 7.217.
[372] Appellate Body Report, *US – Underwear*, p. 21.

authentic information about such a measure. Since in the years prior to the passage of PL 112-99 there was no way of knowing if such law would be passed by Congress and what its contents would be, the importers and exporters of products from NME countries could not possibly have had any reasonable opportunity at the time to acquire authentic information about this measure or to adjust their activities in view of it. I therefore reach the conclusion that such a retroactive application of PL 112-99 is in violation of Article X:2.

7.236. In order to complete my analysis of Article X:2, I also need to explore the meaning of the words "under an established and uniform practice". These words, based on their location in the sentence, seem to relate to the framework under which the "advance in the rate of duty or other charge on imports" has been effected. In other words, the provision requires that the advance in the rate of duty or other charge on imports has been effected within the framework of ("under") "an established and uniform practice". In *EC – IT Products* the panel reached the conclusion that "uniform practice", in its context, refers to the similar application of a measure in the whole customs territory of a Member.[373] As for the term "established", the panel noted that the ordinary meaning of "established" is "[i]nstitute[d] or ordain[ed] permanently by enactment or agreement" or "set up on a permanent or secure basis". "Accordingly, "established" entails an element of duration. Hence, under Article X:2, measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied ("practice") in the whole customs territory ("uniform") and its application should be on a secure basis ("established")." [374] I agree with this interpretation. Applied to our case, we need to examine whether the measure at hand – namely Section 1 of PL 112-99 – was applied in the whole customs territory of the United States and on a secure basis. From the evidence before us, I can conclude that the answer is yes. Since CVD proceedings are conducted by the United States Federal administration and countervailing duties are imposed and collected by the United States Federal administration, they are applied in the whole customs territory of the United States, and they are applied on a secure and established basis. In this context I recall that PL 112-99 imposes an obligation to impose CVDs on imports from NMEs fulfilling the conditions for such duties. Thus, one can safely presume that USDOC fulfills its obligation under United States Law and that the required CVDs are applied on a secure basis. Put slightly differently, one can say that the imposition of CVDs on NME countries effected by PL 112-99 is pursuant to an "established and uniform practice" because it is required in each instance ("uniform") and it is done within the framework of an "established… practice", namely the United States countervailing duty procedures.

7.237. My fellow panelists are of the opinion "that the term 'under an established and uniform practice' serves to define the relevant prior rate that is to be used to establish whether or not an advance in a rate has been effected."[375] From this reading they therefore conclude "that the relevant comparison contemplated by Article X:2 is between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice"[376]. I respectfully disagree. Like the panel in *EC – IT Products,* I understand the words "under an established and uniform practice" to relate to the "measure of general application" which effects an advance in a duty etc.[377] These words *describe* the measure of general application in the sense that "the advance in a rate of duty or other charge on imports" must be made *under* "an established and uniform practice", and not to the situation existing prior to this measure to which one should compare the new increased duty. This prior situation is not mentioned or alluded to in Article X:2, and therefore, unlike my fellow panelists, I fail to see how these words can describe

[373] Panel Reports, *EC – IT Products*, para. 7.1119.

[374] Ibid. para. 7.1120.

[375] See para. 7.155.

[376] Ibid. See also para. 7.155: "[I]t is clear to us that the term 'under an established and uniform practice' serves to define the relevant prior rate that is to be used to establish whether or not an advance in a rate has been effected. It follows, then, that the relevant comparison contemplated by Article X:2 is between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice."

[377] See, for instance, the following passage from the Panel Reports in *EC – IT Products*: "In line with these considerations, we find that 'uniform practice', in its context, refers to the similar application of a measure in the customs territory of a Member. Accordingly, 'uniform practice' means that the customs authorities of the EC member States apply the measures at issue similarly and consistently throughout the customs territory of the European Communities…. Hence, under Article X:2, measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied ('practice') in the whole customs territory ('uniform') and its application should be on a secure basis ('established')." (Panel Reports, *EC – IT Products*, paras. 7.1119-7.1120).

the baseline to which to compare the new duty or charge. I believe that my interpretation is in line with Article X:2's wording and plain meaning, where clearly the term refers to the measures mentioned in the beginning of the sentence and describes them, and does not serve as a basis for comparison of the "advance in a rate of duty" or "other charge on imports". The provision does not say "an advance in a rate of duty *in comparison to* (or "*in relation to*") an "established and uniform practice". I believe that generally, in the course of interpreting provisions of the covered agreements, an interpreter may not add words that are not there and I can see no justification to do so in this case where the plain and ordinary meaning of Article X:2 is clear and has already been established by a previous WTO panel.

7.238. In addition to being hard to reconcile with the ordinary meaning of the provision, I am also of the opinion that the approach adopted by my fellow panelists is inimical to the very substance of Article X:2 and to its objective. Generally speaking, the objective of the provision is to prohibit the enforcement of higher rates of duties, new charges on imports or other new or burdensome requirements, restrictions or prohibitions before the official publication of such measures. According to the majority opinion, to enforce such a measure before its official publication may actually be a good thing for a Member to do, because then when one compares the new law (which increased the rates of duties or introduced new and more burdensome requirements, restrictions or prohibitions in relation to what would have existed in its absence) to the "uniform and established practice" that existed prior to its enactment, one will actually find (like the majority opinion found in this case) that there was no increase in the rates of duties, nor any new or more burdensome requirements. Under this interpretation, it is hard to see how there would ever be a violation of Article X, since the conduct that it prohibits would constitute proof that there was no violation. I find it hard to believe that this was what the Members had in mind when they agreed to Article X:2.

7.239. Indeed, the Panel asked the United States to respond to the following hypothetical question:

> Assume that Country A's unbound tariff rate on a certain product is x%, and that it has been published properly in its official gazette. On January 1, 2013, Country A's customs authorities start collecting customs duties on this product at the rate of 2x%, although the published tariff rate is x%, and in spite of protests by importers of the product in question. On June 1, 2013, Country A's Minister of Finance signs an order to raise the duty on this product to 2x% with an effective date of January 1, 2013. The order, which is within his authority under the laws of Country A, is published promptly on the same day that it was signed. Would Country A's actions be consistent with GATT Articles X:1 and X:2?[378]

The United States responded *inter alia* that if Country A's customs authorities were acting pursuant to a measure of general application, which was not published, then Country A's actions could be inconsistent with Article X:2 as from January 1, as the measure was enforced before publication. However, "the collection of a duty at the rate of 2x% by only certain customs authorities (perhaps at certain ports or at certain times) would not appear to be a measure of general application"[379] and thus not prohibited by Article X:2. The United States further responded that "the Minister of Finance's order on June 1 … would not fall under one of the listed changes under Article X:2 in the scenario in which there was a measure of general application pursuant to which the customs authorities applied a rate of 2x%. That is, the order was not an 'advance' on a rate of duty or other charge on imports under an established and uniform practice, nor was it a 'new' or 'more burdensome' requirement, restriction or prohibition on imports".[380]

7.240. I find this result, which is a necessary outcome of the interpretation proposed by the United States to be very troubling and in clear conflict with the ordinary meaning of Article X:2, in its context and in light of its objective and purpose. I also find it hard to believe that this was the intention of the drafters and of the Members when they agreed to Article X:2. The alternative interpretation offered by my fellow panelists, namely that the benchmark for comparison of the "advance" and "new or more burdensome requirement" is the previous practice of the authorities of the importing county so long as such practice has not been found to be illegal by a domestic

[378] Panel's Questions to the Parties following the Second Substantive Meeting, Question No. 94.
[379] United States' response to Panel Question No. 94, para. 14.
[380] Ibid. paras. 15-16.

court in a final and binding decision (and ordered to be discontinued), does not really solve the problem. It is quite unlikely that importers can obtain a final binding judgment within six months (as were the facts in the above hypothetical), considering that most domestic legal systems require a much longer time to resolve such an issue. Even if the unauthorized practice of collecting a duty at a higher rate than was officially published continued for two or three years, it would be unlikely that importers could obtain a final binding judgment against this practice in time to stop it, since the authorities of the importing country could always file an appeal against a such a judgment and thereby prevent it from becoming binding and final. Eventually, a new order could be issued and published with the effect of legalizing the higher charge retroactively, and no violation of Article X:2 could be found. I am of the opinion that such a result is clearly unsatisfactory.

7.241. For all of the reasons set out above, I have reached the conclusion that in adopting Section 1 of PL 112-99, the United States did not comply with Article X:2 of the GATT 1994.

7.6 Claim under Article X:3(b) of the GATT 1994

7.242. The Panel now turns to China's claim that Section 1 of PL 112-99 violates the United States' obligations under Article X:3(b) of the GATT 1994.[381]

7.243. China submits that Section 1 violates the obligation in the second sentence of Article X:3(b).[382] Article X:3(b) reads in full:

> Each [Member] shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and *their decisions shall be implemented by, and shall govern the practice of, such agencies* unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts. (Emphasis added)

7.244. China claims that Section 1 of PL 112-99 is inconsistent, as such[383], with the obligation in the second sentence of Article X:3(b). According to China, Section 1 of PL 112-99 is inconsistent with Article X:3(b) "because it amends United States law retroactively and makes it applicable to judicial proceedings concerning administrative actions taken prior to its enactment".[384] China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government was incompatible with the obligations of the United States under Article X:3(b)".[385] China argues that the text of Article X:3(b) contemplates only two "exceptions" to the rule that an agency is required to implement and be governed in its practice by a decision of the court of first instance – the first being where a party appeals the decision to a court of superior jurisdiction, and the second being the possibility of a "collateral challenge" in another proceeding.[386] China argues, *inter alia*, that if the drafters of Article X:3(b) "had intended that the decisions of courts or tribunals could be superseded by legislative enactments, as opposed to the decisions of superior courts or tribunals, they would have referred to this possibility in the text".[387]

[381] See para. 7.11.
[382] China's first written submission, paras. 81-105; oral statement at the first meeting with the Panel, paras. 49-57; second written submission, paras. 130-155; oral statement at the second meeting with the Panel, paras. 21-23. See also China's responses to Panel questions Nos. 16, 22, 23, 67, 68, 69, 79, 98, 99, 100, 121, 122, 123, and 131, and comments on the United States' response to Panel question Nos. 102 and 104.
[383] China's request for the establishment of a panel, p. 3.
[384] China's first written submission, para. 105.
[385] China's first written submission, para. 85.
[386] China's first written submission, paras. 89-90; second written submission, paras. 148-150.
[387] China's response to Panel question No. 121.

7.245. According to China, if superseding decisions of courts or tribunals by legislative action were permissible under Article X:3(b), there would be "no point"[388] to seeking judicial review of what an interested party considers to be unlawful agency conduct, since even a correct understanding of the law, confirmed as such by an independent tribunal, could always be superseded by the enactment of a new law that renders the agency's actions lawful after the fact. China submits that "[t]his outcome is clearly inimical to Article X:3(b) and to the principles of due process that it embodies".[389] China's claim "relates to the requirement that the decisions of reviewing tribunals 'shall be implemented by, and shall govern the practice of' the agency whose action is under review".[390] China argues that the United States' actions in this case were contrary to both the letter and the spirit of Article X:3(b), and were inconsistent with "the role that independent judicial review is meant to serve" and the "role of independent tribunals".[391]

7.246. The United States submits that the Panel should reject China's claim under Article X:3(b).[392] The United States argues that insofar as China's claim is that USDOC should have implemented the decision in *GPX V*, then China's claim fails because the CAFC opinion in *GPX V* never became a final decision with legal effect.[393] The United States argues that insofar as China is not claiming that USDOC should have implemented the *GPX V*, and is instead claiming that Section 1 of PL 112-99 violates Article X:3(b), China's claim still fails for two other reasons. First, the United States argues that Article X:3(b) "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".[394] The United States further argues that Article X:3(b) contains a "structural" obligation, and that "[f]or there to be a breach of Article X:3(b), the Member must have failed to establish tribunals that issue final decisions that shall be implemented by agencies".[395]

7.247. Several third parties made written and oral submissions in this dispute, and each that did took the position that Article X:3(b) does not prohibit a Member's legislature from enacting a law that overrides a decision by a reviewing tribunal. In this regard, Australia submits that Article X:3(b) contains specific obligations requiring WTO Members to maintain systems of independent review and to implement the outcomes of such reviews if they are not appealed, and "does not otherwise address the relationship between the legislative, executive and judicial branches of government, nor can any obligation in this regard be implied".[396] Canada submits that "there is nothing in the ordinary meaning or context of GATT Article X:3(b) indicating that this provision disciplines actions of Members' legislatures".[397] According to the European Union, "Article X:3(b) of the GATT 1994 should not be interpreted as prohibiting Members from taking legislative actions which would impact the decisions issued under the review procedures required under that provision".[398] Japan submits that "no express obligations to WTO Members are set forth in Article X:3(b) with respect to actions by the legislature in response to judicial decisions".[399]

7.248. The Panel will begin its analysis of China's claim by discussing the nature of the measure at issue. We will then turn to what we consider to be the two main issues concerning the interpretation of Article X:3(b): first, whether Article X:3(b) prohibits a Member from taking

[388] China's first written submission, para. 101.
[389] Ibid. para. 101.
[390] China's first written submission, para. 86; response to Panel question No. 131.
[391] China's first written submission, paras. 83 and 91; second written submission, para. 152; response to Panel question No. 121.
[392] United States' first written submission, paras. 125-146; oral statement at the first meeting with the Panel, paras. 11-20; second written submission, paras. 85-101; and oral statement at the second meeting with the Panel, paras. 52-54. See also United States' responses to Panel questions Nos. 14, 15, 16, 27, 67, 68, 71, 73, 74, 75, 76, 77, 98, 103, 104, 101, 102, 121, and 123, and comments on the China's response to Panel question Nos. 99, 100, 104, and 122.
[393] United States' first written submission, paras. 134-146.
[394] United States' second written submission, para. 89.
[395] United States' response to Panel question No. 14.
[396] Australia's third-party response to Panel question No. 15.
[397] Canada's third-party response to Panel question No. 15.
[398] European Union's third-party written submission, para. 43. See also the European Union's third-party response to Panel question No. 15.
[399] Japan's third-party response to Panel question No. 15.

legislative action in the nature of Section 1 of PL 112-99; second, the United States' argument that the obligation in Article X:3(b) is only "structural" in nature.[400]

7.6.1 The nature of the measure at issue

7.249. As indicated, the Panel begins its analysis by examining the nature of the legislative action that is at issue in this dispute. Once we have determined the nature of the legislative action that is at issue, we will proceed to consider whether that legislative action is inconsistent with the requirement, in Article X:3(b), that the decisions of reviewing tribunals be implemented by, and govern the practice of, administrative agencies.

7.250. We have been presented with arguments from the parties and third parties that formulate the issue before us in relatively broad and abstract terms. They variously described the issue as being whether Article X:3(b) applies to the "legislative branch", the "actions of Members' legislatures", and "legislative actions".[401] We are not persuaded that the issue before us can or should be formulated in such broad terms. First, we consider that formulating the issue so broadly, e.g. in terms of the applicability of Article X:3(b) to the "legislative branch", may lead to confusion, insofar as it could be taken to suggest that what is legally relevant is the *source* of action – i.e. the legislature – rather than the *nature* of the action – i.e. the nature of the legislative action at issue. The United States is not arguing that it is not responsible for the actions of the legislature, and it is well established in WTO jurisprudence that, consistent with principles of general international law, a Member is responsible for the conduct of all State organs, including the legislature.[402] In addition, we question whether such an analytical approach is consistent with the approach taken by the Appellate Body, in the context of interpreting and applying other provisions of the covered agreements, that a panel must carefully consider the nature of the measure at issue, including its "principal characteristics". Thus, we must first characterize the nature of the measure that is at issue in this dispute. Only then, once the measure at issue has been properly characterized, should we "proceed to assess whether a measure of that nature" falls within the disciplines of Article X:3(b).[403]

7.251. In its 1986 decision in *Georgetown Steel*, the CAFC affirmed USDOC's decision to not apply CVD measures to imports from NME countries.[404] USDOC's understanding (documented in several sources, including the June 2005 GAO Report[405]) was that in *Georgetown Steel*, the CAFC had ruled only that USDOC was not required to apply the CVD law in factual circumstances where USDOC judged that it was impossible to identify and measure subsidies as a consequence of the economic situation in the NME country in question.

7.252. Between 1986 and 2006, Congress on several occasions considered the enactment of new legislation relating to the applicability of United States CVD law to imports from NME countries, including in the form of bills in 1988, 1998, 2004, and 2005. However, none of these initiatives

[400] Thus, in addressing the first issue, we proceed on the *arguendo* assumption that the obligation in the second sentence of Article X:3(b) is not merely "structural" in nature.

[401] See e.g. United States' second written submission, para. 5, and above at para. 7.247.

[402] See e.g. Appellate Body Reports, *US – Gasoline*, page 28, and *US – Shrimp*, para. 173.

[403] For example, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body faulted the panel's analytical approach to the issue of whether "purchases of services" are excluded from the scope of Article 1.1(a)(1)(i) of the SCM Agreement. The Appellate Body stated that "[i]t would seem more logical to determine first the issue of the proper characterization of the measures at issue and, once the measures have been properly determined, to examine the question of whether such types of measures fall within the scope" of the provision at issue. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 585). The Appellate Body recalled its earlier statements, in *China – Auto Parts*, that a "panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics", and that, "[i]n making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant [measure] and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements". (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 586, citing Appellate Body Report, *China – Auto Parts*, para. 171).

[404] China's first written submission, paras. 10-16; United States' first written submission, Annex, paras. 13-20.

[405] GAO Report (Exhibit CHI-16), p. 15, and Comment 1 on p. 44.

ultimately resulted in the enactment of new legislation, explicitly to give the USDOC the authority to apply United States CVD law to imports from NME countries.[406]

7.253. Pursuant to a CVD investigation on *CFS Paper* initiated on 27 November 2006, USDOC began applying United States CVD law to imports from China, notwithstanding that the United States continued to designate China as an NME country. USDOC did so after reaching the conclusion that it was possible to identify and measure subsidies as a consequence of the economic situation in China, and its understanding that this action was in accordance with then-existing United States law. This understanding was based, in part, on its interpretation of the CAFC decision *Georgetown Steel*.[407]

7.254. Following the initiation of the *CFS Paper* investigation in 2006, years of litigation before the United States courts over this issue ensued. On at least three occasions, the CIT decided that the applicable United States law and the CAFC decision in *Georgetown Steel* were "ambiguous" regarding whether United States CVD law could be applied to imports from China. The first such decision was in *CFS Paper*[408], followed by the CIT decision in *GPX I*[409], and then its decision *GPX II*.[410]

7.255. However, in its 19 December 2011 decision in *GPX V*, the CAFC held that, contrary to the understanding and ongoing practice of USDOC, it was not in accordance with United States law for USDOC to apply United States CVD law to imports from NME countries, including China. Following the issuance of this decision, the United States government petitioned the CAFC to grant a rehearing *en banc* to reconsider its decision. Both parties consider that the United States government's request for a rehearing by the CAFC *en banc* was "equivalent to an appeal to a court of superior jurisdiction"[411] within the meaning of Article X:3(b).

7.256. On 13 March 2012, Congress enacted PL 112-99 to "overrule"[412] and supersede the CAFC decision in *GPX V*, thus effectively ensuring that USDOC would continue to apply United States CVD law to imports from China. The United States agrees that Congress enacted Section 1 of PL 112-99 to "overturn" the CAFC decision in *GPX V*[413]; as previously noted, the United States refers to this measure as "the *GPX* legislation", and states, for example, that it "ensured that *GPX V* would never have any effect under U.S. law".[414]

7.257. To recall, Section 1(a) of PL 112-99 amends United States law to render United States CVD law applicable to imports from NME countries, except in circumstances where USDOC judges that it is impossible to identify and measure subsidies as a result of the economic situation in the NME country in question. Pursuant to Section 1(b) of PL 112-99, this amendment applies to all CVD proceedings initiated on or after 20 November 2006 (as well as all resulting USCBP actions and associated Federal court proceedings).

7.258. Based on the foregoing, we consider that the principal characteristics of the measure at issue are (i) the measure at issue is part of a law enacted by Congress, i.e. the legislative branch of the United States government; (ii) the objective of the legislation appears to have been to continue the application by USDOC of United States CVD law to imports from NME countries like China, by effectively "overruling" the CAFC decision in *GPX V*; (iii) this legislation was enacted

[406] China's first written submission, paras. 17-25; United States' first written submission, Annex, paras. 21-28.
[407] China's first written submission, paras. 26-31; United States' first written submission, Annex, paras. 29-33.
[408] *CFS Paper* (Exhibit USA-28), p. 1282.
[409] *GPX I* (Exhibit USA-93), pp. 1289-1290.
[410] *GPX II* (Exhibit CHI-03), p. 1237.
[411] China's first written submission, para. 103; China's and United States' responses to Panel question No. 16(b).
[412] For example, in *GPX VI*, the CAFC stated that "Congress clearly sought to overrule our decision in *GPX*. The language of section 1(b) is clear in this respect. Moreover, during the floor debate, our decision in *GPX* was referenced by name and discussed at length. One of the bill's sponsors specifically noted that the new legislation "overturns an erroneous decision by the Federal circuit [sic] that the Department of Commerce does not have the authority to apply these countervailing duty rules to nonmarket economies." (*GPX VI* (Exhibit CHI-07), p. 1311).
[413] See e.g. United States' first written submission, paras. 50 and 57.
[414] See e.g. United States' first written submission, para. 59.

following the issuance of the CAFC decision in *GPX V*, but before that decision could become final and legally binding, and therefore did not involve the reopening of a court decision that had become final; and (iv) the legislation applies to all CVD proceedings (and resulting USCBP actions and Federal court proceedings) initiated on or after 20 November 2006.

7.259. In its panel request, China defines the measure as "Section 1" of PL 112-99. However, China has also made statements to the effect that its claim under Article X:3(b) relates more particularly to Section 1(b) of PL 112-99.[415] As noted, Section 1(b) of PL 112-99 makes the new rule in Section 1(a), Section 701(f), applicable to all CVD proceedings (and resulting actions and judicial proceedings) initiated on or after 20 November 2006. In this regard, as we have explained[416], Section 1(b) is not an autonomous provision, and must be considered together with the new rule in Section 1(a). Accordingly, and taking into account how the measure is defined in the panel request, and the relationship between Section 1(a) and 1(b), we conduct our analysis on the understanding that the measure at issue is Section 1.

7.6.2 Interpretation of Article X:3(b)

7.6.2.1 Whether Article X:3(b) prohibits a Member from taking legislative action in the nature of Section 1 of PL 112-99

7.260. Having considered the nature of the measure at issue, we will now turn to the interpretation of Article X:3(b).

7.261. We note at the outset that there are two interpretative issues arising from the text of Article X:3(b) in respect of which there appears to be agreement between the parties. First, the parties agree that the phrase "administrative action relating to customs matters" includes administrative action relating to countervailing and anti-dumping duty proceedings in general, and that the CAFC decision in *GPX V*, for instance, involved a "review" of administrative action relating to customs matters.[417] In this regard, the parties are of the view that the obligations in Article X:3(b), Article 23 of the SCM Agreement[418], and Article 13 of the Anti-Dumping Agreement[419] are cumulative in nature. The latter provisions contain judicial review obligations regarding countervailing duty and anti-dumping duty determinations. We see no reason to disagree with the parties' understanding of the phrase "administrative action relating to customs matters". The dictionary definition of the word "customs" is "such duty levied by a government on imports", which suggests that the term "customs" is broad enough to include countervailing duties.[420] As previously noted, the term "countervailing duty" is defined in Article VI:3 of the GATT 1994, and footnote 36 to Article 10 of the SCM Agreement, as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise". In addition, we note that in *Thailand – Cigarettes (Philippines)*, the Appellate Body considered the meaning of "administrative action relating to customs matters". The Appellate Body stated that "the obligation contained in Article X:3(b) is not limited to particular types of customs-related 'administrative action'", and agreed with the panel that the phrase "administrative action relating to customs matters" encompasses "a wide range of acts applying legal instruments that have a rational relationship with customs matters".[421] Furthermore, as the obligations in Article 23 of the SCM Agreement and

[415] China's first written submission, para. 105; response to Panel question No. 23.
[416] See subsection 7.4.2 of this Report.
[417] Responses by China and the United States to Panel question Nos. 15 and 40.
[418] Article 23 of the SCM Agreement, entitled "Judicial Review", states that "[e]ach Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review."
[419] Article 13 of the Anti-Dumping Agreement, entitled "Judicial Review", states that "[e]ach Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."
[420] The *Shorter Oxford English Dictionary* (2002), p. 584.
[421] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 197 and 202.

Article 13 of the Anti-Dumping Agreement only came into existence in 1995, interpreting the phrase "administrative action relating to customs matters" in Article X:3(b) so as to exclude countervailing duty and anti-dumping duty determinations would have meant that, prior to 1995, there was no obligation to provide for the prompt review and correction of such measures.

7.262. Second, the parties agree that the "decisions" that must be implemented under Article X:3(b) include the decisions of courts or tribunals of superior jurisdiction such as the CAFC (once their decisions are final and legally binding), and not only those of "first instance" review tribunals.[422] Thus, the United States accepts that in the context of its domestic system of judicial review and with specific reference to USDOC, Article X:3(b) requires that USDOC implement and be governed not only by the decisions of the CIT, which, as we have said, is the court of first instance review in respect of USDOC actions, but also the decisions of the CAFC and, where appropriate, the United States Supreme Court.[423] We see no reason to disagree. In *EC – Selected Customs Matters*, the Appellate Body stated that Article X:3(b) "relates to first instance review", and "requires that first instance review decisions 'shall be implemented by, and shall govern the practice of, such agencies' (that is, agencies entrusted with the administration of customs matters)".[424] However, the Appellate Body did not state that the obligation in Article X:3(b) relates *exclusively* to first instance review decisions. Indeed, once a final decision has been reached after an appeal, the rationale for an administrative agency to implement that decision is no less compelling than the rationale for an administrative agency to implement a first instance decision that has not been appealed.

7.263. We will now proceed to address whether Article X:3(b), which requires that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, prohibits a Member from taking legislative action in the nature of Section 1 of PL 112-99. We will examine the text of Article X:3(b), its context, the object and purpose underlying Article X:3(b), as well as preparatory work relating to Article X:3(b).

7.6.2.1.1 The text of Article X:3(b)

7.264. The first sentence of Article X:3(b) provides that each Member "shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters". The second sentence of Article X:3(b), which is the one on which China's claim rests, goes on to state that "[s]uch tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies", unless an appeal is lodged.

7.265. The Panel notes that the wording of the second sentence of Article X:3(b) refers only to "tribunals" and "agencies", and not to the legislature (or other entities). It provides that "such tribunals" shall be independent of the "agencies", and requires that the decisions of "such tribunals" be implemented by, and govern the practice of, "such agencies". Notably, the obligation to implement and be governed by the decisions of reviewing tribunals is addressed to "such agencies". Therefore, by its express terms, Article X:3(b) establishes an obligation directed at the reviewing tribunals and the administrative agencies. There is no textual reference to the legislative branch or any other entity.

7.266. We also note that Article X:3(b) says that it is "decisions" that shall be implemented by the administrative agencies concerned. It is useful to point out in this connection that Section 1(b)(3) of PL 112-99 does not reopen any cases that have already been decided by Federal courts. Rather, the text of Section 1(b) refers to all relevant proceedings "before a Federal court". This indicates that it applies both to cases that were still pending before a Federal court when the PL 112-99 was enacted, and that it applies prospectively to any cases brought after its enactment. It does not, however, apply to any decided cases. This view is also supported by the fact that Section 1(b)(3)

[422] United States' response to Panel question No. 103. See also China's second written submission, para. 142 (referring to United States' response to Panel question No. 14, para. 17).

[423] We understand that within the United States legal system: (i) USDOC makes determinations, (ii) these are reviewed by the CIT, (iii) decisions of the CIT may be appealed to the CAFC, and (iv) decisions of the CAFC may be further appealed to the United States Supreme Court, subject to *certiorari* having been granted.

[424] Appellate Body Report, *EC – Selected Customs Matters*, paras. 294-295.

provides for application of the new Section 701(f) to "proceedings" and "actions" before Federal courts, and not to "decisions" by such courts. Thus, Section 1(b)(3) does not prevent USDOC from implementing any final court decisions that had been made as of 13 March 2012.[425]

7.267. We agree with China that the text of Article X:3(b) contemplates only two "exceptions" to the rule that an agency is required to implement and be governed in its practice by a decision of a court of first instance – the first being situations where a party appeals the decision to a court or tribunal of superior jurisdiction, and the second being the possibility of a "collateral challenge" in another proceeding initiated by the central administration of the agency at issue.[426] We further agree with China that legislative action in the nature of Section 1 of PL 112-99 would not fall within the scope of either of those "exceptions". However, the fact that there are only two "exceptions" to justify actions by administrative agencies that might otherwise be inconsistent with the requirement in Article X:3(b) that administrative agencies implement and be governed in their practice by decisions by reviewing tribunals, does not bring within the scope of Article X:3(b) actions such as the type of legislative action at issue in this dispute.

7.268. In sum, an analysis of the text of Article X:3(b) suggests that the kind of legislative action at issue in this dispute does not fall within the scope of the obligation in the second sentence of Article X:3(b).

7.6.2.1.2 The context of Article X:3(b)

7.269. We address next the question whether the context of Article X:3(b) suggests that the obligation in the second sentence thereof prohibits legislative action in the nature of Section 1 of PL 112-99. In our view, the obligation in Article X:2 is relevant context with regard to the issue before us.

7.270. As we have discussed in the context of addressing China's claim under Article X:2, this provision explicitly provides that no measure falling within the scope of Article X:2 shall be enforced prior to its official publication. The measures that fall within the scope of Article X:2 include any measure of general application 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". We have explained above that the kind of restrictive measures that falls within the scope of Article X:2 may not be enforced in respect of events or circumstances that occurred before they have been officially published.

7.271. The structure of Article X suggests that each of its paragraphs addresses a different issue. Article X:1 concerns, *inter alia*, the prompt publication of measures. Article X:2 addresses, *inter alia*, measures of general application, including legislative actions of general application, that are enforced in respect of events or circumstances that occurred prior to their official publication. Finally, Article X:3(b) concerns the prompt review and correction of certain administrative actions by independent tribunals. Article X:3(b) contains no language resembling that found in Article X:2, and it contains no textual link to the obligation in Article X:2. This suggests to us that the same matter, namely legislative actions of general application, is not covered in Article X:3(b) nor is it contemplated by it.

7.272. In this regard, we note China's argument, regarding the interpretation of the obligation in Article X:3(b), that "[t]o be sure, the national legislature may enact new laws, and national courts may be required to interpret and apply those laws in future cases. But consistent with Article X:1 and Article X:2, any such law must apply prospectively, and may not have the effect of altering the outcome of a judicial decision that was based on the laws in effect at the time the relevant administrative actions were taken".[427] Along similar lines, China argues, again in the context of interpreting Article X:3(b), that "Members are free to change their domestic laws and regulations

[425] Initially, there was disagreement between the parties as to whether the CAFC decision in *GPX V* was a "decision" within the meaning of Article X:3(b). However, in the light of China's clarification that its claim concerns Section 1 as such, as opposed to *GPX V* or any other individual court decision, the parties appeared to agree that this issue became moot. See United States' second written submission, paras. 85-86, and United States' response to Panel question No. 104; China's response to Panel questions Nos. 22 and 23, and China's comments on the United States' response to Panel question No. 104.

[426] China's first written submission, paras. 89-90; second written submission, paras. 148-150.

[427] China's first written submission, fn. 91.

as they see fit, provided that they are otherwise in accordance with relevant provisions of the covered agreements. Under Article X:2, however, any such amended laws and regulations can be applied only in respect of action or conduct that occurs after the official publication of the amending measure, to the extent that the measure advances a rate of duty or other charge on imports, or imposes a new or more burdensome requirement or restriction on imports."[428]

7.273. We consider that China's argument amounts to reading the obligation in Article X:2 into Article X:3(b). We find it useful to recall the findings by the panel and the Appellate Body in *EC – Selected Customs Matters* when presented with a similar argument. In that case, the issue was the relationship between Article X:3(b) and the obligation in Article X:3(a). The panel rejected an interpretation that would amount to "merging different requirements that are currently contained in separate sub-paragraphs of Article X".[429] The Appellate Body agreed:

> The Panel, however, noted that Article X:3(b) of the GATT 1994 does not contain an express textual link to the obligation of uniform administration of customs laws in Article X:3(a). The Panel contrasted this with Article X:3(c) of the GATT 1994, which explicitly cross-references Article X:3(b).[430] Against this background, the Panel considered that it was not possible to infer that the drafters of the GATT 1994 intended the obligation of Article X:3(b) to be read as simultaneously requiring uniform administration in accordance with Article X:3(a). In the Panel's view, this would amount to 'merging different requirements that are currently contained in separate sub-paragraphs of Article X'.[431] We see no reason to disagree with the Panel's interpretation. We are also of the view that the requirement of "uniformity" contained in Article X:3(a) does not imply that under Article X:3(b) decisions of review tribunals must govern the practice of all agencies entrusted with customs enforcement throughout the territory of a WTO Member. Article X:3(a) requires, *inter alia*, uniformity of administration. In contrast, Article X:3(b) relates to the review and correction of administrative action by independent mechanisms.[432]

7.274. In the light of the foregoing, the Panel considers that the context of Article X:3(b) does not support the view that the obligation in the second sentence thereof prohibits legislative action in the nature of Section 1 of PL 112-99.

7.6.2.1.3 The object and purpose of Article X:3(b)

7.275. The Panel now considers whether the object and purpose of the GATT 1994, as reflected in Article X:3(b)[433], supports the view that the obligation in Article X:3(b) prohibits a Member from taking legislative action in the nature of Section 1 of PL 112-99.

7.276. China argues in this connection that if legislative intervention in pending judicial proceedings of the kind at issue here were permissible, an interested party could (i) develop a *correct* understanding of municipal law through its review of "[l]aws, regulations, judicial decisions and administrative rulings of general application"; (ii) bring an action in a domestic court to *enforce* its correct understanding of the law against unlawful agency conduct; (iii) have its understanding of municipal law *confirmed* by the court; but then (iv) have that decision undone by a legislative intervention that amends the law retroactively and directs the courts to apply the

[428] China's second written submission, para. 151.
[429] Panel Report, *EC – Selected Customs Matters*, para. 7.534.
[430] (*footnote original*) Likewise, this is in contrast with Article X:3(a), which contains a cross-reference to Article X:1.
[431] (*footnote original*) Panel Report, paras. 7.534.
[432] Appellate Body Report, *EC – Selected Customs Matters,* para. 301.
[433] The Appellate Body has explained that Article 31(1) of the Vienna Convention does not exclude an interpreter from "taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole", and that it is not necessary "to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa". (Appellate Body Report, *EC – Chicken Cuts*, para. 238). As an example, discussed further below, in *Thailand – Cigarettes (Philippines)* the Appellate Body stated that "[a] basic object and purpose of the GATT 1994, as reflected in Article X:3(b), is to ensure due process in relation to customs matters". (Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 202).

amended law to the administrative action under review. China submits that this outcome is "clearly inimical" to Article X:3(b) and to the principles of "due process" that it embodies.[434]

7.277. We will begin by considering the question of "due process". We note that in *Thailand – Cigarettes (Philippines)*, the Appellate Body discussed the principle of due process as it relates specifically to Article X:3(b). The Appellate Body stated:

> A basic object and purpose of the GATT 1994, as reflected in Article X:3(b), is to ensure due process in relation to customs matters. The Appellate Body referred to this due process objective in *EC – Selected Customs Matters*.[435] In that vein, the panel in *EC – Selected Customs Matters* stated that Article X:3(b) seeks to 'ensure that a trader who has been adversely affected by a decision of an administrative agency has the ability to have that adverse decision reviewed.'[436] In addition, relating more broadly to Article X:3 of the GATT 1994, the Appellate Body has found that this provision establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations.[437] While recognizing WTO Members' discretion to design and administer their own laws and regulations, Article X:3 also serves to ensure that Members afford the protection of due process to individual traders. As we see it, the obligation under Article X:3(b) to maintain tribunals or procedures for the prompt review and correction of administrative action relating to customs matters is an expression of this due process objective of Article X:3.[438]

7.278. Thus, the Appellate Body has clarified that Article X:3 serves to ensure that Members afford the protection of due process to individual traders. In *EC – Selected Customs Matters*, the Appellate Body addressed what is demanded by "due process" in the particular context of Article X:3(b). Specifically, the Appellate Body stated that "this due process objective is not undermined even if first instance review decisions do not govern the practice of all the agencies entrusted with customs enforcement throughout the territory of a WTO Member, so long as there is a possibility of an independent review and correction of the administrative action of every agency".[439] In a similar vein, we will now address whether Section 1 undermines the objective of "independent review and correction" of USDOC, USITC or USCBP administrative action relating to customs matters.

7.279. China argues that the actions of the United States in this case were contrary to both the letter and the spirit of Article X:3(b), and were inconsistent with "the role that independent judicial review is meant to serve" and the "role of independent tribunals".[440] China further argues that one function of tribunals established in accordance with Article X:3(b) is to "review and correct" administrative actions, and this "based on the interpretation and application of the relevant laws and regulations in effect at the time the administrative action was taken".[441]

7.280. The Panel recalls that Article X:3(b) requires Members to establish and maintain such courts "for the purpose", *inter alia*, of "prompt review and correction" of administrative action. Article X:3(b) further provides that courts must be "independent" of the administrative agencies whose decisions are being reviewed.[442] Reading Article X:3(b) in context, Article 23 of the SCM Agreement and Article 13 of the Anti-Dumping Agreement, which as explained above establish requirements for judicial review that operate cumulatively with Article X:3(b)[443], also require that reviewing courts be independent "of the authorities responsible for the determination or review in

[434] China's first written submission, para. 101.
[435] (*footnote original*) Appellate Body Report, *EC – Selected Customs Matters*, para. 302.
[436] (*footnote original*) Panel Report, *EC – Selected Customs Matters,* para. 7.536.
[437] (*footnote original*) See Appellate Body Report, *US – Shrimp*, para. 183.
[438] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 202.
[439] Appellate Body Report, *EC – Selected Customs Matters*, para. 302.
[440] China's first written submission, paras. 83, 91; second written submission, para. 152; response to Panel question No. 121.
[441] China's first written submission, paras. 91-92.
[442] As the panel in *EC – Selected Customs Matters* stated, this means that such courts should be "free of control or influence from the administrative agencies whose decisions are the subject of review, [so as to act] with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed". (Panel Report, *EC – Selected Customs Matters*, para. 7.520).
[443] See para. 7.261.

question". In addition, Article X:3(c) confirms that the independence requirement in Article X:3(b) reflects an objective to ensure that the review be "objective and impartial" as between an affected trader and the administering agency.[444] In our view, legislative action in the nature of Section 1 does not adversely affect a court's ability to engage in "objective and impartial" review. Section 1(b) does not itself speak to, much less direct, how Federal courts are to review USDOC, USITC or USCBP actions, or otherwise interfere with the courts' discharge of their reviewing function. Rather, it speaks to the scope of application of a new substantive rule of United States law, the new Section 701(f). Furthermore, it is true that Article X:3(b) requires that traders be afforded the possibility of seeking and obtaining judicial review. Contrary to China, however, we see nothing in Article X:3(b) that explicitly or by necessary implication requires review under the law as it was in force at the time when the agency took the action under review. While we agree that Article X:3(b) contemplates review based on law (as would appear to be confirmed, *inter alia*, by the reference in the *proviso* to "established principles of law"), it is ordinarily the case, as also noted by China[445], that courts interpret the law and apply it to facts, but that the legislature makes or amends the law. In the absence of any specific requirement to the contrary, the concepts of "review and correction" based on law by an independent, objective and impartial court do not suggest to us that the legislature is thereby precluded from changing the law, even in respect of pending cases.[446]

7.281. In addition, having regard to the subject-matter of Article X:3(b), i.e. judicial review, we recall that the panel in *EC – Selected Customs Matters* considered how judicial review functions in domestic legal systems, and we consider that such an examination may usefully inform our interpretation of that provision as well.[447] In this regard, it is common ground between the parties that under United States constitutional law, when a new Federal law makes clear that it is retroactive, a United States appellate court must in principle apply that law in reviewing lower-court judgments still under appeal that were rendered before the law entered into force, and must alter the outcome accordingly.[448] In *GPX VI*, the CAFC observed that "Congress clearly sought to overrule our decision in *GPX [V]*", but found that this did not constitute an impermissible interference with the judicial process:

> Although the scope of the new legislation is clear, appellees nonetheless contend that the new legislation is unconstitutional because (1) it attempts to prescribe a rule of decision for this case after our decision in *GPX* was rendered …

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[444] Article X:3(c) provides in relevant part: "The provisions of sub-paragraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement."

[445] See para. 7.279.

[446] In *Thailand – Cigarettes (Philippines)*, the Appellate Body stated that:
"Article X:3(b) refers to 'review and correction' of administrative action. The word 'review' is defined as '[a]n inspection, an examination', or in the legal context as '[c]onsideration of a judgment, sentence, etc., by some higher court or authority'. The word 'correction' is defined as '[t]he action of putting right or indicating errors'. The reference to 'correction' indicates that Article X:3(b) requires more than mere declaratory action or *ex post* review of whether administrative action conforms to domestic law or not." (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 204. Footnotes omitted).

[447] The panel in *EC – Selected Customs Matters* interpreted the obligation in Article X:3(b) based on its understanding of how judicial review functions "in most legal systems". The panel stated that "[i]n this regard, the Panel does not consider that it would be reasonable to infer that first instance independent review tribunals and bodies, whose jurisdiction in most legal systems is normally limited in substantive and geographical terms, should have the authority to bind all agencies entrusted with administrative enforcement throughout the territory of a Member." Based on its understanding of how judicial review functions in domestic legal systems, the panel concluded that the interpretation of the obligation in Article X:3(b) that was advanced by the complaining Member in that case "would go beyond what is demanded by this due process objective". (Panel Report, *EC – Selected Customs Matters*, para. 7.538).

[448] China's response to Panel question No. 100; United States' comments on China's response to Panel question No. 100. In its response to Panel question No. 100, China refers to the fact that, under United States municipal law, Congress is permitted "to change the law applicable to pending judicial proceedings, at least in certain circumstances". There may, however, be limitations on what Congress can do in this regard, as discussed in the legal expert opinions submitted by China of the "separation of powers" doctrine under US constitutional law. (Expert report of Professor Richard Fallon (Exhibit CHI-83), para. 24 and supplemental expert report of Professor Richard Fallon (Exhibit CHI-124), para. 6).

> We think the first of these arguments is without merit. The Supreme Court has counselled that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 226, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). Unlike *Plaut,* where Congress attempted to undo a final judgment, *see id.* at 227, 115 S.Ct. 1447, this case was still pending on appeal when Congress enacted the new legislation, as our mandate had not yet issued, *see* Fed. R.App. P. 41(b)-(c); *see also Beardslee v. Brown,* 393 F.3d 899, 901 (9th Cir.2004) ("An appellate court's decision is not final until its mandate issues."). It makes no difference that Congress, in the legislative history, addressed the decision in this case by name. *See, e.g., Ileto v. Glock, Inc.,* 565 F.3d 1126, 1139 (9th Cir.2009) ("[A] statute affecting pending cases, indeed designating them by name and number, [does] not offend separation of powers because Congress was changing the law applicable to those cases rather than impermissibly interfering with the judicial process." (citing *Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 440, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992))). Thus, no issue is raised by the fact that our decision in *GPX* had issued prior to enactment of the new legislation because this case remained pending on appeal.[449]

7.282. Thus, legislative intervention in pending cases is not necessarily viewed – even by courts – as impermissible interference with the judicial review function. Having regard to Section 1 of PL 112-99, we consider that the CAFC decision in *GPX VI* at a minimum indicates that legislative action in the nature of Section 1 is not "inimical", *per se*, to principles of "independent judicial review", as China contends.[450]

7.283. China contends that if legislative action of the nature at issue in this dispute was permissible under Article X:3(b), there would be "no point"[451] to seeking judicial review of what an interested party considers to be unlawful agency conduct, since even a correct understanding of the law, confirmed by an independent tribunal, could always be superseded by the enactment of a new law that renders the agency's actions lawful after the fact. China argues that this type of legislative intervention, if accepted, would render independent judicial review "meaningless".[452]

7.284. The Panel is not persuaded that the possibility of taking legislative action in the nature of Section 1 of PL 112-99 has as a consequence that there would be "no point"[453] to seeking judicial review of what an interested party considers to be unlawful agency conduct. First, China's argument seems to assume that such legislative action would always side with and favour the view of the administering agency. We see no basis for that assumption.[454] Second, China's argument focuses on outcomes, yet Article X:3(b) does not guarantee any outcome. Rather, Article X:3(b) guarantees access to judicial review, i.e. "a possibility of an independent review and correction of the administrative action of every agency".[455] Third, the argument seems to assume that the only relevant perspective is that of any interested party that is adversely affected by such legislative action. However, from the perspective of the legislature, for example, there may be legitimate reasons for making sure that the new law is applied across the board in all relevant fact situations. Article X:3(b) does not indicate or suggest that the desire that some interested parties may have for judicial review to proceed on the basis of the law in place prevails over the legislature's interest in using its prerogative to make or change the law. Fourth, we note the United States argument[456]

[449] *GPX VI (*Exhibit CHI-07), p. 4.

[450] In this context, it is useful to recall and bear in mind also that one of the particular features of Section 1 is that it amends United States law not just in respect of pending Federal court cases but also in respect of future court proceedings as well as in respect of USDOC and USITC proceedings and USCBP actions. Thus, Section 1 amends the law across the board and does not narrowly address itself only to pending court cases. Indeed, Section 1 is arguably directed as much at administering agencies – USDOC, USITC and USCBP – as it is directed at Federal courts.

[451] China's first written submission, para. 101.

[452] Ibid.

[453] Ibid.

[454] To the contrary, Article 23 of the SCM Agreement explicitly guarantees access to judicial review to "all interested parties who participated in the administrative proceeding and are directly and individually affected by the outcome". The neutral wording of Article 23 confirms that such interested parties may well include domestic interested parties who would seek to challenge a decision by an administrative agency that is beneficial to the exporters in a particular case.

[455] Appellate Body Report, *EC – Selected Customs Matters*, para. 302.

[456] United States' response to Panel question No. 74.

that there is no reason to assume that legislative action in the nature of Section 1 of PL 112-99 would, if not prohibited by Article X:3(b), become a "routine" occurrence. While we understand that this may be of no consolation to China in the context of the present case[457], the apparent exceptional nature of this kind of legislative action has a direct bearing on China's assertion that there would be "no point" to seeking judicial review if this kind of legislative action is possible. If, as we consider, such legislative action can be expected to be infrequent (see paragraph 7.288 below), due to the time and effort ordinarily required to initiate and successfully complete legislative action, then it is difficult to see how such infrequent legislative action would warrant the conclusion that there would be no point to seeking judicial review.

7.285. In the light of the foregoing, we are not persuaded that the object and purpose of the GATT 1994, as reflected in Article X:3(b), supports the view that Article X:3(b) prohibits legislative action in the nature of Section 1 of PL 112-99.

7.6.2.1.4 Recourse to supplementary means of interpretation

7.286. Having reviewed the text of Article X:3(b), relevant context, and its object and purpose, we do not consider it necessary to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention. However, we note that preparatory work relating to Article X:3(b) tends to confirm the meaning resulting from the application of the customary rules of interpretation reflected in Article 31 of the Vienna Convention.[458]

7.287. The initial version of the text that ultimately became Article X:3(b) included an obligation for administrative agencies to implement and be governed by judicial decisions, unless an appeal were lodged within the prescribed time-frame. In the context of the negotiations, the United States proposed that there should, in addition, be a possibility of allowing the administrative agency the right to seek review of the same matter in a subsequent proceeding (i.e. a so-called collateral challenge).

7.288. When explaining the purpose behind an amendment to include what became the proviso[459] regarding the right to seek review of the same matter in a subsequent proceeding, the United States delegate explained that such a proviso was desirable because "it is extremely difficult and rare to introduce legislation to correct a judicial decision in customs matters, which is not in line with intended policy". The United States delegate continued by stating that "therefore the central authority must have the right to test such a decision in new cases".[460] The preparatory work further records that "[i]n the ensuing discussion several delegates made it clear that the practice in their respective countries was similar", with the United Kingdom delegate stating that "in his country customs authorities are bound by court decisions for all like cases, and corrections could be achieved only by new legislation which was not always easy".[461] While the need for such a proviso was the subject of discussion among delegations during the negotiations, it was ultimately included in the final text.

7.289. It thus appears that the drafters proceeded on the assumption that Article X:3(b) was without prejudice to the right of GATT Contracting Parties to introduce legislation to "correct" a judicial decision in customs matters. We recognize that the United States delegate could have been referring to legislative correction that would occur after a binding judicial decision has been issued by a reviewing tribunal and thus would affect only subsequent judicial decisions. In this regard, the United States delegate indicated that the proposed proviso regarding the right to seek review of the same matter in a subsequent proceeding was not intended to reopen final decisions,

[457] China's second written submission, para. 153.

[458] Pursuant to Article 32 of the Vienna Convention, a treaty interpreter may have recourse to supplementary means of interpretation "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable."

[459] The proviso reads "... *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."

[460] United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Working Group on "Technical Articles", Summary Record of the Meeting of the ad hoc Sub-Committee appointed for the discussion of Article 21, paragraph 2, E/PC/T/WP.1/SR/3, dated 22 May 1947, p. 1.

[461] Ibid.

stating that "[t]he implementation of any final decision in the specific case to which it refers remains, however, unaffected". But the identified statements nonetheless indicate that even though the legislature is not referred to in the text of Article X:3(b), its drafters were well aware, and apparently did not question, that legislatures can and do choose to use their legislative powers to respond to judicial decisions. Significantly, this possibility appears to have been viewed by delegations as unremarkable, even though Article X:3(b) requires that judicial decisions must govern the practice of agencies.

7.290. Thus, the Panel considers that the preparatory work of Article X:3(b) at a minimum confirms that Article X:3(b) does not prohibit legislatures from making or changing the law in a manner consistent with its terms.

7.6.2.1.5 Conclusion

7.291. For the reasons set forth above, the Panel finds that Article X:3(b), which requires that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99.

7.292. In reaching this conclusion, it is useful to recall that we have examined whether Section 1, i.e. a measure with particular characteristics, is inconsistent with Article X:3(b). One of the particular features of Section 1 is that it amends United States law not just in respect of pending cases but also in respect of future cases as well as USDOC proceedings and USCBP actions. In that sense, Section 1 amends the law across the board and does not narrowly target pending court cases. In addition, we recall our finding that Article X:2 contains relevant disciplines addressing measures of general application within its scope, including laws of general application, that are enforced in respect of events or circumstances that occurred prior to their official publication.[462]

7.6.2.2 Whether the obligation in the second sentence of Article X:3(b) is "structural" in nature

7.293. The Panel turns, finally, to the United States' argument that the obligation in the second sentence of Article X:3(b) is "structural" in nature.

7.294. The United States argues that Article X:3(b) imposes nothing more than what it calls an obligation of "structure".[463] In this regard, the United States argued that the provisions of Article X:3(b) are directed to ensuring that Members set up an appropriate structure so that tribunals or procedures may review administrative action and that administrative agencies will then implement those decisions. According to the United States, once a Member has put in place a "structure" of independent tribunals to review and correct agency action, it has no obligation to ensure that *specific* court decisions are actually "implemented by" and "govern the practice of" the government agency whose action is subject to review. The United States explains that "[f]or there to be a breach of Article X:3(b), the Member must have failed to establish tribunals that issue final decisions that shall be implemented by agencies".[464] In response to a question from the Panel, the United States submits that the first and second sentences of Article X:3(b) establish a single obligation, which is structural in nature.[465] The United States refers to certain statements by the panel and the Appellate Body in *Thailand – Cigarettes (Philippines)* in support of its view that the obligation in Article X:3(b) is structural in nature.[466]

7.295. China rejects the United States' interpretation of the obligations under Article X:3(b).[467] In this regard, China argues that the United States' "structural" interpretation is based exclusively on

[462] See subsection 7.5.1 of this Report.
[463] United States' oral statement at first meeting with the Panel, para. 3; second written submission, paras. 98-101; oral statement at the second meeting with the Panel, paras. 6, 53-54; responses to Panel questions Nos. 15, 71, 98, 124, 132, and comments on China's response to Panel question No. 122.
[464] United States' response to Panel question No. 14.
[465] United States' response to Panel question No. 124(a).
[466] United States' response to Panel question No. 98(a).
[467] China's second written submission, paras. 132-138; oral statement at the second meeting with the Panel, para. 21; responses to Panel questions Nos. 98 and 122, and comments on the United States' responses to Panel questions No. 102.

the first sentence of Article X:3(b). China submits that even if the word "maintain" in this sentence could be construed to refer only to the initial establishment of such tribunals – a doubtful proposition according to China – it is the *next* sentence of Article X:3(b) that establishes the relevant obligation in this dispute. According to China, the wording of the second sentence of Article X:3(b) makes clear that it is a separate and mandatory obligation. This obligation relates to the "decisions" of independent tribunals, i.e. their *actual* decisions, not just their decisions in some abstract legal "framework". Among other things, China argues that the use of the word "the" in this proviso confirms that the obligation in this sentence refers to *specific* "decisions", not just "decisions" in the abstract. China argues that the claims under Article X:3(b) in *Thailand – Cigarettes (Philippines)* concerned the first sentence of Article X:3(b), and is not particularly relevant to the issues before the Panel in this dispute.[468]

7.296. The Panel has analysed whether Article X:3(b) prohibits a Member from taking legislative action in the nature of Section 1 of PL 112-99. We conducted this analysis on the *arguendo* assumption that the obligation in the second sentence of Article X:3(b) goes beyond what the United States terms an obligation of "structure". We have already found that the obligation in the second sentence of Article X:3(b) does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99. As a consequence, we found that Section 1 of PL 112-99 is not inconsistent with the United States' obligation in the second sentence of Article X:3(b), even on the assumption that China is correct in its view that the obligation in the second sentence of Article X:3(b) is more than a "structural" obligation. In these circumstances, it is not necessary for us to go on and examine whether that obligation is only in the nature of a "structural" obligation: were we to agree with the United States on this interpretative issue, this would merely serve to establish a separate basis for our overall conclusion that Section 1 is not inconsistent with Article X:3(b)[469]; were we to agree with China on this issue, it would not affect our overall conclusion, as we would remain of the view that the obligation in the second sentence of Article X:3(b) does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99. Thus, we consider it unnecessary to resolve the parties' disagreement on whether the obligation in the second sentence of Article X:3(b) is in the nature of a "structural" obligation. We recall that "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim".[470]

7.6.3 Overall conclusion

7.297. For the reasons set forth above, the Panel finds that the United States has not acted inconsistently with Article X:3(b) of the GATT 1994, as Article X:3(b), which requires that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99.

7.7 "Double Remedies": Articles 19.3, 10 and 32.1 of the SCM Agreement

7.298. The Panel now turns to address China's claims that the United States acted inconsistently with Articles 19.3, 10 and 32.1 of the SCM Agreement. As the claims under Articles 10 and 32.1 are in the nature of consequential claims[471], we will first examine the claim under Article 19.3.

7.299. Article 19 of the SCM Agreement is entitled "Imposition and Collection of Countervailing Duties". Article 19.3 contains several obligations, including an obligation to levy countervailing duties "in the appropriate amounts" in each case. The text of Article 19.3 reads:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury, except as

[468] China response to Panel question No. 124(a).
[469] It is not in dispute that the United States' maintains independent tribunals for the prompt review and correction of administration action relating to customs matters, and that their decisions must be implemented by and govern the practice of the administrative agencies. See e.g. China's first written submission, para. 88.
[470] Appellate Body Report, *EC – Poultry*, para. 135. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 116-127.
[471] See paras. 7.393-7.395.

