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

(WT/DS449)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

August 8, 2013

I. INTRODUCTION

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