CHINA – INTELLECTUAL PROPERTY RIGHTS[1] (DS362)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*United States*	*TRIPS Arts. 9, 41, 46, 59, 61 Berne Convention*	Establishment of Panel	*25 September 2007*
			Circulation of Panel Report	*13 November 2008*
Respondent	*China*		Circulation of AB Report	*NA*
			Adoption	*20 March 2009*

1. MEASURE AND INTELLECTUAL PROPERTY RIGHTS AT ISSUE

- **Measure at issue:**

(i) China's Criminal Law and related Supreme People's Court Interpretations which establish thresholds for criminal procedures and penalties for infringements of intellectual property rights;

(ii) China's Regulations for Customs Protection of Intellectual Property Rights and related Implementing Measures that govern the disposal of infringing goods confiscated by customs authorities; and

(iii) Art. 4 of China's Copyright Law which denies protection and enforcement to works that have not been authorized for publication or distribution within China.

- **IP at issue**: Copyright and trademarks.

2. SUMMARY OF KEY PANEL FINDINGS[2]

- **TRIPS Art. 61 (border measures – remedies):** The Panel found that while China's criminal measures exclude some copyright and trademark infringements from criminal liability where the infringement falls below numerical thresholds fixed in terms of the amount of turnover, profit, sales or copies of infringing goods, this fact alone was not enough to find a violation because Art. 61 does not require Members to criminalize all copyright and trademark infringement. The Panel found that the term "commercial scale" in Art. 61 meant "the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market". The Panel did not endorse China's thresholds but concluded that the factual evidence presented by the United States was inadequate to show whether or not the cases excluded from criminal liability met the TRIPS standard of "commercial scale" when that standard is applied to China's marketplace.

- **TRIPS Art. 59 (remedies):** The Panel found that the customs measures were not subject to Trips Agreement Arts. 51 to 60 to the extent that they apply to exports. With respect to imports, although auctioning of goods is not prohibited by Art. 59, the Panel concluded that the way in which China's customs auctions these goods was inconsistent with Art. 59, because it permits the sale of goods after the simple removal of the trademark in more than just exceptional cases.

- **TRIPS Art. 9.1 (Berne Convention – Arts. 5(1) and 17) and TRIPS Art. 41.1 (enforcement – general obligations):** The Panel found that while China has the right to prohibit the circulation and exhibition of works, as acknowledged in Art. 17 of the Berne Convention, this does not justify the denial of all copyright protection in any work. China's failure to protect copyright in prohibited works (i.e. that are banned because of their illegal content) is therefore inconsistent with Art. 5(1) of the Berne Convention as incorporated in Art. 9.1, as well as with Art. 41.1, as the copyright in such prohibited works cannot be enforced.

1 *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*
2 Other issues addressed: prima facie case; Panel's terms of reference; exhaustiveness of TRIPS Art. 59; information from WIPO.

US – SHRIMP AND SAWBLADES (CHINA)[1]
(DS422)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	ADA Art. 2.4.2	Establishment of Panel	25 October 2011
			Circulation of Panel Report	8 June 2012
Respondent	United States		Circulation of AB Report	NA
			Adoption	23 July 2012

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** United States anti-dumping measures covering two products from China.
- **Product at issue:** (i) certain frozen warmwater shrimp; and (ii) diamond sawblades and parts thereof.

2. SUMMARY OF KEY PANEL FINDINGS

- **ADA Art. 2.4.2 (dumping determination – zeroing):** The Panel upheld China's claim that the use of zeroing in calculating the margins of dumping in the anti-dumping investigations at issue was inconsistent with Art. 2.4.2, and therefore concluded that the United States had acted inconsistently with its obligations under this provision.

  ADA Art. 2.4.2 (dumping determination – separate rate calculation): The Panel rejected China's claim concerning the separate rate in the shrimp investigation. As the investigation concerned imports from a non-market economy, the United States Department of Commerce (USDOC) assigned a "separate rate" to exporters that were able to demonstrate the absence of government control, both *de jure* and *de facto*, over their export activities; other exporters were assigned the rate for the People's Republic of China-entity. In calculating the separate rate, the USDOC had averaged the dumping margins of the investigated companies, which were calculated with zeroing. China argued that the separate rate was also inconsistent with ADA Art. 2.4.2. The Panel considered that China "has not … satisfactorily explained how Article 2.4.2 could provide the legal basis for a finding of inconsistency with respect to the separate rate" and said that "[t]he fact that margins of dumping are inconsistent with Article 2.4.2 does not necessarily mean that a separate rate calculated on the basis of such margins is also, itself, inconsistent with that same provision". The Panel however agreed with the statement of the panel in *US – Shrimp (Ecuador)* that the calculation of the separate rate on the basis of individual margins calculated with zeroing "necessarily incorporates the WTO-inconsistent zeroing methodology".

