UNITED STATES COURT OF INTERNATIONAL TRADE

Before: The Honorable Jane A. Restani, Judge

GPX International Tire Corporation et al, Plaintiffs,	**PUBLIC DOCUMENT**
United States, Defendant,	**Consol. Court No.: 08-00285**
and	
Bridgestone Americas Inc., et al., Defendant-Intervenors.	

RESPONDENT PLAINTIFFS' *SUPPLEMENTAL* MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE AGENCY RECORDS

Unconstitutionality of the New CVD Legislation

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INTRODUCTION AND SUMMARY OF ARGUMENT

From the moment the U.S. Department of Commerce asserted the right to conduct CVD investigations against China, various parties (including the Plaintiffs in this case) have strenuously and repeatedly argued that Commerce had no such right and that those investigations were unlawful. After almost five years of protracted and costly litigation, the courts finally confirmed that those investigations were in fact beyond Commerce's authority under the law in effect at that time. The unlawful CVD orders should be terminated.

But instead, Plaintiffs find themselves back in court. Congress decided to change the law. Although Congress can change the law prospectively, Plaintiffs strongly disagree with the way in which Congress has applied parts of its new law retroactively. This selective retroactivity violates three fundamental principles of justice enshrined in the Constitution. First, the retroactivity provision singles out a particular group, and then condemns and punishes conduct by that group not illegal or punishable at the time it was committed, and in doing so violates the *Ex Post Facto* Clause of Article I. Second, even if the new law is not so punitive as to trigger the *Ex Post Facto* Clause, the retroactivity provision imposes wholly new taxes that dramatically burden importers with no notice, going back far beyond the limited period of retroactivity typically allowed with or without notice, and in doing so violates due process rights under the Fifth Amendment. Third, the retroactivity provision irrationally discriminates against past importers, refusing to give them the same rights and opportunities given to future importers, and in doing so denies equal protection of the laws also guaranteed by the Fifth Amendment.

Congressional discretion does not justify violations of the Constitution. The effort to impose wholly new and discriminatory penalties going back more than five years to November 2006 must be struck down as unconstitutional.

RESPONDENT PLAINTIFFS' STATEMENT PURSUANT TO RULE 56.2

A. Administrative Determinations Under Appeal

In this continuing consolidated court action respondent and domestic interested parties have challenged Commerce's final AD and CVD determinations and resulting orders concerning *OTR tires from China*: (1) *Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 73 Fed. Reg. 51,624 (Sept. 4, 2008); and (2) *Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480 (July 15, 2008). These administrative determinations have been discussed in great detail in the Court's prior decisions in this case.

B. Issues of Law Presented

This case presents the following important issues of constitutional law for this Court to address and resolve: [1]

- whether Section l(b) of Pub. L. No. 112-99, 126 Stat. 265 (2012) is unconstitutional because it violates the *Ex Post Facto* Clause of Article I;
- whether Section 1(b) is unconstitutional because it violates the Fifth Amendment's guarantee of due process; and
- whether Section 1(b) is unconstitutional because it violates equal protection of the law as guaranteed by the Fifth Amendment's due process clause.

C. Statement of Reasons for Vacating Commerce Determinations

Commerce's CVD determination and order should be vacated because Section 1(b) is unconstitutional and should be severed from the legislation. Thus, pursuant to *GPX Int'l Tire*

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[1] When it ordered a remand "for a determination of the constitutionality of the new legislation" the Court of Appeals did not limit which constitutional issues could be addressed on remand. To the contrary, the Court of Appeals specifically noted that it had only received "cursory" briefing on the constitutional questions and recognized that initial consideration of any constitutional issues resides with this Court. *See GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1312-13 (Fed. Cir. 2012) ("*GPX VI*").

Corp. v. United States, 666 F. 3d 732 (Fed. Cir. 2011) ("*GPX V*"), Commerce did not have and still does not have legal authority to impose CVD duties retroactively against imports from NME countries, such as China. These reasons are set forth in more detail below.

STATEMENT OF FACTS

Those facts concerning initiation and conduct of the simultaneous AD and CVD investigations against OTR tires from China that yielded the final determinations and orders being appealed are set forth in the respective complaints of the individual court actions, and in this Court's prior decisions in *GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008) ("*GPX I*"); 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009) ("*GPX II*"); 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010) ("*GPX III*"); and 2010 WL 3835022 (Ct. Int'l Trade Oct. 1, 2010) ("*GPX IV*"). We set forth below those relevant facts that occurred after this Court's October 2010 final judgment.

AD and CVD Administrative Reviews and Appeals: GPX and Starbright requested and Commerce conducted AD and CVD administrative reviews of entries made during the first administrative review period. *See Certain New Pneumatic Off-the-Road Tires, Countervailing Duty Administrative Review*, 76 Fed. Reg. 23,286 (April 26, 2011) and *See Certain New Pneumatic Off-the-Road Tires, Antidumping Duty Administrative Review*, 76 Fed. Reg. 22,871 (April 25, 2011). GPX and Starbright appealed these AD and CVD administrative review determinations, obtaining injunctions against liquidation of the reviewed entries. *See* Order dated May 9, 2011 in Court No. 11-000-129. These appeals were stayed pending resolution of the *GPX* CAFC proceeding. *See* Order dated August 23, 2011 in Court No. 11-000-129.

Court of Appeals Proceeding and New CVD Legislation: The U.S. Court of Appeals for the Federal Circuit (CAFC) on December 19, 2011 rendered its decision on the proper scope of

CVDs under the then current law. The CAFC held unambiguously that "countervailing duties cannot be applied to goods from NME countries." *GPX V,* 666 F.3d 732 (Fed. Cir. 2011).

The Administration and Congress immediately began efforts to reverse the CAFC decision and obtain time for legislation while the CAFC mandate was pending.[2] On January 18, 2012, the Administration sent an "urgent" letter to Congress laying the groundwork for new legislation to preempt the CAFC's decision and avoid "substantial adverse economic implications for our country." *See* Letter to the Senate Finance Chair Max Baucus from USTR Ron Kirk and Comm. Sec. John Bryson (Jan. 18, 2012).[3] This letter also notes the need to comply with U.S. "international obligations," but does not otherwise discuss the double-remedy issue or the need for an offset to AD duties. Two days later, the United States requested and eventually received an extension until March 5, 2012 to file a petition for rehearing of the CAFC's decision in *GPX V*.

