

**EUROPEAN COMMUNITIES<sup>1</sup> – DEFINITIVE ANTI-DUMPING MEASURES  
ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA**

Notification of an Other 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 23(1) of the Working Procedures for Appellate Review

The following notification, dated 30 March 2011, from the Delegation of the People's Republic of China, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the DSU, the People's Republic of China hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel and certain legal interpretations developed by the Panel in its Report in the dispute *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (WT/DS397/R). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, China simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

China seeks review by the Appellate Body of the following aspects of the Report of the Panel:

1. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation by excluding from the definition of the domestic industry the producers that made themselves known after the 15-day deadline following the publication of the Notice of Initiation and the producers that did not support the complaint (paragraphs 7.209 – 7.221 and paragraph 8.3(b) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel failed to make an objective assessment of the facts in violation of, *inter alia*, Article 11 of the DSU and Article 17.6 of the AD Agreement in connection with

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<sup>1</sup>On 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party.

China's claim that the EU violated Articles 4.1 and 3.1 of the AD Agreement by excluding from the definition of the domestic industry producers that did not support the complaint, since:

- the Panel erroneously accepted as a "fact" the unsubstantiated statement of the EU that "at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample"<sup>2</sup>;
- the Panel erroneously concluded that the fact that "at least one producer which was not a complainant, and had remained silent prior to initiation, was not only included in the domestic industry, but was selected for the sample" demonstrated that "the EU investigating authority, in this case, did [not], in fact, exclude producers that did not support the complaint from the domestic industry"<sup>3</sup> and erroneously ignored the explanation put forward by China pointing out that such conclusion cannot be and was not correct;
- the Panel disregarded and ignored the evidence submitted by China which demonstrated that the EU excluded from the domestic industry all producers that did not support the complaint.

China requests the Appellate Body to reverse the Panel's findings and to complete the analysis by finding that it has been demonstrated that the EU excluded from the definition of the domestic industry the producers that did not support the complaint. China further requests the Appellate Body to complete the analysis by finding that the exclusion from the definition of the domestic industry of the producers that did not support the complaint is inconsistent with Article 4.1 of the AD Agreement.

- The Panel erred in its interpretation of Article 4.1 of the AD Agreement when examining China's claim that the exclusion from the domestic industry of producers that did not come forward within 15 days as of the date of publication of the Notice of Initiation was inconsistent with Article 4.1 and failed to make an objective assessment of the facts in violation of Article 11 of the DSU in connection with that claim:
  - the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU when it concluded that the "EU did not act to exclude"<sup>4</sup> producers that did not make themselves known within 15 days as of the date of initiation of the investigation;
  - the Panel erred in its interpretation of Article 4.1 of the AD Agreement when concluding that there is nothing in Article 4.1 which would preclude investigating authorities from establishing deadlines for companies to come forward in order to be considered for inclusion in the domestic industry;
  - the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU when concluding that China has not demonstrated that "the 15 days allowed by the Commission was insufficient".<sup>5</sup>

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<sup>2</sup>Panel Report, para. 7.214.

<sup>3</sup> Panel Report, para. 7.215.

<sup>4</sup> Panel Report, para. 7.215.

<sup>5</sup> Panel Report, para. 7.219.

China requests the Appellate Body to reverse the Panel's findings and to complete the analysis by finding that, on the basis of the facts before the Panel, it has been demonstrated that the EU acted to exclude from the definition of the domestic industry the producers which did come forward within 15 days as of the date of publication of the Notice of Initiation and that, therefore, the EU acted in violation of Article 4.1 of the AD Agreement. China furthermore requests the Appellate Body to conclude that it has been demonstrated that the 15-day period granted to the domestic producers to come forward was not "reasonable" or "sufficient" and that therefore the EU acted in violation of Article 4.1 of the AD Agreement.

- The Panel erred in dismissing China's claim that the EU violated Article 3.1 of the AD Agreement by excluding from the domestic industry the producers which did not come forward within 15 days as of the date of the Notice of Initiation and the producers which did not support the complaint.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 3.1 since it failed to make an injury determination which is based on an "objective examination" as required by Article 3.1 of the AD Agreement.

2. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation because the domestic industry as defined by the EU did not include domestic producers whose collective output of the like product constitutes a major proportion of the total domestic production (paragraphs 7.222 – 7.230 and para. 8.3(b) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of laws and of legal interpretations developed by the Panel:

- The Panel failed to make a correct interpretation of the terms "major proportion" which is based on the ordinary meaning of these terms and in light of their context, pursuant to the principles of treaty interpretation of the Vienna Convention on the Law of Treaties, and, as a result, made the following erroneous findings and conclusions:
  - (i) the Panel erroneously concluded that the fact that the Commission relied on a presumption is not alone sufficient to demonstrate, *prima facie*, that the definition of the domestic industry in this case is inconsistent with Article 4.1 of the AD Agreement;
  - (ii) the Panel erroneously concluded that the non-quantitative factors raised by China are not relevant in this case or in general.

