

***** CHECK AGAINST DELIVERY *****

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

(AB-2011-4 / DS399)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

JULY 7, 2011

1. Good morning, Madame Chair and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today.
2. This appeal centers around the proper interpretation of the terms “increasing rapidly” and “significant cause” in paragraph 16.4 of the Protocol. The Panel conducted a thorough analysis of the many arguments presented, in a manner consistent with the customary rules of interpretation of public international law.¹ Rooting its analysis in the text of the Protocol, the Panel correctly rejected China’s arguments because they hinged on tortured definitions and concepts borrowed from other trade remedies agreements, concepts that do not appear in the Protocol and that China attempted to incorporate without the appropriate context. In addition, China’s arguments were premised on the unfounded assertion that there is a special “strict” interpretation rule that should apply to the Protocol.
3. The Appellate Body need not reach the issue of whether the Panel properly applied the law to the facts if it upholds the Panel’s legal interpretations. Nonetheless, we would point out that the Panel applied the proper standard of review, by assessing whether the USITC’s determination was reasoned and adequate. In doing so, the Panel critically analyzed the record evidence and addressed the many arguments raised by China. There should be no doubt that this Panel took its task seriously and conducted an objective assessment of the matter before it. In this regard, China’s Article 11 claims are unfounded and should be rejected.
4. Having explained in our written submission why the Panel was correct in rejecting China’s interpretation of the Protocol, we will summarize the key points here.

¹ See Panel Report, para. 7.37.

I. The Panel Did Not Err With Respect To “Increasing Rapidly”

5. Turning to the issue of rapidly increasing imports, there should be no doubt that imports of tires from China were “increasing rapidly”. Over the period of investigation, the quantity of Chinese imports rose by 215 percent, their value rose by nearly 300 percent, and their market share more than tripled. Moreover, Chinese imports increased in every year of the period, with the majority of this growth occurring in 2007 and 2008, the last two years of the period of investigation. These increases were not “small” or “gradual”; instead, they were large, rapid, and continuing.

6. To counter the strong evidence that imports from China were “increasing rapidly,” China has developed a theory that the Protocol of Accession imposes an especially stringent standard in this respect. For example, China argues that the Protocol requires an exclusive focus on imports in the *most* recent period, which China defines as the year 2008. However, the Protocol does not require the Member to focus on import data for any specific period, much less the “most recent period.” Past panel and Appellate Body reports have recognized that an authority may generally analyze import data over any reasonable period, so long as the period “allows it to focus on the recent imports” and so long as it is “sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.”² The period examined by the USITC meets these criteria.

7. Moreover, even China’s argument fails to establish any error by the Panel because the USITC did, in fact, examine the data for 2008 and concluded that import increases in that year

² See *US - Line Pipe (Panel)*, para. 7.201.

were large, continuing and rapid.³ The Panel agreed.

8. With respect to the interpretation of the word “rapidly” in Paragraph 16.4, China seeks to read into the phrase “increasing rapidly” a requirement that imports be increasing at an accelerating rate of increase. Simply put, neither the dictionary definition of “rapidly” – that is “with great speed” or “swiftly” – nor anything else in the Protocol supports such a reading.

9. Finally, China argues that the “increasing imports” standard of the Protocol embodies a higher standard than the standard contained in certain other WTO agreements, in particular the Safeguards Agreement. In doing so, China highlights differences in the texts of the various agreements that, in its view, support its theory, while ignoring other textual differences that would support the opposite conclusion. For example, China overlooks that the Protocol links the increase in imports to a lower injury standard than the Safeguards Agreement, and does not link imports to “unforeseen developments” or characterize measures taken pursuant to it as “emergency actions”. The Panel’s task was to assess what the Protocol itself requires, applying the customary rules of interpretation, and that is what it did. Rules of interpretation should not be applied differently based on some notion of “strictness” found nowhere in the texts of the agreements.

II. The Panel Did Not Err With Respect to “A Significant Cause”

A. The Panel Correctly Interpreted the Causation Requirements of the Protocol

10. The record also shows, quite clearly, that these rapid increases in Chinese import volumes were a “significant cause” of material injury to the U.S. industry. As Chinese imports grew

³ USITC Report, pp. 11-12.

consistently throughout the period and undersold the U.S. industry, all of the significant injury factors for the U.S. tires industry declined by double digit margins. For example, the industry's production fell by 26.6 percent over the period, its shipments and sales quantities fell by more than 28 percent, and its market share fell by 13.7 percentage points.⁴ The record did show that Chinese imports were a significant cause of the industry's injury.

