UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JANE A. RESTANI

GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd., Plaintiffs, and Tianjin United Tire & Rubber International Co., Ltd. Consolidated Plaintiff, v. United States, Defendant, and Bridgestone Americas, Inc., Bridgestone Americas Tire Operations, LLC, Titan Tire Corporation, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC Defendant-intervenors .	**PUBLIC DOCUMENT** Consol. Court No. 08-00285

BRIEF ON CONSTITUTIONAL ISSUES OF CO-PLAINTIFF TIANJIN UNITED TIRE AND RUBBER INTERNATONAL CO., LTD.

Mark B. Lehnardt
Lehnardt & Lehnardt, LLC
20 Westwoods Dr.
Liberty, MO 64068
Mark@Lehnardt.com
Tel - 816.407.1400

Counsel to Tianjin United Tire & Rubber International Co., Ltd.

Date: August 17, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JANE A. RESTANI

GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd., Plaintiffs, and Tianjin United Tire & Rubber International Co., Ltd. Consolidated Plaintiff, v. United States, Defendant, and Bridgestone Americas, Inc., Bridgestone Americas Tire Operations, LLC, Titan Tire Corporation, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC Defendant-intervenors .	Court No. 11-00082

BRIEF ON CONSTITUTIONAL ISSUES OF CO-PLAINTIFF TIANJIN UNITED TIRE AND RUBBER INTERNATONAL CO., LTD.

Consolidated-plaintiff, Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC"), respectfully submits this brief, arguing that the March 13, 2012 law, Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1) ("New Law"), is unconstitutional because it violates the equal protection guarantees of the Fifth Amendment to the United States Constitution. U.S. Const. amend. V.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The issue before this Court is whether the New Law is made unconstitutional by the two effective dates in the New Law – one which retroactively applies the countervailing duty ("CVD") law to non-market-economy ("NME") countries, and the other which only prospectively applies protections from excessive duties. The New Law violates the equal protection guarantees of the Fifth Amendment because it creates two classifications of companies without a rational relationship to a legitimate governmental purpose. All companies are made subject to the CVD law. But only one classification of companies receives protection from excessive duties resulting from the double-counting inherent in the concurrent application of CVD law and the NME methodology for calculating antidumping duties ("AD"). The other classification of companies is denied equal protection of the law.

This classification distinction is not rationally related to a legitimate governmental purpose for three reasons. First, Congress's stated intent to "avoid future adverse results" in actions brought before the World Trade Organization ("WTO") is invalid because the WTO has no statute of limitations. Second, an excessive remedy is contrary to the limited intent of the AD and CVD law to offset unfair competitive advantage. Third, there is no other plausible policy reason for the discriminatory classification.

The offending provision of the New Law cannot be removed without affecting the remainder of the law. Any attempt to do so would be insufficient to result in the application of the New Law to this case. Because the law cannot be construed to avoid constitutional infirmities in this case, this Court must apply the Federal Circuit's initial opinion barring application of the CVD law to NME countries.

STATEMENT PURSUANT TO RULE 56.2

A. Administrative Determination Under Review

In this appeal, TUTRIC challenges the final affirmative countervailing duty determination by the U.S. Department of Commerce ("Commerce") in the investigation of certain off-the-road tires from the People's Republic of China and resulting countervailing duty order. *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 51,627 (Dep't of Commerce Sept. 4, 2008) ("*Order*") ; *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 Fed. Reg. 40,480 (Dep't of Commerce July 15, 2008) ("*Final Determination*").

B. Issue of Law Presented

> Is the New Law unconstitutional because it violates the equal protection guarantees of the Fifth Amendment to the U.S. Constitution?

C. Statement of Reasons for Vacating Commerce Determinations

TUTRIC contests the application of the *Final Determination* and *Order* because the New Law is unconstitutional because it violates the equal protection guarantees of the Fifth Amendment to the U.S. Constitution. Thus, the CVD law may not be applied in this case, and this Court must remand this case to Commerce with instructions to rescind the *Order*. TUTRIC's arguments are explained in detail in the Summary of the Argument and Argument sections of this brief.