Having secured additional time, the rush to legislate continued. H.R. 4105 and S. 2153 were introduced on February 29, 2012 with identical provisions. Both proposals contained asymmetrical provisions on retroactivity – applying the CVD law to China both prospectively and retroactively, but applying the adjustment for double-counting only prospectively. The accompanying press releases[4] stressed the need to reverse the CAFC decision and the need to "hold China responsible" and "to stop China" so as to save American jobs. *See* Baucus, Thune

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[2] As there is no official compendium for this legislative history, for the Court's convenience, in this brief we provide in footnotes the internet address where the various pieces of miscellaneous legislative history cited herein may be found.

[3] http://www.commerce.gov/sites/defaultlfiles/documents/2012/january/commerce_ustr_011612.pdf.

[4] http://www.finance.senate.gov/newsroom/chairman/release/?id=1611b6e1-f691-4223-933b-b980771e16b2; and http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=282425.

Introduce Bill to Protect U.S. Jobs, Fight Unfair Chinese Subsidies with Countervailing Duties, Senate Finance Committee Press Release (Feb. 29, 2012) and Camp, Levin, Brady, and McDermott Introduce Legislation to Ensure Commerce Department Can Continue to Apply Countervailing Duty Laws to Non-Market Economies Like China, House Ways and Means Committee Press Release (Feb. 29, 2012). Both press releases also addressed the need to reduce the AD margins to account for any double-counting, and thus comply with U.S. international obligations. Neither press release mentioned the asymmetrical provisions on retroactivity.

Other than letters and press releases, there is virtually no other legislative history for this new law. There were no House or Senate hearings. There were no House or Senate reports. Other than a CBO analysis that the new law would increase revenues by $160 million over the 2013-2022 period, *see* Letter to Ways and Mean Chair David Camp from CBO Director Douglas Elmendorf (Mar. 2, 2012),[5] there was no other formal analysis of the new law. S. 2153 passed the Senate by unanimous consent. Applying the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, 158 Cong. Rec. S1375 (Mar. 5, 2012). H.R. 4105 passed the House under suspension of the rules. Applying Countervailing Duty Provisions to Nonmarket Economy Countries, 158 Cong. Rec. H1166-1173 (Mar. 6, 2012). The Senate then passed H.R. 4150 by unanimous consent. To Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, 158 Cong. Rec. S1441 (Mar. 7, 2012).

There was no debate at all in the Senate and only very limited debate in the House. During a brief 32 minute period before the vote, several House Members offered brief floor statements on the legislation. These statements criticized the CAFC decision, and repeatedly singled out China. Representative Camp stressed that "China distorts the free market."

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[5] http://www.cbo.gov/sites/default/files/cbofiles/attachments/HR4105Introduced.pdf.

Representative Levin emphasized the need "to hold China and other nations accountable" and "to rein in China's abusive trade practices." 158 Cong. Rec. H1167. Representative Rohrabacher elaborated that China "supports every rogue enemy of the United States." 158 Cong. Rec. H1168. Beyond this focus on China, there was also repeated condemnation of illegal subsidies by Representative Pascrell, H1169 ("illegal subsidies"), Representative Michaud, H1170 ("illegally subsidized"), and Representative Slaughter, H1170 ("illegal Chinese subsidies"). There was much discussion of the need to apply the CVD law to China to address these "illegal" subsidies, and occasional acknowledgement of the need to make adjustments for double-counting to comply with the WTO, but no discussion or acknowledgement of the asymmetrical provisions on retroactivity.

Although several Members suggested that should existing CVD orders be terminated because of the CAFC decision, U.S. industries would be vulnerable to imports from China, *see* 58 Cong. Rec. H1167 (Rep. Camp) and H1167 (Rep. Levin), none of these statements mentioned the parallel antidumping orders against these same imports. Each of the 23 then outstanding CVD orders against China had and still have a companion AD order. For 96 of the 114 calculated AD rates in these orders, the AD rate imposed was higher than 15 percent, resulting in a practical exclusion of those Chinese suppliers from the U.S. market. In this particular case, the AD order against plaintiffs GPX and Starbright imposes duties of 19.15 percent – market preclusive duties that have virtually eliminated plaintiffs' exports to the United States. In short, since imports from China were already subject to high AD duties, termination of the CVD orders would have very little if any effect on the imposition of relief for U.S. industries. There is not even a hint of this issue in the limited House debate.

It thus took Congress just nine days to introduce, pass, and present the legislation to the President for his signature on March 8, 2012. The President signed the new legislation into law on March 13, 2012. A White House press release acknowledged the need to apply the CVD law to China, and the need to adjust for double-counting, but also ignored the asymmetry in how these new rules would apply. *See* Statement by the Press Secretary on H.R. 4105, The White House Office of the Press Secretary (Mar. 13, 2012).[6]

The New Law: The new law mirrors H.R. 4105 and S. 2153 exactly, and contains several specific provisions relevant to constitutional law issues this case:

- Section 1(a) amends the CVD law to apply to "a nonmarket economy country," apparently relying on the definition of "nonmarket economy country" set forth at 19 U.S.C. § 1677(18);
- Section 1(b) extends the effective date of Section 1(a) back more than five years to November 20, 2006;
- Section 1(b) also makes clear that this retroactivity applies to all CVD proceedings by Commerce, "all resulting actions" by Customs, and all "civil actions, criminal proceedings, and other proceedings" before a Federal court in connection with the administrative actions by Commerce and Customs;
- Section 2(a) amends the AD law to make an adjustment to the dumping margin for nonmarket economy countries for double-counting, when certain conditions have been met; and
- Section 2(b) limits the applicability of Section 2(a) to determinations made on or after March 13, 2012.

See Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (Mar. 13, 2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1). Collectively, these provisions establish the following basic points about the new law:

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[6] http://www.whitehouse.gov/the-press-office/2012/03/13/statement-press-secretary-hr-4105.