11. To offset the strong record evidence on the issue of causation, China seeks to establish that, compared to other WTO agreements, the Protocol contains a uniquely demanding causation standard. Rather than adopt China's strained theory, the Panel correctly focused on the ordinary meaning of the terms in the Protocol, in context, and in light of the agreement's object and purpose.⁵ As the Panel explained, the Protocol required the USITC to assess whether rapidly increasing imports are an "important" or "notable" cause of material injury to the domestic industry.⁶ Nothing more was required of the USITC under the Protocol.⁷

12. China is also simply wrong when it argues that the Panel was only looking at whether imports from China were "a cause" of material injury to the industry. The Panel expressly rejected the notion that Chinese imports could be considered a "significant cause" of injury even if they were only a "mere" or "minimal" cause of that injury.⁸ Moreover, throughout its analysis, the Panel very clearly continued to test the USITC's analysis to assess whether the USITC had

⁴ USITC Report, Table C-1. Exhibit US-1.

⁵ See Panel Report, paras. 7.37, 7.111 - 7.178, and 7.228 - 7.233.

⁶ Panel Report, paras. 7.158 and 7.159.

⁷ Panel Report, paras. 7.111- 7.379.

⁸ Panel Report, para. 7.159, n. 271.

shown that imports were a “significant cause” – not merely “a cause” – of material injury.

B. The Panel Correctly Concluded that the ITC’s Causation Analysis Was Consistent with the Protocol

13. With respect to causation, China continues to misstate and misinterpret the record evidence as well as the Protocol requirements. We will address some of the most significant misstatements.

1. The USITC Reasonably Found Chinese and U.S. Tires Were Competing in the U.S. Market

14. First, China argues that competition between Chinese and U.S. tires was “attenuated” because they were allegedly focused on different parts of the market. As the Panel found, China’s theory of “attenuated competition” is simply not supported by the record evidence.⁹ Most market participants agreed that the U.S. replacement market was perceived to contain three categories or tiers of tires. However, there was no industry-wide consensus on what tires or brands were included in each tier, how large the tiers were, or whether they even existed.¹⁰

15. Moreover, there was a significant degree of competition between Chinese and U.S. tires within the market, particularly in tiers 2 and 3 of the replacement market.¹¹ Specifically, the record showed that, in 2008, at least 16 percent of the U.S. industry’s shipments were made in category 2 of the replacement market while 27.3 percent of Chinese imports were shipped into this category.¹² Similarly, at least 18.6 percent of the U.S. industry’s shipments of tires were

⁹ USITC Report, pp. 26 - 27; Panel Report, paras. 7.185 - 7.197.

¹⁰ USITC Report, pp. 26 - 27; Panel Report, paras. 7.185 - 7.197.

¹¹ USITC Report, pp. 26 - 27; Panel Report, para. 7.195.

¹² USITC Report, pp. 22 and 27; Panel Report, paras. 7.195 and 7.196.

made in category 3 of the replacement market, while 42.4 percent of Chinese tires were sold into that category.¹³ Furthermore, Chinese imports also held five percent of the OEM part of the market by the end of the period and were sold in category 1 of the market as well¹⁴ There clearly was competition between U.S. and Chinese tires in all parts of the market.

16. Moreover, China’s arguments are belied by market participants’ own statements on the interchangeability of U.S. and Chinese tires. The large majority of market participants reported that Chinese imports and U.S. tires were always or frequently interchangeable.¹⁵ As the USITC and the Panel both noted, the Chinese respondents’ own hearing witnesses confirmed that there were not significant differences between “high-end” and “low-end” tires in the market.¹⁶

Given these statements, and market participants’ perceptions of interchangeability, it was clear that market participants themselves did not believe that there was limited competition between Chinese and U.S. tires.¹⁷ The Panel, reasonably, came to the same conclusion.

2. The USITC Reasonably Found a Coincidence Between the Growth in Imports and Declines in the Industry’s Condition

17. China also challenges the Panel’s analysis regarding coincidence. China relies heavily on the assumption that the Panel was required to apply a heightened standard of review when reviewing the USITC’s correlation analysis. China argues that the Panel should not merely have assessed whether there was an overall correlation of trends between imports and the industry’s

¹³ USITC Report, p. 27. Exhibit US-1.

¹⁴ USITC Report, pp. 21 - 27. Exhibit US-1.

¹⁵ USITC Report, Table V-6. Exhibit US-1.

