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CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 27 May 2016, from the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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On 25 September 2013, the DSB adopted its recommendations and rulings in *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* ("*China – Broiler Products*") (DS427).[1] The DSB found that the Government of China ("China") imposed antidumping and countervailing duties on US exports of broiler products in a manner that breached China's obligations under the under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The DSB recommended that China bring its measures into conformity with its obligations under these agreements.

On 19 December 2013, the United States and China informed the DSB that they had agreed that the reasonable period of time ("RPT") for China to implement the DSB recommendations and rulings would be 9 months, 14 days, from the date of adoption of the panel report, expiring on 9 July 2014.[2]

On 15 July 2014, the United States and China informed the DSB that the two parties had concluded *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding* ("Agreed Procedures").[3] Paragraph 1 of the Agreed Procedures provides that, "[s]hould the United States consider that the situation described in Article 21.5 of the DSU exists, the United States will request that China enter into consultations with the United States."[4]

On 17 May 2016, the United States requested consultations with China pursuant to paragraph 1 of the Agreed Procedures.[5] The consultations were held on 24 May 2016, but did not resolve US concerns.

The United States considers that China has failed to bring its measures into conformity with the covered agreements. Specifically, the United States considers that China's measures continuing to impose antidumping and countervailing duties on broiler products from the United States, as set forth by China's Ministry of Commerce (MOFCOM) in Announcement No. 44 [2014], Announcement No. 56 [2013], Announcement No. 52 [2010], Announcement No. 51 [2010], Announcement No. 26 [2010], Announcement No. 8 [2010], and the annexes to the foregoing

[1] WT/DSB/M/337, para. 6.8; WT/DS427/5.
[2] WT/DS427/7
[3] WT/DS427/9.
[4] WT/DS427/9. The United States recalls that footnote 1 following the above-cited sentence confirms that "[t]he Parties agree that under Article 21.5 of the DSU, consultations are not obligatory."
[5] WT/DS427/9.

documents, are inconsistent with China's obligations under the following provisions of the AD Agreement, SCM Agreement, and the GATT 1994:

1. Articles 3.1 and 3.2 of the AD Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, because MOFCOM's analysis of the alleged price effects of imports under investigation did not involve an objective examination of the record and was not based on positive evidence. For example, MOFCOM:

   – Failed to account for differences in the product mix between the average unit value of subject imports and the average unit value of domestic sales;

   – Failed to explain how it collected product-specific pricing data in the re-investigation, why data was solicited from only four domestic producers, and what proportion of total domestic industry sales were covered by the data;

   – Failed to explain how the alleged price underselling could have suppressed domestic prices in the first half of 2009 when similar underselling had no price suppressive effects at other points during the period of investigation; and

   – Failed to address evidence that prices for domestically produced products that competed with subject imports declined far less than prices for other domestic products in the first half of 2009.

2. Articles 3.1 and 3.4 of the AD Agreement, and Articles 15.1 and 15.4 of the SCM Agreement, because MOFCOM's findings that subject imports had an adverse impact on the domestic industry did not involve an objective evaluation of all relevant economic factors and indices having a bearing on the state of the industry. For example, MOFCOM did not address economic evidence and factors that contradicted its finding that the industry was not suffering material injury on account of US imports.

3. Articles 3.1 and 3.5 of the AD Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, because MOFCOM's determination that subject imports were causing injury to the domestic industry was not based on an examination of all relevant evidence, including that subject import volume did not increase at the expense of the domestic industry and that a large portion of subject imports consisted of products that could not have been injurious, and was based on MOFCOM's flawed price and impact analyses.

4. Articles 6.4 and 6.5 of the AD Agreement, and Articles 12.3 and 12.4 of the SCM Agreement, because during the reinvestigation MOFCOM did not provide interested parties timely opportunities to see all non-confidential information that was relevant to their case and that was used by the investigating authority, and MOFCOM treated information as confidential absent good cause. For example, MOFCOM failed to disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.

5. Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement because during the reinvestigation MOFCOM did not provide notice of the information that MOFCOM required and did not provide interested parties ample opportunity to present in writing all evidence they considered relevant. For example, MOFCOM did not disclose the questionnaires it submitted to Chinese domestic producers during the re-investigation.

6. Article 6.9 of the AD Agreement and Article 12.8 of the SCM Agreement because MOFCOM failed to inform interested Members and parties of the essential facts under consideration which form the basis for its decision to apply definitive measures. For example, MOFCOM did not disclose the calculations utilized to determine the dumping and subsidy margins for US producers.

7. Articles 12.2 and 12.2.2 of the AD Agreement, and Articles 22.3 and 22.5 of the SCM Agreement, because MOFCOM failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law it considered material, all relevant information on matters of fact and law and the reasons which led to the imposition of final measures, and the reasons for the acceptance or rejection of relevant arguments or claims.

For example, MOFCOM's explanations with respect to its findings for its material injury determination fail to address key arguments made by interested parties.

8. Articles 2.2 and 2.2.1.1 of the AD Agreement because MOFCOM improperly calculated the cost of production for US producers, failed to calculate costs on the basis of the records kept by the US producers under investigation, and did not consider all available evidence on the proper allocation of costs. For example, MOFCOM allocated production costs of non-subject merchandise to subject merchandise and failed to properly allocate processing costs for subject merchandise.

9. Article 9.4 of the AD Agreement because MOFCOM applied to imports from producers and exporters not included in the examination – and to which the application of facts available was not warranted – an antidumping duty that exceeded the weighted average margin of dumping established with respect to the selected exporters or producers. For example, MOFCOM failed to correctly calculate dumping margins for US interested parties, and then applied a rate to imports from producers and exporters not included in the examination that exceeded the selected exporters or producers' weighted average margin of dumping.

10. Article 6.8 and Annex II (including, *inter alia*, paragraphs 1, 3, 5, and 6) of the AD Agreement because MOFCOM made determinations for U.S. producers on the basis of the facts available even though it:

    – failed to specify in detail the information required from interested parties and the manner in which it should be structured;

    – did not take into account verifiable and appropriately submitted information; and

    – failed to provide supplying parties of the reasons evidence or information was rejected and an opportunity to provide further explanations.

11. Article 1 of the AD Agreement as a consequence of the breaches of the AD Agreement described above.

12. Article 10 of the SCM Agreement as a consequence of the breaches of the SCM Agreement described above.

13. Article VI of the GATT 1994 as a consequence of the breaches of the AD and SCM Agreements described above.

As "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" between the United States and China within the meaning of Article 21.5 of the DSU, the United States seeks recourse to Article 21.5 of the DSU, including wherever possible resort to the original panel.

The United States recalls that, pursuant to Paragraph 2 of the Agreed Procedures, China has agreed to accept the establishment of the panel at the first DSB meeting at which a request for the establishment of an Article 21.5 panel appears on the agenda.

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