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**UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION
TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA**

**NOTIFICATION OF AN APPEAL BY THE PEOPLE'S REPUBLIC OF CHINA
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 18 November 2016, from the Delegation of China, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), China hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the Panel Report in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings involving China* (WT/DS471) ("Panel Report").

2. Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), China simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

3. For the reasons further elaborated in its submissions to the Appellate Body, China appeals, and requests the Appellate Body to reverse, certain issues of law and legal interpretations developed by the Panel in this dispute. China also requests the Appellate Body to modify certain issues of law and legal interpretations developed by the Panel. China also requests the Appellate Body to complete certain aspects of the analysis and make certain findings.¹

I Appeal of the Panel's error in interpreting and applying the legal standard under Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* for identifying a relevant pricing pattern and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*

4. China appeals the Panel's error in interpreting and applying the first of the two pre-conditions under Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* for having recourse to the exceptional weighted average-to-transaction ("W-T") comparison methodology (the "pattern clause"). The pattern clause requires that there be "a pattern of export prices which differ significantly among different purchasers, regions or time periods" (a "relevant pricing pattern"). Specifically, China appeals errors in the manner in which the Panel interpreted and applied the pattern clause in addressing USDOC's use of statistical concepts in determining the existence of a relevant pricing pattern. Because USDOC used statistical tools disconnected from their underlying assumptions and analytical framework for which they were developed, those tools could not satisfy the requirements of the pattern clause.

¹ Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal lists paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of China to refer to other paragraphs of the Panel Report in the context of its appeal.

5. In this regard, China appeals the Panel's rejection of China's arguments regarding two of the four *quantitative* flaws identified by China in the so-called "Nails Test" (namely, the first and the third flaws), which was applied in three challenged determinations.²

6. As regards the *first* quantitative flaw identified by China, the Panel erroneously found, in Paragraph 7.67 of the Panel Report, that China had failed to demonstrate that USDOC's application of the so-called "one-standard-deviation" threshold does not succeed in identifying a relevant pricing pattern in those situations in which the export price data are not distributed in a manner that permits the standard deviation tool to render valid conclusions. Consequently, the Panel erroneously found it irrelevant that USDOC did not examine the underlying price distributions.

7. As regards the *third* quantitative flaw identified by China, the Panel erred, in Paragraph 7.84 of the Panel Report, in dismissing China's argument that USDOC's attribution of "significance" to wider price gaps in the "tail" of price distributions compared to price gaps closer to the "mean" amounted to nothing more than confirmation of an inherent characteristic as to the shape of distributions whose existence is implicitly assumed by the test itself, without this ever being confirmed by USDOC.

8. In dismissing China's arguments regarding the first and third quantitative flaws, the Panel also failed to ensure that USDOC's establishment of the facts was proper, and it accepted an evaluation by USDOC of the relevant facts that fell short of being objective and unbiased, contrary to the requirements set out in the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*.

9. Accordingly, China requests that the Appellate Body reverse the Panel's rejection of China's claim under the pattern clause of Article 2.4.2, second sentence, in respect of the *first* quantitative flaw of the Nails Test applied in the three challenged determinations in Paragraphs 7.56-7.67 and 8.1.a.vi of the Panel Report, and in respect of the *third* quantitative flaw of the Nails Test applied in the three challenged determinations in Paragraphs 7.75-7.84 and 8.1.a.vi of the Panel Report.

10. Having reversed the Panel, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with the pattern clause of Article 2.4.2, second sentence of the *Anti-Dumping Agreement* in *OCTG OI*, *Coated Paper OI*, and *Steel Cylinders OI*, by failing to find through an objective and unbiased evaluation of the facts, a pattern of export prices that differ significantly, within the meaning of the pattern clause of Article 2.4.2, second sentence.