First, the retroactivity provisions are asymmetrical. The new law applies the CVD law to NME countries retroactively for more than five years, but applies the adjustment mandated by the World Trade Organization ("WTO") for double-counting only prospectively from the date of enactment. The various press statements and House debate acknowledged this WTO requirement. But, this adjustment does not apply retroactively.

Second, the new law provides no mechanism for the ITC to reconsider its injury determinations for the current AD or CVD orders. Under the law, the ITC "shall evaluate … the magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). But, there is no mechanism under the new law either to reissue the original AD determination based on corrected AD margins, or reevaluate the material injury finding in light of any AD margins lowered by the offset for double-counting. Although future injury determinations will reflect properly adjusted AD margins, past injury determinations remain tainted by the higher margins that reflect the WTO inconsistent double-counting.

Third, Congress explicitly recognized that the enforcement of the CVD law involves a combination of civil and criminal proceedings. That is why Section 1(b) addresses "all resulting actions by" Customs, including actions for criminal customs fraud and specifically references "criminal proceedings" by Federal courts in connection with CVD determinations. 126 Stat. 265. An importer that does not pay the proper duty – by asserting on the import paperwork that the goods are not subject to the CVD order – faces possible criminal penalties.

Actions Subsequent to the New Law: Shortly after enactment of the new law, the CAFC requested and received five-page "letter briefs" from the parties concerning the impact of the new law on the case. On May 9, 2012 the CAFC rendered a subsequent decision that addressed the effect of the new law. *GPX VI*, 678 F.3d 1308 (Fed. Cir. 2012). The CAFC determined that,

on its face, the new legislation applied to all CVD cases initiated after November 2006, including those CVD cases for which an appeal had been made. The CAFC noted that "in order to implement World Trade Organization ("WTO") requirements," the new CVD legislation also contained a double-counting adjustment mechanism, but that adjustment did not apply retroactively. *GPX VI*, 678 F.3d at 1311.

The CAFC's decision *also* noted the arguments by GPX that the retroactive application provision was unconstitutional. Indeed, without prejudice to any of the constitutional issues raised, the CAFC noted that, given the operation and effective dates for another provision of the new legislation, there existed at least one issue of first impression. Accordingly, the CAFC remanded the *GPX* case to the Court of International Trade for proper briefing and "a determination of the constitutionality of the new legislation." *Id.* at 1313.

On May 16, 2012, the CAFC issued its mandate for the *GPX* case, and then issued an amended mandate on June 4, 2012 returning the case back to this Court.

ARGUMENT

I. THE EXCESSIVE AND ASYMMETRICAL RETROACTIVITY PROVISON IN SECTION 1(B) OF THE NEW CVD LAW IS UNCONSTITUTIONAL

A. Section 1(b) Is Unconstitutional Because It Violates Article I, Section 9 of the Constitution (The *Ex Post Facto* Clause)

The Constitution expressly prohibits Congress from enacting any *ex post facto* laws, U.S. Const. art. I, § 9, cl. 3, and also prohibits the States from enacting such laws, U.S. Const. art. I, § 10, cl. 1. These parallel clauses reflect the strong presumption against retroactive legislation "deeply rooted" in American jurisprudence. *Landsgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-33 (1998). As the Supreme Court has recognized, the Legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups

or individuals." *Landsgraf,* 511 U.S. at 266. That is precisely why there is a strong presumption against retroactive legislation and constitutional limits on its use.

This constitutional prohibition, however, does not apply to all civil laws. Rather, the Supreme Court has held the constitutional prohibition applies only to penal legislation – laws that impose new punishment. *Eastern Enterprises*, 524 U.S. at 533 ("…the *Ex Post Facto* Clause is directed at the retroactivity of penal legislation…."); *Landgraf,* 511 U.S. at 266 ("The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation."). As we show below, Section 1(b) of the new law, which retroactively applies the CVD law to NME countries, and which does not provide for any adjustment for double counting, imposes a new punishment after the fact, and therefore is retroactive penal legislation that violates the *Ex Post Facto* Clause. U.S. Const. art. I, § 9, cl. 3.

1. The Supreme Court has confirmed that retroactive civil penalties can violate the *Ex Post Facto* Clause

Although many of the Supreme Court's *ex post facto* cases address criminal laws, there have also been several instances where the Court has discussed this constitutional prohibition in the context of civil laws that imposed retroactive penalties or punishment of various types. In one of the earliest such discussions, Chief Justice Marshall considered a Georgia law that retroactively terminated title to property, and explained his definition of a constitutionally impermissible *ex post facto* law: "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. 87, 138 (1810). This definition focuses on the existence of punishment, and is not limited to criminal laws. Justice Marshall emphasized this distinction by nothing that the punishment need not be jail time, and that "[s]uch a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury." *Id.*

In this focus on retroactive changes to the manner of punishment, Justice Marshall summarized what had been two distinct categories under the formulation in another early case, *Calder v. Bull*, 3 U.S. 386 (1798). Justice Chase explained his view that *ex post facto* laws were, among other things, laws that either (1) punished an action "which was innocent when done," or (2) that "inflicts a greater punishment" than applied when the act was committed. Both of these categories represent changes to the manner of punishment. *Id.* at 390.

The Supreme Court returned to these themes in the aftermath of the Civil War. When addressing a Missouri law denying former Confederate soldiers eligibility for the ministry, Justice Field relied on this definition from *Fletcher*, and then went on to stress two aspects of the non-criminal retroactive law being challenged, drawing on the categories from *Calder*. First, he stressed that the law imposed "a punishment for an act not punishable at the time it was committed." Second, he also stressed that the law imposed "additional punishment to that prescribed when the act was committed." *Cummings v. Missouri*, 71 U.S. 277, 328 (1866). In a parallel case attacking a similar congressional enactment restricting the practice of law, the Court made clear its rationale from *Cummings* also applied to Congress. *Ex Parte Garland*, 71 U.S. 333, 377-78 (1866).