> to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

7.300. China challenges what it describes as USDOC's "failure to investigate and avoid double remedies" in 26 countervailing duty (CVD) investigations and administrative reviews initiated over the period 2008-2012. Relying on the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* (hereafter DS379), China argues that Article 19.3 obliges an investigating authority to "investigate" and determine, on the basis of "positive evidence", whether double remedies arise in situations when an investigating authority concurrently imposes CVDs and anti-dumping duties calculated under a nonmarket economy (NME) methodology. China submits that the United States has presented no "cogent reasons" to deviate from the Appellate Body's finding. China asserts that USDOC failed to take any steps to investigate and avoid double remedies in the investigations and reviews at issue in this dispute. Accordingly, China argues that any CVDs collected pursuant to the resulting CVD measures are inconsistent with Article 19.3.[472]

7.301. The United States submits that China's claims are baseless both legally and factually. Regarding the legal basis of the claims, the United States argues that China's claim is "founded on an erroneous interpretation" of Article 19.3, and that the Appellate Body's reasoning in DS379 is "not persuasive". Regarding the factual basis of the claims, the United States argues that China has failed to substantiate its assertions regarding USDOC's alleged failure to investigate and avoid double remedies. Accordingly, the United States asks the Panel to reject China's claims under Article 19.3.[473]

7.302. The Panel notes that there are two main issues. The first issue is whether, as China contends, Article 19.3 obliges an investigating authority to investigate and avoid double remedies when concurrently imposing CVDs and anti-dumping duties calculated under an NME methodology. The second issue is whether, in the CVD investigations and reviews at issue in this dispute, USDOC imposed CVDs concurrently with anti-dumping duties calculated under an NME methodology without investigating whether double remedies arose. We will begin by explaining what is meant by "double remedies". We will then address the two main issues in turn.

7.7.1 The concept of "double remedies"

7.303. The Panel considers it useful to explain what is meant by the concept of "double remedies", because it underlies China's claims in this dispute. In short, to the extent that a subsidy leads to a reduction in the export price of a product, that subsidy will necessarily be captured in the dumping margin if that dumping margin, and the resulting anti-dumping duty, are calculated using a nonmarket economy methodology that calculates normal value based on surrogate values from a third country. From this, it follows that if a Member imposes a CVD in an amount equivalent to the full amount of the subsidy in such circumstances, and an anti-dumping duty equivalent to the full amount of the dumping margin is concurrently imposed on the same products to offset the dumping, this will result in the subsidy being offset twice, i.e. a double remedy. Thus, whether or not a double remedy will arise in a particular case depends on whether (and to what extent) a subsidy leads to a reduction in the export price of the product at issue.

7.304. In DS379, both the panel and the Appellate Body elaborated on what is meant by "double remedies". The Appellate Body, drawing upon the panel's explanation[474], stated:

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[472] China's first written submission, paras. 106-126; oral statement at the first meeting with the Panel, paras. 58-74; second written submission, paras. 156-180; oral statement at the second meeting with the Panel, paras. 24-31.

[473] United States' first written submission, paras. 147-203; oral statement at the first meeting with the Panel, paras. 41-55; second written submission, paras. 102-148; oral statement at the second meeting with the Panel, paras. 55-72.

[474] A detailed explanation of how and why double remedies may arise is set out in paras. 14.67 through 14.75 of the panel report in DS379.

> In essence, "double remedies" may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products. The term "double remedies" does not, however, refer simply to the fact that both an anti-dumping and a countervailing duty are imposed on the same product. Rather, as explained below, "double remedies", also referred to as "double counting", refers to circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice. [...]
>
> [...] When investigating authorities calculate a dumping margin in an anti-dumping investigation involving a product from an NME, they compare the export price to a normal value that is calculated based on surrogate costs or prices from a third country.[475] Because prices and costs in the NME are considered unreliable, prices, or, more commonly, costs of production, in a market economy are used as the basis for calculating normal value.[476] In the dumping margin calculation, investigating authorities compare the product's constructed normal value (not reflecting the amount of any subsidy received by the producer) with the product's actual export price (which, when subsidies have been received by the producer, is presumably lower than it would otherwise have been). The resulting dumping margin is thus based on an asymmetric comparison and is generally higher than would otherwise be the case.[477]
>
> As the Panel explained, the dumping margin calculated under an NME methodology "reflects not only price discrimination by the investigated producer between the domestic and export markets ('dumping')", but also "economic distortions that affect the producer's costs of production", including specific subsidies to the investigated producer of the relevant product in respect of that product.[478] An anti-dumping duty calculated based on an NME methodology may, therefore, "remedy" or "offset" a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price.[479] Put differently, the subsidization is "counted" within the overall dumping margin. When a countervailing duty is levied against the same imports, the same domestic subsidy is also "counted" in the calculation of the rate of subsidization and, therefore, the resulting countervailing duty offsets the same subsidy a second time. Accordingly, the concurrent imposition of an anti-dumping duty calculated based on an NME methodology, and a countervailing duty may result in a subsidy being offset more than once, that is, in a double remedy. Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidized, constructed, or third country normal value is used in the anti-dumping investigation.[480]
>
> The Panel understood the United States to have accepted the principle that double remedies may result from the concurrent imposition, on the same product, of countervailing duties and anti-dumping duties calculated using an NME methodology.[481] The United States nevertheless argued that the existence of a double remedy depends on whether the subsidy leads to a reduction in the export price in

[475] (*footnote original*) Panel Report, para. 14.68.

[476] (*footnote original*) Panel Report, para. 14.68. The use of surrogate, market economy values presumptively puts the producer in the position of having unsubsidized costs of production. (Ibid. footnote 965 to para. 14.69)

[477] (*footnote original*) The asymmetry is due to the comparison of an *actual*, *subsidized* export price to a *constructed*, *unsubsidized* normal value, rather than to an actual, subsidized normal value. (Panel Report, paras. 14.69 and 14.72)

[478] (*footnote original*) Panel Report, para. 14.69.

[479] (*footnote original*) Panel Report, para. 14.70. The potential for double remedies is even greater in the context of export subsidies, which benefit only exported goods and therefore presumably lower the export price. (*Ibid.* footnote 972 to para. 14.72)

[480] (*footnote original*) However, double remedies are unlikely to result in the context of domestic subsidies granted within market economies if normal value is based on domestic sales. In such cases, both the normal value and the export price will be lowered as a result of the domestic subsidy, so that the dumping margin should not be affected. (See Panel Report, footnote 972 to paragraph 14.72)

[481] (*footnote original*) Panel Report, para. 14.71.

any given instance, and contended that it cannot be presumed that domestic subsidies lower export prices pro rata, or one-for-one.[482] [483]

7.305. The parties use the term "double remedies" in the same sense in this dispute, and so do we. Likewise, when referring to an "NME methodology" in this Report, we are referring to a methodology for the calculation of dumping margins under which the export price is compared to a normal value that is constructed on the basis of "surrogate" costs or prices from a third country. In other words, we use the term "NME methodology" in the same sense as the panel and the Appellate Body in DS379.[484]

7.306. In outlining the concept of double remedies above, we have sought to explain what is meant by "double remedies". This entails an explanation of why and how double remedies *potentially* arise when CVDs are imposed concurrently with anti-dumping duties calculated under an NME methodology. The *likelihood* of double remedies arising is a disputed issue in this case. We will address that issue at a subsequent step of our analysis.[485]

7.307. Having defined the concept of "double remedies", we will now proceed to address the first main issue in this dispute, which relates to the interpretation of Article 19.3.

7.7.2 The interpretation of Article 19.3

7.308. In DS379, China argued that the imposition of double remedies is inconsistent with Article 19.3 and 19.4 of the SCM Agreement (and certain other WTO provisions), whereas the United States argued that Article 19.3 and 19.4 do not relate to the issue of double remedies. The panel agreed with the United States.[486] On appeal, the Appellate Body reversed the panel's interpretation of Article 19.3, and in this connection made two findings regarding the interpretation of Article 19.3, which are relevant to the present dispute: (i) the imposition of double remedies arising from the concurrent imposition of CVDs and anti-dumping duties calculated under an NME methodology is inconsistent with the obligation in Article 19.3 to levy CVDs "in the appropriate amounts"[487]; and (ii) the burden is on an investigating authority imposing such concurrent duties to "investigate" whether it is offsetting the same subsidies twice.[488] The Appellate Body proceeded to complete the analysis, and found, based on the panel's factual findings and the undisputed facts in the panel record, that the United States acted inconsistently with Article 19.3 by virtue of USDOC's failure to assess whether double remedies arose in the four sets of investigations at issue in that dispute.[489]

7.309. China agrees with both of the Appellate Body's interpretations of Article 19.3 above, and argues that the Panel should adopt those same interpretations in this dispute. The United States disagrees with both interpretations developed by the Appellate Body. The United States also argues that any obligation to investigate double remedies would not apply to CVD investigations in the context of the United States retrospective system of duty assessment.

7.310. The Panel considers that the relevant issue raised in respect of China's claim under Article 19.3 is whether that provision obliges an investigating authority to assess the existence of double remedies when concurrently imposing CVDs and anti-dumping duties calculated under an NME methodology, and if so, whether such an obligation applies not only to administrative

[482] (*footnote original*) Panel Report, footnote 968 to para. 14.71, and para. 14.73. The United States observed that, while certain domestic production subsidies will result in increased production and a reduction in export prices, other more general subsidies may be used for other purposes (payments of dividends, severance payments, research and development), thus not resulting in any increase in production. (Panel Report, para. 14.71 and footnote 968 thereto; United States' responses to Panel Questions 72 and 73 after the first Panel meeting) A similar point is made by the European Union in its third participant's submission, at paragraph 56.

[483] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 541-544.

[484] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.68; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 542.

[485] See para. 7.335.

[486] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.104-14.130.

[487] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 547-583, and 611(d)(i) and (ii).

[488] Ibid. paras. 596-602.

[489] Ibid. paras. 603-606.

reviews, but also to original investigations, in the context of a retrospective system of duty assessment such as that of the United States.[490] To address this issue, we will consider the following: first, whether we should revisit the interpretation of Article 19.3 notwithstanding the Appellate Body Report in DS379; second, whether the phrase "in the appropriate amounts" in Article 19.3 relates to only the non-discrimination obligation in that provision, as the United States contends; third, whether an investigating authority is under an affirmative obligation to investigate the existence of double remedies; and fourth, whether the obligation in Article 19.3 applies to original investigations in the context of the United States retrospective system of duty assessment. We will address these issues in this order.

7.7.2.1 The task of the Panel in the light of the prior Appellate Body Report in DS379

7.311. The United States argues that with respect to the interpretation of Article 19.3, the Panel is to undertake its own interpretation of that provision by applying the customary rules of interpretation of public international law. The United States submits that a WTO panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. In its view, 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. The United States argues that "a prior Appellate Body report is to be taken into account only to the extent it is relevant and a panel should follow the reasoning in a prior Appellate Body report only if that panel found the reasoning to be persuasive".[491] The United States recalls that the Appellate Body has also itself recognized that at a minimum panels are "free to depart"[492] from prior Appellate Body findings where there are "cogent reasons", and one example of a cogent reason would be where the Appellate Body findings are not persuasive or not in keeping with the covered agreements.[493]

7.312. The United States also submits that it has presented new arguments regarding the interpretation of Article 19.3 that were not considered by the Appellate Body in DS379, and states that Article 19.3 was not the focus of China's arguments in DS379. According to the United States, China did not argue for the interpretation of Article 19.3 that the Appellate Body adopted in DS379 and largely based it claims on Article 19.4. For this reason, the United States submits that it never had an opportunity to address the interpretation adopted by the Appellate Body in DS379, and that the reasoning of the Appellate Body "strayed far afield"[494] from the arguments presented by the parties in DS379. Thus, this dispute represents the first opportunity the United States has had to address rationales first introduced by the Appellate Body in DS379.[495]

7.313. China argues that the Panel should reject the United States' invitation to revisit the interpretation of Article 19.3. China recalls prior Appellate Body statements to the effect that panels are expected to follow Appellate Body interpretations where the issues are the same, including the need for "cogent reasons" to deviate from a prior Appellate Body interpretation. The Appellate Body has not defined the concept of "cogent reasons", but, according to China, it cannot be the case that rehearsing arguments that are materially indistinguishable from arguments that the Appellate Body considered and rejected in DS379 would qualify. Likewise, China argues that the mere assertion that the Appellate Body findings are "not persuasive or not in keeping with the covered agreements" is not a "cogent reason" for the Panel to decline to follow the Appellate Body's interpretation. China argues also that this is particularly true in a dispute, such as this one,

[490] In *US – Section 129(c)(1) URAA*, the panel provided the following description of the US retrospective duty assessment system: "The United States employs a 'retrospective' duty assessment system under which definitive liability for antidumping or countervailing duties is determined after merchandise subject to an antidumping or countervailing duty measure enters the United States. The determination of definitive duty liability is made at the end of "administrative reviews" which are initiated by the Department of Commerce each year on request by an interested party (such as the foreign exporter or the US importer of the imports), beginning one year from the date of the order. In addition to calculating an assessment rate in respect of the entries under review, administrative reviews also determine the cash deposit rates for estimated antidumping or countervailing duties that will be required as a security on future entries, until subsequent administrative reviews are conducted with respect to those entries." (Panel Report, *US – Section 129(c)(1) URAA*, para. 1.6).

[491] United States' response to Panel question No. 41.

[492] Ibid.

[493] United States' first written submission, paras. 190-192; oral statement at the first meeting of the Panel, paras. 49-50; response to Panel question No. 41; second written submission, para. 129; oral statement at the second meeting of the Panel, para. 56.

[494] United States' second written submission, para. 142.

[495] United States' first written submission, paras. 189, 192; oral statement at the first meeting of the Panel, para. 49; response to Panel question No. 31; second written submission, paras. 137, 142-145.

that involves the same litigants, the same types of measures, and the same claims, in relation to an issue of interpretation that was analysed exhaustively by the Appellate Body in its report. China asserts that the attempt by the United States to re-litigate an interpretative issue that the Appellate Body has already resolved is "even more surprising and inappropriate"[496] in light of the fact that Congress enacted a new provision of United States law to comply with that decision. China charges that it is "wasteful in the extreme"[497] to continue litigating these issues when the United States has already taken steps to bring itself into compliance, and inconsistent with the goal of bringing security and predictability to the multilateral trading system.[498]

7.314. China further argues that in its appeal of the panel report in DS379, China advocated precisely the interpretation of Article 19.3 that the Appellate Body adopted. China submits that the United States had every opportunity to present arguments in opposition to this interpretation. China further argues that the "new" arguments that the United States put forward in this case are "materially indistinguishable"[499] from those considered by the Appellate Body in DS379, and amount to "nothing more than taking issue" with the Appellate Body's detailed interpretative analysis of this provision.[500]

7.315. The Panel is presented with an interpretative issue that has already been resolved in an adopted Appellate Body report in another dispute. The Appellate Body has stated that its legal interpretation of a provision in the covered agreements "is not limited to the application of a particular provision in a specific case".[501] The Appellate Body has emphasized that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[502] In the Appellate Body's view, this expectation supports "a key objective of the dispute settlement system", namely, "to provide security and predictability to the multilateral trading system".[503] The Appellate Body has stated that a failure to acknowledge the "hierarchical structure" contemplated in the DSU would "undermine[] the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements".[504] In *US – Stainless Steel (Mexico)*, the Appellate Body stated that it was "deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues", and explained that the panel's approach in that dispute had "serious implications for the proper functioning of the WTO dispute settlement system".[505] The Appellate Body explained that the DSU contains a number of provisions that support this view, including, among others, Articles 3.2, 17.6, and 17.13.[506]

7.316. We understand these considerations to underlie the Appellate Body's conclusion that, absent "cogent reasons"[507], an adjudicatory body will resolve the same legal question in the same way in a subsequent case. The Appellate Body has not defined the concept of "cogent reasons". However, the Appellate Body's reference to "cogent reasons" must in our view be considered in the context of the Appellate Body's other statements regarding the hierarchy provided for in the DSU between itself and panels, the objectives that are served through the development of a consistent, coherent and predictable body of jurisprudence, and the concerns that it has expressed when panels have departed from its prior jurisprudence.

7.317. From the foregoing we conclude that a panel must take the Appellate Body's prior interpretation as a point of departure in its interpretative analysis. However, a panel may confront the issue, e.g. because it has been raised by a party, of whether there are any arguments or there

[496] China's oral statement at the first meeting, para. 67.
[497] Ibid.
[498] China's oral statement at the first meeting, paras. 62-67; response to Panel question No. 41; second written submission, para 31.
[499] China's oral statement at the first meeting, para. 67; response to Panel question No. 41.
[500] China's oral statement at the first meeting, paras. 65-66; second written submission, paras. 173-175; oral statement at the second meeting, para. 31.
[501] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.
[502] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.
[503] Appellate Body Report, *US – Continued Zeroing*, para. 362.
[504] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.
[505] Ibid. paras. 160 and 162.
[506] Ibid. para. 161.
[507] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160; Panel Report, *US – Continued Zeroing*, paras. 7.174, 7.179-7.180; Appellate Body Report, *US – Continued Zeroing*, para. 362.

is any evidence submitted to the panel that would provide "cogent reasons" to reach a different interpretation. In our view, bearing in mind the Appellate Body's particular function in the WTO dispute settlement system, reasons that could support but would not compel a different interpretative result to the one ultimately adopted by the Appellate Body would not rise to the level of "cogent" reasons. To our minds, "cogent" reasons, i.e. reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, *inter alia*: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.

7.7.2.2 The meaning of the phrase "in the appropriate amounts" in Article 19.3

7.318. With the above observations in mind, the Panel now turns to the meaning of the phrase "in the appropriate amounts" in Article 19.3. We recall that in DS379, the Appellate Body found that the imposition of double remedies would be inconsistent with Article 19.3, specifically with the obligation to levy CVDs "in the appropriate amounts" in each case.[508] The issue which the United States' arguments present us with is whether there are cogent reasons to depart from the Appellate Body's interpretation of the phrase "in the appropriate amounts" in Article 19.3.

7.319. The United States argues that Article 19.3 is essentially a non-discrimination provision requiring that CVDs be levied "on a non-discriminatory basis on imports ... from all sources" found to be subsidized and causing injury, and that the phrase "the appropriate amounts in each case" simply means that a Member is permitted to impose different amounts of CVDs upon different exporters because different producers and exporters of the product in question may have received different amounts of subsidies. The United States argues that the Appellate Body's interpretation of the phrase "appropriate amounts", which results in a subjective and open-ended concept and goes far beyond the non-discrimination principle in Article 19.3, is not persuasive.[509] In support of its interpretation of the phrase "in the appropriate amounts", the United States presents arguments based on a textual analysis of these terms and the remainder of Article 19.3[510]; a contextual analysis of the structure of the SCM Agreement and the nature and scope of the obligations in Articles 19.1, 19.2, and 19.4[511]; the interpretation developed by the panel in *EC – Salmon (Norway)*[512]; and the rules that govern(ed) the concurrent application of CVDs and anti-dumping duties in Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code.[513] In the context of providing comments on China's responses to the second set of questions from the Panel, the United States presents an argument based on what it terms the "negotiating history" of Article 19.3.[514]

7.320. China relies on the Appellate Body's interpretation of the phrase "in the appropriate amounts" in DS379. In this regard, China recalls that the Appellate Body found that the amount of a CVD cannot be "appropriate" within the meaning of Article 19.3 in situations where that duty represents the full amount of the subsidy and where antidumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry.[515] China counters that the "new" arguments that the United States put forward in this case are "materially indistinguishable" from those considered by the Appellate

[508] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 547-583.
[509] United States' first written submission, paras. 163-188, and 193-196; oral statement at the first meeting, paras. 51-53; response to Panel question No. 44; second written submission, para. 131; oral statement at the second meeting, paras. 58-59.
[510] United States' first written submission, paras. 163-170; oral statement at the first meeting, para. 51.
[511] United States' first written submission, paras. 171-176 and 193-195; oral statement at the first meeting, para. 52.
[512] United States' first written submission, paras. 177-181.
[513] Ibid. paras. 183-188.
[514] United States' comments on China's response to Panel question No. 108.
[515] China's first written submission, paras. 120-121; oral statement at the first meeting, paras. 60-61; second written submission, para. 168.

Body in DS379, and amount to "nothing more than taking issue with the Appellate Body's detailed interpretative analysis of this provision".[516]

7.321. The Panel agrees with China that most of the arguments that the United States has presented in this case are similar to those considered by the Appellate Body in DS379. At a minimum, this holds true for the United States' arguments regarding the interpretation developed by the panel in *EC – Salmon (Norway)*[517], and the provisions governing the concurrent application of CVDs and anti-dumping duties in Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code.[518] As regards the United States' textual analysis of the phrase "in the appropriate amounts" and the remainder of Article 19.3[519], and its contextual analysis of the structure of the SCM Agreement and the nature and scope of the obligations in Article 19.1, 19.2, and 19.4[520], this appears to be an elaboration of the same interpretation that the Appellate Body considered and rejected in DS379. The Appellate Body devoted nine pages of analysis to the text of Article 19.3[521] and its context[522], including but not limited to express consideration of Articles 10, 19.1, 19.2, 19.3, 21.1, 32.1 of the SCM Agreement, the parallel provisions of the Anti-Dumping Agreement, and Article VI:5 and the *Ad* Note to Article VI:1 of the GATT 1994. The Appellate Body reached a different conclusion regarding the interpretation of these provisions from that advanced by the United States.[523]

7.322. We do not agree with the United States that it was Article 19.4, and not Article 19.3, that was the focus of China's arguments in DS379.[524] It is clear from the panel report in DS379 that a number of the interpretative arguments advanced by the parties and considered by the panel, were relevant both to Articles 19.3 and 19.4. Rather than repeating its analysis, the panel simply incorporated it by reference in the context of its relatively brief section on Article 19.3. As the Appellate Body noted in its own report:

> The Panel reviewed what it considered to be relevant contextual elements for its interpretation of Article 19.4 of the *SCM Agreement*. However, the Panel also recalled these contextual elements in its interpretation of Article 19.3 and noted that "[t]he same considerations likewise suggest that it was not the intention of the drafters [of] the SCM Agreement to address the question of double remedies in Article 19.3 of the SCM Agreement". (Panel Report, para. 14.129)[525]

7.323. We consider that the United States' arguments in this case rebut a position that the Appellate Body did not actually take in DS379. According to the United States, "[t]he interpretation advanced by the Appellate Body … does not relate the phrase 'in the appropriate amounts' at all to the non-discrimination obligations of Article 19.3".[526] However, it appears to us that the Appellate Body accepted that the meaning of the phrase "in the appropriate amounts" is informed by, and linked to, the non-discrimination obligation in Article 19.3. The Appellate Body observed in this regard that the first sentence of Article 19.3 contains two elements: first, a requirement that CVDs be levied in the appropriate amounts in each case, and, second, a requirement that these duties be levied on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except for imports from sources that

[516] China's oral statement at the first meeting, paras. 65-66; second written submission, paras. 173-175; oral statement at the second meeting, para. 31.
[517] United States' first written submission, paras. 177-181; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 575.
[518] United States' first written submission, paras. 183-188; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 565-569, 576-581.
[519] United States' first written submission, paras. 163-170; oral statement at the first meeting, para. 51.
[520] United States' first written submission, paras. 171-176 and 193-195; oral statement at the first meeting, para. 52.
[521] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 551-553.
[522] Ibid. paras. 554-572.
[523] China's second written submission, paras. 173-174. See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 550-572.
[524] United States' first written submission, paras. 189, 192; oral statement at the first meeting of the Panel, para. 49; response to Panel question No. 31; second written submission, paras. 137, 142-145.
[525] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, fn. 533.
[526] United States' first written submission, para. 193.

have renounced the relevant subsidies or from which undertakings have been accepted.[527] The Appellate Body then explained that:

> We consider that the two requirements in the first sentence of Article 19.3 *inform each other*. Thus, it would not be appropriate for an importing Member to levy countervailing duties on imports from sources that have renounced relevant subsidies, or on imports from sources whose price undertakings have been accepted. *Similarly, because the requirement that the duty be levied in "appropriate amounts" implies a certain tailoring of the amounts according to circumstances, this suggests that the requirement that the duty be imposed on a non-discriminatory basis on imports from all subsidized sources should not be read in an overly formalistic or rigid manner.* The second sentence of Article 19.3 provides a specific example of circumstances in which it is permissible not to differentiate amongst individual exporters, as well as of when and how differentiated treatment in the establishment of a countervailing duty rate is required.[528]

7.324. Thus, the Appellate Body did not read the phrase "in the appropriate amounts" in isolation from the non-discrimination obligation in Article 19.3. Rather, the Appellate Body determined that these two obligations "inform" one another. However, the Appellate Body's analysis of the phrase "in the appropriate amounts" shows that it did not read this phrase as being linked *exclusively* to, or informed exclusively by, the non-discrimination obligation in Article 19.3. Put differently, it appears that both the United States and the Appellate Body considered that the phrase "in the appropriate amounts" must be interpreted having regard to its context. The United States understood the relevant context to consist of the non-discrimination obligation in Article 19.3. The Appellate Body understood the relevant context to *include* the non-discrimination obligation in Article 19.3, but also *other* obligations in the SCM Agreement and Anti-Dumping Agreement. This is a significant difference, and so we are not suggesting that the Appellate Body's interpretation of Article 19.3 is essentially the same as the interpretation advocated by the United States. The critical point is that the Appellate Body did not suggest that the phrase "in the appropriate amounts" is unconnected to the non-discrimination obligation in Article 19.3. Rather, it concluded that the phrase "in the appropriate amounts" is not unconnected to *other* obligations contained in the SCM Agreement, as well as the Anti-Dumping Agreement. Accordingly, we consider that the United States' argument intended to demonstrate that the phrase "in the appropriate amounts" must be interpreted in a manner that links it to the non-discrimination obligation in Article 19.3 does not invalidate the Appellate Body's interpretation of that phrase.

7.325. This leads us to the United States' arguments relating to the origins of the phrase "in the appropriate amounts". At the second meeting with the Panel, and again in the context of providing comments on China's written responses to the second and final set of questions from the Panel, the United States presented an argument based on what it termed the "negotiating history" of Article 19.3.[529] In this regard, the United States traces the phrase "in the appropriate amounts" back to the 1960 "Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties" (L/1141); a 1965 "Draft International Code on Anti-Dumping Procedure and Practice" (Spec(65)86); a 1966 Secretariat document on "Draft Elements to Be Considered for Inclusion in an Anti-Dumping Code" (TN.64/NTB/W/13); a "Revised List" of elements (TN.64/NTB/W/14); and the Kennedy Round Antidumping Code, and the Tokyo Round Subsidies Code.[530] According to the United States, these documents suggest that the GATT Contracting Parties viewed the phrase "in the appropriate amounts" as being linked to the non-discrimination obligation that is now

[527] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552.
[528] Ibid. para. 553. (emphasis added)
[529] The Panel notes that the United States presented its argument regarding the negotiating history to the Panel and China orally at the second panel meeting, and provided relevant citations orally, in the context of providing an oral answer to a Panel question on an issue related to the interpretation of Article 19.3. However, in its subsequent written response to the same question, the United States did not refer to the negotiating history. In its comments on China's responses to the second set of questions, the United States argues that "China has regrettably refused to engage with that material", and then proceeds to present, for the first time in writing, its argument based on the negotiating history of Article 19.3. United States' comments on China's response to Panel question No. 108. Question No. 108 reads, "How does China respond to the US suggestion, at paragraphs 105 and 113 of its second written submission, that China has resorted to '"shortcuts' instead of making a prima facie case?"
[530] United States' comments on China's response to Panel question No. 108.

contained in Article 19.3 of the SCM Agreement.[531] We need not express a view on whether a panel could depart from a prior Appellate Body interpretation on the basis of "supplementary means of interpretation" under Article 32 of the Vienna Convention in the situation where the Appellate Body concluded that the text and context of the provision at issue were sufficiently clear and that it was therefore not necessary to have recourse to supplementary means of interpretation to confirm that interpretation.[532] As we have explained above, we do not understand the Appellate Body report in DS379 to mean that the phrase "in the appropriate amounts" is "unconnected"[533] to the non-discrimination obligation in Article 19.3. Therefore, even if the documents submitted by the United States supported the view that the phrase "in the appropriate amounts" must be read together with the non-discrimination obligation in Article 19.3, these historical documents would not invalidate the Appellate Body's interpretation in DS379. Moreover, the United States did not indicate to us that any of the special circumstances of the type outlined in paragraph 7.20 above, which could constitute "cogent" reasons that could in appropriate cases justify a panel in adopting a different interpretation, are applicable in the current case.

7.326. In the light of the foregoing, the Panel considers that the United States has not presented "cogent reasons" to depart from the Appellate Body's prior interpretation that the imposition of double remedies is inconsistent with the obligation in Article 19.3 to levy CVDs "in the appropriate amounts in each case".[534] Accordingly, we will base our analysis of China's claim on the Appellate Body's interpretation.

7.7.2.3 Whether an investigating authority is under an affirmative obligation to investigate the existence of double remedies

7.327. The Panel, having considered the meaning of the phrase "in the appropriate amounts" in Article 19.3, will now proceed to consider whether there are cogent reasons to depart from another element of the Appellate Body's interpretation of Article 19.3. This concerns the issue, put before us by the United States, whether an investigating authority is under an affirmative obligation to investigate the existence of double remedies. We recall that in DS379, the Appellate Body found that an investigating authority is "subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and that this "affirmative obligation" encompasses "a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record".[535]

7.328. The United States disagrees with the Appellate Body's finding that Article 19.3 establishes an affirmative obligation to investigate the existence of double remedies. On its face, Article 19 does not contain any obligations that require an administering authority to engage in an investigative function. The United States observes that Article 19 is entitled "imposition and collection" of CVDs, and Article 19.3 sets out an obligation relating to the CVD "levied". The United States argues that nothing in Article 19.3 relates to an obligation to investigate and other provisions in the SCM Agreement govern the conduct of investigations. The United States submits that, to find a duty to investigate residing in Article 19.3, the Appellate Body in DS379 states that it relied on the one hand on its findings in *US – Countervailing Measures on Certain EC Products* to draw a parallel between Article VI:3 of the GATT 1994 on the one hand, and Articles 19.3 and 19.4 of the SCM Agreement on the other hand. However, the United States avers that the analogy is misplaced because no parallel exists between Article VI:3 and Article 19.3, and the Appellate Body also misconstrued its prior findings in *US – Countervailing Measures on Certain EC Products.*

7.329. The United States also disagrees with the premise that double remedies are "likely" to arise when CVDs are imposed concurrently with anti-dumping duties determined in accordance with the United States NME methodology.[536] The United States argues that "the Appellate Body in

[531] Ibid.
[532] The Panel recalls that in DS379, the Appellate Body concluded that "having reviewed Article 19.3 of the *SCM Agreement* and its relevant context, we do not consider it necessary to confirm the interpretation of Article 19.3 of the *SCM Agreement* by relying on supplementary means of interpretation". (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 579).
[533] United States' first written submission, paras. 174 and 176; oral statement at the first meeting with the Panel, para. 7.
[534] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 547-583.
[535] Ibid. para. 602.
[536] United States' first written submission, paras. 198-201; response to Panel questions Nos. 32 and 78.

DS379 presumed that domestic subsidies automatically lower export prices to some degree"[537]; however, the United States argues, this depends on the form of the subsidy, market forces, and other circumstances. The United States calls upon the Panel not to assume the same findings of the panel in DS379, but rather to make its own objective assessment of the facts. The United States further contends that China has made no effort to demonstrate the existence of a double remedy in any of the challenged sets of investigations and reviews or to identify evidence from any of the challenged determinations that would support the "presumptive" theory adopted by the panel, and subsequently by the Appellate Body, in DS379.

7.330. China relies on the Appellate Body's finding that an investigating authority is under an "affirmative obligation" to investigate double remedies. China recalls that the Appellate Body held that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record". According to China, this includes taking into account "evidence of whether and to what degree the same subsidies are being offset twice", bearing in mind that double remedies are "likely" when the corresponding anti-dumping duties are determined in accordance with the United States NME methodology.

7.331. China argues that the Appellate Body's legal finding that an investigating authority has an affirmative duty to investigate was based on the panel's finding in DS379, with which the Appellate Body agreed, that double remedies are "likely" to arise when CVDs are imposed concurrently with anti-dumping duties determined in accordance with the United States NME methodology. China notes that the United States has opted not to challenge this finding before the Appellate Body in DS379. According to China, the United States has presented no reason to support reaching a different factual conclusion from what the panel found in DS379. Accordingly, China argues, the Panel can and should adopt this finding.

7.332. The Panel considers it useful to set out the Appellate Body's statements on this issue in DS379:

> On appeal, China claims that it is "the obligation of the investigating authority to *investigate* and make a determination as to whether it is offsetting the same subsidies twice", whereas the United States argues that "the burden to establish the existence of such an alleged double remedy would be on China".
>
> We observe that, in *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated that, "under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation."[538] We consider that a parallel can be drawn between the obligation of an investigating authority under Article VI:3 of the GATT 1994 to determine the precise amount of the subsidy, on the one hand, and the analogous obligations that an investigating authority has under Articles 19.3 and 19.4 of the *SCM Agreement*, on the other hand, to determine and levy countervailing duties in amounts that are appropriate in each case and that do not exceed the amount of the subsidy found to exist.
>
> In the same way, therefore, as an investigating authority is subject to an affirmative obligation to ascertain the precise amount of the subsidy, so too is it subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3. This obligation encompasses a requirement to conduct a sufficiently diligent "investigation" into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record. We recall our finding above that, among the factors to be taken into account by an investigating authority, in establishing the "appropriate" amount of countervailing duty to be imposed, is evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products. We also recall that such double remedies are "likely" when the

[537] United States' first written submission, para. 198.

[538] (*footnote original*) Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139. (footnote omitted)

> concurrent anti-dumping duties are calculated on the basis of an NME methodology.[539] [540]

7.333. We agree with the United States that the text of Article 19.3 does not contain any explicit obligation to "investigate" the existence of double remedies. However, we do not consider that this is sufficient, in and of itself, to undermine the Appellate Body's conclusion. In our view, the Appellate Body based its finding on a *necessary implication* arising from the words that are found in Article 19.3. That is, the Appellate Body appeared to reason that the obligation to assess and collect CVDs in the appropriate amounts necessarily implies an affirmative obligation to first establish what the appropriate amount is.

7.334. We do not agree with the United States that the Appellate Body relied on a misplaced analogy in referring to its prior analysis in *US – Countervailing Measures on Certain EC Products.* In that dispute, the Appellate Body examined Article VI:3 of the GATT 1994. Article VI:3 states that in order to offset or prevent dumping, a Member "may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". In *US – Countervailing Measures on Certain EC Products*, the Appellate Body reasoned that these terms imply an obligation to "ascertain the precise amount of a subsidy attributed to the imported products under investigation".[541] The Appellate Body reached that view by interpreting Article VI:3 in the context of a number of other provisions, including Articles 10 and 19.4 of the SCM Agreement. In DS379, the Appellate Body examined Article 19.3 of the SCM Agreement, which states that when a CVD is imposed in respect of any product, such CVD "shall be levied, in the appropriate amounts in each case …". In DS379, the Appellate Body reasoned that these terms of Article 19.3 implied "an affirmative obligation to establish the appropriate amount of the duty under Article 19.3".[542] The Appellate Body reached that view by interpreting Article 19.3 in the context of a number of other provisions, including Articles 10 and 19.4 of the SCM Agreement. Thus, we see the analogy on which the Appellate Body relied as apt, and not misplaced.

7.335. We have indicated that if there was a demonstration that an Appellate Body interpretation was based on a factually incorrect premise, this could amount to a "cogent reason" to depart from that interpretation.[543] The United States argues that "the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative", and that "it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy".[544]

7.336. We understand the Appellate Body's interpretation of Article 19.3 to stem, at least in part, from the fact that the Appellate Body, like the panel, accepted the "general proposition"[545] that double remedies are "likely" to arise when CVDs are imposed concurrently with anti-dumping duties determined in accordance with the United States NME methodology.[546] China agrees with that proposition.[547] The United States challenges that proposition, arguing that "the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative".[548] In the light of the United States' arguments, we will proceed to examine (i) what the panel and Appellate Body actually said in DS379, (ii) whether the United States raises issues here that were not considered in DS379, and (iii) China's uncontested assertions regarding USDOC findings in the Section 129 redeterminations for the four investigations that were at issue in DS379.

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[539] (*footnote original*) Panel Report, paras. 14.67 and 14.75. We also note that the Panel expressed the view that the USDOC had itself recognized the potential for double remedies in such circumstances. (See *Ibid.* para. 14.71, and the statements quoted in footnote 966 thereto)

[540] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 600-603.

[541] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139. (footnote omitted)

[542] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602.

[543] See para. 7.317.

[544] United States' first written submission, paras. 198, 200.

[545] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67, 14.75; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599.

[546] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602.

[547] China's first written submission, paras. 116-122; second written submission, paras. 159-161.

[548] United States' first written submission, para. 198.

7.337. First, we consider what the panel and Appellate Body actually said in DS379. The panel and the Appellate Body in DS379 both accepted the "general proposition" that double remedies are "likely" to arise from the concurrent imposition of CVDs and anti-dumping duties calculated under an NME methodology. The panel and the Appellate Body discussed this general proposition in detail.[549] The Appellate Body, like the panel in DS379, explicitly made clear that it was *not* convinced that double remedies *necessarily* result in every instance of such concurrent application of CVDs and anti-dumping duties calculated under the NME methodology:

> We do not accept China's contention that a finding of inconsistency of the measures at issue must directly follow from our reversal of the Panel's interpretation of Article 19.3 of the *SCM Agreement*. We have expressed the view that, as a *legal* matter, this provision prohibits double remedies. But, we have not yet considered the question of when, as a *factual* matter, double remedies arise. In principle, we agree with the statement by the Panel that double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties[550], but we are not convinced that double remedies *necessarily* result in every instance of such concurrent application of duties. This depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.[551]

7.338. In the light of this, it appears to us that the United States misreads the panel and Appellate Body reports in DS379 when the United States argues that "the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree".[552] Second, insofar as the United States is actually challenging the general proposition that double remedies are "likely" to lower export prices to some degree, its arguments appear to be the same arguments presented to, and rejected by, the panel in DS379. In this case, the United States argues that whether a subsidy lowers export prices depends on the form of the subsidy, market forces, and other circumstances.[553] When presented with similar arguments, the panel in DS379 responded:

> The United States puts forward a number of scenarios under which it is plausible that the subsidy would not have a one-for-one impact on the producer's costs of production or on export prices. The United States also points out that the imposition of countervailing duties is not conditioned upon a demonstration of the price effects of the subsidy; in other words, that a Member is allowed to countervail subsidies that have no effects on the price of subsidized imports.
>
> All else being equal, one would expect a domestic subsidy to lower the recipient's production costs, allowing that producer to lower its prices in both the domestic and export markets.[554] It would, in our view, be a rare case in which a subsidy bestowed upon the producer of an exported good has *no effect at all* on either the producer's costs of production or – assuming they are relevant – export prices, such that no portion of that subsidy would be subject to a double remedy where both anti-dumping

[549] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67-14.75, and in particular paras. 14.67, 14.70, and 14.72 (double counting "likely to result"). Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599 (agreeing with the panel's conclusion that double remedies "would likely result"). We note in passing that the record contains a report by the United States GAO and decisions by the CIT wherein these entities similarly determined that there is a "substantial" and "high" potential that double remedies will arise from the concurrent imposition of CVDs and anti-dumping duties calculated under the United States' NME methodology. See GAO Report (Exhibit CHI-16), at p. 33 (maintaining its view, in response to comments from USDOC, that there is "substantial potential" for double counting); *GPX II* (Exhibit CHI-03), at p. 1240 (referring to the "high potential for double remedies", p. 1243 (referring to the "substantial potential for double counting" and concluded that the US NME methodology "likely" accounts for any competitive advantages the exporter received that are measurable); *GPX III* (Exhibit CHI-04), at p. 1345 (reiterating that there is a "high likelihood" of double counting).

[550] (*footnote original*) Panel Report, paras. 14.67 and 14.75.

[551] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599.

[552] United States' first written submission, para. 198.

[553] United States' first written submission, paras. 198-201; response to Panel questions Nos. 32 and 78.

[554] (*footnote original*) The USDOC itself seems to have made this assumption in the past. *See* footnote 972, *supra*.

> duties based on an NME methodology, and countervailing duties, were imposed on imports of a given product.
>
> In sum, the United States' arguments raise the question of the extent of a double remedy in specific factual circumstances – whether a *complete* double remedy *necessarily* results from *all instances* of concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. They do not, however, invalidate the general proposition that at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology. If anything, the arguments put forward by the United States reinforce the idea that ascertaining the precise extent of double remedy in specific investigations would be a complex task, a fact which is highlighted by both the GAO, in its 2005 Report, and by the CIT in *GPX*.[555] [556]

7.339. We recall the Appellate Body's statement that while "factual findings made in prior disputes do not determine facts in another dispute … if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings."[557] It is not contested that the factual question facing the Panel in this dispute is the same question that was confronted by the panel in DS379, that the underlying NME methodology subject to that factual inquiry is identical, and that the dispute is between the same parties.[558]

7.340. Third, we note China's uncontested assertions regarding USDOC's Section 129 redeterminations for the four investigations that were at issue in DS379. Specifically, the United States does not contest China's assertion that, in the Section 129 redeterminations for the four investigations at issue in DS379, USDOC estimated that 63% of the input subsidies that the USDOC had identified had been double counted.[559] Thus, insofar as the United States is arguing that it is impossible or incorrect to assert any general proposition regarding the likelihood (or lack thereof) of domestic subsidies lowering export prices, this argument is not supported by the USDOC's recent redeterminations for the four investigations examined in DS379. As these four different investigations would have involved a variety of different subsidies, and a series of producers, USDOC's finding that 63% of the input subsidies that the USDOC had identified had been double counted is consistent with the general proposition, supported by the panel and the Appellate Body in DS379, that domestic subsidies are *likely* to lower the export price of a product *to some extent*, and that, for that reason, double remedies are "likely" to arise from the concurrent imposition of CVDs and anti-dumping duties calculated under the United States' NME methodology.

7.341. Based on all of the foregoing, we consider that the United States has failed to present us with any sufficient basis to reject the general proposition, supported by the panel and Appellate Body in DS379, that domestic subsidies are *likely* to lower the export price of a product *to some extent*, and that, for that reason, double remedies are "likely" to arise from the concurrent imposition of CVDs and anti-dumping duties calculated under the United States' NME methodology. Thus, we are not persuaded that the Appellate Body's interpretation of Article 19.3 was based on a factually incorrect premise.

7.342. In the light of the foregoing, the Panel considers that the United States has not presented "cogent reasons" to depart from the Appellate Body's prior interpretation that an investigating authority is under an affirmative obligation to determine, based on positive evidence, whether the concurrent imposition of CVDs and anti-dumping duties calculated under an NME methodology will

[555] (*footnote original*) Exhibits CHI-121, p. 48; CHI-169, pp. 17-19. We note that the GAO indicated that the experts it consulted agreed that in theory, the double remedy would be significant. (Exhibit CHI-169, p. 28).

[556] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.73-14.75.

[557] Appellate Body Report, *US – Continued Zeroing*, para. 190.

[558] China's second written submission, para. 158.

[559] China's response to Panel question No. 78; second written submission, para. 167; oral statement at the second meeting with the Panel, para. 29; China's response to Panel question No. 78 (providing a hyperlink to the Section 129 redeterminations for the four investigations at issue in DS379).

result in double remedies.[560] Accordingly, we will base our analysis on the Appellate Body's interpretation.

7.7.2.4 Whether the obligation in Article 19.3 applies to original investigations in the context of a retrospective system of duty assessment

7.343. The Panel will now consider the United States argument that, in the context of a retrospective system of duty assessment, the obligations in Article 19.3 apply only to administrative reviews, and not to original investigations. In DS379, however, the Appellate Body found that the United States acted inconsistently with its obligations in Article 19.3 in the context of four sets of original investigations. In view of the United States argument, we will therefore proceed to consider whether there are cogent reasons to depart from the Appellate Body's interpretation of Article 19.3 insofar as it brings original investigations within the scope of application of Article 19.3.

7.344. The United States argues that the obligation in Article 19.3 does not apply to original investigations under the United States retrospective system of duty assessment, which results in a decision whether to impose a CVD, and not the amount of duty to levy. Article 19.3 applies to situations when a CVD is "levied". Footnote 51 to Article 19.4 clarifies that, "[a]s used in this Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax". Under the United States retrospective system of duty assessment, investigations serve as the basis to determine whether to issue a CVD "order" on a particular product. When USDOC issues an order following affirmative determinations of subsidization and injury, this directs the customs authority "to collect security against future liability (cash deposits or bonds)". It is the reviews, which may be conducted annually after issuance of an order, that serve as the basis to determine the actual amount of duties to be assessed. Therefore, under the United States retrospective duty system, duties are only "levied" through reviews. Accordingly, any purported obligation to investigate the appropriate amounts of duties to be levied would only 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). As is evident in its report, the Appellate Body in DS379 did not consider the distinction between original investigations and administrative reviews in the United States retrospective system in interpreting Article 19.3.[561]

7.345. China argues that the United States argument that the obligations in Article 19.3 do not apply to original investigations in the United States retrospective system has been rejected by the Appellate Body and by prior panels that have explicitly or implicitly addressed the issue. According to China, this Panel should also reject this argument.[562]

7.346. The Panel recalls that in DS379, the measures at issue encompassed four sets of original investigations, not administrative reviews. Therefore, the Appellate Body's finding of a violation of Article 19.3 in respect of those investigations, by virtue of USDOC's failure to investigate double remedies in those investigations, is an implicit finding that the obligation in Article 19.3 applies to CVD investigations (and not only reviews) in the context of the United States system of duty assessment. We note that in DS379, the United States made the same argument before the panel that it makes before this Panel, i.e. that the obligation in Article 19.3 does not apply to original investigations under the United States retrospective system of duty assessment. The panel in DS379 did not consider it necessary to address the United States' argument, in the light of its conclusion, subsequently reversed by the Appellate Body, that the obligations in Article 19.3 and 19.4 do not relate to the issue of double remedies. However, the United States' arguments on this issue, China's counter-arguments, and the panel's decision, are all reflected in the panel report in DS379.[563] It may be surmised that the Appellate Body would therefore have been aware of this issue, and did not expressly address it simply because the United States chose not to present this argument to the Appellate Body on appeal.

[560] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 600-603.
[561] United States' response to Panel question Nos. 29 and 88; second written submission, paras. 132-136; oral statement at the second meeting, paras. 61-62; response to Panel question No. 105.
[562] China's response to Panel question No. 105.
[563] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.81, 14.93, 14.109, 14.123.

7.347. We note that in at least one prior dispute, the Appellate Body explicitly stated that the obligation in Article 19.4 is applicable to original investigations in the context of the United States retrospective system of duty assessment. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body upheld the panel's finding that the United States acted inconsistently with Article 19.4 in its original investigation determination by failing to account for the effect of a privatization on the existence of a subsidy benefit.[564] In the course of its analysis, the Appellate Body stated that "[b]ecause the 12 determinations challenged in this dispute and on appeal include six original investigations, two administrative reviews and four sunset reviews, we must … examine this matter in the light of the provisions of the *SCM Agreement* covering each of these three types of countervailing duty determinations".[565] After recalling the obligations in several provisions, including Article 19.4, the Appellate Body concluded that "[t]hese obligations apply to original investigations as well as to administrative and sunset reviews".[566] We recognize that the obligation at issue in this case is Article 19.3, not Article 19.4. However, the United States argument relating to the interpretation of Article 19.3 is based on the use of the word "levy" in Article 19.3 and the corresponding definition of the term "levy" in footnote 51 to Article 19.4. Accordingly, the United States argument regarding the scope of Article 19.3 would, if correct, apply equally to the interpretation of Article 19.4, because Article 19.4 refers to the amount of countervailing duties that may be "levied".

7.348. We attach significance to the consequences that would follow from the United States' interpretation of Article 19.3. In *US – Carbon Steel*, the Appellate Body offered the following observations on the object and purpose of the SCM Agreement:

> [T]he [SCM] Agreement contains no preamble to guide us in the task of ascertaining its object and purpose. In *Brazil – Desiccated Coconut*, we observed that the *'SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947.'[567] The *SCM Agreement* defines the concept of 'subsidy', as well as the conditions under which Members may not employ subsidies. It establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member's subsidization practices. Part V of the *SCM Agreement* deals with one such remedy, permitting Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy. Taken as a whole, the main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.
>
> We thus believe that the Panel properly identified, as among the objectives of the *SCM Agreement*, the establishment of a framework of rights and obligations relating to countervailing duties[568], and the creation of a set of rules which WTO Members must respect in the use of such duties.[569] Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so.[570]

7.349. Were we to accept the United States argument, the obligation in Article 19.3 (and, by necessary implication, the obligation in Article 19.4) would be triggered only by a final legal assessment of the amount of a countervailing duty. Under the United States system, such an assessment is in principle not made unless and until an administrative review is carried out; however, if no administrative review is requested, then the cash deposit rate ultimately becomes

[564] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 161(a); Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 8.1(a).
[565] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 135.
[566] Ibid. para. 139.
[567] (*footnote original*) Appellate Body Report on *Brazil – Desiccated Coconut*, at 181.
[568] (*footnote original*) Panel Report, para. 8.32.
[569] (*footnote original*) Ibid. para. 8.68.
[570] Appellate Body Report, *US – Carbon Steel*, paras. 73-74.

the final rate. This would mean that an investigating authority operating in a retrospective system of duty assessment could conduct a countervailing duty investigation, determine the precise amount of the subsidy rate (e.g. 25% *ad valorem*), and then proceed to impose a countervailing duty order in an amount that far exceeds the subsidy rate (e.g. 50% *ad valorem*). It could also impose the countervailing duty order on a discriminatory basis, given that the obligation in Article 19.3 to levy countervailing duty "on a non-discriminatory basis on imports of such product from all sources found to be subsidized" also applies to the "levy" of countervailing duties. These actions would not be inconsistent with the obligation in Article 19.3 (to levy a countervailing duty "in the appropriate amounts in each case") or Article 19.4 (prohibiting countervailing duties from being levied "in excess of the amount of the subsidy found to exist") under the United States interpretation of those provisions. The reason is that these obligations would not be triggered until such time as there was an administrative review leading to a final legal assessment, which may not take place for a considerable period of time after the imposition of the CVD order and the collection of cash deposits pursuant to that order[571], or may not take place at all in the absence of a request from an interested party. As noted, in the absence of an administrative review, the cash deposits collected would ultimately become the final countervailing duties levied. In our view, an interpretation of Article 19.3 that has the potential to produce the aforesaid consequences is at variance with the object and purpose of the SCM Agreement, which includes the imposition of effective disciplines on Members applying CVDs to imports, and in particular "the requirement that the countervailing duty cannot exceed the amount of the subsidy".[572]

7.350. We have indicated that if there was evidence that an interpretation developed by the Appellate Body led to a result that was unworkable in practice, this could amount to a "cogent reason" to depart from that interpretation.[573] The United States has explained that, in the context of its retrospective system of duty assessment, original investigations and administrative reviews serve different functions. Therefore, we have considered whether the application of an obligation to investigate double remedies to original investigations would be unworkable in the context of the United States retrospective system of duty assessment. In this connection, we find it relevant that Section 2 of PL 112-99 explicitly obliges USDOC to take steps to investigate double remedies not only in the context of administrative reviews, but also in the context of original investigations.[574] Specifically, Section 2(a) obliges USDOC to take into account the potential for the simultaneous imposition of anti-dumping and countervailing duties to result in overlapping remedies and to reduce the anti-dumping duty to the extent of overlap, provided certain conditions are met. Section 2(b)(1) then states that this obligation applies to "all investigations and reviews" initiated on or after 13 March 2012. Section 2(b)(2) further provides that it also applies to "all determinations" issued under Section 129(c) of the Uruguay Round Agreements Act, without distinguishing between different types of determinations. Section 2 is a measure apparently taken by the United States to comply with the recommendations and rulings of the DSB in DS379 as they relate to the issue of double remedies.[575] Of course, the fact that the United States enacted this legislation does not suggest that it necessarily agrees with all aspects of the Appellate Body's interpretation of Article 19.3 in DS379. However, the fact that the United States enacted legislation that obliges USDOC to take steps to investigate double remedies not only in the context of administrative reviews, but also in the context of original investigations, suggests to us that the application of an obligation to investigate double remedies to original investigations is not unworkable in the context of the United States retrospective system of duty assessment.

7.351. In the light of the foregoing, the Panel considers that the United States has not presented "cogent reasons" to depart from the Appellate Body's understanding that the obligation in Article 19.3 applies to original investigations in the context of a retrospective system of duty assessment.[576] Accordingly, we will follow the Appellate Body's interpretation.

[571] See Article 9.3.1 of the Anti-Dumping Agreement.
[572] Appellate Body Report, *US – Carbon Steel*, para. 73.
[573] See para. 7.317.
[574] The text of Section 2 of PL 112-99 is reproduced above at paragraph 7.11.
[575] China's oral statement at the first meeting with the Panel, para. 67. See also the statement to the same effect in *GPX VI* (Exhibit CHI-07), page 4. The United States does not dispute that Section 2 is a measure taken to comply with the recommendations and rulings of the DSB in DS379 as they relate to the issue of double remedies.
[576] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 606, 611(d)(iii).

7.7.2.5 Overall conclusion on the interpretation of Article 19.3

7.352. In the light of the foregoing, the Panel considers that the United States has not presented any "cogent reasons" that would justify the Panel in departing from the Appellate Body's interpretation of Article 19.3 in DS379. Accordingly, we will base our analysis on the Appellate Body's interpretation of Article 19.3.

7.7.3 The 26 investigations and reviews

7.353. The Panel considers that the relevant question of fact raised in respect of China's claim under Article 19.3 is whether USDOC imposed CVDs concurrently with anti-dumping duties calculated under an NME methodology without investigating whether double remedies arose in the 26 CVD investigations and reviews at issue in this dispute. We will begin by defining the precise measures at issue in this dispute. We will then review the parties' evidence and arguments regarding the 26 investigations and reviews at issue in this dispute.

7.7.3.1 The measures at issue: USDOC's failure to investigate double remedies in a series of investigations and reviews

7.354. China's claim under Article 19.3 is based on USDOC's alleged "failure to investigate and avoid" double remedies in 26 identified CVD investigations and reviews.

7.355. The Panel sets out the relevant investigations and reviews below, in chronological order by reference to the date on which the investigation or review was initiated. In our analysis, we will generally refer to proceedings 1 through 25 as the "25 investigations and reviews at issue". For reasons that will be set out further below, we will address the last proceeding separately, i.e. *Drawn Stainless Steel Sinks* (proceeding 26 below). China submitted the associated determinations in these investigations and reviews, and the final column indicates the relevant exhibit numbers.[577]

No.	NAME	C-	Initiation	Determination
1	Raw Flexible Magnets from the People's Republic of China	C-570-923	72 FR 59076, October 18 2007	CHI-28
2	Lightweight Thermal Paper from the People's Republic of China	C-570-921	72 FR 62209, November 2, 2007	CHI-29
3	Sodium Nitrite from the People's Republic of China	C-570-926	72 FR 68568, December 5, 2007	CHI-30
4	Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China	C-570-931	73 FR 9994, February 25, 2008	CHI-31
5	Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China	C-570-936	73 FR 23184, April 29, 2008	CHI-32
6	Citric Acid and Certain Citrate Salts From the People's Republic of China	C-570-938	73 FR 26960, May 12, 2008	CHI-33
7	Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China	C-570-940	73 FR 42324, July 21, 2008	CHI-35
8	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China	C-570-942	73 FR 50304, August 26, 2008	CHI-36 USA-100
9	Certain Oil Country Tubular Goods from the People's Republic of China	C-570-944	74 FR 20678, May 5, 2009	CHI-38
10	Prestressed Concrete Steel Wire Strand From the People's Republic of China	C-570-946	74 FR 29670, June 23, 2009	CHI-39
11	Certain Steel Grating From the People's Republic of China	C-570-948	74 FR 30278, June 25, 2009	CHI-40
12	Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China	C-570-953	74 FR 39298, August 6, 2009	CHI-41
13	Certain Magnesia Carbon Bricks From the People's Republic of China	C-570-955	74 FR 42858, August 25, 2009	CHI-42

[577] China submitted copies of the final determinations for proceedings 1 through 23 (Exhibits CHI-27 through CHI-49), and the preliminary determinations for proceedings 24-26 (CHI-50 through CHI-52). China also submitted copies of the corresponding final and preliminary determinations for the parallel anti-dumping proceedings (Exhibits CHI-53 through CHI-78).