II Appeal of the Panel's error in interpreting and applying Article 2.4.2, second sentence, and in applying the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement* as permitting authorities to find relevant pricing patterns on the basis of average export prices to purchasers or time periods, instead of individual export transaction prices

11. The Panel erred in interpreting the pattern clause in Article 2.4.2, second sentence, when it found that investigating authorities are permitted to find a relevant pricing pattern on the basis of *average* export prices to purchasers or time periods, instead of *individual* export transaction prices. The Panel also erred in its application of this same provision by applying its erroneous interpretation to the facts of the three challenged determinations.

12. The Panel further erred in approving as WTO-consistent a test (applied in the three challenged determinations) that biased the outcome by systematically increasing the likelihood of finding a relevant pricing pattern, contrary to the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*.

13. Accordingly, China requests that the Appellate Body reverse the Panel's finding in Paragraphs 7.115-7.128 and 8.1.a.ix of the Panel Report that USDOC did not act inconsistently with the pattern clause of Article 2.4.2, second sentence, in the three challenged determinations,

² The findings of the Panel in relation to the three original investigations in which USDOC applied the Nails Test are contained in para. 8.1.a of the Panel Report. The three challenged determinations relate to the original investigations in *Coated Paper*, *OCTG* and *Steel Cylinders*.

by finding a relevant pricing pattern on the basis of average export prices to purchasers or time periods, as opposed to individual export prices.

14. Having reversed the Panel, the Appellate Body should complete the analysis and find that USDOC acted inconsistently with Article 2.4.2, second sentence, by finding a relevant pricing pattern on the basis of purchaser or time period averages, as opposed to individual export transaction prices.

III Appeal of the Panel's error in interpreting and applying Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* as not requiring investigating authorities to consider objective market factors in determining whether relevant pricing differences are "significant"

15. China appeals the Panel's interpretation underlying its finding that USDOC has not acted inconsistently with Article 2.4.2, second sentence, in the three challenged determinations because USDOC wrongly concluded, on the sole basis of numerical (quantitative) differences, that the observed export prices formed relevant pricing patterns.

16. Investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods. The Panel failed to recognize that qualitative factors are objective market factors, such as seasonality or market-driven fluctuations in the costs of production. The Panel further failed to recognize that investigating authorities have an obligation to examine these qualitative factors on their own initiative as part of the applicable legal standard under Article 2.4.2, i.e., regardless whether evidence has been provided by interested parties.

17. China therefore requests that the Appellate Body modify the Panel's interpretation of Article 2.4.2, second sentence, spelt out in Paragraphs 7.105-7.114 of the Panel Report, and find that, although investigating authorities are not required to consider the *subjective* cause of (or the *subjective* reasons for) the observed export price differences, they must consider relevant *objective* market factors (i.e., the relevant *objective* causes of the observed export price differences) when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among customers, regions or time periods.

18. China also requests that the Appellate Body find that the qualitative factors thus to be considered are objective market factors, including, *inter alia*, objective factors such as seasonality or market-driven fluctuations in the costs of production.

19. Finally, China requests that the Appellate Body find that an investigating authority has an obligation to examine these qualitative factors on its own initiative as part of the applicable legal standard under Article 2.4.2, i.e., regardless whether evidence has been provided to the authority by interested parties.

20. Accordingly, China requests that the Appellate Body reverse the Panel's rejection in Paragraphs 7.105-7.114 and 8.1.a.viii of the Panel Report of China's claim under Article 2.4.2, second sentence, as regards USDOC's failure to consider relevant qualitative factors prior to finding the existence of a relevant pricing pattern in the three challenged determinations.

