



WORLD TRADE
ORGANIZATION

WT/DS449/AB/R

7 July 2014

(14-3867)

Page: 1/100

Original: English

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

AB-2014-4

Report of the Appellate Body

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<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, circulated to WTO Members 26 March 2014 [appeal in progress]
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365

Short Title	Full Case Title and Citation
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Additional Import Duties</i>	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3

Short Title	Full Case Title and Citation
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , 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
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R and Add.1, circulated to WTO Members 27 March 2014 [appeal in progress]
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

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<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit No.	Description
CHI-1	United States Public Law No. 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 Stat. 265 (13 March 2012)
CHI-2	United States Court of Appeals for the Federal Circuit, <i>Georgetown Steel Corporation v. United States</i> , 801 F.2d 1308 (Fed. Cir. 1986)
CHI-3	United States Court of International Trade, <i>GPX International Tire Corporation v. United States</i> , 645 F. Supp. 2d 1231 (CIT 18 September 2009)
CHI-6	United States Court of Appeals for the Federal Circuit, <i>GPX International Tire Corporation v. United States</i> , 666 F.3d 732 (Fed. Cir. 2011)
CHI-7	United States Court of Appeals for the Federal Circuit, <i>GPX International Tire Corporation v. United States</i> , 678 F.3d 1308 (Fed. Cir. 2012)
CHI-14	USDOC, Countervailing Duties: Final Rule, <i>United States Federal Register</i> , Vol. 63, No. 227 (25 November 1998), pp. 65348-65360
CHI-15	Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary"
CHI-83	Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University
CHI-124	Supplemental Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University
USA-2	<i>United States Code</i> , Title 19, Chapter 4, Section 1671
USA-7	USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, <i>United States Federal Register</i> , Vol. 49, No. 89 (7 May 1984), pp. 19370-19374
USA-10	USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, <i>United States Federal Register</i> , Vol. 49, No. 89 (7 May 1984), pp. 19374-19378
USA-21	General Issues Appendix, appended to the Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, <i>United States Federal Register</i> , Vol. 58, No. 130 (9 July 1993), pp. 37225-37261
USA-23	USDOC, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea, <i>United States Federal Register</i> , Vol. 71, No. 227 (27 November 2006), pp. 68549-68549
USA-25	USDOC, Coated Free Sheet Paper from the People's Republic of China: Amended Affirmative Preliminary Countervailing Duty Determination, <i>United States Federal Register</i> , Vol. 72, No. 67 (9 April 2007), pp. 17484-17486
USA-26	Memorandum dated 29 March 2007 from Shauna Lee-Alaia, et al., Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, "Countervailing Duty Investigation of Coated Free Sheet Paper from the Peoples' Republic of China – Whether the Analytical Elements of the <i>Georgetown Steel</i> Opinion are Applicable to China's Present-Day Economy"
USA-27	USDOC, Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, <i>United States Federal Register</i> , Vol. 72, No. 206 (25 October 2007), pp. 60645-60648
USA-28	United States Court of International Trade, <i>Government of the People's Republic of China v. United States</i> , 483 F. Supp. 2d 1274 (CIT 2007)
USA-41	United States Federal Rules of Appellate Procedure (1 December 2010), Rule 41(b)
USA-43	United States Court of Appeals for the Federal Circuit, <i>GPX International Tire Corporation v. United States</i> , Corrected Petition for Rehearing <i>En Banc</i> of Defendant-Appellant, <i>United States</i> (Fed. Cir. 2011-1107/1108/1109 5 March 2012)

Exhibit No.	Description
USA-85	Supreme Court of the United States, <i>Ed Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995)
USA-93	United States Court of International Trade, <i>GPX International Tire Corporation v. United States</i> , 587 F. Supp. 2d 1278 (CIT 2008)
USA-94	USDOC, Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, <i>United States Federal Register</i> , Vol. 57, No. 59 (26 March 1992), pp. 10459-10460
USA-95	Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China, <i>United States Federal Register</i> , Vol. 57, No. 109 (5 June 1992), pp. 24018-24022
USA-96	Omnibus Trade and Competitiveness Act of 1988, Pubic Law No. 100-418, 102 Stat. 1107 (23 August 1988)
USA-115	Legal Opinion of John C. Jeffries, Jr, Professor of Law, University of Virginia, in response to Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University
USA-119	Table setting out the Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China
USA-125	USDOC, Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Countervailing Duty Investigation, C-570-984, <i>United States Federal Register</i> , Vol. 77, No. 59 (27 March 2012), pp. 18211-18215

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CAFC	United States Court of Appeals for the Federal Circuit
CFS	Coated free sheet
<i>CFS Paper</i>	United States Court of International Trade, Government of the People's Republic of China v. United States, 483 F. Supp. 2d 1274 (CIT 2007)
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 1994	General Agreement on Tariffs and Trade 1994
<i>Georgetown Steel</i>	United States Court of Appeals for the Federal Circuit, Georgetown Steel Corporation v. United States, 801 F.2d 1308 (Fed. Cir. 1986) (Panel Exhibit CHI-2)
GPX	GPX International Tire Corporation
<i>GPX I</i>	United States Court of International Trade, GPX International Tire Corporation v. United States, 587 F. Supp. 2d 1278 (CIT 2008) (Panel Exhibit USA-93)
<i>GPX II</i>	United States Court of International Trade, GPX International Tire Corporation v. United States, 645 F. Supp. 2d 1231 (CIT 2009) (Panel Exhibit CHI-3)
<i>GPX V</i>	United States Court of Appeals for the Federal Circuit, GPX International Tire Corporation v. United States, 666 F.3d 732 (Fed. Cir. 2011) (Panel Exhibit CHI-6)
<i>GPX VI</i>	United States Court of Appeals for the Federal Circuit, GPX International Tire Corporation v. United States, 678 F.3d 1308 (Fed. Cir. 2012) (Panel Exhibit CHI-7)
NME	Non-market economy
Panel Report	Panel Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/R, 27 March 2014
PL 112-99	United States Public Law No. 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 Stat. 265 (13 March 2012) (Panel Exhibit CHI-1)
Preliminary Ruling	Preliminary Ruling of the Panel dated 7 May 2013, contained in document WT/DS449/4
SCM Agreement	Agreement on Subsidies and Countervailing Measures
<i>Sulfanilic Acid</i>	Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary" (Panel Exhibit CHI-15)
US Tariff Act	United States Tariff Act of 1930, <i>United States Code</i> , Title 19, Chapter 4
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
<i>Wireking</i>	United States Court of Appeals for the Federal Circuit, Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States, 2013-1404 (Fed. Cir. 2014)
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the WTO

WORLD TRADE ORGANIZATION
APPELLATE BODY

**United States – Countervailing and
Anti-Dumping Measures on Certain
Products from China**

China, *Appellant/Appellee*
United States, *Other Appellant/Appellee*

Australia, *Third Participant*
Canada, *Third Participant*
European Union, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Russia, *Third Participant*
Turkey, *Third Participant*
Viet Nam, *Third Participant*

AB-2014-4

Appellate Body Division:

Bhatia, Presiding Member
Chang, Member
Zhang, Member

1 INTRODUCTION

1.1. China and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*¹ (Panel Report). The Panel was established² to consider a complaint by China with respect to measures taken by the United States regarding the application of countervailing duties to imports from non-market economy (NME) countries, and the United States' failure to investigate and avoid double remedies in certain countervailing and anti-dumping duty investigations.³

1.2. The measure at issue in this dispute is Section 1 of US Public Law No. 112-99⁴ (PL 112-99), introducing the new Section 701(f) of the United States Tariff Act of 1930⁵ (US Tariff Act). Before the Panel, China also challenged the failure of the United States authorities to investigate and avoid double remedies in 26 countervailing duty investigations and reviews initiated between 20 November 2006 and 13 March 2012.⁶

1.3. The new Section 701(f) of the US Tariff Act, which is established by Section 1 of PL 112-99, applies the countervailing duty provisions of the US Tariff Act to NME countries, except in cases where "the administering authority is unable to identify and measure subsidies provided by the government of the [NME] country or a public entity within the territory of the [NME] country because the economy of that country is essentially comprised of a single entity." Section 701(f) applies to countervailing duty proceedings initiated on or after 20 November 2006, as well as to all resulting actions by the US Customs and Border Protection and all relating civil actions, criminal proceedings, and other proceedings before a US federal court.⁷

¹ WT/DS449/R, 27 March 2014.

² At its meeting held 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 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). (Panel Report, para. 1.3)

³ See Request for the Establishment of a Panel by China, WT/DS449/2.

⁴ United States Public Law No. 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 Stat. 265 (13 March 2012) (Panel Exhibit CHI-1).

⁵ *United States Code*, Title 19, Chapter 4.

⁶ Panel Report, para. 3.2. See also *ibid.*, para. 7.8.

⁷ Panel Report, para. 7.11.

1.4. China originally identified a broad set of claims and measures in its panel request⁸, but eventually narrowed them down during the course of the Panel proceedings.⁹ China claimed before the Panel that Section 1 of PL 112-99 is inconsistent, as such, with Articles X:1, X:2, and X:3(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). First, China claimed that Section 1 is inconsistent with the requirement in Article X:1 to publish "promptly", because it was "made effective" as of 20 November 2006, but was not published until 13 March 2012.¹⁰ Second, China claimed that Section 1 is inconsistent with Article X:2, because it is a measure of general application, which effects an "advance" in a rate of duty and imposes a "new or more burdensome" requirement or restriction on imports, enforced by the United States prior to its official publication on 13 March 2012.¹¹ Third, China claimed that 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".¹²

1.5. China also claimed before the Panel that the United States failed to investigate and avoid double remedies in 26 countervailing duty investigations and reviews initiated between 20 November 2006 and 13 March 2012.¹³ According to China, the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 19, and 32 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).¹⁴

1.6. On 15 March 2013, the United States submitted a request for a preliminary ruling challenging the consistency of certain aspects of China's panel request with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The United States argued that Parts C and D of China's panel request regarding the failure of the US Department of Commerce (USDOC) 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, thus, were not within the Panel's terms of reference.¹⁵ In a letter to the Panel dated 25 March 2013, China indicated that it would not pursue the entirety of its claims in Part C, and some of its claims under Part D, so that its only remaining claims under Part D were those under Articles 10, 19, and 32 of the SCM Agreement. The Panel issued its Preliminary Ruling¹⁶ on

⁸ China's original claims included:

- a. Section 1 of PL 112-99, including the new Section 701(f) of the US Tariff Act that it establishes, is inconsistent, as such, with Articles X:1, X:2, X:3(a), and X:3(b) of the GATT 1994;
- b. Section 2 of PL 112-99 amending Section 777A of the US Tariff Act is inconsistent, as such, with Article X:3(a) of the GATT 1994;
- c. the United States lacks the 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 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (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.

(Panel Report, para. 3.1)

⁹ In its letter to the Panel dated 25 March 2013, China indicated that it would not pursue the entirety of its claims in Part C of the panel request, and some of its claims under Part D of the panel request, so that its only remaining claims under Part D were those under Articles 10, 19, and 32 of the SCM Agreement. In addition, in response to Panel question No. 39, China also stated that it was not pursuing its claims under Article X:3(a) of the GATT 1994. (Panel Report, fn 11 to para. 3.2)

¹⁰ Panel Report, para. 7.17.

¹¹ Panel Report, para. 7.91.

¹² Panel Report, para. 7.244.

¹³ Panel Report, para. 3.1.

¹⁴ Panel Report, paras. 7.298 and 7.300.

¹⁵ Panel Report, para. 7.1.

¹⁶ Preliminary Ruling by the Panel of 7 May 2013, contained in document WT/DS449/4 (Preliminary Ruling).

7 May 2013, prior to the filing of the first written submissions of the parties¹⁷, and circulated it to Members of the World Trade Organization (WTO) on 7 June 2013. In its Preliminary Ruling, which forms an integral part of the Panel Report¹⁸, the Panel found that:

- a. in the light of China's representation that it would not pursue certain claims¹⁹, the Panel declined to rule on whether the panel request was consistent with Article 6.2 of the DSU insofar as it relates to those claims; and
- b. 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 had not established that Part D of the panel request failed to "plainly connect" the challenged measures with those obligations.²⁰

1.7. The Panel Report was circulated to WTO Members on 27 March 2014. With respect to China's claims under Article X of the GATT 1994 concerning Section 1 of PL 112-99, the Panel found that:

- a. the United States did not act inconsistently with Article X:1 of the GATT 1994, because 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;
- b. 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 enforced Section 1 before it had been officially published, the United States did not act inconsistently with Article X:2 of the GATT 1994, because 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
- c. the United States did not act inconsistently with Article X:3(b) of the GATT 1994, because that provision, 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 112-99.²¹

1.8. With respect to China's claims under the SCM Agreement concerning the United States' alleged failure to investigate and avoid double remedies in 26 investigations and reviews initiated between 20 November 2006 and 13 March 2012, the Panel found that:

- a. in respect of one proceeding (Drawn Stainless Steel Sinks From the People's Republic of China²²), China failed to demonstrate that the measure fell within the description of its claim as set out in its panel request and, in any event, failed to demonstrate that the United States acted inconsistently with Article 19.3 of the SCM Agreement or, consequently, Articles 10 or 32.1 of the SCM Agreement; and
- b. in the other 25 proceedings²³, the United States 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

¹⁷ Panel Report, para. 7.3.

¹⁸ Panel Report, para. 6.6 (referring to Preliminary Ruling, para. 4.3). See also *ibid.*, para. 7.5.

¹⁹ China's letter to the Panel dated 25 March 2013, pp. 1-2. These abandoned claims include Part C of China's panel request in its entirety, and the references in Part D 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.

²⁰ Panel Report, para. 8.1.a; Preliminary Ruling, para. 4.2.

²¹ Panel Report, para. 8.1.b.

²² USDOC, Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Countervailing Duty Investigation, C-570-984, *United States Federal Register*, Vol. 77, No. 59 (27 March 2012), pp. 18211-18215 (Panel Exhibit USA-125).

²³ These investigations and reviews at issue are identified in paragraph 7.355 of the Panel Report.

duties calculated on the basis of an NME methodology on the same products, without having investigated, either in the countervailing duty investigations and reviews or in the parallel anti-dumping investigations and reviews, whether double remedies arose from such concurrent duties.²⁴

1.9. Pursuant to Article 19.1 of the DSU, the Panel then recommended that the United States bring the investigations and reviews identified in paragraph 7.355 of the Panel Report, excluding the investigation of Drawn Stainless Steel Sinks from the People's Republic of China, into conformity with its obligations under the SCM Agreement.²⁵

1.10. On 8 April 2014, China notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal²⁶ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review²⁷ (Working Procedures).

1.11. China's appeal in this dispute was filed simultaneously with the appeal by the United States of the panel report in a different dispute, namely, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China – Rare Earths)* (DS431).²⁸ In a letter dated 9 April 2014, the Chairman of the Appellate Body explained to the parties to this dispute, as well as to the parties to the *China – Rare Earths* (DS431; DS432; DS433²⁹) disputes, that, in the past, the Appellate Body had attributed appeal numbers sequentially based on the date and time of receipt of the Notice of Appeal. Given the unprecedented situation of simultaneous filings of appeals, however, the Appellate Body Chair invited the parties in these disputes to provide their views, by 10 April 2014, as to the considerations relevant to the Appellate Body's determination of how to allocate appeal numbers AB-2014-3 and AB-2014-4 between the two appeals in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) and *China – Rare Earths* (DS431).

1.12. On 10 April 2014, the Appellate Body received comments from China, the European Union, Japan, and the United States. On the same day, the Appellate Body Chair sent a letter to the parties to this dispute and to the *China – Rare Earths* (DS431; DS432; DS433) disputes informing them that, having given careful consideration to their submissions, the Appellate Body had determined that, in the face of the unprecedented situation of simultaneous appeals, the Appellate Body's usual manner of assigning such numbers – according to the sequence in which they were appealed – was not available. The Appellate Body underlined the necessity of assigning an appeal number to each appeal before the Appellate Body Members constituting the respective divisions could be selected. The Appellate Body recalled, in this connection, that Rule 6(2) of the Working Procedures calls for the Members constituting a division to be selected taking into account, *inter alia*, "the principles of random selection [and] unpredictability". The Appellate Body expressed the view that, in order to ensure respect for these principles, in the specific circumstances of a simultaneous filing of two appeals, the appeal numbers should be assigned to each dispute by means of a random draw. To this end, the Appellate Body invited the parties to this dispute and to the *China – Rare Earths* (DS431; DS432; DS433) disputes to the Appellate Body Secretariat on Friday, 11 April 2014, in order to witness the assignment of appeal numbers to the appeals in DS449 and DS431 through a random draw. The Appellate Body Chair also adverted, in his letter, to the Appellate Body's regret at the unfortunate circumstances that had led to this situation, and to the need for parties to WTO disputes to coordinate, communicate, and cooperate amongst themselves, as well as with the Appellate Body and the Appellate Body Secretariat, in the planning, filing, and conduct of their appeals.

²⁴ Panel Report, para. 8.1.c.

²⁵ Panel Report, para. 8.3.

²⁶ WT/DS449/6 (attached as Annex 1 to this Report).

²⁷ WT/AB/WP/6, 16 August 2010.

²⁸ WT/DS431/R, 26 March 2014.

²⁹ The panel report in DS431 (complaint by the United States) was circulated together with the panel reports in DS432 (complaint by the European Union) and DS433 (complaint by Japan) in the form of a single document constituting three separate panel reports. China subsequently appealed the panel reports in DS432 and DS433 on 25 April 2014.

1.13. On Friday, 11 April 2014, a random draw was held at the Appellate Body Secretariat in the presence of the parties to this dispute and to the *China – Rare Earths* (DS431; DS432; DS433) disputes. As a result of this draw, the appeal initiated by the United States in *China – Rare Earths* (DS431) was assigned appeal number AB-2014-3, and the appeal by China in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) was assigned appeal number AB-2014-4.

1.14. Also on 11 April 2014, the United States requested an extension for the filing of the relevant documents for an other appeal pursuant to Rule 16(2) of the Working Procedures on account of "exceptional circumstances", particularly: (i) the filing of China's Notice of Appeal and appellant submission 12 days after the circulation of the Panel Report in this dispute (DS449); (ii) the simultaneous filing of the appeals in this dispute and in *China – Rare Earths* (DS431); and (iii) the granting of an extension to China to file its Notice of Other Appeal in *China – Rare Earths* (DS431). On 14 April 2014, the Appellate Body Division hearing this appeal issued a Procedural Ruling³⁰ extending the time-period for the United States to file its Notice of Other Appeal and other appellant's submission to 17 April 2014. The Division also extended the deadlines for the filing of the appellees' submissions to 1 May 2014 and the third participants' submissions to 5 May 2014. The Division based its decision on Rule 16(1) and (2) of the Working Procedures.

1.15. On 16 April 2014, Japan requested the Appellate Body, pursuant to Rule 16 of the Working Procedures, to extend the date for the filing of the third participants' submission to 7 May 2014, because the original deadline fell within a holiday period in Japan. On 24 April 2014, the Division denied Japan's request on the ground that the difficulties that Japan could encounter in finalizing its submission during this period did not constitute "exceptional circumstances" that would result in a "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures.

1.16. On 17 April 2014, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal³¹ and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 30 April 2014, China and the United States each filed an appellee's submission.³² On 5 May 2014, Australia, the European Union, and Japan each filed a third participant's submission.³³ Canada, India, and Turkey (on 5 May 2014), Russia (on 12 May 2014), and Viet Nam (on 13 May 2014) each indicated its intention to appear at the oral hearing as a third participant.³⁴

1.17. The oral hearing in this appeal was held on 15 and 16 May 2014. The participants and third participants Australia and Japan made opening statements. The participants and third participants responded to questions posed by the Members of the Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

2.1 Claims of error by China – Appellant

2.1. China claims that the Panel erred in the interpretation and application of Article X:2 of the GATT 1994, because it concluded that the relevant baseline of comparison under Article X:2 is any "established and uniform practice" of a government agency, and in finding that Section 1 of PL 112-99 does not effect an "advance" in a rate of duty or other charge on imports under an "established and uniform practice", or impose a "new or more burdensome" requirement, restriction, or prohibition on imports in relation to this established and uniform practice.³⁵ Moreover, China claims that the Panel acted inconsistently with Article 11 of the DSU in its determination of the meaning of US municipal law, and in finding that the USDOC practice of applying US countervailing duty law to imports from China as an NME country was "presumptively lawful".³⁶ China requests the Appellate Body to reverse the Panel's finding that the United States

³⁰ Attached as Annex 3 to this Report.

³¹ WT/DS449/7 (attached as Annex 2 to this Report).

³² Pursuant to Rules 22 and 23(4) of the Working Procedures.

³³ Pursuant to Rule 24(1) of the Working Procedures.

³⁴ Pursuant to Rules 24(2) and 24(4) of the Working Procedures.

³⁵ China's appellant's submission, para. 68 (referring to Panel Report, paras. 7.189-7.191 and 7.206-7.208).

³⁶ China's appellant's submission, paras. 95-98 (quoting Panel Report, para. 7.165).

did not act inconsistently with Article X:2 and to complete the analysis and find, instead, that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994.³⁷

2.1.1 Interpretation and application of Article X:2 of the GATT 1994

2.2. China takes issue with the Panel's interpretation that the "practice" of a government agency must be the baseline of comparison for determining whether a newly published measure of general application effects an "advance" in a rate of duty or imposes a "new or more burdensome" requirement or restriction on imports. In China's view, there is no genuine interpretative support for the aforementioned conclusion.³⁸

2.3. China argues that the Panel erred in finding that the phrase "under an established and uniform practice" defines the relevant baseline of comparison under Article X:2 of the GATT 1994, because, based on its ordinary meaning and its location within the first clause of Article X:2, it is clear that this phrase qualifies the immediately preceding reference to "measure[s] of general application ... effecting an advance in a rate of duty or other charge on imports". China claims that it does not follow from the meaning of the term "advance" that the phrase "under an established and uniform practice" defines the relevant baseline of comparison for purposes of determining whether a measure effects an "advance in a rate of duty". There is no textual, interpretative, or grammatical basis for this phrase to refer to the baseline or define the relevant prior rate against which the impugned measure could be compared. China believes that doing so would amount to inserting words into Article X:2 that are simply not there.

2.4. In China's view, the phrase "under an established and uniform practice" describes a further characteristic of the measure that is being challenged and, in particular, *how* the measure must effect an advance in a rate of duty or other charge on imports – namely, "under an established and uniform practice". China observes that this was also the understanding of the panel in *EC – IT Products*, which found that the phrase "under an established and uniform practice" modifies both "advance in a rate of duty" and "other charge on imports", and means that these must be applied in the whole customs territory ("uniform") and that its application should be on a secure basis ("established").³⁹

2.5. China notes that the phrase "under an established and uniform practice" reads in French "*en vertu d'usages établis et uniformes*" and in Spanish "*en virtud del uso establecido y uniforme*". China points out that "*en vertu de*" and "*en virtud de*" can be translated into English as "by virtue of" or "as consequence of". The term "by virtue of" also suggests that the phrase "under an established and uniform practice" describes how the measure of general application must effect an advance in a rate of duty or other charge on imports, in order to fall within the scope of Article X:2.⁴⁰

2.6. According to China, "[t]he baselessness of the Panel majority's interpretation is further demonstrated by the fact that the phrase 'under an established and uniform practice' has no textual connection to the second category of measures described by Article X:2, namely those measures of general application that 'impos[e] a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor'."⁴¹ Instead, China contends, "the Panel appears to have concluded, without any interpretative basis whatsoever, that the phrase 'under an established and uniform practice' in the first clause of Article X:2 also serves to define the relevant baseline of comparison for the types of measures described by the second clause of Article X:2."⁴² In China's view, this "makes no sense on its face", because, if the phrase "under an established and uniform practice" were meant to serve as the relevant baseline of

³⁷ China's appellant's submission, paras. 69 and 175.

³⁸ China's appellant's submission, para. 28.

³⁹ China's appellant's submission, para. 34 (referring to Panel Reports, *EC – IT Products*, paras. 7.1116, 7.1119, and 7.1120).

⁴⁰ China's appellant's submission, para. 35.

⁴¹ China's appellant's submission, para. 38.

⁴² China's appellant's submission, para. 38. (fn omitted)

comparison under Article X:2 for both categories of measures, then it would not be attached grammatically to only one of the two types of measures that Article X:2 encompasses.⁴³

2.7. According to China, the baseline of comparison under Article X:2 can only be discerned by interpreting Article X:2 in its context and in the light of the object and purpose of the GATT 1994. The "common thread" among the provisions of Article X is the requirement of publication of measures that serves to inform governments and traders of the rates, requirements, and restrictions that the importing Member will apply to different types of trade-related conduct.⁴⁴

2.8. China claims that, within the structure of Article X, the types of measures subject to Article X:2 are a subset of the types of measures that a Member is required to publish promptly under Article X:1, and that, prior to the official publication of any measure subject to Article X:2, the previously applicable rate or requirement was necessarily one set forth in a measure of general application published in accordance to Article X:1. According to China, the relevant baseline to determine whether a measure of general application effects an advance in a rate of duty or imposes a new or more burdensome requirement is provided by the measure of general application that a Member is required to publish under Article X:1. Therefore, a newly published measure of general application effects an "advance" in a rate of duty or imposes a "new or more burdensome" requirement or restriction on imports in relation to this baseline.

2.9. This conclusion follows from the context of Article X as a whole and from the basic principles of notice and due process that Article X embodies. China observes that the principle of due process is fundamental to the security and predictability of the multilateral trading system. China further remarks that, in this way, Article X:2 ensures that governments and traders can rely upon published measures of general application, knowing that they will not be subjected to additional or more burdensome rates, requirements, or restrictions until the importing Member publishes a new measure of general application.

2.10. In addition to the claim that the Panel erred in identifying the baseline of comparison under Article X:2, China alleges that the Panel erred in identifying the point in time when the comparison between the measure at issue and the baseline of prior rates and requirements and restrictions is to be made.⁴⁵ China contends that the Panel erred in considering that the comparison under Article X:2 should be made in relation to the rates, requirements, and restrictions that existed prior to the *enactment* of the measure at issue, and argues that such comparison should be made in relation to the rates, requirements, and restrictions that existed prior to the *enforcement* of the measure at issue.⁴⁶ China points out that Article X:2 is concerned with the enforcement of certain types of measures prior to their official publication, and that it is at the time of enforcement, not enactment, that the expectations of traders and governments are adversely affected by the failure to provide public notice of the relevant measure effecting such a change.⁴⁷

2.11. In this dispute, China observes that the Panel found that Section 1 of PL 112-99 was enforced as of 20 November 2006, and contends that, in the light of that finding, the Panel should have compared the rates, requirements, and restrictions effected by the measure at issue in relation to those that existed prior to November 2006.⁴⁸ China notes that this would be true even under the Panel's erroneous conclusion that the relevant baseline of comparison under Article X:2 is any "established and uniform practice".

2.12. In China's view, the Panel's interpretation of the relevant baseline of comparison in Article X:2 is inconsistent with the object and purpose of ensuring the security and predictability of the multilateral trading system. China contends that the Panel's interpretation of Article X:2 as requiring a comparison of the measure at issue with an established and uniform practice would render Article X:2 inutile. In China's view, if the baseline of comparison was "an established and uniform practice", then Article X:2 would be deprived of its useful effect, because a Member could escape the obligation in Article X:2 by enforcing a measure through an established and uniform

⁴³ China's appellant's submission, para. 39.

⁴⁴ China's appellant's submission, para. 43.

⁴⁵ China's appellant's submission, para. 50.

⁴⁶ China's appellant's submission, paras. 50 (referring to Panel Report, para. 7.168) and 51.

⁴⁷ China's appellant's submission, para. 51 (referring to Panel Report, para. 7.157).

⁴⁸ China's appellant's submission, para. 53 (referring to Panel Report, para. 7.122).

practice before enacting it, so that it could no longer be considered an "advance in a rate of duty". In other words, the act of enforcing a measure of general application before publication, which is what Article X:2 prohibits, "would constitute proof that no violation of Article X:2 has occurred".⁴⁹

2.13. China argues that an "absurd result" of the Panel's interpretation of Article X:2 would be that "the only circumstance in which Article X:2 could be violated is if a Member were to publish a measure of general application that retroactively increases rates of duty or imposes new or more burdensome requirements or restrictions on imports, without any prior 'practice' of applying those rates, restrictions, or requirements".⁵⁰ In China's view, while a measure that retroactively increases the rates of duty "out of the blue" is undoubtedly a violation of Article X:2, this is by no means the only circumstance in which Article X:2 can be violated according to its terms.⁵¹ China contends that, "[b]y severing any connection between Article X:2 and previously published measures of general application, the Panel majority's interpretation of Article X:2 would make it impossible for governments and traders ... to engage in trade with the importing Member on a secure and predictable basis."⁵²

2.14. Finally, China remarks that the absurdity of the interpretation adopted by the Panel majority is illustrated by question No. 94 that the Panel posed following the second substantive meeting with the parties.⁵³ Question No. 94 posits a hypothetical scenario where, on 1 January 2013, country A's customs authorities start collecting duties on a product at the rate of 2x%, although the published rate is x%. On 1 June 2013, country A's Minister of Finance signs an order to raise the duty on this product to 2x% with an effective date of 1 January 2013. In China's view, not to find a violation of Article X:2 under the hypothetical facts of question No. 94, because country A had an "established and uniform practice" of collecting duties at 2x%, would mean that the conduct that Article X:2 seeks to prohibit – i.e. the enforcement of a measure of general application effecting an advance in a rate of duty prior to its official publication – would constitute a basis for finding that there was no violation of Article X:2. Moreover, China contends that the hypothetical facts of question No. 94 demonstrate not only that an agency's practice cannot serve as the baseline of comparison under Article X:2, but also that the relevant point in time to undertake such comparison is the date of enforcement of the measure, not its date of enactment.

2.15. In respect of the application of Article X:2 to the facts of this dispute, China contends that, having misinterpreted Article X:2, the Panel then erred in finding that: (i) Section 1 does not effect an "advance" in a rate of duty or other charge on imports in relation to an "established and uniform practice", which according to the Panel was the USDOC's practice of applying countervailing duties to NME countries⁵⁴; and (ii) Section 1 does not impose a "new or more burdensome" requirement, restriction, or prohibition on imports in relation to this established and uniform practice.⁵⁵ China, thus, claims that the Panel erred in finding that the United States did not act inconsistently with Article X:2 of the GATT 1994, notwithstanding the Panel's finding that the United States had enforced Section 1 prior to the date of its official publication.⁵⁶ Consequently, China claims that, because the Panel's findings concerning the consistency of

⁴⁹ China's appellant's submission, para. 56.

⁵⁰ China's appellant's submission, para. 57.

⁵¹ China's appellant's submission, para. 58.

⁵² China's appellant's submission, para. 66.

⁵³ Panel question No. 94 reads:

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?

⁵⁴ China's appellant's submission, para. 68 (referring to Panel Report, paras. 7.189-7.191).

⁵⁵ China's appellant's submission, para. 68 (referring to Panel Report, paras. 7.206-7.208).

⁵⁶ China's appellant's submission, para. 68 (referring to Panel Report, para. 8.1.b.ii).

Section 1 of PL 112-99 with Article X:2 of the GATT 1994 were based on the Panel's misinterpretation of that provision, the Appellate Body must reverse these findings.⁵⁷

2.1.2 Article 11 of the DSU

2.16. In support of its claim under Article 11 of the DSU, China argues, first, that the Panel did not apply the standard set out by Appellate Body jurisprudence for determining the meaning of municipal law.⁵⁸ In China's view, the failure to apply this standard would "constitute an error of law under Article 11, just as the failure to apply the correct standard of review constitutes an error of law".⁵⁹ According to China, the Panel should have examined the relevant provisions of the US Tariff Act, including the text of Section 1 of PL 112-99 in relation to the prior version of the US Tariff Act that it amended. China contends that "[t]he Panel majority's failure to examine the text of the relevant legal instruments would clearly be material to the validity and objectivity of its findings".⁶⁰

2.17. Moreover, China takes issue with the Panel's conclusion that an agency's "practice or interpretation" is "presumptively lawful" unless and until a domestic court issues a final, non-appealable order directing the agency to cease that practice or interpretation. In China's view, "[t]his 'presumption' finds no support in prior Appellate Body reports or in established methods for determining the meaning of municipal law".⁶¹ If accepted, this "presumption of lawfulness" would amount to giving deference to a Member's characterization of its own municipal laws, a proposition that prior panels have properly rejected.⁶²

2.18. Finally, China contends that the Panel failed to acknowledge that, on the basis of the text of the relevant legal instruments, China had established a *prima facie* case that prior US municipal law did not provide for the application of countervailing duties to imports from NME countries. In China's view, "[t]he Panel majority's rule of 'presumptive lawfulness' amounted to a reversal of the burden of proof, [as it] absolve[d] the United States of its obligation to rebut the *prima facie* case that China had established."⁶³ On this basis, China requests the Appellate Body to reverse these findings and not rely on them for the purpose of completing the analysis under Article X:2 of the GATT 1994.

2.19. China observes that the United States may contend on appeal that the Panel majority's finding that the USDOC's "practice" was "presumptively lawful" as of the date of enactment of Section 1 is somehow relevant to the Appellate Body's completion of the analysis under a correct interpretation of Article X:2 of the GATT 1994. China disagrees with any such characterization of the Panel's findings – in paragraphs 7.158-7.186 of the Panel Report – and argues that, if the Appellate Body were to conclude that the Panel made any findings relating to the status of prior US municipal law, it would need to reverse these findings based on the Panel's failure to comply with Article 11 of the DSU.⁶⁴

2.1.3 China's request for completion of the analysis

2.20. China requests the Appellate Body to complete the analysis and find that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994. In particular, China considers that the Appellate Body should examine whether Section 1 had any of the effects described in Article X:2 in relation to prior US municipal law, as set forth in the published measures of general application. In order to complete the analysis, the Appellate Body should rely on the Panel's factual findings or

⁵⁷ China's appellant's submission, para. 69 (referring to Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 340; *US – Softwood Lumber IV*, para. 121; and *India – Additional Import Duties*, para. 182).

⁵⁸ China's appellant's submission, para. 93 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).

⁵⁹ China's appellant's submission, para. 93 (referring to Appellate Body Reports, *US – Countervailing Investigation on DRAMS*, para. 187; and *US – Continued Suspension*, para. 615).

⁶⁰ China's appellant's submission, para. 94.

⁶¹ China's appellant's submission, para. 95 (quoting Panel Report, para. 7.165).

⁶² China's appellant's submission, para. 95 (referring to Panel Reports, *US – 1916 Act (EC)*, para. 6.51; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.106).

⁶³ China's appellant's submission, para. 97.

⁶⁴ China's appellant's submission, paras. 89 and 90.

undisputed facts in the Panel record to determine whether Section 1 effected an "advance" in a rate of duty or other charge on imports under an "established and uniform practice" or imposed a "new or more burdensome" requirement, restriction, or prohibition on imports from China. China notes that, as the Panel found that Section 1 of PL 112-99 is a "measure of general application" taken by the United States, and that the United States "enforced" this measure prior to its official publication, "there is no need for the Appellate Body to examine those elements of China's claim under Article X:2".⁶⁵

2.21. According to China, completing the analysis will require the Appellate Body to examine the text of the measure at issue – Section 1 of PL 112-99 – in relation to the rates, requirements, and restrictions that were previously applicable under US law as set forth in the published measures of general application. In China's view, "[t]his is ... a determination as to the meaning of U.S. municipal law prior to the enforcement of Section 1 as of 20 November 2006."⁶⁶ It is in relation to this baseline of prior municipal law that the Appellate Body should evaluate whether Section 1 effected an "advance" in a rate of duty or other charge on imports, or imposed a "new or more burdensome" requirement or restriction on imports from China.

2.22. China argues that the Panel made no findings concerning the relationship between Section 1 and the rates, requirements, and restrictions that were applicable to imports from China pursuant to the published measures of general application prior to the enforcement of Section 1. Rather, based on its erroneous conclusion regarding the relevant baseline of comparison under Article X:2, the Panel considered that its application of Article X:2 required two principal inquiries: (i) whether the USDOC had an "established and uniform practice" of applying countervailing duties to imports from China prior to the enactment of Section 1; and (ii) whether this practice, if it existed, was "lawful" under the municipal law of the United States at the time that Section 1 was enacted.⁶⁷

2.23. According to China, in determining whether the USDOC's practice was lawful before the enactment of Section 1, the Panel considered that, absent a determination that certain agency practice has been judicially determined to be unlawful by a domestic court, that agency practice should be regarded as "presumptively lawful".⁶⁸ In China's view, under the rule of "presumptive lawfulness", the Panel made clear that, "even if an examination of the text of Section 1 led to the conclusion that it 'added something to United States [countervailing duty (CVD)] law that it did not already contain', and even if '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', the Panel majority would nonetheless accept the USDOC's 'practice' as the relevant baseline of comparison under Article X:2".⁶⁹ The Panel's analysis of whether the USDOC's practice was "lawful", and its finding that it was "presumptively lawful", are "inextricably bound up" with its erroneous interpretation of Article X:2.⁷⁰ Thus, China requests the Appellate Body to declare the Panel's findings, in paragraphs 7.158 through 7.186 of the Panel Report, moot and of no legal effect.⁷¹

2.24. China indicates that, although the Panel majority did not make factual findings concerning the effects of Section 1 in relation to the rates, requirements, and restrictions established under prior US municipal law as of the date of enforcement, the undisputed facts in the Panel record provide more than a sufficient basis for the Appellate Body to complete the analysis.⁷² China notes that these undisputed facts lead to the same result whether the comparison is made as of the date on which Section 1 was enforced (20 November 2006), or as of the date on which it was enacted and officially published (13 March 2012). The undisputed facts in the Panel record lead to the same result regardless of the date, "because U.S. law, as set forth in published measures of general

⁶⁵ China's appellant's submission, para. 71.

⁶⁶ China's appellant's submission, para. 72.

⁶⁷ China's appellant's submission, para. 78 (referring to Panel Report, para. 7.168).

⁶⁸ China's appellant's submission, para. 83 (quoting Panel Report, para. 7.165).

⁶⁹ China's appellant's submission, para. 85 (quoting Panel Report, para. 7.184).

⁷⁰ China's appellant's submission, para. 88.

⁷¹ China's appellant's submission, para. 88.