No.	NAME	C-	Initiation	Determination
14	Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China	C-570-957	74 FR 52945, October 15, 2009	CHI-43
15	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China	C-570-959	74 FR 53703, October 20, 2009	CHI-44
16	Certain Potassium Phosphate Salts from the People's Republic of China	C-570-963	74 FR 54778, October 23, 2009	CHI-45
17	Certain New Pneumatic Off-The-Road Tires from the People's Republic of China [*Administrative Review*]	C-570-913	74 FR 54956, October 26, 2009	CHI-27
18	Drill Pipe From the People's Republic of China	C-570-966	75 FR 4345, January 27, 2010	CHI-46
19	Aluminum Extrusions From the People's Republic of China	C-570-968	75 FR 22114, April 27, 2010	CHI-47
20	Citric Acid and Certain Citrate Salts From the People's Republic of China [*Administrative Review*]	C-570-938	75 FR 37759, June 30, 2010	CHI-34
21	Certain Kitchen Appliance Shelving and Racks From the People's Republic of China [Administrative Review]	C-570-942	75 FR 66349, October 28, 2010	CHI-37
22	Multilayered Wood Flooring From the People's Republic of China	C-570-971	75 FR 70719, November 18, 2010	CHI-48
23	High Pressure Steel Cylinders From the People's Republic of China	C-570-978	76 FR 33239, June 8, 2011	CHI-49
24	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China	C-570-980	76 FR 70966, November 16, 2011	CHI-50
25	Utility Scale Wind Towers From the People's Republic of China	C-570-982	77 FR 3447, January 24, 2012	CHI-51
26	Drawn Stainless Steel Sinks From the People's Republic of China	C-570-984	77 FR 18211, March 27, 2012	CHI-52

7.356. As indicated in the table above, proceedings 17, 20, and 21 are administrative reviews. Apart from these three administrative reviews, the remaining 23 proceedings are original investigations.

7.357. China identified these investigations and reviews in Appendix A to its panel request, and again in Appendix A of Exhibit CHI-24. In addition to providing the information set forth above, China also identified the date, along with the corresponding United States Federal Register reference, for the associated preliminary or final determinations, orders, and amended final determinations and orders (where available) for each of these investigations and reviews.[578] China provided the same information for all of the associated anti-dumping investigations and reviews in Appendix B to its panel request, and again in Appendix B of Exhibit CHI-24.

7.358. In response to a Panel question[579], China explained that for the purpose of defining the "measure(s)" at issue, China "does not perceive a distinction" between the relevant determinations themselves and the alleged "failure to investigate and avoid" double remedies in these determinations. According to China, the CVD determination is the relevant "measure" at issue in respect of each of the identified investigations and reviews. The CVD determination sets forth the evidence and reasoning that the USDOC relied upon in reaching its determination, as well as its disposition of issues that the USDOC was required to address in reaching its determination. The failure of the USDOC "to investigate and avoid double remedies" in these investigations and reviews is reflected in its determinations, either explicitly (e.g. in its refusal to investigate and avoid double remedies in response to requests made by interested parties) or implicitly (e.g. in its failure to indicate that it solicited and evaluated relevant information pertaining to double remedies). That being the case, China considers that the determinations and the failure to investigate and avoid double remedies are one and the same thing.

[578] China clarified the difference between "final determinations", "orders", and "amended final determinations and orders" in its responses to Panel question No. 9.

[579] China's response to Panel question No. 83.

7.359. Having identified the investigations and reviews at issue in this dispute, the Panel considers that it is important to clarify what China is challenging in respect of these investigations and reviews, and the resulting implications for what China has to prove in this dispute. In our view, two points in particular merit clarification. The first is that China is not asking the Panel to find that USDOC actually imposed double remedies in the investigations and reviews at issue. The second point, to which we shall return further below, concerns the relationship between the measure at issue, i.e. USDOC's "failure to investigate and avoid" double remedies, and China's argument, which China has advanced throughout this proceeding, that USDOC "lacked legal authority" to investigate and avoid double remedies over the period 20 November 2006 to 13 March 2012.[580]

7.360. Dealing with the first point, the measure at issue in this dispute is identified in China's panel request as the United States' "failure to investigate and avoid" double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012.[581] In its submissions, China has repeatedly framed the measure before the Panel in the same way, i.e. as USDOC's failure to "investigate and avoid" double remedies. For example, Section VII.B of its first written submission is entitled "Article 19.3 of the SCM Agreement Requires the United States to Investigate and Avoid the Double Remedies that Are Likely to Occur when the United States Applies Countervailing Duties in Conjunction with Anti-Dumping Duties Determined under the U.S. NME Methodology"; Section VII.C of its first written submission is entitled "The USDOC Took No Steps to Investigate and Avoid Double Remedies in the Investigations at Issue in this Dispute"; and in its Request for Findings and Recommendations in its first written submission, China requests that the Panel find that "the United States acted inconsistently with Article 19.3 of the SCM Agreement by failing to investigate and avoid double remedies in the CVD determinations identified in CHI-24".[582]

7.361. We recall that in DS379, the Appellate Body found that the United States acted inconsistently with Article 19.3 by failing to *investigate* whether double remedies arose in the investigations at issue. In DS379, neither the panel nor the Appellate Body arrived at any conclusion as to whether double remedies *actually* arose (and if so, in what amounts) from any of the four sets of investigations at issue in that dispute. In DS379, the Appellate Body explicitly found that "in the four sets of anti-dumping and CVD investigations at issue, by virtue of the USDOC's imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, *without having assessed whether* double remedies arose from such concurrent duties, the United States acted inconsistently with its obligations under Article 19.3".[583] We further observe that the sections of the panel and Appellate Body reports in DS379 concerning the issue of "double remedies" contain no mention of even basic factual elements that would have to be known to support any conclusion as to whether a double remedy arose in any particular case – including (but not limited to) the amount of the subsid(ies) at issue, and the margin of dumping.

7.362. China's claim in this dispute is based on the Appellate Body's interpretation of Article 19.3. For the reasons already set forth above, we have also decided to base our analysis on the Appellate Body's interpretation of Article 19.3.[584] Thus, the Panel understands China's claim in this dispute to be that USDOC acted inconsistently with Article 19.3 by failing to discharge its affirmative obligation to *investigate* whether double remedies arose, "irrespective of whether double remedies actually occurred in these investigations and reviews".[585] China does not claim that the investigations and reviews at issue *actually* resulted in the imposition of double remedies. Accordingly, China has neither asserted nor sought to prove that double remedies actually arose in the investigations and reviews at issue. In response to a Panel question, China confirmed that its position is that it does not have to demonstrate, and that to uphold its claim the Panel does not

[580] Section 2 of PL 112-99 grants USDOC legal authority to make adjustments to anti-dumping duties to avoid double remedies in respect of investigations and reviews initiated on or after its date of enactment, i.e. 13 March 2012.
[581] China's request for the establishment of a panel, p. 4.
[582] China's first written submission, para. 127(d).
[583] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 611(d)(iii). (emphasis added)
[584] See para. 7.352.
[585] China's response to Panel question No. 43.

have to find, that double remedies actually occurred in any of the investigations or reviews at issue.[586]

7.363. The second point that merits clarification is the relationship between the measure at issue, i.e. USDOC's "failure to investigate and avoid" double remedies, and China's argument, which China has advanced throughout this proceeding, that USDOC "lacked legal authority" to investigate and avoid double remedies over the period 20 November 2006 and 13 March 2012.[587] Here, we consider it useful to address a potential source of confusion that may arise from the manner in which China has formulated the measure at issue, namely USDOC's alleged failure to "investigate and avoid" double remedies. As we understand it, China is claiming that USDOC failed to *investigate* double remedies, and, as a consequence, *thereby* failed to *avoid* imposing double remedies. In this regard, when China challenges USDOC's failure to "investigate and avoid" double remedies, we understand China to mean that USDOC did not investigate, for the *purpose* of avoiding, double remedies.

7.364. The Panel considers it important to clarify the relationship between the measure at issue, i.e. USDOC's alleged "failure to investigate and avoid" double remedies in proceedings 1 through 26, and China's argument, advanced throughout this proceeding, that USDOC lacked legal authority to investigate and avoid double remedies over the period 20 November 2006 and 13 March 2012. Section C of China's panel request identifies, as a measure at issue, the "Absence of Legal Authority" to identify and avoid double remedies in respect of investigations or reviews initiated between the period 20 November 2006 and 13 March 2012. In its panel request, China made an "as such" claim in respect of this alleged "omission". As reflected in our preliminary ruling under Article 6.2, China subsequently decided not to pursue this claim. Notwithstanding that China is not pursuing this claim, in attempting to substantiate its claim that USDOC failed to investigate and avoid double remedies in the 26 investigations and reviews at issue, China argues, *inter alia*, that USDOC failed to do so because it lacked legal authority to do so.[588] In its response to a Panel question[589], China clarified that the measure at issue for the purpose of China's claims in this dispute is USDOC's "failure to investigate and avoid double remedies in the identified investigations", not the alleged "absence of legal authority" to investigate and avoid double remedies prior to the enactment of Section 2 of PL 112-99, and China further clarified that USDOC's alleged "lack of legal authority" under United States law to investigate and avoid double remedies prior to the enactment of Section 2 is one factual basis, but not the only factual basis, supporting the conclusion that USDOC did not actually do so in the 26 investigations and reviews at issue. China explained that:

> The fact that the USDOC had no authority under U.S. law to investigate and avoid double remedies prior to 13 March 2012 explains *why* the USDOC acted inconsistently with Article 19.3 in the investigations and reviews at issue, but it is the USDOC's failure to conduct a "sufficiently diligent 'investigation'"[590] with respect to potential double remedies in the investigations and reviews at issue that is the basis for China's claims under Article 19.3.[591]

7.365. In sum, the relevant question of fact raised in respect of China's claim under Article 19.3 is whether USDOC imposed CVDs concurrently with anti-dumping duties calculated under an NME methodology without discharging its affirmative obligation to *investigate* whether double remedies arose in the 26 CVD investigations and reviews at issue in this dispute. The issue is not whether double remedies actually arose, and if so in what amounts, in any of these investigations or reviews. In addition, the question whether USDOC had authority under United States law to investigate and avoid double remedies prior to 13 March 2012 is relevant and necessary to consider only insofar as it sheds light on whether USDOC discharged its affirmative obligation to

[586] Ibid.
[587] Section 2 of PL 112-99 grants USDOC legal authority to make adjustments to anti-dumping duties to avoid double remedies in respect of investigations and reviews initiated on or after its date of enactment, i.e. 13 March 2012.
[588] China's first written submission, paras. 5, 30, 38, 11, 125; oral statement at the first meeting, paras. 68-73; response to Panel question Nos. 51(b) and 82.
[589] China's response to Panel question No. 107.
[590] (*footnote original*) Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602.
[591] China's response to Panel question No. 107.

investigate whether double remedies arose in the 26 CVD investigations and reviews at issue in this dispute.

7.366. For reasons that will be discussed in the context of its assessment of the facts surrounding proceeding 26, the Panel will discuss that investigation separately from the other 25 investigations and reviews that China challenges in this dispute. We will then undertake an assessment of proceedings 1 through 25.

7.7.3.2 Proceeding 26 (Drawn Stainless Steel Sinks)

7.367. The Panel recalls that Section 2 of PL 112-99 grants USDOC explicit legal authority to take certain steps to investigate and avoid double remedies in respect of investigations and reviews initiated on or after its date of enactment, i.e. 13 March 2012. China's claim in this dispute, as set forth in its panel request and as reiterated in its subsequent submissions, is that USDOC failed to investigate double remedies in the identified investigations and reviews initiated prior to the enactment of Section 2, i.e. prior to 13 March 2012.[592] China identified the CVD investigations and reviews at issue in Appendix A to its panel request, and again in Appendix A of Exhibit CHI-24. China specified the date of initiation for each of the investigations and reviews listed therein. The information that China provided for proceeding 26, *Drawn Stainless Steel Sinks*, indicates that this investigation was actually initiated *after* the enactment of Section 2 of PL 112-99:

	OFFICIAL NAME	C-	Initiation	Determination
26	Drawn Stainless Steel Sinks From the People's Republic of China	C-570-984	77 FR 18211, March 27, 2012	77 FR 46717, August 6, 2012 (*prelim*)

7.368. If one or more of the proceedings challenged by China were actually initiated *after* the enactment of Section 2 of PL 112-99, then any such proceeding would fall outside China's own description of the scope of its claim. In its panel request, China indicated that the date of initiation for proceeding 26 is actually 27 March 2012. The information contained in Exhibit CHI-24 is the same. In the light of the foregoing, we sought clarification from China. China responded that it included the preliminary determination in *Drawn Stainless Steel Sinks* because USITC published its "notice of institution" of the CVD investigation on 7 March 2012, with an effective date of 1 March 2012.[593] China did not elaborate, or provide any supporting evidence, such as the notice of initiation referenced in footnote 1 of the preliminary determination and in China's response. Nor did China say anything about the discrepancy between this information, and the information that it had provided in its panel request and in Exhibit CHI-24. The United States, however, submitted a copy of the corresponding notice of initiation for *Drawn Stainless Steel Sinks*. This notice of initiation shows that the effective date for the initiation of this proceeding was indeed 27 March 2012, that is to say after the enactment of the Section 2 of PL 112-99.[594]

7.369. We consider that the foregoing may be a sufficient basis to conclude that the investigation in *Drawn Stainless Steel Sinks* falls outside the scope of China's claim. However, with a view to clarifying this factual question and ensuring that our understanding is correct, we examined Exhibit CHI-78, which contains the preliminary determination in the parallel anti-dumping investigation for *Drawn Stainless Steel Sinks*. This preliminary determination, dated 4 October 2012, indicates that a "full description of the methodology underlying our conclusions" is contained in the "Decision Memorandum for Preliminary Determination for the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China," ("Preliminary Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with this determination and hereby adopted by this notice".[595] The preliminary determination further indicates that one of the issues addressed in the Preliminary Decision Memorandum is a "Double Remedies Offset".[596]

[592] China's request for the establishment of a panel, p. 4.
[593] China's response to Panel question No. 112.
[594] See United States' comments on China's response to Panel question No. 112, citing Exhibit USA-125.
[595] Exhibit CHI-78, pp. 60673-60674.
[596] Ibid. p. 60674.

7.370. Neither party provided us with a copy of the Preliminary Decision Memorandum. However, the preliminary determination submitted to the Panel in Exhibit CHI-78, to which we have just referred, states that "a complete version of the Preliminary Decision Memorandum can be found on the Internet at *http://www.trade.gov/ia/*", and confirms that "[t]he signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content".[597] In the light of the fact that the exhibit submitted to the Panel specifies where this further information can easily be located, and with a view to confirming that our understanding of the facts is correct, the Panel in this case found it appropriate to consult the electronic version of the Preliminary Decision Memorandum that is explicitly referenced in Exhibit CHI-78.[598]

7.371. The associated Preliminary Decision Memorandum[599] for the preliminary determination submitted as Exhibit CHI-78 makes clear that in *Drawn Stainless Steel Sinks*, USDOC *did* take steps to investigate double remedies. Specifically, at pp. 21-23 of the Memorandum, under the heading "Adjustment Under Section 777A(f) of the Act", USDOC provides a detailed explanation of how it arrived at the conclusion that "the Department preliminarily estimates that 61.01 percent of the value of the input subsidies that impact cost of manufacturing were 'passed through' to [export prices] for this industry during the [period of investigation]". This explanation makes clear that USDOC made this adjustment pursuant to the legal requirement contained in Section 2 of PL 112-99. This further confirms our understanding that the investigation in *Drawn Stainless Steel Sinks* was initiated on 27 March 2012, *after* the enactment of Section 2 of PL 112-99.

7.372. Based on the foregoing, the Panel concludes that China has not established that the investigation in *Drawn Stainless Steel Sinks* was initiated prior to the enactment of Section 2 of PL 112-99 and consequently falls within the description of its claim as set out in its panel request. In any event, China has failed to demonstrate that in *Drawn Stainless Steel Sinks*, USDOC imposed anti-dumping duties calculated on the basis of an NME methodology, and concurrently imposed CVDs on the same products, without having investigated, on the basis of "positive evidence", whether this resulted in double remedies. Accordingly, the Panel is unable to accept China's claim and finds no violation of Article 19.3 in respect of *Drawn Stainless Steel Sinks*.

7.7.3.3 Proceedings 1 through 25

7.373. The Panel now turns to proceedings 1 through 25.

7.374. In accordance with Article 11 of the DSU, our task is to make an "objective assessment of the facts of the case". Before turning to the 25 proceedings at issue, we consider it useful to recall certain principles that apply in WTO dispute settlement and international law more generally[600] with respect to the burden of proof, the assessment of evidence, and the level of proof required. We recall that the general rule on burden of proof in WTO dispute settlement is that a party claiming a violation of a provision of a covered agreement by another Member must assert and substantiate its claim.[601] Moreover, any party that asserts a fact, whether the complaining party or the responding party, is responsible for providing proof thereof.[602] Thus, in the present dispute, China has the burden of establishing its claim under Article 19.3. To discharge that burden, China must provide evidence that is sufficient to establish a "presumption" that what is claimed is true, and if it does, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut that "presumption".[603] With respect to a panel's assessment of the evidence, it is well established that "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to

[597] Ibid. p. 60675.
[598] In this regard, the Panel notes that the question of when the *Drawn Stainless Steel Sinks* was actually initiated arose only at a relatively late stage of the proceeding, and, as a consequence, the United States only provided a copy of the notice of initiation in its comments on China's responses to the final set of questions from the Panel.
[599] Decision Memorandum for Preliminary Determination for the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China," ("Preliminary Decision Memorandum") from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated 27 September 2012, available at http://ia.ita.doc.gov/frn/summary/prc/2012-24549-1.pdf
[600] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.13.
[601] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[602] Ibid. p. 16.
[603] Ibid. p. 16.

provision, and case to case".[604] According to the Appellate Body, the "evidence and arguments underlying a *prima facie* case … must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".[605] In *US – Upland Cotton (Article 21.5 – Brazil),* the Appellate Body implied that the applicable standard of proof is whether there is sufficient evidence demonstrating that it is "more likely than not" that what is claimed is true.[606] In *US – Continued Zeroing*, the Appellate Body explained that "[i]f evidence 'necessarily showing' a particular fact were required, this would suggest that the evidence must in no circumstance permit of a conclusion *other than* the existence of that fact", and that "such a standard is more stringent than the assessment of whether the evidence meets the required burden of proof".[607]

7.375. We recall that in proceedings 1 through 25, USDOC concurrently imposed CVDs and anti-dumping duties calculated under the United States' NME methodology. These 25 parallel CVD and anti-dumping investigations and reviews were initiated between 18 October 2007 (proceeding 1) and 24 January 2012 (proceeding 25). These 25 proceedings comprise all CVD investigations and reviews on imports from China initiated between 20 November 2006 and 13 March 2012 that included a parallel anti-dumping investigation, with the exception of (i) the four sets of investigations that were already examined in DS379; and (ii) several other investigations that resulted in a negative injury determination and therefore did not lead to the imposition of any CVDs.[608] In every one of these cases, USDOC imposed CVDs and anti-dumping duties in the full amount (i.e. 100%), without making any adjustment to avoid double remedies; while the parties disagree on why that was, it is not in dispute that "Commerce did not make any adjustment or offset in the challenged determinations".[609]

7.376. We have already found that the United States has failed to present any basis to reject the general proposition that double remedies are "likely" to arise when CVDs are imposed concurrently with anti-dumping duties determined in accordance with the United States NME methodology. In reaching that conclusion, we observed, *inter alia*, that this factual premise was discussed in detail, and accepted, by both the panel and the Appellate Body in DS379.[610]

7.377. The Appellate Body has stated that "panels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C."[611] In this case: (i) USDOC imposed CVDs concurrently with anti-dumping duties in 25 successive investigations and reviews over a four-year period without making any adjustment or offset to avoid double remedies, either on the anti-dumping or the CVD side[612]; and (ii) the United States has failed to present us with any sufficient basis to reject the general proposition, supported by the panel and Appellate Body in DS379, that double remedies are "likely" to arise from the concurrent imposition of CVDs and anti-dumping duties calculated under the United States' NME methodology.

7.378. In our view, the inference to be drawn from these two points taken together is that USDOC failed to take steps to investigate double remedies in these investigations and reviews. We acknowledge that these two facts do not *necessarily* lead to this (and only this) conclusion. That is to say, we are not suggesting that these facts permit of no conclusion *other than* this conclusion. The reason is that we do not presume that the concurrent imposition of CVDs and anti-dumping duties calculated under the United States' NME methodology will necessarily result in double remedies; rather, this "depends … on whether and to what extent domestic subsidies have lowered the export price of a product".[613] However, as explained above[614], the United States has failed to

[604] Ibid. p. 14.
[605] Appellate Body Report, *US – Gambling*, para. 141.
[606] See e.g. Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 301, 321.
[607] Appellate Body Report, *US – Continued Zeroing*, para. 335 (emphasis original, footnote omitted).
[608] China's first written submission, para. 32.
[609] United States' second written submission, para. 112.
[610] See fn. 549.
[611] Appellate Body Report, *Canada – Aircraft*, para. 198.
[612] Prior to these 25 investigations and reviews, there were also the four investigations that were at issue in DS379. In addition to these 25 investigations and reviews, there were several proceedings in which no CVDs were imposed, but this was a consequence of the US investigating authorities arriving at a negative injury determination.
[613] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599.

present us with any sufficient basis to reject the general proposition that it is "likely" that subsidies will lower the export price to some degree, and thereby result in some degree of overlapping remedies. It is hypothetically conceivable that USDOC would have investigated whether double remedies arose in the investigations and reviews at issue, and determined – in respect of 25 successive proceedings, and in respect of every subsidy at issue in each one of those proceedings – that none of these subsidies had any effect on the export price for any of the products in question. However, if as a "general proposition"[615] double remedies are "likely" to arise when CVDs are imposed concurrently with anti-dumping duties determined in accordance with the United States NME methodology, it is a remote possibility that USDOC investigated and, based on such an investigation, determined on the basis of positive evidence that none of the subsidies at issue in any of the investigations had any effect on the export price of any of the products at issue (and then justifiably imposed CVDs concurrently with anti-dumping duties in 25 successive investigations and reviews without making any adjustments on account of double remedies). We consider that to reject China's claim on the basis of a remote possibility that USDOC might have investigated whether double remedies arose (when 100% CVDs were concurrently imposed with 100% anti-dumping duties without making any adjustments on either the CVD side or the anti-dumping side to offset for double remedies, in 25 successive investigations and reviews, which comprise every CVD investigation on imports from China over a period of more than four years[616]) would not be in keeping with the standard of proof that applies in WTO panel proceedings. We consider that "such a standard [would be] more stringent" than is required of China to meet "the required burden of proof".[617] As explained above, it is uncontested that USDOC itself has since concluded, in the Section 129 determinations for the four investigations at issue in DS379, which were initiated prior the 25 investigations at issue in this dispute, that 63% of the input subsidies that the USDOC had identified had been double counted. These are the only four redeterminations that we have been informed of, and in each of those redeterminations, USDOC found double remedies. Thus, the foregoing suffices, in our view, to establish a presumption that what China asserts is true, namely, that USDOC failed to take steps to investigate double remedies in the identified 25 investigations and reviews, where USDOC made no adjustment to avoid double remedies.

7.379. We consider that this conclusion is consistent with the decisions of the CIT in *GPX II* and *GPX III,* which, although subsequently vacated by the CAFC in *GPX VI*, shed light on whether USDOC was taking steps to investigate and avoid double remedies during the period of time when the investigations and reviews at issue in this dispute were initiated. In its first written submission, China directed us to the CIT's 18 September 2009 ruling, in *GPX II*, that it was not reasonable for USDOC to apply CVDs in conjunction with anti-dumping duties determined in accordance with the United States NME methodology, unless USDOC could devise appropriate methodologies to ensure that no double remedies would occur.[618] China submitted the subsequent USDOC remand determination. In that determination, USDOC recalled that in *GPX II* the CIT ordered USDOC "to adopt additional policies and procedures to adapt the Department's NME AD methodology and CVD methodology to account for the imposition of CVDs on merchandise from the PRC", and stated that it was "complying with the Court's order, under protest".[619] China also directed us to the CIT's ruling in *GPX III*, reviewing the CIT's approach in this remand determination, and finding that USDOC's proposed solution to the problem of double remedies was a "tacit admission" that USDOC was incapable of addressing the problem of double remedies "in the absence of new statutory tools".[620]

7.380. We have read the CIT decisions in *GPX II* and *GPX III*. In *GPX III*, the CIT stated that USDOC's approach in its subsequent remand determination demonstrated that "at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring".[621] We agree with the United States that this statement is not a statement, nor necessarily tantamount to a statement,

[614] See para. 7.341.
[615] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67, 14.75; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 599.
[616] See fn. 612.
[617] Appellate Body Report, *US – Continued Zeroing*, para. 335.
[618] China's first written submission, para. 35, citing *GPX II* (Exhibit CHI-03).
[619] Final Results of Remand Pursuant to Redetermination, pp. 1-11 (September 18, 2009) (Exhibit CHI-09), p. 2.
[620] China's first written submission, fn. 95, citing *GPX III* (Exhibit CHI-04).
[621] *GPX III* (Exhibit CHI-04), at p. 1345.

that USDOC necessarily lacked "legal authority" under United States law as it stood at the time to address and avoid the issue of double remedies.[622] However, these statements, and the timing and chronology of events, in *GPX II* and *GPX III* are consistent with China's assertion that USDOC did not investigate the existence of double remedies during the time-period in question. The significance of this statement in the CIT's decision in *GPX III*, dated 4 August 2010, is that, as of 4 August 2010, it appears that USDOC did not have any methodology to determine "whether and to what degree double counting is occurring".[623] The statements above suggest that USDOC had to devise a methodology to deal with the issue of double remedies to comply with the remand order of the CIT in *GPX II* (dated 18 September 2009), and did so only "under protest".[624] The methodology that USDOC devised for the purpose of this remand determination was to make an adjustment to the anti-dumping duty rate equivalent to the full amount of the CVDs found to exist. In *GPX III*, the CIT then found that the methodology that USDOC had devised for the purpose of the remand determination that it undertook was unreasonable[625], leading the CIT to conclude, as already mentioned, that "at this time, it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring".[626] The parties have not directed us to anything in the record to suggest that USDOC proceeded to devise any new methodology to address the issue of double remedies during the time-period in question, i.e. between 20 November 2006 and 13 March 2012. We therefore find this contemporaneous evidence to be instructive. If it was "too difficult" for USDOC to have an appropriate methodology to determine "whether and to what degree double counting is occurring", this is consistent with the conclusion that USDOC did not take steps to investigate double remedies in the 25 investigations and reviews at issue.[627]

7.381. We now turn to consider the evidence and arguments advanced by the United States to determine whether it has rebutted the *prima facie* conclusion that, in the investigations and reviews at issue, USDOC failed to investigate double remedies as required by Article 19.3. We begin by discussing the United States' argument regarding the reason why USDOC did not make any adjustment or offset in the identified determinations in proceedings 1 through 25.

7.382. We recall that, in attempting to substantiate its claim that USDOC failed to investigate and avoid double remedies in the investigations and reviews at issue, China argues, *inter alia*, that USDOC lacked legal authority to do so, and therefore did not do so.[628] The United States regards China's allegation that USDOC lacked legal authority to address overlapping remedies to be "the

[622] United States' response to Panel question No. 86.

[623] *GPX III* (Exhibit CHI-04), at p. 1345.

[624] Final Results of Remand Pursuant to Redetermination, pp. 1-11 (September 18, 2009) (Exhibit CHI-09), p. 2.

[625] In *GPX III*, the CIT stated that "In its remand order, the court presented Commerce with a choice between two alternatives. Commerce could either 'reasonably ... do all of its remedying though the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable,' or it could 'apply methodologies that make such parallel remedies reasonable.' In its remand redetermination, however, Commerce proposes guarding against double counting by merely offsetting CVD against NME AD after it uses its regular methodologies to calculate the CVD and NME AD margins. *Remand Results* at 9–10. The court notes that with this offset, the combination of the CVD margin and the NME AD cash deposit rate will always equal the unaltered NME AD margin. *See id.* at 59. This result, therefore, renders concurrent CVD and AD investigations unnecessary because the same remedial price adjustment can otherwise be obtained by merely conducting an NME AD investigation. As GPX and Starbright suggest, it is not reasonable to 'force[ ] foreign parties to spend many months and large sums of money to go through an investigation, the end result of which is to calculate a CVD margin, but then to eliminate that CVD [margin] because it has been offset by some parallel investigation.' (GPX's Comments 6.) Perhaps even more importantly, the offset that Commerce now advances is inconsistent with 19 U.S.C. § 1677a, which lists the specific offsets to export price and constructed export price that are permissible. *See* 19 U.S.C. § 1677a(c)–(d) . Accordingly, the court holds that the offset does not comply with the statute and is also unreasonable due to the expense associated with conducting an additional investigation that is essentially useless." (*GPX III* (Exhibit CHI-04), p. 1345, original footnotes omitted).

[626] *GPX III* (Exhibit CHI-04), at p. 1345.

[627] In GPX *II* and *III*, the CIT was assessing the consistency of USDOC's approach to double remedies with US law. In assessing China's claims under Article 19.3 of the SCM Agreement, the Panel has taken the CIT decisions in *GPX II* and *GPX III* into account, and the statements referred to above, for the purpose of assessing whether they shed light on the factual question of whether USDOC did or did not take steps to investigate double remedies during the relevant time-period.

[628] China's first written submission, paras. 5, 30, 38, 11, 125; oral statement at the first meeting, paras. 68-73; response to Panel question Nos. 51(b) and 82.

centrepiece"[629] of China's argument that USDOC failed to investigate double remedies in the investigations at issue. The United States disputes China's assertion.[630] According to the United States, the reason USDOC did not make any adjustment or offset in the challenged determinations was not because it lacked the legal authority to address potential double remedies, but rather because Chinese parties, despite having had an opportunity to do so, failed to provide USDOC with sufficient evidence demonstrating the existence of double remedies. According to the United States, "Commerce could not properly address any claims of overlapping remedies because interested parties failed to provide sufficient evidence and presented only abstract economic theories".[631]

7.383. During the first substantive meeting with the Panel, in support of its explanation why USDOC did not make any adjustments, the United States submitted copies of the final determinations in the parallel CVD and anti-dumping investigations in proceeding 6[632], and indicated that a review of these determinations would demonstrate that it was for this reason, and not an alleged lack of legal authority to make an adjustment to offset double remedies, that USDOC did not make any adjustment or offset in the challenged determinations. At pages 10-11 of the final determination in the anti-dumping determination for proceeding 6, USDOC explains its approach as follows:

> [G]iven the statute's relative silence (at most) regarding the issue, the Department has quite properly asked respondents in combined AD and CVD proceedings to substantiate their theory that the concurrent application of such measures automatically results in a double remedy to the full extent that any CVDs are imposed upon domestic subsidies in China. This is especially true in light of the highly theoretical and hypothetical nature of the respondents' claim, which is explained below. Respondents have declined to submit any positive evidence on the subject. Respondents, including the GOC, have declined to submit any evidence to support their claims. Instead, they refer to the alleged double remedies as if they were an adjustment specifically provided by the AD law, such as the adjustment for CVDs imposed to offset export subsidies. In the case of export subsidies, the argument that the Department would be required to explain how the adjustment should be made would be strong. Where the adjustment is a novel and highly theoretical construct fashioned by respondents, with little, if any, discernible connection to the statute, the situation is the reverse. The respondents must provide some concrete evidence to support their novel theory.[633]

7.384. In response to a Panel question, the United States confirmed that these determinations "can be seen as representative of China's arguments and Commerce's responses on the issue of overlapping remedies in the challenged determinations".[634] For its part, China also agrees that these determinations are representative of USDOC's approach to double remedies in the 25 investigations and reviews at issue.[635] Our own reading of the determinations in the 25 investigations and reviews at issue confirms the parties' view that proceeding 6 may be seen as representative of how the issue of double remedies was addressed in the investigations and reviews at issue, when it was addressed. In a number of these determinations, there is no discussion of the issue of double remedies, because it was apparently not raised by China or other interested parties in the investigation in question. However, more than a dozen of the determinations do address the issue (in response to the issue being raised by China or other interested parties), and there one finds explicit language to the effect that USDOC consistently required respondents to demonstrate, on the basis of positive evidence, that double remedies would result from the simultaneous imposition of CVDs and anti-dumping duties. These determinations also reveal that when USDOC concluded that no such evidence was provided, USDOC did not take steps on its own initiative to investigate the possibility of double remedies.[636]

[629] United States' second written submission, para. 114.
[630] Ibid. paras. 113-127.
[631] United States' first written submission, para. 159.
[632] Exhibits USA-100 (CVD determination) and USA-99 (associated anti-dumping determination).
[633] Exhibit US-100, pp. 10-11.
[634] United States' response to Panel question No. 79(c).
[635] China's response to Panel question No. 79(c).
[636] See the similar statements in Exhibit CHI-53, pages 31-32; Exhibit CHI-58, pages 35, 36, 37; Exhibit CHI-60, page 12; Exhibit CHI-62, pages 10-11; Exhibit CHI-64, page 36; Exhibit CHI-65, page 33;

7.385. We recall in this connection that in DS379, China claimed that it is "the obligation of the *investigating authority* to investigate and make a determination as to whether it is offsetting the same subsidies twice", whereas the United States argued that "the burden to establish the existence of such an alleged double remedy would be on China".[637] The Appellate Body agreed with China, and found that the burden rests on the investigating authority.[638] The Appellate Body's finding, which we have said we will follow, was that an investigating authority imposing CVDs concurrently with anti-dumping duties calculated under an NME methodology is under an "affirmative obligation" to establish the appropriate amount of the duty under Article 19.3, and that this obligation "encompasses a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, *and to base its determination on positive evidence in the record*".[639]

7.386. The foregoing, and in particular USDOC's reasoning that the burden to establish the existence of a double remedy would be on Chinese exporters, suggests that USDOC's determinations were based on the *absence* of positive evidence demonstrating the existence of double remedies. As USDOC stated in the passage from proceeding 6 that we have reproduced above, "[r]espondents have declined to submit any positive evidence on the subject."[640] We note that this is consistent with the statement by the Court of International Trade in *GPX II*, issued during the same time period as the 25 investigations/reviews at issue, that USDOC had proceeded by "placing the burden to demonstrate double counting on GPX" in that case.[641] The CIT stated, "Commerce cannot avoid addressing an important aspect of the problem caused by applying CVD and AD methodologies to goods from NME countries by placing the burden to demonstrate double counting on GPX, because there is likely no way for any respondent to accurately prove what may very well be occurring".[642]

7.387. In the light of the foregoing, we are unable to agree with China's assertion that USDOC lacked legal authority to investigate double remedies prior to the enactment of Section 2 of PL 112-99. Rather, the determinations demonstrate that USDOC declined to investigate double remedies for a different reason, namely, USDOC's view that respondents had failed to submit positive evidence demonstrating the existence of double remedies.

7.388. Apart from this aspect of the determinations, there are two other reasons why we are unable to accept China's contention that USDOC lacked legal authority to investigate double remedies prior to the enactment of PL 112-99, and in particular Section 2 thereof. First, the text of Section 2 of PL 112-99 *obliges* USDOC to take into account the potential for the simultaneous imposition of anti-dumping and countervailing duties to result in overlapping remedies and to reduce ("shall") the anti-dumping duty to the extent of the overlap, provided certain conditions are met. While we have no difficulty accepting that prior to the enactment of Section 2 there was no *obligation* under United States law for USDOC to take steps to investigate and avoid double remedies, it does not logically follow from this that USDOC did not have *permissive authority* to do so, e.g. had respondents brought forward positive evidence that USDOC deemed sufficient in order to support their assertions regarding double remedies.[643] Second, the determinations before us suggest that USDOC believed that it might well have had legal authority to take steps to investigate and avoid double remedies. From our review of the investigations and reviews at issue, it appears that when the issue of double counting was raised by a respondent, USDOC proceeded in essentially the same way: (i) when the issue was raised in the context of a CVD proceeding, USDOC stated that it had no such authority in the context of the CVD proceeding; (ii) USDOC explained that the possibility of an adjustment could only be made in the context of the associated anti-dumping investigation; (iii) when the issue was raised in the context of the associated anti-dumping proceeding, USDOC proceeded to engage in a relatively detailed and lengthy discussion of the issue, as compared with the relatively cursory manner in which it disposed of the issue in the context of the CVD determinations; and (iv) USDOC ultimately concluded that no adjustment

Exhibit CHI-69, page 19; Exhibit CHI-70, page 20; Exhibit CHI-72, page 9; Exhibit CHI-73, page 17; Exhibit CHI-74, pp. 43-44; Exhibit CHI-75, page 15; Exhibit CHI-76, page 55.

[637] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 600.

[638] Ibid. paras. 600-602.

[639] Ibid. para. 602. (emphasis added)

[640] Exhibit US-100, pp. 10-11.

[641] *GPX II* (Exhibit CHI-3), pp. 1242-1243.

[642] Ibid.

[643] In this regard, we note the concept of "permissive authority" as set forth in the United States' response to Panel question No. 89.

to anti-dumping duties was called for, on the basis that respondents failed to submit sufficient positive evidence in support of their assertions of double counting. We think that it is reasonable to presume that if USDOC considered that it did not have any legal authority to investigate and avoid double remedies, it would have simply responded by invoking that lack of authority – just as it did when the issue of double counting was raised in the context of the CVD determinations at issue. The manner in which USDOC actually proceeded instead suggests that USDOC considered that it had legal authority to take steps to investigate and avoid double remedies – provided that respondents submitted positive evidence on this issue that USDOC deemed to be sufficient.

7.389. For these reasons, we are unable to accept China's contention that USDOC lacked legal authority to investigate double remedies prior to the enactment of PL 112-99, and in particular Section 2 thereof. We would also note a further difficulty with China's reasoning on this point. China reasons that (i) USDOC had no legal authority under United States law to investigate double remedies prior to the enactment of Section 2; and (ii) it therefore follows that USDOC did not do so. See e.g. China's first written submission, para. 125. In the present case, however, China has also argued, at length, that (i) USDOC had no legal authority under United States law to apply United States CVD law to imports from China prior to the enactment of Section 1 of PL 112-99; but that (ii) nonetheless, USDOC did in fact do so, based on USDOC's flawed (in China's view) understanding of United States law. Thus, even assuming *arguendo* that it could be deduced from Section 2 of PL 112-99 that USDOC had no legal authority to investigate double remedies prior to the enactment of Section 2, it would not follow, even in China's own view, that USDOC did not in fact do so.

7.390. However, in our view this does not serve to rebut the *prima facie* conclusion that in the investigations and reviews at issue, USDOC failed to investigate double remedies as required by the Appellate Body in DS379. Rather, it only amounts to a different explanation of *why* it was that USDOC did not do so. It does not call into question the conclusion – and if anything, actually reinforces the conclusion – that USDOC did not discharge its "affirmative obligation" to conduct "a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record."[644]

7.391. We now turn to the United States' second main rebuttal argument. The United States argues that in all of the investigations and reviews at issue, Chinese respondents had the opportunity to present USDOC with evidence and arguments demonstrating the existence of overlapping remedies, and USDOC fully addressed any such evidence, or lack thereof.[645] We accept the United States' assertion as far as it goes. However, we do not consider that this demonstrates that USDOC properly discharged its "affirmative obligation" under Article 19.3 to "investigate" the issue of double remedies. The reason is that the manner in which USDOC "addressed" the issue of double remedies in the determinations at issue was by taking the position that the burden was on Chinese respondents to provide positive evidence demonstrating the existence of double remedies. As we have found, this was inconsistent with the obligation on USDOC, under Article 19.3, to conduct "a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record".[646]

7.392. Based on the foregoing, the Panel concludes that in proceedings 1 through 25, the USDOC imposed anti-dumping duties calculated on the basis of an NME methodology, and concurrently imposed CVDs on the same products, without having investigated, on the basis of positive evidence, whether double remedies arose. Accordingly, the Panel finds that in proceedings 1 through 25, the United States acted inconsistently with its obligation under Article 19.3 to investigate whether, on the basis of positive evidence, double remedies arose from the imposition of such concurrent duties.

7.7.4 Claims under Articles 10 and 32.1

7.393. In DS379, the Appellate Body found that the United States acted inconsistently with its obligations under Articles 10 and 32.1 of the SCM Agreement as a consequence of its acting inconsistently with Article 19.3:

[644] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602.
[645] United States' first written submission, paras. 155-159; response to Panel question No. 126.
[646] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602.

> We have already explained that when a Member's measures do not satisfy the express conditions for the imposition of a countervailing duty set out in relevant provisions of the *SCM Agreement*, this means that the right to impose a countervailing duty has not been established and, as a consequence, such measures are also inconsistent with Articles 10 and 32.1 of the *SCM Agreement*.[647] Accordingly, we are of the view that China was not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1. Having found that the USDOC's concurrent imposition of anti-dumping duties calculated on the basis of its NME methodology, and countervailing duties on the same products in the four countervailing duty determinations at issue is inconsistent with Article 19.3 of the *SCM Agreement*, we *find* that this is also inconsistent with Articles 10 and 32.1 of the *SCM Agreement*.[648]

7.394. In the present dispute, China argues on this basis that a violation of Article 19.3 would establish, by itself, a consequential violation of Articles 10 and 32.1.[649] The United States does not challenge this argument.[650]

7.395. Having reviewed the evidence related to proceedings 1 through 25, the Panel has found that USDOC's concurrent imposition of anti-dumping duties calculated on the basis of its NME methodology and CVDs on the same products is inconsistent with Article 19.3. Accordingly, the Panel finds, and concludes in addition, that the violation of Article 19.3 gives rise to a consequential violation of Articles 10 and 32.1 in each of these proceedings. Having found no violation of Article 19.3 in respect of *Drawn Stainless Steel Sinks*, we consequently reject China's claims under Articles 10 and 32.1 in respect of that particular investigation.

7.7.5 Overall conclusion

7.396. For the reasons set forth above, the Panel finds that in proceedings 1 through 25[651], USDOC imposed anti-dumping duties calculated on the basis of an NME methodology, and concurrently imposed CVDs on the same products, without having investigated, on the basis of positive evidence, whether double remedies arose. As a consequence of that finding, the Panel finds that in respect of proceedings 1 through 25, the United States acted inconsistently with Articles 19.3, 10, and 32.1 of the SCM Agreement. For the reasons set forth above, the Panel rejects China's claims in respect of proceeding 26.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. In respect of China's panel request[652]:

   i. in the light of China's representation that it would not pursue certain claims[653], the Panel declines to rule on whether the panel request is consistent with Article 6.2 of the DSU insofar as it relates to those claims; and

   ii. the Panel finds that the general references to Articles 10, 19, and 32 of the SCM Agreement contained in Part D of the panel request are consistent with the requirements of Article 6.2 of the DSU, on the basis that the general references warrant the inference that the obligations at issue are those contained in Articles 10, 19.3, and 32.1 of the SCM Agreement, and the United States has not established

[647] (*footnote original*) See *supra*, para. 358. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 143.
[648] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 610. See also para. 611(d)(iii).
[649] China's first written submission, para. 126; oral statement at the first meeting, para. 74.
[650] United States first written submission, para. 203; oral statement at the first meeting, para. 55; second written submission, para. 148.
[651] The investigations and reviews at issue are identified above at para. 7.355.
[652] The Panel's conclusions incorporate those set forth in its preliminary ruling, which is contained in document WT/DS449/4 circulated on 7 June 2013 and which forms an integral part of this Report.
[653] Those claims include Part C of China's panel request in its entirety, and the references in Part D of the China's panel request to Articles 15 and 21 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the Anti-Dumping Agreement.

that Part D of the panel request fails to "plainly connect" the challenged measures with those obligations.

b. In respect of China's claims under Article X[654] of the GATT 1994 concerning Section 1 of PL 112-99:

i. the Panel finds that the United States has not acted inconsistently with Article X:1 of the GATT 1994, as Section 1 was "made effective" by the United States on 13 March 2012 (and not on 20 November 2006), and published on the same day;

ii. the Panel finds that although, through Section 1(b) and relevant determinations or actions made or taken by the United States between 20 November 2006 and 13 March 2012 in respect of imports from China, the United States has enforced Section 1 before it has been officially published, the United States has not acted inconsistently with Article X:2 of the GATT 1994, as Section 1 does not "effect[] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[e] a new or more burdensome requirement, restriction, or prohibition on imports"; and

iii. the Panel finds that the United States has not acted inconsistently with Article X:3(b) of the GATT 1994, as Article X:3(b), which requires that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters, does not prohibit a Member from taking legislative action in the nature of Section 1 of PL 112-99.

c. In respect of China's claims under the SCM Agreement concerning the United States' alleged failure to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012:

i. the Panel finds that in respect of one proceeding (*Drawn Stainless Steel Sinks From the People's Republic of China,* C-570-984, initiated on 27 March 2012), China has failed to demonstrate that the measure falls within the description of its claim as set out in its panel request, and has in any event failed to demonstrate that the United States has acted inconsistently with Article 19.3 of the SCM Agreement, or, consequently, Articles 10 or 32.1 of the SCM Agreement; and

ii. the Panel finds that in the other 25 proceedings[655], the United States has acted inconsistently with Article 19.3 of the SCM Agreement, and, consequently, Articles 10 and 32.1 of the SCM Agreement, by virtue of the USDOC's concurrent imposition of countervailing duties and anti-dumping duties calculated on the basis of an NME methodology on the same products, without having investigated, either in the CVD investigations and reviews or in the parallel anti-dumping investigations and reviews, whether double remedies arose from such concurrent duties.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to China under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring the investigations and reviews identified in paragraph 7.355, excluding the investigation of *Drawn Stainless Steel Sinks from the People's Republic of China*, into conformity with its obligations under the SCM Agreement.

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[654] The Panel recalls that China abandoned its claim under Article X:3(a) of the GATT 1994. See para. 7.7.

[655] These investigations and reviews at issue are identified above at para. 7.355.

WORLD TRADE ORGANIZATION

WT/DS449/R/Add.1

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS449/R.

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WORKING PROCEDURES OF THE PANEL

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES FOR THE PANEL

Adopted on 14 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Unless a different procedure is provided for in consultation with the parties, the following procedure shall be followed. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the respondent chooses not to avail itself of that right, the Panel

shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each third party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. Each party shall submit executive summaries of its arguments as presented in each of its written submissions and statements. The total number of pages of the executive summaries to be provided by each party, all four parts combined, shall not exceed 30 pages, and shall be submitted at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. A party may include its responses to questions in the executive summary of its statement. In that case, the executive summary, covering the party's statement and responses to questions, shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit executive summaries of its arguments as presented in its written submission and statement at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. The total number of pages of the summaries to be provided by each third party, the two parts combined, shall not exceed 5 pages. A third party may include its responses to questions in the executive summary of its statement. In that case, the executive summary of the third party's statement and responses to questions shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the third parties' responses to questions.

20. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report before translation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 9 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****.*****@wto.org, with a copy *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org and

*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF CHINA

Executive Summary of China's First Written Submission

I. Introduction and Summary

1. This dispute concerns the basic principles of transparency and due process that are embodied in Article X of the GATT 1994. At the centre of this dispute is an action that is fundamentally inimical to those principles: the retroactive application of a law to events and circumstances that occurred prior to its enactment. The retroactive application of laws is so clearly inconsistent with basic principles of transparency and due process that it is prohibited by Article X:2 of the GATT. The retroactive application of laws is, in addition, self-evidently incompatible with the requirement of Article X:1 to publish measures of general application "promptly" so that governments and traders have an opportunity to become familiar with the laws and regulations that will be applied to their conduct.

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". P.L. 112-99 was passed by the U.S. Congress and then signed into law by President Obama on 13 March 2012. Section 1 of P.L. 112-99 amends section 701 of the U.S. Tariff Act of 1930 (the Tariff Act) to provide the United States Department of Commerce (the USDOC) with the legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies (NMEs) for the purpose of its anti-dumping laws. Congress enacted this law after the United States Court of Appeals for the Federal Circuit reaffirmed an earlier decision holding that the U.S. countervailing duty laws do not apply to imports from NME countries.

3. P.L. 112-99 specifies that section 1 applies retroactively to 20 November 2006, nearly five and a half years before the enactment and publication of the law. As China will demonstrate in Part III of this submission, the publication of a law five and half years after its effective date was plainly inconsistent with the obligation of the United States under Article X:1 to ensure that measures of general application are "published promptly in such a manner as to enable governments and traders to become acquainted with them". In Part IV of this submission, China will demonstrate that the retroactive enforcement of section 1 is inconsistent, on its face, with the prohibition in Article X:2 against the enforcement of a measure "before such measure has been officially published". Finally, in Part V, China will demonstrate that the retroactive enforcement of P.L. 112-99 ensured that the decision of the Federal Circuit was not implemented by the USDOC, and did not govern the practice of the USDOC, in violation of Article X:3(b) of the GATT.

4. In addition to amending the Tariff Act to give the USDOC legal authority to apply countervailing duties to imports from NME countries, section 2 of P.L. 112-99 amended section 777A of the Tariff Act to provide the USDOC with authority to avoid the double remedies that are likely to occur when it applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology. In stark contrast to section 1, the authority conferred by section 2 became effective only upon the enactment of the law, i.e. prospectively.

5. As China will discuss in Part VI of this submission, the retroactive enforcement of section 1 of P.L. 112-99, when juxtaposed with the entirely prospective enforcement of section 2, creates a class of "orphaned" anti-dumping and countervailing duty investigations for which the USDOC has no legal authority to investigate and avoid double remedies. Consistent with this lack of legal authority, the USDOC took no steps in any of those investigations to investigate and avoid the double remedies that were likely to occur. This failure to investigate and avoid double remedies was inconsistent, on its face, with Article 19.3 of the SCM Agreement, as interpreted by the Appellate Body in in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

II. Background

6. China will begin this submission with a review of the history of the U.S. countervailing duty laws in the 25 years leading up to the enactment of P.L. 112-99. This history is bookended by two decisions of the United States Court of Appeals for the Federal Circuit: its 1986 decision holding that the U.S. countervailing duty laws do not apply to imports from non-market economies, and its reaffirmation of that decision in December 2011 after the USDOC had sought to apply countervailing duties to imports from China in contravention of existing U.S. law.

7. In the early 1980s, the USDOC was presented with a set of petitions seeking the imposition of countervailing duties on imports from countries that the United States designated as non-market economies for the purpose of its anti-dumping laws. In responding to these petitions, the USDOC held that, "as a matter of law", the provisions of the Tariff Act that provide for the imposition of countervailing duties were inapplicable to countries that the United States designates as non-market economies. The USDOC found that the concept of subsidization is not meaningful in respect of imports from these countries. The USDOC was also influenced in its determination by its review of the legislative history of the Tariff Act and by the special provisions of the U.S. anti-dumping laws that Congress had enacted to address imports from NME countries. The USDOC considered this history to support its view that Congress had not intended the countervailing duty provisions of the Tariff Act to apply to imports from NME countries.

8. On appeal, the USDOC's interpretation of the Tariff Act was affirmed by the United States Court of Appeals for the Federal Circuit in its 1986 decision in *Georgetown Steel Corp. v. United States*. The Federal Circuit held that "Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of [the U.S.] statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply." The court concluded its decision by noting that if the NME anti-dumping provisions enacted by Congress were "inadequate to protect American industry from … foreign competition" – a question that was not within the court's competence to answer – then it would be "up to Congress to provide any additional remedies it deems appropriate."

9. After the Federal Circuit's decision in *Georgetown Steel*, the U.S. Congress did, on several occasions, consider the enactment of new legislation to permit the application of countervailing duties to imports from non-market economy countries. None of these initiatives ultimately resulted in the enactment of new legislation to give the USDOC this authority, but they did prompt the U.S. Government Accountability Office (GAO) to issue a report in June 2005 entitled *U.S.-China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties.*

10. The first topic that the GAO Report addressed was the question of whether the USDOC had authority under *existing* law to apply countervailing duties to imports from an NME country. The GAO explained that the USDOC had essentially two options, in this regard. First, it could designate China as a market economy and apply normal market economy methodologies in anti-dumping investigations of Chinese products. The second option was for the USDOC to declare, unilaterally, that it was departing from *Georgetown Steel* and begin applying countervailing duties to imports from NME countries. The GAO cautioned, however, that "absent a clear grant of authority from Congress, such a reversal could be challenged in court."

11. The other main topic that the GAO Report addressed was the problem of double remedies. The GAO recognized that, even if the USDOC were given authority to apply countervailing duties to imports from NME countries, the simultaneous application of countervailing duties and anti-dumping duties determined in accordance with the U.S. NME methodology was likely to give rise to "double counting" of the same subsidies. Shortly after the GAO issued its report, the U.S. House of Representatives passed the "United States Trade Rights Enforcement Act", H.R. 3283. The main purpose of this bill was to provide the USDOC with legal authority to apply countervailing duties to imports from NMEs, but it was never enacted into U.S. law.

12. In October 2006, a little over a year after the House of Representatives had passed the United States Trade Rights Enforcement Act, the NewPage Corporation filed anti-dumping and countervailing duty petitions with the USDOC concerning coated free sheet paper from China. Despite its lack of legal authority, and despite the objections raised by parties, the USDOC

conducted a countervailing duty investigation in *CFS Paper* and issued a final affirmative countervailing duty determination in October 2007. The USDOC's actions in *CFS Paper* unleashed a wave of new countervailing duty petitions against Chinese products – all of which raised the same legal problems as *CFS Paper* itself.

13. Chinese respondents appealed many of the USDOC's affirmative countervailing duty determinations to the U.S. Court of International Trade. The first appeal to be decided by the CIT was the appeal of the USDOC's countervailing duty determination concerning Off-the-Road Tires (OTR) from China. In *GPX Int'l Tire Corp. v. United States*, the CIT ruled that it was not reasonable for the USDOC to apply countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology, unless the USDOC could devise appropriate methodologies to ensure that no double remedies would occur.

14. The CIT ultimately concluded that the USDOC was incapable of addressing the problem of double remedies "in the absence of new statutory tools". The case was thereafter appealed to the United States Court of Appeals for the Federal Circuit, which issued its decision on 19 December 2011. The court of appeals sustained the lower court's order to forgo the imposition of countervailing duties, but on the grounds that the Tariff Act did not permit the imposition of countervailing duties on imports from countries that the United States designates as non-market economies. In so ruling, the Federal Circuit reaffirmed its 1986 decision in *Georgetown Steel*. The court held that the U.S. Congress had ratified the Federal Circuit's earlier interpretation of the Tariff Act through its "repeated reenactment of [the U.S.] countervailing duty law" with full knowledge, and explicit approval of, the court's 1986 decision in *Georgetown Steel*. On this basis, the court reaffirmed its prior holding that "[the] countervailing duty law does not apply to NME countries".

15. At the end of its decision in *GPX V*, the Federal Circuit stated that "if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change." This was the same statement that the Federal Circuit had made 25 years earlier in *Georgetown Steel*. The Federal Circuit made note of this fact, and quoted its statement in *Georgetown Steel* that if the existing NME anti-dumping remedy was "inadequate to protect American industry from … foreign competition … it is up to Congress to provide any additional remedies it deems appropriate."

16. The consequence of the Federal Circuit's decision was that <u>all</u> of the USDOC's countervailing duty investigations of Chinese products were *ultra vires.* In the absence of explicitly retroactive legislation giving the USDOC authority for actions it had already taken, all of the USDOC's past actions relating to the imposition of countervailing duties on imports from China would need to be undone. In a letter to the chairman of the House Ways and Means Committee dated 18 January 2012, the U.S. Secretary of Commerce and the U.S. Trade Representative called upon Congress to enact legislation *retroactively* authorizing the USDOC's countervailing duty investigations of Chinese products.

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

18. Section 1 of P.L. 112-99 amends Section 701 of the Tariff Act, the provision of U.S. law governing the imposition of countervailing duties, to add a new subsection (f) entitled "Applicability to Proceedings Involving Nonmarket Economy Countries". This new subsection provides that the countervailing duty provisions of the Tariff Act apply to imports from countries that the United States designates as non-market economies.

