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UNITED STATES – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

REQUEST FOR CONSULTATIONS BY CHINA

The following communication, dated 12 December 2016, from the delegation of China to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII 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 (AD Agreement).

Background

At the time of China's accession to the WTO, the Members agreed that for a period of 15 years, investigating authorities would be allowed to determine normal value in anti-dumping proceedings involving Chinese products using methodologies "not based on a strict comparison with domestic prices or costs in China". The limited authority to use these methodologies was set forth in Section 15(a)(ii) of the Protocol on the Accession of the People's Republic of China ("Protocol"), and subject to the conditions set forth therein. Pursuant to Section 15(d) of the Protocol, "[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession". Accordingly, Members were required to terminate the use of these methodologies under Section 15(a)(ii) of the Protocol no later than 11 December 2016, and the continued use of these methodologies thereafter is in violation of a Member's obligations under the covered agreements.

After 11 December 2016, the provisions of the AD Agreement and the GATT 1994 that ordinarily apply to the determination of normal value apply to imports from China without derogation. China is concerned that the provisions of U.S. law pertaining to the determination of normal value in anti-dumping proceedings involving products from China are inconsistent with those provisions.

Pursuant to Section 773(a) of the Tariff Act of 1930 (Tariff Act), the United States Department of Commerce (USDOC) ordinarily determines normal value based on: (1) the price at which the like product is sold or offered for sale for consumption in the exporting country; (2) the price at which the like product is sold or offered for sale for consumption in a third-country export market; or (3) the cost of production in the country of origin, including an amount for administrative, selling, and general costs, and for profits.¹

Under Section 773(c)(1) of the Tariff Act, however, if an investigation involves imports from a country that the United States designates as a "non-market economy", and the USDOC "finds that available information" does not permit the determination of normal value in accordance with the methodologies set forth in Section 773(a) of the Tariff Act, then the USDOC "shall determine"

¹ The methodologies for determining the cost of production in the country of origin are further specified in Sections 773(e) and 773(f) of the Tariff Act.

normal value on the basis of the values of the factors of production (plus amounts for general expenses and profit) as identified in a third country (referred to hereinafter as "surrogate values").² The USDOC's regulations implementing Section 773(c) of the Tariff Act are set forth at 19 C.F.R. § 351.408.

Section 771(18)(c) of the Tariff Act provides that a determination by the USDOC that a country is a non-market economy "shall remain in effect until revoked by the administering authority", i.e. by the USDOC. The USDOC last determined that China is a "non-market economy" in 2006.³ As of the present date, the USDOC has not revoked that determination. Accordingly, pursuant to Section 771(18)(c) of the Tariff Act, the provisions of Section 773(c) of the Tariff Act remain applicable in anti-dumping proceedings relating to products from China.⁴

The foregoing provisions of US law provide for, and result in, the determination of normal value and margins of dumping other than in accordance with the requirements of Article 2 of the AD Agreement and Article VI of the GATT 1994. These derogations from the covered agreements were exceptionally permitted pursuant to Section 15 of the Protocol, subject to the conditions set forth therein, but are no longer permitted as a result of the expiration of Section 15(a)(ii).

Separate and apart from the provisions of Section 773(c) of the Tariff Act, Section 773(e) of the Tariff Act provides that, in some circumstances, the USDOC may determine a constructed normal value on the basis of "another calculation methodology under this subtitle or any other calculation methodology". Section 773(e) could, in principle, permit the USDOC as a matter of US law to determine normal value and margins of dumping in investigations and reviews of imports from China using surrogate values.

Measures at Issue

As described above, the measures at issue establish the US non-market economy methodology and result in the continued use of surrogate values to determine normal value and margins of dumping in anti-dumping investigations and reviews of Chinese products initiated and/or resulting in preliminary or final determinations after 11 December 2016. These measures consist of:

1. Section 771(18) of the Tariff Act;
2. Section 773 of the Tariff Act;
3. Part 351.408 of the USDOC's regulations, 19 C.F.R. § 351.408;
4. The USDOC's 2006 determinations that China is a "non-market economy" for the purposes of the Tariff Act; and
5. The failure of the United States, by way of omission, to revoke the USDOC's 2006 determinations that China is a "non-market economy" or otherwise modify its laws and regulations to render the surrogate value provisions of Section 773(c) of the Tariff Act (or Section 773(e), to the extent that it permits the use of surrogate values) inapplicable

² Section 773(c)(2) provides that if the USDOC finds that the available information concerning the values of the factors of production in a "market economy country" is "inadequate", the USDOC shall determine normal value by reference to the price at which the product at issue is sold from a "market economy" country into the United States or other countries. The term "surrogate values" as used herein encompasses the use of third-country prices as provided for under Section 773(c)(2).