The Supreme Court has also considered the specific circumstance of retroactively raising taxes on a specific product. In *Salmon v. Burgess*, 97 U.S. 381 (1878), the Court considered whether a manufacturer could be punished civilly for violating an increased tax on tobacco not in effect at the time the conduct occurred. The Court said that such penalties – the payment of an additional tax of $377 – subjected the manufacturer to "the operation of an *ex post facto* law." 97 U.S. at 384. The Court noted the availability of parallel criminal and civil sanctions, and emphasized that the prohibition against *ex post facto* laws cannot be evaded by "giving a civil

form to that which is essentially criminal." *Id.* at 385. But at the same time, the Court stressed it was considering civil penalties, not criminal penalties. *Id.* at 382. The Court cited to *Fletcher*, and *Cummings*, both decidedly non-criminal cases.

Beyond stressing changes to the nature of the punishment, the Court has also stressed that singling out a group for punishment crosses the constitutional line, even when the Court was divided on where to draw that line. For example, *Flemming v. Nestor*, 363 U.S. 603 (1960), involved termination of social security benefits for certain categories of individuals. The Court summarized its prior cases as relying heavily on a finding of punitive intent behind the challenged legislative enactment. 363 U.S. at 615. The Court also clarified that as "prior decisions make clear … the severity of a sanction is not determinative of its character as 'punishment,'" rather it is the targeting of the class for punishment. *Id*. at 616 n.9.

Going back to *Calder* and *Fletcher* and consistently since then, the constitutional test has been whether a retroactive law changes punishment after the fact, and singles out a group for this new punishment. Congress can single out groups for punitive treatment prospectively, but as the Court recently cautioned, the constitutional limit imposed by the *Ex Post Facto* Clause means that "the regulatory interest that supports prospective application will not necessarily also sustain its application to past events." *Landgraf*, 511 U.S. at 267, n.21 (citations omitted).

2. Section 1(b) of the new law imposes retroactive penalties against imports from Nonmarket economies, and thus violates the *Ex Post Facto* Clause.

Section 1(b) of the new law authorizes retroactive CVD measures against NME countries, but without any adjustment for possible double-counting. 126 Stat. 265. Section 1(b) is punitive in two different respects. At its most general level, the new law imposes new penalties against imports from China, sanctioning acts that were not eligible for penalties under prior law. Imports from China could previously be subjected to special AD measures, but the addition of

CVD measures punishes acts that were "innocent when done," *Calder*, 3 U.S. at 390. Importers from NME countries like China are thus being singled out for new penalties in a way that falls squarely within the principles set forth in *Calder*, *Fletcher*, *Cummings*, *Salmon*, and *Flemming*.

Even more troubling, however, are the details of the new law. The new law has asymmetrical effective dates. The authorization to apply CVD measures applies both prospectively, and retroactively back to November 20, 2006. Sec. 1(b), 126 Stat. 265. But, the authorization to adjust for possible double-counting applies only prospectively. Sec. 2(b), 126 Stat. 265, 266. The continued imposition of these original CVD orders (1) without any retroactive adjustment of the parallel AD margins, and (2) without any chance for an injury determination based on proper AD margins is fundamentally punitive in nature, and thus subject to the *Ex Post Facto* Clause. The new law thus "inflicts a greater punishment," *Calder*, 3 U.S. at 390, than both penalties under the old law as well as prospective penalties under the new law.

Such retroactive CVD measures meet the three-part test for finding a statute to be penal as set forth in *Huntington v. Attrill*, 146 U.S. 657 (1897). As the CAFC has summarized this test, a statute is considered "penal" when:

> (1) the costs imposed are unrelated to the amount of actual harm suffered and are related more to the penalized party's conduct, (2) the proceeds from infractions are collected by the state, rather than paid to the individual harmed, and (3) the statute is meant to address a harm to the public, as opposed to remedying a harm to an individual.

Huaiyin Foreign Trade Corp. v. United States, 322 F.3d 1369, 1380 (Fed. Cir. 2003)(citing *Ingalls Shipbuilding Inc. v. Dalton*, 119 F.3d 972, 978 (Fed. Cir. 1997)). The new law meets this test for a penal statute.

The additional CVD measures are unrelated to the amount of actual harm suffered. Under the new law, importers are being punished for their prior conduct of importing from China.

Even assuming that normal AD/CVD measures are proportional to some measure of harm, the new law operates in ways to disrupt this proportionality in a punitive manner. First, the duties are now higher than under either prior law or the new law applied prospectively. Under prior law, the CVD measures were unlawful, and therefore no CVD measures could be imposed. *GPX V*, 666 F.3d at 745. The blunt tool of the NME AD measures was the exclusive remedy under the old law. Under the new law applied prospectively, CVD measures can be added as an additional remedy, but any parallel AD measures must be reduced by the amount of any demonstrated double-counting that the new law authorizes. Prospectively, the law preserves some proportionality through the offset for double counting. For the period of retroactive application, in contrast, the additional CVD measures apply but without any possible adjustment to the AD measures. The combined duties are thus higher, and any proportionality has been shattered.

Second, these higher AD duties that were improper under prior law have tainted the ITC injury determinations, which cannot be reconsidered. All of the prior CVD orders subject to the new law also have parallel AD orders that impose additional duties. In making its single injury determination for those parallel AD and CVD investigations, the statute required the ITC to evaluate "all relevant economic factors," including the "magnitude of the margin of dumping." 19 U.S.C. § 1677(7)(C)(iii)(V). Under the new law, any adjustment for double-counting takes the form of a reduction in the AD margin. Section 2(a), 126 Stat. 265, 265-66. Prospectively, future injury determinations will take this adjusted AD margin into account. Retroactively, past ITC injury determinations have been tainted by artificially high AD margins – margins that included the double-counting that has not been eliminated – which increased the likelihood of affirmative injury determinations.

In addition, current U.S. law does not make any self correcting mechanism to adjust the magnitude of the duties. Unlike those countries that apply the so-called "lesser-duty-rule," *cf. WTO Anti-Dumping Agreement*, Article 9.1 ("it is desirable … that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry"), *WTO SCM Agreement*, Article 19.2 (same), the United States has no mechanism to adjust duties downward when they are disproportionate to the degree of harm being suffered by the domestic industry. Thus, current U.S. law has no self-correcting mechanism to address situations where the AD and/or CVD measures are too high relative to the harm being suffered by the domestic industry. The retroactive imposition of CVD measures without any adjustment to parallel AD measures for double-counting thus exacerbates an already troubling situation. The new law did not fix this problem, and instead increased the punishment.