19. Consistent with the request of the U.S. administration, section 1 of P.L. 112-99 is expressly retroactive. Under section 1(b) of the law, the new authority relating to the imposition of countervailing duties on imports from NME countries has an "effective date" of 20 November 2006 – nearly five and half years prior to its official publication. The effective date of section 1 retroactively encompasses all countervailing duty investigations initiated on or after 20 November 2006 (including countervailing duty measures resulting from those investigations), as well as any judicial proceedings or actions by U.S. Customs and Border Protection relating to those countervailing duty investigations. It is evident that Congress chose a retroactive effective date of

20 November 2006 because this is the date on which the USDOC had initiated the countervailing duty investigation in *CFS Paper*.

20. Section 2 of P.L. 112-99 provides authority to the USDOC to address the problem of double remedies. In sharp contrast to section 1 of the law, section 2 does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012.

21. After the Federal Circuit issued its decision in *GPX V*, the United States and other appellants had filed what is called a "petition for rehearing". The Federal Circuit had not acted on the petition for rehearing as of 13 March 2012, the date that P.L. 112-99 entered into law. The following day, the Federal Circuit issued a letter to the parties directing them to make submissions "commenting on the impact of this legislation on further proceedings in this case."

22. The Federal Circuit issued its decision on rehearing on 9 May 2012. The court began by restating its prior holding that "in amending and reenacting the trade laws in 1998 and 1994, Congress adopted the position that countervailing duty law does not apply to NME countries, and thus, countervailing duties cannot be applied to goods from NME countries." The court then explained that, subsequent to its decision in *GPX V*, Congress had "enacted legislation to apply countervailing duty law to NME countries." The Federal Circuit observed that section 1 of the legislation enacted by Congress "applies retroactively" to all countervailing duty investigations initiated after 20 November 2006. The Federal Circuit then remanded the case to the CIT to address constitutional issues relating to the retroactive application of the new law.

23. In the remand proceedings before the CIT, the United States argued that the constitutional issues raised by the importing parties were unfounded because the new legislation "did not change the law retroactively". Contrary to the position that it had taken in its submission to the Federal Circuit, in which it had expressly highlighted the "retroactivity" of the new law, the United States now contended that section 1 of P.L. 112-99 was merely a "clarification" of the law that existed *before* the Federal Circuit's decision in *GPX V*. According to the United States, section 1 of P.L. 112-99 did nothing more than "confirm" that the USDOC had always possessed the legal authority to apply countervailing duties to imports from NME countries.

24. The CIT issued its decision on the constitutional issues on 7 January 2013. Not surprisingly, the CIT found it difficult to credit the contention by the United States that section 1 of the P.L. 112-99 was not retroactive. The CIT further considered that "the government's view of a simple clarification" of existing law was "not easily extracted from the tangled history of this case." The court observed, for example, that the Federal Circuit had not vacated its prior decision in *GPX V*, despite an explicit request by the United States that it do so. Thus, the Federal Circuit's decision in *GPX V*, which held that prior U.S. law did not permit the application of countervailing duties to imports from NME countries, remained a valid, precedential decision. The only thing that had changed was that Congress had enacted new legislation to change the law retroactively, which the Federal Circuit had duly applied in *GPX VI*. The CIT also noted that, in taking this action, the Federal Circuit had in no way suggested that "its view of the prior law was wrong."

III. Section 1 of P.L. 112-99 Was Not "Published Promptly in Such a Manner as to Enable Governments and Traders to Become Acquainted" with the New Law, as Required by Article X:1 of the GATT 1994

25. Section 1 of P.L. 112-99, which provides the USDOC with legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies, was not "published promptly in such a manner as to enable governments and traders to become acquainted" with it. The fact that section 1 was not "published promptly" is evident from the fact that it was published nearly five and a half years after the date on which section 1 became effective.

26. P.L. 112-99 is a law made effective by the United States pertaining to "rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports". It authorizes the application of countervailing duties (which can be seen as "rates of duty" or "other charges … on imports") to imports from countries that the United States designates as non-market economy

countries. In addition, 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. P.L. 112-99 is a law "of general application" because it is "not limited to a single import or single importer", but instead affects a range of products, producers, importers, and countries.

27. Section 1 of P.L. 112-99 was "made effective" as of 20 November 2006. This is evident from the plain language of section 1(b), which refers to 20 November 2006 as the "*effective* date" of this section. Prior panels interpreting Article X:1 have considered the date on which a measure was "made effective" as the appropriate reference point for determining whether the measure was "published promptly". The basic inquiry is whether the measure was "published promptly" in relation to this effective date. In evaluating whether a measure was "published promptly", the context of Article X:1 requires consideration of whether the measure was published in a sufficiently timely manner to enable "governments and traders to become acquainted" with the content and requirements of the measure. While Article X:1 does not specify a period of time that must elapse between publication of the measure and when it takes effect, in no event can publication be considered "prompt" if it takes place *after* the measure has taken effect.

28. It is self-evident that P.L. 112-99 was not "published promptly" in relation to its effective date of 20 November 2006. P.L. 112-99 was not published until nearly five and half years after the date on which it was made effective. This was not "prompt" by any conceivable standard. This conclusion is underscored by the fact that the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries. This is fundamentally inconsistent with the requirements of due process and transparency that underlie all of Article X, including Article X:1. For these reasons, the Panel should find that the United States acted inconsistently with Article X:1 of the GATT by failing to publish section 1 of P.L. 112-99 "promptly" in relation to its effective date.

IV. The Retroactive Application of Section 1 of P.L. 112-99 Is Inconsistent with Article X:2 of the GATT 1994

29. Article X:2 reflects what the Appellate Body has referred to as a "presumption of prospective effect", a presumption that finds its source in "basic principles of transparency and due process". These principles compel the conclusion that measures of general application affecting the conduct of governments and traders should apply only in respect of actions taken *after* the publication of the measure. This is why "prior publication is required for all measures falling within the scope of Article X:2" – "prior", that is, to the application of the measure to particular conduct or actions. Article X:2 contains no exceptions to this requirement of prior publication. By its terms, Article X:2 "precludes retroactive application of a measure" in all cases.

30. The necessary implication of Article X:2 is that governmental agencies must act within the confines of their authority, as that authority is set forth in measures that have been officially published. This limitation on agency action is central to the principle of legality that underlies all administrative systems. When governmental agencies act outside the confines of their published authority, their actions are *ultra vires* (referred to in some legal systems as *excès de pouvoir*). Article X:2 prohibits actions that are *ultra vires* by requiring governmental agencies to act within the confines of measures that have been officially published. The act of enforcing a measure of general application prior to its official publication is an act that is necessarily *ultra vires* and, as such, inconsistent with Article X:2.

31. As China discussed in Part III above, Section 1 of P.L. 112-99 is a "measure of general application" taken by the United States "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". Equally important, P.L. 112-99 "impos[es] a new or more burdensome requirement, restriction or prohibition on imports" in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties. For these reasons, section 1 of P.L. 112-99 is plainly within the scope of Article X:2.

32. Section 1(b) of P.L. 112-99 states that section 1 of the law "applies to all proceedings initiated under Subtitle A of title VII [of the Tariff Act] 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 [such] proceedings …". By stating that section 1 "applies" to events that occurred prior to 13 March 2012, it is evident on the face of the legislation that section 1 applies on a retroactive basis. 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.

33. The fact that the United States has applied section 1 of the legislation prior to its official publication is confirmed by the fact that the United States imposed countervailing duty orders on imports from China at a time when existing U.S. law did not permit this action, and then continued to maintain these pre-existing orders subsequent to the official publication of the measure. In the absence of the retroactive application of section 1, the USDOC would have been required under U.S. law to revoke these pre-existing orders. The fact that the United States has continued to maintain these orders subsequent to the official publication of P.L. 112-99 confirms that the United States has applied section 1 of the legislation to events and circumstances that occurred prior to its official publication.

34. For these reasons, the Panel should find that section 1 of P.L. 112-99 is a measure of general application that the United States has enforced prior to its official publication, in violation of Article X:2.

V. The United States Has Failed to Ensure that Decisions of its Courts Are "Implemented by", and "Govern the Practice of", the USDOC, in Violation of Article X:3(b) of the GATT 1994

35. China's claim under Article X:3(b) relates to the requirement that the decisions of reviewing tribunals "shall be implemented by, and shall govern the practice of" the agency whose action is under review. It is clear that the requirement to "implement" the decision of a tribunal means, at a minimum, that the agency under review must apply the decision of the tribunal in the specific case decided. The requirement to ensure that the decision "govern[s] the practice of" the agency goes beyond the specific case decided, and requires the agency to be bound by the decision "with respect to identical factual situations that may arise in the future concerning identical legal issues".

36. In its decision in *GPX V*, issued on 19 December 2011, the Federal Circuit held that "the [U.S.] countervailing duty law does not apply to NME countries". Through this decision, the court established that existing U.S. law did not permit the USDOC to impose countervailing duties on imports from countries that the United States designates as non-market economies. Within the U.S. system of judicial review, there were only two scenarios in which the court's decision in *GPX V* could have been reversed. First, the United States (or another interested party) had the right to petition the court for rehearing of the original panel decision. Second, whether or not a petition for rehearing had been sought, an interested party could seek review of the Federal Circuit's decision by the United States Supreme Court.

37. The original deadline for the United States to file a petition for rehearing was 2 February 2012. The United States sought a 60-day extension of this deadline, which the court cut in half by extending the deadline to 5 March 2012. On that date, the United States filed a petition for rehearing *en banc*, i.e. for review of the Federal Circuit's decision in *GPX V* by the entire court of appeals.

38. The petition for rehearing filed by the United States was pending before the Federal Circuit when President Obama signed P.L. 112-99 into law eight days later. This action prompted the Federal Circuit to issue a notice to the parties, on 14 March, directing them to brief the court on the significance of the new legislation. In its submission, the United States explained to the court that section 1 of P.L. 112-99 "is retroactive to November 20, 2006", which was "prior to the initiation of Commerce's CVD investigation in this case". The United States took the position that the express retroactivity of section 1 required the Federal Circuit to apply the new law to the case under appeal, since the appeal was technically still pending before the court in light of the petition

for rehearing. The Federal Circuit agreed with this position in its decision in *GPX VI*, and applied the new law retroactively to change the outcome of the case.

39. The actions by the U.S. Congress and the U.S. administration foreclosed the two opportunities for further judicial review that were available after the Federal Circuit's decision in *GPX V.* Through its own actions, the administration ensured that the Federal Circuit never had an opportunity to consider the arguments advanced by the United States in support of its contention that the court's decision in *GPX V* was in error. Moreover, these actions obviated the need to petition the Supreme Court for a review of that decision. As a result of these actions, the Federal Circuit's decision in *GPX V* became the final judicial decision on the status of U.S. law prior to the enactment of P.L. 112-99.

40. China considers that it was consistent with Article X:3(b) for the United States to seek rehearing *en banc* of the Federal Circuit's decision in *GPX V.* This was equivalent to an appeal to a court of superior jurisdiction. China also considers that it would have been consistent with Article X:3(b) for the United States to have filed a petition for certiorari with the U.S. Supreme Court, as this, too, would have been an appeal to a higher court. In either event, the USDOC would have been bound by the final decision of its reviewing courts, whether it was the Federal Circuit's decision in *GPX V*, a subsequent *en banc* decision of the Federal Circuit, or a decision of the U.S. Supreme Court.

41. What was not consistent with Article X:3(b) was for the Federal Circuit to issue its decision in *GPX V* and for the United States to then amend the law, retroactively, to change the outcome of that decision. This had the effect of ensuring that the Federal Circuit's decision in *GPX V* would not be implemented by, and would not govern the practice of, the USDOC. In addition, it ensured that the U.S. courts were not able to discharge their required function of reviewing and correcting the actions of the USDOC in relation to the domestic laws in effect at the time those actions were taken. For these reasons, the Panel should find that section 1(b) of P.L. 112-99, by amending U.S. law retroactively and making it applicable to judicial proceedings concerning administrative actions taken prior to its enactment, is inconsistent with the obligations of the United States under Article X:3(b).

VI. The United States Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

42. When the USDOC decided to begin applying countervailing duties to imports from countries that it continued to designate as non-market economies, it was aware that the simultaneous application of countervailing and anti-dumping duties could result in offsetting the same subsidy twice – once through the imposition of the countervailing duty, and then again through the manner in which the United States calculates anti-dumping duties under its NME methodology.

43. In an anti-dumping investigation, the existence and extent of an anti-dumping margin is based on a comparison of the producer's normal value for the product under investigation (determined by reference either to the producer's costs of production or to its home-market prices for the product) to the producer's export price for the product. The producer is said to be "dumping" if its normal value is higher than its export price. The GAO Report had explained that because normal value under the U.S. NME methodology is based on unsubsidized costs of production in countries that the United States considers to be market economies, the resulting comparison of normal value to the producer's export price is likely to reflect not only dumping, but also any subsidization of that product as well.

44. In DS379, the Appellate Body held that the United States has an obligation under Article 19.3 of the SCM Agreement to investigate and avoid the double remedies that are likely to occur when the United States applies countervailing duties in conjunction with anti-dumping duties determined under the U.S. NME methodology. Because the USDOC lacked authority under existing U.S. law to address the problem of double remedies, it was clear that any attempt by the United States to comply with the recommendations and rulings of the DSB would require the U.S. Congress to enact new legislation to give the USDOC this authority.

45. Section 2 of P.L. 112-99 purports to give the USDOC sufficient legal authority to identify and avoid double remedies in the NME context. In sharp contrast to section 1 of the law, the USDOC's

authority to address the problem of double remedies does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012. The contrast between the effective dates for section 1 and section 2 creates an "orphaned" class of countervailing duty investigations for which the USDOC has no authority under U.S. law to investigate and avoid double remedies (See CHI-24). Under the statute, the only scenario in which the USDOC can apply its authority under section 2 in respect of those past investigations is if China challenges those determinations at the WTO.

46. Because section 1 of P.L. 112-99 is plainly inconsistent with Article X of the GATT, for the reasons set forth in Parts III and IV above, it should not be necessary for the United States to address the problem of double remedies in respect of the "orphaned" investigations. The correct course of action is for the United States to acknowledge that the USDOC had no duly published authority to conduct countervailing duty investigations in respect of imports from NME countries at the time those investigations occurred. That being the case, the problem of double remedies simply would not arise in respect of those past investigations. However, to the extent that the United States continues to maintain those countervailing duty measures, whether or not this is action is consistent with Article X, it is nonetheless obligated under the covered agreements to investigate and avoid double remedies in respect of those investigations.

47. The USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the SCM Agreement. This is because the USDOC has failed to ensure that it imposes countervailing duties "in the appropriate amounts in each case", taking into account the simultaneous imposition of anti-dumping duties that are likely to offset the same subsidies. China therefore requests the Panel to find that each of these determinations is inconsistent, as applied, with Article 19.3. As a consequence, and as the Appellate Body did in DS379, the Panel should find that the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the First Meeting of the Panel

Introduction

1. The United States has staked its entire defence of this case on the proposition that the *GPX* legislation did nothing more than "maintain[] the status quo that existed prior to its enactment" and "confirm" the law that already existed. As I will demonstrate, the proposition that the *GPX* legislation effected no substantive change in the law is contradicted by the terms of the statute itself. This proposition is, in addition, based upon a wholesale rewriting of history and obvious mischaracterizations of how the U.S. legal system works.

2. I will begin with the terms of the statute itself. The statute is entitled "an act *to apply* the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries." If the purpose of the act is "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries", it must be the case that those provisions previously did *not* apply to NME countries. Section 1(a) of the statute amends Section 701 of the Tariff Act "by adding" a new subsection (f). The new subsection (f)(1) provides that countervailing duties "shall be imposed" on imports from nonmarket economy countries. It is clear from the amended statute that it is *this* provision of law that imposes countervailing duties on imports from nonmarket economy countries and provides the legal authority for Commerce to take this action.

3. Consider the new subsection (f)(2), in this regard. This is a new provision of U.S. law, establishing the terms of an exemption from countervailing duties that never before appeared in any officially published measure of general application. If Congress was of the view that the general countervailing duty authority set forth in subsection 701(a) of the Tariff Act had always applied to imports from NME countries, then Congress could have done nothing more than enact this new exception. Instead, it enacted an entirely new subsection to provide for the imposition of countervailing duties on imports from NMEs, and attached this exception to it. Once again, this demonstrates that it is the new section 701(f), not section 701(a), that creates the legal basis for the imposition of countervailing duties on imports from NMEs.

4. Finally, let us consider the effective date provision set forth in section 1(b) of the statute. This provision states that the new subsection (f) "applies to" all countervailing duty proceedings initiated "on or after November 20, 2006". The only conceivable purpose for making a law retroactive is to *change* the law as it existed in the past. If the statute was merely restating the law that already existed, as the United States contends, then there would have been no need for Congress to make the new law retroactive to a specific date in the past. In short, no reasonable observer could examine this statute on its face and conclude that it did nothing more than restate the law that already existed. This conclusion is underscored by an examination of the facts and circumstances surrounding the enactment of this statute.

5. Under the U.S. narrative, the "status quo" prior to the enactment of the *GPX* legislation was that the Tariff Act already permitted Commerce to apply countervailing duties to imports from NME countries, and that Congress enacted the *GPX* legislation merely to "confirm" this proposition. Within this narrative, the United States treats the Federal Circuit's decision in *GPX V* as a mere aberration from the status quo, rather than as a decision of a United States federal court holding that Commerce's understanding of the Tariff Act was incorrect.

6. This is a complete rewriting of history. The Federal Circuit's decision in *GPX V* held that what the United States tries to characterize as the "status quo" was, in fact, inconsistent with U.S. law as it then existed. When it enacted the *GPX* legislation, Congress sought to change the applicable law, as established by the Federal Circuit, and have the courts apply this new law retroactively to keep the countervailing duty orders in place. That is exactly what happened.

7. In *GPX VI*, the Federal Circuit began its decision by reiterating its prior holding in *GPX V* that the Tariff Act did not permit the application of countervailing duties to imports from nonmarket economy countries. It then observed, however, that Congress had subsequently "enacted legislation to apply countervailing duty law to NME countries". This "new legislation", the court explained, "applies retroactively" to countervailing duty investigations initiated on or after November 20, 2006, including any appeals in federal courts relating to those investigations.

Therefore, without casting any doubt upon its decision in *GPX V* as a valid interpretation of the prior law, the Federal Circuit applied the new law retroactively to alter the outcome of the case.

8. In sum, whether we look at the face of the statute itself or at the facts and circumstances surrounding its enactment, the result is the same: the *GPX* legislation effected a substantive change in U.S. law. The basic premise of the U.S. defence – that the Federal Circuit's decision in *GPX V* never happened, and that Congress was merely restating existing law when it enacted the *GPX* legislation – is transparently false. Once this premise is taken away, the United States has no substantive defence to China's claims under Article X of the GATT.

Article X:1

9. In relation to China's claim under Article X:1, the only real question is whether section 1 of the *GPX* legislation was "published promptly" in relation to when it was "made effective". The United States argues that the date on which a measure is "made effective" is the date on which the measure is formally "adopted" as a matter of municipal law. What the United States fails to confront, however, is that section 1 of the legislation has an "effective date" of November 20, 2006. It is hard to see how the United States can argue that the statute was "made *effective*" on March 13, 2012 when the statute itself has an "*effective* date" of November 20, 2006.

10. The proposition that a measure is only "made effective" when it is formally "adopted" as a matter of municipal law is a proposition that the United States successfully argued *against* in *EC – IT Products.* The EC in that case argued that the term "made effective" refers to the date on which the measure at issue was "adopted", i.e. the date on which it formally entered into force as a matter of municipal law. The United States argued, by contrast, that the term "made effective" refers to the date on which the measure became "applicable", without regard to when it was formally adopted as a matter of municipal law or when it was officially published.

11. The United States was right in *EC – IT Products*, and is wrong in this dispute. As that panel held, the term "made effective" refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." With regard to the *GPX* legislation, that date was November 20, 2006. It is impossible to conclude that the publication of a measure five and half years after it was "made effective" is "prompt" under any understanding of that term. The United States has therefore acted inconsistently with the requirements of Article X:1.

Article X:2

12. The U.S. response to China's claim under Article X:2 can be reduced to two propositions: (1) that the *GPX* legislation did not change U.S. law, and therefore did not "effect[] an advance in a rate of duty or other charge on imports under an established and uniform practice" or "impos[e] a new or more burdensome requirement, restriction or prohibition on imports"; and (2) that China has failed to prove that this expressly retroactive legislation was "enforced before such measure has been officially published". Both of these propositions are incorrect.

13. The *GPX* legislation "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice" not only because it makes imports from NME countries potentially subject to the imposition of countervailing duties, but also because it provides a legal basis for the continued maintenance of 24 countervailing duty orders which, in the absence of this legislation, would have been revoked. It is equally obvious that an act that "applies" countervailing duties to a particular class of imports is, without question, one that "impos[es] a new or more burdensome requirement, restriction or prohibition on imports". Being subject to countervailing duty investigations, as well as the actual imposition of countervailing duties, is a "requirement" or "restriction" on imports.

14. For the reasons that I have already explained, the fact that this requirement or restriction is "new" and "more burdensome" is evident not only from the text of the statute itself, but from the fact that this provision was enacted in direct response to the Federal Circuit's holding in *GPX V*. As the United States explained to the Federal Circuit after the legislation was enacted, it is this new provision of U.S. law that "requires that Commerce apply CVDs to imports from NMEs, including

China." In *GPX VI*, the Federal Circuit held, by the United States' own description, that "the *new legislation* clearly requires that Commerce retroactively apply the CVD statute to NMEs".

15. In China's view, it should be self-evident that a measure of general application with a retroactive effective date is, by definition, a measure that has been enforced prior to its official publication. The term "enforce" is synonymous with the term "apply". Section 1(b) of the *GPX* legislation states that the new section 701(f) of the Tariff Act "applies to" all countervailing duty proceedings initiated on or after November 20, 2006. It follows that the *GPX* legislation enforces the new section 701(f) in respect of events and actions that occurred prior to its official publication on March 13, 2012. It does so by providing the legal foundation for the countervailing duty orders and duties imposed from November 2006 onward that the Federal Circuit had held to be inconsistent with prior U.S. law.

16. As the Appellate Body has explained, the basic principle of due process that underlies Article X:2 is that governments and traders should have a reasonable opportunity to learn about a measure, and to adjust their conduct accordingly, before that measure is enforced in respect of their conduct. That principle is necessarily offended when a statute reaches back in time and changes the law applicable to events and circumstances that have already occurred. Government and traders cannot possibly adjust their conduct in light of such a measure, since the conduct affected by the measure has already occurred. A measure that is expressly retroactive is, for that reason, the paradigmatic example of the type of measure that Article X:2 prohibits.

Article X:3(b)

17. The United States appears to have misstated China's claim under Article X:3(b), or at least misunderstood it. To be perfectly clear, China's claim is <u>not</u> that Commerce was required to implement and give effect to the Federal Circuit's decision in *GPX V* at the moment that decision was issued. Rather, China's claim is that it was inconsistent with Article X:3(b) for the United States Congress to change the applicable law retroactively and direct courts to apply this new rule of law to cases under review. This legislative intervention in ongoing judicial proceedings is not contemplated by Article X:3(b) and, if accepted, would deprive the independent judicial review required by Article X:3(b) of any practical meaning.

18. Consider the facts of this case. Based on their review of published measures of general application, the Government of China and interested Chinese parties understood that the countervailing duty provisions of the Tariff Act did not apply to imports from nonmarket economy countries. When Commerce began to act inconsistently with this understanding of U.S. law in 2006, interested parties challenged Commerce's actions in court and ultimately prevailed in their understanding of U.S. law. In response to that decision, the United States Congress changed the applicable law, retroactively, to make lawful what the court had held was not lawful at the time of the underlying agency action. Based solely on that newly-enacted legislation, the court changed the outcome of the appeal to sustain the legality of imposing countervailing duties on imports from China.

19. These actions make a mockery of independent judicial review, and of Article X as a whole. The entire concept of requiring Members to publish laws of general application in a transparent fashion, to enforce those laws only after their official publication, and to provide for review and correction by independent tribunals of administrative actions taken pursuant to those laws, would be utterly pointless if national legislatures were free to change the law retroactively and direct courts to apply the new law to events that have already occurred.

20. The Federal Circuit's decision in *GPX V* was a "decision" of a U.S. court. Without any apparent sense of irony, the United States asserts that the decision in *GPX V* "was an ideal candidate for both options." But instead of allowing the judicial proceedings to run their course based on the law in effect at the time of the events at issue, the United States Congress intervened in these proceedings to change the applicable law and direct the outcome of the appeal. This disposition of the Federal Circuit's decision in *GPX V* was not one of the two exceptions permitted under Article X:3(b).

Double Remedies

21. Despite having lost on the issue of double remedies in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), and despite having enacted a new provision of U.S. law in order to comply with the recommendations and rulings of the DSB in that dispute, the United States is trying to re-litigate these issues all over again before this Panel. This is not a constructive use of the dispute settlement system.

22. The Appellate Body held in DS379 that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." This includes taking into account "evidence of whether and to what degree the same subsidies are being offset twice", bearing in mind the unappealed finding of the panel in that dispute that double remedies are "likely" when the corresponding anti-dumping duties are determined in accordance with the U.S. non-market economy methodology.

23. The Appellate Body has stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." The United States has presented no such "cogent reasons" in this dispute. The arguments that it advances in its first written submission with regard to the interpretation of Article 19.3 are materially indistinguishable from arguments that the Appellate Body considered and rejected in DS379. Whatever sorts of reasons might constitute "cogent" reasons, it cannot be the case that rehearsing arguments that the Appellate Body has already considered would justify the extraordinary step of departing from its prior interpretation of a provision of the covered agreements. This is particularly true in a dispute, such as this one, that involves the same litigants, the same types of measures, and the same claims that were at issue in the prior dispute.

24. Notwithstanding its arguments regarding the alleged errors in the Appellate Body's report in DS379, the United States also maintains that Commerce "fully addressed any evidence and arguments relating to allegedly overlapping remedies" in the investigations at issue. This is a remarkable assertion in light of the undisputed fact that Commerce had *no legal authority* to do *anything* to address the problem of double remedies in these investigations.

25. Commerce's new legal authority to address double remedies under section 2 of the *GPX* legislation applies on a prospective basis, i.e., only in respect of determinations issued after March 13, 2012. Accordingly, it is preposterous for the United States to suggest that Commerce actually took steps in the investigations at issue in this dispute to identify and avoid double remedies. On what legal basis would it have done so? What specific steps would U.S. law have authorized Commerce to take in order to avoid these double remedies? And if Commerce already had sufficient authority under U.S. law to take these actions, then why did Congress consider it necessary to enact section 2 of the *GPX* legislation?

26. The short answer to these questions is that Commerce had no authority under U.S. law to identify and avoid double remedies in NME investigations until section 2 of the *GPX* legislation was enacted. It is this fact, and this fact alone, that explains why Commerce took no action in any of these investigations to identify and avoid double remedies. Having failed to discharge its affirmative obligation under Article 19.3 to impose countervailing duties "in the appropriate amounts in each case", the countervailing duty determinations that China has identified in CHI-24 were necessarily inconsistent with this provision. It follows that these determinations were also inconsistent with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Second Written Submission of China

I. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Not "Published Promptly" as Required By Article X:1 of the GATT 1994

1. In China's view, there is relatively little left to be said with respect to China's claim under Article X:1 of the GATT 1994. The parties do not appear to dispute that the appropriate reference point for determining whether a measure was "published promptly" is the date on which the measure was "made effective". Because Section 1 of P.L. 112-99 has an "effective date" of 20 November 2006, but was not published until 13 March 2012, China considers it self-evident that the United States did not publish this measure "promptly" as required by Article X:1.

2. Contrary to the positions that it took in *EEC – Apples (US)* and *EC – IT Products*, the United States now appears to argue that the term "made effective" refers to the date on which the measure at issue was formally "adopted" as a matter of municipal law. The United States is trying to convince the Panel that a measure with an "effective date" of 20 November 2006 was actually "made effective" on 13 March 2012. This is, needless to say, an uphill struggle.

3. The United States was right in *EEC – Apples (US)* and *EC – IT Products*, and it is wrong in the present dispute. More importantly, both of those panel reports reflect a proper interpretation and application of the requirements of Article X:1. The term "made effective" under Article X:1 refers to the date on which a measure became operative in practice, not the date on which it was "formally promulgated" or "formally 'entered into force'". This includes, as in *EEC – Apples (US)*, measures that have an expressly retroactive effective date, such as the measure at issue in the present dispute. Were that not the case, the obligation under Article X:1 to publish measures "promptly in such a manner as to enable governments and traders to become acquainted with them" would be "meaningless", as the panel in *EEC – Apples (US)* found in respect of the materially indistinguishable requirement in Article XIII:3(c).

4. The panel in *EEC – Apples (US)* found that publication of a measure two months after it was made effective was not consistent with Article X:1, while the panel in *EC – IT Products* found that publication of a measure eight months after it was made effective was not consistent with Article X:1. It follows, *a fortiori*, that the publication of Section 1 of P.L. 112-99 nearly six years after it was made effective cannot be considered "prompt" within the meaning of Article X:1. For this reason, the Panel should find that the United States has acted inconsistently with its obligations under this provision.

II. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Enforced Prior to its Official Publication in Violation of Article X:2 of the GATT 1994

A. Section 1 of P.L. 112-99 Is the Relevant Measure at Issue, and It Is a "Measure of General Application"

5. The first interpretative issue relating to Article X:2 need not detain the Panel for long. While the United States concedes, as it must, that Section 1 of P.L. 112-99 is a "measure of general application" within the meaning of Article X:2, it is now trying to suggest that Section 1 is simultaneously *not* a "measure of general application" in relation to countervailing duty proceedings initiated prior to its official publication on 13 March 2012. The United States asserts that because those prior proceedings "were limited and known as of the date of enactment of the measure", it is "difficult to see" how Section 1 is a measure of general application "in relation to" those proceedings.

6. Aside from being factually inaccurate, this is a frivolous suggestion. Section 1 of P.L. 112-99 is the relevant measure of general application. It does not need to be a measure of general application "in relation to" a particular set of proceedings or imports. Section 1(b) of P.L. 112-99 is not a distinct "measure", but rather evidence on the face of the statute that the new Section 701(f) of the Tariff Act was enforced before its official publication. It cannot be the case that Section 1 of P.L. 112-99 is a measure of general application for some purposes, but not for other purposes.

7. In any event, even if Section 1(b) of P.L. 112-99 were deemed to apply to a known set of investigations and products, the *exporters* subject to the resulting countervailing duty orders constitute "an unidentified number of economic operators". This is because any exporter – past, present, or future – that exports the goods subject to the countervailing duty orders will be liable for the assessment of countervailing duties. Accordingly, even if it were possible to view Section 1(b) as a distinct "measure", it would still constitute a "measure of general application".

B. Section 1 of P.L. 112-99 Effects an Advance in a Rate of Duty and Imposes a New or More Burdensome Requirement or Restriction on Imports

8. The next interpretative question before the Panel is whether Section 1 of P.L. 112-99 "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[es] a new or more burdensome requirement, restriction or prohibition on imports".

9. As suggested by question 54 from the Panel, Article X:2 requires some baseline of comparison to determine if a measure "advance[s]" a rate of duty or charge, or imposes a requirement, restriction or prohibition on imports that is "new or more burdensome". These are, necessarily, relative concepts.

10. The United States does not appear to dispute, at least not with credible legal arguments, that Section 1 of P.L. 112-99 could be considered to have had one or more of the effects described by Article X:2 *if* the relevant baseline of comparison under Article X:2 is prior municipal law, and *if* prior municipal law is understood to have prohibited the imposition of countervailing duties on imports from nonmarket economy countries. Its principal defence is, instead, that Section 1 of P.L. 112-99 did not have these effects because the USDOC's "approach previous to P.L. 112-99 [had] been to apply the U.S. CVD law to China." This is the "existing approach" baseline advocated by the United States under Article X:2.

11. The U.S. "existing approach" baseline, if accepted, would render Article X:2 a nullity. This is because the act of enforcing a measure of general application before its official publication – the very thing that is prohibited by Article X:2 – would itself be an "approach". In *EC – IT Products*, for example, various EC customs authorities had the "approach" of classifying certain types of goods so that they were no longer eligible for duty-free treatment. By the U.S. logic, there would have been no violation of Article X:2 when the EC later published a measure of general application providing for this classification, since the measure did not advance a rate of duty in relation to the "approach" that was already in place. This would amount to relying on a violation of Article X:2 in order to claim that no violation of Article X:2 occurred – an obviously absurd result.

12. Moreover, the context of Article X:2 plainly supports the conclusion that the relevant baseline for comparison is the prior municipal law of the importing Member, as reflected in its previously published measures of general application. Under Article X:1, Members are required to publish promptly measures of general application affecting the conduct of international trade. It is these previously published laws and regulations, including judicial decisions interpreting those laws and regulations, that form the body of municipal law that governments and traders rely upon to determine the consequences of their actions. These are the laws and regulations that governments and traders expect the importing Member to apply in a uniform, impartial, and reasonable manner, as required by Article X:3(a), and to be enforced by the importing Member's domestic courts, as required by Article X:3(b).

13. Within this context, the relevant inquiry under Article X:2 is whether a measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports in relation to the prior municipal law that governments and traders could have ascertained from their review of published measures of general application. A measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports when it has these effects in relation to the rates of duty, requirements, or restrictions that were ascertainable from prior published law. Article X:2 prohibits the enforcement of these types of measures before their official publication precisely because they constitute a material deviation from the municipal law that governments and traders expect the importing Member to apply in respect of their conduct, and that they expect to be enforced by the importing Member's domestic courts.

14. Prior municipal law is, moreover, the only baseline under Article X:2 that can be objectively determined by a panel and that is properly attributable to the importing Member as a unitary subject of international law. Municipal law is an objective fact that can be adduced by evidence demonstrating the scope and meaning of the law. As the Appellate Body has repeatedly observed,

> Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.

These are the sources of evidence that will allow a panel reviewing a claim under Article X:2 to determine the meaning of prior municipal law and the meaning of municipal law subsequent to the publication of the measure at issue, to the extent that those meanings are contested. In contrast, "Commerce's understanding" of the prior municipal law does not establish what that law was, especially in light of the fact that this "understanding" of the law was not shared by the highest court of the United States specifically charged with interpreting the meaning of the Tariff Act. Under these circumstances, "Commerce's understanding" does not provide an objective basis to determine what the law *of the United States* was prior to the enactment of P.L. 112-99. This can only be determined by reference to valid sources of evidence of municipal law.

15. Despite the U.S. contention that the text of the measure at issue in this dispute is "irrelevant" to whether that measure had any of the effects described by Article X:2, it is axiomatic that any determination of the meaning of municipal law must begin with the "text of the relevant legislation or legal instruments". China explained in detail in its oral statement at the first meeting why it is evident on the face of Section 1 that it advances a rate of duty and imposes a new or more burdensome requirement or restriction on imports in relation to the Tariff Act as it previously existed.

16. In China's view, the Panel's evaluation of whether Section 1 of P.L. 112-99 is within the scope of Article X:2 could end at this juncture. However, because the United States has continued to make assertions about the meaning of prior municipal law (despite its apparent irrelevance under the U.S. interpretation of Article X:2), and because the Appellate Body has observed that proof of municipal law "may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars", China will proceed to examine these other sources of evidence.

17. China will begin with the repeated U.S. assertion that Section 1 of P.L. 112-99 was "a clarification of U.S. law". For the reasons explained in response to question 52 from the Panel, China does not consider the "change" versus "clarification" issue to be determinative of the issue before the Panel under Article X:2. Furthermore, as the party seeking to establish that Section 1 of P.L. 112-99 was "clarifying" legislation, as that concept is sometimes understood as a matter of municipal U.S. law, it is incumbent upon the United States to provide proof of this assertion. The United States has provided no such evidence.

18. Notwithstanding the fact that the United States has failed to meet its burden of proof, and notwithstanding the ultimate irrelevance of the "change" vs. "clarification" issue, China has included as an exhibit to this rebuttal submission the expert report of Professor Richard H. Fallon, the Ralph S. Tyler Professor of Constitutional Law at Harvard Law School. Whatever the relevance of this issue, China has demonstrated, and Professor Fallon's expert report confirms, that Section 1 of P.L. 112-99 was not a "clarification" of the Tariff Act, as this concept is sometimes understood as a matter of U.S. law.

19. China will now turn to the attempt by the United States to have the Panel disregard the decisions of the Federal Circuit in the *Georgetown Steel* and *GPX* cases as definitive interpretations of the meaning of U.S. law. The United States has gone to extraordinary lengths in this dispute to convince the Panel that those decisions of the highest U.S. court specifically tasked with interpreting the Tariff Act somehow do not constitute evidence of what the Tariff Act meant prior to the enactment of Section 1 of P.L. 112-99.

20. For the reasons that China has already indicated, it is unclear why the United States has bothered to engage in this effort. The U.S. position appears to be that, even if it were beyond all doubt or cavil that prior municipal law had been interpreted by domestic courts to prohibit the application of countervailing duties to imports from nonmarket economy countries, it still would have been consistent with Article X:2 for the United States to enforce Section 1 of P.L. 112-99 in respect of imports that occurred prior to its official publication. This is not only because of its absurd interpretation of what it means to enforce a measure of general application prior to its official publication, which China will address in Part C below. It is also because the United States considers the relevant baseline under Article X:2 to be whatever "existing approach" was in place prior to the official publication of the measure, without regard to whether this "approach" had any basis in existing municipal law.

21. It is understandable why the United States has been forced to take such an extreme and untenable position. The United States has presented no relevant evidence – literally none – to demonstrate that prior municipal law permitted or required the application of countervailing duties to imports from nonmarket economy countries. Separate and apart from its "clarification" theory, the "evidence" advanced by the United States consists entirely of assertions about the meaning of prior municipal law that the U.S. administration presented to its own domestic courts, which those courts considered and found to be unpersuasive. The United States has offered no reason why this Panel should accept these assertions as evidence of prior municipal law, and there is no conceivable reason why it should.

22. China has demonstrated by reference to the Federal Circuit's decisions in the *Georgetown Steel* and *GPX* cases that, prior to the enactment of Section 1 of P.L. 112-99, the Tariff Act was consistently interpreted by the Federal Circuit – the highest U.S. court specifically charged with its interpretation – as prohibiting the imposition of countervailing duties on imports from nonmarket economy countries. China has thoroughly rebutted the U.S. mischaracterizations of these decisions in response to question 51(a) from the Panel, but will respond here to one additional mischaracterization put forward by the United States in its own responses to the Panel's questions.

23. In response to question 16 from the Panel, the United States repeats its mantra that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", but it then goes on to assert that "[t]he U.S. Federal Circuit's legally binding decision in *GPX VI* confirms this fact." This is a remarkable assertion.

24. As China has previously explained, the Federal Circuit's decision in *GPX VI* begins by reiterating its prior holding in *GPX V*, and then takes that prior holding as its baseline for evaluating the implications of the subsequent enactment of P.L. 112-99. Despite multiple requests by the United States, the Federal Circuit declined to vacate its prior decision in *GPX V*, thereby signalling that it considered its interpretation of prior U.S. law to be authoritative and precedential. It is ludicrous for the United States to claim that the Federal Circuit's decision in *GPX VI* "confirms" that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", when in fact it confirms just the opposite.

25. But there is no need to belabour these points further. In his expert report, Professor Fallon explains why "*GPX VI*, through its reliance on the holding of *GPX V* and otherwise, reflects a judicial determination that P.L.112-99 substantively changed the meaning of Section 701(a) of the Tariff Act to make it retroactively applicable to nonmarket economies and to goods from nonmarket economies." Professor Fallon lays out in detail why the Federal Circuit's decisions in *GPX V* and *GPX VI*, taken together, establish the meaning of the Tariff Act both before and after the enactment of P.L. 112-99. Professor Fallon's detailed examination of the legal status and significance of the Federal Circuit's decisions in *GPX V* and *GPX VI* should be sufficient to lay this matter to rest.

C. The United States Enforced Section 1 of P.L. 112-99 Prior to its Official Publication on 13 March 2012

26. The final interpretative issue before the Panel in respect of China's claim under Article X:2 is whether the United States enforced Section 1 of P.L. 112-99 before its official publication on 12 March 2012. For the reasons that China has explained, China considers it self-evident from Section 1(b) of P.L. 112-99 that the United States enforced the new Section 701(f) of the Tariff Act

before its official publication. This is because Section 1(b), by its express terms, applies the new Section 701(f) to all countervailing duty proceedings initiated on or after 20 November 2006, nearly five and a half years before its official publication.

27. The U.S. submissions to date establish that the United States has no credible response to this aspect of China's claim under Article X:2. Aside from its half-hearted and baseless attempt to draw a distinction between what it means to "apply" a measure and to "enforce" a measure, the United States has no basis for refuting China's demonstration that P.L. 112-99 was enforced prior to its official publication. This has forced the United States to defend its conduct by offering interpretations of Article X:2 that bear no resemblance to the actual text of the treaty, properly interpreted in light of its context and object and purpose. Most notable in this regard are its assertion that Article X:2 is only designed to ensure that measures are "not kept secret from foreign governments and traders" and its assertion that "Article X:2 neither prohibits nor permits measures of general application from applying to events that occurred prior to the date of publication".

28. While the U.S. position remains unclear, it appears to be its position that Article X:2 applies only in the circumstance in which a Member formulates a measure of general application (*e.g.* in "secret" form), and then begins to apply this measure to imports before it is officially published. It is not a problem, apparently, when governments *flagrantly and openly* produce the identical result by applying a measure to events or conduct that had already occurred at the time of its official publication. Article X:2 is, apparently, a provision of the GATT that is violated only by governments with bad trade lawyers.

29. The United States offers no interpretative support whatsoever for its nonsensical interpretation of Article X:2. Instead, its argument is based entirely on an outlandish mischaracterization of the Appellate Body report in *US – Underwear*. Contrary to the U.S. assertion, the Appellate Body in *US – Underwear* did not remotely suggest that the panel had misinterpreted Article X:2 when it had found that Article X:2 precluded the application of a measure to actions or events that occurred prior to its official publication. On the contrary, the Appellate Body went out of its way to affirm that this understanding of Article X:2 was correct, and one that was "appropriately protective" of the purposes that Article X:2 is meant to serve.

D. Conclusion to Part II

30. For the reasons set forth in this Part II, China has demonstrated that Section 1 of P.L. 112-99 is a measure of general application effecting an advance in a rate of duty or other charge on imports, and imposing a new or more burdensome requirement or restriction on imports, which the United States enforced before its official publication on 13 March 2012. Accordingly, the Panel should find that the United States has acted inconsistently with its obligations under Article X:2 of the GATT 1994.

III. The United States Has Failed to Rebut China's Demonstration that the United States Acted Inconsistently with Article X:3(b) of the GATT 1994

31. China has demonstrated that the United States acted inconsistently with Article X:3(b) by changing the law applicable to countervailing duty proceedings initiated prior to 13 March 2012 and directing domestic courts to apply this new rule of law to cases under review. As with its response to China's other claims under Article X, the United States has been forced to advance wholly unsustainable interpretations of Article X:3(b) in order to mount any sort of defence. The proposed U.S. interpretations, if accepted, would deprive Article X:3(b) of any practical meaning and gut the obligation of Members to ensure that the decisions of its courts and tribunals are enforced.

32. According to the United States, Article X:3(b) imposes nothing more than what it calls an obligation of "structure". Once a Member has put in place a "structure" of independent tribunals to review and correct agency action, it has no obligation at all to ensure that *specific* court decisions are actually "implemented by" and "govern the practice of" the government agency whose action is subject to review.

33. Needless to say, this is not a credible interpretation of the obligations under Article X:3(b). To begin with, the U.S. "structural" interpretation is based exclusively on the first sentence of Article X:3(b), but it is the *next* sentence of Article X:3(b) that establishes the relevant obligation in this dispute. That sentence provides that:

> Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions *shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers.

34. As is clear from the use of the word "shall" in the second sentence of Article X:3(b), this is a separate and mandatory obligation. This sentence has moved beyond the establishment and maintenance of independent tribunals and is now discussing what effects must be given to the decisions of those tribunals in order for a Member to comply with Article X:3(b). This obligation relates to the "decisions" of independent tribunals, i.e. their *actual* decisions, not just their decisions in some abstract legal "framework". This is obvious from the first part of the sentence, but it is fully confirmed by the proviso that follows: "*[p]rovided* that the central administration of such agency may take steps to obtain a review of *the* matter in another proceeding if there is good cause to believe that *the* decision is inconsistent with established principles of law or the actual facts." The use of the word "the" in this proviso confirms that the obligation in this sentence refers to *specific* "decisions", not just "decisions" in the abstract.

35. Notwithstanding its "structural" interpretation of Article X:3(b), the United States continued to argue in its responses to Panel questions that the Federal Circuit's decision in *GPX V* was not a "decision" in the sense of Article X:3(b). The United States contends that "[a] 'decision' requires that a judicial opinion must put an end to or conclude the tribunal's consideration of the proceeding and result in a final judgment that is conclusive. In order to be conclusive, a decision must have legal effect to end the proceeding." The United States does not reconcile this interpretation with the fact that Article X:3(b) recognizes that a "decision" may not be "final" in the sense that it suggests. The United States argues that a contrary understanding of what a "decision" means would require Members to implement *any* decision of a court or tribunal "immediately", but Article X:3(b) already holds open the possibility that a decision of a court of first instance or an intermediate court of appeal can be subject to further appeal, in which case the Member's obligation to implement the decision would remain contingent upon the outcome of that appeal.

36. The Federal Circuit's decision in *GPX V* was a decision that was subject to the obligations of the United States under Article X:3(b). Under Article X:3(b), the United States was required to ensure that the USDOC implemented and was governed in its practice by this decision, unless one of the two exceptions set forth in Article X:3(b) occurred. In this case, however, the event that prevented the implementation of the decision in *GPX V* was the intervention of the national legislature to change the law applicable to the underlying agency action, retroactively, and thereby direct the outcome of the appeal. As China has previously explained, this is not one of the exceptions to the obligation set forth in Article X:3(b) with respect to the implementation of the decisions of courts or tribunals.

37. The U.S. response to China's argument appears to be limited to its assertion that Article X:3(b) "does not define the relationship between legislatures and the judicial branch". It appears to be the U.S. position that because Article X:3(b) does not expressly proscribe or otherwise address the possibility of legislative intervention in ongoing judicial proceedings, it must be the case that such intervention is permitted under Article X:3(b).

38. This position has no basis in the text of Article X:3(b). It is an accepted canon of legal construction that "to express or include one thing implies the exclusion of the other or of the alternative". Because Article X:3(b) states that the decisions of courts or tribunals "*shall* be implemented by, and *shall* govern the practice of, such agencies *unless* an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers", it is evident under this canon of construction that there are no other exceptions to this requirement. Article X:3(b) does not contemplate the intervention by a national legislature to change the outcome of a judicial proceeding and thereby prevent the implementation of a decision. This action is therefore prohibited.

39. The Government of China and interested Chinese parties strongly and consistently objected when the USDOC began to apply countervailing duties to imports from China in 2006, on the grounds that this action was not in accordance with U.S. municipal law. They availed themselves of their right to judicial review of the USDOC's actions and ultimately prevailed in their understanding of U.S. law as it then existed. Consistent with Article X:3(b), and consistent with the principles of fairness and due process inherent in Article X, they had every expectation that a judicial decision in their favour would be implemented by the USDOC and would govern the practice of the USDOC in other proceedings that raised the same issue. It is of no solace that, as the United States notes, the U.S. Congress does not "routinely" go about depriving foreign parties of their litigation victories in U.S. courts. It happened here, and it is inconsistent with Article X:3(b), properly interpreted.

IV. The United States Has Failed to Rebut China's Demonstration that the USDOC Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

A. The Panel Can and Should Adopt the Panel's Factual Finding in DS379

40. While the Appellate Body has said that "factual findings made in prior disputes do not determine facts in another dispute", it also has recognized that "if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings." For the reasons China explained in response to Panel question 78, the situation the Appellate Body described in *US – Continued Zeroing* is precisely what the Panel confronts in this case. The factual question facing the Panel in this dispute is the exact question that was confronted by the panel in DS379, the underlying NME methodology that is the subject of that factual inquiry is identical, and the dispute is between the same parties.

41. The panel in DS379 concluded that "the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once", and provided a detailed account of its reasoning in paragraphs 14.67 to 14.75 of its report.

42. The United States elected not to appeal the panel's factual finding regarding the likelihood of the double remedy. As China demonstrated in its response to Panel question 78, the USDOC itself has since confirmed the accuracy of that finding through its measures taken to comply with the recommendations and rulings of the DSB in relation to the dispute in DS379. Nonetheless, in response to question 78 from the Panel, the United States argues that the Panel should not rely on the panel's factual finding in DS379 because it rests upon "a flawed premise that domestic subsidies are 'likely' to lower export prices to some degree".

43. China notes that the arguments presented by the United States in support of its contention that domestic subsidies may not result in a reduction in export price are exactly the same arguments that the United States presented to the panel in DS379. The panel properly concluded that "[t]aking both sides of the dumping margin equation into consideration" – i.e. looking at normal value and export price together – did not alter the panel's prior conclusion that a double remedy is likely to arise from the replacement of the producer's actual, subsidized costs with unsubsidized costs of production. Using the wholly reasonable assumption that it would be "the rare case" when domestic subsidies did not have some effect on export prices, the resulting dumping margin would "once again" reflect not only "price discrimination (dumping), but also … subsidies that were granted to the investigated producer."

44. For all of these reasons, the panel's conclusion that "at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology" is unassailable.

B. The United States Has Presented No "Cogent Reasons" for the Panel to Disregard the Appellate Body's Finding Under Article 19.3

45. China has described the Appellate Body's interpretation of Article 19.3 of the SCM Agreement in DS379 at length in both its first written submission and its oral statement at the first

substantive meeting of the parties. In brief, the Appellate Body in DS379 held that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record."

46. The Appellate Body has made clear that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Nonetheless, the United States argues that the Panel should disregard the Appellate Body's findings in DS379 in light of the arguments that it has presented in this dispute that were "not considered" by the Appellate Body.

47. The allegedly "new" arguments that the United States has presented in Sections VI(B)(1) and (2) of its first written submission relate to the ordinary meaning of the relevant terms in Article 19.3, when read in the context of both Article 19.3 as a whole and the remaining Article 19 provisions. The problem with these "new" arguments is that the United States ignores that the Appellate Body engaged in precisely the same ordinary meaning and contextual analysis in its interpretation of Article 19.3, and arrived at an understanding of that provision diametrically opposed to that advocated by the United States. It is the Appellate Body's legal interpretation, and not the contrasting view of a single Member, that the Panel is expected to follow in this dispute.

C. China Has Demonstrated that the USDOC Acted in Violation of Article 19.3 in the Investigations at Issue in this Dispute

48. The parties' interventions at the first meeting of the Panel and their answers to the Panel's questions establish their agreement that the *Kitchen Shelving* determinations in Exhibits USA-99 and USA-100 are representative of how the USDOC addressed the issue of overlapping remedies in all of the challenged determinations. Accordingly, if the USDOC's approach in the *Kitchen Shelving* determinations is the same as the approach that it took in the investigations at issue in DS379, then all of the determinations at issue are inconsistent with Article 19.3. This conclusion necessarily follows from the Appellate Body's finding that in the investigations at issue in DS379, the USDOC acted in violation of Article 19.3 by failing to investigate and avoid double remedies.

49. In point of fact, the USDOC's determinations in the *Kitchen Shelving* investigation are carbon copies of its determinations in the DS379 investigations, as China laid out in detail in response to question 79(b) from the Panel. The United States could not, and does not, contend otherwise. Instead, the United States argues in response to question 79(b) from the Panel that "by fully considering the factual evidence and arguments made by respondent parties, as illustrated by Exhibits USA-99 and USA-100, Commerce discharged any alleged burden to determine whether overlapping remedies would arise." The United States further argues that Chinese respondents "never presented, or attempted to present, any evidence concerning the actual extent to which the remedies may have overlapped".

50. These are the same arguments that the United States made in DS379, and that were rejected by the Appellate Body in that dispute. In DS379, the Appellate Body agreed with China that the investigating authority has an affirmative obligation to investigate and make its own determination about the existence of any double remedy. In paragraph 602 of its report, the Appellate Body explained that in order to make such a determination, an investigating authority would need to "solicit[]" relevant facts and "base its determination on positive evidence in the record".

51. The obligation on the investigating authority to solicit relevant facts and make a determination based on positive evidence is not contingent on the respondent's presentation of "evidence concerning the actual extent to which the remedies may have overlapped". Rather, it stems from the panel's finding, endorsed by the Appellate Body, that double remedies are "likely" when the concurrent anti-dumping duties are calculated on the basis of an NME methodology. It is not enough for the investigating authority to "fully consider[] the factual evidence and arguments made by respondent parties" if the investigating authority never solicits relevant evidence in the first place.

52. The United States has not attempted to argue that the USDOC actually engaged in the kind of investigation that the Appellate Body has said is required under Article 19.3 in any of the determinations at issue. China submits that the uncontested failure of the USDOC to investigate and avoid double remedies in the investigations at issue establishes a clear violation of Article 19.3 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the Second Meeting of the Panel

Article X:1

1. The U.S. defence of China's claim under Article X:1 is based on an interpretation that is contrary to its ordinary meaning, contrary to the manner in which this provision has been interpreted by prior panels, and contrary to interpretations that the United States has advocated in other disputes – including another dispute presently underway.

2. In *EC – IT Products,* the United States argued, and the panel agreed, that the term "made effective" in Article X:1 refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." Consistent with this holding, the United States is currently advocating in another dispute that the term "made effective" refers to the date on which a measure "is first rendered operative or applied in practice, or formally promulgated, *whichever is earlier*."

3. By its express terms, section 1 of the GPX legislation was made effective on 20 November 2006. This is the date on which the new section 701(f) of the Tariff Act had legal effect in practice, by supplying a statutory basis for countervailing duty investigations initiated on or after that date. As the United States successfully argued in *EEC – Dessert Apples,* a measure of general application is not "published promptly" under Article X:1 when it is backdated to apply to events that have already occurred.

4. In the present dispute, by contrast, the United States has taken the position that "Article X:1 requires that measures be published promptly *upon their adoption*". It is clear why the United States has been forced to take this position – it has no other option but to depart from the interpretation of Article X:1 that it has correctly advocated in other disputes. Under a proper interpretation of Article X:1, there simply is no justification for publishing a measure of general application nearly six years after it was made effective.

Article X:2

5. There are two key issues in dispute with respect to the proper interpretation and application of Article X:2. The first is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge on imports, or imposed a new or more burdensome requirement on imports. The second is what it means to enforce a measure before its official publication.

6. With regard to the first issue, the U.S. second written submission continues to be confused and internally contradictory. Most importantly, it remains unclear to China whether the United States considers the meaning of its own municipal law to be relevant to the Panel's analysis under Article X:2. The United States continues to assert that the meaning of U.S. law prior to the enactment of the GPX legislation is irrelevant to the Panel's analysis because Commerce was already imposing countervailing duties on imports from China. Therefore, according to the United States, the enactment of the GPX legislation did not result in any change in Commerce's treatment of these imports. At the same time, however, the United States is still trying to convince the Panel that U.S. law permitted the application of countervailing duties to imports from China prior to the enactment of the GPX legislation.

7. It seems to China that the United States lacks the courage of its convictions. If the only relevant fact under Article X:2 is that Commerce was already applying countervailing duties to imports from China, then the United States should be completely indifferent to the meaning of its prior municipal law. It is altogether unclear, then, why the United States continues to argue in its second written submission that imports from China "were already subject to the U.S. CVD law" prior to the enactment of the GPX legislation. The United States has devoted a great deal of effort to trying to convince the Panel of this assertion, for no apparent reason.

8. It is clear, though, why the United States has been forced to tack back and forth between these contradictory positions. If the relevant baseline under Article X:2 is prior municipal law,

properly determined as a question of fact, the United States must realize that it has no evidence to support its assertion that U.S. law previously provided for the imposition of countervailing duties on imports from NME countries. This explains, for example, why the United States has taken the position that the text of the GPX legislation is "irrelevant" to the Panel's analysis under Article X:2 – it knows that any objective examination of the statute leads to the conclusion that the statute amended the Tariff Act to provide for the application of countervailing duties to imports from NME countries. The United States does not want prior municipal law to be the baseline under Article X:2, and it does not want the Panel to examine the text of the measure at issue in this dispute, because it is obvious that the GPX legislation had the types of effects that place it squarely within the scope of this provision.