STATEMENT OF FACTS

This consolidated case has its genesis in the Final Determinations issued by Commerce after AD and CVD investigations into *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*. *See GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1235-36 (Ct. Int'l Trade 2009) ("*GPX II*").[1] In *GPX II*, this court concluded that the U.S. Department of Commerce ("Commerce") – although permitted by law to apply CVD law to China – had unreasonably interpreted the applicable statute as not requiring any action to avoid double counting of duties. *Id.*, 645 F. Supp. 2d at 1234, 1236-45. This double counting occurred when Commerce applied the non-market-economy ("NME") methodology for calculating antidumping ("AD") duties while concurrently applying CVD law to China. *Id.* When Commerce was unable to take any action to avoid double counting (other than completely eliminating the effect of the CVD duties by reducing the AD margin by the amount of the CVD margin), this Court ordered Commerce to forgo application of the CVD law to China. *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1342, 1344-47 (Ct. Int'l Trade 2010) ("*GPX III*").

Upon appeal to the Court of Appeals for the Federal Circuit ("Federal Circuit"), the Federal Circuit affirmed this Court's opinion on different grounds, without opining on the merits of the double-counting issue. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) ("*GPX V*"). But before *GPX V* became final (due to a petition for rehearing *en banc*), Congress passed the New Law on March 13, 2012. *GPX V*, 666 F.3d at 1310.

The New Law includes merchandise from NMEs among the merchandise upon "which countervailing duties shall be imposed" when countervailable subsidies are identifiable and

[1] In this brief, the naming convention for *GPX* cases relies upon the order in which the opinions have been issued by this Court and by the Court of Appeals for the Federal Circuit. Because not all opinions issued in this case are relevant to the constitutional issues or the background, the case-name conventions do not appear in regular or complete sequence.

measurable. New Law, Pub. L. No. 112-99 §1(a), 126 Stat. 265 (2012) (to be codified at 19 U.S.C. §§ 1671(f)). With the effective date of Section 1 of the New Law, Congress explicitly made this law retroactive to cover "all proceedings initiated . . . on or after November 20, 2006." *Id*. §1(b). The New Law also provides protection from excessive duties by requiring that Commerce make an adjustment to account for double-counting by reducing the AD margin to the extent double-counting is demonstrated and reasonably estimated. *Id.* §2(a) (to be codified at 19 U.S.C. § 1677f-1(f)). This protection from excessive duties, however, is only afforded to those companies involved in investigations and reviews initiated after March 13, 2012, which is the date the New Law was enacted, and is the effective date of Section 2. *Id.* §2(b). Companies with ongoing involvement in investigations and reviews initiated before March 13, 2012, were excluded from protection from excessive duties.

After the New Law was enacted, the Federal Circuit sought additional briefing, then issued its opinion, which vacated *GPX V*, approved the retroactive application of Section 1 of the New Law, and remanded the case to this Court to address constitutional arguments related to the two different effective dates. *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) ("*GPX VI*").

STANDARD OF REVIEW

In this brief, TUTRIC argues that the New Law is unconstitutional because it violates the equal protection guarantees of the Fifth Amendment. U.S. Const. amend. V. In evaluating "whether a law violates the Equal Protection Clause,"[2] the Court looks "to three things: the character of the classification in question; the individual interests affected by the classification;

[2] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

The Court applies "different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Here, because the law does not involve a fundamental right or involve suspect classifications, the appropriate level of review is rational relation. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (U.S. 2012) ("a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (*quoting Heller v. Doe*, 509 U.S. 312, 319-320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993))).

The evaluation for rational relation involves answering two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (U.S. 1981). Further, the Supreme Court has explained that,

> {i}n general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, *see United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, *see Minnesota v. Clover Leaf Creamery* Co., 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, *see Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. {432,} 446 {(1985)}.

Nordlinger v. Hahn, 505 U.S. 1, 11 (1992). *See also Walters v. St. Louis*, 347 U.S. 231, 237 (1954) (any discriminating classification must "rest on real and not feigned differences, . . . have some relevance to the purpose for which the classification is made, {and not be} so disparate, relative to the difference in classification, as to be wholly arbitrary").

The Supreme Court provided the rationale behind the rational-relation requirement standard:

> {t}he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.
> . . . .
> By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer v. Evans, 517 U.S. 620, 632-633 (1996). The law only passes constitutional muster if it is "narrow enough in scope and grounded in a sufficient factual context for {a court} to ascertain some relation between the classification and the purpose it served." *Id.*

Indeed, "this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker. *Nordlinger*, 505 U.S. at 15-16 (*quoting Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959)) and (*citing Schweiker v. Wilson*, 450 U.S. 221, 235, 67 L. Ed. 2d 186, 101 S. Ct. 1074 (1981) (classificatory scheme must "rationally advance a reasonable and *identifiable* governmental objective" (emphasis added)).