Thus, the retroactive CVD measures without any adjustment to the parallel AD measures are no longer proportional. The adjustment that Congress deemed necessary prospectively to comply with U.S. international obligations has been denied retroactively. This situation is thus the opposite of *Huaiyin Foreign Trade*, where the CAFC noted the amount of the anti-dumping duties were "identical" before and after the new law, 322 F.3d. at 1380, and there were no other penalties being imposed. Here the amount of total duties being collected is higher than under the old law, past importers of Chinese products suffer penalties for conduct "not punishable when it was committed," *Fletcher*, 10 U.S. at 138, and the past importers are much worse off than prospective importers.

The proceeds are collected by the state, not paid to the individual. In *Huaiyin Foreign Trade*, the CAFC noted that the Byrd Amendment –requiring the payment of duties to the domestic industry – actually enhanced the non-penal nature of measures. 322 F.3d. at 1380. But,

the Byrd Amendment has been repealed and the duties paid now are once again collected by the state. To paraphrase *Huaiyin Foreign Trade*, the duties now bear more resemblance to a fine payable to the government, and look less like compensation to victims of anti-competitive behavior. This feature of the U.S. law must be viewed in light of Chief Justice Marshall's recognition many years ago that the *Ex Post Facto* Clause also protects against punishment that "may inflict pecuniary penalties which swell the public treasury." *Fletcher*, 10 U.S. at 138.

The retroactive duties address a public harm, not a harm to any individual. Although normal AD and CVD measures being applied prospectively may be remedial, the extra duties being imposed by retroactive application of the CVD measures to NME countries are not remedial. Rather, they are addressing a public harm, and are more in the nature of a penalty.

First, the additional duties are duplicative, not remedial. The cases to which the new law applies all involved both AD and CVD measures. Congress has itself now required an adjustment prospectively for any demonstrated double-counting. So, the CVD measure and the properly adjusted AD measures are remedial when applied prospectively. Continued imposition of unadjusted AD measures retroactively leaves in place double counting, going beyond the remedial purpose of the normal operation of the trade remedy laws, and by doing so must be addressing some other public harm, not simply providing a remedy.

Second, although the legislative history of this new law is exceedingly sparse, it suggests Congress was addressing a perceived public harm – the need to punish China (thereby punishing past U.S. importers) and address "illegal" subsidies – and not providing a remedy. Unlike other cases, there was no clear congressional reiteration of a strictly remedial purpose. *Cf. Huaiyin Foreign Trade*, 322 F.3d. at 1380-81 (quoting congressional statements about remedial purpose). Here the congressional rush to judgment left no hearings or reports that provide evidence of such

deliberation. Rather, the 32 minute House Floor Debate on March 6, 2012 saw several statements of punitive intent. *See* Mr. Levin, 158 Cong. Rec. at H1167 (need to "hold China and other nations accountable"); Mr. Rohrabacher, *Id.* (China "supports every rogue enemy of the United States."). Only one Member suggested a possible remedial purpose. Mr. Ellmers, *Id.* at H1169 ("These duties are not punitive; they merely serve as a correction to unfair Chinese subsidies."). Yet, this lone comment was surrounded by three other members – Representatives Pascrell, Michaud, and Slaughter -- condemning the "illegal" subsidies. H1169-H1170. Although there were many statements that the adjustment was needed to makes the law consistent with U.S. WTO obligations, there were no statements at all acknowledging the asymmetry in application.

Thus, Section 1(b) of the new law, 126 Stat. 265, represents a penalty. By retroactively imposing both the full CVD measure and the full, unadjusted AD measure based on the NME antidumping methodology, this provision ignores the proportionality. The old law used the crude NME anti-dumping methodology, and avoided double counting by not imposing any CVD measures. The new law imposes both AD and CVD measures, avoiding double-counting through the offset, but only prospectively. This new law and its asymmetrical retroactivity thus addresses some perceived public wrong, and the Congressional desire to punish China (by punishing past U.S. importers) and address "illegal" subsidies, not any properly targeted remedy for a private wrong. The "regulatory interest that supports prospective application" of the CVD law to NME countries, "will not necessarily also sustain its application to past events." *Landgraf*, 511 U.S. at 267, n.21 (citations omitted). Moreover, this new law illustrates the precise problem that the Supreme Court has warned against – that congressional "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of

retribution against unpopular groups or individuals," *id.* at 266, such as those like GPX who import from China. The retroactive application of this change, without the corresponding adjustment for any double-counting, thus crosses the line from permissible legislation to an unconstitutional penalty.

3. The *Ex Post Facto* Clause applies to all retroactive penal legislation, not just criminal legislation.

Some have argued that the *Ex Post Facto* Clause applies only to criminal laws. The language to this effect originates in *Calder*, and has been repeated with some regularity over the past two centuries. But, this narrow reading of *Calder* is incorrect.

Even in *Calder* itself, the term "criminal" was being used in a broader sense. It describes the provision as needed "to protect his person from punishment by legislative acts, having a retrospective operation." 3 U.S. at 390. *Calder* thus uses "crime" in the more general sense of the predicate act that triggers some punishment or penalty. *Calder* cites Blackstone as the authority, 3 U.S. at 391 , and Blackstone used the concept "criminal" broadly to refer to any "public wrongs," as opposed to "private wrongs". Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893), Vol. 1 – Books 1 & 2, Ch. 1, p. 123. Blackstone specifically included smuggling or other laws to protect the King's revenue as examples of "public wrongs." *Id.*, Vol. 2 – Books 3 & 4, Ch. 12, pp. 154-155.