3. OTHER ISSUES

- **Uncontested claims:** Although the respondent did not contest China's claims, the Panel considered that its responsibilities remained as set forth under DSU Art. 11, i.e. to make "an objective assessment of the matter before it". Further, with respect to the burden of proof, the Panel held that even though the respondent did not contest the claims, China was nevertheless required to make a prima facie case of violation.

1 *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*

US – TYRES (CHINA)[1]
(DS399)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*China*	*China's Accession Protocol*	Establishment of Panel	*19 January 2010*
			Circulation of Panel Report	*13 December 2010*
Respondent	*United States*		Circulation of AB Report	*5 September 2011*
			Adoption	*5 October 2011*

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** US transitional product-specific safeguard measure applied under para. 16 of China's Accession Protocol pursuant to Section 421 of the US Trade Act of 1974.
- **Product at issue:** Certain passenger vehicle and light truck tyres from China.

2. SUMMARY OF KEY PANEL/AB FINDINGS[2]

- **China's Accession Protocol, para. 16.4 (imports "increasing rapidly"):** The Appellate Body upheld the Panel's finding that the United States International Trade Commission ("USITC") properly established that imports of subject tyres from China met the "increasingly rapidly" threshold provided in para. 16.4. The Appellate Body reasoned that such increases in imports must be occurring over a short and recent period of time, and must be of a sufficient magnitude in relative or absolute terms so as to be a significant cause of material injury to the domestic industry.
- **China's Accession Protocol, para. 16.4 (causation):** The Appellate Body upheld the Panel's finding that the USITC properly demonstrated that subject imports were a "significant cause" of material injury. The Appellate Body found that the causal link expressed by the term "a significant cause" in para. 16.4 requires that rapidly increasing imports make an "important" or "notable" contribution in bringing about material injury to the domestic industry. An investigating authority can find imports to be a significant cause of material injury only if it ensures that the effects of other known causes are not improperly attributed to subject imports.

  The Appellate Body further upheld the Panel's finding that the USITC's reliance on an overall correlation between an upward movement in subject imports and a downward movement in injury factors reasonably supported the USITC's finding that rapidly increasing subject imports were a significant cause of material injury to the domestic injury within the meaning of para. 16.4.

  The Appellate Body also upheld the Panel's finding that China failed to establish that the USITC improperly attributed injury caused by other factors to subject imports from China. The Appellate Body found that the collective injurious effects of other causes (e.g. US industry's business strategy, the reasons for US plant closures, changes in demand, and the effects of imports from third countries) did not suggest that subject imports were not "a significant cause" of material injury to the US domestic industry.
- **China's Accession Protocol, paras. 16.3 and 16.6 (remedy and duration):** The Panel found that China failed to establish that (i) the measure exceeded the extent necessary to prevent or remedy the market disruption caused by rapidly increasing subject imports contrary to para. 16.3; and (ii) the measure exceeded the period of time necessary to prevent or remedy the market disruption under para. 16.6.
- **DSU Art. 19.1 (Panel and Appellate Body's recommendations – suggestion on implementation):** The Appellate Body did not find that the United States acted inconsistently with its WTO obligations in imposing a product-specific safeguard measure on subject tyres from China. Hence, the Appellate Body made no recommendation under Art. 19.1.

1 *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*
2 Other issues addressed: GATT Arts. I:1 and II:1.

CHINA – ELECTRONIC PAYMENT SERVICES[1]
(DS413)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*United States*	*GATS Arts. XVI and XVII*	Establishment of Panel	*25 March 2011*
			Circulation of Panel Report	*16 July 2012*
Respondent	*China*		Circulation of A.B Report	*NA*
			Adoption	*31 August 2012*

1. MEASURES AND SERVICES AT ISSUE

- **Measures at issue:** A series of requirements imposed by China and alleged by the United States to constitute impermissible market access restrictions or national treatment limitations on foreign suppliers of the services at issue.
- **Services at issue:** Electronic payment services ("EPS") for all types of renminbi ("RMB") payment card transactions involving bank cards issued and/or used in China.

