

**UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER
VEHICLE AND LIGHT TRUCK TYRES FROM CHINA**

Notification of an Appeal by China
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 24 May 2011, from the Delegation of China, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the People's Republic of China hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report in *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (WT/DS399) ("Panel Report"). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, China is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

2. The measure at issue is a transitional product-specific safeguard measure under Paragraph 16 of the *Protocol of Accession* that has been applied by the United States on imports of certain passenger vehicle and light truck tyres from China pursuant to Section 421 of the Trade Act of 1974. The U.S. International Trade Commission ("USITC") determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry. The USITC made this determination in its investigation of *Certain Passenger Vehicle and Light Truck Tires from China* (Inv. No. TA-421-7).

3. The issues that China raises in this appeal relate to the Panel's findings and conclusions in respect of the consistency of the challenged measures with the *Protocol on the Accession of the People's Republic of China* ("the Protocol") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

4. For the reasons stated below, and as will be developed in its submissions to the Appellate Body, China appeals the following errors of law and legal interpretation contained in the Panel Report and requests the Appellate Body to reverse or modify the related findings and conclusions of the

Panel. In doing so, China makes five specific claims, delineated below and to be detailed in its submissions to the Appellate Body.¹

5. First, China seeks review by the Appellate Body of the Panel's interpretation of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were "increasing rapidly" within the meaning of that provision. The Panel's legal interpretation erred by not giving appropriate meaning to the phrase "increasing rapidly."² The Panel's errors of law and legal interpretation include:

- (a) The Panel erred in interpreting the term "increasing" from Paragraph 16.4 as meaning nothing more than the term "increased" from Paragraph 16.1 and failing to otherwise address the analytically appropriate period of time in a meaningful way.³
- (b) The Panel erred in interpreting the term "rapidly" from Paragraph 16.4 as meaning "with great speed" but not requiring an assessment of the rate of increase in imports or any other alternative metric to give meaning to the idea of great speed.⁴
- (c) The Panel erred in interpreting the phrase "increasing rapidly" from Paragraph 16.4 as not requiring the most recent rate of increase in imports to be put in context relative to prior rates of increase earlier in the period, or in any other context, that would distinguish imports that are "increasing rapidly" from those that merely "increased" or are merely "increasing."⁵

6. Second, China seeks review by the Appellate Body of the Panel's application of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were "increasing rapidly" within the meaning of that provision. The Panel's application of the legal standard erred by upholding the USITC finding that imports from China were "increasing rapidly."⁶ The Panel's errors of law and legal application include:

- (a) The Panel erred in upholding the USITC determination even though the USITC assessed the period as a whole, instead of the most recent period.⁷ Rather than requiring a focus on the most recent period, as is necessary to determine properly whether subject imports are "increasing rapidly," the Panel approved a temporal assessment that stressed the entire five-year period as a whole.
- (b) The Panel erred in upholding the USITC determination even though the USITC failed to assess properly the rate of increase in imports, particularly that of the most recent year.⁸ Instead of determining whether this rate constituted a "rapid" increase, the Panel dismissed the notion that the USITC was required to assess the rate of increase in subject imports when determining whether they were "increasing rapidly."

¹ Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes citations to the paragraphs of the Panel Report containing the alleged errors. These citations, however, do not prejudice to the ability of China to refer to other paragraphs of the Panel Report in its appeal.

² Panel Report, para. 7.110.

³ Panel Report, paras. 7.90-7.91.

⁴ Panel Report, para. 7.92.

⁵ Panel Report, paras. 7.90-7.93.

⁶ Panel Report, para. 7.110.

⁷ Panel Report, paras. 7.83-7.85, 7.96-7.100, 7.104.

⁸ Panel Report, paras. 7.92-7.93.

- (c) The Panel erred in upholding the USITC determination even though the USITC failed to put the most recent rate of increase in proper context with prior rates of increases.⁹ To the extent the Panel did assess the most recent rate of increase in context, the Panel erred in going beyond the USITC determination as written and in finding that a lower rate of increase constituted "increasing rapidly" because it came "in addition" to prior increases.¹⁰

7. Third, China seeks review by the Appellate Body of the Panel's interpretation of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were a "significant cause" within the meaning of that provision. The Panel's legal interpretation erred by not giving proper meaning to the term "significant" from the phrase "significant cause" and failing to distinguish a "significant cause" from a "cause."¹¹ The Panel's errors of law and legal interpretation include:

- (a) The Panel erred in offering a definition of the term "significant" but not otherwise providing an interpretation of what "significant" meant in application, or explaining how a "significant cause" differed from a "cause."¹²
- (b) The Panel erred in interpreting the phrase "significant cause" as not requiring a conditions of competition analysis that meaningfully assesses whether subject imports are capable of being a "significant cause" of injury and not simply whether they are capable of being a "cause."¹³
- (c) The Panel erred in interpreting the phrase "significant cause" as not requiring a coincidence analysis that assesses whether correlation goes beyond mere overall correlation, and instead corresponds in the degrees of relative magnitude as well as in a year-by-year assessment.¹⁴
- (d) The Panel erred in interpreting the phrase "significant cause" as not requiring analysis that ensures injury caused by other factors is not being attributed to the significance, or degree, of the injury allegedly caused by subject imports.¹⁵