Subsequent decisions have read *Calder* in this light. *See Eastern Enterprises*, 524 U.S. at 533 (1998) ("*Ex Post Facto* Clause is directed at the retroactivity of penal legislation," citing *Calder*); *Landgraf ,* 511 U.S. at 266 n.19 ("We have construed the Clauses as applicable only to penal legislation," citing *Calder*). Thus, both *Calder* on its face and recent construction of that decision confirm that the *Ex Post Facto* Clause applies to all penal legislation, and not just to criminal laws. Cases that cite *Calder* for the narrower proposition are simply ignoring this

important distinction. *See NationsBank v. United States*, 269 F.3d 1332, 1336 (Fed. Cir. 2002). One need not overrule *Calder* entirely, as some have argued with great force. *Id.* at 1339 (Plager, J, dissenting) (discussing the historical and logic criticisms of *Calder*). Rather, this Court need only recognize and respect the long line of Supreme Court decisions that have recognized that certain non-criminal laws may be sufficiently punitive to trigger the constitutional prohibition set forth in the *Ex Post Facto* Clause. This new law presents such a situation.

B. Section 1(b) Is Unconstitutional Because It Violates The Fifth Amendment's Guarantee Of Due Process

The constitutional limits on retroactive legislation take many forms. The new law seeks to impose retroactive penalties, and is thus barred by the *Ex Post Facto* Clause. But, even if the Court were to ignore the punishment inherent in the new law's extreme and asymmetrical retroactivity, the new law would still not pass constitutional muster. CVD measures are taxes designed to eliminate any unfair advantage. Their retroactive application under Section 1(b) of the new law is unconstitutional as a violation of due process under Fifth Amendment. U.S. Const. amend. V. Indeed, this conclusion is true even if the new CVD law is considered as general economic legislation rather than specifically as a tax measure.

1. By instituting a retroactive tax, Section 1(b) of the new law exceeds specific constitutional restraints under the Fifth Amendment

a. CVDs are a tax subject to due process restraints

The purpose of the CVD law is to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from . . . subsidies paid by their governments." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978). It is not just an offset; it responds to an "unfair" advantage – effectively a windfall to the importer. Since enactment of the first countervailing duty statute in 1897, this offset was accomplished by imposing an "additional duty" to be paid by the importer as the beneficiary of that unfair advantage, as opposed to any

fee or charge levied against the foreign producer. *See* Sec. 5 of the Tariff Act of 1897, 30 Stat. 205 (July 24, 1897). The existing statute follows this approach, although the duty in question is now referred to as a "countervailing duty," to be imposed "in addition to any other duty imposed." 19 U.S.C. § 1671(a).

"Duties" have historically and universally been understood to constitute a tax. *See* Blackstone, Vol. I, Ch. 8, pp. 314-18 (discussing "{t}he customs; or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported" among the "perpetual taxes"). The very power of the Federal Government to levy duties is found under the Taxing and Spending Clause of the U.S. Constitution, U.S. Const. art. I, § 8, cl. 1, and the term tax and duty have been used interchangeably by the courts in addressing the Federal Government's authority to tax foreign commerce. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 411 (1928) ("{N}o historian, whatever his view of the wisdom of the policy of protection, would contend that Congress, since the first revenue Act in 1789, has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations . . . .").

The fact that CVDs serve a regulatory purpose does not alter their status as a tax. As explained by the Congressional Research Service in its annotated analysis of the Constitution, "{t}he earliest examples of taxes levied with a view to promoting desired economic objectives" were import duties. *The Constitution of the United States of America: Analysis and Interpretation*, Congressional Research Service, S. Doc. No. 108-17 (2004) (emphasis added) at 160 (citations omitted). Indeed, the second statute adopted by the first Congress was a tariff act, calling for, *inter alia*, "the encouragement and protection of manufactures." *Id*. (citations omitted). Even in situations where the revenue generated is negligible, a fact not present in this case in light of the expected $160 million in revenue, or the purpose of a duty "has the effect of

suppressing an activity or where it is coupled with regulations that clearly have no possible relation to the collection of the tax," it does not alter its status as a tax. *Id*. at 159. To this end, CVDs may be seen in the same context as the duties upheld by the Supreme Court in *J.W. Hampton, Jr. & Co.* – a tax that served the purpose of "equalizing" competition between foreign and domestic goods. 276 U.S. at 403-4. Given this history as well as the legal and practical effect of duties, CVDs are a special type of tax properly assessed for constitutionality under the Supreme Court's tax cases.

Although Congress may enact retroactive taxes in a manner that does not offend due process rights under the Fifth Amendment, the Supreme Court has "never intimated that Congress possesses unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations.'" *United States v. Carlton*, 512 U.S. 26, 37 (1994) (O'Connor, J., concurring) (citations omitted). "The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Id.* at 37-38. To determine whether a retroactive tax survives scrutiny under the Fifth Amendment, it is "necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *United States v. Hemme*, 476 U.S. 558, 568 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

The harsh and oppressive standard applied by the Supreme Court in prior cases has produced a few key considerations. First, borrowing from cases that predate the standard, the Court has stated that "wholly new taxes" may not be applied retroactively at all. *Carlton*, 512 U.S. at 34. This rule on "wholly new taxes" may be viewed in the context of proper notice. As explained by Justice O'Connor in her concurring opinion, "{b}ecause the tax consequences of

commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them." *Id*. at 38.

Second, the principle of notice has been paired with the issue of consequences to affected taxpayers in analyzing whether retroactive application violates due process. In *Hemme*, the Supreme Court stated that "one of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute." *Hemme*, 476 U.S. at 569. To that end, the Court found relevant whether taxpayers were "no worse off than they would have been without the enactment" of the retroactive legislation. *Id*. at 570. Another important aspect of "notice and consequence" analysis is whether the retroactive measure applied to the voluntary act of the taxpayer that would have been avoided had proper notice been effected. In *Welch*, the Court distinguished challenges of retroactive measures that applied to voluntary acts, such as the award of gifts made and completely vested before the enactment of the taxing statute, as opposed to challenges of retroactive measures that apply to incidents such as income. According to the Court, the former measure presented a question of reasonable avoidance that implicated due process, whereas the later measure involved only "the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate." *Welch*, 305 U.S. at 147-48.