⁷² China's appellant's submission, paras. 74 and 75. China argues that the Panel majority undertook no analysis of the text of Section 1 in relation to the previously published measure of general application that it amended, and the Panel majority's findings concerning the "lawfulness" of the USDOC's "relevant practice or interpretation" will not assist the Appellate Body in its completion of the analysis. (Ibid., para. 74)

application, did not provide for the application of countervailing duties to imports from [NMEs] at any point prior to the enactment and official publication of Section 1."⁷³

2.25. China maintains that an evaluation of whether Section 1 had either or both of the types of effects described in Article X:2 must begin with an examination of the text of Section 1 in relation to the text of the prior law that it amends. Section 1, by its terms, amends the prior version of Section 701 of the US Tariff Act (i.e. the provision of US law relating to the application of countervailing duties). In China's view, an examination of the text of both legal instruments reveals that, "[i]f the purpose of P.L. 112-99 was 'to apply the countervailing duty provisions of the Tariff Act of 1930 to [NME] countries', it must be the case that those provisions previously did not apply to [NMEs], at any point in time."⁷⁴

2.26. China highlights that this is further supported by the text and structure of the new Section 701(f), which establishes that countervailing duties "shall be imposed" on imports from NME countries pursuant to the USDOC's general countervailing duty authority under Section 701(a) of the US Tariff Act.⁷⁵ Moreover, the introduction of an express exception to this provision further supports the view that US countervailing duty law did not previously apply to imports from NME countries. In this respect, China observes that, "[i]f subsection 701(a) had 'always' provided for the application of countervailing duties to imports from [NME] countries, as the United States repeatedly contended before the Panel, then the only *new* provision of law established by Section 1 ... would have been the 'exception' for economies 'essentially comprised of a single entity'."⁷⁶ China adds that "[t]he final – and conclusive – textual element of Section 1 in relation to the prior provision of law that it amended is its expressly retroactive effective date".⁷⁷ In China's view, "[t]he only conceivable purpose for making a statutory amendment retroactive is to change the law as it existed in the past."⁷⁸

2.27. China argues that these textual elements of PL 112-99 are sufficient to establish a *prima facie* case that Section 1 has the types of effects described by Article X:2. Regarding the first type of measure encompassed by Article X:2, Section 1 "effect[ed] an advance in a rate of duty or other charge on imports under an established and uniform practice", because it subjected imports from China to the imposition of countervailing duties, when previously those imports were not subject to those duties under US law as long as China was designated as an NME country. China further contends that PL 112-99 also imposed a "new or more burdensome" requirement or restriction on imports because, contrary to the situation prior to the enforcement of Section 1, it makes imports from NME countries subject to the initiation and conduct of countervailing duty investigations, as well as to the potential imposition of countervailing duties.⁷⁹

2.28. China asserts that the United States' only response to China's *prima facie* case before the Panel was that "Section 1 did no more than 'clarify' what Section 701 of the Tariff Act had 'always' meant."⁸⁰ China considers that the United States' "clarification" theory, even if proven, would not have rebutted China's *prima facie* case. This is because "the enactment and official publication of Section 1 had a 'demonstrable link' with the imposition of countervailing duties on imports of products from China (i.e. an 'advance in a rate of duty or other charge on imports')".⁸¹ The "demonstrable link" between Section 1 and the imposition of countervailing duties on imports from China is that PL 112-99 was enacted "in direct response" to the 2011 decision of the United States Court of Appeals for the Federal Circuit (CAFC) in the GPX International Tire Corporation case⁸² (GPX V).⁸³

⁷³ China's appellant's submission, para. 100.

⁷⁴ China's appellant's submission, para. 104.

⁷⁵ China's appellant's submission, para. 105.

⁷⁶ China's appellant's submission, para. 106. (emphasis original)

⁷⁷ China's appellant's submission, para. 108.

⁷⁸ China's appellant's submission, para. 109.

⁷⁹ China's appellant's submission, paras. 110-112.

⁸⁰ China's appellant's submission, para. 113.

⁸¹ China's appellant's submission, para. 116 (referring to Panel Reports, *EC – IT Products*, para. 7.1105).

⁸² United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (Panel Exhibit CHI-6).

⁸³ China's appellant's submission, paras. 117 and 118.

2.29. In China's view, the 2012 decision of the CAFC in *GPX VI*⁸⁴ further supports this position as it "made clear that the only reason for altering the outcome of *GPX V* was the intervening enactment of P.L. 112-99 by Congress".⁸⁵ China contends that, in any event, the United States failed to prove its "clarification theory" because it did not demonstrate that the facts and circumstances under which US courts have considered particular Congressional enactments to constitute "clarifying" legislation were present in the case of Section 1.⁸⁶ Notwithstanding the failure of the United States to sustain its burden of proof, China argues that PL 112-99 bears none of the indicia that the courts have treated as crucial hallmarks of "clarificatory legislation".⁸⁷

2.30. In addition, China claims that its *prima facie* case, based on the text of relevant legal instruments, is confirmed by other sources of US municipal law. Although China argues that the Appellate Body should complete the analysis based on the text of the relevant US legal instruments, because a contrary approach could amount to a reversal of the burden of proof, China adds that other sources of US municipal law confirm what is evident on the face of the legislation itself. China asserts that there are undisputed facts in the Panel record relating to two of these additional sources of US municipal law: "evidence of the consistent application of such laws", and "the pronouncements of domestic courts on the meaning of such laws".⁸⁸

2.31. China indicates that, in its 1986 decision in *Georgetown Steel Corporation v. United States*⁸⁹ (*Georgetown Steel*), the CAFC reviewed the history and purpose of the US trade remedy laws and concluded that the countervailing duty provisions of these laws do not apply to imports from NME countries. According to China, in *Georgetown Steel*, the CAFC agreed with the USDOC that, in an NME country, the government is incapable of conferring subsidies in the sense of US countervailing duty law.⁹⁰

2.32. Moreover, China maintains that, between 1986 and 2006, the US Congress "clearly understood" that the application of countervailing duties to imports from NME countries would require Congress to amend the US Tariff Act.⁹¹ After the CAFC's decision in *Georgetown Steel*, Congress considered on several occasions the enactment of new legislation to permit the application of countervailing duties to imports from NME countries. None of these initiatives, however, resulted in the enactment of new legislation.⁹² In particular, China observes that, in connection with the Omnibus Trade and Competitiveness Act of 1988⁹³, the US House of Representatives passed a bill that would have amended the US Tariff Act to provide that US countervailing duty law would henceforth apply to imports from NME countries. The US Senate, however, did not pass a corresponding provision. As a result, the legislation that Congress finally enacted into law did not provide the USDOC with authority to apply countervailing duties to imports from NME countries.⁹⁴ China adds that, in connection with the passage of the Uruguay Round Agreements Act in 1994, Congress once again referred to the CAFC's decision in *Georgetown Steel* and "noted that it stood for 'the reasonable proposition that the [countervailing duty] law cannot be applied to imports from [NME] countries'".⁹⁵ In China's view, the US Congress provided no indication that it disagreed with the decision in *Georgetown Steel*, or that it had any intention of changing existing US trade remedy laws to permit the application of countervailing duties to imports from NME countries.

⁸⁴ United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) (Panel Exhibit CHI-7).

⁸⁵ China's appellant's submission, para. 119 (referring to *GPX VI*, p. 1310).

⁸⁶ China's appellant's submission, para. 123.

⁸⁷ China's appellant's submission, para. 124 (quoting Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), para. 41).

⁸⁸ China's appellant's submission, para. 132.

⁸⁹ United States Court of Appeals for the Federal Circuit, *Georgetown Steel Corporation v. United States*, 801 F.2d 1308, 1310 (Fed. Cir. 1986) (Panel Exhibit CHI-2).

⁹⁰ China's appellant's submission, para. 137 (referring to *Georgetown Steel*, p. 1316).

⁹¹ China's appellant's submission, para. 165.

⁹² China's appellant's submission, para. 141.

⁹³ Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100-418, 102 Stat. 1107 (23 August 1988) (Panel Exhibit USA-96).

⁹⁴ China's appellant's submission, para. 142.

⁹⁵ China's appellant's submission, para. 143 (referring to Statement of Administrative Action accompanying the Uruguay Round Agreements Act, HR Doc. No. 103-316, Vol. 1 (1994), p. 926, as contained in *GPX V*, p. 743).

2.33. Regarding "evidence of the consistent application" of US municipal law, China argues that the undisputed facts in the Panel record demonstrate that, prior to 20 November 2006, the USDOC did not apply countervailing duties to imports from NME countries.⁹⁶ For instance, in 1998, the USDOC promulgated a set of countervailing duty regulations to implement the Uruguay Round Agreements Act, where, citing the decision in *Georgetown Steel*, the USDOC stated that it would only apply countervailing duties to subsidies conferred after the date on which the USDOC designated a particular country as a market economy.⁹⁷ In addition, China notes that, in October 2006, anti-dumping and countervailing duty petitions were filed with the USDOC concerning coated free sheet (CFS) paper from China.⁹⁸ According to China, the USDOC initiated the countervailing duty investigation in CFS paper from China⁹⁹ (*CFS Paper*) on 20 November 2006 and subsequently issued a final affirmative countervailing duty order¹⁰⁰, notwithstanding its inconsistency with existing US law, in particular, with the decision in *Georgetown Steel* and the USDOC's 1998 Countervailing Duty Regulations.¹⁰¹

2.34. China further contends that there is no evidence in the Panel record demonstrating a "consistent application" by the USDOC of US countervailing duty law.¹⁰² Indeed, "looking at the period from 1986 to 2012, the USDOC applied the Tariff Act in an *inconsistent* manner: in the 20-year period from 1986 to 2006, it did not apply the countervailing duty provisions of the Tariff Act to imports from [NME] countries" and "in the six-year period from 2006 to 2012 it changed course and began to apply [them]".¹⁰³

2.35. China further submits that the USDOC's decision to begin applying countervailing duties to imports from China resulted in a wave of joint anti-dumping and countervailing duty petitions directed against Chinese products, which were challenged in US courts by China and other interested parties. China points out that the first of these challenges decided by the CAFC was the *GPX V* decision issued in 2011, where it "reaffirmed its prior holding in *Georgetown Steel* that the Tariff Act did not permit the imposition of countervailing duties on imports from countries that the United States designates as [NMEs]".¹⁰⁴ Subsequently, the US Congress enacted PL 112-99 on 13 March 2012 to create a new Section 701(f) of the US Tariff Act, which provides that countervailing duties "shall be imposed" on imports from NME countries subject to the exception for imports from countries whose economies are "essentially comprised of a single entity". One day after the enactment of PL 112-99, the CAFC issued a letter to the parties in the *GPX* litigation directing them "to make submissions 'commenting on the impact of this legislation on further proceedings in this case.'"¹⁰⁵ On 9 May 2012, while the case was still pending before it, the CAFC issued its decision in *GPX VI*. According to China, in *GPX VI*, the CAFC restated its prior holding in *GPX V* that, prior to Section 1, "countervailing duties [could not] be applied to goods from NME countries", and ultimately concluded that PL 112-99 could be applied retroactively to sustain the imposition of countervailing duties on the products at issue.¹⁰⁶

2.36. China observes that, following the CAFC's decision in *GPX VI*, there remained certain unresolved issues concerning the constitutionality of Section 1, which were challenged by interested Chinese parties. In particular, China points out that the issue of whether the *GPX V* decision was an authoritative statement of US law prior to the enactment of Section 1 was

⁹⁶ China's appellant's submission, para. 164.

⁹⁷ China's appellant's submission, para. 144 (referring to USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14)).

⁹⁸ China's appellant's submission, para. 148 (referring to United States Court of International Trade, *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274 (CIT 2007) (Panel Exhibit USA-28)).

⁹⁹ USDOC, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea, *United States Federal Register*, Vol. 71, No. 227 (27 November 2006), pp. 68546-68549 (Panel Exhibit USA-23).

¹⁰⁰ USDOC, Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 72, No. 206 (25 October 2007), pp. 60645-60648 (Panel Exhibit USA-27).

¹⁰¹ China's appellant's submission, paras. 148 and 149.

¹⁰² China's appellant's submission, para. 166.

¹⁰³ China's appellant's submission, para. 166. (emphasis original)

¹⁰⁴ China's appellant's submission, para. 152. See also *ibid.*, paras. 168 and 169.

¹⁰⁵ China's appellant's submission, para. 156 (quoting *GPX VI*, p. 1311).

¹⁰⁶ China's appellant's submission, para. 157 (quoting *GPX VI*, p. 1310).

resolved by the CAFC in Guangdong Wireking Housewares & Hardware Co. Ltd. v. United States (*Wireking*), a "decision" issued on 18 March 2014. China asserts that, in *Wireking*, the CAFC rejected the proposition that its decision in *GPX V* was not an authoritative statement of US law prior to the enactment of Section 1.¹⁰⁷ China observes that the *Wireking* decision was issued after the issuance of the Panel Report in this dispute, and therefore does not constitute part of the Panel record. However, China considers it appropriate to advise how this issue has since been resolved by the CAFC, because this decision is publically available and the Panel explicitly referred to the ongoing *Wireking* litigation as a reason for not resolving whether the decision in *GPX V* was an authoritative statement of the law.¹⁰⁸

2.37. On this basis, China requests the Appellate Body to complete the analysis based on the undisputed facts in the Panel record and find that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994.¹⁰⁹ In the alternative, China argues that, if the Appellate Body were to complete the analysis following the Panel's interpretation of Article X:2, then the comparison must be made as of the time of enforcement of Section 1 and not as of the time of its enactment.¹¹⁰ China indicates that the Panel found that the date of enforcement of Section 1 was 20 November 2006.¹¹¹ According to China, the undisputed facts in the record demonstrate that, prior to 20 November 2006, the USDOC did not have an "established and uniform practice" of applying countervailing duties to imports from NME countries. Thus, Section 1 effected an "advance" in a rate of duty, and imposed a "new or more burdensome" requirement or restriction on imports, in relation to the USDOC's "practice or interpretation" prior to 20 November 2006. Accordingly, China requests the Appellate Body to find that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994, even if it adopts the Panel majority's interpretation of the relevant baseline of comparison.¹¹²

2.2 Arguments of the United States – Appellee

2.38. The United States responds that the Panel was correct in finding that China failed to establish that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994. Accordingly, the United States requests the Appellate Body to reject the claims of error by China in all respects.¹¹³

2.2.1 Interpretation and application of Article X:2 of the GATT 1994

2.39. The United States responds that the phrase "under an established and uniform practice" in Article X:2 of the GATT 1994 defines the relevant rate that was previously applicable to the imports at issue. The Panel interpreted this phrase based on "the ordinary meaning of the text of that article and in a manner that would prevent the term from being redundant with or contradict the meaning of the term 'measure of general application'".¹¹⁴

2.40. The United States argues that, if this phrase were not read in this way, there would have been no need to insert the phrase "under an established and uniform practice" in Article X:2, because the terms "of general application" and "established and uniform" would be redundant if, as argued by China, they all defined the measure at issue. The United States contends that the terms "general application" and "uniform" both convey the meaning that "the measure or practice should be similarly applied to a whole class of imports rather than to a specific subset of imports or traders."¹¹⁵ Moreover, China's reading of "established" as modifying the measure of general application would "introduce a gap in time before a breach of Article X:2 could be established", because a relevant advance in a rate of duty could only result if the Member was already enforcing the measures at issue, such as to bring about an "established" practice for some time.¹¹⁶ Accordingly, the United States concludes that the Panel was correct in finding that the phrase

¹⁰⁷ China's appellant's submission, para. 160.

¹⁰⁸ China's appellant's submission, para. 162 (referring to Panel Report, fn 303 to para. 7.181).

¹⁰⁹ China's appellant's submission, para. 175.

¹¹⁰ China's appellant's submission, heading V.D, at p. 56.

¹¹¹ China's appellant's submission, para. 172 (referring to Panel Report, para. 7.122).

¹¹² China's appellant's submission, para. 175.

¹¹³ United States' appellee's submission, para. 202.

¹¹⁴ United States' appellee's submission, para. 30.

¹¹⁵ United States' appellee's submission, paras. 31 and 60.

¹¹⁶ United States' appellee's submission, para. 60 (referring to Panel Report, para. 7.156).

"under an established and uniform practice" modifies the terms "rate of duty" and "other charge", such that the relevant baseline of comparison under Article X:2 is the rate of duty or other charge established under the previous "established and uniform practice".¹¹⁷

2.41. The United States contends that an "established and uniform practice" could lead to legitimate expectations that could be relied upon by traders. If such practice becomes more restrictive, Article X:2 requires Members to publish officially the measure of general application before its enforcement. In contrast, a trader could not rely on a one-off duty assessment or an inconsistent application of a rate of duty, because such singular transactions would not allow for a fair or equivalent comparison to a measure of general application.¹¹⁸

2.42. The United States further contends that the Panel gave proper meaning to the word "practice" in Article X:2, when it found that it included the actual published practice of the USDOC in determining the rates of duty on the imports at issue.¹¹⁹ The United States notes that this is consistent with the Appellate Body's interpretation, in *Japan – Alcoholic Beverages II*, of the word "practice" as "a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern".¹²⁰ In contrast, the United States argues that, if, as China contends, the measure of general application effects the advance in the duty "under an established and uniform practice", then the provision should read "*through* an established or uniform practice" to indicate that it is the "advance" that is being modified and not the rate of duty or other charge.¹²¹ In this respect, the United States is of the view that China's interpretation would read the word "practice" out of Article X:2, because it would be subsumed by the scope of the measure of general application.¹²²

2.43. The United States thus argues that, taken as a whole, the phrase "under an established and uniform practice" means (i) a "'discernible pattern' of a sequence of acts" ("practice") (ii) that has "been securely in place for some time" ("established") and (iii) that "stays the same in different places or circumstances or at different times" ("uniform").¹²³

2.44. The United States considers that the Panel correctly determined that the finding of the panel in *EC – IT Products* that an "'advance in a rate of duty' must be under an 'established and uniform practice'" does not support China's claim.¹²⁴ The United States argues that, when viewed in context, the focus of the *EC – IT Products* panel's analysis was on whether the phrase "under an established and uniform practice" qualified only the term "other charge", or both the terms "other charge" and "rate of duty". The panel in *EC – IT Products* did not analyse the term "advance" in relation to the phrase "under an established and uniform practice". Moreover, in the United States' view, this finding reveals a "clear and unexplained leap in logic" and is not persuasive, because, while the relationship between "rate of duty" and "other charge" may support an interpretation that "under an established and uniform practice" applies to both terms, there is no reason to assume, as the panel in those disputes did, that this means that "under an established and uniform practice" modifies the term "advance".¹²⁵

2.45. Turning to the phrase "new or more burdensome requirement [or] restriction", the United States argues that the Panel properly determined, based on the ordinary meaning of Article X:2, that "a new or more burdensome requirement or restriction on imports is one that has not previously been imposed ('new') or one that is of the nature of a burden in a greater degree, or is onerous to a greater extent ('more burdensome')."¹²⁶ Contrary to China's arguments, the

¹¹⁷ United States' appellee's submission, para. 61 (referring to Panel Report, para. 7.157).

¹¹⁸ United States' appellee's submission, para. 62 (referring to Panel Report, para. 7.110).

¹¹⁹ United States' appellee's submission, para. 65 (referring to Panel Exhibit USA-119, comprising a table setting out the Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China).

¹²⁰ United States' appellee's submission, para. 66 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, p. 106).

¹²¹ United States' appellee's submission, para. 68.

¹²² United States' appellee's submission, para. 68.

¹²³ United States' appellee's submission, para. 66.

¹²⁴ United States' appellee's submission, para. 80 (quoting Panel Report, fn 238 to para. 7.155, in turn referring to Panel Reports, *EC – IT Products*, para. 7.1116).

¹²⁵ United States' appellee's submission, para. 82.

¹²⁶ United States' appellee's submission, para. 94 (quoting Panel Report, para. 7.200).

Panel did not insert the phrase "under an established and uniform practice" into this clause of Article X:2. Rather, based on the plain text and context of Article X:2, "the Panel properly determined that it could consider the 'publicly known practice of agencies charged with administering a relevant requirement or restriction on imports.'"¹²⁷

2.46. Thus, according to the United States, the Panel did not interpret the phrase "new or more burdensome requirement [or] restriction" as incorporating the phrase "under an established and uniform practice". The Panel considered that the same analytical approach, but not the same legal standard, should be used to determine whether a relevant change has occurred with respect to both categories of measures under Article X:2. Accordingly, the Panel properly found that the terms "new" or "more burdensome" require a comparison, and that such comparison should be between the prior requirement or restriction on imports and the requirement or restriction imposed by the measure at issue.¹²⁸

2.47. The United States claims that the Panel was correct in considering that, when examining what is a pre-existing "restriction" or "requirement", it is necessary to consider the treatment of imports under a Member's domestic legal regime, and argues that the Panel properly concluded that, "in the context of an analysis involving United States law", a requirement or restriction on imports may be assessed with reference to an administering agency's interpretation and application of domestic law.¹²⁹ The United States also points out that the immediate context of Article X:2 reflects the relevance of agency action. In this respect, Article X:1 lists the measures of "general application" that fall within its scope as "[l]aws, regulations, judicial decisions and administrative rulings of general application".

2.48. In respect of China's argument that the Panel erred in determining the time-frame for comparison by reference to the time of enactment rather than to the time of enforcement, the United States responds that the Panel did not find that Section 1 was enforced on 20 November 2006, but it properly found that no actions were taken by the United States to enforce Section 1 prior to 13 March 2012. Thus, according to the United States, even under China's approach that the baseline of comparison should be as of the time of enforcement of the challenged measure of general application, that date would still be 13 March 2012.

2.49. Regarding China's argument that Panel question No. 94 illustrates the "absurdity" of the Panel majority's interpretation, the United States responds that it does not consider that the hypothetical of question No. 94 is relevant to the dispute at issue, because US law prior to Section 1 had never been that the USDOC was prohibited from applying US countervailing duty law to NME countries. Moreover, the United States contends that the Panel did not interpret Article X:2 as allowing for "any" established and uniform practice of an administering agency to serve as a relevant baseline. Rather, under the hypothetical of question No. 94, a panel would not have to accept "any" practice of Country A's administering authority, but may evaluate whether such practice was lawful based on the facts of the hypothetical set out in question No. 94. In this regard, the United States remarks that the Panel correctly found that the USDOC's interpretation of US countervailing duty law was the governing interpretation of the US Tariff Act unless a court found otherwise in a final and binding judicial decision.¹³⁰

2.50. In respect of the application of Article X:2 to the facts of this dispute, the United States asserts that the Panel was correct in finding that China failed to establish that Section 1 is inconsistent with Article X:2 of the GATT 1994.¹³¹ In the United States' view, given that China's appeal is predicated on the Panel's alleged errors of interpretation, a rejection of these interpretation claims means that China's claims regarding the application of Article X:2 to the measure at issue should fail.¹³²

¹²⁷ United States' appellee's submission, para. 95 (quoting Panel Report, para. 7.203).

¹²⁸ United States' appellee's submission, para. 99 (referring to Panel Report, para. 7.201).

¹²⁹ United States' appellee's submission, para. 104 (referring to Panel Report, para. 7.203).

¹³⁰ United States' appellee's submission, para. 74 (referring to Panel Report, paras. 7.163 and 7.185).

¹³¹ United States' appellee's submission, heading II, at p. 13 (referring to Panel Report, para. 7.211).

¹³² United States' appellee's submission, para. 52.

2.51. The United States argues that the Panel correctly applied to the facts of the case its interpretation of the phrase "under an established and uniform practice". In particular, the United States contends that the Panel correctly determined that the term "practice" included the actual published practice of the USDOC in determining the rates of duty on the imports at issue.¹³³ The United States observes that the Panel correctly found that, "between November 2006, or at least April 2007, and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country that was securely in place (established) and that did not change over time (uniform)."¹³⁴

2.52. The United States further claims that the Panel correctly applied to the facts of the case its interpretation of the phrase "new or more burdensome" requirement or restriction. The United States emphasizes that, in determining whether Section 1 imposed a "new or more burdensome" requirement or restriction, the Panel did not examine whether prior requirements or restrictions imposed through the USDOC's application of US law reflected an "established and uniform practice". Rather, the Panel indicated that it would use the same "analytical approach" under the first and second clauses of Article X:2 and, thus, it would compare the existing requirement or restriction on imports and the requirement or restriction imposed by the measure of general application.¹³⁵

2.53. Moreover, the United States contends that the context of Article X:2 supports the Panel's examination of the USDOC's application of US countervailing duty law to China when determining whether Section 1 imposes a "new or more burdensome" requirement. In particular, the United States points out that the ordinary meaning of the term "administrative ruling" in Article X:1 would include the USDOC's application of US countervailing duty law to imports from China and the resulting determinations. Indeed, as the USDOC's interpretation and application of US countervailing duty law could fall within the scope of Article X:1, it would not be appropriate to exclude such application from Article X:2 in inquiring into a pre-existing restriction or requirement that may result from enforcement of a measure of general application.¹³⁶

2.54. Finally, even assuming *arguendo* that the phrase "under an established and uniform practice" modifies the measure at issue, the United States claims that the Panel did not err in considering the USDOC's existing practice as a baseline of comparison under Article X:2. The United States asserts that, "if the challenged measure at issue must establish requirements on the practice of an administering authority ... in order to be a relevant measure under Article X:2, then by the same logic, the baseline of comparison should also consider the practice of the same authority administering a previous measure of general application".¹³⁷ The Panel properly determined that the established and uniform practice before Section 1 was the USDOC's application of US countervailing duty law to imports from China and that such practice remained the same after the enactment of Section 1. Thus, the United States points out that Section 1 "did not effect an advance in the rate of duty that applied to imports from China".¹³⁸ In the United States' view, China has failed to demonstrate that, even under its own proposed approach to Article X:2, the Panel erred in considering the application by the USDOC of countervailing duties to China as the proper basis of comparison under Article X:2 of the GATT 1994.

2.2.2 Article 11 of the DSU

2.55. The United States asserts that China's claims under Article 11 of the DSU are without merit, because China has failed to establish that the Panel's appreciation of the evidence amounts to a failure to make an objective assessment of the facts. Moreover, in the United States' view, China dresses a complaint that the Panel failed to draw a correct legal conclusion as a failure to make an

¹³³ United States' appellee's submission, para. 65 (referring to Panel Report, para. 7.163; and referring further to Panel Exhibit USA-119, comprising a table setting out the Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China).

¹³⁴ United States' appellee's submission, para. 67 (quoting Panel Report, para. 7.169).

¹³⁵ United States' appellee's submission, paras. 100 and 101 (referring to Panel Report, para. 7.201).

¹³⁶ United States' appellee's submission, para. 108.

¹³⁷ United States' appellee's submission, para. 90.

¹³⁸ United States' appellee's submission, para. 92.

objective assessment. The Appellate Body has repeatedly held that the parties to a dispute "should not merely take alleged legal errors and recast them as claims of error under Article 11".¹³⁹

2.56. The United States contends that, contrary to China's argument, the Panel did apply the approach set out by the Appellate Body in *US – Carbon Steel*¹⁴⁰ by drawing on all of the "sources" that it considered relevant to make a determination of the meaning of US municipal law.¹⁴¹ The United States highlights that, after considering this evidence, "the Panel properly found that [the USDOC's] application of the U.S. CVD law was not a breach of U.S. municipal law".¹⁴² The United States emphasizes that, as the Panel did apply the approach set out by the Appellate Body in *US – Carbon Steel*, China's claim under Article 11 relating to an alleged failure to apply the "correct" standard for determining the meaning of municipal law must fail.¹⁴³

2.57. The United States disagrees with China that the Panel erred under Article 11 on the ground that the Panel allegedly failed to examine the text of the relevant legal instruments. According to the United States, China's "assertion is demonstrably erroneous"¹⁴⁴, because "the Panel examined the text of the relevant provisions repeatedly in its report ... despite the fact that China did not engage on the meaning of the 'text' of the *existing* U.S. CVD law".¹⁴⁵ Following the Appellate Body's guidance in *US – Carbon Steel*, the Panel also examined the consistent application of the law and pronouncements of domestic courts. The United States disagrees with China's argument that, "when the *GPX* legislation is read in relation to Section 701(a) of the U.S. Tariff Act, 'it must be the case that those provisions previously did not apply to [NMEs]'".¹⁴⁶ The United States argues that, since the text of Section 701(a) does not even mention NME countries, it is difficult to sustain that it necessarily prohibits the application of countervailing duties to NME countries. As Section 701(a) contains no reference to NME countries, the US Congress clarified the provision by enacting PL 112-99 to eliminate any ambiguities.¹⁴⁷ According to the United States, the Panel rejected China's argument and found that the USDOC's application of US countervailing duty law has never been unlawful and constituted binding US municipal law prior to the enactment of Section 1.¹⁴⁸ Thus, the United States maintains that the Appellate Body should reject China's attempt to reverse the Panel's factual findings "under the guise" of a claim under Article 11 of the DSU.¹⁴⁹

2.58. Finally, the United States asserts that the fact that China disagrees with how the Panel weighed the evidence before it or that it rejected China's arguments does not rise to a breach of Article 11.¹⁵⁰ The determination of whether the municipal law or action is unlawful should be based on the status and meaning of those actions within the municipal legal system itself. Thus, "to the extent that China considers that the meaning of U.S. municipal law '[f]ollowing customary principles of international law' or under the Appellate Body's approach in *US – Carbon Steel* would produce a different outcome than an approach applying principles of statutory interpretation under U.S. municipal law, the United States would disagree".¹⁵¹ In addition, "to the extent that China is asserting that ... the Appellate Body must follow a different approach to interpret the provisions of Section 701(a) in relation to [the USDOC's] application of the U.S. CVD law under a different standard than what would be used by a U.S. court, China's approach would produce an erroneous

¹³⁹ United States' appellee's submission, para. 117 (referring to Appellate Body Reports, *EC – Fasteners (China)*, para. 442; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

¹⁴⁰ United States' appellee's submission, para. 119 (referring to Panel Report, para. 7.162, in turn referring to Appellate Body Report, *US – Carbon Steel*, para. 157).

¹⁴¹ United States' appellee's submission, para. 119 (referring to Panel Report, paras. 7.162, 7.163, and 7.179).

¹⁴² United States' appellee's submission, para. 116.

¹⁴³ United States' appellee's submission, para. 120.

¹⁴⁴ United States' appellee's submission, para. 121.

¹⁴⁵ United States' appellee's submission, para. 122 (referring to Panel Report, paras. 7.162 and 7.204). (emphasis original)

¹⁴⁶ United States' appellee's submission, para. 124 (quoting China's appellant's submission, para. 104).

¹⁴⁷ United States' appellee's submission, para. 125.

¹⁴⁸ United States' appellee's submission, para. 126 (referring to Panel Report, para. 7.185).

¹⁴⁹ United States' appellee's submission, para. 128.

¹⁵⁰ United States' appellee's submission, para. 129 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 229).

¹⁵¹ United States' appellee's submission, para. 131 (quoting China's appellant's submission, para. 73). (additional fn text omitted)

interpretation and result".¹⁵² Accordingly, the United States contends that an assessment of whether the pre-existing Section 701 "would produce a different rate of duty or restriction or requirement than the new [Section 1 of PL 112-99] ... is a question of U.S. domestic law and can logically only be answered using the approach of the U.S. legal system".¹⁵³ The United States adds that the Appellate Body should not follow China's approach that "speculate[s] as to the ultimate outcome of domestic litigation regarding the lawfulness of [the USDOC's] application of the U.S. CVD law under U.S. municipal law prior to *GPX* litigation".¹⁵⁴

2.2.3 China's request for completion of the analysis

2.59. The United States argues that China's claims under Article X:2 of the GATT 1994 are without merit and that the Appellate Body should reject China's request to complete the analysis.¹⁵⁵ However, should the Appellate Body choose to complete the analysis under Article X:2, the United States asserts that, contrary to China's assertion, the Panel made numerous findings on matters of fact relating to the baseline of comparison under Article X:2 – i.e. the rates, requirements, or restrictions under PL 112-99 and those under Section 701(a) – that could assist the Appellate Body in completing the analysis and finding that Section 1 is consistent with Article X:2.¹⁵⁶ The United States notes that the Appellate Body can only complete the analysis if the factual findings by the Panel or undisputed facts in the Panel record provide a sufficient basis for the Appellate Body to do so.¹⁵⁷

2.60. The United States refers to several findings by the Panel regarding the baseline of comparison under Article X:2 in support of its position that they could assist the Appellate Body in completing the analysis, including the following: (i) there is no evidence of any enforcement of Section 1 by US administrative agencies before 13 March 2012; (ii) neither party contends, and nothing in the Panel record indicates, that, in relation to any of the court decisions submitted by the parties, the USDOC received an order from a US court to either change or discontinue its practice of applying US countervailing duty law to imports from NME countries; (iii) the Panel was not persuaded that the decision in *Georgetown Steel* demonstrates that the USDOC's practice, since at least April 2007, of applying US countervailing duty law to imports from China had, in effect, been judicially determined to be unlawful under US law well before the USDOC developed the practice; (iv) the USDOC was not legally required to adjust its relevant practice as a consequence of the CAFC decision in *GPX V*; (v) the evidence before the Panel suggests that the USDOC's practice was "presumptively lawful" under US law, because the USDOC's interpretation of US countervailing duty law governed in the absence of a binding judicial determination indicating otherwise; (vi) Section 1 did not effect an advance in a rate of duty, because this provision maintained the same rates of duty that were already applied, pursuant to the USDOC's established and uniform practice, prior to the enactment of Section 1; and (vii) to the extent that it can be properly said that, in applying countervailing duties to imports from China, the USDOC subjected imports from China to a "requirement" or "restriction", it is the same "requirement" or "restriction" that China says was subsequently imposed by Section 1.¹⁵⁸

2.61. In the United States' view, it is clear that the Panel made findings of fact based on the totality of the evidence on the record and not on the basis of an alleged erroneous interpretation of Article X:2, as argued by China. However, if the Appellate Body were to agree that the Panel did not make any relevant findings that could assist it in completing the analysis, then the Appellate Body should desist from doing so. This is because the United States considers that the

¹⁵² United States' appellee's submission, para. 132.

¹⁵³ United States' appellee's submission, para. 132. (fn omitted)

¹⁵⁴ United States' appellee's submission, para. 135 (referring to China's appellant's submission, para. 99).

¹⁵⁵ United States' appellee's submission, para. 138.

¹⁵⁶ United States' appellee's submission, para. 142.

¹⁵⁷ United States' appellee's submission, paras. 139 (referring to Appellate Body Reports, *EC – Selected Customs Matters*, para. 278; *Australia – Salmon*, para. 118; and *Canada – Autos*, para. 145) and 140 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1140; *Canada – Continued Suspension*, para. 735; *US – Hot-Rolled Steel*, para. 180; and *EC – Asbestos*, para. 78).

¹⁵⁸ United States' appellee's submission, para. 142 (referring to Panel Report, paras. 7.120, 7.172, 7.177, 7.180, 7.185, 7.190, and 7.204).

facts presented by China in its appellant's submission are not "undisputed".¹⁵⁹ The United States points out that the Panel had already made findings on these contested statements and correctly determined that PL 112-99 is not inconsistent with Article X:2 of GATT 1994.¹⁶⁰

2.62. The United States points to a number of facts that it considers to be "disputed". First, China's assertion that the "the US Tariff Act 'did not previously provide' for the application of the U.S. CVD law to imports from NME countries"¹⁶¹ is erroneous and contradicted by the plain text of Section 701(a), which states that "every 'country' exporting merchandise to the United States is subject to the CVD law, with no exceptions".¹⁶² Second, China incorrectly characterizes the CAFC's decision in *Georgetown Steel* as standing for the conclusion that "the U.S. CVD law does not apply to NME countries as a matter of statutory interpretation."¹⁶³ The United States asserts that, in *Georgetown Steel*, the CAFC "affirmed [the USDOC's] interpretation and decision to not apply the U.S. CVD law to certain Soviet-style centrally planned economies".¹⁶⁴ In the United States' view, since US countervailing duty law mandated that countervailing duties "shall be applied" to subsidized imports, the exception invoked by the USDOC was limited to those situations in which it was impossible to apply the law because a subsidy could not be identified in the case before it. This, argues the United States, was the case with respect to certain Soviet-bloc countries at the time.¹⁶⁵

2.63. Third, the United States takes issue with China's characterization of various legislative initiatives and the USDOC's administration of the countervailing duty law after *Georgetown Steel*.¹⁶⁶ According to the United States, the legislative history of the Omnibus Trade and Competitiveness Act of 1988 "makes no reference to the CVD law and does not suggest that the changes in the [anti-dumping] law had anything to do with the [CAFC's] decision in *Georgetown Steel*, as alleged by China".¹⁶⁷ With respect to the passage of the Uruguay Round Agreements Act, the United States maintains that China "takes out of context a fleeting reference in the 1994 legislative history that summarizes *Georgetown Steel* as being 'limited to the reasonable proposition that the countervailing duty law cannot be applied to imports from [NME] countries'".¹⁶⁸ However, the United States contends that "the statement of administrative action accompanying the legislation demonstrates that the reference was meant to clarify an interpretation by a binational panel under Chapter 19 of the North American Free Trade Agreement that the holding of *Georgetown Steel* required a so-called 'effects test' in determining whether a subsidy may be countervailed."¹⁶⁹ Moreover, the USDOC "did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because [the USDOC] continued to consider that the structure of the NME countries of the time made it impossible to identify countervailable subsidies".¹⁷⁰

¹⁵⁹ United States' appellee's submission, para. 144 (referring to China's appellant's submission, paras. 99-170).

¹⁶⁰ United States' appellee's submission, para. 147.

¹⁶¹ United States' appellee's submission, para. 150 (referring to China's appellant's submission, para. 104).

¹⁶² United States' appellee's submission, para. 150.

¹⁶³ United States' appellee's submission, para. 158 (referring to China's appellant's submission, para. 137). (additional fn text omitted)

¹⁶⁴ United States' appellee's submission, para. 157.

¹⁶⁵ United States' appellee's submission, para. 156.

¹⁶⁶ United States' appellee's submission, paras. 163 and 165.

¹⁶⁷ United States' appellee's submission, para. 163 (referring to China's appellant's submission, para. 141).

¹⁶⁸ United States' appellee's submission, para. 164 (quoting China's appellant's submission, para. 143).

¹⁶⁹ United States' appellee's submission, para. 164 (referring to Statement of Administrative Action accompanying the Uruguay Round Agreements Act, HR Doc. No. 103-316, Vol. 1 (1994), p. 926, as contained in Panel Exhibit USA-2 (*United States Code*, Title 19, Chapter 4, Section 1671)).