China requests the Appellate Body to reverse the Panel's findings and to conclude that, by considering that producers accounting for 25% of total domestic production necessarily constitute a major proportion, the EU violated Article 4.1 of the AD Agreement and that the "non-quantitative factors" identified by China are relevant for the purposes of determining whether the major proportion requirement is satisfied and had to be considered by the Commission in the fasteners investigation. China further requests the Appellate Body to conclude that, in light of these non-quantitative factors, the domestic producers constituting the domestic industry in the fasteners investigation did not represent a "major proportion" of the domestic industry.

3. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Articles 3.1 and 4.1 of the AD Agreement since it made an injury determination with respect to a sample of producers that was not representative (paragraphs 7.234 to

7.241 and 8.3(b) of the Panel Report). China identified, *inter alia*, the following errors in the issues of law and of legal interpretations developed by the Panel:

- The Panel erroneously concluded that "it cannot accept the contention that only a statistically valid sample will be sufficiently representative for purposes of an injury determination";
- the Panel erroneously concluded that China has not demonstrated that the EU investigating authority could have carried out its injury examination for the domestic industry it had defined, or at least include more producers in the sample.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 3.1 of the AD Agreement.

4. China seeks review of the Panel's conclusions and findings concerning China's claim that the European Union violated Article 2.4 of the AD Agreement with respect to the dumping determination in the fasteners investigation (paragraphs 7.291 – 7.311 and para. 8.3(d) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of laws and legal interpretations developed by the Panel:

- The Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU by failing to address China's argument that the EU violated Article 2.4 since the Commission failed to indicate to the interested parties what information was necessary to ensure a fair comparison and made it impossible for them to claim adjustments for differences affecting price comparability and, to the extent the Panel would have implicitly concluded that such a failure was not inconsistent with Article 2.4 of the AD Agreement, the Panel failed to make a correct interpretation of Article 2.4 of the AD Agreement;
- the Panel erred in its interpretation of Article 2.4 of the AD Agreement when it rejected China's argument that the EU violated Article 2.4 by failing to evaluate whether the characteristics identified in the PCNs affected price comparability and whether adjustments for these differences in physical characteristics were warranted;
- the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU and Article 17.6 of the AD Agreement when it concluded that China has pointed to no evidence supporting the conclusion that the PCN characteristics indicated differences affecting price comparability and when claiming that "it would be inappropriate for us, under the standard of review to consider it ourselves";
- the Panel erred in its interpretation of Article 2.4 of the AD Agreement when it rejected China's claim that the EU violated Article 2.4 of the AD Agreement by failing to make the necessary adjustments for quality differences.

China requests the Appellate Body to reverse the Panel's findings and to conclude that, on the basis of the facts before the Panel, it has been demonstrated that the EU violated Article 2.4 of the AD Agreement with respect to each of the identified issue mentioned above.

5. China seeks review of the Panel's conclusions and findings concerning China's claim that the EU violated Articles 6.5, 6.4 and 6.2 of the AD Agreement in connection with the non-disclosure of the identity of the complainants and of the supporters of the complaint (paragraphs 7.445 – 7.459 and para. 8.3(h) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of

laws and legal interpretations developed by the Panel in its findings concerning China's claim under Article 6.5 of the AD Agreement:

- The Panel erred in its interpretation of the "good cause" requirement when ignoring the difference between a hypothetical potential retaliation which "could" happen and a retaliation which "would" happen;
- the Panel erred in law in considering that the "good cause" requirement was satisfied without supporting evidence provided by the parties requesting confidential treatment;
- the Panel erred in rejecting China's argument that no good cause was established since the seven EU producers that made up the sample for purposes of the Commission's injury determination were also complainants and supporters and that they did not ask the Commission to treat their identity as confidential information.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the EU violated Article 6.5 of the AD Agreement through the non-disclosure of the identity of the complainants and of the supporters of the complaint. China also requests the Appellate Body to reverse the Panel's findings concerning China's claim under Articles 6.4 and 6.2 of the AD Agreement and to complete the analysis by finding that the EU's failure to disclose the identity of the complainants and of the supporters of the complaint is also inconsistent with Articles 6.4 and 6.2 of the AD Agreement.

6. China seeks review of the Panel's conclusions and findings concerning China's claim that the EU violated Article 6.1.1 of the AD Agreement by limiting the time period for the submission of MET/IT claim form to 15 days as of the date of publication of the Notice of Initiation (paragraphs 7.566 – 7.579 and 8.3(k) of the Panel Report). China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel erred in its interpretation of the term "questionnaire" in Article 6.1.1 of the AD Agreement by adopting an interpretation which is not consistent with the ordinary meaning of that word in light of its context and the object and purpose as required by the principles of treaty interpretation included in the Vienna Convention on the Law of Treaties;
- even assuming that the Panel did not err in its interpretation of the term "questionnaire" in that it would refer to "the initial comprehensive questionnaire issued in an anti-dumping investigation to each of the interested parties by an investigating authority at or following the initiation of an investigation, which seeks information as to all relevant issues pertaining to the main questions that will need to be decided (dumping, injury and causation)", the Panel erroneously concluded that that the MET/IT claim form was not a "questionnaire" according to this definition.

China requests the Appellate Body to reverse the Panel's findings and to conclude that the "MET/IT claim form" is a questionnaire within the meaning of Article 6.1.1 of the AD Agreement and to complete the analysis by finding that the EU violated Article 6.1.1 of the AD Agreement.

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