9. At the same time, the United States must realize that its proposed interpretation of Article X:2 – that the relevant baseline is whatever Commerce's "existing approach" happened to be – is not viable as a matter of treaty interpretation. This is why the United States continues to argue about the meaning of U.S. law prior to the enactment of the GPX legislation. The problem for the United States, however, is that it has no evidence whatsoever to support its assertions about the meaning of prior U.S. law. Its "evidence" seems to amount to nothing more than an implicit assertion that U.S. law is synonymous with whatever Commerce happens to be doing in practice at any given point in time.

10. The United States asserts, for example, that "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." The second sentence in this statement is an obvious non-sequitur. As subsequent events confirmed, "Commerce's existing and well-known treatment" of imports from China was not the same as "the U.S. CVD law" as it then existed. The fact that Commerce was applying countervailing duties to imports from China does not mean that "the U.S. CVD law … applied to these imports". U.S. law is not synonymous with Commerce's "treatment" of imports.

11. What this non-sequitur illustrates, however, is the importance of evaluating the issues under Article X:2 from the standpoint of the United States as a Member of the WTO, not from the standpoint of the United States Department of Commerce as a single agency of the United States government. Here at the WTO, what matters for the purposes of Article X:2 is not what Commerce was doing in practice, or how the members of the U.S. delegation believe that U.S. law should have been interpreted. What matters is what the law of the United States was prior to the enactment of section 1 of the GPX legislation, as reflected in published measures of general application. For the reasons that China set forth in its second submission, this is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge, or imposed a new or more burdensome requirement on imports. This baseline must be determined by reference to valid sources of municipal law, not the mere assertions of the United States before this Panel.

12. On one side of this dispute, China has demonstrated by reference to the text of the measure at issue that it effected an advance in a rate of duty or other charge, and imposed a new or more burdensome requirement on imports. China has further demonstrated by reference to authoritative decisions of the United States Court of Appeals for the Federal Circuit that U.S. law did not previously provide for the application of countervailing duties to imports from NME countries. On top of that, China has thoroughly rebutted the unsubstantiated U.S. assertion that the GPX legislation was merely a "clarification" or "confirmation" of U.S. law as it always existed. On the other side of this dispute, by contrast, the United States has refused to engage with the text of the measure at issue, and has offered no factual evidence to support its assertions about the meaning of prior U.S. law. There is no factual support at all for its assertion that U.S. law provided for the application of countervailing duties to imports from NME countries prior to the enactment of section 1 of the GPX legislation. For these reasons, it is clear that section 1 of the GPX legislation is a measure of the type described by Article X:2.

13. The second major issue in dispute in relation to Article X:2 is whether the United States enforced this measure before it was officially published on 13 March 2012. This should not be a hard question to answer – it is obvious from basic principles of treaty interpretation that Article X:2 precludes the application of measures falling within its scope to events that occurred prior to its official publication. The panel and Appellate Body easily recognized this point in *US – Underwear*. For the reasons that China has explained, the fact that Article X:2 precludes the

application of a measure to events that occurred prior to its official publication follows from the undisputed ordinary meaning of what it means to "enforce" a measure, from the interpretation of Article X:2 within the broader context of Article X, and from a proper consideration of the object and purpose of the GATT 1994.

14. Not having any meaningful response to these points, the United States has been forced to concoct an elaborate and confusing interpretation of Article X:2 that has something to do with what the United States calls "secret measures". To the extent that China can even figure out what the United States is talking about, the proposed U.S. interpretation of Article X:2 appears to elevate form over substance, and would appear to render Article X:2 entirely redundant of the prompt publication requirement under Article X:1. With no interpretative support for this result, the United States has based its interpretation of Article X:2 on a clear mischaracterization of the Appellate Body's holdings in *US – Underwear,* a mischaracterization that China has now thoroughly debunked in its second submission. The panel and Appellate Body holdings in *US – Underwear* are fully consistent with China's interpretation of Article X:2, not the "secret measures" interpretation advocated by the United States.

15. In sum, it is clear on the face of the GPX legislation itself that it advanced a rate of duty or other charge on imports and imposed a new or more burdensome requirement on imports, and that the United States enforced this measure before its official publication in violation of Article X:2. As China has explained throughout this dispute, section 1 of the GPX legislation is a paradigmatic example of what Article X:2 precludes – the application of a measure to events that occurred prior to its official publication. The application of section 1 to countervailing duty investigations initiated prior to its official publication was plainly inconsistent with this provision.

Article X:3(b)

16. China has already responded in detail to the assertion by the United States that Article X:3(b) does not require a Member to ensure that the decisions of its courts or tribunals are actually enforced. The contention by the United States that it would not be inconsistent with Article X:3(b) for Commerce "to flout a final decision of the U.S. federal courts" is truly one of the more remarkable positions that the United States has taken in this dispute. China has demonstrated that the "structural" interpretation of Article X:3(b) that underlies this contention is incorrect, and will not discuss it further here.

17. What the United States has failed to come to terms with is the fact that Article X:3(b) prescribes exactly what may happen to a decision of a court or tribunal. As is evident from the requirement that such decisions "*shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction", there are no other exceptions to this requirement, other than the collateral challenge proviso. The United States has failed to explain how the intervention of the United States Congress to change the outcome of an ongoing judicial proceeding was consistent with this requirement. Nor has the United States explained how it can possibly be consistent with the purpose of independent judicial review to allow this to occur.

18. As with its other proposed interpretations of Article X, the United States is effectively trying to read Article X:3(b) out of the GATT by reducing it to a nullity. The Panel must reject this interpretation.

Article 19.3 of the SCM Agreement

19. China has demonstrated that the 26 countervailing duty determinations at issue in this dispute are indistinguishable from those that the Appellate Body found to be inconsistent with Article 19.3 of the SCM Agreement in DS379. In each of the determinations at issue, Commerce declined to take any steps to investigate and avoid the double remedies that were likely to result from the application of countervailing duties in conjunction with anti-dumping duties determined under the U.S. nonmarket economy methodology. Likewise, in the parallel anti-dumping determinations, Commerce made no effort to investigate the problem of double remedies and declined to take any steps to avoid double remedies for precisely the same reasons that it had cited in the parallel anti-dumping determinations in DS379.

20. The United States does not seriously contend that there is any material difference between the determinations at issue in DS379 and those at issue here. In fact, at the last meeting of the Panel, the United States submitted the CVD and AD determinations in the *Kitchen Shelving* investigations, which are identical to those at issue in DS379, and conceded that the other determinations at issue in this dispute are the same. Thus, there should be no disagreement between the parties that the determinations at issue in the present dispute are on all fours with the determinations that were found to be inconsistent with Article 19.3 in DS379.

21. The U.S. defence of these determinations comes down to two propositions, one factual, and the other legal. The factual proposition is that the Panel should decline to find that double remedies were likely to occur in the investigations at issue, even though the methodologies that Commerce used in these investigations were identical in all respects to those at issue in DS379. The United States has tried to dress this up as a series of speculations about why a double remedy might not occur under certain circumstances. As China has demonstrated, however, the panel in DS379 addressed these same speculations and found that they did not detract from its finding that double remedies were likely to occur.

22. In DS379, the panel's bottom-line conclusion, even after taking the U.S. speculations into account, was that "at least some double remedy will likely arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology." The United States opted not to challenge these factual findings before the Appellate Body.

23. The United States has presented the Panel with no reason whatsoever to reach a different factual conclusion than the panel in DS379. It has presented no reason for the Panel to believe, for example, that double remedies were any less likely to occur on the facts of these investigations than on the facts of those at issue in DS379. And since the panel in DS379 made those findings, the United States has subsequently concluded in its compliance determinations in that dispute that 63 per cent of the input subsidies at issue had been remedied twice. Notably, the United States found the same amount of double remedy across four different investigations involving four different products. The United States has offered no reason to believe that a similar factual conclusion would not be warranted with regard to the investigations and products at issue here. In this way, the United States has fully confirmed the factual accuracy of the panel's conclusion that "at least some double remedy will likely arise" from the concurrent application of countervailing duties and anti-dumping duties determined under the U.S. NME methodology.

24. This factual finding – that at least some double remedy is likely to occur – is what formed the basis for the Appellate Body's legal conclusion that the United States has an affirmative obligation under Article 19.3 to investigate and avoid these likely double remedies. As it did in DS379, the United States has tried to argue in the present dispute that the burden fell upon the Chinese respondents to demonstrate the existence and extent of a double remedy. However, as China explained in its second submission, the Appellate Body expressly considered and rejected this argument, holding that the United States has an affirmative obligation under Article 19.3 to solicit relevant facts pertaining to the issue of double remedies and reach a conclusion with regard to this issue that is based on positive evidence in the record. As I explained a moment ago, there is absolutely no indication in any of the determinations at issue in this dispute that Commerce discharged this affirmative obligation.

25. This brings me to the legal proposition on which the United States has based its defence – that the Panel should decline to follow the interpretation of Article 19.3 that the Appellate Body adopted in its report in DS379. For the reasons that China has explained at length, the United States has failed to present any cogent reasons for this Panel to adopt a contrary interpretation of Article 19.3. All of the so-called "new arguments" that the United States has put forward concerning the interpretation of Article 19.3 amount to nothing more than taking issue with the Appellate Body's detailed interpretative analysis of this provision. The Appellate Body engaged in a thorough textual and contextual analysis of Article 19.3 and concluded that it imposes an affirmative obligation upon the United States to investigate and avoid the double remedies that are likely to occur in the NME context. It is this interpretation of Article 19.3 that the Panel is expected to follow, and it should do so here.

ANNEX B-2

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF THE UNITED STATES

Executive Summary of the First Written Submission of the United States of America

I. INTRODUCTION

1. The legislation of the U.S. Congress ("Congress") reaffirming the existing application of U.S. countervailing duty ("CVD") laws to imports from nonmarket economy countries ("NMEs"), or what is commonly known as the "*GPX* legislation," is fully consistent with U.S. obligations under Article X of the *General Agreement on Tariffs and Trade 1994* ("the GATT 1994"). China's claims under Article X of the GATT 1994 fail as a matter of fact and law. China's claims are based on a fundamental misunderstanding of U.S. CVD law and the effect of the *GPX* legislation. The law affirmed the U.S. Department of Commerce's ("Commerce") pre-existing approach to the application of the U.S. CVD law to NME countries such as China. It did not change or otherwise affect the approach that Commerce had been using in the challenged CVD proceedings. Rather, it maintained the *status quo* that existed prior to its enactment.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

3. Despite its length, China's discussion of Commerce's application of the U.S. CVD law to imports from China is incomplete. The United States provides a summary of those facts which may be relevant to the claims that China has raised under the WTO Agreement.

4. First, any discussion of the U.S. CVD law must begin with the plain text of the law, which China fails to provide in its background section. The plain text of the law requires that Commerce must apply countervailing duties to any country where it can identify a countervailable subsidy. Second, a 1986 decision by a U.S. appellate court, *Georgetown Steel v. United States*, did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the U.S. appellate court in *Georgetown Steel* deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. In other words, the U.S. appellate court simply affirmed Commerce's broad discretion to find the existence of a countervailable subsidy. Third, China's assertion that following the *Georgetown Steel* decision, the existing U.S. law prohibited the application of the U.S. CVD law to NME countries fails as a matter of fact. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies. Fourth, in 2006, based on a petition from a U.S. domestic industry, Commerce initiated a CVD investigation on certain Chinese imports in which it determined that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s that it was no longer impossible to identify subsidies there. Fifth, the so-called *GPX* litigation is an on-going challenge to Commerce's approach in the U.S. domestic court system. One of the opinions issued in the middle of a string of judicial opinions in this litigation raised a differing view of what Congress intended in the U.S. CVD law. This view differed from previous court decisions and Commerce's existing application of the U.S. CVD law. The opinion, *GPX V*, however, is legally insignificant as it never became final. Finally, while the opinion was pending on appeal, Congress enacted the *GPX* legislation, which affirmed that the U.S. CVD law is applicable to all countries, including NME countries.

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

5. China's claims under Article X:1 of the GATT 1994 rest not on a proper interpretation of the text of that provision, but on an implausible reading that would require publication before the

existence of a measure and substantive requirements governing the content of a measure. Such a reading is unfounded.

6. As an initial matter, China fails to state which of the categories listed in Article X:1 of the GATT 1994 is applicable to the *GPX* legislation. Without satisfying this threshold issue, China's claims under Article X:1 of the GATT 1994 must fail.

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

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

9. A number of elements of Article X:1 of the GATT 1994 makes this clear. First, the starting point of Article X:1 of the GATT 1994 is that it applies to "laws, regulations, judicial decisions, and administrative rulings of general application" pertaining to certain enumerated subjects. At the risk of stating the obvious, these law, regulations, etc. must be in existence for Article X:1 of the GATT 1994 to apply. In addition, Article X:1 of the GATT 1994 only applies if these types of measures have been "made effective by any [Member]." This "made effective" clause is a limitation on Article X:1 of the GATT 1994 – that is, it excludes from the scope measures that may be in existence, but have not been made effective by a Member. Also, the past tense of the term "made effective" shows that the obligation in Article X:1 of the GATT 1994 applies to measures that have been adopted at some point in the past. The "made effective" clause cannot be read, as China implies, as some sort of additional, substantive obligation to the effect that measures of general application must not apply to past factual situations.

10. Once a measure of general obligation falls within the scope of Article X:1, the article imposes two obligations on the Member that has adopted the measure: the measure must be published (i) "promptly" and (ii) "in such a manner as to enable governments and traders to become acquainted with [it]."

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

12. China proposes to reinterpret Article X:1 of the GATT 1994 not as a procedural requirement on publication, but instead as a substantive obligation. China's argument, however, cannot be squared with the plain text of Article X:1 of the GATT 1994. On the undisputed facts of this dispute, China presents no basis for a finding that the *GPX* legislation was not published promptly. Indeed, China itself states that "[t]he bill was signed by President Obama on 13 March 2012 and officially published on the same date." Given that, as China agrees, the *GPX* legislation was published on the same day that it came into existence, China has no basis for any claim that the measure was not published "promptly" under Article X:1 of the GATT 1994.

13. China argues that "the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries." The plain meaning of "manner" is "the way in which something is done, the mode or procedure." China has presented no basis for a claim that the U.S. publication of the *GPX* legislation was inconsistent with the obligation in Article X:1 of the

GATT 1994 regarding the manner of publication. In fact, the *GPX* legislation was published in the *United States Statutes at Large,* on the same day it was enacted. The *United States Statutes at Large* is readily available to China, Chinese traders and other members of the public. Accordingly, the publication of the *GPX* legislation met the Article X:1 of the GATT 1994 obligation regarding the manner of publication.

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

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

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

17. In fact, Article X:1 of the GATT 1994 itself recognizes that measures may affect events that occurred prior to the publication of a measure. Looking further afield than the text of Article X:1 of the GATT 1994, the application of legal obligations to previous actions is embodied in international law and the parties' own legal systems.

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

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

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

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

21. The requirements for a measure to be covered by Article X:2 of the GATT 1994 can be separated into two parts: the general type of measure, and the requirement that the measure represents a certain type of change from a prior measure. The general types of measures covered by Article X:2 of the GATT 1994 are either a measure of general application effecting a duty rate

or other charge on imports under an established and uniform practice, or a measure of general application imposing a requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either category. As such, China has failed to present *a prima facie* case.

22. Although it is China's burden to present its case in the first instance, the United States notes that it is difficult to understand how China would intend to try to fit the *GPX* legislation within the scope of Article X:2 of the GATT 1994. First, laws involving CVDs do not "effect a an advance in a rate of duty or other charge on imports under an established and uniform practice." Unlike, for example, an ordinary customs duty, countervailing duties do not "effect" (which means to "bring about" or "produce") any particular "rate" or level of a CVD duty under established or uniform practice, unlike a customs tariff which sets out rates of duty. In contrast, CVD laws describe a process for determining a special CVD duty, and CVD laws themselves do not bring about or produce any particular duty rate.

23. Second, China fails to establish that the *GPX* legislation imposes a "requirement, restriction or prohibition" under Article X:2 of the GATT 1994. Rather, China asserts that the *GPX* legislation "'impos[es] a new or more burdensome requirement, restriction or prohibition on imports' in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties." China's argument assumes the conclusion, and fails to explain how the *GPX* legislation imposes a requirement, restriction, or prohibition.

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

25. Because there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports, Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty. The Oxford English Dictionary defines "rate" as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation." Section 1 of the *GPX* legislation imposes no such change, advance or decrease, in the total quantity, amount or sum of CVDs. The rate remains the same as previous to the enactment of the *GPX* legislation.

26. Further, China's argument ignores the requirement under Article X:2 of the GATT 1994 that the initial duty rate (that is, prior to the "advance" in the rate, there must have been "an established and uniform practice."). Even if the *GPX* legislation could be considered as modifying U.S. law (which it did not), it could never be said that the situation prior to the *GPX* legislation could be described as an "established and uniform practice" not to apply CVDs to imports of China. To the contrary, as explained above, the established and uniform practice since at least 2006 was to apply CVDs to China. Moreover, even before that time, Commerce maintained procedures for applying the U.S. CVD law to any country where a countervailable subsidy (or bounty or grant) could be determined.

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

28. Section 1 of the *GPX* legislation was neither a change in the law, nor did it result in any change in the treatment of imports from China. Rather, the legislation reaffirmed Commerce's interpretation of existing law for the purposes of resolving confusion in ongoing litigation. Prior to the law's enactment, Commerce acted pursuant its reasonable interpretation of the Tariff Act of

1930 to apply the U.S. CVD law to China when it could identify a countervailable subsidy in China. For the past seven years, the U.S. CVD laws have applied to imports from China.

29. Though challenged on a number of occasions as being *ultra vires*, Commerce's decision was upheld by a number of U.S. courts. China relies on the fact that five years following its initial judicial challenge of Commerce's decision and numerous CVD proceedings later, the U.S. Federal Circuit issued a contradictory opinion based on legislative silence. The only effect of this opinion, which was not final, was to provide China notice that the state of the relevant U.S. CVD law was unsettled. Section 1 of the *GPX* legislation does not impose any "new or more burdensome" requirements, restrictions or prohibitions. Rather, it maintains Commerce's existing approach.

30. Given that the *GPX* legislation resulted in no change in the treatment of imports from China, and no change in U.S. law, the United States submits that the *GPX* legislation is not a measure covered by Article X:2 of the GATT 1994. Nonetheless, the United States also notes that China has failed to show that the *GPX* legislation is inconsistent with the obligation set out in Article X:2 of the GATT 1994. Although the United States is not in a position to respond to an argument that China has not made, the United States notes that the facts in this case do not support a contention that the *GPX* legislation is inconsistent with this obligation. In particular, the *GPX* legislation was officially published on its date of adoption, March 13, 2012. And Commerce took no action prior to that date to enforce the measure.

31. Instead of addressing the specific language of the WTO provision and the facts of this dispute, China primarily relies on the Appellate Body's findings in *US – Underwear* to support a general proposition that Article X:2 of the GATT 1994 "precludes retroactivity." China's approach fails for a number of reasons. First, citation to a prior Appellate Body report does not substitute for the application of the specific language in Article X:2 of the GATT 1994 to the specific facts in this dispute. Second, a discussion focused on the general concept of "retroactivity" does not lead to any conclusion with respect any specific issue under the WTO Agreement. "Retroactivity" is not a term used anywhere in the GATT 1994.

32. Third, and finally, China misrepresents the Appellate Body findings in *US -Underwear.* What China fails to point out is that, although the Appellate Body discussed both the relevant ATC provisions and Article X:2 of the GATT 1994, the Appellate Body's ruling in favor of Costa Rica was based on the ATC provision (and not Article X:2 of the GATT 1994). In fact, the Appellate Body rejected the argument that Article X:2 precluded the application of the safeguard to imports that entered prior to the June 1995 adoption of the measure.

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

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

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

35. China's claim fails as a matter of fact. The *GPX V* opinion was not finalized under the U.S. judicial appeals process, and was under appeal, and therefore there was no final decision to implement. Such non-binding opinions are not "decisions" under Article X:3(b) of the GATT 1994. A decision of a U.S. appeals court is not final until the court issues what is known as a "mandate." If an appeal is timely filed, the mandate is stayed. In *GPX V*, the United States filed a timely petition for rehearing before all of the judges of the U.S. Federal Circuit, or *en banc*. Prior to the issuance of a mandate, U.S. federal appellate tribunals have broad discretion to alter their

judgments. Importantly, it is the issuance of the mandate that, if appropriate, transfers jurisdiction from the appellate court to the first instance tribunal.

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

36. China has not made a *prima facie* case for its claim under the SCM Agreement; and it erroneously interprets Article 19.3 of the SCM Agreement. As a result, its claim that the United States acted inconsistently with Article 19.3 of the SCM Agreement is baseless.

37. China fails to put forward legal arguments to make out a *prima facie* case. Instead, China merely argues that the findings of the Appellate Body in DS379 should be applied to the investigations and reviews at issue in the instant dispute. Rather than present the evidence necessary to support its legal claims, China makes conclusory and generalized allegations as to what Commerce found across 31 sets of determinations without even a cursory citation to a single piece of evidence. To make out a *prima facie* case, China must establish the facts of each determination to demonstrate evidence adequate to make out its case under the legal theory that it advances. However, China makes no mention of Commerce's determinations at all except to cite the list of challenged determinations in CHI-24.

38. Even had China actually presented the Panel with evidence and analysis in its first written submission, an examination of the 31 challenged sets of determinations would reveal that respondent parties had the opportunity to present Commerce with evidence and arguments demonstrating the existence of overlapping remedies and that Commerce fully addressed such evidence, or lack thereof. At the time of the determinations, Commerce was willing to consider any evidence of overlapping remedies. But in none of the 31 challenged sets of determinations did parties present such evidence. To the extent that parties submitted any information at all on the issue of overlapping remedies, it was in the form of theoretical economic arguments unsubstantiated with any evidence. China's submission contains absolutely no discussion of the facts at issue in the determinations made by Commerce. Therefore, China has failed to make a *prima facie* case.

39. China's failure to make a *prima facie* case is especially striking given that China's legal claim under the SCM Agreement is limited in scope. China, in its first written submission, purports to argue that the United States acted inconsistently with Article 19.3 of the SCM Agreement, and as a consequence, Articles 10 and 32.1. China, however, makes no effort to interpret Article 19.3 of the SCM Agreement, or apply this provision to the facts of this dispute. Rather than engage in an analysis of the text of Article 19.3 of the SCM Agreement pursuant to customary rules of interpretation, China relies exclusively statements made in the Appellate Body report in DS379. Statements of the Appellate Body, however, are not a source of WTO obligations, but instead constitute an interpretation of WTO obligations for the purpose of resolving that particular dispute.

40. Article 19.3 is essentially a non-discrimination provision. Article 19.3 first requires that a "countervailing duty" be levied "on imports of such product from all sources found to be subsidized and causing injury." That is, the CVD must be levied on "all" such sources, and not just some of them. Second, the text directs a Member to apply CVDs "on a non-discriminatory basis" on those imports. That is, when CVDs are levied on imports from all such sources, the Member is not to discriminate between those sources. Rather, a Member will impose a CVD on all imports of a product from each Member where the importing Member finds the product to be subsidized and causing injury. Third, Article 19.3 sets out that CVDs levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case."

41. Moreover, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. In other words, the amount of CVDs imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

42. Furthermore, the United States notes that nothing on the face of the phrase "levied in the appropriate amounts in each case" (nor any other language in the SCM Agreement) has any tie to the question of whether or not other measures, such as *anti-dumping* duties, have been applied,

nor any relation to rules outside the SCM Agreement. To read "in the appropriate amounts" as permitting consideration of the application of other measures or other, non-SCM Agreement rules, would convert "in the appropriate amounts" into a subjective standard, with bounds only set by the eyes of the particular interpreter.

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

44. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement. This context shows that the phrase in Article 19.3 – which requires that a Member levy CVD duties in "the appropriate amounts in each case" is not a general rule – unconnected to the nondiscrimination context of 19.3 – that applies to all aspects of the CVD duty.

45. There is one provision in the WTO agreement that disciplines the concurrent use of antidumping and countervailing duties on the same product, and it is not Article 19.3 of the SCM Agreement. Rather, it is Article VI:5 of the GATT 1994, and that article only applies to export subsidies. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping and export subsidization."

46. Further, Article 15 of the Tokyo Round Subsidies Code, specifically prohibiting the concurrent application of AD and CVD measures to certain countries, and the absence of a similar provision in the WTO agreements, provides additional evidence that the WTO Agreements do not concern the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994.

47. China's legal argument under Article 19.3 relies entirely on the understanding of that provision expressed by the Appellate Body in its report in DS379. However, a WTO panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. The rights and obligations of the Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements. The Appellate Body itself has stated that its reports are not binding on panels.

48. In DS379, the Appellate Body disagreed with the legal interpretation set out by the panel and reached certain findings with respect to Article 19.3 of the SCM Agreement. The United States respectfully disagrees with these Appellate Body findings. In particular, we consider that the Appellate Body in DS379 erred in its interpretation of Article 19.3 and consider that the interpretation set out above is a correct understanding of Article 19.3 pursuant to customary rules of interpretation. Notably, China did not argue for the interpretation of Article 19.3 that the Appellate Body in DS379 adopted. In fact, China largely based it claims on Article 19.4.

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

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

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

52. Fourth, in reaching its findings in DS379, the Appellate Body did not identify any limiting principle to provide some bounds for its interpretation of the term "in the appropriate amounts". Rather than clarify the meaning of "the appropriate amounts," the Appellate Body infused that term with an indeterminate, subjective meaning reliant upon how it interpreted provisions of covered agreements other than the SCM Agreement, which could have unknown or unintended consequences. One consequence of the Appellate Body report in DS379 is that an exporting Member, contrary to other situations, need not demonstrate that CVDs duties are not levied in appropriate amounts in each case in the case of simultaneous AD and CVD investigations. Instead, under the Appellate Body's rationale, the burden would appear to fall on the importing Member to prove that CVDs are levied in the appropriate amounts in each case, regardless of whether the exporting Member presented evidence to indicate otherwise.

53. Fifth, the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative. This Panel should not assume the same findings of the panel in DS379 but rather should make its own objective assessment. Further, neither the Panel nor the Appellate Body in DS379, in considering the impact of domestic subsidies upon export prices, recognized that the form of the subsidy is important because some domestic subsidies give domestic producers a greater incentive to increase production than others. Nor did the Appellate Body in DS379 consider that, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase will result in lower export prices. If the world market price is going up, it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy

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

55. For all of these reasons, the Panel should reject China's legal arguments and find that the United States did not act inconsistently with Article 19.3 in any of the 31 challenged sets of determinations.

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

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

Executive Summary of the Opening Statement of the United States at the First Substantive Meeting of the Panel

1. It may be useful to begin by taking a step back and considering why are we here? The provisions of Article X:1 and X:2 are directed to the publication of trade regulations to provide notice and transparency to traders. China cannot seriously contend that the U.S. CVD regime, and its application to China, has suffered from a lack of transparency. Similarly, the provisions of Article X:3(b) are directed to ensuring that Members set up an appropriate structure so that tribunals or procedures may review administrative action and that administrative agencies will then implement those decisions. And again, China cannot seriously contend that the United States has failed to set up such a structure for review or that the U.S. Department of Commerce is not bound by or does not implement such review decisions.

2. In relation to China's claim under Article 19.3 of the SCM Agreement, you may also be asking yourself why we are here. As noted, the U.S. Congress has acted already to require the Department of Commerce to investigate the extent of any so-called double remedy and to adjust the amount of antidumping duty imposed if necessary. Therefore, the U.S. argument in this dispute is not directed to changing the U.S. approach to this issue in the future. But there are two reasons we bring this issue of interpretation to the Panel.

3. First, we consider the Appellate Body's approach in interpretation to be erroneous, and the more one reads its rationale the less appropriate its interpretation of Article 19.3 appears. The Appellate Body report starts with the identification of a supposed problem and then seeks to find an interpretive solution to that problem. But this interpretive approach has it backwards: if the provision claimed to be breached is properly interpreted and then not found to be applicable to the situation the complaining party has brought forward, there is no "problem" under the covered agreements. Second, the Appellate Body's reading of the phrase "in the appropriate amounts" gives a meaning to that phrase which is not connected to its context in Article 19 or the rules for determining "appropriate amounts" in the SCM Agreement

4. Both sets of claims raised by China are flawed and should be rejected. In this statement we proceed to further detail some of those many flaws.

I. CHINA HAS CONFLATED THE LEGAL REQUIREMENTS AND CONCEPTS OF DOMESTIC LAW WITH THE REQUIREMENTS OF ARTICLE X

5. In this dispute, China has failed to provide a *prima facie* case that the *GPX* legislation is inconsistent with a plain reading of Articles X:1 and X:2, and that the U.S. actions with regard to the *GPX V* opinion is inconsistent with a plain reading of Article X:3(b).

6. As the United States will explain further below, the *GPX* legislation did not change or otherwise affect Commerce's existing approach of applying the U.S. CVD law to China. Specifically, the orders for the CVD proceedings listed in Appendix A of China's panel request have not been changed or otherwise affected by the *GPX* legislation. The law maintains the *status quo* for these orders.

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

7. We will first address China's claims under Article X:1. China's claims depend on reading words into Article X:1 that simply are not there, and these claims thus are without merit. Article X:1 imposes two procedural requirements for the publication of certain measures that have been "made effective." The first is that the measure be "promptly published." The second is that the measure be published in such a "manner as to enable governments and traders to become acquainted" with it. China has not demonstrated that the U.S. publication of the *GPX* legislation was inconsistent with these obligations. Article X:1 does not address how a measure should be applied following its publication. In fact and contrary to China's assertions, Article X:1 itself recognizes that measures may affect events that have occurred prior to the publication of a measure.

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

8. Next, we will address China's claim that the *GPX* legislation is inconsistent with Article X:2. China's claim fails for the following reasons. First, China has failed to prove that the *GPX* legislation is covered by Article X:2. Second, even if found to be within the scope of Article X:2, China has failed to prove that the *GPX* legislation is somehow inconsistent with the obligation.

9. In order to fall within the scope of Article X:2, a measure of general application must be of a type that either (1) effects an advance in a rate of duty or other charge on imports under an established and uniform practice, or (2) imposes a new or more burdensome requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either type. While the burden is on China to make a *prima facie* case, the United States notes that CVD laws provide the framework for determining a CVD duty. The law itself does not prescribe any particular duty rate, let alone effect an "advance" in such a rate, nor does it impose a requirement, restriction or prohibition on imports. Imports are affected once the separate and distinct legal process of an investigation is completed.

10. The *GPX* legislation does not effect an *advance* in a rate of duty. Consistent with the plain text of Article X:2, the panel in *EC – IT Products* found that a covered measure must change an existing approach in order to bring about an increase in a rate of duty. In this dispute, the *GPX* legislation has not changed Commerce's existing approach to apply the U.S. CVD law to China. Further, the *GPX* legislation has not changed any part of the CVD proceedings and orders listed in Appendix A of China's panel request. The CVD rates established through those proceedings remain the same as previous to the enactment of the *GPX* legislation.

11. Similarly, the *GPX* legislation does not impose a *new or more* burdensome requirement, restriction, or prohibition on imports. The term "new" is defined as "not existing before" or "existing for the first time." The term "more" is defined as "in a greater degree" or "to a greater extent." Thus, in order to fall within the scope of Article X:2, imports from China must face a requirement, restriction or prohibition that did not previously exist prior to the enactment of the *GPX* legislation, or face a burden that is of a greater degree than prior to the *GPX* legislation.

12. The *GPX* legislation imposes neither such condition. Prior to the enactment of the *GPX* legislation, imports from China were already subject to the U.S. CVD law. Thus, the law did not impose any condition that had not existed before. Further, the *GPX* legislation did not impose a greater degree of burden on such imports. None of the CVD proceedings cited in China's panel request have been disturbed by the *GPX* legislation. Rather, the law maintained the *status quo* for Commerce's existing approach and the existing CVD orders. Based on these facts, China has failed to prove that the *GPX* legislation is within the scope of Article X:2.

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

13. Next, we will move on to China's claims under Article X:3(b). China has alleged that the U.S. failure to implement a judicial opinion that was pending on appeal, known as the *GPX V* opinion, is inconsistent with Article X:3(b). Such a claim fails as a matter of fact and law.

14. As a factual matter, China is incorrect in its assertion that the *GPX V* opinion was a final decision that was not subject to appeal and had legal effect under the U.S. judicial system. Specifically, China fails to account for the fact that a "mandate" is required to finalize a U.S. appellate court opinion. The U.S. Federal Circuit itself has stated that a mandate was not issued for the *GPX V* opinion because the case was still under appeal. Therefore, *GPX V* was not a final decision that could direct the court of first instance.

15. Further, because the mandate had not issued, the court of first instance could not implement the *GPX V* opinion as a matter of U.S. law. Thus, contrary to China's assertion that the appeal of the *GPX V* opinion was a mere technicality, the issuance of a mandate in the U.S. judicial system is crucial to finalizing what is, up until that point, a non-binding opinion. Prior to the issuance of the mandate, such an opinion is not within the scope of Article X:3.

16. The United States notes that even if the *GPX V* opinion could be considered a "decision" under Article X:3(b), the requirements of the treaty article still would not be applicable to *GPX* V. Article X:3(b) expressly recognizes that an administering authority need not implement a judicial

decision that is under appeal. Specifically, it states that judicial decisions must be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period." In *GPX V*, the United States filed a timely petition for rehearing before the U.S. Federal Circuit sitting *en banc*. In other words, the proceedings had not concluded and the United States had not exhausted its rights to appeal. In fact, the *GPX* litigation is still on-going.

17. As a matter of law, China's claim under Article X:3(b) is not based on the text of the relevant WTO provision, but instead on other vague or irrelevant legal concepts. China has no basis for such an interpretation, as it must prove its allegations based on the specific language of the specific obligations of Article X:3(b).

18. As an example, China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government" is incompatible with Article X:3(b). China's claim has no support in the text of the article. Article X:3(b) does not dictate the relationship between a domestic legislature and the judicial branch. Nor does it not prohibit the timing of when a piece of legislation may be enacted. Article X:3(b) does not prohibit the enactment of the *GPX* legislation because of pending domestic litigation. As the *GPX* litigation has been ongoing for the past five years, China's interpretation of Article X:3(b) would paralyze the ability of legislatures to enact laws and is unsupported by the plain text of the obligation.

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

19. China has advanced claims with respect to 31 sets of determinations. Yet, at each step in this case – in particular its panel request, and, most importantly, in its first written submission – China has failed to present and substantiate its claims through a discussion of the facts, and arguments. Despite advancing claims that dozens of Commerce's findings were inconsistent with the SCM Agreement, China barely discusses Commerce's determinations at all.

20. China declined to include in its first written submission virtually any discussion of the facts at issue in the determinations it challenges here. Accordingly, China has failed to establish a *prima facie* case. China's lackluster effort in making its legal argument raises an eyebrow. Rather than engage in a textual or contextual analysis of the obligations imposed by Article 19.3 of the SCM Agreement, it relies exclusively on statements made in the Appellate Body report in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

21. Now, aside from the defects in China's approach, the United States would like to take this opportunity to make a few points about the Appellate Body report in DS379 and also the U.S. interpretation of Article 19.3 of the SCM Agreement. First, this Panel is not bound by the Appellate Body report in DS379, particularly as the Appellate Body erred in its interpretation of Article 19.3. Second, with respect to the interpretation of Article 19.3 of the SCM Agreement, the Panel is to undertake its own interpretations of that term by applying the customary rules of interpretation of public international law.

22. When that text is analyzed pursuant to customary rules of interpretation, it becomes evident that 19.3 of the SCM Agreement is first and foremost a non-discrimination provision to ensure that the amount of countervailing duties levied corresponds to the amount of subsidies identified. Third, the context provided by the SCM Agreement and its structure support this understanding of Article 19.3. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement.

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

24. Lastly, China contends that, because the United States acted inconsistently with Article 19.3 of the SCM Agreement, it also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement also must fail.

Executive Summary of the Second Written Submission of the United States of America

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. 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.

2. Regarding its claim under Article 19.3 of the SCM Agreement, China's failure to make its *prima facie* case persists. 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. China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should therefore be rejected.

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

3. 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. 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.

4. 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. Otherwise, without the existence of the law, there is nothing to apply or make effective. China's approach also finds no support in the EC – IT Products panel report. 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. As such, China has no basis for any claim that the United States acted inconsistently with Article X:1 of the GATT 1994.

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

5. 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.

6. 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. 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.

7. 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." 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.

8. 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. 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. 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.

9. 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. The *GPX V* opinion is not a final decision of the U.S. Federal Circuit and has no legal effect under U.S. law. As such, Commerce was not obligated to implement its findings and, under U.S. law, was prohibited from such implementation.

10. 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 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. China cannot have it both ways.

11. 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."

12. 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.

13. 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. 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."

14. 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." 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. 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.

15. 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. 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. 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.

16. 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." 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.

17. 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.

18. Although China has used the terms "P.L. 112-99," "Section 1 of P.L. 112-99" and "Section 1(b) of P.L. 112-99" 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.

19. 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.

20. 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.

21. 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." 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.

22. 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." Such a statement is false for the challenged imports.

23. First, a CVD proceeding is not a "requirement" on imports. That is, it does not impose requirements or conditions on the importation of goods. 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. 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.

24. China asserts that the United States has never provided an interpretation of Article X:2. This is incorrect. 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).

25. The Appellate Body has observed that Article X does not address the "substantive content" of measures. 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.

26. For measures that do fall within its scope, 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.

27. 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." 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. 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." However, Article X:2 cannot be interpreted to contain such a prohibition.

28. 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. 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

29. China now appears to raise a broader and potentially new claim, seemingly asking the Panel to find that Article X:3(b) imposes restrictions on national legislatures 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.

30. 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. 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:

- 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.

31. 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. 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.

32. China's argument, however, is unsupported by the principles of treaty interpretation. 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.

33. 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 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. 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.

34. 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)." 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).

35. The United States has established a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters. 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

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

37. 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.

38. 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. 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.

39. 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.

40. 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.

41. 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.

42. 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, a panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. 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.

43. The Appellate Body's reasoning in DS379 is flawed. 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. 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. China has done nothing to demonstrate that this reading is flawed in any respect.

44. 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. China commits a similar error when it argues that preliminary determinations are subject to Article 19.3.

45. 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. For example, the Appellate Body misconstrued Article 19.3 in articulating a duty for an authority to engage in an investigative function. The Appellate Body also misconstrued

the findings in *US – Countervailing Measures on Certain EC Products.* In particular, the Appellate Body interpreted Article VI:3 using Article 19.4 of the SCM agreement as context. 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.

46. 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. 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. 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.

47. 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.

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

48. 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. 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

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

Executive Summary of the Opening Statement of the United States of America at the Second Substantive Meeting of the Panel

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

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

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

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

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

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

7. The United States recalls that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its AD law, and China is not challenging that concurrent application in itself. The United States has exercised this right since 2006. China nevertheless claims that the United States, of all WTO Members, could not apply CVDs to exports from China during the period from 2006 until 2012, and that WTO law should prohibit the application of legislation enacted by the U.S. Congress to preserve Commerce's existing practice of applying CVDs to exports from China. That is an astonishing argument, and as we set out in this statement, one entirely dependent not only on the Panel committing a series of interpretive errors, but also for the Panel to resolve issues of U.S. law contrary to Commerce's interpretation, contrary to the intent and expectation of the U.S. Congress, and which the U.S. courts are considering but have not resolved. The Panel should

not engage in that speculative exercise and it can resolve China's claims on simpler grounds under Article X of the GATT 1994.

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

I. CHINA'S ARTICLE X CLAIMS ARE WITHOUT MERIT

9. The United States has provided multiple bases on which China's claims can be rejected. Thus, it would not be necessary to make findings on every distinct basis on which those claims are flawed. However, because China expends a significant amount of effort and space attempting to read two uniquely domestic legal concepts into Article X, we will spend some time today rebutting those arguments to demonstrate that none of China's arguments withstand scrutiny. Those arguments are (1) that Commerce has acted ultra vires, and as a result, has violated Article X:2, and (2) that Articles X:1 and X:2 prohibit the "retroactive" application of domestic laws. Although China has stopped referring to these terms explicitly, it has continued to pursue them in its Second Written Submission.

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

II. CHINA'S ARGUMENT THAT THE PANEL SHOULD SPECULATE AND SUBSTITUTE ITS JUDGMENT ON U.S. LAW UNDER ARTICLE X:2 IS WITHOUT MERIT

11. China has continued to advance its ultra vires claim, this time as an issue of how domestic law should be "properly determined" for purposes of a so-called "baseline" for Article X:2. There are two fundamental problems with China's "properly determined" argument. First, Article X:2 does not address allegedly ultra vires actions by an administering agency. Thus, whether or not an administering agency's actions were ultra vires under domestic law is irrelevant for an evaluation of the consistency of a measure with Article X:2.

12. Second, China's argument would compel the Panel to speculate on the content of U.S. law and find that Commerce's interpretation was contrary to law. But the legal issue of whether Commerce was prohibited from applying the U.S. CVD law to China has not been resolved by U.S. domestic courts. Given that the courts have not finally spoken to the contrary and therefore Commerce's interpretation remains valid as a matter of U.S. law, the Panel has no basis under U.S. law to substitute its judgment for that of Commerce. The United States would caution that, if the Panel were to speculate and substitute its judgment on the content of U.S. law for Commerce's interpretation, it would run a significant risk of making a factual error.

13. Further, despite pending domestic litigation on these issues, China asserts in its Second Written Submission that a statement by Professor Richard Fallon will "put an end" to and "properly determine" whether the GPX legislation was a clarification or change of existing law and whether the GPX V opinion has any legal effect under U.S. law. China's assertion has no legal basis. First, the conclusions in the statement that Professor Fallon prepared for China are incorrect. Second,

under the U.S. legal system, law professors have no special or authoritative role in interpreting U.S. law. Nonetheless, to the extent the panel is interested in the views of U.S. law professors, the United States has requested the views of Dean John Jeffries, a noted U.S. constitutional law expert. Dean Jeffries' expert statement, submitted as exhibit USA-115, explains numerous shortcomings in Professor Fallon's statement.

14. As an initial matter, Professor Fallon – even though he prepared the statement on behalf of China – does not state and cannot state that the U.S. courts would find or have found that the GPX legislation is a change from previous law. His conclusion is only that it would be "unlikely" for a court to find that the law was a legislative clarification. On the legal status of GPX V, he states that "a U.S. court could very plausibly regard" the opinion to have binding legal effect. Such conclusions are speculative and cannot be treated as putting an end to the matter, as asserted by China.

15. First, on the issue of whether the GPX legislation is a change or clarification of the law, Professor Fallon's statement fails to provide the indicia that the courts have used to determine whether a law is a change or clarification. Rather, the statement focuses on whether there is "an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law." This indication, in Professor Fallon's opinion, is one of the "most important" indicia.

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

17. After surveying U.S. case law on the issue, the Court of Appeals for the Third Circuit found that there is "no bright-line test" to determine whether a law or regulation "clarifies" the existing law. The court noted that it did not "take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification." The court reasoned that "one could posit that quite the opposite was the case – that the new language was fashioned to clarify the ambiguity made apparent by the case law."

18. Second, regarding the issue of the legal status of GPX V, China's reliance on Professor Fallon's statement in no way advances China's argument. Further, the opinion stated by Professor Fallon is contrary to the overwhelming weight of authority under U.S. law. Importantly, it is contrary to the Federal Circuit's own decision in GPX VI, in which it stated that "an appellate court's decision is not final until its mandate issues." Further, Dean Jeffries explains that the U.S. Federal Circuit's position that the grant of rehearing suspended any legal effect of GPX V accords with settled law. Under U.S. law, when a panel grants rehearing, its original decision loses any effect. As a senior federal appellate judge stated, "[t]he first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated."

III. CHINA'S RETROACTIVITY CLAIM UNDER ARTICLE X:2 IS WITHOUT MERIT

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

IV. ARTICLE X:3(B) DOES NOT ADDRESS HOW A LEGISLATIVE BODY CAN ENACT LEGISLATION

20. In its Second Written Submission, China continues to argue that "the intervention by the U.S. Congress in ongoing judicial proceedings" is inconsistent with Article X:3(b). As the United States has explained, Article X:3(b) does not impose any limitations on the ability of a legislative body to enact laws altering the substantive content of the law.

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

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

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

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

24. The Appellate Body's interpretation goes far beyond the principles of non-discrimination and, as already noted, imposes an investigative function not reflected in that Article. Article 19.3 of the SCM Agreement seeks to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's arguments should be rejected.

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

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

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

28. China refuses to analyze the specific facts of each determination. Consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the

case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the parties have put before it here.

29. China makes no effort to demonstrate the existence of an overlapping remedy in any of the challenged determinations or to identify evidence from any of the challenged determinations that would support the theory adopted by the panel in DS379. In making as-applied challenges, China cannot simply rely on factual findings from a prior dispute.

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

31. In sum, China's arguments with respect to Article 19.3 fail.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

Executive Summary of the Written Submission of Australia

I. INTRODUCTION

1. This dispute raises important issues concerning Article X of the GATT 1994 and its reach into Members' domestic legal orders.

II. ARTICLE X:1

2. Article X:1 of the GATT 1994 requires Members to "promptly publish in such a manner as to enable governments and traders to become familiar with them", laws, regulations, judicial decisions and administrative rulings of general application pertaining to the range of subject matters listed in this paragraph. Article X:1 outlines a World Trade Organization (WTO) Member's obligations in relation to the publication of trade regulations and is fundamentally a provision about transparency.

3. Article X:1 is silent on whether "laws, regulations, judicial decisions and administrative rulings" can be applied retrospectively from the date of publication. This is notwithstanding the term "made effective", in the first sentence of Article X:1 which, in Australia's view, could, in the context of domestic legislation, mean "in force". This is consistent with the Appellate Body's interpretation of the term "made effective" in the context of Article XX(g) of the GATT 1994 in *US – Gasoline*.[1]

4. We note that the Panel in *EC – IT Products* found in relation to "made effective" that Article X:1 "covers measures that were brought into effect, or made operative, in practice and is *not limited to* measures formally promulgated or that have formally "entered into force"" (emphasis added).[2] However, this was in the context of an inquiry into whether Article X:1 extended to measures that were applied in practice, despite not being formally binding under European Union law.[3]

5. The factual situation at issue in this case is different. In our view, the Panel's statement in *EC – IT Products* cannot be read as meaning that publishing a law upon its enactment would be a violation of Article X:1 if the law has effects in the past. In Australia's view, Article X:1 does not render laws which have retroactive effects inconsistent with this provision.

6. Finally, it is important that Article X:1, which concerns a procedural obligation to publish, and X:2, which deals with the enforcement or operation of measures, not be conflated.

III. ARTICLE X:2

7. The Appellate Body in *US – Underwear* stated that the "essential implication" of Article X:2 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".[4] The Appellate Body also noted that "prior publication is required for all measures falling within the scope of Article X:2, not just

[1] Appellate Body Report, *US – Gasoline*, p. 20.
[2] Panel Report, *EC – IT Products*, para. 7.1048.
[3] "This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order." Panel Report, *EC – IT Products*, para. 7.1048.
[4] Appellate Body Report, *US – Underwear*, p. 21.

ATC [Agreement on Textiles and Clothing] safeguard restraint measures sought to be applied retrospectively".[5]

8. The Panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that Article X:2 can preclude retroactive application of a measure. It also noted, however, that compliance with this obligation depends on "the timing of the publication of a measure, and its enforcement *in particular circumstances affecting the rights of WTO Members*" (emphasis added).[6]

9. In Australia's view, where a measure does not "advance in a rate of duty or other charge on imports", or impose a "new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor", failure to publish that measure would not fall foul of Article X:2. This is consistent with the purpose of Article X:2 to protect the fundamental principle of transparency by ensuring due process where parties' interests are concretely affected by a particular measure.[7]

IV. ARTICLE X:3(B)

10. Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness.[8] It requires a balance between a trader's fundamental right to procedural fairness and the sovereign right of WTO Members to manage the manner in which they administer their own laws and regulations.[9]

11. Article X:3(b) contains a number of specific obligations. This includes that WTO Members are required to maintain independent tribunals in respect of the review of customs actions which "shall be implemented by and shall govern the practice of" the agencies concerned "unless an appeal is lodged …".

12. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in this provision and remains a matter for each WTO Member in accordance with its own constitution and system of government.[10]

13. Article X:3(b) does not prevent WTO Members from legislating and having such legislation applied by their courts so long as they comply with the specific obligations of the provision. A WTO Member's ability to legislate retroactively on a matter that is being considered by a court is a matter for each Member's domestic legal system.

[5] Ibid.
[6] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.181.
[7] Appellate Body Report, *US – Underwear*, p. 21.
[8] Appellate Body Report, *US – Shrimp*, para. 183.
[9] Panel Report, *Thailand – Cigarettes*, para. 7.874.
[10] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 205.

Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel

INTRODUCTION

1. This dispute raises important issues concerning Article X of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as well as the Agreement on Subsidies and Countervailing Measures.

2. Australia, in a separate written submission, has already addressed issues concerning Article X. This Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel considers what a party needs to demonstrate in order to establish a violation of World Trade Organization (WTO) law.

II. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

3. It is a well-established principle that to establish a violation of WTO law, a party needs to adduce evidence and make arguments as to how a measure or measures are inconsistent, as such or as applied, with an obligation under relevant provisions of the WTO Agreement.[1]

4. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body (DSB)] cannot add to or diminish the rights and obligations provided in the covered agreements." Taken together with Articles 7 and 11 of the DSU, it is clear that panels are obliged to consider each dispute on its merits under the relevant provisions of the covered agreements.

5. While there is no binding rule of precedent in the WTO dispute settlement system, the Appellate Body has previously stated that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[2] This is consistent with the view it previously expressed that panel decision give rise to "legitimate expectations among WTO Members"[3] and "should be taken into account where they are relevant to any dispute."[4]

6. Australia considers that there may be instances where it would be appropriate for a panel to depart from prior Appellate Body findings, including where the evidence presented in a particular case gives rise to a different factual situation that could distinguish it.

7. For Australia, it is nevertheless important to distinguish the question of the *role of precedent* in the WTO dispute settlement system from the question of *the status of prior panel and Appellate Body findings for WTO Members' rights and obligations under WTO Law*. Australia considers that while previous decisions of the Appellate Body may be highly persuasive in how a provision of a covered agreement should be *interpreted*, these interpretations do not in themselves give rise to substantive obligations. To establish a violation of WTO law it remains necessary to identify the relevant WTO provision and obligation contained therein, and to explain the basis for the claimed inconsistency of the measure with that provision on the basis of evidence.[5]

[1] Appellate Body report, *US – Gambling*, paras. 140-141.
[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[3] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.
[4] Ibid.
[5] See, for example, Appellate Body Report, *US – Gambling*, para. 141.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules. Canada's submission will address the concurrent application of anti-dumping and countervailing duties in cases in which normal values are calculated using costs or prices from outside the export nation in question.

II. THE CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING DUTIES WHERE NORMAL VALUE IS CALCULATED USING COSTS OR PRICES OUTSIDE CHINA

2. Canada submits that the WTO Agreements permit the concurrent application of anti-dumping and countervailing duties even where the investigating authority has calculated normal values using costs or prices from outside the home market in the dumping investigation. Canada agrees with the United States that this view is confirmed by the text of the relevant agreements, the Tokyo Round Subsidies Code and specifically confirmed with respect to China as a result of its accession protocol.

3. First, dumping and subsidization are acknowledged as two different causes of injury to domestic industries with distinct sets of rules giving rise to separate remedies: an anti-dumping duty to remedy injurious dumping and a countervailing duty to remedy injurious subsidization.

4. When an imported product happens to be both dumped and subsidized, and causes injury, an importing Member may impose both an anti-dumping duty up to the margin of dumping and a countervailing duty up to the amount of the subsidy.

5. Second, Article VI:5 of GATT 1994 confirms this right to impose concurrent anti-dumping and countervailing duties and expressly limits it in the particular circumstances of export subsidization.

6. Furthermore, the second supplementary provision to Ad Article V:1 of GATT 1994 provides that an importing WTO Member may calculate the normal value of products from centrally planned (i.e. non-market) economies using costs or prices in a surrogate country, instead of domestic prices (which is the norm under Article VI:1 of GATT 1994 and the Anti-dumping Agreement).

7. Third, the Tokyo Round Subsidies Code prohibited importing countries from applying both anti-dumping duties determined on this basis and countervailing duties. However, while WTO Members could have transferred this prohibition into the SCM Agreement during the Uruguay Round, they chose not to. If WTO Members had intended for the prohibition to be carried forward, they would have expressly provided for this.

8. Fourth, with respect to Chinese products specifically, the possibility of imposing concurrent anti-dumping and countervailing duties even if they are not based on the prices or costs found in China is also confirmed by China's Accession Protocol.

9. Subparagraph 15(a)(ii) of China's Accession Protocol expressly permits importing WTO Members to calculate normal value on the basis of costs or prices outside China, if the Chinese producers under investigation fail to show clearly that market economy conditions prevail in their industry. Subparagraph 15(b) of China's Accession Protocol also contemplates that importing WTO Members may impose countervailing duties on Chinese products, allowing them to calculate Chinese subsidies on the basis of benchmarks outside China if there are "special difficulties" in the application of Article 14 of the SCM Agreement.

10. If WTO Members had intended to prohibit the concurrent application of anti-dumping duties calculated specifically on Chinese products on the basis of subparagraph 15(a)(ii) of China's Accession Protocol and countervailing duties, they would have done so in China's Accession Protocol just as they had done earlier in the Tokyo Round Subsidies Code. Instead, China's Accession Protocol enables importing WTO Members to impose both anti-dumping duties calculated on the basis of costs or prices outside China and countervailing duties at the same time.

11. Under GATT Article VI:3 the purpose of imposing a countervailing duty is to offset any subsidy. This purpose is reflected in Article 19.1 of the SCM Agreement, which provides that a countervailing duty may only be imposed "in accordance with the provisions of this Article". Article 19.4 of the SCM Agreement permits importing WTO Members to impose countervailing duty up to "the amount of the subsidy found to exist". A countervailing duty on a Chinese product will be in "the amount of the subsidy found to exist" if that amount is calculated in accordance with either: (a) Article 14 of the SCM Agreement ("Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient"); or (b) subparagraph 15(b) of China's Accession Protocol. No other method for calculating "the amount of the subsidy" is expressly prescribed.

12. Therefore, as long as the importing WTO Member does not impose a countervailing duty in excess of "the amount of the subsidy found to exist" (i.e. according to Article 14 of the SCM Agreement or subparagraph 15(b) of China's Accession Protocol), the duty will be in the "appropriate amount", as required by Article 19.3 of the SCM Agreement.

13. Canada notes that while the panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body regrettably reversed these findings. Canada considers that this reversal was in error. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the Dispute Settlement Understanding.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN UNION

1.1. CHINA'S CLAIMS AGAINST SECTION 1 OF P.L. 112-99

1. Whilst not taking a final position on the specific facts of the case, and in particular on the question of whether Section 1 of P.L. 112-99 maintains the *status quo* on procedures relating to the application of countervailing duties to NME countries, the European Union would like to make the following observations on the various claims raised by China under Article X of the GATT 1994.

1.1.1. China's claim under Article X:1 of the GATT 1994

2. The European Union disagrees with China's interpretation of Article X:1 of the GATT 1994 and agrees with the United States. The European Union considers that Article X:1 of the GATT 1994 seeks to ensure that trade rules are not kept secret but are publicly known by governments and traders so that they know what conditions would apply to their goods when imported into a Member's territory. The fact that those conditions may be altered by publishing a measure of general application in the future does not mean that such a measure was published in breach of the obligations under Article X:1 of the GATT 1994, insofar as the measure was published promptly (i.e. the time span between the adoption of the measure and its publication was "quickly" and "without undue delay") and in an appropriate manner (i.e., with respect to the means employed to make it available to the public) so that governments and traders became aware that the measure exists, regardless of its application only for the future or also to past events.