ARGUMENT

The New Law is unconstitutional because it violates the equal protection guarantees of the Fifth Amendment. Specifically, the two effective dates establish two classifications, one of which does not receive protection from excessive duties. These distinct classifications are not rationally related to a legitimate government purpose. Further, the law is not salvageable by striking solely the offending language or otherwise construing the statute in a manner that could result in a non-constitutionally-offensive law. Accordingly, this Court must strike the New Law as unconstitutional, and enforce the Federal Circuit's holding in *GPX V*.

I. The New Law Violates the Equal Protection Guarantees of the Fifth Amendment Because It Is Not Rationally Related to a Legitimate Government Purpose

The New Law violates the equal protection guarantees of the Fifth Amendment because it creates two distinct classifications of companies without any rational relation to a legitimate government purpose. U.S. Const. amend. V. As we demonstrate below, the stated purposes for the New Law (or for AD/CVD law generally) do not provide justification for the two distinct classifications, and no other potential legitimate purpose provides a rational relationship to the two distinct classifications. Thus, the New Law is unconstitutional.

The New Law creates two distinct classifications of companies by the application of two provisions with different effective dates. First, Section 1 of the New Law applies the CVD law to all respondent companies in CVD investigations and reviews of merchandise from NMEs. Second, Section 2 intentionally discriminates among those subject to Section 1 by extending protection from excessive duties to only some NME companies to which the CVD law applies. *See Dorsey v. United States*, 132 S. Ct. 2321, 2344 (U.S. 2012) ("only intentional discrimination may violate the equal protection component of the Fifth Amendment's Due Process Clause"). That this discrimination is intentional is established by the different effective dates contained in

the New Law, which explicitly separate companies subject to the CVD law into the two distinct classifications. The New Law does not present the case of a facially neutral law apparently treating everyone equal, but that in fact has a disparate effect. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 323 (1980) (discussing additional requirements when a law is facially neutral. This distinct classification, which causes substantial injury to the companies that do not have protection from excessive duties, is not rationally related to a legitimate government interest.

A. The Purpose of Section 1 of the New Law is to "level the playing field," not to provide for excessive duties to tilt the field in favor of the U.S. industry

The purposes of Section 1 of the New Law is to "level the playing field," not to provide for excessive duties to tilt the field in favor of the U.S. industry. This Court must reject attempts to justify a classification when existing laws or legislative history reveals that the justification was not the intent of Congress. *See Califano v. Webster*, 430 U.S. 313, 317 (1977) (noting that the Supreme Court has rejected attempts to justify a gender classification as compensation for past discrimination when the legislative history reveals that this was not the purpose for the classification); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty*., 488 U.S. 336, 345, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989) (finding a discriminatory property assessment law violates equal protection because, in part, the Constitution and laws of the state "provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State").

As uniformly described in the legislative history[3] of the New Law, the purpose of Section 1 is to create a "level playing field" – and no more – for the U.S. domestic industries affected by injurious dumping and subsidies:

[3] The legislative history of the New Law is exceptionally brief. The Senate passed the bill without debate, 158 Cong Rec S 1375 Applying The Countervailing Duty Provisions Of The Tariff Act Of 1930 To Nonmarket Economy Countries (March 5, 2012), and the House suspended its normal rules, voting after only 30 minutes of floor statements. 158 Cong. Rec. H

- "Countervailing duties level the playing field for U.S. employers and workers and allow them to compete against imports that are subsidized through unfair trade practices, emphasis on the word 'unfair.'" 158 Cong. Rec. at H1168 (Hon. Neal – Massachusetts).

- "If America is on a level playing field, our manufacturers can work and compete against the best the world has to offer. But, unfortunately, related to China right now, it is too often not a level playing field. This is an important step going forward to make sure that we can rebalance the equation." 158 Cong. Rec. at H1168 (Hon. Blumenauer – Oregon).

- "I believe that U.S. companies and workers deserve a level playing field in order to successfully compete around the world." 158 Cong. Rec. at H1168 (Hon. Boustany – Louisiana).