Finally, in *Carlton*, the Supreme Court reaffirmed that it was important to look to the period of time it took to enact the legislation at issue to determine whether a period of retroactivity exceeded the boundaries of due process. 512 U.S. at 32. The Court noted that Congress generally has confined the retroactivity of tax statutes "to short and limited periods

required by the practicalities of producing national legislation." *Id*. at 33 (quoting *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981)). In the context of taxes, the "modest period of retroactivity" referred to by the Court in *Carlton*, 512 U.S. at 32, has exceeded roughly one year in only the rare instance in which the legislature in question met only biannually. "{A} period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions." *Id*. at 38 (O'Connor, J., concurring); *see also NationsBank*, 269 F.3d at 1337 (citing *Carlton* in upholding eight-month retroactive treatment).

b. Section 1(b) of the new law fails each of the tests established by the Supreme Court in assessing whether a retroactive tax violates constitutional due process protections

As it stands, Section 1(b) of the new law implicates and fails the three tests cited above found relevant if not dispositive by the Supreme Court in determining whether a retroactive tax violates due process rights guaranteed by the Fifth Amendment. Indeed, because Section 1(b) represents a comprehensive failure of all these tests, it provides strong justification for a finding the provision to be unconstitutional.

First, Section 1 of the new law retroactively introduces a wholly new tax under U.S. law. It accomplishes this feat not by closing a previous loophole or eliminating an express exemption for NMEs, nor is any existing rate of taxation or existing methodology for assessing a rate altered. Rather, the new law expressly includes NMEs within the scope of Section 701 of the Tariff Act of 1930 where their inclusion was never before contemplated, intended, or even thought possible. Sec. 1, 126 Stat. 265. A very long legislative history reflects that in the prior law Congress repeatedly adopted Commerce's position that "countervailing duties cannot be imposed on NME exports." *See GPX V*, 666 F.3d at 737.

Importantly, what drove the CAFC's opinion in *GPX V* was not merely that the statute precluded the application of the CVD law to NMEs. Rather, looking back at its previous opinion

in *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), the CAFC reiterated 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." *GPX V*, 666 F.3d at 738 (citations omitted). In sum, the CAFC in *Georgetown Steel* and again in *GPX V* saw that the practices at play within NMEs as fundamentally distinct from countervailable subsidies, and confirmed that the statute could not apply or reasonably be expected to apply to such practices.

Congress may now define practices within NMEs to be countervailable subsidies, but that change in definition is not the result of any logical extension of prior law or understanding of the activities to which that law applied or potentially applied. It is not simply a matter of the degree of taxation, as it might be in the case of a retroactive amendment in income tax rates. In that circumstance, there is a consensus on the subject of the taxation – income. In the case of the new law, there is a wholesale and dramatic change in perspective that brings within the scope of the statute activities previously not known to give rise to countervailable subsidies, *i.e.*, the very act subject to taxation. Practices in NMEs were not known to be potentially taxable under the old countervailing duty law because subsidies did not exist in NMEs. *Georgetown Steel*, 801 F.2d at 1315-16. Practices in NMEs became taxable under the countervailing duty law because Congress only recently changed what is contemplated under the law. The new law thus is properly understood to introduce a wholly new tax and may not be applied retroactively without violating due process rights under the Fifth Amendment.

Second, the new legislation fails the Supreme Court's notice and consequence analysis. It is uncontested that importers had no notice of Congress' intent to extend the CVD law to NME imports more than five years before Congress acted. The congressional "debate" that transpired

in fashioning the law took little more than a week and took place years after implicated import entries had been made by GPX. Allowing Commerce's own unlawful actions in prosecuting NME CVD cases under then current law to serve as constructive notice of Congress' subsequent legislation would eviscerate any notion of certainty or just and fair treatment under the law. Importers were entitled to take informed (and correct) positions under the law without triggering immediate anticipation that Congress would pull the rug out from under them in the middle of the night. Lacking any notice or reasonable ability to anticipate congressional action, let alone such extreme retroactively, importers such as GPX reasonably chose courses of action – entering goods subject to Commerce investigation – that definitively left them in a position worse off after Congress acted than had Congress not acted at all. GPX is now liable for duties that would not have applied in the absence of the new legislation. *Cf. Hemme*, 476 U.S. at 571 (no due process violation where retroactive change in tax resulted in no greater tax than the estate would have owed under the old law).

Moreover, the decision to enter the goods was entirely voluntary and constituted transactions not unlike the gifts made before enactment of a taxing statute identified by the Supreme Court in *Welch*. Such transactions are of a kind the importer "might well have refrained from making had he anticipated the tax," and therefore "so arbitrary and oppressive as to be a denial of due process." 305 U.S. at 147. This is not a matter of simple receipt of income, where it cannot be assumed that a party "would refuse to receive . . . even if they knew their receipt would later be subject to a new tax or to an increase of an old one." *Id*. at 148.

Third, even if the extension of the CVD law to NMEs is not considered a "wholly new tax," the nearly six-year retroactive period provided under Section 1(b) of the new law far exceeds the "modest period of retroactivity" referred to by the Supreme Court in *Carlton*. 512

U.S. at 32. Thus, six years cannot be associated with the "short and limited periods required by the practicalities of producing national legislation," that have customarily governed congressional practice. *Id*. at 33. The retroactive period provided by Section 1(b) of the legislation exceeds the roughly one-year period normally afforded acts of Congress in a tax context, and therefore "raises serious constitutional questions," *id*. at 38, that must lead to the conclusion that it denies fundamental due process rights under the Constitution.

2. Even if considered simple economic regulation, the retroactive and asymmetrical nature of the new NME CVD law otherwise serves no legitimate legislative purpose furthered by rational means

Even if new CVD measures are not viewed as a tax, but more generally as economic regulation, they do not survive scrutiny. To satisfy due process, Congress must have enacted a retroactive economic statute for a legitimate legislative purpose, and retroactively applying the statute must be a rational means to accomplish Congress' purpose. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729-30 (1984). Moreover, the constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J. concurring) (citations omitted). "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). Finally, as with tax legislation, the period of retroactivity should be moderate and "confined to short and limited periods required by the practicalities of national legislation." *Pension Benefit Guaranty Corp.*, 467 U.S. at 731 (quoting *Darusmont*, 449 U.S. at 449).