1.1.2. China's claim under Article X:2 of the GATT 1994

3. The European Union observes that Article X:2 of the GATT 1994 precludes retroactive application of a measure falling under its scope. Compliance with this obligation depends on the timing of the publication of a measure and its enforcement in particular circumstances affecting acquired rights of WTO Members and private entities. That being said, the European Union notes that the Anti-Dumping Agreement (Article 10) and the SCM Agreement (Article 20) both contemplate provisions envisaging the retroactive application of duties to a date prior the imposition of provisional and/or definitive measures. In the European Union's view, this indicates that the prohibition against retroactive effect in Article X:2 of the GATT 1994 is not absolute and has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities.

4. In the European Union's view, a relevant question for the Panel to examine is whether on 13 March 2012 there were any acquired rights or legitimate expectations that were affected by the US legislator's decision. The European Union understands that China agrees that "because the [Federal Circuit] court had not yet acted on the petition for rehearing, the [OTR] case was technically still pending before the court". If on 13 March 2012 the final collection of duties was still suspended until the court proceedings were completed, it could be argued that on that date private entities had not yet acquired rights or had legitimate expectations that the final collection of duties was definitive and final. In contrast, in cases where countervailing duties were imposed and finally collected and all judicial instances had been completed, those entities would have acquired a legitimate right and the legitimate expectation to have their duties revoked. The application of P.L. 112-99 to those events would be retroactive, contrary to Article X:2 of the GATT 1994. Therefore, the European Union considers that Article X:2 of the GATT 1994 protects acquired rights and legitimate expectations of WTO Members and private entities. In view of the transparency objective contained in Article X, Article X:2 permits operators to protect and adjust their activities in accordance with new laws and requirements affecting

their business and, thus, ensures that measures will not be applied to completed events or situations (e.g., where decisions under municipal law are final).

1.1.3. China's claim under Article X:3(b) of the GATT 1994

5. Article X:3(b) of the GATT 1994 relates to first instance review. It requires WTO Members to have procedures to review actions taken by administrative bodies relating to customs matters, thereby including the imposition of anti-dumping and countervailing duties. In this respect, Article X:3(b) ensures due process in relation to customs matters, and establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations. Article X:3(b) further requires that the decisions issued by those review procedures must be implemented and followed by the administrative bodies. Indeed, otherwise, the obligation under Article X:3(b) to establish such review procedures would be useless. Thus, WTO Members are required to ensure that their system of review provides for the relevant administrative action to be set right. Article X:3(b) also establishes the possibility to have the decision issued under the review procedures appealed before a court or a tribunal. In other words, it provides a guarantee of several instances of legal review of decisions issued by administrative bodies.

6. The European Union disagrees with China's interpretation. The fact that Article X:3(b) does not contemplate explicitly enacting a new law and directing national courts to apply the law retroactively to change the outcome of a case does not imply that there is an obligation to refrain from doing so in this provision. Silence on this issue should not be interpreted as imposing such obligation upon WTO Members. Article X:3(b) of the GATT 1994 establishes a due process obligation and minimum standards for transparency and procedural fairness in Members' administration relating to customs matters. However, this provision does not alter the possibility of legislators modifying rules or setting the temporal application of those rules. In the European Union's view, legislators should be allowed to change the law and confer it retroactive effect insofar as acquired rights and legitimate expectations are preserved.

7. In sum, the European Union considers that Article X:3(b) of the GATT 1994 should not be interpreted as prohibiting Members from taking legislative actions which would impact the decisions issued under the review procedures required under that provision. This is even more the case in situations where those decisions are not yet final.

1.2. DOUBLE REMEDIES

8. In *DS379* the AB explained that "double remedies" arise when the simultaneous application of ADDs and CVDs offset the same subsidization twice. "Double remedies" are "likely" to occur if an NME methodology is used. When authorities calculate a dumping margin for a product from an NME, they compare the export price to a NV that is based on surrogate costs or prices from a third country. Because prices and costs in the NME are unreliable, prices or COP in a market economy are used to calculate NV. Authorities compare the product's constructed NV (not reflecting any subsidy) with the product's actual export price (which, when subsidies have been received, is presumed lower than it would otherwise be). The dumping margin is thus based on an asymmetric comparison and is higher than it would otherwise be. Thus, dumping margins calculated with an NME methodology reflect not only dumping, but also subsidies affecting the producer's COP. An ADD calculated with an NME methodology may "remedy" or "offset" a domestic subsidy, if such subsidy has contributed to a lowering of the export price. The subsidization is "counted" within the overall dumping margin. When a CVD is levied against the same imports, the same domestic subsidy is also "counted" in the calculation of the rate of subsidization and, therefore, the resulting CVD offsets the same subsidy a second time. Accordingly, the concurrent imposition of an ADD calculated with an NME methodology, and a CVD results in a subsidy being offset twice. Double remedies may also arise in the context of domestic subsidies granted within market economies when ADDs and CVDs are concurrently imposed and an unsubsidized, constructed, or third country NV is used.

9. Article 19.3 ADA requires that CVDs be levied in the appropriate amounts in each case; and on a non-discriminatory basis. The term "appropriate" is not an absolute standard, but a relative one. The two requirements in the first sentence of Article 19.3 inform each other. Thus, it would not be appropriate for an importing Member to levy CVDs on imports

from sources that have renounced subsidies, or if price undertakings have been accepted. Similarly, the requirement that the duty be imposed on a non-discriminatory basis should not be read in an overly formalistic manner. While leaving to the importing Member the decision as to whether the amount of the CVD to be imposed shall be the full amount of the subsidy or less, Article 19.2 states that it is "desirable" that "the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury". Article 19.2 thus encourages authorities to link the amount of the CVD to the injury. Once a causal link is demonstrated, the imposition of CVDs is not isolated from any consideration related to injury. A link between the amount of the CVD and the injury is also reflected in Article 19.3, which provides that a "CVD shall be levied, in the appropriate amounts in each case ... on imports of such product ... found to be subsidized and causing injury". Other provisions of the ASCM link the CVD to the injury. Article 19.1 allows for the imposition of CVDs when subsidized imports "are causing injury". The use of the present tense in this provision suggests that injury is a continuing prerequisite for the imposition and levying of CVDs. This is confirmed by Article 21.1.

10. Article 10 establishes that Part V relates to the application of Article VI GATT 1994, and that CVDs must conform to that provision. By providing that "only one form of relief shall be available", footnote 35 makes clear that there can be no "double remedies". Footnote 36 defines a "CVD" as a special duty levied for the purpose of "offsetting" a subsidy. The link between the GATT 1994 and the ASCM also figures in Article 32.1. Article VI:5 prohibits the concurrent application of ADDs and CVDs to compensate for the same situation of dumping or export subsidization. The term "same situation" is central to an understanding of the rationale underpinning this prohibition, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent. An export subsidy will result in a pro rata reduction in export price, but will not affect the domestic price. The subsidy will lead to a higher margin of dumping. The situation of subsidization and the situation of dumping are the "same situation", and the application of concurrent duties would amount to the application of "double remedies". By comparison, domestic subsidies will affect domestic and export prices in the same way. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the calculation, the overall dumping margin will not be affected. In such circumstances, the concurrent application of duties would not compensate for the same situation.

11. Thus, the presence of an express prohibition on the concurrent application of duties to counteract the "same situation" of dumping or export subsidization is logical, when NV is calculated on the basis of domestic sales prices. Article VI:1(a) GATT 1994, like Article 2.1 ADA, provides that the usual method for calculating NV will be based on the comparable price for the like product in the exporter's domestic market. Thus, in anti-dumping investigations, NV will typically be based on domestic sales prices and any domestic subsidy will have no impact on the calculation of the dumping margin. Nonetheless, Article VI:1(b), like Article 2.2 ADA, sets out exceptional methods for the calculation of NV, which are not based on actual prices in the exporter's domestic market. The second Ad Note to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations, also authorizes recourse to exceptional methods for the calculation of NV in investigations of imports from NMEs. In case of domestic subsidization, it is only in these exceptional situations that there is any possibility that the concurrent application of anti-dumping and CVDs on the same product could lead to "double remedies". The references to Article VI GATT 1994 in Articles 10 and 32.1 ASCM, Article VI itself, and the many parallels between the obligations that apply to Members imposing ADDs or CVDs, suggest that any interpretation of "the appropriate amounts" of CVDs must not be based on a refusal to take account of the context offered both by Article VI GATT 1994 and by the provisions of the ADA. Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another. This view is reinforced by the fact that, although the disciplines that apply to a Member's use of ADDs and its use of CVDs are legally distinct, the remedies that result are, from the perspective of producers and exporters, indistinguishable.

12. It follows that a proper understanding of the "appropriate amounts" of CVDs cannot be achieved without regard to relevant provisions of the ADA and recognition of the way in which the two legal regimes, and the remedies which they authorize, operate. The requirement that any amounts be "appropriate" means that authorities may not, in fixing

the appropriate amount of CVDs, simply ignore that ADDs have been imposed to offset the same subsidization. Each agreement sets out strict conditions that must be satisfied before the authorized remedy may be applied. The purpose of each authorized remedy may be distinct, but the form and effect of both remedies are the same. Both the ADA and the ASCM contain provisions requiring that the amounts of ADDs and CVDs be "appropriate in each case". Both agreements also set ceilings on the maximum amount of duties that can be imposed. Article 19.4 ASCM establishes that CVDs shall not exceed the amount of the subsidy found to exist and Article 9.3 ADA establishes that ADDs shall not exceed the margin of dumping. Only if these provisions are read in wilful isolation from each other can it be maintained that the respective rules on the imposition and levying of duties are complied with when double remedies are imposed. In contrast, reading the two agreements together suggests that the imposition of double remedies would circumvent the standard of appropriateness that the two agreements separately establish. In other words, considering that each agreement sets forth a standard of appropriateness and establishes a ceiling for the respective duties, it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization. It is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of ADDs and CVDs that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and CVDs which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found.

13. The EU expects that the Panel will follow a similar line of reasoning in this case.

2. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN UNION (INCLUDING SOME RESPONSES TO THE PANEL'S QUESTIONS)

14. As suggested by the Panel, the EU will provide preliminary answers to the questions advanced by the Panel relating to the GATT 1994. Starting with question 5, the EU considers that the term "enforced" in Article X:2 of the GATT 1994 speaks to the application of the measure in question, i.e. that the measure is being applied or has been put into application. In contrast, the term "made effective" under Article X:1 does not necessarily require an actual application of the measure of general application. A law may be published today and establish that it will be applied only to actions taking place as of 1 January 2014. Such a law will be made effective today although it will be enforced only as of next year. Moving on to question 6, the EU considers that there is no textual or contextual support for China's interpretation of Article X:2, according to which the measures falling under such a provision can be applied only with respect to actions taken after the publication of the measure. As explained in our written submission, Article X:2 has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities. With respect to question 7, the EU considers that Article X:2 does not relate to authority, but rather to transparency and due process. Finally, to answer question 8, the European Union considers that Article X:3(b) obliges agencies to implement and be governed by the decisions of courts of first instance as modified or complemented by the decisions of superior courts with respect to the same matter.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

Executive Summary of the Written Submission of Japan

A. Prompt publication of P.L. 112-99 in accordance with Article X:1 of the *GATT*

1. In the *First Written Submission of China* ("China FWS"),[1] China alleges that "Section 1 of P.L. 112-99 was 'made effective' as of 20 November 2006".[2] China argues that the "basic inquiry [of Article X:1 of the *GATT*] is whether the measure was 'published promptly' in relation to this effective date".[3] China thus claims that the publication of P.L. 112-99 is inconsistent with Article X:1 because it was not been published for "nearly five and half years after the date on which it was made effective."[4]

2. While China submits that "in no event can publication be considered "prompt" if it takes place after the measure has taken effect",[5] Japan is of the view that the requirement under Article X:1 would be satisfied even when the law is published after the effective date of the law. This interpretation is supported by the panel in *EC – IT Products*, which stated "in circumstances where the relevant measure has been 'made effective', the requirement to publish promptly will arise". [6] As stated by the panel, the event triggering the application of Article X:1 is the action to make the measure in question, P.L. 112-99 in this case, effective. The question then is whether the P.L. 112-99 was published promptly after it was made effective.[7] The date from which the law would actually be applied is irrelevant to Article X:1.

3. In this regard, Japan has doubt on China's argument that Section 1 of P.L. 112-99 was 'made effective' within the meaning of Article X:1 as of 20 November 2006. Section 1(b) of P.L. 112-99, on its face, sets forth that the provisions of Section 1(a) apply to all countervailing duty proceedings initiated on or after 20 November 2006, and all resulting actions by US Customs and U.S. Federal courts.[8] From Japan's view, Section 1(b) of P.L. 112-99 addresses the subject matter to which the law applies, not the date on which the law was enacted. Accordingly, the 20th November of 2006 is not the date of enactment, but the date which establishes the scope of application of the law. If this understanding is correct, China's approach to consider the relationship between the 20th November of 2006 and the date of publication in examining the consistency with Article X:1 is doubtful.

4. In connection with the question whether the United States "promptly" published the P.L. 112-99 under Article X:1, Japan agrees with the analysis by the panel in *EC – IT Products*. It explained "an assessment of whether a measure has been published 'promptly' … necessarily requires a case-by-case assessment"[9] in light of whether such publication was made "in such a manner as to enable governments and traders to become acquainted with them."

B. Enforcement of a Measure of General Application before Publication in Accordance with Article X:2 of the *GATT*

5. China argues that Section 1(b) of P.L. 112-99 is inconsistent with Article X:2 of the *GATT*, stating "rights of transparency and due process to which governments and traders are entitled

[1] *See* China FWS, submitted to this Panel on 15 May 2013.
[2] *Id.*, para. 63.
[3] *Id.*, paras. 63-64.
[4] *Id.*, para. 65.
[5] China FWS, para. 64.
[6] Panel Report, *EC – IT Products*, para. 7.1048.
[7] In contrast, under Article X:2 the relevant date is the date of the application of the measure because the provision obliges that WTO members enforce the measure falling within its scope after the measure's official publication.
[8] *See* Pub. L. No. 112-99, CHN-1.
[9] Panel Report, *EC – IT Products*, para. 7.1076.

under Article X:2 are necessarily denied when a measure is applied prior to its official publication."[10]

6. Article X:2 makes explicit that any measure of general application, if it is "effecting an advance in a rate of duty or other charges on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports …", shall be published prior to its enforcement. Consequently, a WTO Member fails to comply with this requirement, if the Member enforces a measure of general application before its publication.

7. As explained by the Appellate Body[11], the prior publication requirement under Article X:2 may embody the principles of transparency and due process. The publication of measures of general application must be made in advance to its enforcement, "so as to enable governments and traders to become acquainted with them".[12]

C. Reversal by Legislature of Court Decisions in Accordance with Article X:3(b) of the *GATT*

8. China argues that P.L. 112-99 is "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government".[13] According to China, "[t]his type of legislative intervention, if accepted, would render meaningless the independent judicial review that is guaranteed by Article X:3(b)." [14] China thus claims that "[e]nacting a new law and directing national courts to apply the law retroactively to change the outcome of a case is not permitted by Article X:3(b) and, if accepted, would gut independent judicial review of any meaning." [15]

9. Article X:3(b) set forth rules on the review by the judicial branch of actions taken by administrative agencies. This Article, however, is silent on relationship between administrative agencies and the legislature, or between the judicial branch and the legislature. At minimum, no rules are set against actions to be taken by the legislature in response to the judicial decision. Therefore, no express obligations to WTO Members are set forth in Article X:3(b) with respect to actions by the legislature in response to judicial decisions.

10. China argues that "legislative intervention, if accepted, would render meaningless the independent judicial review." Article X:3(b), however, explicitly states that the judicial review must be "independent of the agencies" only. Article X sets forth the rules on "laws" in paragraphs 1, and 3(a) and (b), and thus the Article explicitly recognizes the importance of the role of the legislature to establish trade regulations. If it had been contemplated that Article X:3(b) should set forth disciplines on the potential enactment of law in response to judicial decisions, Article X:3(b) could have been drafted to do so. The drafters of the Article, however, did not include any such requirement. Such omission should also be given the meaning.

11. In sum, it is Japan's view that Article X:3(b) does not provide any disciplines on the legislative actions in response to the judicial decision.

D. Avoidance of Double Remedy Pursuant to Article 19.3 of the *SCM Agreement*

12. China alleges that "the USDOC initiated 29 parallel anti-dumping and countervailing duty investigations and periodic reviews that resulted in the imposition of duties on products from China, either on a preliminary or final basis."[16] China claims that the "USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the *SCM Agreement*." [17]

[10] *Id.*, para. 70.
[11] Appellate Body Report, *US – Underwear*, p. 21.
[12] See Article X:1 of the GATT 1994
[13] China FWS, para. 85.
[14] *Id*, para. 101.
[15] *Id.*, para. 85.
[16] *Id*, para. 124.
[17] *Id.*, para. 126.

13. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* examined the issue of the double remedy, and has reached the conclusion that the investigating authority is "subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3" upon conducting "a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." [18] With respect to the question of when double remedies arise, the Appellate Body found that "double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties"[19] because the use of an NME methodology in calculation of dumping margins "likely provides some form of remedy against subsidization".[20]

14. The Appellate Body then applied this legal analysis to four countervailing investigations in the dispute, and found that "the USDOC made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties." [21] Consequently, "the USDOC failed to fulfill its obligation to determine the 'appropriate' amount of countervailing duties within the meaning of Article 19.3 of the *SCM Agreement*." [22]

15. As clarified by the Appellate Body, an investigating authority has an affirmative obligation to make sure that double remedies would not occur when anti-dumping and countervailing duties are simultaneously imposed on products from NME countries.

[18] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602 (a footnote omitted).

[19] *Id.*, para. 599, referring in its footnote to the Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67 and 14.75 (emphasis in original).

[20] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.67.

[21] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 604.

[22] *Id.*, para. 606.

Executive Summary of the Oral Submission of Japan

1. The United States argues that the *GPX* legislation does not fall within the scope of Article X:2 of the *GATT*. Specifically, the United States argues that "Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty" because "there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports."[23] The United States explains that the USDOC established individual CVD measures in accordance with the CVD law that existed at the time of the establishment of these individual measures.[24] The Chinese government and traders thus had been on notice that the USDOC would apply the CVD law to imports from China.[25] According to the arguments of the United States, therefore, the due process rights under Article X:2 have been observed.

2. The United States appears to submit that it is important whether the Chinese government and traders were given a prior notice of the application of the CVD law as of 20 November 2006. Japan finds the United States' apparent approach proper and is of the view that the Panel should take the following points into consideration.

3. As discussed in the third party submission of Japan, Article X:2 may embody transparency and due process rights of WTO Members and traders by ensuring that imports may not be subject to an advance in a rate of duty or subject to a new or more burdensome requirement without prior public notice of such measures of general application. An importing Member thus would have acted inconsistently with Article X:2, if the importing Member were to apply such measures to imports in such situations that the exporting Member and traders had been unable to be aware that their imports would generally be subject to the measure. They must be given a prior notice of the application of the measure to imports so that they "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."[26]

4. Accordingly, one question in this case under Article X:2 would be whether the Chinese government and traders in fact received public notice that the USDOC would apply the CVD law to imports from China prior to the application of such law. Japan does not take any specific position of the factual aspect in this case. Japan respectfully requests that the Panel review the underlying facts to determine whether the Chinese government and traders were appropriately informed of the application of CVD measures generally to imports from China so that they had 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.

5. Japan recalls that the United States also states that "the *GPX* legislation was officially published on its date of adoption, March 13, 2012", and "Commerce took no action prior to that date to enforce"[27] the *GPX* legislation even if the *GPX* legislation were within the scope of Article X:2.

6. Japan would welcome further clarification by the United States on this argument. Nonetheless, to the extent that, given that the GPX legislation is the relevant measure at issue here (as China claims), the United States intends to argue that Article X:2 may permit the application of a more burdensome legislation to action taken by a trader before its publication because the actual enforcement action can occur only after the publication, Japan could not agree. As discussed, the rationale underlying Article X:2 is to ensure that an exporting Member and its traders be given a prior notice so as to 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 before the measure is in fact applied. In this manner, Article X:2 may embody the transparency and due process in the international trade rules. The importing Member, therefore, would have acted inconsistently with Article X:2 if it fails to give an exporting Member and traders such notice prior to the action of such traders to which

[23] First Written Submission of the United States ("US FWS"), para. 106.
[24] *See* US FWS, paras 44-45.
[25] *See* US FWS, para. 60, citing the decision by the United States Court of International Trade in *GPX VII* at 25 in CHI-8.
[26] Appellate Body Report, *US – Underwear*, p. 21.
[27] US FWS, para. 119.

the measure at issue applies. Accordingly, the alleged retroactive application of the *GPX* legislation thus could be inconsistent with Article X:2 if Chinese traders and government did not receive the required public notice of authentic information about the state of the CVD law so as to be aware of it before such traders take action to which the measures apply in a manner that would respect the basic principles of transparency and due process.

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WORLD TRADE ORGANIZATION

WT/DS449/R/Add.1

27 March 2014

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS449/R.

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WORKING PROCEDURES OF THE PANEL

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WORKING PROCEDURES FOR THE PANEL

Adopted on 14 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Unless a different procedure is provided for in consultation with the parties, the following procedure shall be followed. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the respondent chooses not to avail itself of that right, the Panel

shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each third party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. Each party shall submit executive summaries of its arguments as presented in each of its written submissions and statements. The total number of pages of the executive summaries to be provided by each party, all four parts combined, shall not exceed 30 pages, and shall be submitted at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. A party may include its responses to questions in the executive summary of its statement. In that case, the executive summary, covering the party's statement and responses to questions, shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

19. Each third party shall submit executive summaries of its arguments as presented in its written submission and statement at the latest 7 calendar days following the delivery to the Panel of the written version of the relevant submission or statement. The total number of pages of the summaries to be provided by each third party, the two parts combined, shall not exceed 5 pages. A third party may include its responses to questions in the executive summary of its statement. In that case, the executive summary of the third party's statement and responses to questions shall be submitted at the latest 7 calendar days following delivery of its written responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the third parties' responses to questions.

20. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report before translation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 9 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****.*****@wto.org, with a copy *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org and

*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

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ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF CHINA

Executive Summary of China's First Written Submission

I. Introduction and Summary

1. This dispute concerns the basic principles of transparency and due process that are embodied in Article X of the GATT 1994. At the centre of this dispute is an action that is fundamentally inimical to those principles: the retroactive application of a law to events and circumstances that occurred prior to its enactment. The retroactive application of laws is so clearly inconsistent with basic principles of transparency and due process that it is prohibited by Article X:2 of the GATT. The retroactive application of laws is, in addition, self-evidently incompatible with the requirement of Article X:1 to publish measures of general application "promptly" so that governments and traders have an opportunity to become familiar with the laws and regulations that will be applied to their conduct.

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". P.L. 112-99 was passed by the U.S. Congress and then signed into law by President Obama on 13 March 2012. Section 1 of P.L. 112-99 amends section 701 of the U.S. Tariff Act of 1930 (the Tariff Act) to provide the United States Department of Commerce (the USDOC) with the legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies (NMEs) for the purpose of its anti-dumping laws. Congress enacted this law after the United States Court of Appeals for the Federal Circuit reaffirmed an earlier decision holding that the U.S. countervailing duty laws do not apply to imports from NME countries.

3. P.L. 112-99 specifies that section 1 applies retroactively to 20 November 2006, nearly five and a half years before the enactment and publication of the law. As China will demonstrate in Part III of this submission, the publication of a law five and half years after its effective date was plainly inconsistent with the obligation of the United States under Article X:1 to ensure that measures of general application are "published promptly in such a manner as to enable governments and traders to become acquainted with them". In Part IV of this submission, China will demonstrate that the retroactive enforcement of section 1 is inconsistent, on its face, with the prohibition in Article X:2 against the enforcement of a measure "before such measure has been officially published". Finally, in Part V, China will demonstrate that the retroactive enforcement of P.L. 112-99 ensured that the decision of the Federal Circuit was not implemented by the USDOC, and did not govern the practice of the USDOC, in violation of Article X:3(b) of the GATT.

4. In addition to amending the Tariff Act to give the USDOC legal authority to apply countervailing duties to imports from NME countries, section 2 of P.L. 112-99 amended section 777A of the Tariff Act to provide the USDOC with authority to avoid the double remedies that are likely to occur when it applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology. In stark contrast to section 1, the authority conferred by section 2 became effective only upon the enactment of the law, i.e. prospectively.

5. As China will discuss in Part VI of this submission, the retroactive enforcement of section 1 of P.L. 112-99, when juxtaposed with the entirely prospective enforcement of section 2, creates a class of "orphaned" anti-dumping and countervailing duty investigations for which the USDOC has no legal authority to investigate and avoid double remedies. Consistent with this lack of legal authority, the USDOC took no steps in any of those investigations to investigate and avoid the double remedies that were likely to occur. This failure to investigate and avoid double remedies was inconsistent, on its face, with Article 19.3 of the SCM Agreement, as interpreted by the Appellate Body in in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

II. Background

6. China will begin this submission with a review of the history of the U.S. countervailing duty laws in the 25 years leading up to the enactment of P.L. 112-99. This history is bookended by two decisions of the United States Court of Appeals for the Federal Circuit: its 1986 decision holding that the U.S. countervailing duty laws do not apply to imports from non-market economies, and its reaffirmation of that decision in December 2011 after the USDOC had sought to apply countervailing duties to imports from China in contravention of existing U.S. law.

7. In the early 1980s, the USDOC was presented with a set of petitions seeking the imposition of countervailing duties on imports from countries that the United States designated as non-market economies for the purpose of its anti-dumping laws. In responding to these petitions, the USDOC held that, "as a matter of law", the provisions of the Tariff Act that provide for the imposition of countervailing duties were inapplicable to countries that the United States designates as non-market economies. The USDOC found that the concept of subsidization is not meaningful in respect of imports from these countries. The USDOC was also influenced in its determination by its review of the legislative history of the Tariff Act and by the special provisions of the U.S. anti-dumping laws that Congress had enacted to address imports from NME countries. The USDOC considered this history to support its view that Congress had not intended the countervailing duty provisions of the Tariff Act to apply to imports from NME countries.

8. On appeal, the USDOC's interpretation of the Tariff Act was affirmed by the United States Court of Appeals for the Federal Circuit in its 1986 decision in *Georgetown Steel Corp. v. United States*. The Federal Circuit held that "Congress intended that any selling by nonmarket economies at unreasonably low prices should be dealt with under the antidumping law. There is no indication in any of [the U.S.] statutes, or their legislative history, that Congress intended or understood that the countervailing duty law also would apply." The court concluded its decision by noting that if the NME anti-dumping provisions enacted by Congress were "inadequate to protect American industry from … foreign competition" – a question that was not within the court's competence to answer – then it would be "up to Congress to provide any additional remedies it deems appropriate."

9. After the Federal Circuit's decision in *Georgetown Steel*, the U.S. Congress did, on several occasions, consider the enactment of new legislation to permit the application of countervailing duties to imports from non-market economy countries. None of these initiatives ultimately resulted in the enactment of new legislation to give the USDOC this authority, but they did prompt the U.S. Government Accountability Office (GAO) to issue a report in June 2005 entitled *U.S.-China Trade: Commerce Faces Practical and Legal Difficulties in Applying Countervailing Duties.*

10. The first topic that the GAO Report addressed was the question of whether the USDOC had authority under *existing* law to apply countervailing duties to imports from an NME country. The GAO explained that the USDOC had essentially two options, in this regard. First, it could designate China as a market economy and apply normal market economy methodologies in anti-dumping investigations of Chinese products. The second option was for the USDOC to declare, unilaterally, that it was departing from *Georgetown Steel* and begin applying countervailing duties to imports from NME countries. The GAO cautioned, however, that "absent a clear grant of authority from Congress, such a reversal could be challenged in court."

11. The other main topic that the GAO Report addressed was the problem of double remedies. The GAO recognized that, even if the USDOC were given authority to apply countervailing duties to imports from NME countries, the simultaneous application of countervailing duties and anti-dumping duties determined in accordance with the U.S. NME methodology was likely to give rise to "double counting" of the same subsidies. Shortly after the GAO issued its report, the U.S. House of Representatives passed the "United States Trade Rights Enforcement Act", H.R. 3283. The main purpose of this bill was to provide the USDOC with legal authority to apply countervailing duties to imports from NMEs, but it was never enacted into U.S. law.

12. In October 2006, a little over a year after the House of Representatives had passed the United States Trade Rights Enforcement Act, the NewPage Corporation filed anti-dumping and countervailing duty petitions with the USDOC concerning coated free sheet paper from China. Despite its lack of legal authority, and despite the objections raised by parties, the USDOC

conducted a countervailing duty investigation in *CFS Paper* and issued a final affirmative countervailing duty determination in October 2007. The USDOC's actions in *CFS Paper* unleashed a wave of new countervailing duty petitions against Chinese products – all of which raised the same legal problems as *CFS Paper* itself.

13. Chinese respondents appealed many of the USDOC's affirmative countervailing duty determinations to the U.S. Court of International Trade. The first appeal to be decided by the CIT was the appeal of the USDOC's countervailing duty determination concerning Off-the-Road Tires (OTR) from China. In *GPX Int'l Tire Corp. v. United States*, the CIT ruled that it was not reasonable for the USDOC to apply countervailing duties in conjunction with anti-dumping duties determined in accordance with the U.S. NME methodology, unless the USDOC could devise appropriate methodologies to ensure that no double remedies would occur.

14. The CIT ultimately concluded that the USDOC was incapable of addressing the problem of double remedies "in the absence of new statutory tools". The case was thereafter appealed to the United States Court of Appeals for the Federal Circuit, which issued its decision on 19 December 2011. The court of appeals sustained the lower court's order to forgo the imposition of countervailing duties, but on the grounds that the Tariff Act did not permit the imposition of countervailing duties on imports from countries that the United States designates as non-market economies. In so ruling, the Federal Circuit reaffirmed its 1986 decision in *Georgetown Steel*. The court held that the U.S. Congress had ratified the Federal Circuit's earlier interpretation of the Tariff Act through its "repeated reenactment of [the U.S.] countervailing duty law" with full knowledge, and explicit approval of, the court's 1986 decision in *Georgetown Steel*. On this basis, the court reaffirmed its prior holding that "[the] countervailing duty law does not apply to NME countries".

15. At the end of its decision in *GPX V*, the Federal Circuit stated that "if Commerce believes that the law should be changed, the appropriate approach is to seek legislative change." This was the same statement that the Federal Circuit had made 25 years earlier in *Georgetown Steel*. The Federal Circuit made note of this fact, and quoted its statement in *Georgetown Steel* that if the existing NME anti-dumping remedy was "inadequate to protect American industry from … foreign competition … it is up to Congress to provide any additional remedies it deems appropriate."

16. The consequence of the Federal Circuit's decision was that <u>all</u> of the USDOC's countervailing duty investigations of Chinese products were *ultra vires.* In the absence of explicitly retroactive legislation giving the USDOC authority for actions it had already taken, all of the USDOC's past actions relating to the imposition of countervailing duties on imports from China would need to be undone. In a letter to the chairman of the House Ways and Means Committee dated 18 January 2012, the U.S. Secretary of Commerce and the U.S. Trade Representative called upon Congress to enact legislation *retroactively* authorizing the USDOC's countervailing duty investigations of Chinese products.

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

18. Section 1 of P.L. 112-99 amends Section 701 of the Tariff Act, the provision of U.S. law governing the imposition of countervailing duties, to add a new subsection (f) entitled "Applicability to Proceedings Involving Nonmarket Economy Countries". This new subsection provides that the countervailing duty provisions of the Tariff Act apply to imports from countries that the United States designates as non-market economies.

19. Consistent with the request of the U.S. administration, section 1 of P.L. 112-99 is expressly retroactive. Under section 1(b) of the law, the new authority relating to the imposition of countervailing duties on imports from NME countries has an "effective date" of 20 November 2006 – nearly five and half years prior to its official publication. The effective date of section 1 retroactively encompasses all countervailing duty investigations initiated on or after 20 November 2006 (including countervailing duty measures resulting from those investigations), as well as any judicial proceedings or actions by U.S. Customs and Border Protection relating to those countervailing duty investigations. It is evident that Congress chose a retroactive effective date of

20 November 2006 because this is the date on which the USDOC had initiated the countervailing duty investigation in *CFS Paper*.

20. Section 2 of P.L. 112-99 provides authority to the USDOC to address the problem of double remedies. In sharp contrast to section 1 of the law, section 2 does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012.

21. After the Federal Circuit issued its decision in *GPX V*, the United States and other appellants had filed what is called a "petition for rehearing". The Federal Circuit had not acted on the petition for rehearing as of 13 March 2012, the date that P.L. 112-99 entered into law. The following day, the Federal Circuit issued a letter to the parties directing them to make submissions "commenting on the impact of this legislation on further proceedings in this case."

22. The Federal Circuit issued its decision on rehearing on 9 May 2012. The court began by restating its prior holding that "in amending and reenacting the trade laws in 1998 and 1994, Congress adopted the position that countervailing duty law does not apply to NME countries, and thus, countervailing duties cannot be applied to goods from NME countries." The court then explained that, subsequent to its decision in *GPX V*, Congress had "enacted legislation to apply countervailing duty law to NME countries." The Federal Circuit observed that section 1 of the legislation enacted by Congress "applies retroactively" to all countervailing duty investigations initiated after 20 November 2006. The Federal Circuit then remanded the case to the CIT to address constitutional issues relating to the retroactive application of the new law.

23. In the remand proceedings before the CIT, the United States argued that the constitutional issues raised by the importing parties were unfounded because the new legislation "did not change the law retroactively". Contrary to the position that it had taken in its submission to the Federal Circuit, in which it had expressly highlighted the "retroactivity" of the new law, the United States now contended that section 1 of P.L. 112-99 was merely a "clarification" of the law that existed *before* the Federal Circuit's decision in *GPX V*. According to the United States, section 1 of P.L. 112-99 did nothing more than "confirm" that the USDOC had always possessed the legal authority to apply countervailing duties to imports from NME countries.

24. The CIT issued its decision on the constitutional issues on 7 January 2013. Not surprisingly, the CIT found it difficult to credit the contention by the United States that section 1 of the P.L. 112-99 was not retroactive. The CIT further considered that "the government's view of a simple clarification" of existing law was "not easily extracted from the tangled history of this case." The court observed, for example, that the Federal Circuit had not vacated its prior decision in *GPX V*, despite an explicit request by the United States that it do so. Thus, the Federal Circuit's decision in *GPX V*, which held that prior U.S. law did not permit the application of countervailing duties to imports from NME countries, remained a valid, precedential decision. The only thing that had changed was that Congress had enacted new legislation to change the law retroactively, which the Federal Circuit had duly applied in *GPX VI*. The CIT also noted that, in taking this action, the Federal Circuit had in no way suggested that "its view of the prior law was wrong."

III. Section 1 of P.L. 112-99 Was Not "Published Promptly in Such a Manner as to Enable Governments and Traders to Become Acquainted" with the New Law, as Required by Article X:1 of the GATT 1994

25. Section 1 of P.L. 112-99, which provides the USDOC with legal authority to apply countervailing duties to imports from countries that the United States designates as non-market economies, was not "published promptly in such a manner as to enable governments and traders to become acquainted" with it. The fact that section 1 was not "published promptly" is evident from the fact that it was published nearly five and a half years after the date on which section 1 became effective.

26. P.L. 112-99 is a law made effective by the United States pertaining to "rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports". It authorizes the application of countervailing duties (which can be seen as "rates of duty" or "other charges … on imports") to imports from countries that the United States designates as non-market economy

countries. In addition, 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. P.L. 112-99 is a law "of general application" because it is "not limited to a single import or single importer", but instead affects a range of products, producers, importers, and countries.

27. Section 1 of P.L. 112-99 was "made effective" as of 20 November 2006. This is evident from the plain language of section 1(b), which refers to 20 November 2006 as the "*effective* date" of this section. Prior panels interpreting Article X:1 have considered the date on which a measure was "made effective" as the appropriate reference point for determining whether the measure was "published promptly". The basic inquiry is whether the measure was "published promptly" in relation to this effective date. In evaluating whether a measure was "published promptly", the context of Article X:1 requires consideration of whether the measure was published in a sufficiently timely manner to enable "governments and traders to become acquainted" with the content and requirements of the measure. While Article X:1 does not specify a period of time that must elapse between publication of the measure and when it takes effect, in no event can publication be considered "prompt" if it takes place *after* the measure has taken effect.

28. It is self-evident that P.L. 112-99 was not "published promptly" in relation to its effective date of 20 November 2006. P.L. 112-99 was not published until nearly five and half years after the date on which it was made effective. This was not "prompt" by any conceivable standard. This conclusion is underscored by the fact that the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries. This is fundamentally inconsistent with the requirements of due process and transparency that underlie all of Article X, including Article X:1. For these reasons, the Panel should find that the United States acted inconsistently with Article X:1 of the GATT by failing to publish section 1 of P.L. 112-99 "promptly" in relation to its effective date.

IV. The Retroactive Application of Section 1 of P.L. 112-99 Is Inconsistent with Article X:2 of the GATT 1994

29. Article X:2 reflects what the Appellate Body has referred to as a "presumption of prospective effect", a presumption that finds its source in "basic principles of transparency and due process". These principles compel the conclusion that measures of general application affecting the conduct of governments and traders should apply only in respect of actions taken *after* the publication of the measure. This is why "prior publication is required for all measures falling within the scope of Article X:2" – "prior", that is, to the application of the measure to particular conduct or actions. Article X:2 contains no exceptions to this requirement of prior publication. By its terms, Article X:2 "precludes retroactive application of a measure" in all cases.

30. The necessary implication of Article X:2 is that governmental agencies must act within the confines of their authority, as that authority is set forth in measures that have been officially published. This limitation on agency action is central to the principle of legality that underlies all administrative systems. When governmental agencies act outside the confines of their published authority, their actions are *ultra vires* (referred to in some legal systems as *excès de pouvoir*). Article X:2 prohibits actions that are *ultra vires* by requiring governmental agencies to act within the confines of measures that have been officially published. The act of enforcing a measure of general application prior to its official publication is an act that is necessarily *ultra vires* and, as such, inconsistent with Article X:2.

31. As China discussed in Part III above, Section 1 of P.L. 112-99 is a "measure of general application" taken by the United States "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". Equally important, P.L. 112-99 "impos[es] a new or more burdensome requirement, restriction or prohibition on imports" in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties. For these reasons, section 1 of P.L. 112-99 is plainly within the scope of Article X:2.

32. Section 1(b) of P.L. 112-99 states that section 1 of the law "applies to all proceedings initiated under Subtitle A of title VII [of the Tariff Act] 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 [such] proceedings …". By stating that section 1 "applies" to events that occurred prior to 13 March 2012, it is evident on the face of the legislation that section 1 applies on a retroactive basis. 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.

33. The fact that the United States has applied section 1 of the legislation prior to its official publication is confirmed by the fact that the United States imposed countervailing duty orders on imports from China at a time when existing U.S. law did not permit this action, and then continued to maintain these pre-existing orders subsequent to the official publication of the measure. In the absence of the retroactive application of section 1, the USDOC would have been required under U.S. law to revoke these pre-existing orders. The fact that the United States has continued to maintain these orders subsequent to the official publication of P.L. 112-99 confirms that the United States has applied section 1 of the legislation to events and circumstances that occurred prior to its official publication.

34. For these reasons, the Panel should find that section 1 of P.L. 112-99 is a measure of general application that the United States has enforced prior to its official publication, in violation of Article X:2.

V. The United States Has Failed to Ensure that Decisions of its Courts Are "Implemented by", and "Govern the Practice of", the USDOC, in Violation of Article X:3(b) of the GATT 1994

35. China's claim under Article X:3(b) relates to the requirement that the decisions of reviewing tribunals "shall be implemented by, and shall govern the practice of" the agency whose action is under review. It is clear that the requirement to "implement" the decision of a tribunal means, at a minimum, that the agency under review must apply the decision of the tribunal in the specific case decided. The requirement to ensure that the decision "govern[s] the practice of" the agency goes beyond the specific case decided, and requires the agency to be bound by the decision "with respect to identical factual situations that may arise in the future concerning identical legal issues".

36. In its decision in *GPX V*, issued on 19 December 2011, the Federal Circuit held that "the [U.S.] countervailing duty law does not apply to NME countries". Through this decision, the court established that existing U.S. law did not permit the USDOC to impose countervailing duties on imports from countries that the United States designates as non-market economies. Within the U.S. system of judicial review, there were only two scenarios in which the court's decision in *GPX V* could have been reversed. First, the United States (or another interested party) had the right to petition the court for rehearing of the original panel decision. Second, whether or not a petition for rehearing had been sought, an interested party could seek review of the Federal Circuit's decision by the United States Supreme Court.

37. The original deadline for the United States to file a petition for rehearing was 2 February 2012. The United States sought a 60-day extension of this deadline, which the court cut in half by extending the deadline to 5 March 2012. On that date, the United States filed a petition for rehearing *en banc*, i.e. for review of the Federal Circuit's decision in *GPX V* by the entire court of appeals.

38. The petition for rehearing filed by the United States was pending before the Federal Circuit when President Obama signed P.L. 112-99 into law eight days later. This action prompted the Federal Circuit to issue a notice to the parties, on 14 March, directing them to brief the court on the significance of the new legislation. In its submission, the United States explained to the court that section 1 of P.L. 112-99 "is retroactive to November 20, 2006", which was "prior to the initiation of Commerce's CVD investigation in this case". The United States took the position that the express retroactivity of section 1 required the Federal Circuit to apply the new law to the case under appeal, since the appeal was technically still pending before the court in light of the petition

for rehearing. The Federal Circuit agreed with this position in its decision in *GPX VI*, and applied the new law retroactively to change the outcome of the case.

39. The actions by the U.S. Congress and the U.S. administration foreclosed the two opportunities for further judicial review that were available after the Federal Circuit's decision in *GPX V.* Through its own actions, the administration ensured that the Federal Circuit never had an opportunity to consider the arguments advanced by the United States in support of its contention that the court's decision in *GPX V* was in error. Moreover, these actions obviated the need to petition the Supreme Court for a review of that decision. As a result of these actions, the Federal Circuit's decision in *GPX V* became the final judicial decision on the status of U.S. law prior to the enactment of P.L. 112-99.

40. China considers that it was consistent with Article X:3(b) for the United States to seek rehearing *en banc* of the Federal Circuit's decision in *GPX V.* This was equivalent to an appeal to a court of superior jurisdiction. China also considers that it would have been consistent with Article X:3(b) for the United States to have filed a petition for certiorari with the U.S. Supreme Court, as this, too, would have been an appeal to a higher court. In either event, the USDOC would have been bound by the final decision of its reviewing courts, whether it was the Federal Circuit's decision in *GPX V*, a subsequent *en banc* decision of the Federal Circuit, or a decision of the U.S. Supreme Court.

41. What was not consistent with Article X:3(b) was for the Federal Circuit to issue its decision in *GPX V* and for the United States to then amend the law, retroactively, to change the outcome of that decision. This had the effect of ensuring that the Federal Circuit's decision in *GPX V* would not be implemented by, and would not govern the practice of, the USDOC. In addition, it ensured that the U.S. courts were not able to discharge their required function of reviewing and correcting the actions of the USDOC in relation to the domestic laws in effect at the time those actions were taken. For these reasons, the Panel should find that section 1(b) of P.L. 112-99, by amending U.S. law retroactively and making it applicable to judicial proceedings concerning administrative actions taken prior to its enactment, is inconsistent with the obligations of the United States under Article X:3(b).

VI. The United States Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

42. When the USDOC decided to begin applying countervailing duties to imports from countries that it continued to designate as non-market economies, it was aware that the simultaneous application of countervailing and anti-dumping duties could result in offsetting the same subsidy twice – once through the imposition of the countervailing duty, and then again through the manner in which the United States calculates anti-dumping duties under its NME methodology.

43. In an anti-dumping investigation, the existence and extent of an anti-dumping margin is based on a comparison of the producer's normal value for the product under investigation (determined by reference either to the producer's costs of production or to its home-market prices for the product) to the producer's export price for the product. The producer is said to be "dumping" if its normal value is higher than its export price. The GAO Report had explained that because normal value under the U.S. NME methodology is based on unsubsidized costs of production in countries that the United States considers to be market economies, the resulting comparison of normal value to the producer's export price is likely to reflect not only dumping, but also any subsidization of that product as well.

44. In DS379, the Appellate Body held that the United States has an obligation under Article 19.3 of the SCM Agreement to investigate and avoid the double remedies that are likely to occur when the United States applies countervailing duties in conjunction with anti-dumping duties determined under the U.S. NME methodology. Because the USDOC lacked authority under existing U.S. law to address the problem of double remedies, it was clear that any attempt by the United States to comply with the recommendations and rulings of the DSB would require the U.S. Congress to enact new legislation to give the USDOC this authority.

45. Section 2 of P.L. 112-99 purports to give the USDOC sufficient legal authority to identify and avoid double remedies in the NME context. In sharp contrast to section 1 of the law, the USDOC's

authority to address the problem of double remedies does not have a retroactive effective date. Rather, the "effective date" set forth in section 2(b) provides that the USDOC's new authority concerning double remedies "applies to … all investigations and reviews initiated … on or after the date of the enactment of this Act", i.e. after 13 March 2012. The contrast between the effective dates for section 1 and section 2 creates an "orphaned" class of countervailing duty investigations for which the USDOC has no authority under U.S. law to investigate and avoid double remedies (See CHI-24). Under the statute, the only scenario in which the USDOC can apply its authority under section 2 in respect of those past investigations is if China challenges those determinations at the WTO.

46. Because section 1 of P.L. 112-99 is plainly inconsistent with Article X of the GATT, for the reasons set forth in Parts III and IV above, it should not be necessary for the United States to address the problem of double remedies in respect of the "orphaned" investigations. The correct course of action is for the United States to acknowledge that the USDOC had no duly published authority to conduct countervailing duty investigations in respect of imports from NME countries at the time those investigations occurred. That being the case, the problem of double remedies simply would not arise in respect of those past investigations. However, to the extent that the United States continues to maintain those countervailing duty measures, whether or not this is action is consistent with Article X, it is nonetheless obligated under the covered agreements to investigate and avoid double remedies in respect of those investigations.

47. The USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the SCM Agreement. This is because the USDOC has failed to ensure that it imposes countervailing duties "in the appropriate amounts in each case", taking into account the simultaneous imposition of anti-dumping duties that are likely to offset the same subsidies. China therefore requests the Panel to find that each of these determinations is inconsistent, as applied, with Article 19.3. As a consequence, and as the Appellate Body did in DS379, the Panel should find that the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the First Meeting of the Panel

Introduction

1. The United States has staked its entire defence of this case on the proposition that the *GPX* legislation did nothing more than "maintain[] the status quo that existed prior to its enactment" and "confirm" the law that already existed. As I will demonstrate, the proposition that the *GPX* legislation effected no substantive change in the law is contradicted by the terms of the statute itself. This proposition is, in addition, based upon a wholesale rewriting of history and obvious mischaracterizations of how the U.S. legal system works.

2. I will begin with the terms of the statute itself. The statute is entitled "an act *to apply* the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries." If the purpose of the act is "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries", it must be the case that those provisions previously did *not* apply to NME countries. Section 1(a) of the statute amends Section 701 of the Tariff Act "by adding" a new subsection (f). The new subsection (f)(1) provides that countervailing duties "shall be imposed" on imports from nonmarket economy countries. It is clear from the amended statute that it is *this* provision of law that imposes countervailing duties on imports from nonmarket economy countries and provides the legal authority for Commerce to take this action.

3. Consider the new subsection (f)(2), in this regard. This is a new provision of U.S. law, establishing the terms of an exemption from countervailing duties that never before appeared in any officially published measure of general application. If Congress was of the view that the general countervailing duty authority set forth in subsection 701(a) of the Tariff Act had always applied to imports from NME countries, then Congress could have done nothing more than enact this new exception. Instead, it enacted an entirely new subsection to provide for the imposition of countervailing duties on imports from NMEs, and attached this exception to it. Once again, this demonstrates that it is the new section 701(f), not section 701(a), that creates the legal basis for the imposition of countervailing duties on imports from NMEs.

4. Finally, let us consider the effective date provision set forth in section 1(b) of the statute. This provision states that the new subsection (f) "applies to" all countervailing duty proceedings initiated "on or after November 20, 2006". The only conceivable purpose for making a law retroactive is to *change* the law as it existed in the past. If the statute was merely restating the law that already existed, as the United States contends, then there would have been no need for Congress to make the new law retroactive to a specific date in the past. In short, no reasonable observer could examine this statute on its face and conclude that it did nothing more than restate the law that already existed. This conclusion is underscored by an examination of the facts and circumstances surrounding the enactment of this statute.

5. Under the U.S. narrative, the "status quo" prior to the enactment of the *GPX* legislation was that the Tariff Act already permitted Commerce to apply countervailing duties to imports from NME countries, and that Congress enacted the *GPX* legislation merely to "confirm" this proposition. Within this narrative, the United States treats the Federal Circuit's decision in *GPX V* as a mere aberration from the status quo, rather than as a decision of a United States federal court holding that Commerce's understanding of the Tariff Act was incorrect.

6. This is a complete rewriting of history. The Federal Circuit's decision in *GPX V* held that what the United States tries to characterize as the "status quo" was, in fact, inconsistent with U.S. law as it then existed. When it enacted the *GPX* legislation, Congress sought to change the applicable law, as established by the Federal Circuit, and have the courts apply this new law retroactively to keep the countervailing duty orders in place. That is exactly what happened.

7. In *GPX VI*, the Federal Circuit began its decision by reiterating its prior holding in *GPX V* that the Tariff Act did not permit the application of countervailing duties to imports from nonmarket economy countries. It then observed, however, that Congress had subsequently "enacted legislation to apply countervailing duty law to NME countries". This "new legislation", the court explained, "applies retroactively" to countervailing duty investigations initiated on or after November 20, 2006, including any appeals in federal courts relating to those investigations.

Therefore, without casting any doubt upon its decision in *GPX V* as a valid interpretation of the prior law, the Federal Circuit applied the new law retroactively to alter the outcome of the case.

8. In sum, whether we look at the face of the statute itself or at the facts and circumstances surrounding its enactment, the result is the same: the *GPX* legislation effected a substantive change in U.S. law. The basic premise of the U.S. defence – that the Federal Circuit's decision in *GPX V* never happened, and that Congress was merely restating existing law when it enacted the *GPX* legislation – is transparently false. Once this premise is taken away, the United States has no substantive defence to China's claims under Article X of the GATT.

Article X:1

9. In relation to China's claim under Article X:1, the only real question is whether section 1 of the *GPX* legislation was "published promptly" in relation to when it was "made effective". The United States argues that the date on which a measure is "made effective" is the date on which the measure is formally "adopted" as a matter of municipal law. What the United States fails to confront, however, is that section 1 of the legislation has an "effective date" of November 20, 2006. It is hard to see how the United States can argue that the statute was "made *effective*" on March 13, 2012 when the statute itself has an "*effective* date" of November 20, 2006.

10. The proposition that a measure is only "made effective" when it is formally "adopted" as a matter of municipal law is a proposition that the United States successfully argued *against* in *EC – IT Products.* The EC in that case argued that the term "made effective" refers to the date on which the measure at issue was "adopted", i.e. the date on which it formally entered into force as a matter of municipal law. The United States argued, by contrast, that the term "made effective" refers to the date on which the measure became "applicable", without regard to when it was formally adopted as a matter of municipal law or when it was officially published.

11. The United States was right in *EC – IT Products*, and is wrong in this dispute. As that panel held, the term "made effective" refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." With regard to the *GPX* legislation, that date was November 20, 2006. It is impossible to conclude that the publication of a measure five and half years after it was "made effective" is "prompt" under any understanding of that term. The United States has therefore acted inconsistently with the requirements of Article X:1.

Article X:2

12. The U.S. response to China's claim under Article X:2 can be reduced to two propositions: (1) that the *GPX* legislation did not change U.S. law, and therefore did not "effect[] an advance in a rate of duty or other charge on imports under an established and uniform practice" or "impos[e] a new or more burdensome requirement, restriction or prohibition on imports"; and (2) that China has failed to prove that this expressly retroactive legislation was "enforced before such measure has been officially published". Both of these propositions are incorrect.

13. The *GPX* legislation "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice" not only because it makes imports from NME countries potentially subject to the imposition of countervailing duties, but also because it provides a legal basis for the continued maintenance of 24 countervailing duty orders which, in the absence of this legislation, would have been revoked. It is equally obvious that an act that "applies" countervailing duties to a particular class of imports is, without question, one that "impos[es] a new or more burdensome requirement, restriction or prohibition on imports". Being subject to countervailing duty investigations, as well as the actual imposition of countervailing duties, is a "requirement" or "restriction" on imports.

14. For the reasons that I have already explained, the fact that this requirement or restriction is "new" and "more burdensome" is evident not only from the text of the statute itself, but from the fact that this provision was enacted in direct response to the Federal Circuit's holding in *GPX V*. As the United States explained to the Federal Circuit after the legislation was enacted, it is this new provision of U.S. law that "requires that Commerce apply CVDs to imports from NMEs, including

China." In *GPX VI*, the Federal Circuit held, by the United States' own description, that "the *new legislation* clearly requires that Commerce retroactively apply the CVD statute to NMEs".

15. In China's view, it should be self-evident that a measure of general application with a retroactive effective date is, by definition, a measure that has been enforced prior to its official publication. The term "enforce" is synonymous with the term "apply". Section 1(b) of the *GPX* legislation states that the new section 701(f) of the Tariff Act "applies to" all countervailing duty proceedings initiated on or after November 20, 2006. It follows that the *GPX* legislation enforces the new section 701(f) in respect of events and actions that occurred prior to its official publication on March 13, 2012. It does so by providing the legal foundation for the countervailing duty orders and duties imposed from November 2006 onward that the Federal Circuit had held to be inconsistent with prior U.S. law.

16. As the Appellate Body has explained, the basic principle of due process that underlies Article X:2 is that governments and traders should have a reasonable opportunity to learn about a measure, and to adjust their conduct accordingly, before that measure is enforced in respect of their conduct. That principle is necessarily offended when a statute reaches back in time and changes the law applicable to events and circumstances that have already occurred. Government and traders cannot possibly adjust their conduct in light of such a measure, since the conduct affected by the measure has already occurred. A measure that is expressly retroactive is, for that reason, the paradigmatic example of the type of measure that Article X:2 prohibits.

Article X:3(b)

17. The United States appears to have misstated China's claim under Article X:3(b), or at least misunderstood it. To be perfectly clear, China's claim is <u>not</u> that Commerce was required to implement and give effect to the Federal Circuit's decision in *GPX V* at the moment that decision was issued. Rather, China's claim is that it was inconsistent with Article X:3(b) for the United States Congress to change the applicable law retroactively and direct courts to apply this new rule of law to cases under review. This legislative intervention in ongoing judicial proceedings is not contemplated by Article X:3(b) and, if accepted, would deprive the independent judicial review required by Article X:3(b) of any practical meaning.

18. Consider the facts of this case. Based on their review of published measures of general application, the Government of China and interested Chinese parties understood that the countervailing duty provisions of the Tariff Act did not apply to imports from nonmarket economy countries. When Commerce began to act inconsistently with this understanding of U.S. law in 2006, interested parties challenged Commerce's actions in court and ultimately prevailed in their understanding of U.S. law. In response to that decision, the United States Congress changed the applicable law, retroactively, to make lawful what the court had held was not lawful at the time of the underlying agency action. Based solely on that newly-enacted legislation, the court changed the outcome of the appeal to sustain the legality of imposing countervailing duties on imports from China.

19. These actions make a mockery of independent judicial review, and of Article X as a whole. The entire concept of requiring Members to publish laws of general application in a transparent fashion, to enforce those laws only after their official publication, and to provide for review and correction by independent tribunals of administrative actions taken pursuant to those laws, would be utterly pointless if national legislatures were free to change the law retroactively and direct courts to apply the new law to events that have already occurred.

20. The Federal Circuit's decision in *GPX V* was a "decision" of a U.S. court. Without any apparent sense of irony, the United States asserts that the decision in *GPX V* "was an ideal candidate for both options." But instead of allowing the judicial proceedings to run their course based on the law in effect at the time of the events at issue, the United States Congress intervened in these proceedings to change the applicable law and direct the outcome of the appeal. This disposition of the Federal Circuit's decision in *GPX V* was not one of the two exceptions permitted under Article X:3(b).