³ See *The People's Republic of China (PRC) Status as a Non-Market Economy (NME)*, Memorandum (15 May 2006) and *Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China") – China's Status as a Non-Market Economy ("NME")*, Memorandum (30 August 2006).

⁴ The provisions of Section 773(c) of the Tariff Act apply in any circumstance in which the USDOC determines normal value for the purposes of the anti-dumping provisions of the Tariff Act. These circumstances include: (i) original anti-dumping investigations initiated pursuant to section 732 of the Tariff Act; (ii) administrative (periodic) reviews of anti-dumping orders pursuant to sections 751(a)(1) and 751(a)(2)(A) of the Tariff Act; (iii) "new shipper" reviews pursuant to section 751(a)(2)(B) of the Tariff Act; (iv) "changed circumstance" reviews pursuant to section 751(b) of the Tariff Act; and (v) sunset (expiry) reviews pursuant to section 751(c) of the Tariff Act (items (ii) through (v) referred to hereinafter, collectively, as "reviews").

to anti-dumping investigations and reviews of Chinese products initiated and/or resulting in preliminary or final determinations after 11 December 2016.

Legal Basis of the Complaint

It appears to China that the measures at issue, in their combined operation, are inconsistent with:

1. Article 2.2 of the AD Agreement and Article VI:1 of the GATT 1994, because the measures at issue provide for, and result in, the calculation of normal value and margins of dumping in investigations and reviews of products from China other than on the basis of the cost of production "in the country of origin" (or on the basis of "a comparable price of the like product when exported to an appropriate third country");
2. Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994, because the measures at issue provide for, and result in, the calculation of normal value and margins of dumping in investigations and reviews of products from China other than by reference to the price at which the product at issue is sold "when destined for consumption in the exporting country", i.e. China;
3. Article VI:2 of the GATT 1994, because the measures at issue provide for, and result in, the levying of anti-dumping duties greater than the margin of dumping determined in accordance with the provisions of Article VI:1 of the GATT 1994;
4. Article 18.1 of the AD Agreement, because the measures at issue constitute a specific action against dumping taken other than in accordance with the provisions of the GATT 1994 as interpreted by the AD Agreement;
5. Article I:1 of the GATT 1994, because the measures at issue fail to extend immediately and unconditionally to China an "advantage, favour, privilege or immunity" granted by the United States "[w]ith respect to customs duties and charges of any kind imposed on or in connection with" the importation of products originating in the territory of other Members, as well as with respect to "the method of levying such duties and charges" and the "rules and formalities in connection with importation";
6. Article 9.2 of the AD Agreement, because the measures at issue provide for, and result in, the collection of anti-dumping duties other than on a "non-discriminatory basis";
7. Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization, as a consequence of the foregoing, because the United States has failed to ensure "the conformity of its laws, regulations and administrative procedures" with the identified provisions of the AD Agreement and the GATT 1994.

In addition, and as a consequence of the foregoing, the measures at issue appear to nullify or impair benefits accruing to China directly or indirectly under the cited agreements.

The inconsistencies with the covered agreements specified above ceased to be justifiable when Section 15(a)(ii) of the Protocol expired on 11 December 2016 pursuant to Section 15(d) of the Protocol. After that date, Section 15(a)(ii) of the Protocol does not provide a legal basis for Members to determine normal value using methodologies that are "not based on a strict comparison with domestic prices or costs in China". In addition, the measures at issue are not justifiable under the second Supplementary Provision to Article VI:1 of the GATT 1994, as referenced in Article 2.7 of the AD Agreement.

* * *

China reserves the right to raise additional claims and legal matters regarding the above-mentioned measures during the course of the consultations. For the avoidance of doubt, China considers the scope of this request for consultations to encompass specific instances of the application of the measures described herein, as well as any ongoing conduct resulting from the

continued application of these measures in respect of anti-dumping investigations and reviews of Chinese products initiated and/or resulting in preliminary or final determinations after 11 December 2016.

China looks forward to receiving the reply of the Government of the United States to this request and to setting a mutually convenient date for consultations.