2. SUMMARY OF KEY PANEL FINDINGS

- **Classification of the services at issue:** The Panel found that electronic payment services for payment card transactions are classifiable under Subsector 7.B(d) of China's Services Schedule, which reads "[a]ll payment and money transmission services, including credit, charge, and debit cards, travellers cheques and bankers drafts (including import and export settlement)". It observed that the use of the term "all" manifests an intention to cover the entire spectrum of the "payment and money transmission services" encompassed under Subsector (d).
- **Scope of China's GATS commitments:** The Panel rejected the United States' view that China's Schedule includes a cross-border (mode 1) market access commitment to allow the supply of EPS into China by foreign EPS suppliers. The Panel found, however, that China's Schedule includes a market access commitment that allows foreign EPS suppliers to supply their services through commercial presence (mode 3) in China, so long as a supplier meets certain qualifications requirements related to local currency business. The Panel further found that China's Schedule contains a full national treatment commitment for the cross-border supply of EPS (mode 1) as well as a commitment under mode 3 (commercial presence) that is subject to certain qualifications requirements related to local currency business.
- **GATS Art. XVI (market access obligation):** The Panel rejected on the basis of lack of evidence that China maintains China UnionPay (CUP) – a Chinese EPS supplier – as an across-the-board monopoly supplier for the processing of all domestic RMB payment card transactions, in breach of its obligations under Art. XVI. The Panel found, however, that China acted inconsistently with GATS Art. XVI:2(a) in view of its mode 3 market access commitment by granting CUP a monopoly for the clearing of certain RMB payment card transactions, because only CUP may clear RMB-denominated transactions involving RMB payment cards issued in China and used in Hong Kong or Macao, or RMB cards issued in Hong Kong or Macao used in China.
- **GATS Art. XVII of the GATS (national treatment obligation):** The Panel found that some of the relevant requirements, namely the requirements that all bank cards issued in China must bear the *Yin Lian*/UnionPay logo (i.e., the logo of CUP's network) and be interoperable with that network, that all terminal equipment in China must be capable of accepting *Yin Lian*/UnionPay logo cards, and that acquirers of transactions for payment card companies post the *Yin Lian*/UnionPay logo and be capable of accepting payment cards bearing that logo, are each inconsistent with China's national treatment obligations under Art. XVII. This is because, contrary to China's mode 1 and mode 3 national treatment commitments, these requirements modified the conditions of competition between EPS suppliers of other Members and China's own like services and service supplier CUP to the detriment of those other EPS suppliers.

3. OTHER ISSUES

- **Preliminary ruling:** The Panel rejected China's claim that the United States' request for the establishment of a panel failed to meet the requirement in DSU Art. 6.2 to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1 *China – Certain Measures Affecting Electronic Payment Services*

CHINA – RARE EARTHS[1]
(DS431, 432, 433)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	*United States, European Union, Japan*	*Accession Protocol, Working Party Report, Marrakesh Agreement, GATT Arts. XI and XX*	Establishment of Panel	*23 July 2012*
			Circulation of Panel Report	*26 March 2014*
Respondent	*China*		Circulation of AB Report	*7 August 2014*
			Adoption	*29 August 2014*

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Export restrictions on a number of rare earths, tungsten, and molybdenum. The export restrictions comprised export duties, export quotas, and certain limitations on the enterprises permitted to export the products.
- **Products at issue:** Various forms of rare earths, tungsten, and molybdenum