Double Remedies

21. Despite having lost on the issue of double remedies in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), and despite having enacted a new provision of U.S. law in order to comply with the recommendations and rulings of the DSB in that dispute, the United States is trying to re-litigate these issues all over again before this Panel. This is not a constructive use of the dispute settlement system.

22. The Appellate Body held in DS379 that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." This includes taking into account "evidence of whether and to what degree the same subsidies are being offset twice", bearing in mind the unappealed finding of the panel in that dispute that double remedies are "likely" when the corresponding anti-dumping duties are determined in accordance with the U.S. non-market economy methodology.

23. The Appellate Body has stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." The United States has presented no such "cogent reasons" in this dispute. The arguments that it advances in its first written submission with regard to the interpretation of Article 19.3 are materially indistinguishable from arguments that the Appellate Body considered and rejected in DS379. Whatever sorts of reasons might constitute "cogent" reasons, it cannot be the case that rehearsing arguments that the Appellate Body has already considered would justify the extraordinary step of departing from its prior interpretation of a provision of the covered agreements. This is particularly true in a dispute, such as this one, that involves the same litigants, the same types of measures, and the same claims that were at issue in the prior dispute.

24. Notwithstanding its arguments regarding the alleged errors in the Appellate Body's report in DS379, the United States also maintains that Commerce "fully addressed any evidence and arguments relating to allegedly overlapping remedies" in the investigations at issue. This is a remarkable assertion in light of the undisputed fact that Commerce had *no legal authority* to do *anything* to address the problem of double remedies in these investigations.

25. Commerce's new legal authority to address double remedies under section 2 of the *GPX* legislation applies on a prospective basis, i.e., only in respect of determinations issued after March 13, 2012. Accordingly, it is preposterous for the United States to suggest that Commerce actually took steps in the investigations at issue in this dispute to identify and avoid double remedies. On what legal basis would it have done so? What specific steps would U.S. law have authorized Commerce to take in order to avoid these double remedies? And if Commerce already had sufficient authority under U.S. law to take these actions, then why did Congress consider it necessary to enact section 2 of the *GPX* legislation?

26. The short answer to these questions is that Commerce had no authority under U.S. law to identify and avoid double remedies in NME investigations until section 2 of the *GPX* legislation was enacted. It is this fact, and this fact alone, that explains why Commerce took no action in any of these investigations to identify and avoid double remedies. Having failed to discharge its affirmative obligation under Article 19.3 to impose countervailing duties "in the appropriate amounts in each case", the countervailing duty determinations that China has identified in CHI-24 were necessarily inconsistent with this provision. It follows that these determinations were also inconsistent with Articles 10 and 32.1 of the SCM Agreement.

Executive Summary of the Second Written Submission of China

I. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Not "Published Promptly" as Required By Article X:1 of the GATT 1994

1. In China's view, there is relatively little left to be said with respect to China's claim under Article X:1 of the GATT 1994. The parties do not appear to dispute that the appropriate reference point for determining whether a measure was "published promptly" is the date on which the measure was "made effective". Because Section 1 of P.L. 112-99 has an "effective date" of 20 November 2006, but was not published until 13 March 2012, China considers it self-evident that the United States did not publish this measure "promptly" as required by Article X:1.

2. Contrary to the positions that it took in *EEC – Apples (US)* and *EC – IT Products*, the United States now appears to argue that the term "made effective" refers to the date on which the measure at issue was formally "adopted" as a matter of municipal law. The United States is trying to convince the Panel that a measure with an "effective date" of 20 November 2006 was actually "made effective" on 13 March 2012. This is, needless to say, an uphill struggle.

3. The United States was right in *EEC – Apples (US)* and *EC – IT Products*, and it is wrong in the present dispute. More importantly, both of those panel reports reflect a proper interpretation and application of the requirements of Article X:1. The term "made effective" under Article X:1 refers to the date on which a measure became operative in practice, not the date on which it was "formally promulgated" or "formally 'entered into force'". This includes, as in *EEC – Apples (US)*, measures that have an expressly retroactive effective date, such as the measure at issue in the present dispute. Were that not the case, the obligation under Article X:1 to publish measures "promptly in such a manner as to enable governments and traders to become acquainted with them" would be "meaningless", as the panel in *EEC – Apples (US)* found in respect of the materially indistinguishable requirement in Article XIII:3(c).

4. The panel in *EEC – Apples (US)* found that publication of a measure two months after it was made effective was not consistent with Article X:1, while the panel in *EC – IT Products* found that publication of a measure eight months after it was made effective was not consistent with Article X:1. It follows, *a fortiori*, that the publication of Section 1 of P.L. 112-99 nearly six years after it was made effective cannot be considered "prompt" within the meaning of Article X:1. For this reason, the Panel should find that the United States has acted inconsistently with its obligations under this provision.

II. The United States Has Failed to Rebut China's Demonstration that Section 1 of P.L. 112-99 Was Enforced Prior to its Official Publication in Violation of Article X:2 of the GATT 1994

A. Section 1 of P.L. 112-99 Is the Relevant Measure at Issue, and It Is a "Measure of General Application"

5. The first interpretative issue relating to Article X:2 need not detain the Panel for long. While the United States concedes, as it must, that Section 1 of P.L. 112-99 is a "measure of general application" within the meaning of Article X:2, it is now trying to suggest that Section 1 is simultaneously *not* a "measure of general application" in relation to countervailing duty proceedings initiated prior to its official publication on 13 March 2012. The United States asserts that because those prior proceedings "were limited and known as of the date of enactment of the measure", it is "difficult to see" how Section 1 is a measure of general application "in relation to" those proceedings.

6. Aside from being factually inaccurate, this is a frivolous suggestion. Section 1 of P.L. 112-99 is the relevant measure of general application. It does not need to be a measure of general application "in relation to" a particular set of proceedings or imports. Section 1(b) of P.L. 112-99 is not a distinct "measure", but rather evidence on the face of the statute that the new Section 701(f) of the Tariff Act was enforced before its official publication. It cannot be the case that Section 1 of P.L. 112-99 is a measure of general application for some purposes, but not for other purposes.

7. In any event, even if Section 1(b) of P.L. 112-99 were deemed to apply to a known set of investigations and products, the *exporters* subject to the resulting countervailing duty orders constitute "an unidentified number of economic operators". This is because any exporter – past, present, or future – that exports the goods subject to the countervailing duty orders will be liable for the assessment of countervailing duties. Accordingly, even if it were possible to view Section 1(b) as a distinct "measure", it would still constitute a "measure of general application".

B. Section 1 of P.L. 112-99 Effects an Advance in a Rate of Duty and Imposes a New or More Burdensome Requirement or Restriction on Imports

8. The next interpretative question before the Panel is whether Section 1 of P.L. 112-99 "effect[s] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[es] a new or more burdensome requirement, restriction or prohibition on imports".

9. As suggested by question 54 from the Panel, Article X:2 requires some baseline of comparison to determine if a measure "advance[s]" a rate of duty or charge, or imposes a requirement, restriction or prohibition on imports that is "new or more burdensome". These are, necessarily, relative concepts.

10. The United States does not appear to dispute, at least not with credible legal arguments, that Section 1 of P.L. 112-99 could be considered to have had one or more of the effects described by Article X:2 *if* the relevant baseline of comparison under Article X:2 is prior municipal law, and *if* prior municipal law is understood to have prohibited the imposition of countervailing duties on imports from nonmarket economy countries. Its principal defence is, instead, that Section 1 of P.L. 112-99 did not have these effects because the USDOC's "approach previous to P.L. 112-99 [had] been to apply the U.S. CVD law to China." This is the "existing approach" baseline advocated by the United States under Article X:2.

11. The U.S. "existing approach" baseline, if accepted, would render Article X:2 a nullity. This is because the act of enforcing a measure of general application before its official publication – the very thing that is prohibited by Article X:2 – would itself be an "approach". In *EC – IT Products*, for example, various EC customs authorities had the "approach" of classifying certain types of goods so that they were no longer eligible for duty-free treatment. By the U.S. logic, there would have been no violation of Article X:2 when the EC later published a measure of general application providing for this classification, since the measure did not advance a rate of duty in relation to the "approach" that was already in place. This would amount to relying on a violation of Article X:2 in order to claim that no violation of Article X:2 occurred – an obviously absurd result.

12. Moreover, the context of Article X:2 plainly supports the conclusion that the relevant baseline for comparison is the prior municipal law of the importing Member, as reflected in its previously published measures of general application. Under Article X:1, Members are required to publish promptly measures of general application affecting the conduct of international trade. It is these previously published laws and regulations, including judicial decisions interpreting those laws and regulations, that form the body of municipal law that governments and traders rely upon to determine the consequences of their actions. These are the laws and regulations that governments and traders expect the importing Member to apply in a uniform, impartial, and reasonable manner, as required by Article X:3(a), and to be enforced by the importing Member's domestic courts, as required by Article X:3(b).

13. Within this context, the relevant inquiry under Article X:2 is whether a measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports in relation to the prior municipal law that governments and traders could have ascertained from their review of published measures of general application. A measure advances a rate of duty or imposes a new or more burdensome requirement or restriction on imports when it has these effects in relation to the rates of duty, requirements, or restrictions that were ascertainable from prior published law. Article X:2 prohibits the enforcement of these types of measures before their official publication precisely because they constitute a material deviation from the municipal law that governments and traders expect the importing Member to apply in respect of their conduct, and that they expect to be enforced by the importing Member's domestic courts.

14. Prior municipal law is, moreover, the only baseline under Article X:2 that can be objectively determined by a panel and that is properly attributable to the importing Member as a unitary subject of international law. Municipal law is an objective fact that can be adduced by evidence demonstrating the scope and meaning of the law. As the Appellate Body has repeatedly observed,

> Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars.

These are the sources of evidence that will allow a panel reviewing a claim under Article X:2 to determine the meaning of prior municipal law and the meaning of municipal law subsequent to the publication of the measure at issue, to the extent that those meanings are contested. In contrast, "Commerce's understanding" of the prior municipal law does not establish what that law was, especially in light of the fact that this "understanding" of the law was not shared by the highest court of the United States specifically charged with interpreting the meaning of the Tariff Act. Under these circumstances, "Commerce's understanding" does not provide an objective basis to determine what the law *of the United States* was prior to the enactment of P.L. 112-99. This can only be determined by reference to valid sources of evidence of municipal law.

15. Despite the U.S. contention that the text of the measure at issue in this dispute is "irrelevant" to whether that measure had any of the effects described by Article X:2, it is axiomatic that any determination of the meaning of municipal law must begin with the "text of the relevant legislation or legal instruments". China explained in detail in its oral statement at the first meeting why it is evident on the face of Section 1 that it advances a rate of duty and imposes a new or more burdensome requirement or restriction on imports in relation to the Tariff Act as it previously existed.

16. In China's view, the Panel's evaluation of whether Section 1 of P.L. 112-99 is within the scope of Article X:2 could end at this juncture. However, because the United States has continued to make assertions about the meaning of prior municipal law (despite its apparent irrelevance under the U.S. interpretation of Article X:2), and because the Appellate Body has observed that proof of municipal law "may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars", China will proceed to examine these other sources of evidence.

17. China will begin with the repeated U.S. assertion that Section 1 of P.L. 112-99 was "a clarification of U.S. law". For the reasons explained in response to question 52 from the Panel, China does not consider the "change" versus "clarification" issue to be determinative of the issue before the Panel under Article X:2. Furthermore, as the party seeking to establish that Section 1 of P.L. 112-99 was "clarifying" legislation, as that concept is sometimes understood as a matter of municipal U.S. law, it is incumbent upon the United States to provide proof of this assertion. The United States has provided no such evidence.

18. Notwithstanding the fact that the United States has failed to meet its burden of proof, and notwithstanding the ultimate irrelevance of the "change" vs. "clarification" issue, China has included as an exhibit to this rebuttal submission the expert report of Professor Richard H. Fallon, the Ralph S. Tyler Professor of Constitutional Law at Harvard Law School. Whatever the relevance of this issue, China has demonstrated, and Professor Fallon's expert report confirms, that Section 1 of P.L. 112-99 was not a "clarification" of the Tariff Act, as this concept is sometimes understood as a matter of U.S. law.

19. China will now turn to the attempt by the United States to have the Panel disregard the decisions of the Federal Circuit in the *Georgetown Steel* and *GPX* cases as definitive interpretations of the meaning of U.S. law. The United States has gone to extraordinary lengths in this dispute to convince the Panel that those decisions of the highest U.S. court specifically tasked with interpreting the Tariff Act somehow do not constitute evidence of what the Tariff Act meant prior to the enactment of Section 1 of P.L. 112-99.

20. For the reasons that China has already indicated, it is unclear why the United States has bothered to engage in this effort. The U.S. position appears to be that, even if it were beyond all doubt or cavil that prior municipal law had been interpreted by domestic courts to prohibit the application of countervailing duties to imports from nonmarket economy countries, it still would have been consistent with Article X:2 for the United States to enforce Section 1 of P.L. 112-99 in respect of imports that occurred prior to its official publication. This is not only because of its absurd interpretation of what it means to enforce a measure of general application prior to its official publication, which China will address in Part C below. It is also because the United States considers the relevant baseline under Article X:2 to be whatever "existing approach" was in place prior to the official publication of the measure, without regard to whether this "approach" had any basis in existing municipal law.

21. It is understandable why the United States has been forced to take such an extreme and untenable position. The United States has presented no relevant evidence – literally none – to demonstrate that prior municipal law permitted or required the application of countervailing duties to imports from nonmarket economy countries. Separate and apart from its "clarification" theory, the "evidence" advanced by the United States consists entirely of assertions about the meaning of prior municipal law that the U.S. administration presented to its own domestic courts, which those courts considered and found to be unpersuasive. The United States has offered no reason why this Panel should accept these assertions as evidence of prior municipal law, and there is no conceivable reason why it should.

22. China has demonstrated by reference to the Federal Circuit's decisions in the *Georgetown Steel* and *GPX* cases that, prior to the enactment of Section 1 of P.L. 112-99, the Tariff Act was consistently interpreted by the Federal Circuit – the highest U.S. court specifically charged with its interpretation – as prohibiting the imposition of countervailing duties on imports from nonmarket economy countries. China has thoroughly rebutted the U.S. mischaracterizations of these decisions in response to question 51(a) from the Panel, but will respond here to one additional mischaracterization put forward by the United States in its own responses to the Panel's questions.

23. In response to question 16 from the Panel, the United States repeats its mantra that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", but it then goes on to assert that "[t]he U.S. Federal Circuit's legally binding decision in *GPX VI* confirms this fact." This is a remarkable assertion.

24. As China has previously explained, the Federal Circuit's decision in *GPX VI* begins by reiterating its prior holding in *GPX V*, and then takes that prior holding as its baseline for evaluating the implications of the subsequent enactment of P.L. 112-99. Despite multiple requests by the United States, the Federal Circuit declined to vacate its prior decision in *GPX V*, thereby signalling that it considered its interpretation of prior U.S. law to be authoritative and precedential. It is ludicrous for the United States to claim that the Federal Circuit's decision in *GPX VI* "confirms" that "the state of law in the United States has always been that Commerce is not prohibited from applying the U.S. CVD law to NME countries", when in fact it confirms just the opposite.

25. But there is no need to belabour these points further. In his expert report, Professor Fallon explains why "*GPX VI*, through its reliance on the holding of *GPX V* and otherwise, reflects a judicial determination that P.L.112-99 substantively changed the meaning of Section 701(a) of the Tariff Act to make it retroactively applicable to nonmarket economies and to goods from nonmarket economies." Professor Fallon lays out in detail why the Federal Circuit's decisions in *GPX V* and *GPX VI*, taken together, establish the meaning of the Tariff Act both before and after the enactment of P.L. 112-99. Professor Fallon's detailed examination of the legal status and significance of the Federal Circuit's decisions in *GPX V* and *GPX VI* should be sufficient to lay this matter to rest.

C. The United States Enforced Section 1 of P.L. 112-99 Prior to its Official Publication on 13 March 2012

26. The final interpretative issue before the Panel in respect of China's claim under Article X:2 is whether the United States enforced Section 1 of P.L. 112-99 before its official publication on 12 March 2012. For the reasons that China has explained, China considers it self-evident from Section 1(b) of P.L. 112-99 that the United States enforced the new Section 701(f) of the Tariff Act

before its official publication. This is because Section 1(b), by its express terms, applies the new Section 701(f) to all countervailing duty proceedings initiated on or after 20 November 2006, nearly five and a half years before its official publication.

27. The U.S. submissions to date establish that the United States has no credible response to this aspect of China's claim under Article X:2. Aside from its half-hearted and baseless attempt to draw a distinction between what it means to "apply" a measure and to "enforce" a measure, the United States has no basis for refuting China's demonstration that P.L. 112-99 was enforced prior to its official publication. This has forced the United States to defend its conduct by offering interpretations of Article X:2 that bear no resemblance to the actual text of the treaty, properly interpreted in light of its context and object and purpose. Most notable in this regard are its assertion that Article X:2 is only designed to ensure that measures are "not kept secret from foreign governments and traders" and its assertion that "Article X:2 neither prohibits nor permits measures of general application from applying to events that occurred prior to the date of publication".

28. While the U.S. position remains unclear, it appears to be its position that Article X:2 applies only in the circumstance in which a Member formulates a measure of general application (*e.g.* in "secret" form), and then begins to apply this measure to imports before it is officially published. It is not a problem, apparently, when governments *flagrantly and openly* produce the identical result by applying a measure to events or conduct that had already occurred at the time of its official publication. Article X:2 is, apparently, a provision of the GATT that is violated only by governments with bad trade lawyers.

29. The United States offers no interpretative support whatsoever for its nonsensical interpretation of Article X:2. Instead, its argument is based entirely on an outlandish mischaracterization of the Appellate Body report in *US – Underwear*. Contrary to the U.S. assertion, the Appellate Body in *US – Underwear* did not remotely suggest that the panel had misinterpreted Article X:2 when it had found that Article X:2 precluded the application of a measure to actions or events that occurred prior to its official publication. On the contrary, the Appellate Body went out of its way to affirm that this understanding of Article X:2 was correct, and one that was "appropriately protective" of the purposes that Article X:2 is meant to serve.

D. Conclusion to Part II

30. For the reasons set forth in this Part II, China has demonstrated that Section 1 of P.L. 112-99 is a measure of general application effecting an advance in a rate of duty or other charge on imports, and imposing a new or more burdensome requirement or restriction on imports, which the United States enforced before its official publication on 13 March 2012. Accordingly, the Panel should find that the United States has acted inconsistently with its obligations under Article X:2 of the GATT 1994.

III. The United States Has Failed to Rebut China's Demonstration that the United States Acted Inconsistently with Article X:3(b) of the GATT 1994

31. China has demonstrated that the United States acted inconsistently with Article X:3(b) by changing the law applicable to countervailing duty proceedings initiated prior to 13 March 2012 and directing domestic courts to apply this new rule of law to cases under review. As with its response to China's other claims under Article X, the United States has been forced to advance wholly unsustainable interpretations of Article X:3(b) in order to mount any sort of defence. The proposed U.S. interpretations, if accepted, would deprive Article X:3(b) of any practical meaning and gut the obligation of Members to ensure that the decisions of its courts and tribunals are enforced.

32. According to the United States, Article X:3(b) imposes nothing more than what it calls an obligation of "structure". Once a Member has put in place a "structure" of independent tribunals to review and correct agency action, it has no obligation at all to ensure that *specific* court decisions are actually "implemented by" and "govern the practice of" the government agency whose action is subject to review.

33. Needless to say, this is not a credible interpretation of the obligations under Article X:3(b). To begin with, the U.S. "structural" interpretation is based exclusively on the first sentence of Article X:3(b), but it is the *next* sentence of Article X:3(b) that establishes the relevant obligation in this dispute. That sentence provides that:

> Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions *shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers.

34. As is clear from the use of the word "shall" in the second sentence of Article X:3(b), this is a separate and mandatory obligation. This sentence has moved beyond the establishment and maintenance of independent tribunals and is now discussing what effects must be given to the decisions of those tribunals in order for a Member to comply with Article X:3(b). This obligation relates to the "decisions" of independent tribunals, i.e. their *actual* decisions, not just their decisions in some abstract legal "framework". This is obvious from the first part of the sentence, but it is fully confirmed by the proviso that follows: "*[p]rovided* that the central administration of such agency may take steps to obtain a review of *the* matter in another proceeding if there is good cause to believe that *the* decision is inconsistent with established principles of law or the actual facts." The use of the word "the" in this proviso confirms that the obligation in this sentence refers to *specific* "decisions", not just "decisions" in the abstract.

35. Notwithstanding its "structural" interpretation of Article X:3(b), the United States continued to argue in its responses to Panel questions that the Federal Circuit's decision in *GPX V* was not a "decision" in the sense of Article X:3(b). The United States contends that "[a] 'decision' requires that a judicial opinion must put an end to or conclude the tribunal's consideration of the proceeding and result in a final judgment that is conclusive. In order to be conclusive, a decision must have legal effect to end the proceeding." The United States does not reconcile this interpretation with the fact that Article X:3(b) recognizes that a "decision" may not be "final" in the sense that it suggests. The United States argues that a contrary understanding of what a "decision" means would require Members to implement *any* decision of a court or tribunal "immediately", but Article X:3(b) already holds open the possibility that a decision of a court of first instance or an intermediate court of appeal can be subject to further appeal, in which case the Member's obligation to implement the decision would remain contingent upon the outcome of that appeal.

36. The Federal Circuit's decision in *GPX V* was a decision that was subject to the obligations of the United States under Article X:3(b). Under Article X:3(b), the United States was required to ensure that the USDOC implemented and was governed in its practice by this decision, unless one of the two exceptions set forth in Article X:3(b) occurred. In this case, however, the event that prevented the implementation of the decision in *GPX V* was the intervention of the national legislature to change the law applicable to the underlying agency action, retroactively, and thereby direct the outcome of the appeal. As China has previously explained, this is not one of the exceptions to the obligation set forth in Article X:3(b) with respect to the implementation of the decisions of courts or tribunals.

37. The U.S. response to China's argument appears to be limited to its assertion that Article X:3(b) "does not define the relationship between legislatures and the judicial branch". It appears to be the U.S. position that because Article X:3(b) does not expressly proscribe or otherwise address the possibility of legislative intervention in ongoing judicial proceedings, it must be the case that such intervention is permitted under Article X:3(b).

38. This position has no basis in the text of Article X:3(b). It is an accepted canon of legal construction that "to express or include one thing implies the exclusion of the other or of the alternative". Because Article X:3(b) states that the decisions of courts or tribunals "*shall* be implemented by, and *shall* govern the practice of, such agencies *unless* an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers", it is evident under this canon of construction that there are no other exceptions to this requirement. Article X:3(b) does not contemplate the intervention by a national legislature to change the outcome of a judicial proceeding and thereby prevent the implementation of a decision. This action is therefore prohibited.

39. The Government of China and interested Chinese parties strongly and consistently objected when the USDOC began to apply countervailing duties to imports from China in 2006, on the grounds that this action was not in accordance with U.S. municipal law. They availed themselves of their right to judicial review of the USDOC's actions and ultimately prevailed in their understanding of U.S. law as it then existed. Consistent with Article X:3(b), and consistent with the principles of fairness and due process inherent in Article X, they had every expectation that a judicial decision in their favour would be implemented by the USDOC and would govern the practice of the USDOC in other proceedings that raised the same issue. It is of no solace that, as the United States notes, the U.S. Congress does not "routinely" go about depriving foreign parties of their litigation victories in U.S. courts. It happened here, and it is inconsistent with Article X:3(b), properly interpreted.

IV. The United States Has Failed to Rebut China's Demonstration that the USDOC Acted Inconsistently with Article 19.3 of the SCM Agreement by Failing to Investigate and Avoid Double Remedies in the Identified Investigations

A. The Panel Can and Should Adopt the Panel's Factual Finding in DS379

40. While the Appellate Body has said that "factual findings made in prior disputes do not determine facts in another dispute", it also has recognized that "if the critical evidence is the same and the factual question about the operation of domestic law is the same, it is likely that the finder of facts would reach similar findings in the two proceedings." For the reasons China explained in response to Panel question 78, the situation the Appellate Body described in *US – Continued Zeroing* is precisely what the Panel confronts in this case. The factual question facing the Panel in this dispute is the exact question that was confronted by the panel in DS379, the underlying NME methodology that is the subject of that factual inquiry is identical, and the dispute is between the same parties.

41. The panel in DS379 concluded that "the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once", and provided a detailed account of its reasoning in paragraphs 14.67 to 14.75 of its report.

42. The United States elected not to appeal the panel's factual finding regarding the likelihood of the double remedy. As China demonstrated in its response to Panel question 78, the USDOC itself has since confirmed the accuracy of that finding through its measures taken to comply with the recommendations and rulings of the DSB in relation to the dispute in DS379. Nonetheless, in response to question 78 from the Panel, the United States argues that the Panel should not rely on the panel's factual finding in DS379 because it rests upon "a flawed premise that domestic subsidies are 'likely' to lower export prices to some degree".

43. China notes that the arguments presented by the United States in support of its contention that domestic subsidies may not result in a reduction in export price are exactly the same arguments that the United States presented to the panel in DS379. The panel properly concluded that "[t]aking both sides of the dumping margin equation into consideration" – i.e. looking at normal value and export price together – did not alter the panel's prior conclusion that a double remedy is likely to arise from the replacement of the producer's actual, subsidized costs with unsubsidized costs of production. Using the wholly reasonable assumption that it would be "the rare case" when domestic subsidies did not have some effect on export prices, the resulting dumping margin would "once again" reflect not only "price discrimination (dumping), but also … subsidies that were granted to the investigated producer."

44. For all of these reasons, the panel's conclusion that "at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology" is unassailable.

B. The United States Has Presented No "Cogent Reasons" for the Panel to Disregard the Appellate Body's Finding Under Article 19.3

45. China has described the Appellate Body's interpretation of Article 19.3 of the SCM Agreement in DS379 at length in both its first written submission and its oral statement at the first

substantive meeting of the parties. In brief, the Appellate Body in DS379 held that investigating authorities have an "affirmative obligation to establish the appropriate amount of the duty under Article 19.3", and stated that this obligation requires investigating authorities "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record."

46. The Appellate Body has made clear that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Nonetheless, the United States argues that the Panel should disregard the Appellate Body's findings in DS379 in light of the arguments that it has presented in this dispute that were "not considered" by the Appellate Body.

47. The allegedly "new" arguments that the United States has presented in Sections VI(B)(1) and (2) of its first written submission relate to the ordinary meaning of the relevant terms in Article 19.3, when read in the context of both Article 19.3 as a whole and the remaining Article 19 provisions. The problem with these "new" arguments is that the United States ignores that the Appellate Body engaged in precisely the same ordinary meaning and contextual analysis in its interpretation of Article 19.3, and arrived at an understanding of that provision diametrically opposed to that advocated by the United States. It is the Appellate Body's legal interpretation, and not the contrasting view of a single Member, that the Panel is expected to follow in this dispute.

C. China Has Demonstrated that the USDOC Acted in Violation of Article 19.3 in the Investigations at Issue in this Dispute

48. The parties' interventions at the first meeting of the Panel and their answers to the Panel's questions establish their agreement that the *Kitchen Shelving* determinations in Exhibits USA-99 and USA-100 are representative of how the USDOC addressed the issue of overlapping remedies in all of the challenged determinations. Accordingly, if the USDOC's approach in the *Kitchen Shelving* determinations is the same as the approach that it took in the investigations at issue in DS379, then all of the determinations at issue are inconsistent with Article 19.3. This conclusion necessarily follows from the Appellate Body's finding that in the investigations at issue in DS379, the USDOC acted in violation of Article 19.3 by failing to investigate and avoid double remedies.

49. In point of fact, the USDOC's determinations in the *Kitchen Shelving* investigation are carbon copies of its determinations in the DS379 investigations, as China laid out in detail in response to question 79(b) from the Panel. The United States could not, and does not, contend otherwise. Instead, the United States argues in response to question 79(b) from the Panel that "by fully considering the factual evidence and arguments made by respondent parties, as illustrated by Exhibits USA-99 and USA-100, Commerce discharged any alleged burden to determine whether overlapping remedies would arise." The United States further argues that Chinese respondents "never presented, or attempted to present, any evidence concerning the actual extent to which the remedies may have overlapped".

50. These are the same arguments that the United States made in DS379, and that were rejected by the Appellate Body in that dispute. In DS379, the Appellate Body agreed with China that the investigating authority has an affirmative obligation to investigate and make its own determination about the existence of any double remedy. In paragraph 602 of its report, the Appellate Body explained that in order to make such a determination, an investigating authority would need to "solicit[]" relevant facts and "base its determination on positive evidence in the record".

51. The obligation on the investigating authority to solicit relevant facts and make a determination based on positive evidence is not contingent on the respondent's presentation of "evidence concerning the actual extent to which the remedies may have overlapped". Rather, it stems from the panel's finding, endorsed by the Appellate Body, that double remedies are "likely" when the concurrent anti-dumping duties are calculated on the basis of an NME methodology. It is not enough for the investigating authority to "fully consider[] the factual evidence and arguments made by respondent parties" if the investigating authority never solicits relevant evidence in the first place.

52. The United States has not attempted to argue that the USDOC actually engaged in the kind of investigation that the Appellate Body has said is required under Article 19.3 in any of the determinations at issue. China submits that the uncontested failure of the USDOC to investigate and avoid double remedies in the investigations at issue establishes a clear violation of Article 19.3 of the SCM Agreement.

Executive Summary of the Opening Statement of China at the Second Meeting of the Panel

Article X:1

1. The U.S. defence of China's claim under Article X:1 is based on an interpretation that is contrary to its ordinary meaning, contrary to the manner in which this provision has been interpreted by prior panels, and contrary to interpretations that the United States has advocated in other disputes – including another dispute presently underway.

2. In *EC – IT Products,* the United States argued, and the panel agreed, that the term "made effective" in Article X:1 refers to the date on which the measure at issue was "brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'." Consistent with this holding, the United States is currently advocating in another dispute that the term "made effective" refers to the date on which a measure "is first rendered operative or applied in practice, or formally promulgated, *whichever is earlier*."

3. By its express terms, section 1 of the GPX legislation was made effective on 20 November 2006. This is the date on which the new section 701(f) of the Tariff Act had legal effect in practice, by supplying a statutory basis for countervailing duty investigations initiated on or after that date. As the United States successfully argued in *EEC – Dessert Apples,* a measure of general application is not "published promptly" under Article X:1 when it is backdated to apply to events that have already occurred.

4. In the present dispute, by contrast, the United States has taken the position that "Article X:1 requires that measures be published promptly *upon their adoption*". It is clear why the United States has been forced to take this position – it has no other option but to depart from the interpretation of Article X:1 that it has correctly advocated in other disputes. Under a proper interpretation of Article X:1, there simply is no justification for publishing a measure of general application nearly six years after it was made effective.

Article X:2

5. There are two key issues in dispute with respect to the proper interpretation and application of Article X:2. The first is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge on imports, or imposed a new or more burdensome requirement on imports. The second is what it means to enforce a measure before its official publication.

6. With regard to the first issue, the U.S. second written submission continues to be confused and internally contradictory. Most importantly, it remains unclear to China whether the United States considers the meaning of its own municipal law to be relevant to the Panel's analysis under Article X:2. The United States continues to assert that the meaning of U.S. law prior to the enactment of the GPX legislation is irrelevant to the Panel's analysis because Commerce was already imposing countervailing duties on imports from China. Therefore, according to the United States, the enactment of the GPX legislation did not result in any change in Commerce's treatment of these imports. At the same time, however, the United States is still trying to convince the Panel that U.S. law permitted the application of countervailing duties to imports from China prior to the enactment of the GPX legislation.

7. It seems to China that the United States lacks the courage of its convictions. If the only relevant fact under Article X:2 is that Commerce was already applying countervailing duties to imports from China, then the United States should be completely indifferent to the meaning of its prior municipal law. It is altogether unclear, then, why the United States continues to argue in its second written submission that imports from China "were already subject to the U.S. CVD law" prior to the enactment of the GPX legislation. The United States has devoted a great deal of effort to trying to convince the Panel of this assertion, for no apparent reason.

8. It is clear, though, why the United States has been forced to tack back and forth between these contradictory positions. If the relevant baseline under Article X:2 is prior municipal law,

properly determined as a question of fact, the United States must realize that it has no evidence to support its assertion that U.S. law previously provided for the imposition of countervailing duties on imports from NME countries. This explains, for example, why the United States has taken the position that the text of the GPX legislation is "irrelevant" to the Panel's analysis under Article X:2 – it knows that any objective examination of the statute leads to the conclusion that the statute amended the Tariff Act to provide for the application of countervailing duties to imports from NME countries. The United States does not want prior municipal law to be the baseline under Article X:2, and it does not want the Panel to examine the text of the measure at issue in this dispute, because it is obvious that the GPX legislation had the types of effects that place it squarely within the scope of this provision.

9. At the same time, the United States must realize that its proposed interpretation of Article X:2 – that the relevant baseline is whatever Commerce's "existing approach" happened to be – is not viable as a matter of treaty interpretation. This is why the United States continues to argue about the meaning of U.S. law prior to the enactment of the GPX legislation. The problem for the United States, however, is that it has no evidence whatsoever to support its assertions about the meaning of prior U.S. law. Its "evidence" seems to amount to nothing more than an implicit assertion that U.S. law is synonymous with whatever Commerce happens to be doing in practice at any given point in time.

10. The United States asserts, for example, that "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." The second sentence in this statement is an obvious non-sequitur. As subsequent events confirmed, "Commerce's existing and well-known treatment" of imports from China was not the same as "the U.S. CVD law" as it then existed. The fact that Commerce was applying countervailing duties to imports from China does not mean that "the U.S. CVD law … applied to these imports". U.S. law is not synonymous with Commerce's "treatment" of imports.

11. What this non-sequitur illustrates, however, is the importance of evaluating the issues under Article X:2 from the standpoint of the United States as a Member of the WTO, not from the standpoint of the United States Department of Commerce as a single agency of the United States government. Here at the WTO, what matters for the purposes of Article X:2 is not what Commerce was doing in practice, or how the members of the U.S. delegation believe that U.S. law should have been interpreted. What matters is what the law of the United States was prior to the enactment of section 1 of the GPX legislation, as reflected in published measures of general application. For the reasons that China set forth in its second submission, this is the relevant baseline for determining whether a measure of general application effected an advance in a rate of duty or other charge, or imposed a new or more burdensome requirement on imports. This baseline must be determined by reference to valid sources of municipal law, not the mere assertions of the United States before this Panel.

12. On one side of this dispute, China has demonstrated by reference to the text of the measure at issue that it effected an advance in a rate of duty or other charge, and imposed a new or more burdensome requirement on imports. China has further demonstrated by reference to authoritative decisions of the United States Court of Appeals for the Federal Circuit that U.S. law did not previously provide for the application of countervailing duties to imports from NME countries. On top of that, China has thoroughly rebutted the unsubstantiated U.S. assertion that the GPX legislation was merely a "clarification" or "confirmation" of U.S. law as it always existed. On the other side of this dispute, by contrast, the United States has refused to engage with the text of the measure at issue, and has offered no factual evidence to support its assertions about the meaning of prior U.S. law. There is no factual support at all for its assertion that U.S. law provided for the application of countervailing duties to imports from NME countries prior to the enactment of section 1 of the GPX legislation. For these reasons, it is clear that section 1 of the GPX legislation is a measure of the type described by Article X:2.

13. The second major issue in dispute in relation to Article X:2 is whether the United States enforced this measure before it was officially published on 13 March 2012. This should not be a hard question to answer – it is obvious from basic principles of treaty interpretation that Article X:2 precludes the application of measures falling within its scope to events that occurred prior to its official publication. The panel and Appellate Body easily recognized this point in *US – Underwear*. For the reasons that China has explained, the fact that Article X:2 precludes the

application of a measure to events that occurred prior to its official publication follows from the undisputed ordinary meaning of what it means to "enforce" a measure, from the interpretation of Article X:2 within the broader context of Article X, and from a proper consideration of the object and purpose of the GATT 1994.

14. Not having any meaningful response to these points, the United States has been forced to concoct an elaborate and confusing interpretation of Article X:2 that has something to do with what the United States calls "secret measures". To the extent that China can even figure out what the United States is talking about, the proposed U.S. interpretation of Article X:2 appears to elevate form over substance, and would appear to render Article X:2 entirely redundant of the prompt publication requirement under Article X:1. With no interpretative support for this result, the United States has based its interpretation of Article X:2 on a clear mischaracterization of the Appellate Body's holdings in *US – Underwear,* a mischaracterization that China has now thoroughly debunked in its second submission. The panel and Appellate Body holdings in *US – Underwear* are fully consistent with China's interpretation of Article X:2, not the "secret measures" interpretation advocated by the United States.

15. In sum, it is clear on the face of the GPX legislation itself that it advanced a rate of duty or other charge on imports and imposed a new or more burdensome requirement on imports, and that the United States enforced this measure before its official publication in violation of Article X:2. As China has explained throughout this dispute, section 1 of the GPX legislation is a paradigmatic example of what Article X:2 precludes – the application of a measure to events that occurred prior to its official publication. The application of section 1 to countervailing duty investigations initiated prior to its official publication was plainly inconsistent with this provision.

Article X:3(b)

16. China has already responded in detail to the assertion by the United States that Article X:3(b) does not require a Member to ensure that the decisions of its courts or tribunals are actually enforced. The contention by the United States that it would not be inconsistent with Article X:3(b) for Commerce "to flout a final decision of the U.S. federal courts" is truly one of the more remarkable positions that the United States has taken in this dispute. China has demonstrated that the "structural" interpretation of Article X:3(b) that underlies this contention is incorrect, and will not discuss it further here.

17. What the United States has failed to come to terms with is the fact that Article X:3(b) prescribes exactly what may happen to a decision of a court or tribunal. As is evident from the requirement that such decisions "*shall* be implemented by, and *shall* govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction", there are no other exceptions to this requirement, other than the collateral challenge proviso. The United States has failed to explain how the intervention of the United States Congress to change the outcome of an ongoing judicial proceeding was consistent with this requirement. Nor has the United States explained how it can possibly be consistent with the purpose of independent judicial review to allow this to occur.

18. As with its other proposed interpretations of Article X, the United States is effectively trying to read Article X:3(b) out of the GATT by reducing it to a nullity. The Panel must reject this interpretation.

Article 19.3 of the SCM Agreement

19. China has demonstrated that the 26 countervailing duty determinations at issue in this dispute are indistinguishable from those that the Appellate Body found to be inconsistent with Article 19.3 of the SCM Agreement in DS379. In each of the determinations at issue, Commerce declined to take any steps to investigate and avoid the double remedies that were likely to result from the application of countervailing duties in conjunction with anti-dumping duties determined under the U.S. nonmarket economy methodology. Likewise, in the parallel anti-dumping determinations, Commerce made no effort to investigate the problem of double remedies and declined to take any steps to avoid double remedies for precisely the same reasons that it had cited in the parallel anti-dumping determinations in DS379.

20. The United States does not seriously contend that there is any material difference between the determinations at issue in DS379 and those at issue here. In fact, at the last meeting of the Panel, the United States submitted the CVD and AD determinations in the *Kitchen Shelving* investigations, which are identical to those at issue in DS379, and conceded that the other determinations at issue in this dispute are the same. Thus, there should be no disagreement between the parties that the determinations at issue in the present dispute are on all fours with the determinations that were found to be inconsistent with Article 19.3 in DS379.

21. The U.S. defence of these determinations comes down to two propositions, one factual, and the other legal. The factual proposition is that the Panel should decline to find that double remedies were likely to occur in the investigations at issue, even though the methodologies that Commerce used in these investigations were identical in all respects to those at issue in DS379. The United States has tried to dress this up as a series of speculations about why a double remedy might not occur under certain circumstances. As China has demonstrated, however, the panel in DS379 addressed these same speculations and found that they did not detract from its finding that double remedies were likely to occur.

22. In DS379, the panel's bottom-line conclusion, even after taking the U.S. speculations into account, was that "at least some double remedy will likely arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology." The United States opted not to challenge these factual findings before the Appellate Body.

23. The United States has presented the Panel with no reason whatsoever to reach a different factual conclusion than the panel in DS379. It has presented no reason for the Panel to believe, for example, that double remedies were any less likely to occur on the facts of these investigations than on the facts of those at issue in DS379. And since the panel in DS379 made those findings, the United States has subsequently concluded in its compliance determinations in that dispute that 63 per cent of the input subsidies at issue had been remedied twice. Notably, the United States found the same amount of double remedy across four different investigations involving four different products. The United States has offered no reason to believe that a similar factual conclusion would not be warranted with regard to the investigations and products at issue here. In this way, the United States has fully confirmed the factual accuracy of the panel's conclusion that "at least some double remedy will likely arise" from the concurrent application of countervailing duties and anti-dumping duties determined under the U.S. NME methodology.

24. This factual finding – that at least some double remedy is likely to occur – is what formed the basis for the Appellate Body's legal conclusion that the United States has an affirmative obligation under Article 19.3 to investigate and avoid these likely double remedies. As it did in DS379, the United States has tried to argue in the present dispute that the burden fell upon the Chinese respondents to demonstrate the existence and extent of a double remedy. However, as China explained in its second submission, the Appellate Body expressly considered and rejected this argument, holding that the United States has an affirmative obligation under Article 19.3 to solicit relevant facts pertaining to the issue of double remedies and reach a conclusion with regard to this issue that is based on positive evidence in the record. As I explained a moment ago, there is absolutely no indication in any of the determinations at issue in this dispute that Commerce discharged this affirmative obligation.

25. This brings me to the legal proposition on which the United States has based its defence – that the Panel should decline to follow the interpretation of Article 19.3 that the Appellate Body adopted in its report in DS379. For the reasons that China has explained at length, the United States has failed to present any cogent reasons for this Panel to adopt a contrary interpretation of Article 19.3. All of the so-called "new arguments" that the United States has put forward concerning the interpretation of Article 19.3 amount to nothing more than taking issue with the Appellate Body's detailed interpretative analysis of this provision. The Appellate Body engaged in a thorough textual and contextual analysis of Article 19.3 and concluded that it imposes an affirmative obligation upon the United States to investigate and avoid the double remedies that are likely to occur in the NME context. It is this interpretation of Article 19.3 that the Panel is expected to follow, and it should do so here.

ANNEX B-2

EXECUTIVE SUMMARIES OF THE ARGUMENTS OF THE UNITED STATES

Executive Summary of the First Written Submission of the United States of America

I. INTRODUCTION

1. The legislation of the U.S. Congress ("Congress") reaffirming the existing application of U.S. countervailing duty ("CVD") laws to imports from nonmarket economy countries ("NMEs"), or what is commonly known as the "*GPX* legislation," is fully consistent with U.S. obligations under Article X of the *General Agreement on Tariffs and Trade 1994* ("the GATT 1994"). China's claims under Article X of the GATT 1994 fail as a matter of fact and law. China's claims are based on a fundamental misunderstanding of U.S. CVD law and the effect of the *GPX* legislation. The law affirmed the U.S. Department of Commerce's ("Commerce") pre-existing approach to the application of the U.S. CVD law to NME countries such as China. It did not change or otherwise affect the approach that Commerce had been using in the challenged CVD proceedings. Rather, it maintained the *status quo* that existed prior to its enactment.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

3. Despite its length, China's discussion of Commerce's application of the U.S. CVD law to imports from China is incomplete. The United States provides a summary of those facts which may be relevant to the claims that China has raised under the WTO Agreement.

4. First, any discussion of the U.S. CVD law must begin with the plain text of the law, which China fails to provide in its background section. The plain text of the law requires that Commerce must apply countervailing duties to any country where it can identify a countervailable subsidy. Second, a 1986 decision by a U.S. appellate court, *Georgetown Steel v. United States*, did not decide that Commerce was prohibited as a matter of law from applying the CVD law to NME countries. Rather, the U.S. appellate court in *Georgetown Steel* deferred to Commerce's judgment that it was not required to apply the CVD law where it was impossible to do so. In other words, the U.S. appellate court simply affirmed Commerce's broad discretion to find the existence of a countervailable subsidy. Third, China's assertion that following the *Georgetown Steel* decision, the existing U.S. law prohibited the application of the U.S. CVD law to NME countries fails as a matter of fact. Commerce did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because the structure of the NME countries at that time made it impossible to identify countervailable subsidies. Fourth, in 2006, based on a petition from a U.S. domestic industry, Commerce initiated a CVD investigation on certain Chinese imports in which it determined that China's modernized economy was so substantially different from those of the Soviet-bloc states of the 1980s that it was no longer impossible to identify subsidies there. Fifth, the so-called *GPX* litigation is an on-going challenge to Commerce's approach in the U.S. domestic court system. One of the opinions issued in the middle of a string of judicial opinions in this litigation raised a differing view of what Congress intended in the U.S. CVD law. This view differed from previous court decisions and Commerce's existing application of the U.S. CVD law. The opinion, *GPX V*, however, is legally insignificant as it never became final. Finally, while the opinion was pending on appeal, Congress enacted the *GPX* legislation, which affirmed that the U.S. CVD law is applicable to all countries, including NME countries.

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

5. China's claims under Article X:1 of the GATT 1994 rest not on a proper interpretation of the text of that provision, but on an implausible reading that would require publication before the

existence of a measure and substantive requirements governing the content of a measure. Such a reading is unfounded.

6. As an initial matter, China fails to state which of the categories listed in Article X:1 of the GATT 1994 is applicable to the *GPX* legislation. Without satisfying this threshold issue, China's claims under Article X:1 of the GATT 1994 must fail.

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

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

9. A number of elements of Article X:1 of the GATT 1994 makes this clear. First, the starting point of Article X:1 of the GATT 1994 is that it applies to "laws, regulations, judicial decisions, and administrative rulings of general application" pertaining to certain enumerated subjects. At the risk of stating the obvious, these law, regulations, etc. must be in existence for Article X:1 of the GATT 1994 to apply. In addition, Article X:1 of the GATT 1994 only applies if these types of measures have been "made effective by any [Member]." This "made effective" clause is a limitation on Article X:1 of the GATT 1994 – that is, it excludes from the scope measures that may be in existence, but have not been made effective by a Member. Also, the past tense of the term "made effective" shows that the obligation in Article X:1 of the GATT 1994 applies to measures that have been adopted at some point in the past. The "made effective" clause cannot be read, as China implies, as some sort of additional, substantive obligation to the effect that measures of general application must not apply to past factual situations.

10. Once a measure of general obligation falls within the scope of Article X:1, the article imposes two obligations on the Member that has adopted the measure: the measure must be published (i) "promptly" and (ii) "in such a manner as to enable governments and traders to become acquainted with [it]."

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

12. China proposes to reinterpret Article X:1 of the GATT 1994 not as a procedural requirement on publication, but instead as a substantive obligation. China's argument, however, cannot be squared with the plain text of Article X:1 of the GATT 1994. On the undisputed facts of this dispute, China presents no basis for a finding that the *GPX* legislation was not published promptly. Indeed, China itself states that "[t]he bill was signed by President Obama on 13 March 2012 and officially published on the same date." Given that, as China agrees, the *GPX* legislation was published on the same day that it came into existence, China has no basis for any claim that the measure was not published "promptly" under Article X:1 of the GATT 1994.

13. China argues that "the Government of China and Chinese producers could not possibly have become acquainted with section 1 of P.L. 112-99 before it took effect, since the law was not published until long after it took effect as a legal basis for the USDOC to apply countervailing duties to imports from NME countries." The plain meaning of "manner" is "the way in which something is done, the mode or procedure." China has presented no basis for a claim that the U.S. publication of the *GPX* legislation was inconsistent with the obligation in Article X:1 of the

GATT 1994 regarding the manner of publication. In fact, the *GPX* legislation was published in the *United States Statutes at Large,* on the same day it was enacted. The *United States Statutes at Large* is readily available to China, Chinese traders and other members of the public. Accordingly, the publication of the *GPX* legislation met the Article X:1 of the GATT 1994 obligation regarding the manner of publication.

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

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

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

17. In fact, Article X:1 of the GATT 1994 itself recognizes that measures may affect events that occurred prior to the publication of a measure. Looking further afield than the text of Article X:1 of the GATT 1994, the application of legal obligations to previous actions is embodied in international law and the parties' own legal systems.

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

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

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

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

21. The requirements for a measure to be covered by Article X:2 of the GATT 1994 can be separated into two parts: the general type of measure, and the requirement that the measure represents a certain type of change from a prior measure. The general types of measures covered by Article X:2 of the GATT 1994 are either a measure of general application effecting a duty rate

or other charge on imports under an established and uniform practice, or a measure of general application imposing a requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either category. As such, China has failed to present *a prima facie* case.

22. Although it is China's burden to present its case in the first instance, the United States notes that it is difficult to understand how China would intend to try to fit the *GPX* legislation within the scope of Article X:2 of the GATT 1994. First, laws involving CVDs do not "effect a an advance in a rate of duty or other charge on imports under an established and uniform practice." Unlike, for example, an ordinary customs duty, countervailing duties do not "effect" (which means to "bring about" or "produce") any particular "rate" or level of a CVD duty under established or uniform practice, unlike a customs tariff which sets out rates of duty. In contrast, CVD laws describe a process for determining a special CVD duty, and CVD laws themselves do not bring about or produce any particular duty rate.

23. Second, China fails to establish that the *GPX* legislation imposes a "requirement, restriction or prohibition" under Article X:2 of the GATT 1994. Rather, China asserts that the *GPX* legislation "'impos[es] a new or more burdensome requirement, restriction or prohibition on imports' in so far as it makes certain categories of imports subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties." China's argument assumes the conclusion, and fails to explain how the *GPX* legislation imposes a requirement, restriction, or prohibition.

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

25. Because there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports, Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty. The Oxford English Dictionary defines "rate" as "[t]he total quantity, amount, or sum *of* something, esp. as a basis for calculation." Section 1 of the *GPX* legislation imposes no such change, advance or decrease, in the total quantity, amount or sum of CVDs. The rate remains the same as previous to the enactment of the *GPX* legislation.

26. Further, China's argument ignores the requirement under Article X:2 of the GATT 1994 that the initial duty rate (that is, prior to the "advance" in the rate, there must have been "an established and uniform practice."). Even if the *GPX* legislation could be considered as modifying U.S. law (which it did not), it could never be said that the situation prior to the *GPX* legislation could be described as an "established and uniform practice" not to apply CVDs to imports of China. To the contrary, as explained above, the established and uniform practice since at least 2006 was to apply CVDs to China. Moreover, even before that time, Commerce maintained procedures for applying the U.S. CVD law to any country where a countervailable subsidy (or bounty or grant) could be determined.

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

28. Section 1 of the *GPX* legislation was neither a change in the law, nor did it result in any change in the treatment of imports from China. Rather, the legislation reaffirmed Commerce's interpretation of existing law for the purposes of resolving confusion in ongoing litigation. Prior to the law's enactment, Commerce acted pursuant its reasonable interpretation of the Tariff Act of

1930 to apply the U.S. CVD law to China when it could identify a countervailable subsidy in China. For the past seven years, the U.S. CVD laws have applied to imports from China.

29. Though challenged on a number of occasions as being *ultra vires*, Commerce's decision was upheld by a number of U.S. courts. China relies on the fact that five years following its initial judicial challenge of Commerce's decision and numerous CVD proceedings later, the U.S. Federal Circuit issued a contradictory opinion based on legislative silence. The only effect of this opinion, which was not final, was to provide China notice that the state of the relevant U.S. CVD law was unsettled. Section 1 of the *GPX* legislation does not impose any "new or more burdensome" requirements, restrictions or prohibitions. Rather, it maintains Commerce's existing approach.

30. Given that the *GPX* legislation resulted in no change in the treatment of imports from China, and no change in U.S. law, the United States submits that the *GPX* legislation is not a measure covered by Article X:2 of the GATT 1994. Nonetheless, the United States also notes that China has failed to show that the *GPX* legislation is inconsistent with the obligation set out in Article X:2 of the GATT 1994. Although the United States is not in a position to respond to an argument that China has not made, the United States notes that the facts in this case do not support a contention that the *GPX* legislation is inconsistent with this obligation. In particular, the *GPX* legislation was officially published on its date of adoption, March 13, 2012. And Commerce took no action prior to that date to enforce the measure.

31. Instead of addressing the specific language of the WTO provision and the facts of this dispute, China primarily relies on the Appellate Body's findings in *US – Underwear* to support a general proposition that Article X:2 of the GATT 1994 "precludes retroactivity." China's approach fails for a number of reasons. First, citation to a prior Appellate Body report does not substitute for the application of the specific language in Article X:2 of the GATT 1994 to the specific facts in this dispute. Second, a discussion focused on the general concept of "retroactivity" does not lead to any conclusion with respect any specific issue under the WTO Agreement. "Retroactivity" is not a term used anywhere in the GATT 1994.

32. Third, and finally, China misrepresents the Appellate Body findings in *US -Underwear.* What China fails to point out is that, although the Appellate Body discussed both the relevant ATC provisions and Article X:2 of the GATT 1994, the Appellate Body's ruling in favor of Costa Rica was based on the ATC provision (and not Article X:2 of the GATT 1994). In fact, the Appellate Body rejected the argument that Article X:2 precluded the application of the safeguard to imports that entered prior to the June 1995 adoption of the measure.

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

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

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

35. China's claim fails as a matter of fact. The *GPX V* opinion was not finalized under the U.S. judicial appeals process, and was under appeal, and therefore there was no final decision to implement. Such non-binding opinions are not "decisions" under Article X:3(b) of the GATT 1994. A decision of a U.S. appeals court is not final until the court issues what is known as a "mandate." If an appeal is timely filed, the mandate is stayed. In *GPX V*, the United States filed a timely petition for rehearing before all of the judges of the U.S. Federal Circuit, or *en banc*. Prior to the issuance of a mandate, U.S. federal appellate tribunals have broad discretion to alter their

judgments. Importantly, it is the issuance of the mandate that, if appropriate, transfers jurisdiction from the appellate court to the first instance tribunal.

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

36. China has not made a *prima facie* case for its claim under the SCM Agreement; and it erroneously interprets Article 19.3 of the SCM Agreement. As a result, its claim that the United States acted inconsistently with Article 19.3 of the SCM Agreement is baseless.

37. China fails to put forward legal arguments to make out a *prima facie* case. Instead, China merely argues that the findings of the Appellate Body in DS379 should be applied to the investigations and reviews at issue in the instant dispute. Rather than present the evidence necessary to support its legal claims, China makes conclusory and generalized allegations as to what Commerce found across 31 sets of determinations without even a cursory citation to a single piece of evidence. To make out a *prima facie* case, China must establish the facts of each determination to demonstrate evidence adequate to make out its case under the legal theory that it advances. However, China makes no mention of Commerce's determinations at all except to cite the list of challenged determinations in CHI-24.

38. Even had China actually presented the Panel with evidence and analysis in its first written submission, an examination of the 31 challenged sets of determinations would reveal that respondent parties had the opportunity to present Commerce with evidence and arguments demonstrating the existence of overlapping remedies and that Commerce fully addressed such evidence, or lack thereof. At the time of the determinations, Commerce was willing to consider any evidence of overlapping remedies. But in none of the 31 challenged sets of determinations did parties present such evidence. To the extent that parties submitted any information at all on the issue of overlapping remedies, it was in the form of theoretical economic arguments unsubstantiated with any evidence. China's submission contains absolutely no discussion of the facts at issue in the determinations made by Commerce. Therefore, China has failed to make a *prima facie* case.

39. China's failure to make a *prima facie* case is especially striking given that China's legal claim under the SCM Agreement is limited in scope. China, in its first written submission, purports to argue that the United States acted inconsistently with Article 19.3 of the SCM Agreement, and as a consequence, Articles 10 and 32.1. China, however, makes no effort to interpret Article 19.3 of the SCM Agreement, or apply this provision to the facts of this dispute. Rather than engage in an analysis of the text of Article 19.3 of the SCM Agreement pursuant to customary rules of interpretation, China relies exclusively statements made in the Appellate Body report in DS379. Statements of the Appellate Body, however, are not a source of WTO obligations, but instead constitute an interpretation of WTO obligations for the purpose of resolving that particular dispute.