- "{Countervailing duties} restore the level playing field." 158 Cong. Rec. at 1169 (Hon. Ellmers – North Carolina).

- "This bill is critical to ensuring that our American businesses compete on a level playing field." 158 Cong. Rec. at 1170 (Hon. Michaund – Maine).

- "Where I'm from in northwest Pennsylvania, western Pennsylvania, we relish competition. In fact, we can't wait to go head-to-head and toe-to-toe with anybody, anytime, anyplace in the world. The only thing we ask for is a level playing field, something that's fair for everyone." 158 Cong. Rec. at H1170 (Hon. Kelly – Pennsylvania).

- "We must level the playing field." 158 Cong. Rec. at 1170 (Hon. Critz – Pennsylvania).

- "What we are talking about is allowing the imposition of countervailing duties . . . and making sure that when we go to the battlefield of the marketplace that that marketplace is put on an even, level playing field so that we can compete squarely." 158 Cong. Rec. at 1170 (Hon. Reed – New York).

- "Countless American companies, from Rochester, New York, to Detroit, Michigan, rely upon a level playing field to compete and win." 158 Cong. Rec. at 1170 (Hon. Slaughter – New York).

- "We must continue to support measures that will establish and ensure a level playing field for American workers and American companies." 158 Cong. Rec. at 1171 (Hon. Jackson Lee – Texas).

- "Most importantly, the bill will help workers and businesses in my home State of Michigan compete fairly on a level playing field." 158 Cong. Rec. at H1173 (Hon. Dingell – Michigan).

1166 – 1173, Applying Countervailing Duty Law to NME Countries (Mar. 6, 2012). All Members who spoke supported the bill. *Id.*

- "{W}e must move swiftly to ensure U.S. manufacturers and workers can compete on a level playing field in the global marketplace." 158 Cong. Rec. at H1173 (Hon. Turner – Ohio).

See also GPX V, 666 F.3d at 738 ("the purpose of countervailing duty law is 'to offset the unfair competitive ***advantage*** that foreign producers would otherwise enjoy from export subsidies'" (emphasis added) (*quoting Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315-16 (Fed. Cir. 1986))). Consequently, any attempt to collect excessive duties (more duties than necessary to "level the playing field"), is beyond the scope of the CVD law's purpose, and is irreconcilable contradicted by Congressional intent relative to the overall trade law. Thus, the purposes for Section 1 that are identifiable in the legislative history do not intimate intent to provide excessive remedy. *See Schweiker*, 450 U.S. at 235 (classificatory scheme must "rationally advance a reasonable and *identifiable* government objective" (emphasis added)).

Section 2(a) of the New Law is a testament to Congress's intent only to level the playing field rather than to tilt the playing field in favor of the U.S. domestic industry. Section 2(a) requires that Commerce reduce AD margins to eliminate double counting caused by application of the CVD law to an NME. Thus, Section 2(a) eliminates excessive remedy – so that the playing field is level, rather than slanted in either direction. This sentiment for a truly even playing field is best captured in the statement of Rep. Blumenauer of Oregon, who affirmed, "If America is on a ***level*** playing field, our manufacturers can work and compete against the best the world has to offer." 158 Cong. Rec. H. 1166 at 1168 (emphasis added).

Leveling the playing field does not rationally relate to an endorsement of imposing excessive duties with no adjustment available to one classification of companies under Section 2 of the New Law. *See Heller*, 509 U.S. at 319-20 (to survive an equal protection challenge, there must be "a rational relationship between the disparity of treatment and some legitimate

governmental purpose"). Instead, both excessive duties and insufficient duties are repugnant to the notions of fairness embodied in the quest for an even playing field. Thus, leveling the playing field is not rationally related to the discriminatory classification and excessive duties created by the dual effective dates of the New Law.

B. The Purposes for the New Law Section 2 of the New Law is intended to bring the United States into Compliance with its WTO Obligations and Avoid Future Adverse Results

The intent of Section 2(b) of the New Law was specifically stated to bring U.S. law in compliance with the WTO obligations of the United States, and to avoid future adverse results in WTO dispute resolution proceedings. The House floor statements regarding H.R. 4105 were nearly uniform in their explanations of this purpose.