IV Appeal of the Panel's interpretation of Article 2.4.2 of the *Anti-Dumping Agreement* as permitting the combination of different comparison methodologies

21. China appeals the Panel's interpretation in the statement in footnote 385 of the Panel Report that "it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let {...} negative dumping {found outside of a pattern} offset the dumping found within the pattern". This interpretation is erroneous because it is premised on the understanding that an investigating authority may conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transaction" under the W-W or T-T comparison methodology, and then combine the two into a single margin of dumping for the exporter and the

product as a whole. In *US – Washing Machines*, the Appellate Body recently concluded that Article 2.4.2 does not permit the combining of different comparison methodologies.³

22. Accordingly, China requests that the Appellate Body declare the statement made in footnote 385 of the Panel Report to be moot and of no legal effect.

V Appeal of the Panel's finding that the AFA Norm is a measure without prospective application and requests to complete the analysis

23. The Panel found that China had not demonstrated the prospective application of the measure defined in paragraph 2.4 of its Report as the "AFA Norm", and therefore concluded that China had not demonstrated that the AFA Norm constitutes a "measure" in the form of a rule or norm of general and prospective application that could be challenged in WTO dispute settlement.

24. In so finding, the Panel erred in its interpretation and application of the term "measure" under Articles 3.3 and 6.2 of the DSU. The Panel erred in articulating the legal standard for establishing that an alleged rule or norm is a "measure" under these provisions, in particular that the alleged rule or norm has prospective application. The Panel also erred in applying the relevant legal standard in concluding that the AFA Norm is not a "measure" in the form of a rule or norm with general and prospective application.

25. Accordingly, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.457-7.479 and 8.1.d.ii of the Panel Report in this regard. If, as requested, the Appellate Body reverses the Panel's findings that the AFA Norm does not have prospective application, then China requests the Appellate Body to complete the analysis and find that:

- the AFA Norm has general and prospective application, and, therefore, is a rule or norm of general and prospective application that may be challenged by China as a "measure" under Articles 3.3 and 6.2 of the DSU; and,
- the AFA Norm is inconsistent with Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.

VI Conditional appeals in relation to the Panel's exercise of judicial economy with respect to certain claims and conditional requests to complete the analysis

26. The Panel exercised judicial economy with respect to China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement* in relation to 30 challenged determinations.⁴

27. If the Appellate Body reverses the Panel's findings under Article 6.10 and/or Article 9.2 in relation to one or more of the 30 challenged determinations in which USDOC determined a margin for the PRC-wide entity,⁵ China requests that the Appellate Body take the following action in relation to each challenged determination for which the Panel's findings under Article 6.10 and/or Article 9.2 have been reversed.

28. If the condition described in paragraph 27 above is met, the Panel's exercise of judicial economy:

- is inconsistent with the requirement to make an objective assessment of the matter under Article 11 of the DSU;

³ See Appellate Body Report, *US – Washing Machines*, para. 5.124.

⁴ The relevant analysis and conclusions of the Panel are contained in paras. 7.480-7.508 and 8.1.d.iii of the Panel Report.

⁵ The findings of the Panel in relation to the application of the Single Rate Presumption in certain USDOC determinations are contained in paras. 7.369-7.382, 7.388, and 8.1.c.iii of the Panel Report. These findings pertain to 38 challenged determinations, including eight determinations in which USDOC did not determine a rate for the PRC-wide entity. A list of the 38 determinations subject to findings in relation to the application of the Single Rate Presumption, as well as a list of the 30 challenged determination in which USDOC determined a margin for the PRC-wide entity, are set forth in footnote 956 to para. 7.480 of the Panel Report.

- fails to contribute to prompt settlement of the dispute under Article 3.3 of the DSU; and
- frustrates the ability of the parties to find a positive solution to the dispute, contrary to Article 3.7 of the DSU.

29. Accordingly, if the condition is met, the Appellate Body should, for each such determination:

- reverse the Panel's exercise of judicial economy, reflected in paragraphs 7.486, 7.499 and 8.1.d.iii of the Panel Report, with respect to China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7); and,
 - complete the analysis of China's claims under Article 6.1, Article 6.8 and Annex II(1), and Article 6.8 and Annex II(7) of the *Anti-Dumping Agreement*.
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