40. Article 19.3 is essentially a non-discrimination provision. Article 19.3 first requires that a "countervailing duty" be levied "on imports of such product from all sources found to be subsidized and causing injury." That is, the CVD must be levied on "all" such sources, and not just some of them. Second, the text directs a Member to apply CVDs "on a non-discriminatory basis" on those imports. That is, when CVDs are levied on imports from all such sources, the Member is not to discriminate between those sources. Rather, a Member will impose a CVD on all imports of a product from each Member where the importing Member finds the product to be subsidized and causing injury. Third, Article 19.3 sets out that CVDs levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury shall be "levied in the appropriate amounts in each case."

41. Moreover, use of the definite article "the" before "appropriate amounts" suggests that "the appropriate amounts in each case" is not an open-ended or subjective concept. Instead, "the appropriate amounts" is an objective concept. To be objective, the metric for "the appropriate amounts" must be known and defined. In other words, the amount of CVDs imposed should correspond to the subsidies identified for imports from a particular source, and not from any other.

42. Furthermore, the United States notes that nothing on the face of the phrase "levied in the appropriate amounts in each case" (nor any other language in the SCM Agreement) has any tie to the question of whether or not other measures, such as *anti-dumping* duties, have been applied,

nor any relation to rules outside the SCM Agreement. To read "in the appropriate amounts" as permitting consideration of the application of other measures or other, non-SCM Agreement rules, would convert "in the appropriate amounts" into a subjective standard, with bounds only set by the eyes of the particular interpreter.

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

44. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement. This context shows that the phrase in Article 19.3 – which requires that a Member levy CVD duties in "the appropriate amounts in each case" is not a general rule – unconnected to the nondiscrimination context of 19.3 – that applies to all aspects of the CVD duty.

45. There is one provision in the WTO agreement that disciplines the concurrent use of antidumping and countervailing duties on the same product, and it is not Article 19.3 of the SCM Agreement. Rather, it is Article VI:5 of the GATT 1994, and that article only applies to export subsidies. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping and export subsidization."

46. Further, Article 15 of the Tokyo Round Subsidies Code, specifically prohibiting the concurrent application of AD and CVD measures to certain countries, and the absence of a similar provision in the WTO agreements, provides additional evidence that the WTO Agreements do not concern the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994.

47. China's legal argument under Article 19.3 relies entirely on the understanding of that provision expressed by the Appellate Body in its report in DS379. However, a WTO panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. The rights and obligations of the Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements. The Appellate Body itself has stated that its reports are not binding on panels.

48. In DS379, the Appellate Body disagreed with the legal interpretation set out by the panel and reached certain findings with respect to Article 19.3 of the SCM Agreement. The United States respectfully disagrees with these Appellate Body findings. In particular, we consider that the Appellate Body in DS379 erred in its interpretation of Article 19.3 and consider that the interpretation set out above is a correct understanding of Article 19.3 pursuant to customary rules of interpretation. Notably, China did not argue for the interpretation of Article 19.3 that the Appellate Body in DS379 adopted. In fact, China largely based it claims on Article 19.4.

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

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

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

52. Fourth, in reaching its findings in DS379, the Appellate Body did not identify any limiting principle to provide some bounds for its interpretation of the term "in the appropriate amounts". Rather than clarify the meaning of "the appropriate amounts," the Appellate Body infused that term with an indeterminate, subjective meaning reliant upon how it interpreted provisions of covered agreements other than the SCM Agreement, which could have unknown or unintended consequences. One consequence of the Appellate Body report in DS379 is that an exporting Member, contrary to other situations, need not demonstrate that CVDs duties are not levied in appropriate amounts in each case in the case of simultaneous AD and CVD investigations. Instead, under the Appellate Body's rationale, the burden would appear to fall on the importing Member to prove that CVDs are levied in the appropriate amounts in each case, regardless of whether the exporting Member presented evidence to indicate otherwise.

53. Fifth, the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative. This Panel should not assume the same findings of the panel in DS379 but rather should make its own objective assessment. Further, neither the Panel nor the Appellate Body in DS379, in considering the impact of domestic subsidies upon export prices, recognized that the form of the subsidy is important because some domestic subsidies give domestic producers a greater incentive to increase production than others. Nor did the Appellate Body in DS379 consider that, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase will result in lower export prices. If the world market price is going up, it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy

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

55. For all of these reasons, the Panel should reject China's legal arguments and find that the United States did not act inconsistently with Article 19.3 in any of the 31 challenged sets of determinations.

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

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

Executive Summary of the Opening Statement of the United States at the First Substantive Meeting of the Panel

1. It may be useful to begin by taking a step back and considering why are we here? The provisions of Article X:1 and X:2 are directed to the publication of trade regulations to provide notice and transparency to traders. China cannot seriously contend that the U.S. CVD regime, and its application to China, has suffered from a lack of transparency. Similarly, the provisions of Article X:3(b) are directed to ensuring that Members set up an appropriate structure so that tribunals or procedures may review administrative action and that administrative agencies will then implement those decisions. And again, China cannot seriously contend that the United States has failed to set up such a structure for review or that the U.S. Department of Commerce is not bound by or does not implement such review decisions.

2. In relation to China's claim under Article 19.3 of the SCM Agreement, you may also be asking yourself why we are here. As noted, the U.S. Congress has acted already to require the Department of Commerce to investigate the extent of any so-called double remedy and to adjust the amount of antidumping duty imposed if necessary. Therefore, the U.S. argument in this dispute is not directed to changing the U.S. approach to this issue in the future. But there are two reasons we bring this issue of interpretation to the Panel.

3. First, we consider the Appellate Body's approach in interpretation to be erroneous, and the more one reads its rationale the less appropriate its interpretation of Article 19.3 appears. The Appellate Body report starts with the identification of a supposed problem and then seeks to find an interpretive solution to that problem. But this interpretive approach has it backwards: if the provision claimed to be breached is properly interpreted and then not found to be applicable to the situation the complaining party has brought forward, there is no "problem" under the covered agreements. Second, the Appellate Body's reading of the phrase "in the appropriate amounts" gives a meaning to that phrase which is not connected to its context in Article 19 or the rules for determining "appropriate amounts" in the SCM Agreement

4. Both sets of claims raised by China are flawed and should be rejected. In this statement we proceed to further detail some of those many flaws.

I. CHINA HAS CONFLATED THE LEGAL REQUIREMENTS AND CONCEPTS OF DOMESTIC LAW WITH THE REQUIREMENTS OF ARTICLE X

5. In this dispute, China has failed to provide a *prima facie* case that the *GPX* legislation is inconsistent with a plain reading of Articles X:1 and X:2, and that the U.S. actions with regard to the *GPX V* opinion is inconsistent with a plain reading of Article X:3(b).

6. As the United States will explain further below, the *GPX* legislation did not change or otherwise affect Commerce's existing approach of applying the U.S. CVD law to China. Specifically, the orders for the CVD proceedings listed in Appendix A of China's panel request have not been changed or otherwise affected by the *GPX* legislation. The law maintains the *status quo* for these orders.

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

7. We will first address China's claims under Article X:1. China's claims depend on reading words into Article X:1 that simply are not there, and these claims thus are without merit. Article X:1 imposes two procedural requirements for the publication of certain measures that have been "made effective." The first is that the measure be "promptly published." The second is that the measure be published in such a "manner as to enable governments and traders to become acquainted" with it. China has not demonstrated that the U.S. publication of the *GPX* legislation was inconsistent with these obligations. Article X:1 does not address how a measure should be applied following its publication. In fact and contrary to China's assertions, Article X:1 itself recognizes that measures may affect events that have occurred prior to the publication of a measure.

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

8. Next, we will address China's claim that the *GPX* legislation is inconsistent with Article X:2. China's claim fails for the following reasons. First, China has failed to prove that the *GPX* legislation is covered by Article X:2. Second, even if found to be within the scope of Article X:2, China has failed to prove that the *GPX* legislation is somehow inconsistent with the obligation.

9. In order to fall within the scope of Article X:2, a measure of general application must be of a type that either (1) effects an advance in a rate of duty or other charge on imports under an established and uniform practice, or (2) imposes a new or more burdensome requirement, restriction or prohibition on imports. China has failed to explain how the *GPX* legislation falls under either type. While the burden is on China to make a *prima facie* case, the United States notes that CVD laws provide the framework for determining a CVD duty. The law itself does not prescribe any particular duty rate, let alone effect an "advance" in such a rate, nor does it impose a requirement, restriction or prohibition on imports. Imports are affected once the separate and distinct legal process of an investigation is completed.

10. The *GPX* legislation does not effect an *advance* in a rate of duty. Consistent with the plain text of Article X:2, the panel in *EC – IT Products* found that a covered measure must change an existing approach in order to bring about an increase in a rate of duty. In this dispute, the *GPX* legislation has not changed Commerce's existing approach to apply the U.S. CVD law to China. Further, the *GPX* legislation has not changed any part of the CVD proceedings and orders listed in Appendix A of China's panel request. The CVD rates established through those proceedings remain the same as previous to the enactment of the *GPX* legislation.

11. Similarly, the *GPX* legislation does not impose a *new or more* burdensome requirement, restriction, or prohibition on imports. The term "new" is defined as "not existing before" or "existing for the first time." The term "more" is defined as "in a greater degree" or "to a greater extent." Thus, in order to fall within the scope of Article X:2, imports from China must face a requirement, restriction or prohibition that did not previously exist prior to the enactment of the *GPX* legislation, or face a burden that is of a greater degree than prior to the *GPX* legislation.

12. The *GPX* legislation imposes neither such condition. Prior to the enactment of the *GPX* legislation, imports from China were already subject to the U.S. CVD law. Thus, the law did not impose any condition that had not existed before. Further, the *GPX* legislation did not impose a greater degree of burden on such imports. None of the CVD proceedings cited in China's panel request have been disturbed by the *GPX* legislation. Rather, the law maintained the *status quo* for Commerce's existing approach and the existing CVD orders. Based on these facts, China has failed to prove that the *GPX* legislation is within the scope of Article X:2.

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

13. Next, we will move on to China's claims under Article X:3(b). China has alleged that the U.S. failure to implement a judicial opinion that was pending on appeal, known as the *GPX V* opinion, is inconsistent with Article X:3(b). Such a claim fails as a matter of fact and law.

14. As a factual matter, China is incorrect in its assertion that the *GPX V* opinion was a final decision that was not subject to appeal and had legal effect under the U.S. judicial system. Specifically, China fails to account for the fact that a "mandate" is required to finalize a U.S. appellate court opinion. The U.S. Federal Circuit itself has stated that a mandate was not issued for the *GPX V* opinion because the case was still under appeal. Therefore, *GPX V* was not a final decision that could direct the court of first instance.

15. Further, because the mandate had not issued, the court of first instance could not implement the *GPX V* opinion as a matter of U.S. law. Thus, contrary to China's assertion that the appeal of the *GPX V* opinion was a mere technicality, the issuance of a mandate in the U.S. judicial system is crucial to finalizing what is, up until that point, a non-binding opinion. Prior to the issuance of the mandate, such an opinion is not within the scope of Article X:3.

16. The United States notes that even if the *GPX V* opinion could be considered a "decision" under Article X:3(b), the requirements of the treaty article still would not be applicable to *GPX* V. Article X:3(b) expressly recognizes that an administering authority need not implement a judicial

decision that is under appeal. Specifically, it states that judicial decisions must be implemented "*unless* an appeal is lodged with a court or tribunal of superior jurisdiction within a prescribed time period." In *GPX V*, the United States filed a timely petition for rehearing before the U.S. Federal Circuit sitting *en banc*. In other words, the proceedings had not concluded and the United States had not exhausted its rights to appeal. In fact, the *GPX* litigation is still on-going.

17. As a matter of law, China's claim under Article X:3(b) is not based on the text of the relevant WTO provision, but instead on other vague or irrelevant legal concepts. China has no basis for such an interpretation, as it must prove its allegations based on the specific language of the specific obligations of Article X:3(b).

18. As an example, China argues that "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government" is incompatible with Article X:3(b). China's claim has no support in the text of the article. Article X:3(b) does not dictate the relationship between a domestic legislature and the judicial branch. Nor does it not prohibit the timing of when a piece of legislation may be enacted. Article X:3(b) does not prohibit the enactment of the *GPX* legislation because of pending domestic litigation. As the *GPX* litigation has been ongoing for the past five years, China's interpretation of Article X:3(b) would paralyze the ability of legislatures to enact laws and is unsupported by the plain text of the obligation.

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

19. China has advanced claims with respect to 31 sets of determinations. Yet, at each step in this case – in particular its panel request, and, most importantly, in its first written submission – China has failed to present and substantiate its claims through a discussion of the facts, and arguments. Despite advancing claims that dozens of Commerce's findings were inconsistent with the SCM Agreement, China barely discusses Commerce's determinations at all.

20. China declined to include in its first written submission virtually any discussion of the facts at issue in the determinations it challenges here. Accordingly, China has failed to establish a *prima facie* case. China's lackluster effort in making its legal argument raises an eyebrow. Rather than engage in a textual or contextual analysis of the obligations imposed by Article 19.3 of the SCM Agreement, it relies exclusively on statements made in the Appellate Body report in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379).

21. Now, aside from the defects in China's approach, the United States would like to take this opportunity to make a few points about the Appellate Body report in DS379 and also the U.S. interpretation of Article 19.3 of the SCM Agreement. First, this Panel is not bound by the Appellate Body report in DS379, particularly as the Appellate Body erred in its interpretation of Article 19.3. Second, with respect to the interpretation of Article 19.3 of the SCM Agreement, the Panel is to undertake its own interpretations of that term by applying the customary rules of interpretation of public international law.

22. When that text is analyzed pursuant to customary rules of interpretation, it becomes evident that 19.3 of the SCM Agreement is first and foremost a non-discrimination provision to ensure that the amount of countervailing duties levied corresponds to the amount of subsidies identified. Third, the context provided by the SCM Agreement and its structure support this understanding of Article 19.3. Viewing Article 19 of the SCM Agreement in light of this context, it is evident that Article 19 is concerned with the primarily ministerial function of imposing and collecting CVDs once those duties are calculated and determined in accordance with the obligations imposed by the preceding articles of the SCM Agreement.

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

24. Lastly, China contends that, because the United States acted inconsistently with Article 19.3 of the SCM Agreement, it also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. Because China's claims under Article 19.3 of the SCM Agreement fail, its consequential claims under Articles 10 and 32.1 of the SCM Agreement also must fail.

Executive Summary of the Second Written Submission of the United States of America

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. 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.

2. Regarding its claim under Article 19.3 of the SCM Agreement, China's failure to make its *prima facie* case persists. 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. China's legal arguments, which rely exclusively on the erroneous reasoning of the Appellate Body in DS379, should therefore be rejected.

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

3. 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. 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.

4. 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. Otherwise, without the existence of the law, there is nothing to apply or make effective. China's approach also finds no support in the EC – IT Products panel report. 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. As such, China has no basis for any claim that the United States acted inconsistently with Article X:1 of the GATT 1994.

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

5. 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.

6. 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. 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.

7. 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." 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.

8. 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. 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. 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.

9. 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. The *GPX V* opinion is not a final decision of the U.S. Federal Circuit and has no legal effect under U.S. law. As such, Commerce was not obligated to implement its findings and, under U.S. law, was prohibited from such implementation.

10. 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 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. China cannot have it both ways.

11. 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."

12. 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.

13. 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. 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."

14. 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." 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. 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.

15. 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. 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. 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.

16. 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." 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.

17. 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.

18. Although China has used the terms "P.L. 112-99," "Section 1 of P.L. 112-99" and "Section 1(b) of P.L. 112-99" 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.

19. 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.

20. 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.

21. 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." 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.

22. 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." Such a statement is false for the challenged imports.

23. First, a CVD proceeding is not a "requirement" on imports. That is, it does not impose requirements or conditions on the importation of goods. 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. 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.

24. China asserts that the United States has never provided an interpretation of Article X:2. This is incorrect. 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).

25. The Appellate Body has observed that Article X does not address the "substantive content" of measures. 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.

26. For measures that do fall within its scope, 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.

27. 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." 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. 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." However, Article X:2 cannot be interpreted to contain such a prohibition.

28. 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. 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

29. China now appears to raise a broader and potentially new claim, seemingly asking the Panel to find that Article X:3(b) imposes restrictions on national legislatures 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.

30. 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. 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:

- 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.

31. 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. 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.

32. China's argument, however, is unsupported by the principles of treaty interpretation. 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.

33. 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 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. 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.

34. 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)." 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).

35. The United States has established a judicial system that allows for the full possibility of independent review and correction of every agency entrusted with administrative enforcement of customs matters. 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

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

37. 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.

38. 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. 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.

39. 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.

40. 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.

41. 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.

42. 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, a panel is not bound to follow the reasoning set forth in any adopted panel or Appellate Body report. 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.

43. The Appellate Body's reasoning in DS379 is flawed. 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. 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. China has done nothing to demonstrate that this reading is flawed in any respect.

44. 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. China commits a similar error when it argues that preliminary determinations are subject to Article 19.3.

45. 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. For example, the Appellate Body misconstrued Article 19.3 in articulating a duty for an authority to engage in an investigative function. The Appellate Body also misconstrued

the findings in *US – Countervailing Measures on Certain EC Products.* In particular, the Appellate Body interpreted Article VI:3 using Article 19.4 of the SCM agreement as context. 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.

46. 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. 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. 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.

47. 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.

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

48. 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. 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

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

Executive Summary of the Opening Statement of the United States of America at the Second Substantive Meeting of the Panel

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

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

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

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

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

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

7. The United States recalls that China's Protocol of Accession gives every WTO Member the right to apply CVDs to imports from China while concurrently treating China as a NME country for purposes of its AD law, and China is not challenging that concurrent application in itself. The United States has exercised this right since 2006. China nevertheless claims that the United States, of all WTO Members, could not apply CVDs to exports from China during the period from 2006 until 2012, and that WTO law should prohibit the application of legislation enacted by the U.S. Congress to preserve Commerce's existing practice of applying CVDs to exports from China. That is an astonishing argument, and as we set out in this statement, one entirely dependent not only on the Panel committing a series of interpretive errors, but also for the Panel to resolve issues of U.S. law contrary to Commerce's interpretation, contrary to the intent and expectation of the U.S. Congress, and which the U.S. courts are considering but have not resolved. The Panel should

not engage in that speculative exercise and it can resolve China's claims on simpler grounds under Article X of the GATT 1994.

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

I. CHINA'S ARTICLE X CLAIMS ARE WITHOUT MERIT

9. The United States has provided multiple bases on which China's claims can be rejected. Thus, it would not be necessary to make findings on every distinct basis on which those claims are flawed. However, because China expends a significant amount of effort and space attempting to read two uniquely domestic legal concepts into Article X, we will spend some time today rebutting those arguments to demonstrate that none of China's arguments withstand scrutiny. Those arguments are (1) that Commerce has acted ultra vires, and as a result, has violated Article X:2, and (2) that Articles X:1 and X:2 prohibit the "retroactive" application of domestic laws. Although China has stopped referring to these terms explicitly, it has continued to pursue them in its Second Written Submission.

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

II. CHINA'S ARGUMENT THAT THE PANEL SHOULD SPECULATE AND SUBSTITUTE ITS JUDGMENT ON U.S. LAW UNDER ARTICLE X:2 IS WITHOUT MERIT

11. China has continued to advance its ultra vires claim, this time as an issue of how domestic law should be "properly determined" for purposes of a so-called "baseline" for Article X:2. There are two fundamental problems with China's "properly determined" argument. First, Article X:2 does not address allegedly ultra vires actions by an administering agency. Thus, whether or not an administering agency's actions were ultra vires under domestic law is irrelevant for an evaluation of the consistency of a measure with Article X:2.

12. Second, China's argument would compel the Panel to speculate on the content of U.S. law and find that Commerce's interpretation was contrary to law. But the legal issue of whether Commerce was prohibited from applying the U.S. CVD law to China has not been resolved by U.S. domestic courts. Given that the courts have not finally spoken to the contrary and therefore Commerce's interpretation remains valid as a matter of U.S. law, the Panel has no basis under U.S. law to substitute its judgment for that of Commerce. The United States would caution that, if the Panel were to speculate and substitute its judgment on the content of U.S. law for Commerce's interpretation, it would run a significant risk of making a factual error.

13. Further, despite pending domestic litigation on these issues, China asserts in its Second Written Submission that a statement by Professor Richard Fallon will "put an end" to and "properly determine" whether the GPX legislation was a clarification or change of existing law and whether the GPX V opinion has any legal effect under U.S. law. China's assertion has no legal basis. First, the conclusions in the statement that Professor Fallon prepared for China are incorrect. Second,

under the U.S. legal system, law professors have no special or authoritative role in interpreting U.S. law. Nonetheless, to the extent the panel is interested in the views of U.S. law professors, the United States has requested the views of Dean John Jeffries, a noted U.S. constitutional law expert. Dean Jeffries' expert statement, submitted as exhibit USA-115, explains numerous shortcomings in Professor Fallon's statement.

14. As an initial matter, Professor Fallon – even though he prepared the statement on behalf of China – does not state and cannot state that the U.S. courts would find or have found that the GPX legislation is a change from previous law. His conclusion is only that it would be "unlikely" for a court to find that the law was a legislative clarification. On the legal status of GPX V, he states that "a U.S. court could very plausibly regard" the opinion to have binding legal effect. Such conclusions are speculative and cannot be treated as putting an end to the matter, as asserted by China.

15. First, on the issue of whether the GPX legislation is a change or clarification of the law, Professor Fallon's statement fails to provide the indicia that the courts have used to determine whether a law is a change or clarification. Rather, the statement focuses on whether there is "an explicit indication in the title or text of a statute that its purpose is solely to clarify prior law." This indication, in Professor Fallon's opinion, is one of the "most important" indicia.

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

17. After surveying U.S. case law on the issue, the Court of Appeals for the Third Circuit found that there is "no bright-line test" to determine whether a law or regulation "clarifies" the existing law. The court noted that it did not "take the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification." The court reasoned that "one could posit that quite the opposite was the case – that the new language was fashioned to clarify the ambiguity made apparent by the case law."

18. Second, regarding the issue of the legal status of GPX V, China's reliance on Professor Fallon's statement in no way advances China's argument. Further, the opinion stated by Professor Fallon is contrary to the overwhelming weight of authority under U.S. law. Importantly, it is contrary to the Federal Circuit's own decision in GPX VI, in which it stated that "an appellate court's decision is not final until its mandate issues." Further, Dean Jeffries explains that the U.S. Federal Circuit's position that the grant of rehearing suspended any legal effect of GPX V accords with settled law. Under U.S. law, when a panel grants rehearing, its original decision loses any effect. As a senior federal appellate judge stated, "[t]he first procedural consequence of a grant of rehearing is that the original panel's judgment is vacated."

III. CHINA'S RETROACTIVITY CLAIM UNDER ARTICLE X:2 IS WITHOUT MERIT

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

IV. ARTICLE X:3(B) DOES NOT ADDRESS HOW A LEGISLATIVE BODY CAN ENACT LEGISLATION

20. In its Second Written Submission, China continues to argue that "the intervention by the U.S. Congress in ongoing judicial proceedings" is inconsistent with Article X:3(b). As the United States has explained, Article X:3(b) does not impose any limitations on the ability of a legislative body to enact laws altering the substantive content of the law.

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

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

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

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

24. The Appellate Body's interpretation goes far beyond the principles of non-discrimination and, as already noted, imposes an investigative function not reflected in that Article. Article 19.3 of the SCM Agreement seeks to ensure that, after the subsidy amount is calculated, the level of CVDs imposed by an administering authority accurately and objectively reflects the subsidy amounts calculated for each country and each company investigated. China has not alleged that Commerce's imposition or collection of CVDs was discriminatory or did not correspond to the amount of subsidies identified in any of the sets of determinations at issue in this dispute. Therefore, China's arguments should be rejected.

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

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

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

28. China refuses to analyze the specific facts of each determination. Consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the

case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the parties have put before it here.

29. China makes no effort to demonstrate the existence of an overlapping remedy in any of the challenged determinations or to identify evidence from any of the challenged determinations that would support the theory adopted by the panel in DS379. In making as-applied challenges, China cannot simply rely on factual findings from a prior dispute.

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

31. In sum, China's arguments with respect to Article 19.3 fail.

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ANNEX C

ARGUMENTS OF THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

Executive Summary of the Written Submission of Australia

I. INTRODUCTION

1. This dispute raises important issues concerning Article X of the GATT 1994 and its reach into Members' domestic legal orders.

II. ARTICLE X:1

2. Article X:1 of the GATT 1994 requires Members to "promptly publish in such a manner as to enable governments and traders to become familiar with them", laws, regulations, judicial decisions and administrative rulings of general application pertaining to the range of subject matters listed in this paragraph. Article X:1 outlines a World Trade Organization (WTO) Member's obligations in relation to the publication of trade regulations and is fundamentally a provision about transparency.

3. Article X:1 is silent on whether "laws, regulations, judicial decisions and administrative rulings" can be applied retrospectively from the date of publication. This is notwithstanding the term "made effective", in the first sentence of Article X:1 which, in Australia's view, could, in the context of domestic legislation, mean "in force". This is consistent with the Appellate Body's interpretation of the term "made effective" in the context of Article XX(g) of the GATT 1994 in *US – Gasoline*.[1]

4. We note that the Panel in *EC – IT Products* found in relation to "made effective" that Article X:1 "covers measures that were brought into effect, or made operative, in practice and is *not limited to* measures formally promulgated or that have formally "entered into force"" (emphasis added).[2] However, this was in the context of an inquiry into whether Article X:1 extended to measures that were applied in practice, despite not being formally binding under European Union law.[3]

5. The factual situation at issue in this case is different. In our view, the Panel's statement in *EC – IT Products* cannot be read as meaning that publishing a law upon its enactment would be a violation of Article X:1 if the law has effects in the past. In Australia's view, Article X:1 does not render laws which have retroactive effects inconsistent with this provision.

6. Finally, it is important that Article X:1, which concerns a procedural obligation to publish, and X:2, which deals with the enforcement or operation of measures, not be conflated.

III. ARTICLE X:2

7. The Appellate Body in *US – Underwear* stated that the "essential implication" of Article X:2 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".[4] The Appellate Body also noted that "prior publication is required for all measures falling within the scope of Article X:2, not just

[1] Appellate Body Report, *US – Gasoline*, p. 20.
[2] Panel Report, *EC – IT Products*, para. 7.1048.
[3] "This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order." Panel Report, *EC – IT Products*, para. 7.1048.
[4] Appellate Body Report, *US – Underwear*, p. 21.

ATC [Agreement on Textiles and Clothing] safeguard restraint measures sought to be applied retrospectively".[5]

8. The Panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that Article X:2 can preclude retroactive application of a measure. It also noted, however, that compliance with this obligation depends on "the timing of the publication of a measure, and its enforcement *in particular circumstances affecting the rights of WTO Members*" (emphasis added).[6]

9. In Australia's view, where a measure does not "advance in a rate of duty or other charge on imports", or impose a "new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor", failure to publish that measure would not fall foul of Article X:2. This is consistent with the purpose of Article X:2 to protect the fundamental principle of transparency by ensuring due process where parties' interests are concretely affected by a particular measure.[7]

IV. ARTICLE X:3(B)

10. Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness.[8] It requires a balance between a trader's fundamental right to procedural fairness and the sovereign right of WTO Members to manage the manner in which they administer their own laws and regulations.[9]

11. Article X:3(b) contains a number of specific obligations. This includes that WTO Members are required to maintain independent tribunals in respect of the review of customs actions which "shall be implemented by and shall govern the practice of" the agencies concerned "unless an appeal is lodged …".

12. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in this provision and remains a matter for each WTO Member in accordance with its own constitution and system of government.[10]

13. Article X:3(b) does not prevent WTO Members from legislating and having such legislation applied by their courts so long as they comply with the specific obligations of the provision. A WTO Member's ability to legislate retroactively on a matter that is being considered by a court is a matter for each Member's domestic legal system.

[5] Ibid.
[6] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.181.
[7] Appellate Body Report, *US – Underwear*, p. 21.
[8] Appellate Body Report, *US – Shrimp*, para. 183.
[9] Panel Report, *Thailand – Cigarettes*, para. 7.874.
[10] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 205.

Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel

INTRODUCTION

1. This dispute raises important issues concerning Article X of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as well as the Agreement on Subsidies and Countervailing Measures.

2. Australia, in a separate written submission, has already addressed issues concerning Article X. This Executive Summary of the Third Party Oral Statement of Australia and Responses to Questions from the Panel considers what a party needs to demonstrate in order to establish a violation of World Trade Organization (WTO) law.

II. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

3. It is a well-established principle that to establish a violation of WTO law, a party needs to adduce evidence and make arguments as to how a measure or measures are inconsistent, as such or as applied, with an obligation under relevant provisions of the WTO Agreement.[1]

4. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body (DSB)] cannot add to or diminish the rights and obligations provided in the covered agreements." Taken together with Articles 7 and 11 of the DSU, it is clear that panels are obliged to consider each dispute on its merits under the relevant provisions of the covered agreements.

5. While there is no binding rule of precedent in the WTO dispute settlement system, the Appellate Body has previously stated that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[2] This is consistent with the view it previously expressed that panel decision give rise to "legitimate expectations among WTO Members"[3] and "should be taken into account where they are relevant to any dispute."[4]

6. Australia considers that there may be instances where it would be appropriate for a panel to depart from prior Appellate Body findings, including where the evidence presented in a particular case gives rise to a different factual situation that could distinguish it.

7. For Australia, it is nevertheless important to distinguish the question of the *role of precedent* in the WTO dispute settlement system from the question of *the status of prior panel and Appellate Body findings for WTO Members' rights and obligations under WTO Law*. Australia considers that while previous decisions of the Appellate Body may be highly persuasive in how a provision of a covered agreement should be *interpreted*, these interpretations do not in themselves give rise to substantive obligations. To establish a violation of WTO law it remains necessary to identify the relevant WTO provision and obligation contained therein, and to explain the basis for the claimed inconsistency of the measure with that provision on the basis of evidence.[5]

[1] Appellate Body report, *US – Gambling*, paras. 140-141.
[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.
[3] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.
[4] Ibid.
[5] See, for example, Appellate Body Report, *US – Gambling*, para. 141.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules. Canada's submission will address the concurrent application of anti-dumping and countervailing duties in cases in which normal values are calculated using costs or prices from outside the export nation in question.

II. THE CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING DUTIES WHERE NORMAL VALUE IS CALCULATED USING COSTS OR PRICES OUTSIDE CHINA

2. Canada submits that the WTO Agreements permit the concurrent application of anti-dumping and countervailing duties even where the investigating authority has calculated normal values using costs or prices from outside the home market in the dumping investigation. Canada agrees with the United States that this view is confirmed by the text of the relevant agreements, the Tokyo Round Subsidies Code and specifically confirmed with respect to China as a result of its accession protocol.

3. First, dumping and subsidization are acknowledged as two different causes of injury to domestic industries with distinct sets of rules giving rise to separate remedies: an anti-dumping duty to remedy injurious dumping and a countervailing duty to remedy injurious subsidization.

4. When an imported product happens to be both dumped and subsidized, and causes injury, an importing Member may impose both an anti-dumping duty up to the margin of dumping and a countervailing duty up to the amount of the subsidy.

5. Second, Article VI:5 of GATT 1994 confirms this right to impose concurrent anti-dumping and countervailing duties and expressly limits it in the particular circumstances of export subsidization.

6. Furthermore, the second supplementary provision to Ad Article V:1 of GATT 1994 provides that an importing WTO Member may calculate the normal value of products from centrally planned (i.e. non-market) economies using costs or prices in a surrogate country, instead of domestic prices (which is the norm under Article VI:1 of GATT 1994 and the Anti-dumping Agreement).

7. Third, the Tokyo Round Subsidies Code prohibited importing countries from applying both anti-dumping duties determined on this basis and countervailing duties. However, while WTO Members could have transferred this prohibition into the SCM Agreement during the Uruguay Round, they chose not to. If WTO Members had intended for the prohibition to be carried forward, they would have expressly provided for this.

8. Fourth, with respect to Chinese products specifically, the possibility of imposing concurrent anti-dumping and countervailing duties even if they are not based on the prices or costs found in China is also confirmed by China's Accession Protocol.

9. Subparagraph 15(a)(ii) of China's Accession Protocol expressly permits importing WTO Members to calculate normal value on the basis of costs or prices outside China, if the Chinese producers under investigation fail to show clearly that market economy conditions prevail in their industry. Subparagraph 15(b) of China's Accession Protocol also contemplates that importing WTO Members may impose countervailing duties on Chinese products, allowing them to calculate Chinese subsidies on the basis of benchmarks outside China if there are "special difficulties" in the application of Article 14 of the SCM Agreement.

10. If WTO Members had intended to prohibit the concurrent application of anti-dumping duties calculated specifically on Chinese products on the basis of subparagraph 15(a)(ii) of China's Accession Protocol and countervailing duties, they would have done so in China's Accession Protocol just as they had done earlier in the Tokyo Round Subsidies Code. Instead, China's Accession Protocol enables importing WTO Members to impose both anti-dumping duties calculated on the basis of costs or prices outside China and countervailing duties at the same time.

11. Under GATT Article VI:3 the purpose of imposing a countervailing duty is to offset any subsidy. This purpose is reflected in Article 19.1 of the SCM Agreement, which provides that a countervailing duty may only be imposed "in accordance with the provisions of this Article". Article 19.4 of the SCM Agreement permits importing WTO Members to impose countervailing duty up to "the amount of the subsidy found to exist". A countervailing duty on a Chinese product will be in "the amount of the subsidy found to exist" if that amount is calculated in accordance with either: (a) Article 14 of the SCM Agreement ("Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient"); or (b) subparagraph 15(b) of China's Accession Protocol. No other method for calculating "the amount of the subsidy" is expressly prescribed.

12. Therefore, as long as the importing WTO Member does not impose a countervailing duty in excess of "the amount of the subsidy found to exist" (i.e. according to Article 14 of the SCM Agreement or subparagraph 15(b) of China's Accession Protocol), the duty will be in the "appropriate amount", as required by Article 19.3 of the SCM Agreement.

13. Canada notes that while the panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body regrettably reversed these findings. Canada considers that this reversal was in error. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the Dispute Settlement Understanding.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN UNION

1.1. CHINA'S CLAIMS AGAINST SECTION 1 OF P.L. 112-99

1. Whilst not taking a final position on the specific facts of the case, and in particular on the question of whether Section 1 of P.L. 112-99 maintains the *status quo* on procedures relating to the application of countervailing duties to NME countries, the European Union would like to make the following observations on the various claims raised by China under Article X of the GATT 1994.

1.1.1. China's claim under Article X:1 of the GATT 1994

2. The European Union disagrees with China's interpretation of Article X:1 of the GATT 1994 and agrees with the United States. The European Union considers that Article X:1 of the GATT 1994 seeks to ensure that trade rules are not kept secret but are publicly known by governments and traders so that they know what conditions would apply to their goods when imported into a Member's territory. The fact that those conditions may be altered by publishing a measure of general application in the future does not mean that such a measure was published in breach of the obligations under Article X:1 of the GATT 1994, insofar as the measure was published promptly (i.e. the time span between the adoption of the measure and its publication was "quickly" and "without undue delay") and in an appropriate manner (i.e., with respect to the means employed to make it available to the public) so that governments and traders became aware that the measure exists, regardless of its application only for the future or also to past events.

1.1.2. China's claim under Article X:2 of the GATT 1994

3. The European Union observes that Article X:2 of the GATT 1994 precludes retroactive application of a measure falling under its scope. Compliance with this obligation depends on the timing of the publication of a measure and its enforcement in particular circumstances affecting acquired rights of WTO Members and private entities. That being said, the European Union notes that the Anti-Dumping Agreement (Article 10) and the SCM Agreement (Article 20) both contemplate provisions envisaging the retroactive application of duties to a date prior the imposition of provisional and/or definitive measures. In the European Union's view, this indicates that the prohibition against retroactive effect in Article X:2 of the GATT 1994 is not absolute and has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities.

4. In the European Union's view, a relevant question for the Panel to examine is whether on 13 March 2012 there were any acquired rights or legitimate expectations that were affected by the US legislator's decision. The European Union understands that China agrees that "because the [Federal Circuit] court had not yet acted on the petition for rehearing, the [OTR] case was technically still pending before the court". If on 13 March 2012 the final collection of duties was still suspended until the court proceedings were completed, it could be argued that on that date private entities had not yet acquired rights or had legitimate expectations that the final collection of duties was definitive and final. In contrast, in cases where countervailing duties were imposed and finally collected and all judicial instances had been completed, those entities would have acquired a legitimate right and the legitimate expectation to have their duties revoked. The application of P.L. 112-99 to those events would be retroactive, contrary to Article X:2 of the GATT 1994. Therefore, the European Union considers that Article X:2 of the GATT 1994 protects acquired rights and legitimate expectations of WTO Members and private entities. In view of the transparency objective contained in Article X, Article X:2 permits operators to protect and adjust their activities in accordance with new laws and requirements affecting

their business and, thus, ensures that measures will not be applied to completed events or situations (e.g., where decisions under municipal law are final).

1.1.3. China's claim under Article X:3(b) of the GATT 1994

5. Article X:3(b) of the GATT 1994 relates to first instance review. It requires WTO Members to have procedures to review actions taken by administrative bodies relating to customs matters, thereby including the imposition of anti-dumping and countervailing duties. In this respect, Article X:3(b) ensures due process in relation to customs matters, and establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations. Article X:3(b) further requires that the decisions issued by those review procedures must be implemented and followed by the administrative bodies. Indeed, otherwise, the obligation under Article X:3(b) to establish such review procedures would be useless. Thus, WTO Members are required to ensure that their system of review provides for the relevant administrative action to be set right. Article X:3(b) also establishes the possibility to have the decision issued under the review procedures appealed before a court or a tribunal. In other words, it provides a guarantee of several instances of legal review of decisions issued by administrative bodies.

6. The European Union disagrees with China's interpretation. The fact that Article X:3(b) does not contemplate explicitly enacting a new law and directing national courts to apply the law retroactively to change the outcome of a case does not imply that there is an obligation to refrain from doing so in this provision. Silence on this issue should not be interpreted as imposing such obligation upon WTO Members. Article X:3(b) of the GATT 1994 establishes a due process obligation and minimum standards for transparency and procedural fairness in Members' administration relating to customs matters. However, this provision does not alter the possibility of legislators modifying rules or setting the temporal application of those rules. In the European Union's view, legislators should be allowed to change the law and confer it retroactive effect insofar as acquired rights and legitimate expectations are preserved.

7. In sum, the European Union considers that Article X:3(b) of the GATT 1994 should not be interpreted as prohibiting Members from taking legislative actions which would impact the decisions issued under the review procedures required under that provision. This is even more the case in situations where those decisions are not yet final.

1.2. DOUBLE REMEDIES

8. In *DS379* the AB explained that "double remedies" arise when the simultaneous application of ADDs and CVDs offset the same subsidization twice. "Double remedies" are "likely" to occur if an NME methodology is used. When authorities calculate a dumping margin for a product from an NME, they compare the export price to a NV that is based on surrogate costs or prices from a third country. Because prices and costs in the NME are unreliable, prices or COP in a market economy are used to calculate NV. Authorities compare the product's constructed NV (not reflecting any subsidy) with the product's actual export price (which, when subsidies have been received, is presumed lower than it would otherwise be). The dumping margin is thus based on an asymmetric comparison and is higher than it would otherwise be. Thus, dumping margins calculated with an NME methodology reflect not only dumping, but also subsidies affecting the producer's COP. An ADD calculated with an NME methodology may "remedy" or "offset" a domestic subsidy, if such subsidy has contributed to a lowering of the export price. The subsidization is "counted" within the overall dumping margin. When a CVD is levied against the same imports, the same domestic subsidy is also "counted" in the calculation of the rate of subsidization and, therefore, the resulting CVD offsets the same subsidy a second time. Accordingly, the concurrent imposition of an ADD calculated with an NME methodology, and a CVD results in a subsidy being offset twice. Double remedies may also arise in the context of domestic subsidies granted within market economies when ADDs and CVDs are concurrently imposed and an unsubsidized, constructed, or third country NV is used.

9. Article 19.3 ADA requires that CVDs be levied in the appropriate amounts in each case; and on a non-discriminatory basis. The term "appropriate" is not an absolute standard, but a relative one. The two requirements in the first sentence of Article 19.3 inform each other. Thus, it would not be appropriate for an importing Member to levy CVDs on imports

from sources that have renounced subsidies, or if price undertakings have been accepted. Similarly, the requirement that the duty be imposed on a non-discriminatory basis should not be read in an overly formalistic manner. While leaving to the importing Member the decision as to whether the amount of the CVD to be imposed shall be the full amount of the subsidy or less, Article 19.2 states that it is "desirable" that "the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury". Article 19.2 thus encourages authorities to link the amount of the CVD to the injury. Once a causal link is demonstrated, the imposition of CVDs is not isolated from any consideration related to injury. A link between the amount of the CVD and the injury is also reflected in Article 19.3, which provides that a "CVD shall be levied, in the appropriate amounts in each case ... on imports of such product ... found to be subsidized and causing injury". Other provisions of the ASCM link the CVD to the injury. Article 19.1 allows for the imposition of CVDs when subsidized imports "are causing injury". The use of the present tense in this provision suggests that injury is a continuing prerequisite for the imposition and levying of CVDs. This is confirmed by Article 21.1.

10. Article 10 establishes that Part V relates to the application of Article VI GATT 1994, and that CVDs must conform to that provision. By providing that "only one form of relief shall be available", footnote 35 makes clear that there can be no "double remedies". Footnote 36 defines a "CVD" as a special duty levied for the purpose of "offsetting" a subsidy. The link between the GATT 1994 and the ASCM also figures in Article 32.1. Article VI:5 prohibits the concurrent application of ADDs and CVDs to compensate for the same situation of dumping or export subsidization. The term "same situation" is central to an understanding of the rationale underpinning this prohibition, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent. An export subsidy will result in a pro rata reduction in export price, but will not affect the domestic price. The subsidy will lead to a higher margin of dumping. The situation of subsidization and the situation of dumping are the "same situation", and the application of concurrent duties would amount to the application of "double remedies". By comparison, domestic subsidies will affect domestic and export prices in the same way. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the calculation, the overall dumping margin will not be affected. In such circumstances, the concurrent application of duties would not compensate for the same situation.

11. Thus, the presence of an express prohibition on the concurrent application of duties to counteract the "same situation" of dumping or export subsidization is logical, when NV is calculated on the basis of domestic sales prices. Article VI:1(a) GATT 1994, like Article 2.1 ADA, provides that the usual method for calculating NV will be based on the comparable price for the like product in the exporter's domestic market. Thus, in anti-dumping investigations, NV will typically be based on domestic sales prices and any domestic subsidy will have no impact on the calculation of the dumping margin. Nonetheless, Article VI:1(b), like Article 2.2 ADA, sets out exceptional methods for the calculation of NV, which are not based on actual prices in the exporter's domestic market. The second Ad Note to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations, also authorizes recourse to exceptional methods for the calculation of NV in investigations of imports from NMEs. In case of domestic subsidization, it is only in these exceptional situations that there is any possibility that the concurrent application of anti-dumping and CVDs on the same product could lead to "double remedies". The references to Article VI GATT 1994 in Articles 10 and 32.1 ASCM, Article VI itself, and the many parallels between the obligations that apply to Members imposing ADDs or CVDs, suggest that any interpretation of "the appropriate amounts" of CVDs must not be based on a refusal to take account of the context offered both by Article VI GATT 1994 and by the provisions of the ADA. Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another. This view is reinforced by the fact that, although the disciplines that apply to a Member's use of ADDs and its use of CVDs are legally distinct, the remedies that result are, from the perspective of producers and exporters, indistinguishable.

12. It follows that a proper understanding of the "appropriate amounts" of CVDs cannot be achieved without regard to relevant provisions of the ADA and recognition of the way in which the two legal regimes, and the remedies which they authorize, operate. The requirement that any amounts be "appropriate" means that authorities may not, in fixing

the appropriate amount of CVDs, simply ignore that ADDs have been imposed to offset the same subsidization. Each agreement sets out strict conditions that must be satisfied before the authorized remedy may be applied. The purpose of each authorized remedy may be distinct, but the form and effect of both remedies are the same. Both the ADA and the ASCM contain provisions requiring that the amounts of ADDs and CVDs be "appropriate in each case". Both agreements also set ceilings on the maximum amount of duties that can be imposed. Article 19.4 ASCM establishes that CVDs shall not exceed the amount of the subsidy found to exist and Article 9.3 ADA establishes that ADDs shall not exceed the margin of dumping. Only if these provisions are read in wilful isolation from each other can it be maintained that the respective rules on the imposition and levying of duties are complied with when double remedies are imposed. In contrast, reading the two agreements together suggests that the imposition of double remedies would circumvent the standard of appropriateness that the two agreements separately establish. In other words, considering that each agreement sets forth a standard of appropriateness and establishes a ceiling for the respective duties, it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization. It is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of ADDs and CVDs that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and CVDs which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found.

13. The EU expects that the Panel will follow a similar line of reasoning in this case.

2. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE EUROPEAN UNION (INCLUDING SOME RESPONSES TO THE PANEL'S QUESTIONS)

14. As suggested by the Panel, the EU will provide preliminary answers to the questions advanced by the Panel relating to the GATT 1994. Starting with question 5, the EU considers that the term "enforced" in Article X:2 of the GATT 1994 speaks to the application of the measure in question, i.e. that the measure is being applied or has been put into application. In contrast, the term "made effective" under Article X:1 does not necessarily require an actual application of the measure of general application. A law may be published today and establish that it will be applied only to actions taking place as of 1 January 2014. Such a law will be made effective today although it will be enforced only as of next year. Moving on to question 6, the EU considers that there is no textual or contextual support for China's interpretation of Article X:2, according to which the measures falling under such a provision can be applied only with respect to actions taken after the publication of the measure. As explained in our written submission, Article X:2 has to be understood by reference to whether the measure affects acquired rights or legitimate expectations of WTO Members and private entities. With respect to question 7, the EU considers that Article X:2 does not relate to authority, but rather to transparency and due process. Finally, to answer question 8, the European Union considers that Article X:3(b) obliges agencies to implement and be governed by the decisions of courts of first instance as modified or complemented by the decisions of superior courts with respect to the same matter.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

Executive Summary of the Written Submission of Japan

A. Prompt publication of P.L. 112-99 in accordance with Article X:1 of the *GATT*

1. In the *First Written Submission of China* ("China FWS"),[1] China alleges that "Section 1 of P.L. 112-99 was 'made effective' as of 20 November 2006".[2] China argues that the "basic inquiry [of Article X:1 of the *GATT*] is whether the measure was 'published promptly' in relation to this effective date".[3] China thus claims that the publication of P.L. 112-99 is inconsistent with Article X:1 because it was not been published for "nearly five and half years after the date on which it was made effective."[4]

2. While China submits that "in no event can publication be considered "prompt" if it takes place after the measure has taken effect",[5] Japan is of the view that the requirement under Article X:1 would be satisfied even when the law is published after the effective date of the law. This interpretation is supported by the panel in *EC – IT Products*, which stated "in circumstances where the relevant measure has been 'made effective', the requirement to publish promptly will arise". [6] As stated by the panel, the event triggering the application of Article X:1 is the action to make the measure in question, P.L. 112-99 in this case, effective. The question then is whether the P.L. 112-99 was published promptly after it was made effective.[7] The date from which the law would actually be applied is irrelevant to Article X:1.

3. In this regard, Japan has doubt on China's argument that Section 1 of P.L. 112-99 was 'made effective' within the meaning of Article X:1 as of 20 November 2006. Section 1(b) of P.L. 112-99, on its face, sets forth that the provisions of Section 1(a) apply to all countervailing duty proceedings initiated on or after 20 November 2006, and all resulting actions by US Customs and U.S. Federal courts.[8] From Japan's view, Section 1(b) of P.L. 112-99 addresses the subject matter to which the law applies, not the date on which the law was enacted. Accordingly, the 20th November of 2006 is not the date of enactment, but the date which establishes the scope of application of the law. If this understanding is correct, China's approach to consider the relationship between the 20th November of 2006 and the date of publication in examining the consistency with Article X:1 is doubtful.

4. In connection with the question whether the United States "promptly" published the P.L. 112-99 under Article X:1, Japan agrees with the analysis by the panel in *EC – IT Products*. It explained "an assessment of whether a measure has been published 'promptly' … necessarily requires a case-by-case assessment"[9] in light of whether such publication was made "in such a manner as to enable governments and traders to become acquainted with them."

B. Enforcement of a Measure of General Application before Publication in Accordance with Article X:2 of the *GATT*

5. China argues that Section 1(b) of P.L. 112-99 is inconsistent with Article X:2 of the *GATT*, stating "rights of transparency and due process to which governments and traders are entitled

[1] *See* China FWS, submitted to this Panel on 15 May 2013.
[2] *Id.*, para. 63.
[3] *Id.*, paras. 63-64.
[4] *Id.*, para. 65.
[5] China FWS, para. 64.
[6] Panel Report, *EC – IT Products*, para. 7.1048.
[7] In contrast, under Article X:2 the relevant date is the date of the application of the measure because the provision obliges that WTO members enforce the measure falling within its scope after the measure's official publication.
[8] *See* Pub. L. No. 112-99, CHN-1.
[9] Panel Report, *EC – IT Products*, para. 7.1076.

under Article X:2 are necessarily denied when a measure is applied prior to its official publication."[10]

6. Article X:2 makes explicit that any measure of general application, if it is "effecting an advance in a rate of duty or other charges on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports …", shall be published prior to its enforcement. Consequently, a WTO Member fails to comply with this requirement, if the Member enforces a measure of general application before its publication.

7. As explained by the Appellate Body[11], the prior publication requirement under Article X:2 may embody the principles of transparency and due process. The publication of measures of general application must be made in advance to its enforcement, "so as to enable governments and traders to become acquainted with them".[12]

C. Reversal by Legislature of Court Decisions in Accordance with Article X:3(b) of the *GATT*

8. China argues that P.L. 112-99 is "the intervention in a pending judicial proceeding by the legislative branch of the U.S. government".[13] According to China, "[t]his type of legislative intervention, if accepted, would render meaningless the independent judicial review that is guaranteed by Article X:3(b)." [14] China thus claims that "[e]nacting a new law and directing national courts to apply the law retroactively to change the outcome of a case is not permitted by Article X:3(b) and, if accepted, would gut independent judicial review of any meaning." [15]

9. Article X:3(b) set forth rules on the review by the judicial branch of actions taken by administrative agencies. This Article, however, is silent on relationship between administrative agencies and the legislature, or between the judicial branch and the legislature. At minimum, no rules are set against actions to be taken by the legislature in response to the judicial decision. Therefore, no express obligations to WTO Members are set forth in Article X:3(b) with respect to actions by the legislature in response to judicial decisions.

10. China argues that "legislative intervention, if accepted, would render meaningless the independent judicial review." Article X:3(b), however, explicitly states that the judicial review must be "independent of the agencies" only. Article X sets forth the rules on "laws" in paragraphs 1, and 3(a) and (b), and thus the Article explicitly recognizes the importance of the role of the legislature to establish trade regulations. If it had been contemplated that Article X:3(b) should set forth disciplines on the potential enactment of law in response to judicial decisions, Article X:3(b) could have been drafted to do so. The drafters of the Article, however, did not include any such requirement. Such omission should also be given the meaning.

11. In sum, it is Japan's view that Article X:3(b) does not provide any disciplines on the legislative actions in response to the judicial decision.

D. Avoidance of Double Remedy Pursuant to Article 19.3 of the *SCM Agreement*

12. China alleges that "the USDOC initiated 29 parallel anti-dumping and countervailing duty investigations and periodic reviews that resulted in the imposition of duties on products from China, either on a preliminary or final basis."[16] China claims that the "USDOC's failure to investigate and avoid double remedies in the identified investigations renders these determinations inconsistent with Article 19.3 of the *SCM Agreement*." [17]

[10] *Id.*, para. 70.
[11] Appellate Body Report, *US – Underwear*, p. 21.
[12] See Article X:1 of the GATT 1994
[13] China FWS, para. 85.
[14] *Id*, para. 101.
[15] *Id.*, para. 85.
[16] *Id*, para. 124.
[17] *Id.*, para. 126.

13. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* examined the issue of the double remedy, and has reached the conclusion that the investigating authority is "subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3" upon conducting "a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." [18] With respect to the question of when double remedies arise, the Appellate Body found that "double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties"[19] because the use of an NME methodology in calculation of dumping margins "likely provides some form of remedy against subsidization".[20]

14. The Appellate Body then applied this legal analysis to four countervailing investigations in the dispute, and found that "the USDOC made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties." [21] Consequently, "the USDOC failed to fulfill its obligation to determine the 'appropriate' amount of countervailing duties within the meaning of Article 19.3 of the *SCM Agreement*." [22]

15. As clarified by the Appellate Body, an investigating authority has an affirmative obligation to make sure that double remedies would not occur when anti-dumping and countervailing duties are simultaneously imposed on products from NME countries.

[18] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602 (a footnote omitted).

[19] *Id.*, para. 599, referring in its footnote to the Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 14.67 and 14.75 (emphasis in original).

[20] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 14.67.

[21] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 604.

[22] *Id.*, para. 606.

Executive Summary of the Oral Submission of Japan

1. The United States argues that the *GPX* legislation does not fall within the scope of Article X:2 of the *GATT*. Specifically, the United States argues that "Section 1 of the *GPX* legislation could not effect an increase in a rate of a duty" because "there was no change to Commerce's existing approach in how it interpreted the U.S. CVD law with respect to NME imports."[23] The United States explains that the USDOC established individual CVD measures in accordance with the CVD law that existed at the time of the establishment of these individual measures.[24] The Chinese government and traders thus had been on notice that the USDOC would apply the CVD law to imports from China.[25] According to the arguments of the United States, therefore, the due process rights under Article X:2 have been observed.

2. The United States appears to submit that it is important whether the Chinese government and traders were given a prior notice of the application of the CVD law as of 20 November 2006. Japan finds the United States' apparent approach proper and is of the view that the Panel should take the following points into consideration.

3. As discussed in the third party submission of Japan, Article X:2 may embody transparency and due process rights of WTO Members and traders by ensuring that imports may not be subject to an advance in a rate of duty or subject to a new or more burdensome requirement without prior public notice of such measures of general application. An importing Member thus would have acted inconsistently with Article X:2, if the importing Member were to apply such measures to imports in such situations that the exporting Member and traders had been unable to be aware that their imports would generally be subject to the measure. They must be given a prior notice of the application of the measure to imports so that they "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."[26]

4. Accordingly, one question in this case under Article X:2 would be whether the Chinese government and traders in fact received public notice that the USDOC would apply the CVD law to imports from China prior to the application of such law. Japan does not take any specific position of the factual aspect in this case. Japan respectfully requests that the Panel review the underlying facts to determine whether the Chinese government and traders were appropriately informed of the application of CVD measures generally to imports from China so that they had 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.

5. Japan recalls that the United States also states that "the *GPX* legislation was officially published on its date of adoption, March 13, 2012", and "Commerce took no action prior to that date to enforce"[27] the *GPX* legislation even if the *GPX* legislation were within the scope of Article X:2.

6. Japan would welcome further clarification by the United States on this argument. Nonetheless, to the extent that, given that the GPX legislation is the relevant measure at issue here (as China claims), the United States intends to argue that Article X:2 may permit the application of a more burdensome legislation to action taken by a trader before its publication because the actual enforcement action can occur only after the publication, Japan could not agree. As discussed, the rationale underlying Article X:2 is to ensure that an exporting Member and its traders be given a prior notice so as to 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 before the measure is in fact applied. In this manner, Article X:2 may embody the transparency and due process in the international trade rules. The importing Member, therefore, would have acted inconsistently with Article X:2 if it fails to give an exporting Member and traders such notice prior to the action of such traders to which

[23] First Written Submission of the United States ("US FWS"), para. 106.
[24] *See* US FWS, paras 44-45.
[25] *See* US FWS, para. 60, citing the decision by the United States Court of International Trade in *GPX VII* at 25 in CHI-8.
[26] Appellate Body Report, *US – Underwear*, p. 21.
[27] US FWS, para. 119.

the measure at issue applies. Accordingly, the alleged retroactive application of the *GPX* legislation thus could be inconsistent with Article X:2 if Chinese traders and government did not receive the required public notice of authentic information about the state of the CVD law so as to be aware of it before such traders take action to which the measures apply in a manner that would respect the basic principles of transparency and due process.

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