

**UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN
SHRIMP AND DIAMOND SAWBLADES FROM CHINA**

Agreement on Procedures between China and the United States

The following communication, dated 13 October 2011, from the delegation of China and the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated at the request of those delegations.

The People's Republic of China ("China") and the United States of America would like to inform the Dispute Settlement Body of the attached Agreement on Procedures between China and the United States with respect to the dispute *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China* (DS422).

We request that you please circulate the attached agreement to the Members of the Dispute Settlement Body in the WT/DS422 document series.

United States - Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China
(WT/DS422)

Agreement on Procedures between China and the United States

On February 28, 2011, the Government of China ("China") requested consultations with the United States under Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), with respect to anti-dumping measures on certain frozen warmwater shrimp from China. (WT/DS422/1). On July 22, 2011, China requested additional consultations with respect to anti-dumping measures on diamond sawblades and parts thereof from China. (WT/DS422/1/Add.1). On May 11, 2011 and September 8, 2011, consultations were held by China and the United States (hereinafter the "parties"); together these consultations covered all the measures referenced in the Panel Request pursuant to Article 6.2 of the DSU. These consultations have enabled the parties to agree on the following procedures for purposes of this dispute:

1. Should China request the establishment of a panel in this dispute, China's panel request will be the one attached to this agreement (the "Panel Request"). The United States will not oppose the establishment of a panel at the first Dispute Settlement Body ("DSB") meeting following the filing of the Panel Request by China. The parties agree to make every effort to ensure that they compose the panel without recourse to the Director-General under Article 8.7 of the DSU.
2. The parties will cooperate to enable the panel to circulate its report as quickly as possible in light of the requirements of the DSU. To that end, the parties will work to reach agreement on working procedures that aim to expedite the panel proceedings. The parties will jointly ask the panel to adopt these procedures, which will enable it to complete its work within three months after the composition of the panel. The parties also agree to request the panel to ask that the parties file only one written submission each, and that the panel forego meetings with the parties, or, at most, have only one substantive meeting with the parties. The parties also agree to share drafts of their respective written submissions prior to submitting them to the panel and to take all reasonably available steps to accelerate the proceeding.
3. China will provide the necessary evidence and arguments to support its allegations, including the computer programs and output logs generated by the United States Department of Commerce that were used to calculate the challenged dumping margins. The United States will not contest China's claim that the measures identified in the Panel Request are inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement, on the grounds stated in *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, Report of the Appellate Body adopted 31 August 2004.
4. China will not request that the panel suggest, pursuant to Article 19.1, second sentence, of the DSU, ways in which the United States could implement the panel's recommendations.
5. Provided that the panel's finding is limited to a finding that one or more of the challenged measures, as identified in the Panel Request, is inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement, the parties agree that, pursuant to Article 21.3(b) of the DSU, the reasonable period of time for bringing each such measure into conformity with the Anti-Dumping Agreement will be eight months, beginning on the date on which the DSB adopts the panel report.

6. Subject to the consultation requirements of section 129(b) of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. §3538(b), the United States will use section 129(b) to recalculate margins of dumping (subject to the exclusion of Zhanjiang Guolian Aquatic Products Co., Ltd, in paragraph 7, below) and to issue a new determination in order to render the anti-dumping measures on certain frozen warmwater shrimp from China and the anti-dumping measures on diamond sawblades and parts thereof from China consistent with the recommendations and rulings of the DSB and the Anti-Dumping Agreement. In particular, the United States will implement such recommendations and rulings in respect of the Final Determination, as amended by any and all amended final determinations which are effective at the time of implementation. If any such recalculation that is performed under section 129(b) results in a change in a cash deposit rate or revocation, in part or in whole, for the anti-dumping measures on certain frozen warmwater shrimp from China or the anti-dumping measures on diamond sawblades and parts thereof from China, the new cash deposit rate or revocation will have prospective effect only, taking effect no sooner than the date on which the United States Trade Representative directs the United States Secretary of Commerce to implement its recalculation of the margins and new determination, as set forth in section 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1).