- "This legislation also brings the United States into compliance with its obligations by requiring the Department of Commerce to make an adjustment when there is evidence of a double remedy. 158 Cong. Rec. at H1167 (Hon. Camp – Michigan).[4]

- "It's also important that this bill addresses the double-remedies laws in the right way to ensure that America applies these laws in accordance with our WTO obligations." 158 Cong. Rec. at H1168 (Hon. Brady – TX).

- "The legislation also addresses an adverse World Trade Organization (WTO) finding that there may be "double remedies" in situations where countervailing duties are applied to NME exports at the same time that antidumping duties calculated using

[4] In *GPX VI*, the Federal Circuit recognized, but did not rely upon, the holding by the WTO Appellate Body that finds the concurrent application of the CVD law and the NME methodology for calculating AD duties impermissibly double counts subsidization. *GPX VI*, 678 F.3d at 1311 n.2 ("On March 11, 2011, the Appellate Body of the WTO determined that the United States "imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of antidumping duties calculated on the basis of an NME methodology and countervailing duties, is inconsistent with Article 19.3 of the {Agreement on Subsidies and Countervailing Measures}" (*citing* Appellate Body Report, *United States--Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶611(d), WT/DS379/AB/R (Mar. 11, 2011)).

the so-called "surrogate value" methodology are applied to the exports." 158 Cong. Rec. at H1171 (Hon. Jackson Lee – Texas).

- "Furthermore, this bill allows the Commerce Department to adjust actions to avoid future negative findings by the World Trade Organization." 158 Cong. Rec. at H1168 (Hon. Rohrabacher – California).

Although Section 2 is intended to bring the United States into compliance with its WTO obligations, this purpose is frustrated by the prospective-only implementation of Section 2. The WTO jurisdiction is one without statutes of limitation. *See* Panel Report, *China -- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* - p.135, ¶7.58, WT/DS363/R (12 August 2009) ("Unlike in many domestic court systems, there is no statute of limitations in WTO dispute settlement that would require the United States to file its case by a date certain or lose its standing to bring its claim."). Thus, any investigation or review initiated prior to the enactment of the New Law that can be appealed to the WTO at any time based upon Commerce's failure to exercise its discretion to avoid excessive duties from double counting.[5] Further, WTO Appellate Body precedent would undoubtedly result in additional adverse findings by the WTO.[6] Thus, practically speaking, the

[5] Although the Federal Circuit explained that "the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of countervailing duties on goods imported by NME countries to account for double counting," *GPX VI*, 678 F.3d at 1312, Federal Circuit did not go so far as to say that the statute prohibited making an adjustment. The statue was silent, and thus had to be interpreted in a reasonable manner. *See Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007) (*quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Thus, substantial effect of the amendment was to remove Commerce's interpretive discretion. *See GPX VI*, 678 F.3d at 1312 (*quoting Stone v. INS*, 514 U.S. 386, 397 (1995)).

[6] As one notable academic commentator has exhaustively explained, "a de facto doctrine of stare decisis operates in {WTO} Appellate Body jurisprudence." Raj Bhala, THE PRECEDENT SETTERS: DE FACTO STARE DECISIS IN WTO ADJUDICATION (PART TWO OF A TRILOGY), 9 Fla. St. J. Transnat'l L. & Pol'y 1, 4 (1999). *See also, generally*, Raj Bhala, THE MYTH ABOUT STARE DECISION AND INTERNATIONAL TRADE LAW (PART ONE OF A TRILOGY), 14 Am. U. Int'l L. Rev. 845, 853 (1999); Raj Bhala, THE POWER OF THE PAST: TOWARDS DE JURE STARE DECISIS IN WTO ADJUDICATION (PART THREE OF A TRILOGY), 33 Geo. Wash. Int'l L. Rev. 873, 910-13 (2001).

desire to avoid future adverse results does not provide a legitimate governmental purpose for the discriminatory classification created by the double-counting adjustment required in Section 2(a) and effective date of Section 2(b).

C. No Other Legitimate Purpose Exists For The Discriminatory Classification

No other legitimate reason exists for the difference in treatment of respondents in regards to adjustments for double counting. Counsel for TUTRIC has been unable to discover any other possible legitimate purpose in the legislative history for the discriminatory classification that could have been relied upon by Congress when enacting the New Law. *See Nordlinger*, 505 U.S. at 15-16 ("this Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker" (*quoting Allied Stores*, 358 U.S. at 528-529).