¹⁷⁰ United States' appellee's submission, para. 165 (referring to General Issues Appendix, appended to the Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, *United States Federal Register*, Vol. 58, No. 130 (9 July 1993), pp. 37225-37261 (Panel Exhibit USA-21); USDOC, Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China, *United States Federal Register*, Vol. 57, No. 59 (26 March 1992), pp. 10459-10460 (Panel Exhibit USA-94); and Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China, *United States Federal Register*, Vol. 57, No. 109 (5 June 1992), pp. 24018-24022 (Panel Exhibit USA-95)).

2.64. Fourth, the United States disagrees with China's argument that the USDOC's initiation of a countervailing duty investigation on *CFS Paper* from China was unlawful under US law.¹⁷¹ The United States adds that, contrary to China's assertion, the US Court of International Trade (CIT) "rejected China's argument that the [CAFC's] decision in *Georgetown Steel* stood for the proposition that [the USDOC] could not apply U.S. CVD law to NME countries".¹⁷² Moreover, the USDOC explained in a memorandum prepared in the context of the *CFS Paper* investigation that, unlike the economies of the Soviet-bloc countries in the 1980s, producers and exporters in China were sufficiently distinct from the Government of China to permit a rational determination that the government had transferred a subsidy to them.¹⁷³

2.65. In addition, the United States rejects China's argument that the *GPX V* "opinion" "constitutes an authoritative statement of U.S. law".¹⁷⁴ The United States emphasizes that China's argument "was shown to be incorrect during the proceedings before the Panel because the *GPX V* opinion never became final".¹⁷⁵ In the United States' view, it is uncontested that no mandate was ever issued in conjunction with *GPX V*. Following the issuance of the *GPX V* opinion, the United States filed a petition for rehearing *en banc* on 5 March 2012, thereby staying the mandate.¹⁷⁶ Moreover, the United States maintains that the meaning of the *GPX V* opinion was "heavily contested" during the Panel proceedings and, thus, the Appellate Body should reject China's characterization of its meaning as an "undisputed fact".¹⁷⁷ Finally, the United States contests China's suggestion that "[t]he only conceivable purpose for making a statutory amendment retroactive is to change the law as it existed in the past".¹⁷⁸ According to the United States, "Congress enacted the *GPX* legislation to provide a definitive statement of its intent to resolve that ambiguity created by the *GPX V* opinion."¹⁷⁹ Further, contrary to China's contentions, the structure of Section 1 also supports an interpretation that the US Congress was merely confirming that the USDOC was acting within the bounds of its statutory authority in its prior administration of the countervailing duty law, as it "closely parallels [the USDOC's] longstanding interpretation of the statute".¹⁸⁰

2.66. In addition, the United States argues that the Appellate Body should reject China's attempt to introduce new evidence in the form of a "non-final" judicial opinion issued by the CAFC in *Wireking*.¹⁸¹ The United States notes that China has failed to submit the full opinion as an exhibit, and emphasizes that the opinion was issued after the issuance of the Panel Report and does not form part of the Panel record. The United States recalls that, in *US – Offset Act (Byrd Amendment)*, the Appellate Body indicated that it had "no authority to consider new facts on appeal".¹⁸² The fact that the documents are available on the public record "does not excuse [the Appellate Body] from the limitations imposed by Article 17.6".¹⁸³ The United States asserts that it is "undisputed" that the opinion in *Wireking* is "new evidence" and that the Appellate Body should

¹⁷¹ United States' appellee's submission, para. 166 (referring to China's appellant's submission, para. 149).

¹⁷² United States' appellee's submission, para. 170 (referring to China's appellant's submission, para. 149; and United States Court of International Trade, *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274, slip op. 07–50 (CIT 29 March 2007) (Panel Exhibit USA-28), p. 1282).

¹⁷³ United States' appellee's submission, paras. 172 and 173 (referring to Memorandum dated 29 March 2007 from Shauna Lee-Alaia, et al., Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, "Countervailing Duty Investigation of Coated Free Sheet Paper from the Peoples' Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy" (Panel Exhibit USA-26)).

¹⁷⁴ United States' appellee's submission, para. 176 (referring to China's appellant's submission, paras. 152-162).

¹⁷⁵ United States' appellee's submission, para. 176.

¹⁷⁶ United States' appellee's submission, para. 177 (referring to United States Federal Rules of Appellate Procedure (1 December 2010), Rule 41(b) (Panel Exhibit USA-41)).

¹⁷⁷ United States' appellee's submission, paras. 178 (referring to Panel Report, para. 7.180) and 179.

¹⁷⁸ United States' appellee's submission, para. 180 (quoting China's appellant's submission, para. 109).

¹⁷⁹ United States' appellee's submission, para. 180.

¹⁸⁰ United States' appellee's submission, para. 185 (referring to China's appellant's submission, paras. 106 and 107).

¹⁸¹ United States' appellee's submission, para. 192.

¹⁸² United States' appellee's submission, para. 195 (referring to Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222).

¹⁸³ United States' appellee's submission, para. 195 (quoting Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222).

not consider it based on the limitation set out in Article 17.6 of DSU.¹⁸⁴ Moreover, the *Wireking* litigation itself is on-going, as the United States is currently considering whether to seek a petition for a rehearing by the panel in that opinion or *en banc*. According to the United States, the *Wireking* opinion cited by China as new evidence is not a final, binding US judicial decision, as the mandate has not yet been issued.¹⁸⁵

2.67. For the foregoing reasons, the United States requests the Appellate Body to dismiss China's appeal in all respects, as China has failed to demonstrate that the United States has acted inconsistently with Article X:2 of the GATT 1994.¹⁸⁶

2.3 Claims of error by the United States – Other appellant

2.3.1 Article 6.2 of the DSU

2.68. The United States appeals the Panel's finding in its Preliminary Ruling of 7 May 2013¹⁸⁷ that the claims listed in Part D of China's panel request were identified consistently with Article 6.2 of the DSU. First, the United States argues that the Panel's approach in examining Part D of the panel request "depart[ed] from the plain meaning of Article 6.2 and Appellate Body guidance".¹⁸⁸ The United States emphasizes that, "in reviewing a panel request against the requirements of Article 6.2, a panel should determine if the legal claim was presented 'plainly, manifestly, obviously' or 'without deduction'".¹⁸⁹ Instead of undertaking an analysis as to whether "the problem itself was presented clearly", the Panel determined that the "relevant standard" was to examine whether China's panel request permitted "sufficiently clear inferences as to the WTO obligations at issue in its Part D".¹⁹⁰

2.69. More specifically, the United States contends that "the Panel failed to evaluate whether China's general reference to Article 19 [of the SCM Agreement] in the context of its narrative was sufficient to present the problem clearly."¹⁹¹ The Panel examined each of the four paragraphs of Article 19 and determined that it was "clear" that the only "potentially relevant obligations" are the obligations set forth in Articles 19.3 and 19.4.¹⁹² The United States points out that these findings "directly contradicted" China's own statements as to the specific obligations at issue in the panel request.¹⁹³ The Panel further applied this "erroneous approach" to Article 32 of the SCM Agreement by concluding that Article 32.1 "'is relevant' to the issue of 'double counting' and 'it would be plausible' for China to claim a consequential breach of Article 32.1 following a finding under another provision".¹⁹⁴ The United States asserts that, by following this approach, the Panel went to the merits of the claim and made a "preliminary assessment" of whether these claims would be "plausible" or "potentially relevant".¹⁹⁵ Thus, the United States maintains that the Panel erred in its analysis of the consistency of the panel request with Article 6.2 of the DSU.¹⁹⁶

2.70. Second, the United States points out that, after inferring that the "relevant obligations at issue" are those set out in Articles 19.3 and 19.4 of the SCM Agreement, "the Panel made an additional inference to further narrow the scope of the claim to Article 19.3."¹⁹⁷ The Panel reached its conclusion by "relying heavily on the last two sentences of footnote 6 of China's panel request".¹⁹⁸ In concluding on the basis of footnote 6 that "it was 'possible to draw sufficiently clear

¹⁸⁴ United States' appellee's submission, para. 196.

¹⁸⁵ United States' appellee's submission, para. 199.

¹⁸⁶ United States' appellee's submission, para. 202.

¹⁸⁷ WT/DS449/4. The Preliminary Ruling forms an integral part of the Panel Report. (See Panel Report, paras. 6.6 (referring to Preliminary Ruling, para. 4.3) and 7.5)

¹⁸⁸ United States' other appellant's submission, para. 16.

¹⁸⁹ United States' other appellant's submission, para. 16.

¹⁹⁰ United States' other appellant's submission, para. 16 (quoting Preliminary Ruling, para. 3.2).

¹⁹¹ United States' other appellant's submission, para. 18.

¹⁹² United States' other appellant's submission, para. 19 (quoting Preliminary Ruling, para. 3.39).

¹⁹³ United States' other appellant's submission, para. 18.

¹⁹⁴ United States' other appellant's submission, para. 21.

¹⁹⁵ United States' other appellant's submission, paras. 20 and 21.

¹⁹⁶ United States' other appellant's submission, para. 21.

¹⁹⁷ United States' other appellant's submission, para. 22 (referring to Preliminary Ruling, paras. 3.43 and 3.45).

¹⁹⁸ United States' other appellant's submission, para. 22.

inferences' that China intended only to raise a substantive claim under Article 19.3", the United States asserts that "the Panel erred in looking to an external source to inform the legal basis in the panel request".¹⁹⁹ According to the United States, "the Panel found that the reference to [*US – Anti-Dumping and Countervailing Duties (China)* (DS379)] provided 'useful context'".²⁰⁰

2.71. The United States argues that, "rather than providing 'context' for the Panel's analysis, the particular findings of the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* became an integral part of China's panel request."²⁰¹ As a result of the Panel's approach, the United States posits that "it is not the panel request that sets out the legal basis sufficient to present the problem clearly; rather, through reference to some other document, it is the clarity of that other document that determines whether a particular provision will be included in the legal basis and the terms of reference of the dispute."²⁰² The United States adds that "the logic of the Panel's approach would not be limited to recommendations and rulings"²⁰³, but to "any extrinsic source"²⁰⁴, contrary to the text of Article 6.2 of the DSU and previous Appellate Body guidance that "a panel request should be examined on its face".²⁰⁵ In any event, the United States argues that footnote 6 of the panel request: (i) "makes no reference to any legal claims, much less a reference to Article 19.3"²⁰⁶; (ii) "refers to findings in the context of investigations while this dispute covers both investigations and reviews"²⁰⁷; and (iii) refers to "recommendations and rulings relat[ing] to claims that are within the terms of reference of the dispute".²⁰⁸

2.72. Third, the United States underscores that the Panel's finding that China's panel request was limited to Article 19.3 of the SCM Agreement contradicted China's own indication of its intent to bring claims under Article 19 as an "integrated whole".²⁰⁹ According to the United States, the Panel's conclusion was "over the express statement of China that ... Article 19 was one 'interlinked' obligation and that 'the *entirety* of Article 19 establishes a set of principles that Members are to apply concurrently when they come to the final task of determining the amount of the countervailing duty to impose."²¹⁰ The United States maintains that the Panel's dismissal of China's own explanation of its legal basis "underscores the error in using an analysis based on inferences".²¹¹ In the United States' view, the "problem" in the panel request cannot be considered as having been "presented with sufficient clarity" under Article 6.2 of the DSU "if the Panel has to draw inferences about the meaning of a panel request, particularly when the complaining party states that it never intended such a meaning".²¹² The United States adds that "the scope of the claim under [Part] D was not made clear, even to the complaining party, until the Panel issued its preliminary ruling in May 2013, almost six months after China had filed its panel request and just one month before the United States was required to provide the Panel with its first written submission."²¹³ Because China's panel request failed "to provide the legal basis of the complaint with sufficient clarity", the United States submits that the Appellate Body should reverse the Panel's finding under Article 6.2 of the DSU.²¹⁴

¹⁹⁹ United States' other appellant's submission, para. 22.

²⁰⁰ United States' other appellant's submission, para. 24 (quoting Preliminary Ruling, para. 3.42).

²⁰¹ United States' other appellant's submission, para. 25.

²⁰² United States' other appellant's submission, para. 25.

²⁰³ United States' other appellant's submission, para. 26.

²⁰⁴ United States' other appellant's submission, para. 26.

²⁰⁵ United States' other appellant's submission, para. 25 (referring to Appellate Body Report, *US – Carbon Steel*, para. 127).

²⁰⁶ United States' other appellant's submission, para. 28.

²⁰⁷ United States' other appellant's submission, para. 28.

²⁰⁸ United States' other appellant's submission, para. 30.

²⁰⁹ United States' other appellant's submission, para. 34.

²¹⁰ United States' other appellant's submission, para. 33 (quoting China's response to United States' preliminary ruling request, paras. 26 and 27). (emphasis added by the United States)

²¹¹ United States' other appellant's submission, para. 36.

²¹² United States' other appellant's submission, para. 36.

²¹³ United States' other appellant's submission, para. 37.

²¹⁴ United States' other appellant's submission, para. 38.

2.73. Finally, the United States maintains that a panel's terms of reference must be "objectively determined" on the basis of the panel request "*as it existed at the time of filing*".²¹⁵ As a result, subsequent submissions or statements cannot "cure a defect" in the panel request.²¹⁶ In this regard, the United States argues that the Panel failed to examine China's panel request on its face, and instead sought to "cure" the "vague and deficient" panel request by relying on China's subsequent statements that "entirely changed and reformed" the legal claims in Part D.²¹⁷ The United States points out that, as filed, Part D of China's panel request alleged that more than 60 anti-dumping and countervailing duty proceedings were inconsistent with the following general obligations: (i) Articles 10, 15, 19, 21, and 32 of the SCM Agreement; (ii) Article VI of the GATT 1994; and (iii) Articles 9 and 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).²¹⁸ However, the United States contends that Part D of China's panel request "had been cured to pertain to approximately half of the proceedings originally cited by China and only for [Articles 10, 19.3, and 32.1 of the SCM Agreement]".²¹⁹ The United States asserts that such conclusion "could not have resulted from a determination based on the face of the panel request at the time it was filed", but on the Panel's analysis of Article 19 and the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, as well as on China's subsequent statements as to its intention to abandon certain claims in its panel request.²²⁰

2.74. The United States refers to China's letter dated 25 March 2013 in response to the United States' request for the Panel to determine that Parts C and D of China's panel request did not meet the requirements of Article 6.2 of the DSU. In this letter, China stated that it would no longer pursue its claims under Part C, and would limit those under Part D to Articles 10, 19, and 32 of the SCM Agreement.²²¹ The United States contends that the Panel treated this statement as the "equivalent of a newly filed panel request", because the Panel conducted its Article 6.2 analysis "using the baseline established by China's letter".²²² In the United States' opinion, "the abandonment of claims in an attempt to cure a deficient panel request should not be relied upon by a panel when determining the sufficiency of a panel request on its face as it existed at the time of filing."²²³ The United States submits that China's approach undermines Article 6.2, "as responding parties would have no clarity as to the claims in a dispute until, at the earliest, the first substantive written submission".²²⁴

2.75. On the basis of the foregoing arguments, the United States requests the Appellate Body to reverse the Panel's finding of inconsistency with respect to Articles 10, 19.3, and 32.1 of the SCM Agreement reflected in paragraph 8.1.c of the Panel Report, as these claims are outside the Panel's terms of reference.²²⁵

2.4 Arguments of China – Appellee

2.4.1 Article 6.2 of the DSU

2.76. First, China argues that the United States mischaracterizes the Panel's analysis by suggesting that the Panel articulated a "new standard" for evaluating claims under Article 6.2 of the DSU by examining whether the panel request permits "sufficiently clear inferences" as to the WTO obligations at issue.²²⁶ China maintains that the Panel observed that, by citing Articles 10, 19,

²¹⁵ United States' other appellant's submission, para. 39 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642). (emphasis added by the United States)

²¹⁶ United States' other appellant's submission, para. 40 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642).

²¹⁷ United States' other appellant's submission, para. 41.

²¹⁸ United States' other appellant's submission, para. 42.

²¹⁹ United States' other appellant's submission, para. 43.

²²⁰ United States' other appellant's submission, para. 44.

²²¹ United States' other appellant's submission, para. 44 (referring to China's letter to the Panel dated 25 March 2012, pp. 1-2).

²²² United States' other appellant's submission, para. 45.

²²³ United States' other appellant's submission, para. 46.

²²⁴ United States' other appellant's submission, para. 48.

²²⁵ United States' other appellant's submission, para. 51.

²²⁶ China's appellee's submission, paras. 27 (quoting United States' other appellant's submission, para. 17) and 31.

and 32 of the SCM Agreement, Part D of the panel request "met the 'minimum prerequisite' of identifying the treaty provisions claimed to have been violated".²²⁷ According to China, the Panel then reviewed each of the referenced provisions of the SCM Agreement and turned to examine whether, "despite the lack of explicit identification of the relevant paragraph numbers, a careful reading of China's panel request permits sufficiently clear inferences as to which of the distinct obligations in Articles 19 and 32 form the legal basis of the complaint".²²⁸

2.77. China underscores that, in undertaking this examination, the Panel read the panel request "as a whole"²²⁹ and acknowledged that Article 6.2 requires the complaining party to "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".²³⁰ Thus, contrary to the United States' contention, the Panel did not "articulate[] a new standard"; rather, "the Panel repeatedly cited the relevant text of Article 6.2, and on each occasion (no fewer than seven) accurately and completely quoted the requirement at issue before it, namely that a panel request must provide 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly'".²³¹ In other words, in evaluating which of the obligations may be "potentially relevant", a panel does not "improperly 'engag[e] in a legal interpretation'".²³² Instead, a panel simply "explain[s] succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question", and "plainly connect[s] the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".²³³

2.78. In China's view, the United States' argumentation rests on the proposition that the requirement of Article 6.2 to provide a brief summary of the legal basis "sufficient to present the problem clearly" categorically precludes an "evaluation based on inferences" drawn from the "language used in the panel request, read as a whole, and in light of the specific obligations comprising the [relevant] treaty provisions".²³⁴ China contends that nothing in Article 6.2 "imposes any *a priori* limitation on the types of hermeneutic devices a responding member (or potential third party) might employ in seeking to discern whether the requisite 'brief summary' of the 'legal basis of the complaint' set forth in the panel request at issue is 'sufficient to present the problem clearly'".²³⁵ Article 6.2 does not bar the use of inferential reasoning. China adds that, "by its very nature", evaluating compliance with Article 6.2 "frequently involves drawing 'inferences'".²³⁶ Thus, China submits that, "where a panel request *does not* identify the specific obligation at issue, use of inferential reasoning is likely to be the only way in which a panel may determine whether the panel request sufficiently notifies 'the respondent and third parties of the nature of the complainant's case'".²³⁷

2.79. Second, China dismisses the United States' contention against the Panel's reliance on footnote 6 of the panel request and the relevant Appellate Body findings in *US – Anti-Dumping and Countervailing Duties (China)*. China recalls that footnote 6 "identified the specific measures to which the claims in Part D relate", and "omitt[ed] the four sets of parallel [anti-dumping and countervailing duty] investigations that were 'the subject of recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)* (DS379)'".²³⁸ The exclusion of these investigations was because the DSB had already ruled that "the United States acted inconsistently

²²⁷ China's appellee's submission, para. 28 (quoting Preliminary Ruling, para. 3.32).

²²⁸ China's appellee's submission, para. 31 (quoting Preliminary Ruling, para. 3.35).

²²⁹ China's appellee's submission, para. 31 (quoting Preliminary Ruling, para. 3.36).

²³⁰ China's appellee's submission, para. 32 (quoting Preliminary Ruling, para. 3.53).

²³¹ China's appellee's submission, para. 33 (referring to Preliminary Ruling, paras. 3.17, 3.18, 3.32, 3.33, 3.53, 3.60, and 4.1).

²³² China's appellee's submission, para. 45 (referring to United States' other appellant's submission, para. 20).

²³³ China's appellee's submission, para. 45 (quoting, respectively, Appellate Body Report, *EC – Selected Customs Matters*, para. 130; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

²³⁴ China's appellee's submission, para. 35.

²³⁵ China's appellee's submission, para. 36.

²³⁶ China's appellee's submission, para. 37.

²³⁷ China's appellee's submission, para. 43 (quoting Appellate Body Reports, *China – Raw Materials*, para. 219). (emphasis original)

²³⁸ China's appellee's submission, para. 48.

with its obligations under the covered agreements by failing to investigate and avoid double remedies in those investigations."²³⁹

2.80. According to China, "the Panel effectively narrowed the scope of claims that China could pursue under Part D of its panel request to Article 19.3 alone" when the Panel: (i) viewed footnote 6 as "strongly indicat[ing]" that China sought "to obtain findings of violation ... in respect of the identified measures[]" that parallel the findings that China had previously obtained from the DSB in DS379"; and (ii) recalled that "the finding of inconsistency under Article 19 in that case was limited to Article 19.3".²⁴⁰ China maintains that, having "expressly referenced the findings" in that dispute in its panel request, "it was not merely appropriate for the Panel to take them into account, it was *incumbent* upon the Panel to do so in light of the Appellate Body's often repeated admonition to 'consider[] the panel request as a whole, and in the light of attendant circumstances'".²⁴¹ Regarding the United States' second claim of error concerning the Panel's consideration of the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)*, China simply states that it is a "frivolous assertion" that warrants summary dismissal.²⁴²

2.81. Third, China understands the United States as saying that "a panel commits legal error under Article 6.2 whenever it fails to conform its own reading of a panel request to the reading advocated by the complaining party itself".²⁴³ China surmises that the United States is also, simultaneously or in the alternative, contending that, "where a panel disagrees with the complaining party's view regarding the scope of treaty obligations addressed by a panel request, the panel request necessarily fails to meet the requirement in Article 6.2 to 'provide a brief summary of the claim sufficient to present the problem clearly'".²⁴⁴ China rejects the first argument on the ground that it "improperly introduce[s] a complaining party's purported 'intent' into the Article 6.2 analysis, while simultaneously nullifying a [p]anel's obligation to undertake 'an objective assessment of the matter before it' under Article 11 of the DSU".²⁴⁵ China also dismisses the second proposition not only for improperly introducing intent, but also for "effectively preclud[ing] panels from issuing rulings under Article 6.2 that some of the claims set forth in a panel request, but not others, met the requirements of that provision".²⁴⁶

2.82. Lastly, China argues that the United States' assertion that the Panel treated China's letter dated 25 March 2013 "as the equivalent of a newly filed panel request" lacks any factual basis.²⁴⁷ China points out that the Panel recognized that China's abandonment of some of its claims "did not thereby modify the Panel's terms of reference", because China could not "unilaterally modify" it.²⁴⁸ Thus, the Panel did not treat China's abandonment of its claims as disposing, in and of itself, of the issue of whether Parts C and D of the panel request met the requirements of Article 6.2. Rather, the Panel declined to address these abandoned claims on the ground that the United States' Article 6.2 challenge "had been rendered moot with respect to [those] claims".²⁴⁹ In China's view, "whatever ruling the Panel might have made under Article 6.2 had it examined Part D in its entirety is of no relevance to the United States' appeal, since [the United States] is not appealing the Panel's decision not to address [its] Article 6.2 challenge with respect to the abandoned claims in Part D".²⁵⁰ China also reiterates that, contrary to the United States' "unfounded assertions", its actions were not designed to "cure a deficient panel request"²⁵¹, but "reflect[ed] litigation decisions

²³⁹ China's appellee's submission, para. 48 (quoting Request for the Establishment of a Panel by China, WT/DS449/2, fn. 6, at p. 4).

²⁴⁰ China's appellee's submission, para. 49 (quoting Preliminary Ruling, para. 3.43).

²⁴¹ China's appellee's submission, para. 53 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127). (emphasis original)

²⁴² China's appellee's submission, para. 54.

²⁴³ China's appellee's submission, para. 56.

²⁴⁴ China's appellee's submission, para. 56.

²⁴⁵ China's appellee's submission, para. 57.

²⁴⁶ China's appellee's submission, para. 57.

²⁴⁷ China's appellee's submission, para. 58 (quoting United States' other appellant's submission, para. 45).

²⁴⁸ China's appellee's submission, para. 59 (quoting Preliminary Ruling, para. 3.8).

²⁴⁹ China's appellee's submission, para. 59 (referring to Preliminary Ruling, paras. 3.8 and 3.15).

²⁵⁰ China's appellee's submission, para. 63.

²⁵¹ China's appellee's submission, para. 67 (quoting, respectively, United States' other appellant's submission, paras. 48 and 46).

that are routinely made in dispute settlement proceedings, in good faith, and fully in keeping with a Member's rights under the DSU".²⁵²

2.83. Based on these arguments, China maintains that the claims of error put forward by the United States with respect to Article 6.2 of the DSU do not have any legitimate basis.²⁵³ China submits that, "[f]rom the day it received the request for consultations in this dispute, the United States has been on notice that this dispute would entail, at a minimum, the application of the recommendations and rulings of the DSB in [*US – Anti-Dumping and Countervailing Duties (China)* (DS379)] to a group of parallel [anti-dumping and countervailing duty] investigations that came after those at issue in DS379."²⁵⁴

2.5 Arguments of the third participants

2.5.1 Australia

2.84. Australia views Article X:2 of the GATT 1994 as "protect[ing] commercial expectations in support of a transparent and commercially certain system of trade".²⁵⁵ Australia submits that the central question in this dispute in relation to the interpretation of Article X:2 is the determination of the "baseline ... for comparing whether there has been an advance in a rate of duty".²⁵⁶ In this regard, Australia notes China's position that "using the practice of the [USDOC] in imposing countervailing measures on [NMEs] as the relevant benchmark renders Article X:2 inutile."²⁵⁷ In particular, Australia recalls China's argument that, "if the practice of the customs authority in collecting ... increased duties can be used to establish a 'uniform and established practice' prior to enforcement, it will be impossible to breach Article X:2."²⁵⁸ Australia points out, however, that the current dispute concerns "the imposition of countervailing measures", while the countervailing duties in China's example "are imposed after a competent authority carries out an investigation involving consultation with exporters".²⁵⁹ In Australia's opinion, these measures can be distinguished from the types of duties envisaged in China's hypothetical situation. Moreover, Australia agrees with the Panel that "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."²⁶⁰ What is open for the Appellate Body to consider, in Australia's view, is whether Chinese exporters had "authentic information" that could form the basis for a legitimate expectation that the countervailing measures would be removed.²⁶¹ In the light of such expectation, Australia submits that the Appellate Body may determine "whether ... the continuation of measures following the enactment of Section 1 of Public Law 112-99 amounted to an advance of duty or a new or more burdensome requirement".²⁶²

2.5.2 European Union

2.85. The European Union understands, following the reasoning of the Appellate Body report in *US – Underwear*, that Article X:2 of the GATT 1994 "enshrines the relevant policy principle of transparency and has obviously due process dimensions".²⁶³ While the European Union views the principle of due process as relating to and grounding a presumption against retroactivity, Article X:2 does not contain a "general and absolute rule" against it.²⁶⁴ The European Union

²⁵² China's appellee's submission, para. 67.

²⁵³ China's appellee's submission, para. 68.

²⁵⁴ China's appellee's submission, para. 71.

²⁵⁵ Australia's third participant's submission, para. 3.

²⁵⁶ Australia's third participant's submission, para. 4.

²⁵⁷ Australia's third participant's submission, para. 6 (referring to China's appellant's submission, para. 55).

²⁵⁸ Australia's third participant's submission, para. 7 (referring to China's appellant's submission, para. 54).

²⁵⁹ Australia's third participant's submission, para. 7.

²⁶⁰ Australia's third participant's submission, para. 8 (referring to Panel Report, para. 7.164).

²⁶¹ Australia's third participant's submission, para. 9 (quoting Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, p. 29).

²⁶² Australia's third participant's submission, para. 9.

²⁶³ European Union's third participant's submission, para. 13 (referring to Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, p. 29). (emphasis omitted)

²⁶⁴ European Union's third participant's submission, para. 17.

contends that, "if vested rights and legitimate expectations are respected, then a retroactive measure can comply with the transparency and publication rule in Article X:2".²⁶⁵ In the present dispute, the European Union agrees with the Panel that "effecting an advance" refers to an "increase" in the rate of duties or other charges on imports.²⁶⁶ Further, in making a comparison between "the rate of duties or other import charges that were in place by virtue of an established and uniform practice and the new rate of duties or other import charges that were introduced as a consequence of the new measure of general application", the European Union maintains that "the lawfulness or unlawfulness of the established and uniform practice under the municipal law of the Member in question is not dispositive".²⁶⁷ Rather, what is relevant is to determine whether "the rate of duties have increased as a consequence of the application of the new measure of general application deviating from the established and uniform practice, and whether this new measure of general application applied to completed facts, events or situations thereby affecting vested rights and legitimate expectations of interested parties."²⁶⁸

2.86. Applying this interpretation to the current dispute, the European Union posits that "the rates of countervailing duties at hand did not increase as a consequence of the application of the measure at issue to facts, events or situations as of November 2006."²⁶⁹ The European Union observes that "there was an established and uniform practice by the USDOC to apply the relevant countervailing provisions of the Tariff Act of 1930" to imports from NME countries.²⁷⁰ Moreover, the European Union points out that "there were no acquired rights or legitimate expectations that were affected", because the countervailing duties applied under the old and new regimes are the same and an incomplete judicial process does not create a legitimate expectation.²⁷¹ As to the remaining question of "whether or not it makes any difference that the legislator intervened when adopting a measure of general application that applies to past events and situations", the European Union explains that this will depend on whether the final collection of duties as of 13 March 2012 (the date of the enactment of PL 112-99) was still suspended or already definitive and final.²⁷² On the one hand, if the collection of duties was suspended on 13 March 2012, it could be argued that, on that date, "private entities had not yet acquired rights and did not yet have legitimate expectations that the final collection of duties was definitive and final."²⁷³ On the other hand, if countervailing duties were imposed and finally collected, and all judicial proceedings had been completed indicating the "illegality of the USDOC practice", then the European Union submits that "those entities would have acquired a legitimate right and the legitimate expectation to have their duties revoked."²⁷⁴

2.87. With respect to the issue of whether China's panel request conforms to the requirements of Article 6.2 of the DSU, the European Union agrees with the Panel that footnote 6 of the panel request and its reference to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* are relevant to the analysis. In the European Union's view, "the manner in which the reference was made, and the purpose for which it was stated to be made" cannot be "*per se* irrelevant and excluded from the assessment".²⁷⁵ The European Union does not consider that a panel request cannot refer to a prior Appellate Body report that clarifies the relevant provisions of WTO law, in this case, the report issued in DS379. Rather, "[i]f a Panel Request can refer to a provision, it can also refer to a report clarifying that provision: they are both part of the WTO *acquis*."²⁷⁶ Thus, the European Union states that the Panel was correct in taking into account the reference to DS379, "specifically the part that relates to 'double remedies'".²⁷⁷ According to the European Union, "various references in China's Panel Request to 'double remedies' could reasonably be understood in the context of the relevant section of the Appellate Body Report in

²⁶⁵ European Union's third participant's submission, para. 17.

²⁶⁶ European Union's third participant's submission, para. 24 (referring to Panel Report, para. 7.154).

²⁶⁷ European Union's third participant's submission, para. 25. (fns omitted)

²⁶⁸ European Union's third participant's submission, para. 26. (fn omitted)

²⁶⁹ European Union's third participant's submission, para. 31.

²⁷⁰ European Union's third participant's submission, para. 31.

²⁷¹ European Union's third participant's submission, para. 32.

²⁷² European Union's third participant's submission, para. 33.

²⁷³ European Union's third participant's submission, para. 33.

²⁷⁴ European Union's third participant's submission, para. 33.

²⁷⁵ European Union's third participant's submission, para. 57 (referring to Appellate Body Report, *US – Carbon Steel*, para. 127).

²⁷⁶ European Union's third participant's submission, para. 58.

²⁷⁷ European Union's third participant's submission, para. 59 (referring to Request for the Establishment of a Panel by China, WT/DS449/2, Part D).

US – Anti-Dumping and Countervailing Duties (China)", and these are relevant to determining whether China provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.²⁷⁸

2.5.3 Japan

2.88. Japan agrees with the Panel majority that Article X:2 of the GATT 1994 "embodies the principle of transparency and predictability in international trade under [the] GATT by requiring importing Members to publish new or additional measures of general application prior to their enforcement".²⁷⁹ Japan also concurs with the Panel majority that Section 1 of PL 112-99 "did not fall in the realm of measures under Article X:2" if the applicability of Section 1 is examined in the light of the principle of transparency and predictability embedded in Article X:2.²⁸⁰ Japan points out that, in this dispute, traders had been given the information that countervailing duties may be imposed on imports from China since April 2007. In Japan's view, PL 112-99 did not inform traders that the USDOC would impose any new or additional duties, charges, requirements, or restrictions on imports from China. Rather, Section 1 only provided the information to traders that "it eliminated the possibility of revocation of the measure already imposed by an administrative body."²⁸¹

2.89. Japan further states that "the legality of a measure under the domestic law of a Member would not be necessarily relevant in reviewing the consistency of the Member's action with Article X:2."²⁸² In Japan's opinion, the circumstances in the present dispute suggest that, by promulgating Section 1, "the United States tried to provide remedies to actions of the USDOC which might not be lawful under United States law for the purpose of securing public interest".²⁸³ In this regard, Japan recognizes that certain "remedial mechanisms" are "necessary to avoid terminating actions of an administrative body which are unlawful under domestic law, when their termination is harmful to the public interest". Thus, Japan argues that "[t]hese remedial mechanisms should not be viewed as prejudicial to the legitimate expectation of traders."²⁸⁴ Japan submits that, if Section 1 of PL 112-99 falls within the category of such remedial measures, then it should not be held to be inconsistent with Article X:2 of the GATT 1994 "only because the United States enforced that measure retroactively with respect to actions prior to its enactment."²⁸⁵

3 ISSUES RAISED IN THIS APPEAL

3.1. The following issues are raised in this appeal:

- a. whether the Panel erred in finding that claims under Articles 10, 19.3, and 32.1 of the SCM Agreement were identified in Part D of China's panel request consistently with the requirements of Article 6.2 of the DSU and were thus within the Panel's terms of reference;
- b. whether the Panel erred in finding that the United States has not acted inconsistently with Article X:2 of the GATT 1994, and in particular:
 - i. whether the Panel erred in the interpretation of Article X:2 of the GATT 1994 in respect of the baseline of comparison for 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"; and

²⁷⁸ European Union's third participant's submission, para. 59.

²⁷⁹ Japan's third participant's submission, para. 4.

²⁸⁰ Japan's third participant's submission, para. 8.

²⁸¹ Japan's third participant's submission, para. 8.

²⁸² Japan's third participant's submission, para. 10.

²⁸³ Japan's third participant's submission, para. 11.

²⁸⁴ Japan's third participant's submission, para. 11.

²⁸⁵ Japan's third participant's submission, para. 11. (fn omitted)

- ii. whether the Panel erred in the application of its interpretation of Article X:2 of the GATT 1994 to the measure at issue and, in particular, whether the Panel erred in finding that "China has not established that Section 1 [of PL 112-99] is a provision 'effecting an advance in a rate of duty or other charge on imports under an established and uniform practice'" and that "China has not established that Section 1 [of PL 112-99] is a provision 'imposing a new or more burdensome requirement, restriction or prohibition on imports'";
- c. whether the Panel acted inconsistently with its obligation under Article 11 of the DSU:
 - i. in failing to apply the standard set out by the Appellate Body for determining the meaning of municipal law;
 - ii. in concluding that an agency's "practice or interpretation" is "presumptively lawful" unless and until a domestic court issues a final, non-appealable order directing the agency to cease that "practice or interpretation"; or
 - iii. in reversing the burden of proof under Article X:2 of the GATT 1994 and absolving the United States of its obligation to rebut the *prima facie* case that China had established; and
- d. in the event that the Appellate Body reverses the Panel's finding that the United States has not acted inconsistently with Article X:2 of the GATT 1994, whether the Appellate Body should complete the analysis and find that Section 1 of PL 112-99 effected an "advance in a rate of duty or other charge on imports under an established and uniform practice" or imposed "a new or more burdensome requirement, restriction or prohibition on imports" and, as a consequence, find that the United States acted inconsistently with Article X:2 of the GATT 1994 in enforcing Section 1 of PL 112-99 prior to its official publication.

4 ANALYSIS OF THE APPELLATE BODY

4.1 Article 6.2 of the DSU

4.1. Before addressing the issue raised under Article 6.2 of the DSU, we consider it useful to recount the background for the other appeal of the United States. Before the Panel, the United States requested a preliminary ruling on the consistency of China's request for the establishment of a panel²⁸⁶ with Article 6.2 of the DSU. According to the United States, Parts C and D of China's panel request failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as it "merely lists articles of the [SCM Agreement], the [Anti-Dumping Agreement] and the [GATT 1994] in relation to over 60 US countervailing and anti-dumping proceedings."²⁸⁷

4.2. In its Preliminary Ruling, the Panel noted that, while Article 10 of the SCM Agreement consists of a single paragraph invoked to raise a "consequential claim"²⁸⁸, Articles 19 and 32 contain several paragraphs that have "multiple distinct obligations" and "address distinct issues".²⁸⁹ In ascertaining whether "China's panel request permit[ted] sufficiently clear inferences as to which of the distinct obligations in Articles 19 and 32 form the legal basis of the complaint"²⁹⁰, the Panel considered the "narrative description of the problem"²⁹¹ and the reference to the dispute in *US – Anti-Dumping and Countervailing Duties (China)* (DS379) in the panel request.²⁹² According to the Panel, the narrative pertained to "a very specific issue" – i.e. the United States' alleged failure to investigate and avoid double remedies in certain investigations

²⁸⁶ WT/DS449/2.

²⁸⁷ Preliminary Ruling by the Panel of 7 May 2013, contained in document WT/DS449/4 (Preliminary Ruling), paras. 2.2 and 2.3.

²⁸⁸ Preliminary Ruling, para. 3.35. (fn omitted)

²⁸⁹ Preliminary Ruling, para. 3.34. (fns omitted)

²⁹⁰ Preliminary Ruling, para. 3.35.

²⁹¹ Preliminary Ruling, para. 3.38.