7. The parties also mutually understand that the scope of China's Panel Request does not include any claim regarding the margin of dumping calculated for Zhanjiang Guolian Aquatic Products Co., Ltd. in the anti-dumping duty investigation on certain frozen warmwater shrimp from China or the margin of dumping determined solely on the basis of adverse facts available in either anti-dumping duty investigation. The parties agree that they will inform the panel in their written submissions, whether made jointly or separately, that they are seeking findings consistent with this understanding. Accordingly, to the extent that the findings are consistent with this understanding, implementation would not involve a recalculation of such margins of dumping.

For The People's Republic of China

For the United States of America

Mme. ZHAO Hong
Chargé d'Affaires

H.E. Mr. Michael Punke
Ambassador

ANNEX

United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China (WT/DS422)

Request for the Establishment of a Panel by China

On February 28, 2011 and July 22, 2011, the People's Republic of China ("China") requested consultations with the United States of America pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") with regard to the "zeroing" practice by the United States Department of Commerce ("USDOC") in its anti-dumping measures on certain frozen warmwater shrimp from China¹ and diamond sawblades and parts thereof from China² respectively.

Consultations were held on May 11, 2011 and September 8, 2011. While these consultations assisted in clarifying the issues before the parties, they failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement, that the Dispute Settlement Body ("DSB") establish a panel to examine this matter.

Specific Measures at Issue

(1) Frozen Warmwater Shrimp

The United States initiated an anti-dumping investigation of certain frozen warmwater shrimp from China on January 27, 2004 (Investigation No. A-570-893). The specific measures at issue in this dispute are the anti-dumping order imposed by the United States on certain frozen warmwater shrimp from China, as amended, and the final determination by the USDOC, as amended, leading to that order. To be specific, these measures include:

- *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Federal Register 70997 (December 8, 2004);
- *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Federal Register 5149 (February 1, 2005);
- *Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Second Amended Final Determination of Sales at Less Than Fair Value*, 71 Federal Register 47484 (August 17, 2006);
- *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Notice of Amended Final Determinations of Sales at Less Than Fair Value Pursuant to Court Decision*, 75 Federal Register 53947 (September 2, 2010);

¹ See G/ADP/D87/1, G/L/953, WT/DS422/1.

² See G/ADP/D87/1/Add.1, G/L/953/Add.1, WT/DS422/1/Add.1.

- *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 Federal Register 23277 (April 26, 2011);³
- *Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Amended Final Determination of Sales at Less Than Fair Value Pursuant to Court Decision*, 76 Federal Register 30100 (May 24, 2011);
- as well as any amendments to the measures identified above.

In the final determination, as amended, the USDOC used the "zeroing" methodology in determining the final dumping margins for three individually investigated Chinese exporters⁴, for which margins above the 2 per cent *de minimis* level were calculated.

(2) Diamond Sawblades and Parts Thereof

The United States initiated an anti-dumping investigation of diamond sawblades and parts thereof from China on June 21, 2005 (Investigation No. A-570-900). The specific measures at issue in this dispute are the anti-dumping order imposed by the United States on diamond sawblades and parts thereof from China, as amended, and the final determination by the USDOC, as amended, leading to that order. To be specific, these measures include:

- *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Federal Register 29303 (22 May 2006);
- *Notice of Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Federal Register 35864 (22 June 2006);
- *Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Federal Register 57145 (4 November 2009);
- as well as any amendments to the measures identified above.

In the final determination, as amended, the USDOC used the "zeroing" methodology in determining the final dumping margins for three individually investigated Chinese exporters⁵, for which margins above the 2 per cent *de minimis* level were calculated.

³ On April 29, 2011, as a result of the determinations by the USDOC and the International Trade Commission ("ITC") that revocation of the antidumping duty orders on certain frozen warmwater shrimp from Brazil, India, China, Thailand, and the Socialist Republic of Vietnam ("Vietnam") would be likely to lead to continuation or recurrence of dumping and of material injury to an industry in the United States within a reasonably foreseeable time, the USDOC published a notice of the continuation of these antidumping duty orders. See *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Continuation of Antidumping Duty Orders*, 76 Federal Register 23972 (April 29, 2011).