¹⁶ USITC’s Hearing Tr. at 246 (Borgman). Exhibit US-30

¹⁷ USITC Report, Table V-6. Exhibit US-1.

condition over the period, but whether there was a strong correlation in the “degrees of relative magnitude” of the changes in imports and industry trends.¹⁸

18. As the Panel explained, however, there is no basis in the text of the Protocol or prior WTO reports in similar contexts for China’s proposed standard. Even under the Safeguards Agreement,¹⁹ the Appellate Body and WTO panels have made clear that a “coincidence of trends” analysis requires an assessment of the “temporal relationship between movements in imports and movements in the injury factors,”²⁰ that is, an assessment of year-by-year correlations between movements in import trends and the industry’s condition.²¹ Moreover, as the Panel also noted, no Appellate Body or panel report has suggested that “the orders of magnitude {in the changes} are key” to a correlations analysis, or that “changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors.”²² Instead, these reports provide that “imports should increase at the same time as the injury factors decline,”²³ which is exactly what the record evidence demonstrated.

19. China’s challenges to the Panel findings regarding the USITC’s coincidence analysis are also not supported by the record evidence. As Chinese imports grew from year to year and consistently undersold U.S. tires, the record showed that:

¹⁸ China Appellant Submission, paras. 30 and 297.

¹⁹ Panel Report, para. 7.228.

²⁰ Panel Report, para. 7.231 (*quoting US - Steel Safeguards (Panel)*, paras. 10.299).

²¹ Panel Report, paras. 7.230 - 7.233 (*citing Argentina – Footwear (Panel)*), para. 8.229; *Argentina – Footwear (AB)*, para. 145; *US - Steel Safeguards (Panel)*, paras. 10.299 and 10.302).

²² Panel Report, para. 7.232.

²³ Panel Report, para. 7.232.

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- The industry's production decreased in every year;
- Its U.S. shipment quantities declined in every year;
- Its net sales quantities declined in every year;
- Its market share fell in every year;
- The number of workers employed by the industry, wages paid, and hours worked also declined in every year.²⁴

Moreover, the industry suffered declines in its profitability, capacity utilization, and productivity levels in three out of four years of the period.²⁵

20. China's reliance on the industry's profitability and capacity utilization levels in 2007 is unavailing.²⁶ Even in 2007, the record shows an overall coincidence in import volume and industry condition trends. Although a few factors, such as profitability and productivity, improved somewhat in 2007, numerous other injury factors (including the industry's capacity, shipments, net sales quantities, market share, and employment-related factors) declined in that year as Chinese imports continued their surge into the market.²⁷ And the improvements in profitability and productivity that were seen in 2007 were short-lived. Both of these factors declined to their lowest levels in 2008, which was when the volume and market share of the subject imports were at their highest levels.²⁸

²⁴ USITC Report, pp. 15-18 and Table C-1. Exhibit US-1.

²⁵ USITC Report, Table C-1. Exhibit US-1.

²⁶ China Appellant Submission, paras. 354 - 362.

²⁷ USITC Report, Table C-1. Exhibit US-1

²⁸ USITC Report, Table C-1. Exhibit US-1

C. The Panel Properly Concluded that the USITC Reasonably Considered Other Factors, As Appropriate, In Its Analysis

21. China also contends that the Panel erroneously concluded that the USITC reasonably considered the effects of other factors that were allegedly causing injury to the industry, including the industry’s alleged voluntary “business strategy” of shifting to higher value products, alleged demand declines in the market, and non-subject imports.²⁹ According to China, the USITC failed to adequately “separate and distinguish” the effects of these three factors in its analysis and failed to provide a “reasoned and adequate” discussion.³⁰

22. China errs in claiming that the Protocol contains the same requirement to “separate and distinguish” the effects of these factors as the Appellate Body has found to be required under the Safeguards or Antidumping Agreements.³¹ The Panel properly rejected this notion.³² It is significant that the Protocol does not contain an explicit requirement that an authority must ensure that it not attribute the injury caused by these factors to the subject imports.³³

23. In the absence of such a requirement in the Protocol, the USITC was not required to perform the same “separate and distinguish” analysis of other factors, required under these other WTO agreements.³⁴ Instead, as the Appellate Body made clear in *US - Upland Cotton*, an administering authority has a degree of discretion with respect to the analytical approach that is

²⁹ China Appellant Submission, paras. 381 - 531.

³⁰ China Appellant Submission, paras. 240 - 257, 281-290, and 381 - 385.

³¹ China Appellant Submission, paras. 240 - 257, 281-290, and 381 - 385.

³² Panel Report, paras. 7.174 - 7.178.

³³ *Compare* Safeguards Agreement, Article 4.2(b), and Antidumping Agreement, Article 3.5, with China’s Accession Protocol, paras. 16.1 and 16.4.