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **Accession Protocol (export duties)/Marrakesh Agreement/GATT Art. XX (general exceptions):** The Panel found that China's export duties on rare earths, tungsten, and molybdenum were inconsistent with its Accession Protocol. In its examination of this issue and China's defence under Art. XX, the Panel was mindful of the Appellate Body ruling that absent "cogent reasons an adjudicatory body will resolve the same legal question in the same way in a subsequent case". The Panel concluded that none of China's arguments constituted cogent reasons for departing from the Appellate Body's finding in *China – Raw Materials* that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Art. XX of the GATT 1994. China appealed an intermediate finding made by the panel in reaching its conclusion that Art. XX of the GATT 1994 was not available to justify a breach of Paragraph 11.3 of its Accession Protocol regarding export duties. In upholding the panel's finding, the Appellate Body found that the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol form a single package of rights and obligations that must be read together. However, the questions whether there is an objective link between an individual provision in China's Accession Protocol and existing obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in those agreements to justify a breach of its Accession Protocol, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and in light of the circumstances of the dispute.
- **GATT Art. XI (quantitative restrictions)/GATT Art. XX(g) (general exceptions – exhaustible natural resources):** The Panel found that China's export quotas on rare earths, tungsten, and molybdenum were inconsistent with GATT Art. XI. The Panel also concluded that the export quotas were not justified under the exception in GATT Art. XX(g), which allows WTO Members to implement GATT-inconsistent measures "relating to the conservation of exhaustible natural resources". China did not appeal the panel's overall finding, but appealed limited aspects of the panel's interpretation and application of Art. XX(g), in connection with its findings that the export quotas at issue were not measures "relating to" the conservation of exhaustible natural resources, and were not "made effective in conjunction with" restrictions on domestic production or consumption. The Appellate Body found that the panel rightly considered that it should focus on the measures' design and structure rather than on their effects in the marketplace, although it was not precluded from considering market effects. The Appellate Body further concluded that the burden of conservation did not have to be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand.
- **Working Party Report (trading rights):** The Panel found that China maintained restrictions (minimum registered capital, prior export experience and export performance) on the trading rights of enterprises exporting rare earths and molybdenum contrary to Paragraphs 83 and 84 of China's Working Party Report. The Panel found that China was entitled to seek to justify these breaches pursuant to Art. XX(g). However, China failed to make a prima facie case that such requirements were justified pursuant to Art. XX(g). In this respect, the Panel considered that China's trading rights obligations were distinct obligations and that breaches of these obligations had to be justified separately from the justifications that China had advanced for the imposition of export quotas in violation of Art. XI of the GATT 1994.

1 *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*

CHINA – AUTOS (US)[1]
(DS440)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*United States*	*GATT Art. VI* *ADA Arts. 1, 3.1, 3.2, 3.4, 3.5, 4.1, 5.3, 5.4, 6.2, 6.5.1, 6.8, 6.9, Annex II* *ASCM Arts. 10, 11.3, 11.4, 12.4.1, 12.7, 12.8, 15.1, 15.2, 15.4, 15.5, 16.1, 22.3, 22.5*	Establishment of Panel	*23 October 2012*
			Circulation of Panel Report	*23 May 2014*
Respondent	*China*		Circulation of AB Report	*N/A*
			Adoption	*18 June 2014*

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Anti-dumping and countervailing duties imposed by China on certain automobiles from the United States.
- **Product at issue:** Certain automobiles from the United States with engine displacements equal to or greater than 2500 cubic centimetres ("cc").

2. SUMMARY OF KEY PANEL FINDINGS[2]

- **ADA Art. 6.5.1/ASCM Art. 12.4.1 (evidence – confidential information):** The Panel found a violation of these two provisions on the ground that MOFCOM had failed to require the petitioner to furnish adequate non-confidential summaries of confidential information presented in the petition.
- **ADA Art. 6.9 (evidence – essential facts):** The Panel found a violation of this provision on the ground that MOFCOM had failed to disclose essential facts to US company respondents, specifically the data and calculations underlying their respective dumping margins.
- **ADA Art. 6.8 and Annex II para. 1/ASCM Art. 12.7 (evidence – facts available), ADA Art. 6.9/ASCM Art. 12.8 (evidence – essential facts) and ADA Arts. 12.2, 12.2.2/ASCM Arts. 22.3 and 22.5 (evidence – findings and conclusions on material issues of fact and law):** The Panel found a violation of ADA Art. 6.8 and Annex II para. 1/ASCM Art. 12.7 because MOFCOM had resorted to facts available in the calculation of residual duty rates without notifying unknown exporters subject to such duty rates of the information required of them and of the fact that if they failed to submit the required information the residual duty rates would be calculated on the basis of facts available. However, the Panel rejected the United States' claims, under ADA Art. 6.9 and ASCM Art. 12.8, that MOFCOM had failed to disclose to interested parties the essential facts under consideration that formed the basis for its calculation of the residual AD/CV duty rates, and its claims, under ADA Art.12.2/12.2.2 and ASCM Art. 22.3/22.5, that MOFCOM had failed to give public notice of the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which had led to the imposition of final measures.
- **ADA Art. 3.1/ASCM Art. 15.1 (injury determination – positive evidence and objective examination) and ADA Art. 4.1/ASCM Art. 16.1 (definition of domestic industry):** The Panel considered that the United States failed to establish that MOFCOM had violated these provisions in defining the domestic industry.
- **ADA Art. 3.1/ASCM Art. 15.1 (injury determination – positive evidence and objective examination), ADA Art. 3.2/ASCM Art. 15.2 (injury determination – price effects), ADA Art. 3.5/ASCM Art. 15.5 (injury determination – causation):** The Panel found that MOFCOM had failed to base its price effects and causation analyses on an objective examination based on positive evidence, inconsistently with these provisions.