⁴ The three exporters are Allied Pacific Group ("Allied"), Yelin Enterprise Co Hong Kong ("Yelin") and Shantou Red Garden Foodstuff Co., Ltd. ("Red Garden").

⁵ The three exporters are Advanced Technology & Materials Co., Ltd. (including Beijing Gang Yan Diamond Products Company and Yichang HXF Circular Saw Industrial Co., Ltd.) ("AT&M"), Bosun Tools Group Co., Ltd. ("Bosun") and Hebei Jikai Industrial Group Co., Ltd. ("Hebei Jikai").

In respect of the two investigations identified above, the USDOC's methodology of "zeroing" negative dumping margins may be described more specifically in the following:

- a) different "models", *i.e.*, types, of products are identified based on the most relevant product characteristics;
- b) weighted average prices in the United States and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation;
- c) the weighted average normal value of each model is compared to the weighted average United States price for that same model;
- d) to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated United States price for all models; and
- e) before summing the total amount of dumping for all models, all negative margins on individual models (*i.e.*, where the weighted average normal value is less than the weighted average export price) are set to zero.

Through this method, the USDOC calculates margins of dumping and collects cash deposits in amounts that exceed the actual extent of dumping, if any, by the said individually investigated exporters.

In addition, in respect of the anti-dumping investigation of certain frozen warmwater shrimp, on the basis of the individual dumping margins calculated with the application of zeroing, the USDOC further calculated a weighted-average margin (known as the "separate rate") that applies to the cooperating non-mandatory respondents⁶.

The USDOC's unpublished Issues and Decision Memorandums as well as other documents contained in the administrative record of the investigations, including the computer programs, describe in more detail the USDOC's use of zeroing in the anti-dumping investigations of frozen warmwater shrimp and diamond sawblades and parts thereof from China.

China considers that these measures are inconsistent with the obligations of the United States under the provisions of the GATT 1994 and the Anti-Dumping Agreement described below.

The Legal Basis of the Complaint

Through the use of "zeroing," the United States treats transactions with negative dumping margins as having margins equal to zero in determining weighted average dumping margins in an anti-dumping investigation.

The use of "zeroing" led the United States to find dumping where none would have otherwise been found or to calculate dumping margins that are inflated. China considers that, in the specific measures at issue as identified above, the USDOC's use of "zeroing" in calculating the margins of dumping for the individually investigated exporters and the "separate rate" for the cooperating non-mandatory respondents is inconsistent with the obligations of the United States under the Anti-Dumping Agreement. Specifically, China considers that the measures are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

⁶ Such non-mandatory respondents were also required to pass the "separate-rate test" in order to receive the separate rate.

The "zeroing" methodology that the USDOC used in its anti-dumping investigations of shrimp and diamond sawblades from China is virtually identical to the methodology that was held to be inconsistent with the obligations of the United States under the Anti-Dumping Agreement in the following disputes: *United States - Final Dumping Determination on Softwood Lumber from Canada*⁷; *United States - Anti-Dumping Measures On Shrimp from Ecuador*⁸; *United States - Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*⁹; and *United States - Measures Relating to Shrimp from Thailand*¹⁰.

The forgoing paragraphs are provided without prejudice to any arguments that China may develop and present to the panel regarding the WTO-inconsistency of the measures at issue.

Request for the Establishment of a Panel

Accordingly, China requests pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement, that the DSB establish a panel with the standard terms of reference as set out in Article 7.1 of the DSU. China asks that this request be placed on the agenda of the meeting of the DSB scheduled for October 25, 2011.

⁷ Panel Report, WT/DS264/R, and Appellate Body Report, WT/DS264/AB/R, adopted on August 31, 2004.

⁸ Panel Report, WT/DS335/R, adopted on February 20, 2007.

⁹ Panel Report, WT/DS383/R, adopted on May 20, 2008.

¹⁰ Panel Report, WT/DS343/R, adopted as modified by the Appellate Body on August 1, 2008.