²⁹² Preliminary Ruling, para. 3.41.

and reviews – and defined "double remedies" as those "that are likely to result when the [US Department of Commerce (USDOC)] applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the US non-market economy [(NME)] methodology".²⁹³ In this regard, the Panel took the view that, with respect to Article 19 of the SCM Agreement, "Articles 19.3 and 19.4 are 'the potentially relevant obligations'"²⁹⁴, considering that Article 19.1 "focuses on the issue of whether an importing Member may impose a countervailing duty at all"²⁹⁵, and Article 19.2 "does not appear to contain any legal obligation".²⁹⁶

4.3. The Panel then took footnote 6 of the panel request as "useful context"²⁹⁷, particularly the statement therein that in DS379 the DSB had "already found that the United States acted inconsistently with its obligations ... in those investigations".²⁹⁸ In the Panel's view, this statement indicated that China sought to obtain in the present dispute findings of violation that "parallel[ed] the findings that China had previously obtained" in DS379²⁹⁹, where the Appellate Body made no finding with respect to Article 19.4. According to the Panel, "while the narrative reference to 'double remedies' in Part D suggests that both Articles 19.3 and 19.4 are potentially relevant WTO obligations at issue, consideration of the last sentence in footnote 6 indicates that Article 19.3 is an obligation at issue, while Article 19.4 is not."³⁰⁰ The Panel understood China's statement that "it is obvious on the face of the panel request that China's claims in Part D included the same claims on which it prevailed in DS379" to mean Article 19.3, to the exclusion of Article 19.4.³⁰¹

4.4. With respect to Article 32, the Panel viewed it "plausible" for China to claim that the measure(s), if inconsistent with Article 19, would also be inconsistent with Article 32.1, given that claims under Article 32.1, like claims under Article 10, are "consequential" claims.³⁰² Thus, on the basis of the general reference to Articles 10, 19, and 32 of the SCM Agreement, the narrative, and footnote 6, the Panel found that Part D of China's panel request permitted "sufficiently clear inferences" as to the WTO obligations at issue, namely, Articles 10, 19.3, and 32.1 of the SCM Agreement.³⁰³

4.1.1 Function of Article 6.2 of the DSU

4.5. Before addressing the appeal by the United States that the Panel erred in concluding that China's panel request was not inconsistent with Article 6.2 of the DSU, we briefly consider the function of this provision. Article 6.2 of DSU provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4.6. The requirements under Article 6.2 to identify the specific measure(s) at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of the panel. Both elements constitute the "matter referred to the DSB", which forms the basis of the panel's terms of reference under Article 7.1 of

²⁹³ Preliminary Ruling, para. 3.38. (fn omitted)

²⁹⁴ Preliminary Ruling, para. 3.39. (fn omitted)

²⁹⁵ Preliminary Ruling, para. 3.39.

²⁹⁶ Preliminary Ruling, para. 3.39. (fn omitted)

²⁹⁷ Preliminary Ruling, para. 3.42.

²⁹⁸ Preliminary Ruling, para. 3.43 (quoting China's panel request, fn 6, at p. 4). (emphasis omitted)

²⁹⁹ Preliminary Ruling, para. 3.43.

³⁰⁰ Preliminary Ruling, para. 3.43. The last two sentences of footnote 6 of China's panel request read: China has also excluded the four sets of parallel AD/CVD investigations that were the subject of the recommendations and rulings of the DSB in *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* (DS379). The DSB has already found that the United States acted inconsistently with its obligations under the covered agreement by failing to investigate and avoid double remedies in those investigations.

³⁰¹ Preliminary Ruling, para. 3.45 (quoting China's response to United States' preliminary ruling request, para. 34).

³⁰² Preliminary Ruling, para. 3.40. (fn omitted)

³⁰³ Preliminary Ruling, para. 3.47.

the DSU.³⁰⁴ Thus, in defining the scope of the dispute, Article 6.2 serves the function of establishing and delimiting the panel's jurisdiction.³⁰⁵

4.7. By establishing and defining the jurisdiction of the panel, the panel request also fulfils a due process objective. Due process in the context of Article 6.2 consists in providing the respondent and third parties notice regarding the nature of the complainant's case³⁰⁶ to enable them to respond accordingly.³⁰⁷ However, a determination of whether due process has been respected does not necessitate a separate examination of whether the parties suffered prejudice, considering that "[t]his due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction."³⁰⁸

4.8. In order to respect "both the letter and the spirit of Article 6.2 of the DSU"³⁰⁹, particularly the fulfilment of its functions to establish the panel's jurisdiction and observe due process, a panel must determine whether a panel request is sufficiently clear on the basis of an objective examination of the request as a whole³¹⁰, as it existed at the time of filing³¹¹, and on the basis of the language used therein.³¹² As a minimum requirement, the panel request must list the article(s) of the covered agreement(s) claimed to have been violated.³¹³ There may be situations, however, where such listing may not be "sufficient to present the problem clearly", as in instances where the articles contain multiple and/or distinct obligations.³¹⁴ Moreover, in order to "present the problem clearly", a panel request must "plainly connect" the challenged measure(s) with the provision(s) claimed to have been infringed such that a respondent can "know what case it has to answer, and ... begin preparing its defence".³¹⁵

4.9. In addition, a panel must determine compliance with Article 6.2 "'on the face' of the panel request"³¹⁶ as it existed at the time of filing. Thus, parties' submissions and statements during the panel proceedings cannot "cure" any defects in the panel request.³¹⁷ Nevertheless, these subsequent submissions and statements may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.³¹⁸ In any event, the determination of the conformity with Article 6.2 should be done on a case-by-case basis, considering the particular context in which the measures exist and operate.³¹⁹ This determination must be done on an

³⁰⁴ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416).

³⁰⁵ Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Continued Zeroing*, para. 161; *EC and certain member States – Large Civil Aircraft*, para. 640.

³⁰⁶ Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Carbon Steel*, para. 126; *EC and certain member States – Large Civil Aircraft*, para. 640.

³⁰⁷ Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161. See also Appellate Body Report, *Thailand – H-Beams*, para. 88.

³⁰⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.

³⁰⁹ Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *EC – Bananas III*, para. 142).

³¹⁰ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

³¹¹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

³¹² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

³¹³ Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130.

³¹⁴ Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598).

³¹⁵ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).

³¹⁶ Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

³¹⁷ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 787 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; and *US – Carbon Steel*, para. 127).

³¹⁸ See e.g. Appellate Body Report, *US – Carbon Steel*, para. 127.

³¹⁹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

objective basis, such that any circumstances taken into account may not contemplate those that are relevant only to a party to the panel proceedings.³²⁰

4.1.2 The measure(s) at issue as identified in the panel request

4.10. The identification of the specific measure(s) at issue and the provision of a brief summary of the legal basis of the complaint are two separate requirements that a panel request must fulfil under Article 6.2 of the DSU.³²¹ While the identification of the measure(s) was not challenged in the present dispute, we find it useful to clarify the measure(s) at issue identified in Part D of China's panel request.

4.11. In its Preliminary Ruling, the Panel considered, for an analysis of the legal basis of the complaint, the countervailing duty (CVD) investigations and reviews identified in the panel request as the measures at issue in this dispute.³²² In some parts of its Report, the Panel also referred to these investigations and reviews initiated between 20 November 2006 and 13 March 2012 as the measures at issue.³²³ However, in other portions of its Report, the Panel described the "USDOC's 'failure to investigate and avoid double remedies'" in these investigations and reviews as the measure at issue.³²⁴ More significantly, the Panel's findings under the SCM Agreement concern "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"³²⁵, and not the individual investigations and reviews *per se*.

4.12. Measures and claims are two distinct elements that should not be confused.³²⁶ Article 6.2 of the DSU "sets out separate requirements that must each be satisfied in a panel request in order for a matter to form part of a panel's terms of reference".³²⁷ The "specific measure" identified in a panel request is the "object of the challenge", or, more precisely, "the measure that is alleged to be causing the violation of an obligation contained in a covered agreement".³²⁸ The "legal basis" of the complaint or the "claim", in contrast, is the "specific provision of the covered agreement that contains the obligation alleged to be violated".³²⁹

4.13. China's panel request identifies the "measures at issue" to include "any and all determinations or actions" by the US authorities relating to the "imposition or collection of countervailing duties" on imports into the United States from China in connection with countervailing duty investigations or reviews initiated between 20 November 2006 and 13 March 2012.³³⁰ The "measures at issue" also comprise "the anti-dumping measures listed in Appendix B [of the 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".³³¹ Lastly, the "measures at issue" include "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

³²⁰ See e.g. *Thailand – H-Beams*, where the Appellate Body held that there is no assumed "continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO". As a result, neither can it be assumed that "the range of issues" raised in the investigation will be the same as the claims brought before the WTO. The Appellate Body added that, "although the defending party will be aware of the issues raised in an underlying investigation, other parties may not." (Appellate Body Report, *Thailand – H-Beams*, para. 94)

³²¹ See Appellate Body Report, *Australia – Apples*, para. 421.

³²² Preliminary Ruling, paras. 3.39-3.42 and 3.58.

³²³ Panel Report, paras. 7.13-7.15 and 7.353.

³²⁴ Panel Report, paras. 7.300, 7.359-7.360, and 7.363-7.364.

³²⁵ Panel Report, para. 8.1.c.

³²⁶ Appellate Body Report, *Australia – Apples*, para. 417 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 132).

³²⁷ Appellate Body Report, *Australia – Apples*, para. 421.

³²⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

³²⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

³³⁰ China's panel request, pp. 1-2. (fn omitted)

³³¹ China's panel request, p. 2.

conjunction with anti-dumping duties determined in accordance with the US [NME] methodology" in the investigations and reviews initiated between 20 November 2006 and 13 March 2012.³³²

4.14. As we have pointed out, the Panel referred in several ways to the measure(s) challenged in China's panel request. In its Preliminary Ruling³³³, and in some sections of its Report³³⁴, the Panel considered the identified investigations and reviews as the *measures* at issue. Certain other parts of the Panel Report, particularly the section examining China's claims under the SCM Agreement, describe the USDOC's failure to investigate and avoid double remedies in these investigations and reviews as the *measure* at issue in this dispute.³³⁵ While the identification of the measure(s) at issue is not appealed, we consider it useful to clarify the measure(s) at issue in Part D of China's panel request to assess whether it identifies China's claims in compliance with Article 6.2 of the DSU. In this regard, we agree with the Panel to the extent it considered that China identified "the USDOC's failure to investigate and avoid double remedies" as the measure at issue in Part D of its panel request. Although the identified investigations and reviews initiated between 20 November 2006 and 13 March 2012 are measures taken by the United States, an examination of the panel request as a whole reveals that what China alleged to have violated the obligations contained in Articles 10, 19, and 32 of the SCM Agreement are not these individual investigations and reviews *per se*, but rather the supposed failure of the US authorities to investigate and avoid double remedies. Otherwise put, China is ultimately challenging a specific conduct and omission of the United States in these investigations and reviews, that is, the failure of its authorities to investigate and avoid double remedies, rather than the investigations and reviews themselves. This failure of the USDOC to investigate and avoid double remedies, and the claims of inconsistency with Articles 10, 19, and 32 of the SCM Agreement, taken together, constitute the "matter referred to the DSB". Hence, we proceed below on the basis that it is this failure to investigate and avoid double remedies that must be considered as the measure at issue identified in the panel request.

4.1.3 The United States' claim that China's panel request is inconsistent with Article 6.2 of the DSU

4.15. Having identified the measure at issue as the USDOC's failure to investigate and avoid double remedies in the identified countervailing duty investigations and reviews initiated from 20 November 2006 to 13 March 2012, we now turn to consider whether China's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4.1.3.1 The text and narrative of the panel request

4.16. The United States argues that the Panel employed a new and incorrect legal standard when it assessed whether China's panel request permitted "sufficiently clear inferences"³³⁶, as the Panel engaged in a "legal interpretation" of Articles 19 and 32 of the SCM Agreement in ascertaining the "potentially relevant" claims.³³⁷ China maintains that the Panel's use of the term "sufficiently clear inferences" is not an articulation of a "new standard", as asserted by the United States, considering that "the Panel repeatedly cited the relevant text of Article 6.2, and on each occasion ... accurately and completely quoted the requirement at issue before it."³³⁸ China contends that Article 6.2 does "not bar[]", and in fact "frequently involves", the use of inferential reasoning.³³⁹

4.17. The Appellate Body has repeatedly held that, in order for a panel request to comply with the requirement under Article 6.2 of the DSU to provide a summary of the legal basis of the complaint, the panel request must, at a minimum, list the articles of the covered agreements claimed to have

³³² China's panel request, p. 2. We note that the identified measure relates to China's claims under Part C of its panel request, which China abandoned with its letter of 25 March 2013. (See *infra*, para. 4.47)

³³³ Preliminary Ruling, paras. 3.39-3.42 and 3.58.

³³⁴ Panel Report, paras. 7.13-7.15 and 7.353.

³³⁵ Panel Report, paras. 7.300, 7.359-7.360, and 7.363-7.364.

³³⁶ United States' other appellant's submission, para. 17.

³³⁷ United States' other appellant's submission, paras. 20 and 21.

³³⁸ China's appellee's submission, para. 33 (referring to Preliminary Ruling, paras. 3.17, 3.18, 3.32, 3.33, 3.53, 3.60, and 4.1).

³³⁹ China's appellee's submission, paras. 36 and 37. (fn omitted)

been violated.³⁴⁰ While the listing of treaty provisions is a necessary minimum prerequisite, there may be situations where this may not be sufficient to present the problem clearly, as in instances where the articles contain multiple and/or distinct obligations.³⁴¹ Also, in cases where the panel request challenges a number of measures on the basis of multiple WTO provisions, providing "a brief summary of the legal basis of the complaint sufficient to present the problem clearly may depend on whether it is sufficiently clear which 'problem' is caused by which measure or group of measures".³⁴² Additionally, the panel request must also "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".³⁴³ Whether or not a general reference to a treaty provision will be adequate to meet the requirement of sufficiency under Article 6.2 is to be examined on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue.³⁴⁴ Thus, we reiterate that the determination of whether a panel request is "sufficiently precise" requires the scrutiny of the panel request "as a whole, and on the basis of the language used".³⁴⁵

4.18. Part D and footnote 6 of China's panel request are most relevant for this appeal. They read:

D. Failure to Investigate and Avoid Double Remedies in Certain Investigations and Reviews Initiated Between 20 November 2006 and 13 March 2012

Between 20 November 2006 and 13 March 2012, the US authorities initiated a series of anti-dumping and countervailing duty investigations and reviews that resulted in the imposition of anti-dumping and countervailing duties in respect of the same imported products from China, either on a preliminary or final basis. In none of these investigations and reviews did the US authorities take steps to investigate and avoid double remedies.⁶

In light of the failure of the US authorities to investigate and avoid double remedies in the identified investigations and reviews, China considers 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. China further considers 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.

⁶ Appendix A lists all countervailing duty investigations and reviews initiated between 20 November 2006 and 13 March 2012 that included a parallel anti-dumping investigation. The parallel anti-dumping duty investigations are listed in Appendix B. The investigations and reviews that are the subject of the claims set forth in this subpart D are marked with an asterisk (*). China has excluded those investigations that resulted in a negative injury determination by the US International Trade Commission (indicated in a table), as those investigations did not result in the imposition of anti-dumping and countervailing duties. China has also excluded the four sets of parallel AD/CVD investigations that were the subject of the recommendations and rulings of the DSB in *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* (DS379). The DSB has already found that the United States acted inconsistently with its obligations under the covered agreements by failing to investigate and avoid double remedies in those investigations.

³⁴⁰ Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130.

³⁴¹ Appellate Body Report, *Korea – Dairy*, para. 124.

³⁴² Appellate Body Reports, *China – Raw Materials*, para. 220.

³⁴³ Appellate Body Reports, *China – Raw Materials*, para. 220 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

³⁴⁴ Appellate Body Report, *US – Carbon Steel*, para. 130 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

³⁴⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

4.19. Part D of China's panel request identifies legal claims under Articles 10, 19, and 32 of the SCM Agreement.³⁴⁶ Article 10 mandates Members to "take all necessary steps to ensure that the imposition of a countervailing duty" is in accordance with Article VI of the GATT 1994 and the SCM Agreement.³⁴⁷ We agree with the Panel that "Article 10 is invoked to raise a consequential claim", that is, if the measure at issue is found inconsistent with Article 19, then it would also be inconsistent with Article 10.³⁴⁸ Further, we also agree that no additional detail is required in respect of Article 10, considering that the provision consists of only one paragraph.³⁴⁹

4.20. Turning to Article 32 of the SCM Agreement, another consequential claim³⁵⁰, we note that only Articles 32.1, 32.2, 32.5, and 32.6 impose obligations on Members. Article 32.1 mandates that actions against a subsidy of another Member may be taken only if it is "in accordance with the provisions of GATT 1994".³⁵¹ Article 32.2 provides that reservations in respect of any of the provisions of the SCM Agreement may not be entered "without the consent of the other Members". Article 32.5 obligates Members to "take all necessary steps" to ensure the conformity of its laws, regulations, and administrative procedures with the provisions of the SCM Agreement. Article 32.6 directs Members to inform the SCM Committee of "any changes in its laws and regulations", as well as in the administration thereof, that are relevant to the SCM Agreement.

4.21. We observe that Article 32.1 is the only paragraph that provides an obligation with respect to the imposition of countervailing duties. Articles 32.2, 32.5, and 32.6 are not relevant in this dispute, as the obligations they impose concern reservations with, and the general implementation of, the SCM Agreement. Specifically, Article 32.2 is not pertinent, since the present dispute does not involve any reservations with respect to any of the provisions of the SCM Agreement. As regards Article 32.5, China does not allege that the United States failed to make its laws, regulations, and administrative procedures conform to the SCM Agreement.³⁵² With respect to Article 32.6, China does not contend that the United States failed to inform the SCM Committee of any changes in its laws and regulations. On the basis of these considerations, we agree with the Panel that only Article 32.1 appears to be relevant in this dispute and, like Article 10, its alleged violation is merely consequential to the alleged violation of Article 19.³⁵³

4.22. We now turn to China's claim under Article 19 of the SCM Agreement, which is listed in the panel request without identification of a paragraph of that Article. We note that the Appellate Body has previously described Article 19.1 as a provision that "allows for the imposition of countervailing duties when subsidized imports 'are causing injury'".³⁵⁴ Article 19.2 gives Members the discretion to determine whether or not a countervailing duty is to be imposed and, if so, whether it can be an amount less than the total amount of the subsidy. Further, this provision encourages Members' investigating authorities "to link the actual amount of the countervailing duty to the injury to be removed".³⁵⁵ Thus, Article 19.1 establishes when a countervailing duty

³⁴⁶ In a letter dated 25 March 2013, China dropped its claims under Articles 15 and 21 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the Anti-Dumping Agreement in Part D of its panel request, as well as all of the claims in Part C. (See Preliminary Ruling, para. 3.2) The issue of these claims abandoned by China is addressed further below.

³⁴⁷ Article 10 of the SCM Agreement reads:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

(fn omitted)

³⁴⁸ Preliminary Ruling, para. 3.35 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 143).

³⁴⁹ Preliminary Ruling, para. 3.34.

³⁵⁰ Preliminary Ruling, para. 3.40 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 143).

³⁵¹ Article 32.1 provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

³⁵² Preliminary Ruling, para. 3.40.

³⁵³ Preliminary Ruling, para. 3.40 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 143).

³⁵⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 558.

(fn omitted)

³⁵⁵ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 557.

may be imposed, while Article 19.2 grants Members the discretion for such imposition. Taking into account that the measure at issue in this dispute concerns the failure of the US authorities to investigate and avoid double remedies in investigations and reviews already initiated, as well as the resulting countervailing duties already imposed, we therefore consider that neither Article 19.1 nor Article 19.2 is relevant to China's complaint.

4.23. We now examine the remaining two paragraphs of Article 19 of the SCM Agreement, paragraphs 3 and 4. Article 19.3 states that countervailing duties shall be levied in the "appropriate amounts in each case" and "on a non-discriminatory basis".³⁵⁶ Article 19.4 mandates that the imposition of countervailing duties must not be "in excess of the amount of the subsidy found to exist".³⁵⁷ Based on the language of Articles 19.3 and 19.4, we agree with the Panel that these two provisions are "the potentially relevant obligations"³⁵⁸ to the extent that these are the only paragraphs of Article 19 that impose substantive obligations on the permissible amounts of countervailing duties. Since both paragraphs specifically address the quantitative limits on the imposition of countervailing duties, Articles 19.3 and 19.4 are "closely related" provisions. The obligations contained in Articles 19.3 and 19.4 share an "interlinked nature", as both provisions pertain to the final stage of countervailing duty proceedings, mandating the levy of countervailing duties "in the appropriate amounts", "on a non-discriminatory basis", and not "in excess of the amount of the subsidy".³⁵⁹ We note, however, that the Panel excluded Article 19.4 as a legal basis of China's complaint on account of the meaning the Panel ascribed to footnote 6 of the panel request, as is explained further below. While the United States appeals the Panel's finding that the panel request sufficiently identified China's claim under Article 19.3 of the SCM Agreement as being inconsistent with Article 6.2, the Panel's finding excluding Article 19.4 from its terms of reference³⁶⁰ has not been challenged on appeal. Thus, we shall limit our analysis below to the issue of whether Article 19.3 of the SCM Agreement was identified with sufficient clarity in the panel request.

4.24. The Appellate Body has examined in previous disputes panel requests that did not specify the relevant paragraphs of a provision containing multiple obligations. It found instances when a general reference to an article containing multiple obligations satisfied the requirements of Article 6.2 of the DSU when considered in the context of the language used in the panel request read as a whole. In *Thailand – H-Beams*, for example, the Appellate Body held that a general reference to Article 3 of the Anti-Dumping Agreement, without identifying the relevant paragraphs, was sufficient to fulfil the requirements of Article 6.2 of the DSU, considering that the panel request "referred explicitly to the specific language of Article 3".³⁶¹ The Appellate Body considered that certain claims under Article 5 of the Anti-Dumping Agreement that neither indicated the relevant paragraphs nor used the specific language of the provision were consistent with Article 6.2 of the DSU because "Article 5 sets out various but closely related procedural steps" and its obligations share an "interlinked nature".³⁶² We note that the Appellate Body considered that the panel request contained elements that went beyond a "mere listing"³⁶³ of articles. In presenting the legal claims, the panel request in *Thailand – H-Beams* used the specific language

³⁵⁶ Article 19.3 provides:

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 of such products from all sources found to be subsidized and causing injury, except as 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 has 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.

³⁵⁷ Article 19.4 reads: "No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." (fn omitted)

³⁵⁸ Preliminary Ruling, para. 3.39 (quoting Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, reproducing para. 77 of the panel's preliminary ruling in those disputes).

³⁵⁹ See Appellate Body Report, *Thailand – H-Beams*, para. 93. In addition, we note that the "lesser duty" rule in Article 19.2 is also concerned with the amount of duty – albeit at the earlier stage of the imposition of a countervailing duty order.

³⁶⁰ Preliminary Ruling, para. 3.43.

³⁶¹ Appellate Body Report, *Thailand – H-Beams*, para. 90.

³⁶² Appellate Body Report, *Thailand – H-Beams*, para. 93.

³⁶³ Appellate Body Report, *Thailand – H-Beams*, para. 90.

and content of the treaty provisions at issue, and identified provisions containing interlinked obligations. Thus, in its consideration of whether the panel request complied with Article 6.2, the Appellate Body placed emphasis on these elements in the panel request that went beyond the "mere listing" of articles.³⁶⁴

4.25. In this case, though we agree with the Panel that Articles 19.3 and 19.4 of the SCM Agreement are "potentially relevant" to China's panel request³⁶⁵, we underscore that the concern of these provisions is not limited to "double remedies", but instead covers obligations broader in scope. On the one hand, Article 19.3 pertains to the amount of the duty to be levied ("in the appropriate amounts"), as well as to the manner in which it is imposed ("on a non-discriminatory basis"). On the other hand, Article 19.4 generally limits the maximum amount of the countervailing duty. Thus, the fact that these obligations under Articles 19.3 and 19.4 may be interlinked does not necessarily, in itself, provide a summary of the legal basis of the complaint sufficient to present the problem clearly. Whether the general reference to Article 19 is sufficient to identify Article 19.3 as the legal basis of the claim depends not only on the nature of the obligations under Article 19 in general, and Article 19.3 in particular, but also on the panel request as a whole, including its narrative and appendices. We must, therefore, examine the narrative to see whether the panel request, as a whole, conforms to the requirements of Article 6.2 of the DSU.

4.26. In order for a panel request to meet the requirement of Article 6.2 to "present the problem clearly", it must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".³⁶⁶ The narrative of a panel request, therefore, functions to "explain succinctly *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".³⁶⁷

4.27. We note that the Panel, in its Preliminary Ruling, found that the narrative description of the problem raised in the panel request concerned "a very specific issue: the United States' alleged 'failure to investigate and avoid double remedies in certain investigations and reviews'" ³⁶⁸ The Panel also observed that the panel request defined "double remedies" as "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 [NME] methodology".³⁶⁹

4.28. Like the Panel, we attach significance to the fact that China ultimately challenges only one measure in Part D of its panel request³⁷⁰, namely, the failure of the US authorities to investigate and avoid double remedies in the identified investigations and reviews. The explicit reference in the panel request to "double remedies" is supplemented by an elaboration of what this concept means in the context of the present dispute by stating that it is "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 [NME] methodology" in respect of the investigations or reviews initiated between 20 November 2006 and 13 March 2012.³⁷¹ The panel request narrative sufficiently explains that, in the investigations and reviews mentioned in Appendices A and B, with the exception of those that resulted in a negative determination or were already adjudicated in DS379, the US authorities failed to investigate and avoid double remedies that may have resulted therefrom. Consequently, the panel request alleges that this failure of the United States amounts to a violation of Article 19 of the SCM Agreement. It is true that the term "double remedies" forms part of the identification of the measure (the failure of the US authorities

³⁶⁴ This approach, in our view, conveys the understanding that the listing of a treaty provision containing multiple obligations, while a minimum requirement, would have been insufficient to present the problem clearly had these circumstances including the references to text and content of the relevant provisions not been present.

³⁶⁵ Preliminary Ruling, para. 3.43.

³⁶⁶ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

³⁶⁷ Appellate Body Reports, *China – Raw Materials*, para. 226 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (emphasis original)).

³⁶⁸ Preliminary Ruling, para. 3.38.

³⁶⁹ Preliminary Ruling, para. 3.38 (quoting China's panel request, p. 2).

³⁷⁰ As we have pointed out, China's panel request refers to the individual investigations and reviews initiated on or between 20 November 2006 and 13 March 2012, as identified in Appendices A and B to its panel request, as the "measures at issue".

³⁷¹ China's panel request, p. 2; Preliminary Ruling, para. 3.38.

to investigate and avoid double remedies). Yet, the word "double" in this term also gives an indication that the problem with "double remedies" is that they result in the levying of countervailing duties exceeding the "appropriate amounts in each case" in the sense of Article 19.3 of the SCM Agreement. Therefore, it is our view that the narrative's reference to "double remedies" assists in presenting the problem clearly, by providing a connection between the measure at issue (the failure of the US authorities to investigate and avoid double remedies) and the legal claims (Articles 10, 19, and 32 of the SCM Agreement). In this way, the term "double remedies" "plainly connects" and aids in demonstrating how the measure at issue is inconsistent with the relevant legal provision in Article 19, i.e. Article 19.3.

4.29. Having said that, we emphasize that, ideally, the panel request in this dispute would have referred not only to the specific measure at issue (the failure of the US authorities to investigate and avoid double remedies), but also to the specific provision concerned, namely, Article 19.3 of the SCM Agreement. However, simply specifying Article 19.3, or adopting its exact language in the panel request, without making a reference to "double remedies", would not necessarily have presented the problem clearly. As we have explained, the obligations under Article 19.3 to impose countervailing duties "in the appropriate amounts" and "on a non-discriminatory basis" are much broader in scope than the specific concept of "double remedies". When a Member imposes concurring countervailing and anti-dumping duties on the same imports, strictly speaking, the amount of countervailing duty may still be levied "in the appropriate amounts" or not in excess of the amount of the subsidy found to exist. Neither does the concurrent imposition necessarily mean that the anti-dumping duty exceeds the margin of dumping found to exist. The problem arises when, as a result of the parallel imposition of countervailing and anti-dumping duties, the same subsidization is offset twice in calculating the amount of subsidy and the dumping margin. Under these circumstances, countervailing duties may not be levied "in the appropriate amounts in each case", contrary to Article 19.3. Hence, the reference to "double remedies" in the panel request assumes a key role in explaining succinctly how or why the measure at issue is considered by China to be violating Articles 10, 19.3, and 32.1 of the SCM Agreement, and thus assists in presenting the problem clearly within the meaning of Article 6.2 of the DSU.

4.30. From our examination of China's panel request, we conclude that, even without a specification of the relevant paragraphs of Article 19 of the SCM Agreement, Article 19.3 is nonetheless capable of being identified as the pertinent provision. The reference to "double remedies" in the narrative contextualizes China's panel request and helps present the problem clearly by creating a plain connection between the measure at issue and the legal claims. By referring to "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 [NME] methodology", the narrative provides an explanation of how and why the failure of the US authorities to investigate and avoid double remedies in the identified investigations and reviews allegedly violates the obligations under Article 19 of the SCM Agreement, and specifically those under Article 19.3. Therefore, the narrative in the panel request contributes to presenting the problem clearly, that is, in the investigations and reviews listed in the appendices (except those resulting in a negative determination or those that were the subject of DS379), the US authorities allegedly failed to investigate and avoid potential double remedies. Consequently, the United States failed to ensure that countervailing duties were levied "in the appropriate amounts in each case", causing an alleged violation of Article 19.3 of the SCM Agreement. From our above analysis of the plain text of the panel request at hand, it is clear that the general reference to Article 19 of the SCM Agreement, when read in conjunction with the narrative, can be considered to meet the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

4.31. Nevertheless, we reiterate that the listing of the treaty provision(s) allegedly violated is normally a prerequisite for a panel request to be consistent with Article 6.2 of the DSU.³⁷² A general reference to a treaty article containing multiple obligations, without specifying the relevant paragraph, or one of the multiple obligations thereunder, may be found wanting in respect of the degree of clarity required by Article 6.2. Such general reference may meet the requirement under Article 6.2 depending on the circumstances of each case, including whether

³⁷² Appellate Body Report, *US – Carbon Steel*, para. 130 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

"mere reference to a treaty provision sheds light on the nature of the obligation at issue"³⁷³, and whether the text read in conjunction with the narrative is sufficient to "present the problem clearly". We emphasize that a complainant who includes in its panel request only a general reference to a treaty article containing multiple obligations runs the risk that its request may fall short of the sufficiency threshold under Article 6.2.

4.32. We now turn to address the argument of the United States that the Panel purportedly applied a new and incorrect legal standard when it stated that "China's panel request need only provide as much information on the legal basis as to 'permit[] sufficiently clear inferences' to China's legal claims."³⁷⁴ The United States asserts that, instead of examining the panel request on its face, the Panel engaged in a "legal interpretation" of Articles 19 and 32 of the SCM Agreement when it sought to discern whether China's claims had a "plausible basis" or were "potentially relevant".³⁷⁵ The United States adds that, in so doing, the Panel went into the merits of the claims, rather than determining whether the request presented the problem clearly, or whether such claims were included in the legal basis set out in the panel request.³⁷⁶

4.33. We do not find it erroneous for the Panel to have used the term "sufficiently clear inferences" as such in its analysis of the conformity of China's panel request with Article 6.2 of the DSU. We also disagree with the United States that the Panel's use of "inferences" amounted to an introduction of a new standard in an Article 6.2 analysis. Rather, as the Panel stated, using "sufficiently clear inferences" is merely a way of explaining how "the WTO obligations at issue in a panel request, while not explicitly identified by paragraph number, are nonetheless identifiable from the panel request considered as a whole."³⁷⁷ The use of inferential reasoning may be inevitable in ascertaining compliance with Article 6.2, for instance, in situations where a panel request makes a general reference to a set of measures or legal claims containing multiple obligations, and the specific measure and/or legal claim at issue must be discerned from the panel request as a whole, including its narrative and any annexes. In examining the panel request's consistency with the requirements of Article 6.2, it is often unavoidable for a panel to use inferences in order to determine whether the measure at issue is identified with sufficient clarity, considering the particular context in which the measure exists and operates³⁷⁸, or whether the respondent and third parties are given sufficient notice of the nature of the obligation and the treaty invoked. The extent to which a panel may use inferential reasoning will vary on the specifics of each case, taking into consideration the need to examine the language of the panel request on its face, as a whole, and as it existed at the time of filing.³⁷⁹

4.34. In reviewing the Panel's use of "sufficiently clear inferences" in its assessment of whether China's panel request presented the problem clearly, we find it useful to make a comparison between the present dispute and the disputes in *China – Raw Materials*, referred to by the United States. In *China – Raw Materials*, the Appellate Body found that it was not clear from the panel requests, which listed 37 legal instruments as measures and 13 treaty provisions as legal claims, "which allegations of error pertain[ed] to which particular measure or set of measures identified in the panel requests".³⁸⁰ Neither was it clear to the Appellate Body "whether each of the listed measures relate[d] to one specific allegation described in the narrative paragraphs, or to several or even all of [those] allegations, and whether each of the listed measures allegedly violate[d] one specific provision of the covered agreements, or several of them".³⁸¹ According to the Appellate Body, "the combination of a wide-ranging list of obligations together with 37 legal instruments ... [was] such that it [did] not allow the 'problem' or 'problems' to be discerned clearly

³⁷³ Appellate Body Report, *US – Carbon Steel*, para. 130 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

³⁷⁴ United States' other appellant's submission, para. 10 (referring to Preliminary Ruling, paras. 3.2, 3.35, 3.42, 3.47, 3.48, 3.51, and 4.1).

³⁷⁵ United States' other appellant's submission, paras. 20 and 21.

³⁷⁶ United States' other appellant's submission, paras. 20 and 21.

³⁷⁷ Preliminary Ruling, para. 3.35.

³⁷⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

³⁷⁹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 641 and 642 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

³⁸⁰ Appellate Body Reports, *China – Raw Materials*, para. 226.

³⁸¹ Appellate Body Reports, *China – Raw Materials*, para. 226. (fn omitted)

from the panel requests."³⁸² Because of this indiscriminate listing of measures and obligations, the Appellate Body found that the panel requests were unable to "explain succinctly *how or why* the measure at issue [was] considered by the complaining Member to be violating the WTO obligation in question".³⁸³

4.35. In contrast, Part D of China's panel request in this dispute identifies one measure: the failure of the US authorities to avoid and investigate double remedies. The panel request's general reference to Articles 10, 19, and 32 of the SCM Agreement is contextualized by the narrative's reference to "double remedies", which sheds light on the nature of the specific obligations at issue – i.e. Articles 10, 19.3, and 32.1. Thus, the panel request in this dispute, unlike those in *China – Raw Materials*, provides a plain connection between the failure of the United States to investigate and avoid double remedies, on the one hand, and Article 19 of the SCM Agreement, on the other hand, such that the problem in respect of Article 19.3 is presented with sufficient clarity and is thus in compliance with Article 6.2 of the DSU.

4.36. The preceding analysis of the text and narrative of China's panel request is, in our view, sufficient to conclude that the panel request meets the requirements of Article 6.2 of the DSU to identify the measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In the light of the arguments raised by the participants on appeal, we nonetheless review the Panel's treatment of footnote 6 of China's panel request to ascertain whether it confirms our interpretation of the panel request, as well as in keeping with the principle that the language used in panel requests should be considered as a whole.

4.37. The United States challenges the Panel's reliance on the last two sentences of footnote 6 of China's panel request to conclude that "China intended only to raise a substantive claim under Article 19.3".³⁸⁴ The United States contends that, in considering the particular findings in the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* (DS379), the Panel used "an external source to inform the legal basis in the panel request."³⁸⁵ The United States asserts that the Panel's dismissal of China's own explanation that it intended to bring claims under Article 19 as an "integrated whole"³⁸⁶ "underscores the error in using an analysis based on inferences" in examining China's panel request.³⁸⁷

4.38. China dismisses the United States' argument against the Panel's reliance on footnote 6 and the relevant findings in DS379 on the ground that, having "expressly referenced the findings" in that dispute in its panel request, "it was not merely appropriate for the Panel to take them into account, it was *incumbent* upon the Panel to do so in light of the Appellate Body's often repeated admonition to 'consider[] the panel request as a whole, and in the light of attendant circumstances'".³⁸⁸ According to China, the United States' argument that the Panel "'dismiss[ed] the complaining Party's own explanation of the legal basis' of its claim"³⁸⁹ "would improperly introduce a complaining party's purported 'intent' into the Article 6.2 analysis, while simultaneously nullifying a Panel's obligation to undertake 'an objective assessment of the matter before it' under Article 11 of the DSU".³⁹⁰

4.39. We start by observing that footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint. In China's panel request, footnote 6 reads:

³⁸² Appellate Body Reports, *China – Raw Materials*, para. 231.

³⁸³ Appellate Body Reports, *China – Raw Materials*, para. 226 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (emphasis original)).

³⁸⁴ United States' other appellant's submission, para. 22.

³⁸⁵ United States' other appellant's submission, para. 22. See also *ibid.*, para. 25.

³⁸⁶ United States' other appellant's submission, para. 34. (fn omitted)

³⁸⁷ United States' other appellant's submission, para. 36.

³⁸⁸ China's appellee's submission, para. 53 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127). (emphasis original)

³⁸⁹ China's appellee's submission, para. 55 (quoting United States' other appellant's submission, para. 36).

³⁹⁰ China's appellee's submission, para. 57.

Appendix A lists all countervailing duty investigations and reviews initiated between 20 November 2006 and 13 March 2012 that included a parallel anti-dumping investigation. The parallel antidumping duty investigations are listed in Appendix B. The investigations and reviews that are the subject of the claims set forth in this subpart D are marked with an asterisk (*). China has excluded those investigations that resulted in a negative injury determination by the US International Trade Commission (indicated in the table), as those investigations did not result in the imposition of anti-dumping and countervailing duties. China has also excluded the four sets of parallel AD/CVD investigations that were the subject of the recommendations and rulings of the DSB in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). The DSB has already found that the United States acted inconsistently with its obligations under the covered agreements by failing to investigate and avoid double remedies in those investigations.

4.40. The Panel considered footnote 6 as "useful context for purposes of [its] inquiry into whether it [was] possible to draw sufficiently clear inferences concerning the obligations(s) on which China wishe[d] to base its claims in Part D".³⁹¹ In its view, the statement in footnote 6 that the DSB had "already found that the United States acted inconsistently with its obligations ... in those investigations" indicated that China sought to obtain in the present dispute findings of violation "that parallel the findings that China had previously obtained" in DS379³⁹², where the Appellate Body made no finding with respect to Article 19.4. According to the Panel, "while the narrative reference to 'double remedies' in Part D suggests that both Articles 19.3 and 19.4 are potentially relevant WTO obligations at issue, consideration of the last sentence in footnote 6 indicates that Article 19.3 is an obligation at issue, while Article 19.4 is not".³⁹³ Moreover, the Panel found that, had China wished to raise claims under Article 19.4, China should not have referred to the previous ruling of the DSB that the United States had acted "inconsistently" with its WTO obligations. This was especially so considering China's own argument that "it is obvious on the face of the panel request that China's claims in Part D included the same claims on which it prevailed in DS379" – i.e. Article 19.3, and not Article 19.4.³⁹⁴ We note that most of the Panel's reasoning referring to footnote 6 addressed the issue of whether China's panel request properly identified its claim under Article 19.4. In this respect, we recall our observation above that the Panel's finding excluding China's claim under Article 19.4 of the SCM Agreement from its terms of reference has not been appealed.