Retroactively applying the CVD law, while denying any offset for any double counting that Congress expressly applies prospectively in recognition of the potential harm caused by dual application of NME AD and CVD duties, fails these tests. This asymmetry in treatment cannot

be said to serve a legitimate legislative purpose. Moreover, this improper legislative purpose is exacerbated by the legislation's departure from "customary congressional practice" to confine any retroactivity "to short and limited periods required by the practicalities of producing national legislation." *Id*. The issue of applying CVD law to NME countries was not the subject of years or even months of congressional deliberation. Indeed, the target of the legislation was a very recent opinion of the CAFC Court that reconfirmed decades of established law that Congress had itself repeatedly acknowledged. This is not a situation in which the distinction in the NME AD remedy went unnoticed by Congress in over two decades since it last confirmed that the CVD could not apply to NME countries. This is not a situation in which Congress sought to cure some latent defect in its prior enactments. *Cf. Carlton*, 512 U.S. at 31-32. These facts do not present the kind of "practicalities of producing national legislation" that legitimately support the nearly six years of retroactive treatment called for by Section 1(b) of the legislation. 126 Stat. 265.

Finally, even if Congress has a legitimate legislative purpose to "protect" U.S. industries, retroactive legislation is not a rational means to further this purpose. Retrospectively, the protection sought by Congress has already been effected, and cannot be undone. In the case of GPX, the import-disciplining affect of the unlawful CVD orders began when CVD deposits were first ordered in 2007. No event can undo that protection already provided. The fact that GPX might recover what were unlawful deposits says nothing of GPX's practical inability to ship commercial volumes of the product over the period they were enforced, which is the "protection" Congress irrationally claimed would be lost. This reinforces the harsh, oppressive nature of the retroactivity on companies like GPX, whose business in the United States was destroyed. Prospectively, Congress irrationally implies that the loss of a CVD remedy somehow invites an immediate surge of imports previously subject to unlawful CVD orders. There is no rational

basis for this concern. The reality is that for all imports subject to the unlawful CVD orders, substantial anti-dumping duties also apply. Indeed, the antidumping duties tend to be larger than the CVD duties and market-prohibitive. Any "protection" preserved by retroactively validating unlawful CVD orders is illusory. For these reasons, the retroactive nature of the new legislation cannot be said to serve a legitimate legislative purpose furthered by rations means, and therefore it denies due process under the Fifth Amendment.

C. Section 1(b) Is Unconstitutional Because It Violates Equal Protection Of The Law As Guaranteed By The Fifth Amendment's Due Process Clause

In this case, Congress has drawn a line between two points in time. It has gone back in time to change a law applicable to importers of goods from NMEs under CVD investigation, the result of which is not to equalize treatment among importers, *cf. NationsBank*, 269 F.3d at 1338 (citing rational purposes based on change in tax to effect tax parity), but to further burden those importers under CVD investigation in the former period. Specifically, the asymmetrical periods of retroactivity in the new legislation are logically incoherent and arbitrarily discriminate against importers subject to CVD orders put in place during the retroactive period. That is to say, Section l(b) extends the scope of the CVD law to include NME countries going far back in time. 126 Stat. 265. In contrast, Section 2(b) applies the legislative fix for the "double-counting" that results from such extension of the CVD law only prospectively. 126 Stat. 265, 266. There is no "reasonably conceivable state of facts that could provide a rational basis" for this discriminatory treatment. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). If the application of the CVD law to NME countries requires a fix for double-counting -- as Congress seems to think by passing Section 2(a) of the new law -- there is no legitimate reason to apply that fix only prospectively and thereby deny importers subject to CVD investigations and orders during the retroactive period equitable treatment. This inconsistency cannot reflect any legitimate

legislative purpose furthered by rational means. For that reason, the retroactivity provisions of Section 1(b) of the new law violates equal protection under the law guaranteed by the Fifth Amendment's due process clause.

II. BECAUSE THE NEW CVD LAW CANNOT BE APPLIED RETROACTIVELY, THE OTR-TIRES CVD ORDER MUST BE TERMINATED

Because Section 1(b) of the new law is unconstitutional, it should be severed from the remainder of the new CVD legislation to preserve the broader legislation. The general rule of severability is that a federal court should not invalidate more of a statute than necessary. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)). In 2010, the Supreme Court restated the severability doctrine in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. ___, 130 S. Ct. 3138 (2010). Under step one of the analysis a reviewing court must determine whether all of the remaining provisions of the statute are still fully functional without the constitutionally infirm provision. 561 U.S. at ___, 130 S. Ct. at 3161-3162. If the statute still fully functions, the reviewing court then considers under a second step whether Congress would find the remaining statute acceptable. *Id*.

Applying this test to the statute in question establishes that Section 1(b) of the new law that contains the offending retroactive effective date may be severed from the remainder of the statute. First, eliminating the retroactive effective date found in Section 1(b) of the new legislation does not render the remainder of the statute inoperable. It merely limits application of the CVD law to NMEs to prospective circumstances. Second, it cannot be said that Congress would not be satisfied with prospective application, as Congress clearly intended to provide domestic industries with a new trade remedy. The fact that the remedy in question may not be applied retroactively does not nullify the value Congress placed on that remedy prospectively.

"{N}othing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred" no remedy at all to a remedy that only applies prospectively. 561 U.S. at ___, 130 S. Ct. at 3162.

Severing Section 1(b) of the new legislation from the remainder of the statute means that CVD remedies could not apply retroactively to NME countries. Thus, this Court must hold unlawful the challenged CVD determination pursuant to the CAFC's *GPX V* decision. Commerce had no authority to impose CVD duties against NMEs such as China. Or stated differently, *GPX V* governs this case. It follows that because Commerce had no authority to impose CVD duties against imports from China, this Court must hold unlawful Commerce's underlying CVD determination and then instruct Commerce to terminate the CVD order imposed on OTR tires from China.

CONCLUSION

For all of these reasons, Section 1(b) must be struck down as unconstitutional, and the CVD order at issue here terminated as unlawful under *GPX V*.

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