The potential purposes identifiable in the legislative history do not provide the narrow scope or "sufficient factual context for {this Court} to ascertain some rational relationship between the classification and the purpose it served. *Romer*, 517 U.S. at 632-33. Accordingly, this Court must strike the New Law because it violates the equal protection guarantees of the Fifth Amendment. U.S. Const. amend. V.

II. This Court Cannot Cure the Constitutional Defect in the New Law Sufficient to Apply the New Law Here Because Only Congress Can Make Legislation Retroactive, Thus – In This Case -- This Court Must Give Effect to GPX V

As we have demonstrated, the New Law is unconstitutional because it violates the equal protection guarantees of the Fifth Amendment. Although this Court has a duty to avoid unconstitutional construction of a law where possible, such avoidance cannot cure the constitutional defect sufficiently to apply the New Law to this case. Accordingly, this Court must give effect to *GPX V*.

Despite an obligation to construe the law to avoid an unconstitutional construction, *SKF USA Inc. v. United States Customs & Border Prot*., 556 F.3d 1337, 1349-1350 & n.7 (Fed. Cir. 2009), this Court cannot cure the equal protection defect in the New Law sufficient to apply the New Law to this case. To construe a law to avoid an unconstitutional construction, courts typically strike only the offending language and give effect to the remaining language of the law. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-330 (2006) (setting forth considerations for partial invalidation of a law). Here, the offending language is the language that creates the two distinct classifications: either the first effective date pertaining to Section 1(b) of the New Law, or the second effective date pertaining to Section 2(b) of the New Law. Thus one must be stricken.

If this Court strikes the first effective date, which authorizes Commerce retroactively to apply the CVD law to NMEs, the Supreme Court's holding in *Landgraf v. Usi Film Prods.* would require application of *GPX V* prior to enactment of the New Law, and application of the New Law after its enactment. While courts generally apply the law in effect at the time their decisions are rendered, they will not do so when applying that law has impermissible retroactive effect. *Landgraf v. Usi Film Prods*., 511 U.S. 244, 280 (U.S. 1994). To determine whether a law has impermissible retroactive effect, the Court determines whether the law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* With expressly retroactive language stricken, applying the New Law here would impose CVD duty liability for acts that, under *GPX V*, did not incur CVD duty liability. Thus, the law would be impermissible retroactive, and inapplicable to this case.[7]

[7] It is irrelevant for this case whether Section 1 of the New Law could be construed as applying prospectively in light of specific Congressional intent that it apply retroactively. If such a

This Court could also strike solely the language of the second effective date, but doing so would not change the New Law's effective date or eliminate the two distinct classifications because – without explicit language or clear Congressional intent to make Section 2 retroactive – this Court would be required to construe Section 2 to take effect prospectively, as of the date of enactment. *See Landgraf*, 511 U.S. 244, 272 (U.S. 1994) (affirming that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result" (*quoting Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Thus, striking solely the language of the second effective date would not save the New Law from being unconstitutional, and the New Law would have to be stricken in its entirety.

Accordingly, regardless of any attempt this Court could make to avoid constitutional difficulties, the New Law cannot be salvaged for purposes of application to this case. In the absence of the New Law, the Federal Circuit concluded in *GPX V* that Commerce may not apply the CVD law to NME countries. *GPX V*, 666 F.3d at745. This Court, thus, must give effect to *GPX V*, and remand this case to Commerce with instructions to rescind the *Order*.

---

construction is impossible, the law must be stricken in its entirety, in which case the New Law would not apply. If such a construction is possible, then this Court would still consider the law to be *GPX V*, and thus the New Law would not apply. Further, the question of whether Congress would have enacted the law without the retroactive application does not affect the outcome of this case. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2669 (U.S. 2012)

CONCLUSION

As we have demonstrated, the New Law is unconstitutional, and the CVD law may not be applied in this case.

Respectfully submitted,

/s/*Mark B. Lehnardt*

Mark B. Lehnardt
Lehnardt & Lehnardt, LLC
20 Westwoods Dr.
Liberty, MO 64068
Mark@Lehnardt.com
Tel - 816.407.1400

Counsel to Tianjin United Tire & Rubber International Co., Ltd.

Date: August 17, 2012