4.41. We further note that footnote 6 refers to Appendices A and B to the panel request, which list the parallel countervailing duty and anti-dumping investigations and reviews initiated between 20 November 2006 and 13 March 2012. Footnote 6 also states that China excluded from this list of investigations and reviews those that resulted in a negative injury determination, and those that were already the subject of the dispute in DS379. Thus, the references to the current Appendices and to DS379 merely appear to indicate which investigations and reviews were the subject of, and which were excluded from, Part D of China's panel request. In our view, footnote 6 illustrates and confirms the panel request's definition of "double remedies" by referring to the lists of parallel countervailing duty and anti-dumping investigations in Appendices A and B that may have resulted in the "double remedies" that the US authorities allegedly failed to investigate and avoid. The statement that the DSB had "already found that the United States had acted inconsistently with its obligations under the covered agreements by failing to investigate and avoid double remedies" – similar to the explanation that some investigations "resulted in a negative injury determination by the US International Trade Commission" – merely provides the reason why China excluded some of the investigations and reviews from the coverage of the panel request. This exclusion of certain investigations from China's challenge is not before us, and neither was it disputed before the Panel.

³⁹¹ Preliminary Ruling, para. 3.42.

³⁹² Preliminary Ruling, para. 3.43 (quoting China's panel request, fn 6, at p. 4). (emphasis omitted)

³⁹³ Preliminary Ruling, para. 3.43.

³⁹⁴ Preliminary Ruling, para. 3.45. (fn omitted)

4.42. The meaning that the Panel ascribed to the last two sentences of footnote 6 ultimately led the Panel to narrow down the scope of China's claims under Article 19 to Article 19.3, which contrasted with China's own statement that its claims encompass both Articles 19.3 and 19.4.³⁹⁵ That Part D includes "the same claims on which [China] prevailed in DS379"³⁹⁶ does not necessarily translate to the exclusion of Article 19.4 as a legal claim. After all, footnote 6 as a whole is of very limited assistance in identifying China's claim under Article 19.3. As we have just noted, the Panel relied on the text of that footnote in its reasoning excluding China's claim under Article 19.4, an issue that is not before us in this appeal. Ultimately, footnote 6 does not provide an express reference to any of China's legal claims, but rather to the "subject of the claims", or the investigations and reviews to which the measure at issue pertains.

4.43. We disagree with the manner in which the Panel read China's panel request and especially footnote 6 as excluding China's claim under Article 19.4. The Panel reached this conclusion by reading too much into the language used in footnote 6, rather than by limiting itself to the panel request's textual and contextual elements. In particular, we do not see in the text of the last sentence of footnote 6 the exclusion of Article 19.4 on account of a general reference to measures found inconsistent in DS379. Considering which inconsistencies have been found or have not been found in DS379 goes beyond what is specifically mentioned in the text of footnote 6. This approach, in our view, is not examining the panel request "on its face", as required by Article 6.2 of the DSU. However, footnote 6, as part of the text of China's panel request in this dispute, can be used to clarify and supplement the panel request's definition of "double remedies" by referring precisely to the parallel countervailing duty and anti-dumping investigations that purportedly resulted in such remedies. Thus, we do not agree that footnote 6 can be used, as the Panel did, to refer to elements, such as the findings of inconsistency or the lack thereof by the Appellate Body in DS379, which were applicable to the specific circumstances of that dispute.

4.44. In any event, we are not called upon to pronounce on whether China's panel request includes a sufficient identification of a claim under Article 19.4, considering that the Panel's exclusion of Article 19.4 from its terms of reference is not challenged on appeal. As we have already explained, in respect of China's claim under Article 19.3, by referring to double remedies and to Article 19 of the SCM Agreement, as well as to the consequential claims, the text and the narrative of China's panel request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4.45. On the basis of our examination of all of the components of the panel request as a whole, we consider that the references to Articles 10, 19, and 32 of the SCM Agreement, read in the context of the narrative explanation, allow for the identification of the relevant claims – Articles 10, 19.3, and 32.1 – relating to the measure at issue in this dispute. The mention of "double remedies" in the panel request identifies the problem and plainly connects the measure at issue (the failure of the US authorities to investigate and avoid double remedies) and the legal claims (Articles 10, 19.3, and 32.1 of the SCM Agreement) in a manner that "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

4.1.3.2 Abandoned claims

4.46. Our foregoing analysis of China's panel request and its conformity with Article 6.2 of the DSU highlights an important consideration: A challenge to a panel request under Article 6.2 may be avoided by specifying the particular paragraph of a treaty provision containing more than one

³⁹⁵ China's response to United States' preliminary ruling request, para. 26. China stated: These [Article 19] obligations are not "distinct" in any way. On the contrary, these provisions are closely interlinked and all relate to a single issue: the determination of the amount of the countervailing duty to impose. The provisions of each paragraph are inextricably related to each other. For example, Article 19.4 makes clear that the "appropriate" amount of a countervailing duty under Article 19.3 cannot be greater than the amount of the subsidy found to exist. Articles 19.1 and 19.2, along with Article 19.3 itself, operate together to establish that the "appropriate" amount of a countervailing duty should have some relationship to the injury that is being caused by subsidized imports.

(fns omitted) See also China's comments on United States' comments on China's response to United States' preliminary ruling request, para. 6. China stated: "Articles 19.3 and 19.4 are the only two paragraphs of Article 19 that impose any substantive obligation that would be relevant to the issue of double remedies."

³⁹⁶ Preliminary Ruling, para. 3.45. (fn omitted)

obligation, and making a plain connection between the measure at issue and the legal claim sufficient to present the problem clearly. We thus find it necessary to underscore that listing general or over-inclusive legal claims in a panel request runs the risk of having such claims excluded from the panel's terms of reference if, as a consequence, the panel request fails to present the problem clearly.

4.47. In this regard, we refer to Part D of China's panel request, which lists Articles 10, 15, 19, 21, and 32 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the Anti-Dumping Agreement as the legal claims. In its letter to the Panel dated 25 March 2013, China expressed its intention not to pursue its claims under Part C of the panel request, and limited its claims in Part D to Articles 10, 19, and 32 of the SCM Agreement.³⁹⁷ Relying on China's representation, the Panel considered that China had "validly abandoned" all of its claims in Part C, and some of its claims in Part D, but did not modify the Panel's terms of reference.³⁹⁸ The Panel also found that ruling on the consistency of these abandoned claims with Article 6.2 "would make no practical difference", as the Panel would make no ruling on the merits of those claims.³⁹⁹ The United States did not appeal this finding by the Panel.

4.48. The United States argues in its other appeal that the Panel failed to examine China's panel request on its face as it existed at the time of filing, and instead sought to "cure" its vagueness and deficiency by relying on China's subsequent statements.⁴⁰⁰ In particular, the United States refers to the above-mentioned letter of China dated 25 March 2013⁴⁰¹, and argues that "the abandonment of claims in an attempt to cure a deficient panel request should not be relied upon by a panel when determining the sufficiency of a panel request on its face as it existed at the time of filing."⁴⁰² In response, China argues that the United States was wrong in insisting that the Panel treated China's letter dated 25 March 2013 "as the equivalent of a newly filed panel request"⁴⁰³, considering the Panel's recognition that China could not "unilaterally modify" its terms of reference.⁴⁰⁴

4.49. We do not agree with the United States that China's abandonment of its claims "cured" the alleged lack of specificity of Part D of the panel request. The existence of the abandoned claims does not affect the conformity of the identification of the remaining claims with Article 6.2 of the DSU, as discussed in detail above. While a panel request making general references to treaty provisions containing multiple claims may be viewed as being over-inclusive, it is important to note that abandoning one set of claims is an issue entirely different from attempting to cure deficiencies in the listing of the remaining set of claims in a panel request. A panel request may list multiple claims with sufficient specificity, and it may list few claims in a manner that does not comply with the requirements of Article 6.2. Subsequently dropping claims does not add to, or detract from, an independent assessment of whether the remaining claims are identified in a manner that is sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU.

4.50. In this dispute, the issue of whether Part D of China's panel request complies with the requirements of Article 6.2 is not affected by China's abandoning certain claims under Parts C and D of its panel request. We observe that, even assuming that the initial listing of the abandoned claims in China's panel request failed to fulfil the requirements of Article 6.2 of the DSU, this does not affect the analysis of whether the remaining claims under Articles 10, 19, and 32 of the SCM Agreement were identified with sufficient clarity, which must be addressed in their own right. We do not see how the assessment of whether the remaining claims under Part D present the problem clearly would be affected by any defects that the Panel might have found had

³⁹⁷ Preliminary Ruling, para. 3.2.

³⁹⁸ Preliminary Ruling, para. 3.8.

³⁹⁹ Preliminary Ruling, para. 3.9.

⁴⁰⁰ United States' other appellant's submission, para. 41.

⁴⁰¹ United States' other appellant's submission, para. 44.

⁴⁰² United States' other appellant's submission, para. 46. At the oral hearing, however, the United States clarified that the scope of its appeal is limited to China's remaining claims under Articles 10, 19, and 32 of the SCM Agreement. The United States agrees that the removal of Part C, and some of the claims under Part D, do not affect the specificity of the remaining claims. (United States' response to questioning at the oral hearing)

⁴⁰³ China's appellee's submission, para. 58 (quoting United States' other appellant's submission, para. 45).

⁴⁰⁴ China's appellee's submission, para. 59 (referring to Preliminary Ruling, para. 3.8).

it addressed the question of whether the panel request identified the abandoned claims consistently with Article 6.2. Moreover, we are not persuaded that the mere fact that the United States had to prepare for claims that were later on dropped can be considered as affecting its due process rights in respect of the remaining claims.

4.51. In the light of the above considerations, we do not view the abandonment by China of some of its claims as a factor that should be taken into account in examining the compliance of the remaining claims in Part D of China's panel request with Article 6.2 of the DSU on the basis of the panel request's text and narrative.⁴⁰⁵

4.1.3.3 Conclusions

4.52. Based on our preceding analysis of the panel request as a whole, we consider that China's panel request, given its references to Articles 10, 19, and 32 of the SCM Agreement, and coupled with the identification of the specific measure at issue and a reference to and explanation of "double remedies", provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In our view, the panel request complies with the requirements of Article 6.2, considering that its narrative, including the reference to "double remedies", connects the measure at issue with the legal claims, thereby specifying with sufficient clarity that the United States' failure to investigate and avoid double remedies in the identified investigations and reviews is alleged by China to violate the United States' obligations under Articles 10, 19.3, and 32.1 of the SCM Agreement. Therefore, we uphold the Panel's finding, in paragraph 4.2 of the Panel's Preliminary Ruling and paragraph 7.4 of the Panel Report, that China's panel request is not inconsistent with Article 6.2 of the DSU, and that claims under Articles 10, 19.3, and 32.1 of the SCM Agreement were identified in Part D of China's panel request consistently with Article 6.2 and were thus within its terms of reference. As a consequence, the Panel's findings of inconsistency with respect to Articles 10, 19.3, and 32.1 of the SCM Agreement, in paragraphs 7.396 and 8.1.c of the Panel Report, stand.

4.2 Article X:2 of the GATT 1994

4.53. Article X:2 of the GATT 1994 states:

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.

4.54. China raises on appeal the Panel's interpretation of Article X:2 of the GATT 1994 in respect of the baseline of comparison for measures of general application effecting an advance in a rate of duty or other charge on imports under an established and uniform practice⁴⁰⁶, and for measures of general application imposing a new or more burdensome requirement, restriction, or prohibition on imports.⁴⁰⁷ China also challenges the Panel's application of its interpretation of Article X:2 of the GATT 1994 to the measure at issue, Section 1 of US Public Law No. 112-99⁴⁰⁸ (PL 112-99). In particular, China challenges the Panel's findings that "China ha[d] 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'"⁴⁰⁹ and that "China ha[d] not established that Section 1 is a provision 'imposing a new or more burdensome requirement, restriction or prohibition on imports'"⁴¹⁰. Before addressing China's claims, we find it useful to set out the Panel's findings under Article X:2.

⁴⁰⁵ The United States did not contend otherwise in response to questioning at the oral hearing.

⁴⁰⁶ Panel Report, para. 7.155.

⁴⁰⁷ Panel Report, para. 7.203.

⁴⁰⁸ United States Public Law No. 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 Stat. 265 (13 March 2012) (Panel Exhibit CHI-1).

⁴⁰⁹ Panel Report, para. 7.191.

⁴¹⁰ Panel Report, para. 7.208.

4.2.1 The Panel's findings

4.55. The Panel considered that the determination of whether a measure is inconsistent with Article X:2 of the GATT 1994 required the fulfilment of two cumulative conditions, namely: (i) that it 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 (ii) that it has been enforced before having been officially published.⁴¹¹

4.56. In this dispute, the Panel decided to address the second condition first, that is, whether Section 1 had been enforced before it had been officially published. The Panel found 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 its scope 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.⁴¹² Based on this interpretation, the Panel found that, while "there is no evidence that the United States took any enforcement action, based on Section 1, prior to 13 March 2012", Section 1 had been enforced or applied as from 13 March 2012 in respect of events and circumstances that took place between 20 November 2006 and 13 March 2012.⁴¹³ The Panel then found 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".⁴¹⁴ Neither China nor the United States has appealed this finding by the Panel.

4.57. Turning to the first condition in Article X:2, regarding its scope of application, the Panel first addressed the issue of whether Section 1 is a measure of general application. Before the Panel, the United States argued that Section 1 is not a measure of general application within the meaning of Articles X:1 and X:2 of the GATT 1994, *inter alia*, to the extent that it also applies to a limited and known set of imports and proceedings covering the period 20 November 2006 to 13 March 2012.⁴¹⁵ In its findings under Article X:1, the Panel stated that "[t]he fact that a relevant measure has a narrow regulatory scope does not demonstrate that this measure is not generally applicable". The Panel also found that "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", while "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".⁴¹⁶

4.58. Based on this interpretation, the Panel went on to find that "Section 1(b) uses broad generic descriptions to identify relevant proceedings and actions that pre-date the publication of PL 112-99" and that it was "drafted in a manner that ensures that Section 701(f) is applied comprehensively and across the board in all relevant situations ... that arose during a past period ... or will arise, subsequently, in the period beginning from the date of publication of PL 112-99".⁴¹⁷ The Panel considered that "these features indicate that [Section 1] is concerned with individual proceedings and actions only insofar as they are part of a comprehensive class of relevant proceedings and actions".⁴¹⁸ Accordingly, the Panel found that "Section 1 contains a provision of general application", and the fact 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".⁴¹⁹ The Panel made these findings under Article X:1, but considered that it should adopt the same interpretation of the term "of general application" and follow the same analytical approach under Article X:2, considering that both provisions refer to the same term "of general application".⁴²⁰

⁴¹¹ Panel Report, paras. 7.93 and 7.94.

⁴¹² Panel Report, para. 7.118.

⁴¹³ Panel Report, para. 7.125.

⁴¹⁴ Panel Report, para. 7.127.

⁴¹⁵ Panel Report, paras. 7.133 and 7.23 (referring to 27 proceedings).

⁴¹⁶ Panel Report, para. 7.35.

⁴¹⁷ Panel Report, para. 7.44.

⁴¹⁸ Panel Report, para. 7.44.

⁴¹⁹ Panel Report, para. 7.48.

⁴²⁰ Panel Report, para. 7.137.

4.59. Turning to the phrase "effecting an advance in a rate of duty or other charge on imports", the Panel agreed with the panel in *EC – IT Products*, which had interpreted this term to mean "of a type that 'bring[s]' about an 'increase' in a rate of duty [or other charge on imports]".⁴²¹ The Panel also agreed with the panel in *EC – IT Products* 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".⁴²²

4.60. The Panel then considered that "the term 'advance in a rate' calls for a comparison of two rates of duty or charge: a new rate on imports of a particular product and a prior, initial rate on imports of that product", and that "[i]t 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, the Panel found that "it is clear ... 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", so 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".⁴²³ The Panel also considered that whether a measure of general application imposes a new or more burdensome requirement, restriction, or prohibition on imports should be determined with reference to publicly known practices of administering agencies.⁴²⁴

4.61. The Panel then proceeded to apply its interpretation of the first condition in Article X:2 to the measure at issue in this dispute. The Panel found 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 was "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".⁴²⁵ The Panel found that "Section 1 did not effect an advance in a rate of duty ... 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".⁴²⁶ The Panel also found 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". The Panel thus concluded "that Section 701(f), and by extension Section 1, does not impose any 'new' or 'more burdensome' 'requirement' or 'restriction' on imports from China."⁴²⁷

4.62. In our analysis below, we address China's claim that the Panel erred in the interpretation of Article X:2 of the GATT 1994 and, in particular, with respect to the relevant baseline of comparison to determine whether a measure of general application effects an advance in a rate of duty or other charge on imports, or imposes a new or more burdensome requirement, restriction, or prohibition on imports, or on the transfer of payments therefor.⁴²⁸ We then address China's claim that, having erred in the interpretation of Article X:2 of the GATT 1994, the Panel also erred in the application of Article X:2 to the measure at issue in this dispute.⁴²⁹

4.2.2 Interpretation and application of Article X:2

4.63. In reviewing the Panel's interpretation of the first condition in Article X:2 of the GATT 1994, we begin by considering the function of Article X:2. We then turn to the issue of the identification of the relevant baseline of comparison under Article X:2, starting by reviewing the Panel's interpretation of the "baseline of comparison" for the two categories of measures in Article X:2. We then consider the issue of the determination of the meaning of municipal law, which the identification of the relevant baseline of comparison under Article X:2 entails. Finally, we outline what we consider to be the correct approach in identifying the baseline of comparison for both categories of measures under Article X:2.

⁴²¹ Panel Report, para. 7.154 (quoting Panel Reports, *EC – IT Products*, para. 7.1107).

⁴²² Panel Report, para. 7.154 (quoting Panel Reports, *EC – IT Products*, para. 7.1116).

⁴²³ Panel Report, para. 7.155.

⁴²⁴ Panel Report, para. 7.203.

⁴²⁵ Panel Report, para. 7.186.

⁴²⁶ Panel Report, para. 7.190.

⁴²⁷ Panel Report, para. 7.206.

⁴²⁸ China's appellant's submission, para. 21.

⁴²⁹ China's appellant's submission, para. 68.

4.2.2.1 Function of Article X:2

4.64. Article X of the GATT 1994 is entitled *Publication and Administration of Trade Regulations*. It comprises three paragraphs addressing in order:

- Article X:1: the prompt publication of certain measures of general application⁴³⁰;
- Article X:2: the prohibition on the enforcement of certain measures of general application before their official publication; and
- Article X:3: the requirement to administer measures of general application in a uniform, impartial and reasonable manner and to maintain or institute judicial, arbitral, or administrative tribunals or procedures for the review of administrative action relating to customs matters.

4.65. By requiring that certain measures of general application are published promptly and that they are not enforced before their publication, Articles X:1 and X:2 are meant to ensure that traders are made aware of measures that may have an impact on them, so that they have time to become acquainted with, and to adapt to, the new measures. These provisions thus create expectations among traders that they will not have to face measures that they could not be aware of because such measures were published late or because they were not yet published.

4.66. We recall that the Appellate Body observed in *US – Underwear* that Article X:2 embodies the principle of transparency, which has due process dimensions. The Appellate Body considered that the essential implication of this principle of transparency is that "Members and other persons 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."⁴³¹

4.67. The function of Article X:2 of ensuring transparency and protecting traders' expectations as to the publication and enforcement of certain measures is relevant to the interpretation of the obligations contained in this provision. The fact that Article X:2 applies only to measures that increase duties or charges or impose new or more burdensome requirements, restrictions, or prohibitions is consistent with the due process function of this provision. The transparency and due process functions of Article X:2 also inform the identification of the baseline of comparison to determine whether a measure of general application effects an advance in a rate of duty or imposes a new or more burdensome requirement. As we consider further below, the baseline of comparison is used to determine whether a measure of general application effects an advance in a rate of duty or imposes a new or more burdensome requirement. The proper baseline of comparison under Article X:2 should thus reflect traders' expectations about the applicable measure, considering that Article X:2 is meant to ensure that traders "have a reasonable opportunity to acquire authentic information about [the new] measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures".⁴³²

4.2.2.2 China's appeal of the Panel's interpretation of Article X:2

4.68. We now turn to consider China's appeal of the Panel's interpretation with respect to the relevant baseline of comparison for the two categories of measures of general application in Article X:2 of the GATT 1994, namely: (i) measures "effecting an advance in a rate of duty or

⁴³⁰ Article X:1 requires the prompt publication of "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, 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". Moreover, Article X:1 requires the publication of "Agreements affecting international trade policy which are in force between the government or a governmental agency of any Member and the government or governmental agency of any other Member".

⁴³¹ Appellate Body Report, *US – Underwear*, p. 21, DSR 1996:I, p. 29.

⁴³² Appellate Body Report, *US – Underwear*, p. 21, DSR 1996:I, p. 29.

other charge on imports"; and (ii) measures "imposing a new or more burdensome requirement, restriction or prohibition on imports".

4.2.2.2.1 Measures "effecting an advance in a rate of duty or other charge on imports"

4.69. Having determined that Section 1 of PL 112-99 is a measure of general application within the meaning of Article X:2 of the GATT 1994, and that "effecting an advance in a rate of duty" means bringing about an increase in the rate of duty as compared to a prior rate, the Panel turned to the identification of the baseline of comparison for the purpose of establishing whether the measure at issue effected an advance in a rate of duty or other charge. In doing so, the Panel interpreted the phrase "under an established and uniform practice". After finding that "the term 'advance in a rate' calls for a comparison of two rates of duty or charge: (i) a new rate on imports of a particular product; and (ii) a prior, initial rate on imports of that product", the Panel stated:

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.⁴³³

4.70. China claims that it does not follow from the meaning of the term "advance" that the phrase "under an established and uniform practice" defines the relevant baseline of comparison for purposes of determining whether a measure effects an "advance in a rate of duty". According to China, the Panel committed a legal error, because the ordinary meaning of the phrase, and its position within the first clause of Article X:2, make clear that the phrase "under an established and uniform practice" qualifies the immediately preceding reference to a "measure of general application ... effecting an advance in a rate of duty or other charge on imports". In China's view, the phrase "under an established and uniform practice" describes a further characteristic of the measure and, in particular, how the measure must effect an advance in a rate of duty or other charge on imports.⁴³⁴

4.71. The United States responds that the phrase "under an established and uniform practice" defines the relevant rate of duty that was previously applicable to the imports at issue. According to the United States, the Panel was correct in finding that the phrase "under an established and uniform practice" modifies the terms "rate of duty" and "other charge", such that the relevant baseline of comparison under Article X:2 is the rate of duty or other charge under the previous "established and uniform practice".⁴³⁵

4.72. We observe at the outset of our analysis that, by using the phrase "in the light of this"⁴³⁶, the Panel appears to have linked its conclusion that the phrase "under an established and uniform practice" constitutes the relevant baseline of comparison to the fact that the term "advance in a rate" means an increase in a rate of duty in comparison to a prior rate. While we agree with the Panel that an increase in a rate of duty can only be determined by reference to a baseline of comparison, we do not consider that this alone is sufficient to conclude that the phrase "under an established and uniform practice" constitutes such a baseline.

4.73. The sentence in Article X:2 – "No measure of general application ... shall be enforced" – is interrupted by two phrases that are separated by the disjunctive "or": (i) "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice"; and (ii) "imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". These two phrases, which are located between the subject ("no measure of general application") and its verb ("shall be enforced"), provide alternative characterizations of the subject of the sentence, that is, "no measure of general application". Thus, the position of these two phrases in Article X:2 and their relationship with the subject and verb of

⁴³³ Panel Report, para. 7.155.

⁴³⁴ China's appellant's submission, para. 32.

⁴³⁵ United States' appellee's submission, para. 61.

⁴³⁶ See Panel Report, para. 7.155.

the sentence suggest that the elements contained in these phrases are all related to, and descriptive of, the measure of general application.

4.74. Accordingly, before turning to the Panel's interpretation of the phrase "under an established and uniform practice", we note that an analysis of the structure of Article X:2 in its entirety provides clear indications that the phrases "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice" and "imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor" provide alternative characterizations of the measure of general application. We also note that the second phrase only describes certain effects of the measure (new or more burdensome requirement, restriction, or prohibition) on imports or on related payments, whereas the first phrase has an additional element, because, after describing the effects of the measure on imports (an advance in a rate of duty or other charge), it continues with the phrase "under an established and uniform practice".

4.75. We now turn to the interpretation of the phrase "under an established and uniform practice", starting with the ordinary meaning of the preposition "under". Relevant dictionary definitions of the preposition "under" include "subject to", "subject to the authority, control, direction, or guidance of", "in the form of", and "in the guise of".⁴³⁷ "Under" may be used to introduce "the guise of" or "the manner how" a certain action is to be conducted. While there are several other dictionary definitions for the preposition "under"⁴³⁸, it seems to us that, as discussed above, the structure of Article X:2 and, in particular, the position of the phrase "under an established and uniform practice", suggests that the relevant definitions for the meaning of "under" in Article X:2 are "in the form of" and "in the guise of".

4.76. This meaning of the preposition "under" is reinforced by the French and Spanish versions of the text of Article X:2. We recall that, according to Article XVI:6 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the texts of the WTO covered agreements are authentic in each of the three WTO official languages⁴³⁹, and that, in previous disputes, the Appellate Body has confirmed the ordinary meaning of terms in the English version by reference to the French and Spanish language versions of the relevant provision.⁴⁴⁰ The phrase "under an established and uniform practice" reads in French "*en vertu d'usages établis et uniformes*" and in Spanish "*en virtud del uso establecido y uniforme*". In French and in Spanish, "*en vertu de*" and "*en virtud de*" describe the manner, the means, or how something is done. Moreover, "*en vertu de*" and "*en virtud de*" can be translated literally into English as "by virtue of". The term "by virtue of" can be reconciled with those definitions of "under", such as "in the form of" and "in the guise of". In contrast, translating literally the French and the Spanish texts into English, we fail to see how the term "by virtue of" can qualify the preceding term "rate of duty" so that the phrase "effecting an advance in a rate of duty or other charge *by virtue of* an established and uniform practice" could be read as referring to a *comparison between* a new higher rate and a prior rate.

4.77. The French and Spanish versions of the covered agreements cannot be read as connoting the phrase "under an established and uniform practice" as the baseline of comparison as the Panel did. Rather, the French and Spanish versions of Article X:2 suggest that the phrase "under an established and uniform practice" describes how the measure of general application effects an advance in a rate of duty or other charge on imports, in order to fall within the scope of

⁴³⁷ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3421.

⁴³⁸ Other dictionary definitions for the preposition "under" include: "in or to a position lower than"; "covered by, enveloped in"; "at the foot of, by the side of, close to"; "controlled, restrained, or bound by"; "affected, oppressed, or affected by"; "authorized or attested by"; "unworthy of, beneath"; "less than (a specified number or amount)"; "during (a period of time or an activity)". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3421)

⁴³⁹ We further note that an explanatory note to the GATT 1994 states that "[t]he text of the GATT 1994 shall be authentic in English, French and Spanish."

⁴⁴⁰ In *US – Upland Cotton*, the Appellate Body confirmed the ordinary meaning of the term "price suppression" in Article 6.3(c) of the SCM Agreement by reference to the French and Spanish versions of that provision. (Appellate Body Report, *US – Upland Cotton*, para. 424 and fn 510 thereto. See also Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 111 and fn 176 thereto; and *EC – Tariff Preferences*, para. 147)

Article X:2. Accordingly, the Panel's interpretation of the English text of Article X:2 is not reconcilable with the meaning of the provision in the two other authentic languages of the GATT 1994. In case of differences of meanings among authentic texts, Article 33 of the Vienna Convention on the Law of Treaties⁴⁴¹ (Vienna Convention) requires an interpreter to adopt "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty". In our view, the meanings of "under" that best reconcile the texts of Article X:2 in English, French, and Spanish are "in the form of" and "in the guise of".⁴⁴²

4.78. In the light of the above, it seems to us that, within the context of Article X:2, the preposition "under" may be interpreted as introducing the manner in which the measure of general application should advance the rate of duty or other charge. Therefore, the definitions of the preposition "under" as "in the form of" and "in the guise of", suggest that the phrase "under an established and uniform practice" refers to certain characteristics of the application of the measure "effecting an advance in a rate of duty or other charge on imports".

4.79. The United States argues that, if the phrase "under an established and uniform practice" is read as defining the relevant rate that was previously applicable to the imports at issue, then there would have been no need to insert this phrase in Article X:2, because the terms "of general application" and "established and uniform" would be "redundant" if, as argued by China, they all defined the measure at issue.⁴⁴³ The United States contends that the terms "general application" and "uniform" both convey the meaning that the measure or practice should be similarly applied to a whole class of imports rather than to a specific subset of imports or traders.⁴⁴⁴ Moreover, according to the United States, China's reading of "established" as modifying the measure of general application would introduce a gap in time before a breach of Article X:2 could be established, because a relevant advance in a rate of duty could only result if the Member was already enforcing the measure at issue, such as to bring about an "established" practice for some time.⁴⁴⁵

4.80. We consider that the meanings of the terms "practice", "established", and "uniform" are consistent with an interpretation of the phrase "under an established and uniform practice" as referring to the application of the measure of general application effecting an advance, rather than to the measure itself. In this respect, we recall that the panel in *EC – IT Products* had found that, "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')".⁴⁴⁶

4.81. We agree with the panel in *EC – IT Products* that the term "practice" indicates that this phrase is concerned with how the measure is applied, rather than with the measure itself, and that the term "established" refers to the application of the measure "on a secure basis".⁴⁴⁷ This, however, does not necessarily require a "gap in time", as suggested by the United States⁴⁴⁸, before a measure can be considered as being applied under an "established" practice within the meaning of Article X:2. In our view, the term "established practice" may refer to a practice that has been in place for a period of time, but also to a practice that exists on a secure basis. Among the relevant definitions of "establish", we also find "institute or ordain permanently by enactment or agreement" and "give legal form or recognition"⁴⁴⁹, which suggest that the term "established"

⁴⁴¹ Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

⁴⁴² According to Article 33 of the Vienna Convention, "(w)hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language" and "(t)he terms of the treaty are presumed to have the same meaning in each authentic text." Moreover, "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

⁴⁴³ United States' appellee's submission, para. 56.

⁴⁴⁴ United States' appellee's submission, para. 59.

⁴⁴⁵ United States' appellee's submission, para. 60.

⁴⁴⁶ Panel Reports, *EC – IT Products*, para. 7.1120.

⁴⁴⁷ Panel Reports, *EC – IT Products*, para. 7.1120.

⁴⁴⁸ United States' appellee's submission, para. 60.

⁴⁴⁹ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 865.

can also be used to describe a practice legally instituted and mandated by law that has not necessarily been in place for a period of time.

4.82. Regarding the term "uniform", we agree with the Panel's finding that "'uniform' practice ... is one that does not change according to the time or place of importation, or depending on the traders or governments involved".⁴⁵⁰ Along the same line, we understand the term "uniform" to refer to the consistent application of the measure. The consistent application of the measure, in our view, is different from the general application of a measure, and does not necessarily require application across the entire customs territory of a Member, contrary to what the panel in the *EC – IT Products* disputes found.

4.83. Therefore, we disagree with the view of the United States that, if the phrase "under an established and uniform practice" describes how a measure must effect an advance in a rate of duty, then "the terms 'general application' and 'uniform' would both convey the meaning that the measure or practice should be similarly applied to a whole class of imports rather than to a specific subset of imports or traders".⁴⁵¹ As explained above, we consider the phrase "under an established and uniform practice" to refer to the application of the measure, as opposed to the measure itself. Instead, the term "general application" refers to the measure itself. Thus, a measure that is not applied consistently would not be applied under a "uniform" practice, but it may still be a measure of general application.

4.84. Turning to the context of the phrase "under an established and uniform practice" in Article X:2, we observe that the phrase "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice" provides one of two alternative characterizations of the measure of general application, the other being provided by the phrase "imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor". Assuming that, as the Panel found, the phrase "under an established and uniform practice" refers to the baseline of comparison, it could not be explained why Article X:2 would spell out the baseline of comparison for measures effecting an "advance in a rate of duty or other charge on imports", but would be silent as to the baseline of comparison for measures imposing a "new or more burdensome requirement, restriction or prohibition on imports".

4.85. Article X:1 of the GATT 1994 provides further relevant context for the interpretation of the phrase "under an established and uniform practice". Article X:1 requires that a broad category of measures, including the measures of general application covered by Article X:2, "be published promptly in such a manner as to enable governments and traders to become acquainted with them". Because of the obligation in Article X:1, it can be assumed that existing rates of duty or other charges, as well as requirements, restrictions, or prohibitions on imports, are normally set out in published measures. Accordingly, the context of Article X:1 provides further support for the view that the identification of the baseline of comparison under Article X:2 should start with the measure that Article X:1 requires to be published promptly.⁴⁵² Indeed, we do not see why the baseline of comparison under Article X:2 should necessarily be found in an established and uniform practice, as long as the preceding paragraph requires that measures concerning rates of duty or other charges, as well as requirements or restrictions, be published.⁴⁵³

4.86. In the light of the above, we consider that the ordinary meaning of the phrase "under an established and uniform practice", its position in Article X:2, its relevant context, and the function

⁴⁵⁰ Panel Report, para. 7.156. The Panel referred to the panel report in *EC – Selected Customs Matters*, in which that panel had observed 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". (Panel Report, *EC – Selected Customs Matters*, para. 7.123 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 3488))

⁴⁵¹ United States' appellee's submission, para. 59.

⁴⁵² For exceptional circumstances, see *infra*, para. 4.106.

⁴⁵³ As we consider further below, this is not to say that a practice is not relevant to the identification of the baseline of comparison under Article X:2 of the GATT 1994. The practice of an administering agency is part of the consistent application of a measure and, as such, it is an element that a panel may need to take into account to ascertain the meaning of municipal law. (See *infra*, para. 4.108)

that Article X:2 performs relating to transparency and due process, suggest that this phrase refers to the measure of general application, rather than serving as the baseline of comparison.⁴⁵⁴

4.2.2.2.2 Measures "imposing a new or more burdensome requirement, restriction or prohibition on imports"

4.87. We turn next to the second type of measure of general application that is subject to the requirements in Article X:2 of the GATT 1994. We recall that the Panel found 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 Panel added that "[t]he 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."⁴⁵⁵

4.88. We note that, while the notions of "requirement", "restriction", and "prohibition" all entail an element of burden, a new requirement need not be more burdensome than the prior one to trigger the obligation in Article X:2. There may be circumstances where a new requirement could ultimately be less or no more burdensome than the requirement it replaces. Nonetheless, it would be consistent with the function of Article X:2 that it be published before it is enforced, to the extent that traders would need notice of a new requirement even where this is less or no more burdensome. For instance, a requirement to complete and present customs documents on-line may ultimately be less burdensome than to do so in paper form. However, until the measure introducing such new requirement is published, traders' expectations will be that documents must be produced in paper form. By obliging Members to publish before enforcement all new requirements, Article X:2 protects traders' expectation that the situation with which they are acquainted will not change until the measure introducing such a change is officially published.

4.89. Having interpreted the phrase "new or more burdensome requirement, restriction or prohibition on imports", the Panel turned to the identification of the baseline of comparison to determine if a requirement can be considered as being new or more burdensome. The Panel recalled the reference to an established and uniform practice in the part of Article X:2 that relates to advances in rates of duty and stated that it did "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". The Panel further noted that "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". In the Panel's view, as Article X:2 is concerned with the "enforcement", or application, of the measure imposing the requirement or restriction, "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". Finally, the Panel rejected the "notion that [traders] 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".⁴⁵⁶

4.90. In sum, while the Panel did not find that the phrase "under an established and uniform practice" served to define the baseline of comparison also for the second type of measure imposing a new or more burdensome requirement, restriction, or prohibition, it concluded that, for

⁴⁵⁴ We note that the member of the Panel who wrote a dissenting opinion stated that: 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. 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 the baseline to which to compare the new duty or charge.

(Panel Report, para. 7.237 (referring to Panel Reports, *EC – IT Products*, paras. 7.1119 and 7.1120))

⁴⁵⁵ Panel Report, para. 7.200.

⁴⁵⁶ Panel Report, para. 7.203.

this type of measure, such a comparison should be conducted with the requirement, restriction, or prohibition that resulted from the practice of the administrative agency.⁴⁵⁷ As we consider below, however, the Panel did not provide persuasive textual or contextual elements to support this conclusion.

4.91. At the outset of our analysis, we note that there are no textual elements in Article X:2 suggesting that the baseline of comparison for measures "imposing a new or more burdensome requirement, restriction or prohibition on imports" should be the uniform or established practice of the administering agency. Unlike in the case of measures "effecting an advance in a rate of duty or other charge on imports", the reference to "a uniform and established practice" is clearly of no assistance in defining the relevant baseline of comparison, because this phrase precedes the reference to measures "imposing a new or more burdensome requirement, restriction or prohibition on imports", and thus it has no connection to it. Moreover, like for measures "effecting an advance in a rate of duty or other charge on imports", the context of Article X:1 suggests that the starting point of the analysis of municipal law should, normally, be the published measure of general application, rather than the practice.⁴⁵⁸

4.92. In general, we agree with the Panel that traders develop their expectations also with regard to publicly known practices of agencies charged with administering relevant requirements or restrictions on imports, and that these practices are relevant in identifying the baseline of comparison under Article X:2 of the GATT 1994. As we consider further below, in determining the meaning of municipal law, a panel may need to evaluate several elements, including the text of the law on its face, the pronouncements of domestic courts, and the practice of administering agencies.⁴⁵⁹ We disagree, however, with the Panel on the role that such practice must play in determining whether a measure of general application imposes a new or more burdensome requirement. In particular, we disagree with the Panel's use of the practice as the baseline of comparison without regard to other elements of municipal law, which, as we consider below, are relevant to the determination of its meaning.