³⁴ *US - Upland Cotton (AB)*, paras. 436-438; *see also US - Upland Cotton (Panel)*, paras. 7.1343 - 44.

used to address the effects of these factors under the Protocol.³⁵ As the Panel explained, the issue here is not whether the USITC provided an analysis that specifically “separates and distinguishes” the alleged effects of these other factors from the injurious effects from the Chinese imports, but rather whether the USITC properly concluded that the Chinese imports still had significant injurious effects on the industry, even with the existence of these other allegedly injurious factors.³⁶ And here, as the Panel concluded, the USITC did exactly that.³⁷

1. The Panel Correctly Found the USITC’s Analysis of the Industry’s Business Strategy To Be Consistent With the Protocol

24. In its arguments about other factors, China first asserts that U.S. domestic tire producers adopted a “business strategy” by which they voluntarily left the lower-value part of the replacement tire market in order to focus on higher-value replacement tires. China’s theory is not supported by the evidence. The USITC had an ample evidentiary foundation for its conclusion that Chinese imports played an “important part” in plant closures, which included data showing that Chinese imports were rapidly increasing before the closures were announced, public comments by the companies stating that “low-cost” imports were a cause of the closures, and contemporaneous trade press citing the “profound” impact on the U.S. market that growing Chinese imports were having.

2. The Panel Correctly Found That the USITC’s Consideration of Demand Was Consistent With the Protocol

25. China also asserts that the Panel improperly found that the USITC adequately addressed

³⁵ *US – Upland Cotton (AB)*, paras. 436-438; *see also US – Upland Cotton (Panel)*, paras. 7.1343 - 44.

³⁶ Panel Report, para. 7.177.

³⁷ Panel Report, paras. 7.262 - 7.379.

the impact of demand on the industry’s condition in 2008, and the impact of demand changes during the rest of the period.³⁸ In fact, the USITC did consider whether declines in the industry’s condition in 2008 were caused by the demand declines that occurred in the second half of 2008 due to the economic recession in that period.³⁹ The USITC acknowledged that apparent U.S. consumption fell in 2008 but also pointed out that the shipments of Chinese tires continued to grow during that market contraction.⁴⁰

26. China also argues that the USITC did not address the alleged “broad decline” or “prolonged” contraction in demand across the entire period of investigation. The problem with this argument is that, as the Panel correctly concluded, the record evidence does not support the theory that there was a “prolonged contraction.” Rather, the record showed that demand, as measured by apparent consumption, “fluctuated” over the period, with a slight decline in consumption in 2005, a larger decline in 2006, and an increase in consumption in 2007, and then a significant decline in 2008, as the effects of the recession made their impact felt.⁴¹ Throughout the period, Chinese imports entered the market in increasingly significant volumes and took market share from the industry, causing significant declines in the industry’s production, shipment and sales levels, whether or not demand was increasing or declining.⁴²

³⁸ China Appellant Submission, paras. 320 - 332.

³⁹ USITC Report, p. 26. Exhibit US-1.

⁴⁰ USITC Report, p. 26. Exhibit US-1.

⁴¹ USITC Report at pp. 15 and 32, and Table C-1. Exhibit US-1.

⁴² USITC Report, Table C-1. Exhibit US-1.

3. The Panel Correctly Found the USITC’s Consideration of Non-Subject Imports To Be Consistent With the Protocol

27. Finally, China contends that the USITC “never seriously addressed the competitive significance of non-subject imports”⁴³ and that the Panel acted improperly by upholding the USITC’s determination.⁴⁴

28. China’s concern about the effects of non-subject imports on the industry is a newly developed one. Before the Panel, China did not identify non-subject imports as a possible “other” factor causing injury that the USITC should have addressed in its analysis.⁴⁵ Even aside from this flaw, given that China itself did not think that this issue was significant enough to raise seriously before the Panel, China’s new-found belief that non-subject imports were a major factor causing injury deserves little credence.

29. Nonetheless, the USITC did consider the presence of non-subject imports in the market and reasonably found that they did not sever the causal link between Chinese imports and material injury.⁴⁶ As the Panel found, the USITC did not fail to properly analyze the alleged injury caused by non-subject imports.⁴⁷

IV. Conclusion

30. This concludes our statement. We look forward to answering your questions.

⁴³ China Appellant Submission, para. 470.

⁴⁴ China Appellant Submission, para. 471.

⁴⁵ China’s First Written Submission (Panel), paras. 326 - 356; China’s Second Written Submission, paras. 318 - 344.

⁴⁶ Panel Report, para. 7.367.

⁴⁷ Panel Report, para. 7.367.