8. Fourth, China seeks review by the Appellate Body of the Panel's application of Paragraph 16.4 of the Protocol as it relates to the USITC's determination that imports from China were a "significant cause" within the meaning of that provision. The Panel's application of the legal standard erred by upholding the USITC finding that imports from China were a "significant cause" of injury even though the USITC's and Panel never distinguished a "cause" from a "significant cause" nor modified their causal analyses to conform to this distinct standard.¹⁶ The Panel's errors of law and legal application include:

⁹ Panel Report, paras. 7.92-7.93.

¹⁰ Panel Report, para. 7.93.

¹¹ Panel Report, para. 7.379.

¹² Panel Report, paras. 7.158, 7.139-7.146, 7.170-7.178.

¹³ Panel Report, paras. 7.169-170.

¹⁴ Panel Report, paras. 7.228-7.234.

¹⁵ Panel Report, paras. 7.175-7.177.

¹⁶ Panel Report, para. 7.379.

- (a) The Panel erred in upholding the USITC determination even though the USITC failed to conduct the conditions of competition analysis with care sufficient to assess whether subject imports were in fact capable of being a "significant cause" of injury and not merely a "cause."¹⁷
- (b) The Panel erred in upholding the USITC determination even though the USITC failed to conduct a coincidence analysis that assessed whether correlation went beyond mere general overall correlation and instead corresponded in the degrees of relative magnitude and in a year-by-year assessment that would be necessary to establish a "significant cause."¹⁸
- (c) The Panel erred in upholding the USITC determination even though the USITC failed to analyze other causes properly to ensure that injury caused by these other factors was not being improperly attributed to the significance, or degree, of the injury allegedly caused by subject imports.¹⁹
- (d) The Panel erred in upholding the USITC determination even though the USITC failed to undertake an integrated analysis of all the causation factors to consider their collective implication for the existence of a sufficient link of "significant cause" between those imports that are "increasing rapidly" at the end of the period and the condition of the domestic industry.²⁰

9. Fifth, China seeks review by the Appellate Body under Article 11 of the DSU of how the Panel applied the "significant cause" standard of Paragraph 16.4 of the Protocol. The Panel acted inconsistently with Article 11 of the DSU in conducting its analysis of whether imports from China were a "significant cause" of injury by failing to conduct an objective assessment of the matter. The Panel's errors of law and legal application under Article 11 include:

- (a) The Panel erred in failing to consider the totality of the evidence. Regarding causation, the Panel approached individual arguments and pieces of evidence in isolation instead of addressing the ways in which the arguments and supporting evidence interrelated.
- (b) The Panel erred in failing to conduct a balanced assessment of the evidence. Regarding causation, the Panel went out of its way to cite evidence the USITC majority did not rely on from page III-16, footnote 62 of the USITC determination, yet ignored the evidence in the very same footnote that was not consistent with the USITC conclusion.²¹
- (c) The Panel erred in failing to focus on the USITC's decision as written. In upholding the USITC determination on causation, the Panel repeatedly went beyond the rationale contained in the determination itself and relied upon *post hoc* clarifications by the United States and the Panel's own new analysis of the issues.²²
- (d) The Panel erred in failing to consider all the arguments of the parties. The Panel failed to consider China's arguments about how other causes interacted with each other and had a broader cumulative effect,²³ how the more detailed data on the different suppliers to the

¹⁷ Panel Report, paras. 7.209-7.216.

¹⁸ Panel Report, paras. 7.234-7.238; 7.244-7.245; 7.254-7.260.

¹⁹ Panel Report, paras. 7.285-7.322; 7.333-7.345; 7.348-7.350; 7.353-7.354; and 7.364-7.367.

²⁰ Panel Report, paras. 7.376-7.378.

²¹ Panel Report, paras. 7.301, 7.305, 7.307.

²² Panel Report, paras. 7.195, 7.301, 7.305, 7.336, 7.354, and 7.366-7.367.

²³ Panel Report, paras. 7.376-7.377.

aftermarket affected attenuated competition,²⁴ and how it was necessary to distinguish the Protocol's "significant cause" requirement from the mere "cause" requirement of other WTO agreements.²⁵

10. China respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel that are based on the errors of law and legal interpretation identified above. With respect to the claims of error identified in paragraphs 6 and 8 above, China respectfully requests that the Appellate Body complete the analysis to conclude that the challenged measures were inconsistent with the obligations of the United States under the covered agreements.

²⁴ Panel Report, para. 7.197.

²⁵ Panel Report, paras. 6.26-6.30.