4.2.2.2.3 Conclusions

4.93. In the light of the above, we conclude that the Panel erred in finding that the phrase "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 [of duty] has been effected" and that the relevant comparison contemplated by Article X:2 of the GATT 1994 is "between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice".⁴⁶⁰ We also consider that the Panel committed an error in finding that, in order to determine whether a measure of general application imposes a new or more burdensome requirement or restriction, a comparison should be made with "a requirement or restriction that results from, and reflects, an interpretation of ... a measure adopted and publicly communicated by an administering agency".⁴⁶¹

4.94. Therefore, we reverse the Panel's interpretation of Article X:2 of the GATT 1994, in paragraph 7.155 of the Panel Report, in respect of the baseline of comparison for measures of general application "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice", and in paragraph 7.203 of the Panel Report, in respect of measures of general application "imposing a new or more burdensome requirement, restriction or prohibition on imports".

4.2.2.2.3 Determination of the meaning of municipal law for purposes of Article X:2

4.95. We now turn to consider the approach and the criteria that should guide panels and the Appellate Body in the determination of the meaning of municipal law for purposes of establishing a baseline of comparison.

⁴⁵⁷ Panel Report, para. 7.203.

⁴⁵⁸ For exceptional circumstances, see *infra*, para. 4.106.

⁴⁵⁹ Appellate Body Report, *US – Carbon Steel*, para. 157.

⁴⁶⁰ Panel Report, para. 7.155.

⁴⁶¹ Panel Report, para. 7.203.

4.96. Article X:2 of the GATT 1994 does not explicitly specify the baseline of comparison for either type of measure described therein (i.e. effecting an advance in a rate of duty, or imposing a new or more burdensome requirement). However, the language in Article X:2 that refers to an *advance* in a rate of duty and a *new* or *more burdensome* requirement implies a comparison between the measure that is alleged to be increasing a rate of duty or imposing a new or more burdensome requirement and a relevant baseline, which is normally to be found in published measures of general application.⁴⁶² This is because determining whether a measure "advances", is "new", or is "more burdensome" can only be done in relation to another measure or in the absence of any measure.

4.97. In order to conduct such a comparison, a panel that is charged with the application of Article X:2 will need to ascertain the meaning of the published measure of general application under municipal law. In many instances where the text of the relevant municipal law is clear on its face, a panel's task will be straightforward. However, in cases where the meaning of the municipal law is not clear on its face, a panel will need to rely on further elements to determine whether the new measure advances a rate of duty or imposes a new or more burdensome requirement, thus falling within the scope of measures that must not be enforced before official publication.

4.98. In a number of previous disputes, panels and the Appellate Body have been required to ascertain the meaning of municipal law in order to determine whether the challenged measure was consistent with a provision in the covered agreements. The Appellate Body considered in *US – Hot-Rolled Steel* that, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law."⁴⁶³ As part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the covered agreements.

4.99. In *India – Patents (US)* and *US – Section 211 Appropriations Act*, the Appellate Body stated that municipal law may constitute evidence of facts as well as evidence of compliance or non-compliance with international obligations⁴⁶⁴, and that a panel's examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU.⁴⁶⁵ In *China – Auto Parts*, the Appellate Body considered that it could review a Member's municipal law on its face "to determine whether the legal characterization by the panel was in error".⁴⁶⁶ This review would include text and context, as well as the "structure and logic", of a legal instrument.⁴⁶⁷ The Appellate Body, however, cautioned that "there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements", with which the Appellate Body would "not lightly interfere ... on appeal".⁴⁶⁸ Thus, not every type of evidence that has been examined by panels to determine the scope and meaning of municipal law may be subject to full appellate review.

⁴⁶² For exceptional circumstances, see *infra*, para. 4.106.

⁴⁶³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 200.

⁴⁶⁴ Appellate Body Report, *India – Patents (US)*, para. 65.

⁴⁶⁵ Appellate Body Report, *US – Section 211 Appropriations Act*, para. 105.

⁴⁶⁶ Appellate Body Reports, *China – Auto Parts*, para. 225.

⁴⁶⁷ In *China – Auto Parts*, the Appellate Body looked at text and the "overall structure and logic" of municipal law to determine its meaning. In particular, the Appellate Body found:

[W]e do not see how the text of Article 2(2) and the overall structure and logic of Decree 125, including Article 21(1), would render it possible to separate the charge from the administrative procedures associated with the imposition of that charge. It follows that the "duties" referred to in Article 2(2), which are to be declared and paid upon importation, are not duties imposed under Decree 125. Consequently, the Panel's construction of Article 2(2), read together with Article 21(1), amounts in our view to legal error.

(Appellate Body Reports, *China – Auto Parts*, para. 238)

⁴⁶⁸ Appellate Body Reports, *China – Auto Parts*, para. 225.

4.100. In *US – Carbon Steel*, the Appellate Body clarified the elements that a panel and eventually the Appellate Body would need to examine to ascertain the meaning of municipal law, noting that these will vary from case to case.⁴⁶⁹ The Appellate Body considered that, whereas in some cases the text of the relevant legislation may suffice to clarify the scope and meaning of the relevant legal instruments, in other cases the complainant will also need to support its understanding of the scope and meaning of such legal instruments with "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".⁴⁷⁰

4.101. We consider that, in ascertaining the meaning of municipal law, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies. We also consider that an examination of whether the elements cited by the Appellate Body in *US – Carbon Steel* are legal characterizations, or involve also factual elements, depends on the circumstances of each case. Although factual aspects may be involved in the individuation of the text and of some associated circumstances⁴⁷¹, an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization. Similarly, whether or when a domestic court ruling has been rendered and finalized, or what a writing by a recognized scholar contains, may involve factual aspects. However, the examination of the legal interpretation given by a domestic court or by a domestic administering agency as to the meaning of municipal law with respect to the measure being reviewed for consistency with the covered agreements may be a legal characterization. All of these assessments are subject to the circumstances of each case, including the national legal system in which the municipal law operates.

4.102. We consider these observations particularly relevant in the context of Article X:2, a GATT provision that, by its own terms, can be applied only if a baseline of comparison is identified by ascertaining the meaning of municipal law. We further observe that the determination of the meaning of municipal law under Article X:2 requires a panel to consider the meaning of the measure whose consistency with Article X:2 is being challenged, as well as the meaning of the prior municipal law that serves as the baseline of comparison, to determine whether there has been a "change" (*advance* in a rate of duty or *new* or *more burdensome* requirement) that would trigger the obligation in Article X:2. In this respect, to the extent that the determination of the occurrence of such a change is relevant to the determination of the consistency of the measure of general application with Article X:2, we consider this to be a question of legal interpretation.

4.2.2.4 Identification of the baseline of comparison under Article X:2

4.103. The Panel was of the view that the practice of the administering agency in applying the relevant law of the United States was itself the baseline of comparison. Having identified such practice in the USDOC's practice of applying countervailing duties to NME countries between 2006 and 2012, the Panel then turned to the question of whether such practice was lawful under the municipal law of the United States. The Panel, however, deemed the question of the lawfulness of the practice under US municipal law "potentially relevant, and at a minimum not inappropriate ... for purposes of an analysis under Article X:2" and stated that, only if it found that said practice was unlawful, would it "need to determine whether or not that practice [could] nonetheless be relied on for purposes of [its] analysis under Article X:2".⁴⁷² Thus, the Panel seems to have left

⁴⁶⁹ The Appellate Body found:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. 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. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.

(Appellate Body Report, *US – Carbon Steel*, para. 157)

⁴⁷⁰ Appellate Body Report, *US – Carbon Steel*, para. 157.

⁴⁷¹ For example, whether the text is official in more than one language, its date of enactment, publication and enforcement, the issuing authority, etc.

⁴⁷² Panel Report, para. 7.159.

open the possibility that an unlawful practice of an administering agency could still constitute a relevant baseline of comparison under Article X:2 to determine whether a measure of general application effects an advance in a rate of duty or imposes a new or more burdensome requirement.

4.104. We observe that, in examining the lawfulness of the USDOC's practice, the Panel did engage in some analysis of the US countervailing duty law applicable to NME countries, that is, Section 701(a) of the United States Tariff Act of 1930⁴⁷³ (US Tariff Act), in the light of the USDOC's practice and of US court decisions.⁴⁷⁴ There are, however, important differences between the analysis conducted by the Panel in assessing whether the USDOC's practice of applying countervailing duties to NME countries was lawful and the task the Panel should have performed under the correct approach to identifying the relevant baseline of comparison under Article X:2. In identifying the baseline of comparison under Article X:2, the Panel should have ascertained the meaning of the US countervailing duty law prior to Section 1 of PL 112-99 directly through its objective assessment, and not only through the lens of the agency practice.

4.105. In our view, the identification of the baseline of comparison under Article X:2 for both (i) measures effecting an advance in a rate of duty and (ii) measures imposing a new or more burdensome requirement should start with the text of the published measure of general application that existed prior to the measure allegedly effecting an advance in a rate of duty or imposing a new or more burdensome requirement that replaced it or modified it.⁴⁷⁵ As discussed above, we consider that Article X:2 reflects the principles of transparency and due process and notice. The relevant baseline of comparison for purposes of Article X:2 should be reflected in norms that traders can rely upon and that accordingly create expectations among them. Published measures create expectations among traders, and changes to such measures trigger the due process and notice obligations of Article X:2, which, for this reason, preclude the enforcement of those changes before publication.

4.106. We note, however, that there may be circumstances where the prior measure of general application is either unpublished or there is no measure at all. In the first case, the relevant comparison for the purposes of Article X:2 would need to be conducted with the prior unpublished measure of general application, whose meaning should be ascertained based on its text, as well as other available elements of municipal law, such as practices of administrative agencies, court decisions, writings of recognized scholars, etc. In the second case, the absence of any rate of duty or charge or any requirement, restriction, or prohibition should be the baseline of comparison.

4.107. An interpretation of Article X:2 as requiring a comparison of the new measure with the prior published measure is also consistent with the function of ensuring transparency and protecting traders' expectations under Article X:1, which requires the prompt publication of certain measures of general application so as "to enable governments and traders to become acquainted with them". Until a new measure is published, traders will normally rely on prior measures that have been published and with which they are acquainted. It is a comparison with those measures that should reveal if the new measure effects an advance in a rate of duty or other charge on imports, or imposes a new or more burdensome requirement, thus triggering the obligation in Article X:2.

4.108. We note that, pursuant to the Appellate Body's findings in *US – Carbon Steel*, a determination of the meaning of municipal law entails an examination 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."⁴⁷⁶ While we

⁴⁷³ *United States Code*, Title 19, Chapter 4.

⁴⁷⁴ Panel Report, paras. 7.171-7.186.

⁴⁷⁵ We note that the member of the Panel who wrote a dissenting opinion stated that Article X:2: "... 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.

(Panel Report, para. 7.214)

⁴⁷⁶ Appellate Body Report, *US – Carbon Steel*, para. 157.

consider that the identification of the baseline of comparison in Article X:2 should not be limited to the practice of the administering agency, but, rather, should start with the text of the prior published measure of general application, we nevertheless agree with the Panel that evidence of consistent application of the law by domestic administering agencies, as well as the pronouncements of domestic courts, is relevant to a determination of the meaning of municipal law⁴⁷⁷, particularly where the meaning and content of the municipal law is not evident from the law on its face. Therefore, as we see it, the practice of an administering agency is certainly one of the relevant elements in the determination of the meaning of municipal law, but it cannot constitute, in itself, the baseline of comparison under Article X:2 without regard to the measure on which it is based, as well as other elements such as the consistent interpretation or application of the law in court pronouncements.

4.109. Furthermore, we disagree with the Panel to the extent that it left open the possibility that an unlawful practice of an administering agency could constitute a relevant baseline of comparison under Article X:2.⁴⁷⁸ We do not see how an unlawful practice by an administering agency, which may be overturned by a domestic court decision, could create expectation among traders over and above the published measure of general application with which it fails to comply. Traders cannot be expected to rely on a practice if it conflicts with the published law or with court rulings, as their expectation should be that the law will be correctly applied by the administering agency, or ultimately by a domestic court. In that vein, Article X:3 of the GATT 1994 ensures that judicial, arbitral, or administrative tribunals or procedures are available for traders to challenge administrative actions relating to customs matters.

4.110. In the present case, for the reasons explained above, we consider that the Panel erred in identifying the USDOC's practice of applying countervailing duties to imports from China as an NME country between 2006 and 2012 as the relevant baseline of comparison to determine whether Section 1 increased the rate of duty or imposed a new or more burdensome requirement. Instead of proceeding from the agency practice and then addressing the issue of whether that practice was lawful or not, the Panel should have focused on ascertaining the meaning of the prior published measure of general application, that is, Section 701(a) of the US Tariff Act, in order to determine whether Section 1 (through the new Section 701(f) of the US Tariff Act) increased duties or imposed new or more burdensome requirements as compared to Section 701(a). In ascertaining the meaning of Section 701(a), the Panel should have taken into account all other relevant elements besides its text, including the practice of the USDOC, as well as the relevant judicial decisions on the meaning of Section 701(a), in order to determine the meaning of the US countervailing duty law applicable to NME countries prior to Section 1 of PL 112-99.

4.111. The Panel, however, failed to conduct such an analysis, having determined that the comparison should be conducted between Section 1 and the USDOC's practice of applying countervailing duties to imports from China as an NME country between 2006 and 2012. We have disagreed with this interpretation above. Thus, having established that between 2006 and 2012 the USDOC had a practice of applying countervailing duties to imports from China as an NME country, the Panel erroneously proceeded to determine whether such practice was lawful under the applicable US law, that is, Section 701(a) of the US Tariff Act.

4.112. In addition to alleging that the Panel erred in identifying the baseline of comparison to determine whether the measure at issue effects an advance in a rate of duty or other charge on imports, China claims that the Panel also erred in identifying the point in time when the comparison between the measure at issue and the baseline of prior rates and requirements and restrictions is to be made. According to China, the Panel erred in assuming that the comparison should be made between the measure at issue and the rates, requirements, and restrictions that existed prior to its *enactment* (13 March 2012 for PL 112-99). Given that Article X:2 is concerned with enforcement before publication, China claims that the comparison should be made between the measure at issue and the rates, requirements, and restrictions that existed prior to its *enforcement* (20 November 2006 for PL 112-99).⁴⁷⁹

⁴⁷⁷ Panel Report, para. 7.163.

⁴⁷⁸ Panel Report, para. 7.159.

⁴⁷⁹ China's appellant's submission, para. 51.

4.113. The United States responds that the Panel found that Section 1 of PL 112-99 was not enforced on 20 November 2006 and that no actions were taken by the United States to enforce Section 1 prior to 13 March 2012. Thus, according to the United States, even under China's approach, which is predicated on the date of enforcement as the point in time for comparison, that date would still be 13 March 2012.⁴⁸⁰

4.114. We have concluded above that the baseline of comparison under Article X:2 to determine whether a measure "effects an advance in a rate of duty" is not the practice of the administrative agency as such, but rather the prior published measure of general application as interpreted and applied by the relevant domestic authorities. In the light of this conclusion, we do not deem it necessary to determine a precise point in time for such comparison. If the measure is enforced before publication, the comparison should not be made between the new measure and its pre-publication enforcement, as this would effectively mean to compare the new measure with itself. As we have stated above, the comparison under Article X:2 of the GATT 1994 should always be made between the new measure and the prior published measure that it replaces or modifies.⁴⁸¹

4.2.2.5 The Panel's application of the baseline of comparison to the measure at issue

4.115. Having reversed the Panel's interpretation of Article X:2 of the GATT 1994 in respect of the baseline of comparison for measures of general application effecting an advance in a rate of duty or other charge on imports under an established and uniform practice and for measures of general application imposing a new or more burdensome requirement, restriction, or prohibition on imports, we also reverse the Panel's application of these findings to the measure at issue, that is, Section 1 of PL 112-99.

4.116. In particular, we reverse the Panel's finding that "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" because it "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".⁴⁸²

4.117. We also reverse the Panel's findings 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" and that "Section 701(f), and by extension Section 1, does not impose any 'new' or 'more burdensome' 'requirement' or 'restriction' on imports from China".⁴⁸³

4.118. We, therefore, reverse the Panel's findings, in paragraph 7.191 of the Panel Report, that "China has not established that Section 1 [of PL 112-99] is a provision 'effecting an advance in a rate of duty or other charge on imports under an established and uniform practice'", and in paragraph 7.208 of the Panel Report, that "China has not established that Section 1 [of PL 112-99] is a provision 'imposing a new or more burdensome requirement, restriction or prohibition on imports'".

4.2.3 Conclusions

4.119. In the light of all of the above, we reverse the Panel's findings, in paragraphs 7.209, 7.210.c, 7.211, and 8.1.b.ii of the Panel Report, 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 ha[d] enforced Section 1 before it ha[d] 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'".⁴⁸⁴

⁴⁸⁰ United States' appellee's submission, para. 114.

⁴⁸¹ See *supra*, paras. 4.105-4.107.

⁴⁸² Panel Report, paras. 7.189 and 7.190.

⁴⁸³ Panel Report, para. 7.206.

⁴⁸⁴ Panel Report, para. 8.1.b.ii.

4.120. Having reversed the Panel's interpretation of Article X:2 as requiring a comparison between the measure of general application and an established and uniform practice and the Panel's application of this finding to the measure at issue, we declare moot and of no legal effect: (i) the Panel's finding, in paragraphs 7.185 and 7.186 of the Panel Report, that the USDOC's practice of applying countervailing duties to China as an NME country between 2006 and 2012 was presumptively lawful under US municipal law, as the USDOC's interpretation of US countervailing duty law governed in the absence of a binding judicial determination indicating otherwise; and (ii) the Panel's finding, in paragraph 7.159 of the Panel Report, that it is potentially relevant, and at a minimum not inappropriate, to address the issue of whether the USDOC's practice prior to enactment of Section 1 of PL 112-99 was lawful under US municipal law, for purposes of an analysis under Article X:2 of the GATT 1994.

4.3 Article 11 of the DSU

4.121. China argues that the Panel failed to conduct an objective assessment of the matter as required by Article 11 of the DSU in concluding, in paragraphs 7.158-7.186 of the Panel Report, that the USDOC's practice should be regarded as "presumptively lawful" and, thus, requests us to reverse these findings. China puts forward three main arguments in support of its claim under Article 11 of the DSU. First, China argues that the Panel did not apply the standard set out by the Appellate Body for determining the meaning of municipal law.⁴⁸⁵ According to China, the Panel should have examined "the relevant provisions of the Tariff Act, including the text of Section 1 of P.L. 112-99 in relation to the prior version of the Tariff Act that it amended".⁴⁸⁶ China contends that "[t]he Panel majority's failure to examine the text of the relevant legal instruments would clearly be material to the validity and objectivity of its findings".⁴⁸⁷ Second, China argues that the Panel acted inconsistently under Article 11 in concluding that an agency's "practice or interpretation" is "presumptively lawful" unless and until a domestic court issues a final, non-appealable order directing the agency to cease that practice or interpretation. In China's view, this "presumption", which "finds no support in prior Appellate Body reports" and which "prior panels have properly rejected"⁴⁸⁸, would amount to giving deference to a WTO Member's characterization of its municipal law. Finally, China contends that "[t]he Panel majority's rule of 'presumptive lawfulness' amounted to a reversal of the burden of proof, [as it] absolv[ed] the United States of its obligation to rebut the *prima facie* case that China had established."⁴⁸⁹

4.122. We understand China's claim under Article 11 as being linked to the Panel's approach in the *application* of Article X:2 of the GATT 1994 to the measure at issue. We have already found above that the Panel erred in its *application* of Article X:2 to the measure at issue due to its erroneous interpretation of the relevant baseline of comparison under this provision. Moreover, we have mooted the Panel's findings that: (i) the USDOC's practice of applying countervailing duties to China as an NME country between 2006 and 2012 was "presumptively lawful" under US law, as the USDOC's interpretation of US countervailing duty law governs in the absence of a binding judicial determination indicating otherwise; and (ii) it is potentially relevant, and at a minimum not inappropriate, to address the issue of whether the USDOC's practice prior to the enactment of Section 1 was lawful under US law, for purposes of an analysis under Article X:2. Consequently, China's claim under Article 11 of the DSU addresses issues that we have already dealt with in reviewing the Panel's interpretation and application of Article X:2 of the GATT 1994. As we have reversed the Panel's findings regarding its interpretation and application of Article X:2, and we have declared moot and of no legal effect the Panel's findings regarding the lawfulness of the USDOC's practice in the context of the analysis under Article X:2 of the GATT 1994, we do not consider it necessary to examine further China's claim under Article 11 of the DSU.

⁴⁸⁵ China's appellant's submission, para. 93 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157).

⁴⁸⁶ China's appellant's submission, para. 94.

⁴⁸⁷ China's appellant's submission, para. 94.

⁴⁸⁸ China's appellant's submission, para. 95 (referring to Panel Reports, *US – 1916 Act (EC)*, para. 6.51; and *EC – Trademarks and Geographical Indications (Australia)*, para. 7.106).

⁴⁸⁹ China's appellant's submission, para. 97.

4.4 Completion of the analysis under Article X:2 of the GATT 1994

4.123. Having reversed the Panel's interpretation and application of Article X:2 of the GATT 1994, we turn next to consider whether we are in a position to complete the analysis in order to determine whether Section 1 of PL 112-99 effects "an advance in a rate of duty or other charge on imports" or imposes "a new or more burdensome requirement [or] restriction" within the meaning of this provision, as China requests us to do. We recall that, in order to make such a determination of a measure of general application, it is necessary to conduct a comparison with the prior published measure of general application that the new measure replaces or modifies.⁴⁹⁰ In order to do so, it is necessary to ascertain the meaning of the relevant municipal law. We also recall that, pursuant to the Appellate Body's findings in *US – Carbon Steel*, the assessment of the meaning of municipal law entails an examination 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".⁴⁹¹ Accordingly, in our analysis below, we examine the elements mentioned in *US – Carbon Steel* that are relevant in this dispute for purposes of conducting the comparison required by Article X:2 between the measure at issue (i.e. Section 1 of PL 112-99) and the US countervailing duty law applicable prior to Section 1. In other words, we examine whether the US countervailing duty law was *changed* by Section 1 and thereby effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement. As our examination of these elements seeks to ascertain the meaning of municipal law in the context of reviewing the consistency of Section 1 of PL 112-99 with Article X:2 of GATT 1994, we consider this exercise to be a legal characterization issue subject to appellate review. However, to the extent that this analysis involves examining factual elements, we are mindful that we would need to rely on findings by the Panel or undisputed facts on the Panel record in doing so.

4.124. At the outset, we note that on a number of occasions the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.⁴⁹² We begin by describing the considerations that have informed the Appellate Body's decisions in previous disputes regarding completion of the analysis. The Appellate Body has completed the analysis when sufficient factual findings by the panel and undisputed facts on the panel record allowed it to do so.⁴⁹³ The Appellate Body has not completed the analysis in situations where the factual findings by the panel and undisputed facts on the panel record were insufficient for the Appellate Body to conduct its own analysis.⁴⁹⁴ Other reasons that have prevented the Appellate Body from completing the analysis include "the complexity of the issues, the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights".⁴⁹⁵ The Appellate Body has also declined to complete the analysis "in circumstances where that would involve addressing claims 'which the panel had not examined at all'".⁴⁹⁶

⁴⁹⁰ See section 4.2 of this Report.

⁴⁹¹ Appellate Body Report, *US – Carbon Steel*, para. 157.

⁴⁹² See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-136; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

⁴⁹³ See e.g. Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *EC – Poultry*, para. 156; *EC – Hormones*, para. 222; *US – Shrimp*, paras. 123 and 124; *Japan – Agricultural Products II*, para. 112; *US – FSC*, para. 133; *Australia – Salmon*, paras. 117 and 118; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2nd complaint)*, paras. 1272-1274.

⁴⁹⁴ See e.g. Appellate Body Reports, *EC – Hormones*, para. 251; *Korea – Dairy*, paras. 92 and 102; *Canada – Autos*, paras. 133 and 145; *US – Hot-Rolled Steel*, paras. 180 and 236; *US – Softwood Lumber IV*, para. 118; *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 157 and 161; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 219 and 220; *US – Upland Cotton*, para. 693; *US – Zeroing (EC)*, paras. 228 and 243; *EC – Selected Customs Matters*, para. 286; *US – Continued Zeroing*, para. 194; *US – Anti-Dumping and Countervailing Duties (China)*, para. 537; *EC and certain member States – Large Civil Aircraft*, paras. 736, 990, and 993; and *US – COOL*, para. 481.

⁴⁹⁵ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339).

⁴⁹⁶ Appellate Body Reports, *EC – Seal Products*, para. 5.63 (quoting Appellate Body Report, *EC – Asbestos*, para.79).

4.125. In its request to complete the analysis and find that Section 1 of PL 112-99 is inconsistent with Article X:2 of the GATT 1994, China asks, in particular, that we examine whether Section 1 brought about any of the situations described in Article X:2 in relation to prior US municipal law, as set forth in the published measures of general application.⁴⁹⁷ According to China, the completion analysis would require us to examine the text of the measure at issue – Section 1 of PL 112-99 – in relation to the rates of duty, requirements, and restrictions that were previously applicable under US law as set forth in published measures of general application. For China, this is the baseline of prior municipal law that we should use.⁴⁹⁸ China argues that the above-mentioned textual elements of PL 112-99 are more than sufficient to establish a *prima facie* case that Section 1 has the types of effects described in Article X:2. In addition, China argues that its *prima facie* case based on the text of the relevant legal instruments is confirmed by other sources of municipal law, including the consistent application of those instruments and the pronouncements of domestic courts. The United States contends that the meaning of US countervailing duty law as it applied to NME countries prior to Section 1 cannot be determined on the face of Section 1 of PL 112-99 and Section 701(a) of the US Tariff Act alone, but must also take into account the other elements of the relevant US countervailing duty law and practice. According to the United States, in assessing whether to complete the analysis, we would have to address and take into account these other elements.⁴⁹⁹

4.126. We have disagreed above with the Panel that the baseline of comparison under Article X:2 is "an established and uniform practice" and, in the case at hand, the USDOC's practice of applying countervailing duties to NME countries between 2006 and 2012. We have also considered that the relevant baseline under Article X:2 is the prior published measure of general application creating expectations among traders⁵⁰⁰, which in the present case is the United States' countervailing duty law applicable prior to Section 1 of PL 112-99, that is, Section 701(a) of the US Tariff Act, as interpreted by US courts and interpreted and applied by the USDOC. Section 701(a) states in relevant part:

[I]f the administering authority determines that the government of a country ... is providing, directly or indirectly, a countervailable subsidy ... and an industry is materially injured ... by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty...⁵⁰¹

4.127. As we have considered above, the Appellate Body has established that an assessment of the scope and meaning of municipal law generally comprises the following elements:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. 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. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.⁵⁰²

⁴⁹⁷ China's appellant's submission, para. 101.

⁴⁹⁸ In China's view, the completion analysis requires "a determination as to the meaning of US municipal law prior to the enforcement of Section 1 as of 20 November 2006". (China's appellant's submission, para. 72) China points out, however, that the undisputed facts in the Panel record lead to the same result whether the comparison is made as of the date on which Section 1 was enforced (20 November 2006), or as of the date on which it was enacted and officially published (13 March 2012). (Ibid., para. 100)

⁴⁹⁹ United States' response to questioning at the oral hearing; United States' appellee's submission, paras. 146-201.

⁵⁰⁰ See section 4.2 of this Report.

⁵⁰¹ See Panel Report, fn 249 to para. 7.162 (quoting United States' response to Panel question No. 64(a); and Panel Exhibit USA-119, comprising a table setting out the Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China). (emphasis omitted)

⁵⁰² Appellate Body Report, *US – Carbon Steel*, para. 157. (fn omitted)

4.128. In the light of these considerations, our assessment below is divided in several parts. First, we examine the text of the measure at issue, Section 1 of PL 112-99, as well as the text of Section 701(a) of the US Tariff Act. Next, we assess other elements of US countervailing duty law that are relevant to the present case, including judicial decisions by US courts and the practice of the USDOC in applying countervailing duties to imports from NME countries. Based on a holistic examination, we then assess whether we can reach a conclusion on whether Section 1 effected an advance in a rate of duty or imposed a new or more burdensome requirement or restriction within the meaning of Article X:2 of the GATT 1994, as compared to the US countervailing duty law applicable prior to Section 1.

4.129. We note that, although the Panel refrained from explicitly making findings regarding the nature and content of Section 701(a), the Panel did examine relevant aspects of the meaning of the US countervailing duty law prior to Section 1 in determining whether the USDOC's practice of applying countervailing duties to imports from NME countries was lawful. Despite the fact that these findings by the Panel were made following an erroneous interpretation of Article X:2, we examine below to what extent some of them are not tainted by that error and thus useful in our comparison of Section 1 and Section 701(a) with a view to determining whether the new measure effected an advance in a rate of duty or imposed a new or more burdensome requirement or restriction. Therefore, in our analysis below, we consider it appropriate to rely on certain findings by the Panel that examined relevant aspects of the US countervailing duty law prior to Section 1.

4.130. In respect of the US legislation at issue, the comparison called for by Article X:2 requires determining the meaning of both Section 1 and Section 701(a). We start our analysis with the text of Section 1, given that China contends that the question of whether Section 1 effected an advance or imposed a new or more burdensome requirement must begin with an examination of the text of that legal instrument.⁵⁰³ The United States enacted PL 112-99 on 13 March 2012. This law is entitled "An Act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes". As mentioned above, Section 1 of PL 112-99 is the measure at issue with respect to China's claims under Article X:2 of the GATT 1994.⁵⁰⁴ The text of Section 1 of PL 112-99 is reproduced in full below:

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—

⁵⁰³ China's appellant's submission, paras. 72 and 101.

⁵⁰⁴ Panel Report, para. 7.10.

(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).

4.131. There are several aspects of Section 1 that we consider important. First, the introductory clause of subparagraph (a) of Section 1 states that Section 701 of the US Tariff Act is amended by adding a new subsection (f). Thus, subparagraph (a) of Section 1 sets out what has become an integral part of the US countervailing duty law in the form of Section 701(f) of the US Tariff Act.⁵⁰⁵ Second, the new Section 701(f) of the US Tariff Act relates to the applicability of US countervailing duty provisions to imports from NME countries. In addition, Section 1 explicitly specifies that the merchandise on which countervailing duties shall be imposed under Section 701(a) of the US Tariff Act includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States from an NME country. Finally, the new Section 701(f) provides that a countervailing duty is not required to be imposed under subsection (a) in cases where the administering authority (the 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 essentially comprised of a single entity".

4.132. Although certain aspects of the new section mentioned above could be read as suggesting that the US countervailing duty law did *not* previously apply to imports from NME countries, the United States has introduced considerable arguments in support of the opposite view. In essence, the United States argues that Section 1 only *clarified* that imports from NME countries are subject to Section 701(a), which, in its view, already required the imposition of countervailing duties on imports from NME countries provided that a countervailable subsidy could be identified. China, to the contrary, asserts that the text of Section 1 suffices to establish that Section 1 *changed* the US countervailing duty law by introducing a provision that subjects imports of NME countries to countervailing duty proceedings. As indicated above, the analysis under Article X:2 requires a comparison between Section 1 and the US countervailing duty law applicable prior to Section 1. Thus, we do not consider it appropriate to reach any conclusions as to the nature and effect of Section 1 on the basis of Section 1 alone. Rather, we are called to examine also the text of Section 701(a) and other elements of US municipal law prior to Section 1 in order to determine whether Section 1 changed or merely clarified the law and is thus inconsistent or consistent with Article X:2 of the GATT 1994. We examine below the participants' arguments in relation to each of the relevant elements of US countervailing duty law.

4.133. We begin with the text of Section 701(a) of the US Tariff Act. We recall that China's position is that the relevant inquiry to determine whether the measure at issue effected an advance in a rate of duty or imposed a new or more burdensome requirement under Article X:2 involves "an examination of the text of Section 1 in relation to the text of the prior law that it amends".⁵⁰⁶ We recall that Section 701(a) states that, "if the administering authority determines that the government of a country ... is providing, directly or indirectly, a countervailable subsidy ... and an industry is materially injured ... by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty".⁵⁰⁷

4.134. Several aspects of Section 701(a) are relevant to our analysis. First, this legal instrument does *not* refer explicitly to NME countries. Section 701(a) simply refers to "a country", without making any distinction as to the type of economy prevailing in that country for it to be subject to US countervailing duty law. NME countries are *not* excluded from the scope of the term "country"

⁵⁰⁵ We note that the language used in Section 701(f) of the US Tariff Act is identical to the language used in subparagraph (a) of Section 1 of PL 112-99, setting out the new Section 701(f).

⁵⁰⁶ China's appellant's submission, para. 101.

⁵⁰⁷ See Panel Report, fn 249 to para. 7.162 (quoting United States' response to Panel question No. 64(a); and Panel Exhibit USA-119, comprising a table setting out the Administrative Notice to the Government of China and to Chinese Producers/Exporters Regarding Application of U.S. CVD Laws to China). (emphasis omitted)

and thus could be deemed to be covered by Section 701(a). Second, the use of the language "shall be imposed" suggests that Section 701(a) establishes in mandatory fashion that the administering agency (i.e. the USDOC) impose countervailing duties if certain conditions are met. This would seem to be in line with the United States' position that, under the US countervailing duty law applicable prior to Section 1, the USDOC was bound to impose countervailing duties to imports from any country whenever the existence of a countervailable subsidy could be established.⁵⁰⁸ Third, the use of the conjunction "if" supports the view that this mandatory requirement is conditional upon the USDOC's determination that the government of a country is providing a countervailable subsidy (i.e. that a countervailable subsidy exists). We consider that the use of the conjunction "if" in Section 701(a) could mean, on the one hand, that the application of countervailing duties to any country, including NME countries, is mandatory if certain conditions are met, as the United States contends. On the other hand, the word "if" could also be read as indicating that the USDOC has the discretion to decide whether to apply the countervailing duty law to imports from an NME country by determining whether a countervailable subsidy exists, or to refrain from doing so.

4.135. Our analysis above suggests that the question of whether Section 1 created or confirmed the USDOC's authority to apply countervailing duties to NME countries *cannot* be answered by merely examining the text of Section 1 and Section 701(a) alone. As indicated, although the title and some aspects of the text of Section 1 suggest that US countervailing duty law did *not* previously apply to imports from NME countries, the text and scope of Section 701(a) does not explicitly exclude NME countries from the scope of application of US countervailing duty law. Rather, Section 701(a) applies to imports from *any* "country" where the USDOC determines the existence of a countervailable subsidy. Consequently, our analysis of the text of Section 701(a) and Section 1 alone cannot resolve the issue of whether Section 1 created the USDOC's authority to impose countervailing duties on imports from NME countries or merely confirmed what Section 701(a) already required – i.e. the imposition of countervailing duties on imports from NME countries, subject to a positive determination of the existence of a subsidy.

4.136. In line with our observations regarding the text of the two legal instruments, we note that the parties raised conflicting arguments as to the outcome of the comparison between Section 1 of PL 112-99 and Section 701(a) of the US Tariff Act before the Panel and now on appeal.⁵⁰⁹ The Panel indicated 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."⁵¹⁰ Indeed, China asserts on appeal that the US Tariff Act "did not previously provide for the application of countervailing duties to imports from [NME] countries".⁵¹¹ The United States counters that China's assertion is erroneous and is contradicted by the plain text of Section 701(a), which states that "every 'country' exporting merchandise to the United States is subject to the CVD law, with no exceptions".⁵¹²

4.137. China's position is that "[b]y providing that countervailing duties 'shall be imposed' on imports from [NME] countries ... [Section 1] plainly indicates that subsection 701(a) previously did not apply to imports from [NME] countries".⁵¹³ China further asserts that the express retroactive date in Section 1 is conclusive in that "[t]he only conceivable purpose for making a statutory amendment retroactive is to change the law as it existed in the past".⁵¹⁴ We note, however, that China does not directly refer to the text of Section 701(a) in order to determine the meaning of that instrument, but rather seeks to draw inferences from the text of Section 1 as to the meaning that may be ascribed to Section 701(a).

⁵⁰⁸ As indicated above, under US countervailing duty law, certain conditions must be fulfilled for the imposition of countervailing duties, including, *inter alia*, the existence of a countervailable subsidy, material injury to the domestic industry, and a causal link between the countervailable subsidy and the injury. In this Report, when we refer to the imposition of countervailing duties once a countervailable subsidy has been found to exist, we understand that these conditions have been met.

⁵⁰⁹ We note that Section 701(a) of the US Tariff Act is still an integral part of the US countervailing duty law.

⁵¹⁰ Panel Report, fn 251 to para. 7.162.

⁵¹¹ China's appellant's submission, para. 104.

⁵¹² United States' appellee's submission, para. 150.

⁵¹³ China's appellant's submission, para. 105.

⁵¹⁴ China's appellant's submission, para. 109.

4.138. Conversely, the United States contends that, by enacting PL 112-99, the US Congress sought to clarify and confirm the applicability of the countervailing duty law to imports from NME countries in an attempt to resolve the uncertainty or ambiguity created, partly by the 2011 decision of the United States Court of Appeals for the Federal Circuit (CAFC) in the *GPX International Tire Corporation* case⁵¹⁵ (*GPX V*).⁵¹⁶ The United States further argues that, in establishing that countervailing duties "shall be imposed", Section 1 did not change the state of prior US countervailing duty law. The United States argues to the contrary that the same language is found in Section 701(a) of the US Tariff Act with respect to the requirement to apply countervailing duties to subsidized imports from any "country". In essence, the United States argues that the USDOC was required, before and after Section 1 came into existence, to apply countervailing duties to imports from NME countries provided that a countervailable subsidy could be identified, and thus no change within the meaning of Article X:2 occurred.