1 *China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*
2 Other issues addressed: ADA Art. 1, ASCM Art.10.

US – COUNTERVAILING AND ANTI-DUMPING MEASURES (CHINA)[1] (DS449)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	GATT Arts. X:1; X:2; X:3(b) SCM Arts. 10; 19.3; 32.1 DSU Art. 6.2	Establishment of Panel	17 December 2012
			Circulation of Panel Report	27 March 2014
Respondent	United States		Circulation of AB Report	7 July 2014
			Adoption	22 July 2014

1. MEASURES AT ISSUE

- **Measures at issue:** (1) Section 1 of US Public Law (PL) 112-99[2], enacted on 13 March 2012, which provides for the application of the countervailing duty provisions of the US Tariff Act of 1930 to non-market economy countries and to all countervailing duties initiated by the United States on or after 20 November 2006 as well as to all pending court proceedings relating to such countervailing duty proceedings; and (2) the United States' failure to investigate and avoid double remedies potentially arising from the concurrent imposition of anti-dumping and countervailing duties on the same imported products from China in the 26 countervailing duty investigations and reviews at issue in this dispute.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **GATT Art. X:1 (trade regulations – prompt publication):** In a finding not appealed, the Panel found that Section 1 of PL112-99 was published promptly after it had been made effective because it was published on the same date that it was made effective, and thus the United States did not act inconsistently with Art. X:1 in respect of Section 1.

- **GATT Art. X:2 (trade regulations – no enforcement before publication):** The Appellate Body reversed the Panel's finding that, although Section 1 of PL 112-99 is a measure of general application that has been "enforced" prior to its official publication, it fell outside the scope of Art. X:2 because it neither effects an "advance" in a rate of duty on imports under an established or uniform practice, nor imposes a "new" or "more burdensome" requirement or restriction on imports. The Appellate Body considered that, to determine whether a measure of general application increases a rate of duty or imposes a new or more burdensome requirement, the baseline of comparison is not the practice of the administrative agency as such, but rather the prior published measure of general application as interpreted and applied by the relevant domestic authorities. Having reversed the Panel's interpretation of Art. X:2, the Appellate Body was not able to complete its analysis as to whether Section 1 effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement or restriction on imports.

- **GATT Art. X:3(b) (trade regulations – implementation of court decision by agencies):** In a finding not appealed, the Panel found that the United States did not act inconsistently with Art. X:3(b) in respect of Section 1 of PL 112-99, as that provision did not prohibit a Member from taking legislative action such as Section 1 that applies to cases pending before its domestic courts at the time such legislation enters into force and does not reopen already-decided court decisions.

- **ASCM Arts. 19.3, 10, and 32.1 ("double remedy"):** In a finding not appealed, the Panel found that, in 25 of the 26 countervailing duty investigations or reviews, the United States acted inconsistently with Arts. 19.3, 10 and 32.1 because it failed to investigate and avoid double remedies potentially arising from the concurrent imposition of anti-dumping and countervailing duties on the same imported products from China.

3. OTHER ISSUES

- **DSU Art. 6.2 (requirements of panel request):** The Appellate Body upheld the Panel's finding that the references in China's panel request to ASCM Arts. 10, 19, and 32, read in the context of the narrative explanation in the panel request, allowed for the identification of the relevant claims – Arts. 10, 19.3, and 32.1 – relating to the measure at issue in this dispute. The Appellate Body further found that the mention of "double remedies" in the panel request plainly connected the measure at issue (the failure of the US authorities to investigate and avoid double remedies) and the legal claims (ASCM Arts. 10, 19.3, and 32.1), in a manner that presented the problem clearly.

1 *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*
2 "An act to apply the countervailing duty provisions of the US Tariff Act of 1930 to non-market economy countries, and for other purposes".

Case # 437 'Products from China' not available.