4.139. Before the Panel, the participants presented considerable arguments and evidence, including opinions of legal experts, addressing the issue of whether Section 1 *clarified* or *changed* Section 701(a) with respect to the applicability of countervailing duty law to imports from NME countries. The first opinion of China's legal expert noted that, in enacting legislation, the US Congress usually changes the law, and then examined several criteria identified by US courts when determining whether a given legislation could be considered as a "clarification" of a pre-existing law – e.g. whether this is indicated in the relevant statute, including in its title, or in that statute's legislative history.⁵¹⁷ China's expert opinion concluded that these criteria were not present when PL 112-99 was enacted. The United States, in turn, also submitted an opinion of a legal expert who disagreed with the conclusion of China's expert that the US Congress "changed the applicable law" when it enacted Section 1. The United States' legal expert asserted that, "[a]lthough the [CAFC's] initial, non-final decision in *GPX V* threatened to unsettle the law, in the end nothing changed. The law as it existed after the [CAFC rendered its decisions in] *GPX V* and *GPX VI* ... remains clear: The [USDOC] had and still has the authority to apply the countervailing duty provisions of the Tariff Act of 1930 to imports from China".⁵¹⁸ Subsequently, China submitted a supplemental opinion of its legal expert contending that the United States' expert opinion "includes no reference to or analysis of prior cases laying out the criteria for identifying statutes that aim merely to clarify preexisting law and not to change it".⁵¹⁹

4.140. We observe that, in addressing the question of whether Section 1 *clarified* what was already required under the previous US countervailing duty law or *changed* it, the Panel indicated that "it [was] not necessary to address, let alone to try to resolve, this issue which is still being litigated before United States courts."⁵²⁰ In the Panel's view, none of the participants considered the "change" versus "clarification" argument to be material for the analysis under Article X:2 of the GATT 1994. In our view, this statement of the Panel may have, in major part, resulted from its erroneous interpretation of the baseline of comparison under Article X:2, which it found was the USDOC's post-2006 practice. However, under the correct interpretation of the baseline of comparison under Article X:2, and given the significant amount of argumentation devoted by the participants to this issue, we disagree with the Panel that this issue was not material for purposes of the comparison contemplated under Article X:2. Rather, it is clear to us that answering the question of whether the US countervailing duty law applicable prior to Section 1 already provided authority to the USDOC to apply countervailing duties to imports from NME countries or that Section 1 created such authority is necessary for the baseline of comparison contemplated under the correct interpretation of Article X:2.

4.141. In sum, our analysis of the text of both Section 1 and Section 701(a) suggests that the disagreement between the parties on whether Section 1 changed the prior law and introduced for the first time the authority of the USDOC to apply countervailing duty law to NME countries *cannot*

⁵¹⁵ United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (Panel Exhibit CHI-6).

⁵¹⁶ United States' appellee's submission, para. 183.

⁵¹⁷ Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), paras. 42 and 44.

⁵¹⁸ Legal Opinion of John C. Jeffries, Jr, Professor of Law, University of Virginia, in response to Legal Opinion of Richard H. Fallon, Jr (Panel Exhibit USA-115), para. 29.

⁵¹⁹ Supplemental Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-124), para. 22.

⁵²⁰ Panel Report, para. 7.184. (fn omitted)

be answered by merely examining the text of the two legal instruments. For instance, the conjunction "if" in Section 701(a), when read together with "shall be imposed", could mean, on the one hand, that the application of countervailing duties to any country, including NME countries, is mandatory if certain conditions are met. On the other hand, the use of the conjunction "if" could also be read as indicating that the USDOC has the discretion to decide whether to apply the countervailing duty law to imports from an NME country by determining whether a countervailable subsidy exists, or to refrain from doing so. The texts of the relevant legal instruments therefore do not permit reaching a definitive conclusion as to whether Section 701(a) required or prohibited the USDOC to impose countervailing duties on imports from NME countries.⁵²¹ Thus, further examination of other elements related to the application of US countervailing duty law beyond the text of Section 1 and the text of Section 701(a) is required.⁵²²

4.142. We note that the participants introduced before the Panel considerable argumentation regarding the application of Section 701(a) by the USDOC, as well as judgments rendered by US courts regarding the USDOC's application of countervailing duty law to NME countries, including China. We turn next to examine these elements of municipal law in chronological order, addressing the participant's arguments with respect to each of them. We begin our review with the Panel's analysis of the CAFC's decision in *Georgetown Steel Corporation v. United States*⁵²³ (*Georgetown Steel*). We then turn to examine the USDOC's practice before and after 2006, the year when the USDOC initiated the first countervailing duty investigation with respect to imports from China during the 2006-2012 period.⁵²⁴ Next, we address certain judicial pronouncements, including the decisions of the US Court of International Trade (CIT) in coated free sheet paper from China⁵²⁵ (*CFS Paper*), *GPX I*⁵²⁶, and *GPX II*⁵²⁷, and the CAFC's decisions in *GPX V*⁵²⁸ and *GPX VI*.⁵²⁹

4.143. We begin with the CAFC's decision issued in 1986 in *Georgetown Steel*. According to the Panel, in that ruling, "the CAFC upheld USDOC's decision not to apply CVD measures to NME countries".⁵³⁰ The parties "agree[d] that this decision was a final, unappealed decision, and was governing and controlling under United States law".⁵³¹ Importantly, however, the Panel pointed out that:

... the scope of the CAFC holding in *Georgetown Steel* was the subject of disagreement in the United States throughout the period 2006-2012, and that disagreement was not resolved prior to the enactment of Section 1 by any decision of a United States court that was final, non-appealable, and governing and controlling under United States law.⁵³²

⁵²¹ We note that the findings by the Panel regarding the United States' "clarification" argument versus China's "change" argument are very limited due to the Panel's erroneous reliance on the USDOC's "established and uniform practice" as the relevant baseline of comparison under Article X:2.

⁵²² Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

⁵²³ United States Court of Appeals for the Federal Circuit, *Georgetown Steel Corporation v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (Panel Exhibit CHI-2).

⁵²⁴ We recall that, "between November 2006 and March 2012, USDOC initiated 33 investigations and reviews in respect of imports from China under United States CVD law". (Panel Report, para. 7.169) We note that, "pursuant to Section 1(b) [of PL 112-99], 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." (*Ibid.*, para. 7.72)

⁵²⁵ United States Court of International Trade, *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274 (CIT 2007) (Panel Exhibit USA-28).

⁵²⁶ United States Court of International Trade, *GPX International Tire Corporation v. United States*, 587 F. Supp. 2d 1278 (CIT 2008) (Panel Exhibit USA-93).

⁵²⁷ United States Court of International Trade, *GPX International Tire Corporation v. United States*, 645 F. Supp. 2d 1231 (CIT 2009) (Panel Exhibit CHI-3).

⁵²⁸ United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (Panel Exhibit CHI-6).

⁵²⁹ United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) (Panel Exhibit CHI-7).

⁵³⁰ Panel Report, para. 7.174 (referring to *Georgetown Steel*).

⁵³¹ Panel Report, para. 7.174 (referring to parties' responses to Panel question No. 51).

⁵³² Panel Report, para. 7.174. (fn omitted)

4.144. We observe that the Panel refrained from making an explicit finding regarding its own understanding of the holding in *Georgetown Steel* and only indirectly addressed this issue by referring to the USDOC's understanding of the holding in that decision. In particular, the Panel indicated that, "[t]hroughout [the 2006-2012] 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."⁵³³ The Panel also held that "the CIT ... concluded on at least three occasions that the holding in *Georgetown Steel* was at the very least 'ambiguous'".⁵³⁴

4.145. We note that the holding in *Georgetown Steel* appears to be one of the most contested aspects of this dispute before the Panel and now on appeal. According to China, in the *Georgetown Steel* decision, the CAFC reviewed the history and purpose of the US trade remedy law and concluded that the countervailing duty provisions of US law do not permit the imposition of countervailing duties on imports from NME countries. In China's view, the CAFC agreed with the USDOC's position at that time that, in an NME country, the government is incapable of conferring subsidies in the sense of US countervailing duty law.⁵³⁵ In essence, China understands the *Georgetown Steel* decision as precluding the imposition of countervailing duties on imports from NME countries. On that basis, China submits that Section 1 should be considered as having effected a change in US countervailing duty law for purposes of the comparison contemplated under Article X:2.

4.146. The United States fundamentally disagrees with China's assertion that the CAFC's decision in *Georgetown Steel* stands for "the conclusion that the U.S. CVD law does not apply to NME countries as a matter of statutory interpretation."⁵³⁶ The United States argues to the contrary that the CAFC decision "affirmed [the USDOC's] interpretation and decision to not apply the U.S. CVD law to certain Soviet-style centrally planned economies".⁵³⁷ According to the United States, "[b]ecause the U.S. CVD law mandated that CVDs 'shall be applied' to subsidized imports, the exception invoked by [the USDOC] was limited to those situations in which it was impossible to apply the law when a subsidy could not be identified in the case before it."⁵³⁸ In essence, the United States reads *Georgetown Steel* as mandating the imposition of countervailing duties on imports from NME countries provided that it is factually possible to identify the existence of a countervailable subsidy within an NME country. According to the United States, Section 1 merely confirmed that the USDOC is required to impose countervailing duties whenever a countervailable subsidy can be identified. In the United States' view, Section 1 also clarified that the USDOC is not required to impose countervailing duties in situations where it cannot identify the existence of a countervailable subsidy by introducing the "single entity" exception that Section 1 codifies.⁵³⁹ Either way, the United States contends that Section 1 did not change prior law as reflected in *Georgetown Steel* in a manner inconsistent with Article X:2.

4.147. Although both participants accept that the CAFC's decision in *Georgetown Steel* was "a final, unappealed decision, and was governing and controlling under United States law"⁵⁴⁰, they hold divergent views as to the meaning of that decision. We note that the participants have relied on different passages found in the *Georgetown Steel* decision in support of their respective positions. For instance, in that decision, the CAFC stated that "recent actions of Congress in dealing with the problem of exports by [NMEs] ... indicate that Congress intended that any selling by [NMEs] 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."⁵⁴¹ The CAFC also stated that "[i]f [the] remedy [provided under the antidumping law] is inadequate to protect the American industry from such foreign competition ... it is up to Congress to provide any additional remedies it

⁵³³ Panel Report, para. 7.174. (emphasis added)

⁵³⁴ Panel Report, para. 7.177.

⁵³⁵ China's appellant's submission, para. 137.

⁵³⁶ United States' appellee's submission, para. 158 (referring to China's appellant's submission para. 137).

⁵³⁷ United States' appellee's submission, para. 157.

⁵³⁸ United States' appellee's submission, para. 156.

⁵³⁹ United States' appellee's submission, para. 185.

⁵⁴⁰ Panel Report, para. 7.174 (referring to parties' responses to Panel question No. 51).

⁵⁴¹ *Georgetown Steel*, p. 1316.

deems appropriate."⁵⁴² This language is relied upon by China in support of its position, as it appears to suggest that the CAFC found no authority at all under US countervailing duty law to impose such duties on imports from NME countries.⁵⁴³ Thus, according to China, the USDOC was precluded from imposing countervailing duties on imports from NME countries prior to Section 1.

4.148. However, in the same decision, the CAFC also stated in a concluding section that:

... the agency administering the countervailing duty law has broad discretion in determining the existence of [countervailable subsidies] under that law. We cannot say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not [countervailable subsidies] under Section 303 was unreasonable, not in accordance with law or an abuse of discretion.⁵⁴⁴

This latter statement by the CAFC in *Georgetown Steel*, which is relied upon by the United States⁵⁴⁵, appears to support the position that the CAFC found US countervailing duty law to be applicable to imports from NME countries provided that the USDOC was able to identify the existence of a countervailable subsidy.⁵⁴⁶ On that basis, the United States argues that the USDOC's discretion mentioned in the CAFC's decision was limited to making the factual determination as to whether or not a subsidy could be identified. Subject to that caveat, the United States asserts that the CAFC's decision in *Georgetown Steel* stands for the proposition that the USDOC was already required to apply the countervailing duty law to imports from NME countries prior to Section 1.

4.149. In the light of the above, we observe that the CAFC's decision in *Georgetown Steel* contains at least two passages relevant to this issue, one of which could be read as supporting the view that Section 1 *changed* the previously applicable US countervailing duty law, and the other could be read as suggesting that it *clarified* what the US countervailing duty law already required. On the one hand, the CAFC's statement that "[t]here is no indication ... that Congress intended or understood that the countervailing duty law also would apply"⁵⁴⁷ to imports from NME countries seems to support the view that the countervailing duty law was not applicable to imports from NME countries prior to Section 1. On the basis of this statement in *Georgetown Steel*, China argues that Section 1 should be read as having *changed* that legal situation. On the other hand, the CAFC's statement that "the agency administering the countervailing duty law has broad discretion in determining the existence of [countervailable subsidies]" would appear to suggest that the US countervailing duty law was already applicable to imports from NME countries if it was possible to identify a countervailable subsidy. On the basis of this line of argument, the United States asserts that Section 1 should be read as only having *clarified* what the previously applicable US countervailing duty law already required. These apparently divergent statements by the CAFC in *Georgetown Steel* are used as a basis for diametrically opposing arguments put forward by the participants regarding the comparison required by Article X:2.

4.150. We recall that the Panel did not make any findings in its Report addressing these divergent readings of the *Georgetown Steel* decision. We consider that the Panel should have engaged in an inquiry to determine the scope and meaning of the holding of that decision. This inquiry was necessary to ascertain, through the relevant judicial pronouncement, the meaning of US countervailing duty law with respect to whether the USDOC was required to, or precluded from applying the US countervailing duty law to imports from NME countries prior to Section 1. We note that the Panel record contains the USDOC's countervailing duty determinations regarding carbon

⁵⁴² *Georgetown Steel*, p. 1318.

⁵⁴³ See China's appellant's submission, paras. 137-140.

⁵⁴⁴ *Georgetown Steel*, p. 1318. We note that, at the time of the *Georgetown Steel* decision, the US countervailing duty law was codified in Section 303 instead of Section 701(a). We further point out that, at that time, the US countervailing duty law referred to "bounties or grants" instead of "countervailable subsidies". The term "countervailable subsidies" was only introduced in the US legal system by the Uruguay Round Agreements Act. (United States' appellee's submission, para. 164) For purposes of simplicity, we have replaced the term "bounties or grants" in the *Georgetown Steel* decision with "countervailable subsidies".

⁵⁴⁵ See United States' appellee's submission, paras. 156-158.

⁵⁴⁶ We note that we address below the manner in which the USDOC and the CAFC read the *Georgetown Steel* decision.

⁵⁴⁷ *Georgetown Steel*, p. 1316.

steel wire rod from Poland⁵⁴⁸ and Czechoslovakia⁵⁴⁹ that underlie the CAFC's decision in *Georgetown Steel*. We will address these determinations below. At this juncture, however, we emphasize that the Panel should have analysed in its Report the USDOC's negative determinations in these underlying countervailing duty investigations, with a view to elucidating the scope and meaning of the holding in the CAFC's decision in *Georgetown Steel*. In sum, although the CAFC's decision was eventually an endorsement of these negative determinations made by the USDOC, given the Panel's failure to examine the divergent readings of the *Georgetown Steel* decision and the underlying determinations by the USDOC, we are not in a position now on appeal to draw conclusive guidance from the *Georgetown Steel* decision for the purposes of determining whether Section 1 *changed* or *clarified* the pre-existing countervailing duty law applicable to NME countries.

4.151. We turn next to examine the practice of the USDOC regarding the imposition of countervailing duties on imports from NME countries. China argues that the USDOC's application of the US countervailing duty law prior to 2006 demonstrates that, before the enactment of Section 1, such law did not authorize the imposition of countervailing duties to imports from NME countries.⁵⁵⁰ In particular, China refers to the 1998 countervailing duty regulations promulgated by the USDOC and to the 2002 determination in Sulfanilic Acid from Hungary⁵⁵¹ (*Sulfanilic Acid*) to establish that the USDOC considered that imports from NME countries were not subject to the application of countervailing duties under US law. The United States counters that the USDOC "did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because [the USDOC] continued to consider that the structure of the NME countries of the time made it impossible to identify countervailable subsidies".⁵⁵² According to the United States, the USDOC eventually came to reassess the nature of certain NME countries when determining whether it was possible to identify the existence of subsidies within those economies.⁵⁵³ The United States indicates that, in the case of China, this reassessment took place in the context of the *CFS Paper* investigation, where the USDOC 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".⁵⁵⁴

4.152. At the outset of our analysis of the USDOC's practice, we note that the USDOC is "the primary agency administering the United States Tariff Act of 1930".⁵⁵⁵ We examine the USDOC's practice in order to ascertain whether or not US countervailing duty law applicable prior to Section 1 provided authority to the USDOC to impose countervailing duties on imports from NME countries and required such imposition whenever a countervailable subsidy could be identified. We note that any conclusion that we may be able to reach on the basis of the USDOC's practice would have to take into account the entire period of time since only the "consistent" application of the law may be helpful in ascertaining the meaning of municipal law. In line with the Appellate Body's guidance in *US – Carbon Steel*, an examination of the period spanning at least from the 1984 negative countervailing duty determinations by the USDOC with respect to carbon steel wire rod from Poland and Czechoslovakia to the enactment of Section 1 in 2012 will allow us to examine the *consistency* of the USDOC's practice in applying the relevant US countervailing

⁵⁴⁸ USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19374 (Panel Exhibit USA-10).

⁵⁴⁹ USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19370-19374 (Panel Exhibit USA-7).

⁵⁵⁰ China's appellant's submission, para. 147.

⁵⁵¹ See Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary" (Panel Exhibit CHI-15), pp. 13-15.

⁵⁵² United States' appellee's submission, para. 165. We note that the United States further argues that, "[i]n certain instances following *Georgetown Steel*, [the USDOC] described in shorthand terms the holding of *Georgetown Steel* as being that the CVD law did not apply to exports from NME countries." According to the United States, the use of this shorthand term "explains the references in the preamble to [the 1998 countervailing duty] regulations and a determination involving sulfanilic acid from Hungary cited by China". (Ibid.)

⁵⁵³ United States' appellee's submission, para. 165.

⁵⁵⁴ United States' appellee's submission, para. 172.

⁵⁵⁵ Panel Report, para. 7.161.

duty law.⁵⁵⁶ Accordingly, unlike the Panel, and based on the correct interpretation of the relevant baseline of comparison under Article X:2, we will not limit our analysis to the period between 2006 and 2012.

4.153. The Panel's analysis as to whether the USDOC was precluded from or required to impose countervailing duties on imports from NME countries under relevant US law prior to 2006 is very limited. However, the Panel did refer to the final countervailing duty regulations issued in November 1998 by the USDOC. The Panel held that in those regulations the "USDOC referred to its past practice of 'not applying the CVD law to [NMEs]'", and stated that "the CAFC 'upheld this practice' in *Georgetown Steel*."⁵⁵⁷ In its analysis, the Panel did not attach much significance to the 1998 countervailing duty regulations given that it considered that these regulations "do not detract from what [the Panel had] said about the holding in *Georgetown Steel*."⁵⁵⁸ In the Panel's view, the *Georgetown Steel* decision was "understood by USDOC [between 2006 and 2012] 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".⁵⁵⁹ There appears to be a tension between the previous statements made by the USDOC as to its statutory mandate before 2006, as shown below, and the United States' argument on appeal that, prior to Section 1, the USDOC was required to impose countervailing duties on imports from NME countries provided that subsidies could be identified.

4.154. On appeal, China argues that the 1998 countervailing duty regulations support the view that the USDOC would only apply countervailing duties to subsidies conferred after the date on which it designated a particular country as a market economy.⁵⁶⁰ The United States replies that the USDOC "did not apply the U.S. CVD law to any NME countries during the period following *Georgetown Steel* to 2006 because [the USDOC] continued to consider that the structure of the NME countries of the time made it impossible to identify countervailable subsidies".⁵⁶¹ The United States points out that, in certain instances following *Georgetown Steel*, the USDOC "described in shorthand terms the holding of *Georgetown Steel* as being that the CVD law did not apply to exports from NME countries".⁵⁶² According to the United States, "[t]his shorthand was based on the 1986 understanding of the nature of NMEs, which explains the reference[] in the preamble to [the 1998 countervailing duty regulations]".⁵⁶³

4.155. On the basis of the Panel record, we note that, prior to 2006, the USDOC was faced in 1984 with petitions to apply the countervailing duty law to imports from NME countries in the countervailing duty investigations with respect to carbon steel wire rod from Poland and Czechoslovakia. As indicated above, the final determinations by the USDOC in these two investigations were later challenged before the CIT and the CAFC. The latter rendered its *Georgetown Steel* decision in 1986. We underscore that the Panel Report does not contain any analysis regarding the USDOC's 1984 negative countervailing duty determinations in relation to the question of whether the USDOC was required to or precluded from applying the countervailing duty law to imports from NME countries. We consider that the Panel should have examined the 1984 negative countervailing duty determinations in the context of its analysis of the USDOC's practice and the 1986 *Georgetown Steel* decision. We note that, in both of the negative countervailing duty determinations with respect to carbon steel wire rod from Poland and

⁵⁵⁶ We note that the two negative countervailing duty determinations by the USDOC with respect to carbon steel wire rod from Poland and Czechoslovakia issued in 1984 were later challenged before the CIT and ultimately before the CAFC, which, in 1986, rendered its decision in *Georgetown Steel*.

⁵⁵⁷ Panel Report, para. 7.175 (quoting USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14), p. 65360).

⁵⁵⁸ Panel Report, para. 7.175.

⁵⁵⁹ Panel Report, para. 7.175.

⁵⁶⁰ China's appellant's submission, para. 144.

⁵⁶¹ United States' appellee's submission, para. 165. (fn omitted)

⁵⁶² United States' appellee's submission, para. 165.

⁵⁶³ United States' appellee's submission, para. 165.

Czechoslovakia⁵⁶⁴, the USDOC "concluded that bounties or grants, within the meaning of section 303, cannot be found in NME's".⁵⁶⁵ However, the USDOC also stated that it "has broad discretion in determining the existence or non-existence of the term 'bounty or grant'"⁵⁶⁶, and determined that "manufacturers, producers, or exporters in [Poland and Czechoslovakia] of carbon steel wire rod do not receive bounties or grants."⁵⁶⁷ We note that the above two statements by the USDOC in these negative countervailing duty determinations are not clear regarding the applicability of the US countervailing duty law to imports from NME countries. This is so because the USDOC's statements are not clear as to whether it considered that the US countervailing duty law prohibited, as a general rule, the imposition of countervailing duties on imports from NME countries because countervailable subsidies could *never* be found in the context of NME countries, *or* whether the US countervailing duty law required such application with the caveat that, in *those specific cases* involving steel wire rod producers from Poland and Czechoslovakia, it was not possible for the USDOC to identify the existence of countervailable subsidies.⁵⁶⁸ We consider that an examination of these issues by the Panel would have assisted us in drawing our conclusions as to the precise nature of the statutory mandate on which the USDOC's practice was based, not only after, but also before 2006. This is important for determining whether Section 1 changed the prior US countervailing duty law, as argued by China, or whether Section 1 clarified and confirmed what the US countervailing duty law already required, as argued by the United States.

4.156. We now turn to the 1998 countervailing duty regulations published by the USDOC. We begin by noting that the participants disagree on the meaning of the reference to the *Georgetown Steel* decision in the 1998 countervailing duty regulations. In the 1998 regulations, the USDOC officially stated that "it is important to note here our practice of not applying the CVD law to [NMEs]. The CAFC upheld this practice in *Georgetown Steel Corp. v. United States*".⁵⁶⁹ This statement could be read as suggesting that the USDOC had established its practice of not imposing countervailing duties on NME countries, or, even further, that it was precluded from doing so, prior to Section 1, as argued by China. However, we also note that the reference to *Georgetown Steel* in this context is not of much assistance in ascertaining the USDOC's statutory mandate, because the ruling in *Georgetown Steel* is amenable to different readings, as we have observed above. In any event, the USDOC went on to state in the 1998 regulations that, "[w]here the [USDOC] determines that a change in status from non-market to market [economy] is

⁵⁶⁴ We note that, in both preliminary determinations, the USDOC stated that "nonmarket economy (NME) countries were not exempt from the provisions of section 303 of the Act". In the negative final determinations, the USDOC explained that, on the basis of the phrase "any country", it had "correctly address[ed] part of the jurisdictional question [in the preliminary determinations]; i.e. whether any political entity is exempted *per se* from the countervailing duty law". However, the USDOC added that, "[u]pon reconsideration, [its] preliminary determination[s] did not address adequately the additional jurisdictional question; i.e. whether government activities in an NME confer a 'bounty or grant' within the meaning of section 303." (USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19370-19374 (Panel Exhibit USA-7), p. 19371; USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19374-19378 (Panel Exhibit USA-10), p. 19375)

⁵⁶⁵ USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19370-19374 (Panel Exhibit USA-7), p. 19371; USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19374-19378 (Panel Exhibit USA-10), p. 19375.

⁵⁶⁶ USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19370-19374 (Panel Exhibit USA-7), p. 19374; USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19374-19378 (Panel Exhibit USA-10), p. 19378.

⁵⁶⁷ USDOC, Carbon Steel Wire Rod From Czechoslovakia: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19370-19374 (Panel Exhibit USA-7), p. 19374; USDOC, Carbon Steel Wire Rod From Poland: Final Negative Countervailing Duty Determination, *United States Federal Register*, Vol. 49, No. 89 (7 May 1984), pp. 19374-19378 (Panel Exhibit USA-10), p. 19378.

⁵⁶⁸ We recall that at that time of the negative countervailing duty investigations on wire rod from Poland and Czechoslovakia the US countervailing duty law referred to "bounties" or "grants" instead of countervailable subsidies". The term "countervailable subsidies" was only introduced in the US legal system by the Uruguay Round Agreements Act of 1994.

⁵⁶⁹ USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14), p. 65360.

warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.⁵⁷⁰ This could be read as suggesting that the USDOC was required to impose countervailing duties on imports from certain countries provided that their status was changed from "non-market economy" (NME) countries to "market economy" countries. In other words, the USDOC's statements in the 1998 countervailing duty regulations imply that the US countervailing duty law was not applicable to imports from NME countries unless and until their status changed to "market economy" countries.⁵⁷¹ This cannot be understood to be the same as the argument maintained by the United States in this appeal that countervailing duties had to be applied to imports from NME countries whenever a countervailable subsidy could be identified. Although we are mindful of the United States' argument that, after the *Georgetown Steel* decision, the USDOC referred to the holding in that decision in "shorthand terms", we see, in any event, a tension between the United States' reading in this appeal of the *Georgetown Steel* decision as confirming that the US countervailing law was always applicable to NME countries, and the USDOC's statements in the 1998 countervailing duty regulations that the USDOC's imposition of countervailing duties depended on a change in status of a country from "non-market economy" to "market economy".

4.157. With respect to other instances of the USDOC's practice prior to 2006, China also finds significant the 2002 USDOC determination in *Sulfanilic Acid*. According to China, the USDOC stated that "it would apply countervailing duties only in respect of subsidies conferred by a country after the date on which the USDOC designated that country as a market economy".⁵⁷² China argues that, on the basis of this understanding of the law, the USDOC concluded that "subsidies provided by the Government of Hungary during the period in which the USDOC designated Hungary as an NME were not subject to the application of countervailing duties under U.S. law".⁵⁷³ The United States contends on appeal that the *Sulfanilic Acid* determination does *not* stand for the proposition that, prior to 2006, the USDOC understood the *Georgetown Steel* decision as establishing the inapplicability of countervailing duty laws to imports from NME countries due to their status as NME countries.⁵⁷⁴ The United States asserts that the "shorthand" reference to the holding in *Georgetown Steel* by the USDOC in the *Sulfanilic Acid* determination was based on the understanding that the structure of the NME countries at that time made it impossible to identify countervailable subsidies. For the United States, this does not detract from its position that, even prior to Section 1, the USDOC was required to impose countervailing duties on imports from NME countries provided that a countervailable subsidy could be identified.⁵⁷⁵

4.158. We observe that the Panel did not undertake any analysis or make findings with regard to the conclusions that could be drawn from the *Sulfanilic Acid* determination as to whether the USDOC was required to or precluded from applying the countervailing duty law to imports from NME countries prior to Section 1. We note that, in this decision, the USDOC set out its own understanding of the CAFC's decision in *Georgetown Steel* and of the 1998 countervailing duty regulations. The USDOC concluded that a certain cash infusion was not a countervailable subsidy because, at the time, Hungary was still considered to be an NME country.⁵⁷⁶ Like the conclusions mentioned above in the context of the 1998 countervailing duty regulations, the USDOC's

⁵⁷⁰ USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14), p. 65360.

⁵⁷¹ USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14), p. 65360.

⁵⁷² China's appellant's submission, para. 164.

⁵⁷³ China's appellant's submission, para. 173 (referring to Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary" (Panel Exhibit CHI-15), pp. 13-15).

⁵⁷⁴ United States' appellee's submission, para. 165 (quoting China's appellant's submission, para. 143).

⁵⁷⁵ United States' appellee's submission, para. 165 (referring to China's appellant's submission, para. 144; USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65360 (Panel Exhibit CHI-14); and Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary" (Panel Exhibit CHI-15), pp. 13-15).

⁵⁷⁶ Memorandum dated 18 September 2002 from Richard W. Moreland, Deputy Assistant Secretary, Group I Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Sulfanilic Acid from Hungary" (Panel Exhibit CHI-15), pp. 13-15.

determination in *Sulfanilic Acid* can be read to suggest that the countervailing duty law would not be applicable to imports from NME countries unless and until the USDOC changed their status to "market economy" countries, as China argues. The United States contends that the *Sulfanilic Acid* determination stands for the proposition that the USDOC could not identify a subsidy because Hungary was an NME country at the time of the investigation. According to the United States, this does not exclude that the USDOC was nevertheless required to impose countervailing duties on imports from NME countries prior to Section 1 if subsidies could be identified. As mentioned above, we see a tension between the argument of the United States in this appeal that countervailing duties would be imposed on imports from an NME country whenever a countervailable subsidy could be identified, on the one hand, and the USDOC's statements in *Sulfanilic Acid* that such imposition would depend on a change in the country's status from "non-market economy" to "market economy", on the other hand.

4.159. In sum, we note that the Panel's inquiry into the USDOC's practice prior to 2006 is very limited, despite the fact that pre-2006 practice is an element relevant to ascertaining the meaning of the US countervailing duty law prior to Section 1.⁵⁷⁷ The Panel did not analyse in its Report numerous elements related to the USDOC's practice prior to 2006. Nor did it engage meaningfully with the arguments presented by the participants regarding the question of whether the USDOC was precluded from or required to impose countervailing duties on imports from NME countries under relevant US countervailing duty law prior to 2006. For instance, the Panel's analysis does not address the 1984 negative countervailing duty determinations with respect to carbon steel wire rod from Poland and Czechoslovakia. Nor did the Panel explore whether there were other countervailing duty investigations by the USDOC regarding imports from NME countries prior to 2006. The *Sulfanilic Acid* determination was also not addressed in the findings of the Panel. Due to the lack of analysis by the Panel and undisputed facts in the Panel record, many aspects of the pre-2006 practice of the USDOC remain unclear. As mentioned earlier, the precise nature of the statutory mandate on which the USDOC's practice was based, not only after, but also before 2006, is relevant to our assessment of whether the prior US countervailing duty law was confirmed or changed by Section 1.

4.160. We now turn to the post-2006 practice of the USDOC. The Panel noted that, "[p]ursuant 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".⁵⁷⁸ The Panel indicated that the record shows that, "in December 2006, [the USDOC] published a notice of opportunity to comment on whether the CVD law 'should now be applied to imports from [China]'.⁵⁷⁹ In fact, at the outset of the *CFS Paper* countervailing duty investigation, the USDOC stated the following:

Given the complex legal and policy issues involved, and on the basis of the [USDOC's] discretion as affirmed in *Georgetown Steel*, the [USDOC] intends during the course of this investigation to determine whether the countervailing duty law should now be applied to imports from [China].⁵⁸⁰

4.161. In April 2007, the USDOC published an affirmative preliminary determination in the countervailing duty investigation in *CFS Paper*, in which it preliminarily determined that the US countervailing duty law could be applied to imports from China.⁵⁸¹ The Panel emphasized that the "USDOC did so after reaching the conclusion that it was possible to identify and measure

⁵⁷⁷ As noted earlier, this is a consequence of the Panel's erroneous focus on post-2006 USDOC practice for purposes of determining the baseline of comparison under Article X:2.

⁵⁷⁸ Panel Report, para. 7.253. (emphasis added)

⁵⁷⁹ Panel Report, para. 7.169 (quoting USDOC, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea, United States Federal Register, Vol. 71, No. 227 (27 November 2006), pp. 68549-68549 (Panel Exhibit USA-23), p. 68549).

⁵⁸⁰ Panel Report, fn 280 to para. 7.174 (quoting USDOC, Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper From the People's Republic of China, Indonesia, and the Republic of Korea, United States Federal Register, Vol. 71, No. 227 (27 November 2006), pp. 68546-68549 (Panel Exhibit USA-23), p. 68549).

⁵⁸¹ Panel Report, para. 7.169 (referring to USDOC, Coated Free Sheet Paper from the People's Republic of China: Amended Affirmative Preliminary Countervailing Duty Determination (Preliminary Determination), United States Federal Register, Vol. 72, No. 67 (9 April 2007), pp. 17484-17486 (Panel Exhibit USA-25)).

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".⁵⁸² In particular, the USDOC concluded that, "based on our assessment of the differences between [China's] economy today and the Soviet and Soviet-style economies that were the subject of [*Georgetown Steel*], we preliminarily determine that the countervailing duty law can be applied to imports from [China]".⁵⁸³ According to the Panel, "[t]his understanding was based, in part, on [the USDOC's] interpretation of the CAFC decision [in] *Georgetown Steel*".⁵⁸⁴ In October 2007, the USDOC issued an affirmative final determination in the countervailing duty investigation concerned.⁵⁸⁵

4.162. The Panel found that, "between November 2006 and March 2012, USDOC initiated 33 investigations and reviews in respect of imports from China under United States CVD law, notifying China and other parties of its application of United States CVD law to China, and that in many of those proceedings USDOC issued CVD orders".⁵⁸⁶ The Panel noted that the "USDOC undertook those investigations and reviews, and issued those orders, even though, then as later, the United States designated China as an NME country".⁵⁸⁷ The Panel thus found that, "between November 2006, or at least April 2007, and March 2012, there was indeed a USDOC practice with regard to the application of countervailing duties to imports from China as an NME country".⁵⁸⁸

4.163. We note, however, that the existence of such a practice after 2006 does not necessarily resolve the issue of the legal basis for that practice under US countervailing duty law. China argues that the change in practice in 2006 confirms that the USDOC's practice between 1986 and 2012 was inconsistent. Moreover, China argues that US countervailing duty law prior to 2012 precluded the USDOC from imposing countervailing duties on imports from NME countries, and that Section 1 changed that law by requiring the imposition of countervailing duties on imports from NME countries, thereby violating Article X:2.⁵⁸⁹ The United States, by contrast, argues that before and after 2006 the USDOC was required to apply the countervailing duty law to NME imports and that it merely became possible as of 2006 for the USDOC to identify and measure subsidies in China. Therefore, the United States contends that Section 1 only clarified the pre-existing legal situation and did not effect a change in the sense of Article X:2.⁵⁹⁰

4.164. We once again recall that, following the Appellate Body's approach in *US – Carbon Steel*, the issue of whether or not the US countervailing duty law applicable prior to Section 1 required or at least allowed the application of countervailing duties to imports from NME countries (if a subsidy could be identified) has to be answered by taking into account, in a holistic exercise, the text of the relevant legal instruments, including Section 701(a), evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, and the opinions of legal experts.

4.165. While it is clear that the USDOC's practice in applying US countervailing duty law changed in 2006, this fact, in and of itself, cannot resolve the issue of whether the underlying statutory mandate changed with the enactment of Section 1. We recall that our analysis for purposes of determining the relevant baseline of comparison under Article X:2 must be based on the *consistent* application of Section 701(a) by the USDOC throughout the relevant period, that is, at least since the early decisions by the USDOC on the applicability of the countervailing duty law to imports from NME countries reviewed by the CAFC in its ruling in *Georgetown Steel*. We note that the USDOC's official statements made in the process of applying the US countervailing duty law between 1986 and 2012, in particular before and after 2006, do not appear to be entirely

⁵⁸² Panel Report, para. 7.253.

⁵⁸³ Panel Report, fn 281 to para. 7.174.

⁵⁸⁴ Panel Report, para. 7.253. (fn omitted)

⁵⁸⁵ Panel Report, para. 7.169 (referring to USDOC, Coated Free Sheet Paper from the People's Republic of China: Final Affirmative CVD Determination, *United States Federal Register*, Vol. 72, No. 206 (25 October 2007), pp. 60645-60648 (Panel Exhibit USA-27)).

⁵⁸⁶ Panel Report, para. 7.169. (fn omitted)

⁵⁸⁷ Panel Report, para. 7.169.

⁵⁸⁸ Panel Report, para. 7.169. The Panel further held that the USDOC's practice of imposing countervailing duties to imports from China "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". (Ibid., para. 7.185)

⁵⁸⁹ China's appellant's submission, paras. 166-170.

⁵⁹⁰ United States' appellee's submission, para. 125.

consistent, which may be construed as reflecting a certain level of ambiguity regarding its understanding of the meaning of the CAFC's ruling in *Georgetown Steel*. Some aspects of the USDOC's understanding of its statutory mandate reflected in the 1998 countervailing duty regulations and the 2002 determination in *Sulfanilic Acid* may be read as suggesting that the USDOC understood *Georgetown Steel* as not permitting the application of countervailing duties to imports from NME countries. The more recent USDOC practice, particularly after the initiation of the *CFS Paper* investigation in 2006, appears to indicate that the USDOC understood its statutory mandate and *Georgetown Steel* as requiring the application of countervailing duties to imports from NME countries if it was possible to identify a countervailable subsidy within the economy of the relevant NME country. Thus, on the basis of our reading of the USDOC's statements in the 1998 countervailing duty regulations and the 2002 *Sulfanilic Acid* determination, the rationale behind the USDOC's imposition of countervailing duties to NME countries appears to have changed after 2006 when the USDOC began applying the US countervailing duty law to China, even though it remained classified as an NME country under US law. As noted above, it is difficult to reconcile the United States' contention that the USDOC's understanding of its statutory mandate did not change over time with the above-mentioned USDOC statements.

4.166. For these reasons, we consider that the USDOC's practice over the years does not ultimately assist us in ascertaining whether or not the US countervailing duty law precluded or required the application of countervailing duties to imports from NME countries prior to Section 1. Moreover, we emphasize that our analysis must also take into account, *inter alia*, the text of the relevant legal instruments and the pronouncements of domestic courts on the meaning of such instruments. Consequently, our examination of the USDOC's practice as identified above during the relevant period does not provide a basis on which to reach a definitive conclusion on whether, prior to Section 1, the applicable US countervailing duty law prohibited the application of countervailing duties to imports from NME countries, as argued by China, or whether the USDOC was required to impose countervailing duties on imports from NME countries whenever it was possible to identify the existence of a subsidy, as asserted by the United States.

4.167. We turn next to examine a series of pronouncements of US courts regarding the application of countervailing duties to imports from China after 2006. The Panel noted that, following the initiation of the *CFS Paper* countervailing duty investigation in 2006, years of litigation before US courts over this issue ensued.⁵⁹¹

4.168. We begin by noting the Panel's finding that, "[o]n 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".⁵⁹² The Panel indicated that the first of those decisions by the CIT was in *CFS Paper*, followed by *GPX I*, and then *GPX II*.⁵⁹³

4.169. With respect to the first of those decisions, the Panel found that: "[i]n *CFS Paper*, the CIT appeared to accept USDOC's interpretation of *Georgetown Steel*".⁵⁹⁴ According to the Panel, in that decision, the CIT stated that "the *Georgetown Steel* court only affirmed [the USDOC's] decision not to apply countervailing duty law to the NMEs in question in that particular case [and it] recognized the continuing 'broad discretion' of the agency to determine whether to apply countervailing duty law to NMEs".⁵⁹⁵

4.170. Turning to *GPX I*, according to the Panel, in that decision, the CIT stated that "it was 'not clear' whether *Georgetown Steel* 'was deferring to a determination of [the USDOC] based on ambiguity in the statute or whether the Court held that there was only one legally valid interpretation of the statute'".⁵⁹⁶ The Panel also found that "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

⁵⁹¹ Panel Report, para. 7.254.

⁵⁹² Panel Report, para. 7.254. (fns omitted)

⁵⁹³ Panel Report, para. 7.254. (fns omitted)

⁵⁹⁴ Panel Report, para. 7.176.

⁵⁹⁵ Panel Report, para. 7.176 (quoting United States Court of International Trade, *Government of the People's Republic of China v. United States*, 483 F. Supp. 2d 1274 (CIT 2007) (Panel Exhibit USA-28), p. 1282).

⁵⁹⁶ Panel Report, para. 7.176. (fn omitted)

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".⁵⁹⁷ With respect to *GPX II*, the Panel referred to the CIT's findings "that '[t]he court previously noted that the leading case upholding [the USDOC's] decision not to apply CVD remedies to imports from an NME country, [*Georgetown Steel*], is ambiguous".⁵⁹⁸

4.171. We next examine the decision in *GPX V* rendered by the CAFC in 2011. The Panel's analysis with respect to the *content* of the *GPX V* decision is somewhat limited inasmuch as it only indicates the main conclusion of the decision, without addressing in detail the reasoning of the CAFC. In particular, the Panel found that in *GPX V* "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".⁵⁹⁹ The participants agree that in *GPX V* the CAFC concluded that the USDOC "could not apply the CVD law to China as long as China was classified as a NME country".⁶⁰⁰ In this decision, the CAFC concluded that the USDOC "is barred by the statute from imposing countervailing duties on NME goods".⁶⁰¹ The CAFC reached that conclusion on the basis of an examination of the text of the countervailing duty law, "the legislative history of the countervailing duty law, and particularly Congress's repeated reenactment of countervailing duty law while approving the *Georgetown Steel* holding".⁶⁰² In the CAFC's view, this "demonstrates that Congress adopted [the USDOC's] then-prevailing position that countervailing duties cannot be imposed on NME exports".⁶⁰³ Referring to the 1986 decision in *Georgetown Steel*, the CAFC observed that it "previously held that the statute does not compel the imposition of countervailing duties to goods from NME countries because the government payments with respect to such goods are not 'bounties or grants,' or 'countervailable subsidies' in the current terminology".⁶⁰⁴ The CAFC went on to state that "[i]n *Georgetown Steel* we found that the 'economic incentives and benefits' provided by governments in NME countries 'do not constitute bounties or grants under section 303,' ... that is, 'countervailable subsidies' in the language of the current statute".⁶⁰⁵

4.172. However, "the CAFC did not issue a mandate in *GPX V* and its decision therefore never became final".⁶⁰⁶ According to the Panel, "[t]he reason why the CAFC did not issue a mandate is that following a request by the United States Government, the CAFC granted a rehearing".⁶⁰⁷ The "United States' Government filed a petition for rehearing with the CAFC on the same day" that the CAFC's *GPX V* decision was rendered⁶⁰⁸ and, "[w]hen Section 1 was enacted, the rehearing of the case was still pending".⁶⁰⁹

4.173. Despite the fact that the participants agree on the non-finality of the *GPX V* decision⁶¹⁰, they disagree on the relevance and import within the US legal system of the CAFC's conclusions in *GPX V* as to the meaning of Section 701(a). China takes the view that, even though *GPX V* was not

⁵⁹⁷ Panel Report, para. 7.176 (quoting *GPX I*, pp. 1289-1290).

⁵⁹⁸ Panel Report, para. 7.176 (quoting *GPX II*, p. 1237).

⁵⁹⁹ Panel Report, para. 7.178. (fn omitted) See also *ibid.*, para. 7.255.

⁶⁰⁰ United States' appellee's submission, para. 175. See also China's appellant's submission, para. 152.

⁶⁰¹ *GPX V*, p. 737.

⁶⁰² *GPX V*, p. 737.

⁶⁰³ *GPX V*, p. 737.

⁶⁰⁴ *GPX V*, p. 738. (fn omitted)

⁶⁰⁵ *GPX V*, p. 738.

⁶⁰⁶ Panel Report, para. 7.180. We note that the Panel found that, under US law, "[t]he mandate documents the finality of a court's determination and remands the case to a lower court for further proceedings." (*Ibid.*, fn 289 to para. 7.178 (referring to Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), para. 54))

⁶⁰⁷ Panel Report, para. 7.178. (fn omitted) Indeed, we note that the Panel found that, "[f]ollowing the issuance of this decision, the United States government petitioned the CAFC to grant a rehearing *en banc* to reconsider its decision". (*Ibid.*, para. 7.255)

⁶⁰⁸ Panel Report, fn 302 to para. 7.181 (referring to United States Court of Appeals for the Federal Circuit, *GPX International Tire Corporation v. United States*, Corrected Petition for Rehearing *En Banc* of Defendant-Appellant, United States, 2011-1107/1108/1109 (Fed.Cir.5 March 2012) (Panel Exhibit USA-43)).

⁶⁰⁹ Panel Report, para. 7.178.

⁶¹⁰ China's appellant's submission, paras. 156 and 160; United States' appellee's submission, paras. 177 and 178.

a final decision, "it still stands as a statement of the law at the time of its decision".⁶¹¹ Therefore, China argues that *GPX V* confirms that Section 1 changed the law. The United States rejects China's characterization that the *GPX V* decision "constitutes an authoritative statement of U.S. law".⁶¹² In particular, the United States asserts that, given that the CAFC in *GPX V* issued no mandate, the decision never became final and has no legally binding force under US law.⁶¹³

4.174. In the absence of the issuance of a mandate, the Panel did not analyse the relevance and import within the US legal system of the CAFC's decision in *GPX V* as to the meaning of Section 701(a). The Panel stated that, "[f]or purposes of [its] analysis, [it] 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".⁶¹⁴ On the basis of its erroneous interpretation that the relevant baseline of comparison under Article X:2 was an "established and uniform practice", the Panel considered that what mattered was that the "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".⁶¹⁵ As noted above, we disagree with the legal interpretation of Article X:2 underlying that statement.⁶¹⁶

4.175. In the light of the above considerations, we note that the relevance and import within the US legal system of the *GPX V* decision with respect to the meaning of Section 701(a) remains disputed according to the opinions of legal experts submitted by the participants. The first opinion of China's legal expert contended that, "[b]ecause the [CAFC] did not vacate its opinion in *GPX V*, a U.S. court could very plausibly regard that opinion as having established and as continuing to establish that Section 701(a) of the Tariff Act, prior to its amendment by P.L. 112-99, did not apply to [NME] countries".⁶¹⁷ The expert opinion presented by the United States countered that the view expressed by China's expert was "contrary to the overwhelming weight of authority under United States law. Specifically, it [was] contrary to recent decisions of the Ninth Circuit explicitly holding that an appellate decision is not final until the mandate has [been] issued".⁶¹⁸ In his supplemental opinion, China's expert stated that, "[w]ithout claiming that the decision in *GPX V* was 'final,' my prior opinion ... said that a court could 'very plausibly' rely on [certain] cases to conclude that *GPX V* retained precedential authority unless and until it was vacated, but I pointedly did not say that a court ought to have so ruled".⁶¹⁹ We note that, in any event, because of its non-final status and due to the fact that the Panel explicitly refrained from making any findings regarding the question of whether under US law a US court could rely on the *GPX V* decision to establish what the US countervailing duty law was prior to the enactment of Section 1, there are obvious limitations as to what extent the *GPX V* decision can be relied upon for purposes of determining whether Section 1 changed or clarified US countervailing duty law in respect of the treatment of imports from NME countries.

4.176. We now turn to the CAFC's decision in *GPX VI*. When Section 1 was enacted, the rehearing of the *GPX V* case was still pending.⁶²⁰ A mandate was finally issued in *GPX VI*, after the enactment of Section 1.⁶²¹ Relying on US Supreme Court precedent, the CAFC in *GPX VI* based its

⁶¹¹ China's appellant's submission, para. 160 (quoting United States Court of Appeals for the Federal Circuit, *Guangdong Wireking Housewares & Hardware Co. Ltd. v. United States*, 2013-1404 (Fed. Cir. 2014)).

⁶¹² United States' appellee's submission, para. 176 (referring to China's appellant's submission paras. 152-162).

⁶¹³ United States' appellee's submission, para. 200.

⁶¹⁴ Panel Report, para. 7.180. (fn omitted)

⁶¹⁵ Panel Report, para. 7.180.

⁶¹⁶ See section 4.2 of this Report.

⁶¹⁷ Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), para. 53.

⁶¹⁸ Legal Opinion of John C. Jeffries, Jr, Professor of Law, University of Virginia, in response to Legal Opinion of Richard H. Fallon, Jr (Panel Exhibit USA-115), para. 7. (citations omitted)

⁶¹⁹ Supplemental Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-124), para. 10. (fns omitted)

⁶²⁰ Panel Report, para. 7.178. 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. (Panel Report, fn 290 to para. 7.178 (referring to China's response to Panel question No. 68; China's second written submission, para. 83; Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), paras. 13 and 50; United States' response to Panel question No. 68; and United States' oral statement at the second meeting with the Panel, para. 39))

⁶²¹ Panel Report, para. 7.178 (referring to *GPX VI*, para. 1313).

decision on the new Section 1, given that the *GPX V* case was still pending on appeal at the time Section 1 entered into force.⁶²² In *GPX VI*, the CAFC noted that the US Government and other interested parties had filed a petition for the rehearing of its decision in *GPX V*.

4.177. Except for several observations regarding certain formal aspects of the decision, the Panel's discussion regarding the content and import of the *GPX VI* decision is limited. In particular, the Panel considered that it 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".⁶²³ The Panel appears to have reached that conclusion due to the fact that "[t]he legal expert opinions submitted by the parties come to different conclusions in this regard".⁶²⁴ In particular, the Panel indicated that, while China's expert opinion argues that the CAFC in *GPX VI* reasserted its holding in *GPX V*, the United States' expert opinion supports the exact opposite conclusion.⁶²⁵

4.178. On appeal, the participants' submissions and their responses to our questioning at the oral hearing reflect their divergent positions before the Panel as to whether the *GPX VI* decision established the state of US countervailing duty law prior to the enactment of Section 1. China argues that in *GPX VI* the CAFC made clear that "the Tariff Act did not provide for the application of countervailing duties to imports from [NME] countries prior to the enactment of Section 1".⁶²⁶ While the United States does not question the finding of *GPX VI*, it counters that the CAFC's holding in *GPX VI* does not include its statement on the state of US countervailing duty law prior to Section 1, and thus the decision does not provide an authoritative statement in respect of that law. According to the United States, the CAFC's reference in *GPX VI* to its previous findings in *GPX V* merely serves as background and has no authoritative value under US law.⁶²⁷

4.179. We recall that, due to its interpretation of the relevant baseline of comparison under Article X:2, the Panel explicitly refrained from making findings in its Report regarding the scope of the holding of the *GPX VI* decision.⁶²⁸

4.180. We note that, in the introductory section of *GPX VI*, the CAFC recalled that in *GPX V* it had "held that 'in amending and reenacting the trade laws in 1988 and 1994, the US 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'".⁶²⁹ We note that the location of this statement casts doubt on whether that statement by the CAFC in *GPX VI* is part of the holding of that decision. Whereas the CAFC also stated in *GPX VI* that, in enacting Section 1, "Congress clearly sought to overrule [the CAFC's] decision in *GPX V*".⁶³⁰ the key feature of the holding in *GPX VI* concerned Section 2(a) of PL 112-99. It is thus not to the point of this dispute, which centres on the meaning of Section 1 of PL 112-99.⁶³¹ Given that the main feature of the holding in *GPX VI* is related to Section 2 of PL 112-99, the import of this decision is limited for determining the state of the US countervailing duty law prior to the enactment of Section 1. While it is true that the CAFC issued a mandate and finalized *GPX VI*, and although the CAFC recorded in *GPX VI* what it held in *GPX V*, it is not disputed that the CAFC decision in *GPX V* regarding Section 1 was not finalized. Therefore, there are obvious limitations as to whether and to what extent the *GPX VI* decision can be relied upon to resolve the issue of whether Section 1 made the US countervailing duty law applicable to imports from NME countries, as China submits, or whether

⁶²² Panel Report, para. 7.178 (referring to *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Panel Exhibit USA-85), p. 226). The Panel observed that the *GPX VI* decision was based on the new Section 1 and concerns a countervailing duty proceeding initiated before 13 March 2012. (Ibid., para. 7.123)

⁶²³ Panel Report, fn 300 to para. 7.180.

⁶²⁴ Panel Report, fn 300 to para. 7.180 (referring to Legal Opinion of Richard H. Fallon, Jr, Professor of Law, Harvard University (Panel Exhibit CHI-83), paras. 57 and 58; and Legal Opinion of John C. Jeffries, Jr, Professor of Law, University of Virginia, in response to Legal Opinion of Richard H. Fallon, Jr (Panel Exhibit USA-115), para. 18).

⁶²⁵ Panel Report, fn 300 to para. 7.180.

⁶²⁶ China's appellant's submission, para. 161.

⁶²⁷ United States' response to questioning at the oral hearing.

⁶²⁸ Panel Report, fn 300 to para. 7.180.

⁶²⁹ *GPX VI*, p. 1310. (citation omitted)

⁶³⁰ *GPX VI*, p. 1311.

⁶³¹ We note, in this regard, that the CAFC pronounced in *GPX VI* that, by enacting Section 2(a) of PL 112-99, US Congress changed the law with respect to double counting. In the CAFC's view, "Congress clearly did not view this statutory change as reflecting a clarification of existing law, but rather as a change in the law." (*GPX VI*, p. 1311)

the USDOC was already required, as the United States argues, to impose countervailing duties on imports from any country prior to Section 1 whenever a countervailable subsidy could be identified.

4.181. In addition, China argues on appeal that, following the CAFC's decision in *GPX VI*, the issue of whether the *GPX V* decision was an authoritative statement of US law prior to the enactment of Section 1 was resolved by the CAFC in Guangdong Wireking Housewares & Hardware Co. Ltd. v. United States (*Wireking*), a decision issued on 18 March 2014.⁶³² China acknowledges, however, that the *Wireking* decision was issued after the issuance of the Panel Report in this dispute, and therefore does not constitute part of the Panel record.⁶³³ The United States, in turn, maintains that we should reject China's attempt to introduce new evidence in the form of a "non-final" judicial opinion issued by the CAFC in *Wireking*, as it was issued after the issuance of the Panel Report.⁶³⁴ Given that the *Wireking* decision does not constitute part of the Panel record and was rendered after the issuance of the Panel Report, we see no basis to examine it now on appeal. This is in line with the scope of our jurisdiction and previous findings by the Appellate Body. We recall that "[w]e have no authority to consider new facts on appeal. The fact that the documents are 'available on the public record' does not excuse us from the limitations imposed by Article 17.6".⁶³⁵ Consequently, we do not take the *Wireking* decision into account in our analysis.

4.182. The main question in this dispute under Article X:2 of the GATT 1994 is whether Section 1 of PL 112-99 *changed* the US countervailing duty law and thereby effected an advance in a rate of duty or imposed a new or more burdensome requirement within the meaning of that provision, or whether Section 1 merely *clarified* existing law and effected no such advance or imposition of a requirement. We recall that the relevant baseline of comparison in this case is Section 701(a) of the US Tariff Act, as interpreted by US courts and interpreted and applied by the USDOC.⁶³⁶ Our foregoing examination of the relevant elements of US countervailing duty law on the basis of the Panel record has highlighted that the text of the relevant legal instruments, the USDOC's practice and its consistency in interpreting and applying the US countervailing duty law with respect to imports from NME countries, the relevant judicial pronouncements of US courts, and the opinions of legal experts presented by the participants, are amenable to different readings. Our task has been made difficult because the Panel, as a consequence of its erroneous interpretation of the relevant baseline of comparison under Article X:2, and its consequential focus on the USDOC's practice after 2006, did not adequately examine all relevant elements of US countervailing duty law that would have assisted us in arriving at a conclusion on the basis of the correct interpretation of Article X:2. The Panel failed properly to analyse, and did not address in its findings, the nature of pre-2006 USDOC practice and its consistency with post-2006 practice and the relevant judicial pronouncements on the applicability of US countervailing duty law to NME countries.

4.183. For these reasons, we are unable to complete the analysis and arrive at a conclusion as to whether Section 1 changed the US countervailing duty law and therefore determine whether Section 1 of PL 112-99 effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement or restriction on imports within the meaning of Article X:2 of the GATT 1994.

⁶³² China's appellant's submission, para. 160. China asserts that, in *Wireking*, the CAFC rejected the proposition that its decision in *GPX V* was not an authoritative statement of US law prior to the enactment of Section 1. (Ibid.)

⁶³³ China's appellant's submission, para. 162. China considers it appropriate to advise how this issue has since been resolved by the CAFC, because the *Wireking* decision is publically available, and the Panel explicitly referred to the ongoing *Wireking* litigation as a reason for not resolving whether the decision in *GPX V* was an authoritative statement of the law. (Ibid. (referring to Panel Report, fn 303 to para. 7.187))

⁶³⁴ United States' appellee's submission, para. 192. (fn omitted)

⁶³⁵ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222.

⁶³⁶ See *supra*, para. 4.126.

5 FINDINGS AND CONCLUSIONS

5.1. For the reasons set out in this Report, the Appellate Body:

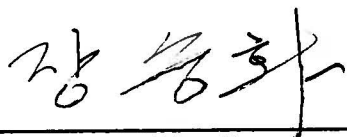
- a. upholds the Panel's finding, in paragraph 4.2 of the Panel's Preliminary Ruling and paragraph 7.4 of the Panel Report, that claims under Articles 10, 19.3, and 32.1 of the SCM Agreement were identified in Part D of China's panel request consistently with the requirements of Article 6.2 of the DSU and were thus within the Panel's terms of reference;
- b. reverses the Panel's interpretation of Article X:2 of the GATT 1994, in paragraph 7.155 of the Panel Report, in respect of the baseline of comparison for measures of general application "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice", and in paragraph 7.203 of the Panel Report, in respect of measures of general application "imposing a new or more burdensome requirement, restriction or prohibition on imports";
- c. reverses the Panel's application of its interpretation of Article X:2 of the GATT 1994 to the measure at issue and, in particular, the Panel's findings, in paragraph 7.191 of the Panel Report, that "China has not established that Section 1 [of PL 112-99] is a provision 'effecting an advance in a rate of duty or other charge on imports under an established and uniform practice'", and in paragraph 7.208 of the Panel Report, that "China has not established that Section 1 [of PL 112-99] is a provision 'imposing a new or more burdensome requirement, restriction or prohibition on imports'"; and accordingly
- d. reverses the Panel's findings, in paragraphs 7.209, 7.210.c, 7.211, and 8.1.b.ii of the Panel Report, that the United States has not acted inconsistently with Article X:2 of the GATT 1994, as Section 1 of PL 112-99 does not "effect[] an advance in a rate of duty or other charge on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports";
- e. declares moot and of no legal effect the Panel's findings:
 - i. in paragraphs 7.185 and 7.186 of the Panel Report, that the USDOC's practice of applying countervailing duties to China as an NME country between 2006 and 2012 was presumptively lawful under US law, as the USDOC's interpretation of US countervailing duty law governed in the absence of a binding judicial determination indicating otherwise; and
 - ii. in paragraph 7.159 of the Panel Report, that it is potentially relevant, and at a minimum not inappropriate, to address the issue of whether the USDOC's practice prior to enactment of Section 1 of PL 112-99 was lawful under US municipal law for purposes of an analysis under Article X:2 of the GATT 1994; and accordingly
- f. having reversed the Panel's findings regarding its interpretation and application of Article X:2 of the GATT 1994, and having declared moot and of no legal effect the Panel's findings regarding the lawfulness of the USDOC's practice in the context of the analysis under Article X:2 of the GATT 1994, does not consider it necessary to examine further China's claim under Article 11 of the DSU; and
- g. is unable to complete the analysis under Article X:2 of the GATT 1994 and determine whether Section 1 of PL 112-99 effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement or restriction on imports within the meaning of Article X:2 of the GATT 1994.

5.2. The Appellate Body recommends that the Dispute Settlement Body request the United States to bring the investigations and reviews identified in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement into conformity with that Agreement.

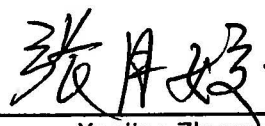
Signed in the original in Geneva this 20th day of June 2014 by:



Ujal Singh Bhatia
Presiding Member



Seung Wha Chang
Member



Yuejiao Zhang
Member

ANNEX 1



WORLD TRADE
ORGANIZATION

WT/DS449/6

11 April 2014

(14-2277)

Page: 1/2

Original: English

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

**NOTIFICATION OF AN APPEAL BY CHINA
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 8 April 2014, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *United States – Countervailing and Anti-Dumping Measures on Certain Products From China* (WT/DS449) ("Panel Report").

2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, China files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to China's ability to rely on other paragraphs of the Panel Report in its appeal.

4. China seeks review by the Appellate Body of the following errors of law and legal interpretation by the Panel in its Report, and requests the following findings by the Appellate Body.

I. Review of the Panel's Findings under Article X:2 of the GATT 1994

5. The Panel erred in its interpretation and application of Article X:2 of the GATT 1994, in so far as the Panel found that United States Public Law 112-99 (P.L. 112-99) is consistent with Article X:2 because it does not effect an "advance in a rate of duty or other charge on imports under an established and uniform practice" or impose "a new or more burdensome requirement, restriction or prohibition on imports" within the meaning of that provision.¹ In particular, the Panel erred because:

¹ Panel Report, paras. 7.191, 7.208, 7.209-7.211, and 8.1(b)(ii).

- it failed to interpret Article X:2 properly in finding that this provision requires a comparison between the rates, requirements, and restrictions effected by the measure at issue, on the one hand, and the rates, requirements, and restrictions previously applicable "under an established and uniform practice", on the other;²
- it failed to interpret Article X:2 properly in finding that this provision requires a comparison between the rates, requirements, and restrictions effected by the measure at issue in relation to the rates, requirements, and restrictions that existed under any baseline of comparison prior to the measure's enactment, rather than prior to its enforcement;³
- it incorrectly applied Article X:2 to the facts of this dispute in finding that Section 1 of P.L. 112-99 did not effect an "advance in a rate of duty or other charge on imports" or impose a "new or more burdensome" requirement or restriction on imports within the meaning of that provision⁴; and
- if the Appellate Body were to consider that the Panel made any factual findings with respect to the rates, requirements, or restrictions applicable under U.S. municipal law prior to the enforcement or enactment of Section 1 of P.L. 112-99, the Appellate Body would need to reverse any such findings on the grounds that the Panel applied an incorrect standard of review, and failed to make an objective assessment of the matter before it, including an objective assessment of the facts, as required by Article 11 of the DSU.⁵

6. For these reasons, China requests that the Appellate Body reverse the Panel's finding that Article X:2 of the GATT 1994 requires a comparison between the rates, requirements, and restrictions effected by Section 1 of P.L. 112-99 and the rates, requirements, or restrictions that were applicable "under an established and uniform practice" prior to the measure's enactment.⁶

7. China requests that the Appellate Body reverse the Panel's findings that Section 1 of P.L. 112-99 did not effect an "advance in a rate of duty" or impose a "new or more burdensome" requirement or restriction on imports under Article X:2 of the GATT 1994.⁷

8. Accordingly, China requests that the Appellate Body reverse the Panel's ultimate finding in paragraph 8.1(b)(ii) of the Panel Report that the United States did not act inconsistently with Article X:2 of the GATT 1994 because Section 1 of P.L. 112-99 did not effect an "advance in a rate of duty or other charge on imports under an established and uniform practice" or impose "a new or more burdensome requirement, restriction or prohibition on imports" within the meaning of that provision.

9. China requests that the Appellate Body complete the legal analysis to find, instead, that Section 1 of P.L. 112-99 effected an "advance in a rate of duty or other charge on imports under an established and uniform practice" and imposed "a new or more burdensome requirement, restriction or prohibition on imports" within the meaning of Article X:2 of the GATT 1994. Consequently, the Appellate Body should also find that the United States acted inconsistently with Article X:2 of the GATT 1994 in enforcing Section 1 of P.L. 112-99 prior to its official publication.

² Panel Report, paras. 7.155-7.161 and 7.201-7.203.

³ Panel Report, paras. 7.168, 7.171.

⁴ Panel Report, paras. 7.165-7.191 and 7.204-7.208.

⁵ Panel Report, paras. 7.158-7.186.

⁶ Panel Report, paras. 7.155, 7.168, 7.171.

⁷ Panel Report, para. 7.158-7.186, 7.190-7.191, 7.206-7.208.

ANNEX 2



WORLD TRADE
ORGANIZATION

WT/DS449/7

24 April 2014

(14-2488)

Page: 1/1

Original: English

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

**NOTIFICATION OF AN OTHER APPEAL BY THE UNITED STATES
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 17 April 2014, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (WT/DS449/R) and certain legal interpretations developed by the Panel in this dispute.

In particular, the United States seeks review by the Appellate Body of the Panel's legal conclusion that Section D of China's Panel Request was not inconsistent with Article 6.2 of the DSU¹ because it provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.² This finding is in error and is based on erroneous findings on issues of law and related legal interpretations, including, for example: the Panel's conclusion that a reference to Article 19 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") in China's panel request "warrant[ed] the inference" that the specific obligation at issue was Article 19.3 of the SCM Agreement;³ that a panel request may satisfy the requirements of DSU Article 6.2 if it permits "sufficiently clear inferences" as to the obligations at issue;⁴ that multiple, distinct legal obligations under an article of a covered agreement may be interpreted to determine whether a particular obligation forms part of the legal basis of the complaint;⁵ that a panel request's reference to an external source may inform whether the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly;⁶ and that subsequent statements may cure a deficient panel request.⁷ The United States respectfully requests the Appellate Body to reverse the Panel's findings and conclude that Section D of China's Panel Request was not consistent with DSU Article 6.2. As a consequence, the United States

¹ See Panel Report, para. 8.1(a).

² See Preliminary Ruling by the Panel, WT/DS449/4, para. 3.52.

³ See Preliminary Ruling by the Panel, WT/DS449/4, para. 4.1.

⁴ See Preliminary Ruling by the Panel, WT/DS449/4, para. 3.32.

⁵ See Preliminary Ruling by the Panel, WT/DS449/4, paras. 3.39-3.40.

⁶ See Preliminary Ruling by the Panel, WT/DS449/4, paras. 3.42-3.43.

⁷ See Preliminary Ruling by the Panel, WT/DS449/4, paras. 3.1-3.15.

further requests that the Panel's findings of inconsistency with respect to Articles 10, 19.3, and 32.1 of the SCM Agreement also be reversed as these claims are outside the terms of reference of this dispute.⁸

⁸ See Panel Report, paras 7.298-7.396, 8.1(c).

ANNEX 3**ORGANISATION MONDIALE
DU COMMERCE****ORGANIZACIÓN MUNDIAL
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***United States – Countervailing and Anti-Dumping Measures on Certain Products from China*

AB-2014-4

Procedural Ruling**1. BACKGROUND**

1.1 On Tuesday, 8 April 2014, China notified the Dispute Settlement Body and filed a Notice of Appeal with the Appellate Body Secretariat with respect to the Panel Report in *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (WT/DS449/R).

1.2 By letter of 11 April 2014, the United States requested the Division in this appeal to extend the time-limits for filing relevant documents pursuant to Rule 16(2) of the Working Procedures for Appellate Review (Working Procedures).

1.3 By letter of 12 April 2014, the Presiding Member of the Division, Mr. Ujal Singh Bhatia, invited the participants and third participants to provide their comments on the United States' request by 10 a.m. on 14 April 2014. China, Canada, the European Union, and Japan submitted comments within the deadline.

1.4 In its request, the United States observed that in the dispute *China – Measures related to the Exportations of Rare Earths, Tungsten, and Molybdenum* (DS431), China requested that the Division hearing that appeal extend "the deadlines for filing of relevant documents" pursuant to Rule 16(2) of the Working Procedures. To the extent that the Appellate Body were to grant such a request, the United States requested that the Division in this appeal grant an equivalent extension of time for the United States' Notice of Other Appeal and other appellant's submission.

1.5 The United States argues that to adhere to the time-period set out in the Working Procedures for filing those documents in this appeal "would result in a manifest unfairness" to the United States, constituting "exceptional circumstances" within the meaning of Rule 16(2). The United States recalls that the Appellate Body has exceptionally treated all documents relating to both appeals as having been filed "simultaneously" and contends that it would result in manifest unfairness to require the United States to file its other appeal in DS449 while permitting more time for China to file its other appeal in DS431, as if those appeals had not commenced "simultaneously". Moreover, according to the United States to permit more time for China to file its other appeal in DS431 than the United States would have to file its other appeal in DS449 would penalize the United States for having withdrawn its Notice of Appeal filed on 4 April 2014 in DS431, and for its willingness to cooperate and agree on an appropriate time for the filing of both appeals. The United States also refers to Rule 16(1), which provides that "[i]n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules."

1.6 China notes that requests for time-limit extensions have been filed occasionally in dispute procedures due to specific situations, and that normally parties did not object to the granting of short extensions to each other. While China does not perceive any linkage between this appeal and

the appeal in *China – Measures related to the Exportations of Rare Earths, Tungsten, and Molybdenum* (DS431) in the manner implied by the United States in its letter of 11 April 2014, China does not object to the Division in this appeal granting the United States the same extension for the filing of its Notice of Appeal and other appellant's submission as it would be granted to China in DS431. Even if it does not object to the extension request, China does not believe that there should be any linkage between the Working Schedule for the present appeal and the Working Schedule for the appeal in DS431. China considers that these are two different appeals involving different issues with different levels of complexity and that each appeal should proceed according to its own timetable based on the nature of each appeal.

1.7 Canada argues that, in the "exceptional circumstances" of two appeals simultaneously filed well in advance of the deadline, the Appellate Body has the discretion and the responsibility to determine working schedules that best preserve its capacity to deliver high-quality outcomes. Canada notes that the Panel Report in this dispute was circulated on 27 March 2014, but that the parties to the appeal have had the Panel Report much earlier than the third parties. Canada thus requests that any departure from the normal working schedule take into account the requirement that third participants be provided a meaningful opportunity to comment. Japan agrees with the United States that, since the appeals in DS431 and DS449 were considered to be filed "simultaneously", and since the Appellate Body decided to accept China's request for the extension to the deadlines in DS431, in the interests of fairness and orderly conduct of the appellate proceedings, the United States' request for the extension in DS449 should be similarly granted. The European Union considers for similar reasons that, with respect to scheduling, the appeal in DS449 should be dealt with in a similar manner to the appeal in DS431.

2. THE UNITED STATES' REQUEST TO EXTEND TIME-LIMITS FOR FILING DOCUMENTS

2.1 Rule 16 of the Working Procedures provides as follows:

(1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

(2) In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

2.2 In considering the United States' request, we find it useful to begin by observing that, while a party to the dispute has the right to initiate an appeal at any time during the 60-day period stipulated in Article 16.4 of the DSU, in practice, in most disputes, Members have appealed panel reports towards the end of this 60-day period. Presumably they do so in order to maximize the time that they have to consider the panel report, to decide whether to appeal it, and to prepare their appeal. We also observe that, in most cases, one of the parties to the dispute places the adoption of a panel report on the agenda of a DSB meeting that falls within the 60-day period under Article 16.4 of the DSU, and that the date of such DSB meeting thus becomes a *de facto* deadline by which any other party must appeal the panel report. We also note that Article 16.1 of the DSU provides that the panel report shall not be considered for adoption by the DSB until 20 days after the date it has been circulated to Members.

2.3 In this dispute, the Panel circulated its Report on 27 March 2014. The first regular DSB meeting scheduled after the circulation of the Panel Report will occur on 25 April 2014. Neither of the parties to this dispute placed the adoption of the Panel Report on the agenda of that DSB meeting and, in any event, China initiated its appeal before the date on which the agenda closed for the 25 April meeting. China launched an appeal of the Panel Report 12 days after its circulation, seemingly with the intention of having the appeal in this dispute heard by the

Appellate Body early. Ultimately, in an unprecedented development, the appeals in this dispute and in DS431 were simultaneously filed. Furthermore, following the simultaneous filing of the two appeals, China challenged the validity of the Notice of Appeal filed by the United States in DS431 and, in the event that the Appellate Body were to reject that challenge, requested the Division hearing that appeal to extend the deadline for the filing of China's Notice of Other Appeal and other appellant's submission. In a Procedural Ruling pursuant to Rule 16 of the Working Procedures dated 13 April 2014, the Division hearing the appeal in DS431 rejected China's challenge to the validity of the United States' Notice of Appeal but granted China's request for an extension of the relevant filing deadlines.

2.4 In the particular circumstances of this case, we consider that the early and unexpected initiation of an appeal by China may adversely affect the ability of the United States as the respondent to exercise its right to appeal in a meaningful and effective way. This may be particularly so to the extent that this appeal coincided with the simultaneous filing of the United States' appeal in DS431 and considering the timing of the appeal. The circumstances in which two appeals involving two of the same parties are filed simultaneously are highly unusual. The simultaneous filing of the two appeals led the Appellate Body to take necessary actions under Rule 16(1) of the Working Procedures to ensure fairness and orderly procedure in the conduct of appeals. Notwithstanding these unusual circumstances, the initiation of the appeal by China triggered the five-day deadline under Rule 23(1) and (3) of the Working Procedures for the United States to file a Notice of Other Appeal and an other appellant's submission. Accordingly, in order to participate in China's appeal as an other appellant, the United States must, pursuant to Rule 23(1) of the Working Procedures, file its other appeal 18 days after the circulation of the Panel Report. We note that this is a period even shorter than the minimum period of time provided for under Article 16.1 of the DSU before a circulated panel report can be considered for adoption by the DSB.

2.5 We further take into account that the dispute at hand involves complex and systemic issues of WTO law, and that additional procedural issues stemming from the exceptional situation of a simultaneous filing of two appeals had to be resolved at the beginning of this appeal. The deadline set out in Rule 23(1) and (3) for the filing of a Notice of Other Appeal and an other appellant's submission falls on a date only two and a half weeks after circulation of the Panel Report. Given all of the circumstances described above, this may be too short for the United States to effectively exercise its rights under the DSU while participating in China's appeal as an other appellant. Accordingly, we consider that strict adherence to the time-period set out in Rule 23(1) and (3) would result in a manifest unfairness in the particular circumstances of the case at hand.

2.6 With respect to third party rights, it is important to note that the third parties obtained access to the final Report of the Panel only after that Report was circulated to the Membership in all three official languages, that is, on 27 March 2014. In contrast, the Panel Report was issued to the parties several months earlier, once it was completed and sent to translation. China's initiation of its appeal also triggers the deadline under Rule 24(1) of the Working Procedures for third participants to file written submissions within 21 days. Within that period, third parties must review all the appellants', other appellants', and appellees' submissions and prepare their own submissions in response to the Panel Report and these other submissions. We consider, therefore, that in the specific circumstances of this case, including the early initiation of the appeal by China, this 21-day period may be insufficient to allow the third parties a meaningful opportunity to comment and sufficient time to finalize their submissions.

2.7 Finally, we take note of our duty, consistent with Rule 16(1) of the Working Procedures, to ensure fairness and orderly procedure in the conduct of appeals. As we have already stated, this consideration, among others, contributed to the Appellate Body's decision of 10 April 2014 resolving certain procedural issues raised by the simultaneous filing of this appeal and the appeal in *China – Measures Related to the Exportations of Rare Earths, Tungsten, and Molybdenum* (DS431), as well as to the Procedural Ruling pursuant to Rule 16 of the Working Procedures issued on 13 April 2014 by the Division hearing the appeal in DS431. We consider that it would also be consistent with the approaches taken in both of those decisions to grant the request for an extension that is made by the United States in this dispute, and to which China and the third parties that submitted comments do not object.

2.8 In the light of the above considerations, we have decided to extend the time-period for the United States to file its Notice of Other Appeal and other appellant's submission to Thursday,

17 April 2014. As a consequence of this decision, and in order to preserve the sequence of and periods between the other deadlines prescribed under the Working Procedures, it is also necessary to modify the dates for the filings of other submissions set out in the Working Schedule. We take note that the Working Procedures provide for all appellees' submissions to be submitted by the same deadline, and consider, in the circumstances of this case, that such deadline should be extended for all appellees irrespective of whether they are responding to the appeal or to the other appeal. We therefore also extend the time-period for the filing of appellees' submissions to Thursday, 1 May 2014, and we extend the time-period for third participants in this dispute to file their submissions to Monday, 5 May 2014.

2.9 At this juncture, we would like to emphasize that our decision to extend the relevant filing deadlines of the above documents has been made in the special context of the particular circumstances surrounding this dispute. The Appellate Body may provide additional reasons for this decision at a later point in time in its eventual report.

Modified Dates for the Submission of Documents

Process	Rule	Date
Notice of Other Appeal	Rules 16 and 23(1)	Thursday, 17 April 2014
Other appellant's submission	Rules 16 and 23(3)	Thursday, 17 April 2014
Appellees' submissions	Rules 16, 22 and 23(4)	Thursday, 1 May 2014
Third participants' submissions	Rules 16 and 24(1)	Monday, 5 May 2014
Third participants' notifications	Rules 16 and 24(2)	Monday, 5 May 2014

Signed in Geneva this 14th day of April 2014 by:

Ujal Bhatia
Presiding Member

Seung Wha Chang
Member

Yuejiao Zhang
Member
