WORLD TRADE ORGANIZATION

WT/DS405/2
9 April 2010

(10-1877)

Original: English

EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN FOOTWEAR FROM CHINA

Request for the Establishment of a Panel by China

The following communication, dated 8 April 2010, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 4 February 2010, The People's Republic of China ("China") requested consultations with the European Union ("EU") pursuant to Article 4 of the DSU, Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 ("*Anti-Dumping Agreement*") with respect to Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community as amended, codified and replaced by Council Regulation (EC) No. 1225/2009 (the "*Basic AD Regulation*"), Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China, and Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in *inter alia* China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.

The request for consultations was circulated in document WT/DS405/1 - G/L/916 - G/ADP/D82/1 dated 8 February 2010.

Consultations were held on 31 March 2010 with a view to reaching a mutually satisfactory solution. These consultations however failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994 and Articles 17.4 and 17.5 of the *Anti-Dumping Agreement*, that the Dispute Settlement Body ("DSB") establish a Panel with standard terms of reference as set out in Article 7.1 of the DSU to examine China's claims.

I. Article 9(5) of Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community[1] as amended,[2] codified and replaced by Council Regulation (EC) No. 1225/2009[3] (the "*Basic AD Regulation*")

[1] Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, p.1.

Article 9(5) of the Basic AD Regulation effectively provides that, in case of imports from non-market economy countries (including China), the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will effectively only be specified for the exporters which can demonstrate, on the basis of properly substantiated claims, that they fulfil all the criteria listed in that provision.

China submits that Article 9(5) of the Basic AD Regulation is inconsistent as such with, at least, the EU's obligations under the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organisation:

I.1 Articles 6.10 of the *Anti-Dumping Agreement* because in order to benefit from an individual dumping margin, an exporter from China must fulfil specific conditions that are not provided for in that article or elsewhere in the *Anti-Dumping Agreement*.

I.2 Article 9.2 of the *Anti-Dumping Agreement* because in order to benefit from an individual anti-dumping duty, an exporter from China must fulfil specific conditions that are not provided for in that article or elsewhere in the *Anti-Dumping Agreement*.

I.3 Article 9.3 of the *Anti-Dumping Agreement* because on account of the additional conditions in order to be entitled for an individual dumping margin, for those producers/exporters who do not fulfil the conditions for the individual treatment regime, the anti-dumping duty is determined on the basis of a dumping margin likely to exceed the dumping margin established in accordance with Article 2 of the *Anti-Dumping Agreement*.

I.4 Article 9.4 of the *Anti-Dumping Agreement* given that the anti-dumping duty that is applied to imports from producers/exporters who are not included in the sample is calculated on the basis of the dumping margins of the sampled producers/exporters, including dumping margins of those who do not qualify for individual treatment in accordance with Article 9(5) of the *Basic AD Regulation*.

I.5 Article I of the GATT 1994 since, by laying down additional conditions for Chinese exporters/producers to benefit from an individual dumping margin and an individual anti-dumping duty, the EU fails to accord to China advantages granted to other contracting parties.

I.6 Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organisation and Article 18.4 of the *Anti-Dumping Agreement* since the EU has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and the *Anti-Dumping Agreement*.

I.7 Article X:3(a) of the GATT by not administering the provisions of Article 9(5) of the *Basic AD Regulation* in a uniform, impartial and reasonable manner.

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[2] Council Regulation (EC) No. 2331/96 of 2 December 1996, OJ L 317, 6.12.1996, p.1, Council Regulation (EC) No. 905/98 of 27 April 1998, OJ L 128, 30.4.1998, p. 18, Council Regulation (EC) No. 2238/2000 of 9 October 2000, OJ L 257, 11.10.2000, p.2, Council Regulation (EC) No. 1972/2002 of 5 November 2002, OJ L 305, 7.11.2002, p.1, Council Regulation (EC) No. 461/2004 of 8 March 2004, OJ L 77, 13.3.2004, p. 12 and Council Regulation (EC) No. 2117/2005 of 21 December 2005, OJ L 340, 23.12.2005, p. 17.

[3] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p.51 and corrigendum to Council Regulation (EC) No. 1225/2009, OJ 7, 12.1.2010, p.22.

II Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating in *inter alia* China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96[4]

The EU initiated an expiry review of the anti-dumping measure applicable to the imports of certain footwear with uppers of leather from *inter alia* China on 3 October 2008. Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 extended the measure for a period of fifteen months.

China considers that Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 is inconsistent, at least, with the EU's obligations under the following provisions of the *Anti-Dumping Agreement* and the GATT 1994:

II.1 Articles 2.1 and 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU precluded a fair comparison between the export price and the normal value:

- on account of the analogue country selection procedure and the selection of Brazil as the analogue country; and

- by using the PCN methodology applied in the original investigation and suddenly reclassifying the footwear categories in the middle of the investigation.

II.2 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products, as the EU used different sampling procedures for Chinese exporters, EU importers, and non-complaining EU producers on the one hand, and complainant EU producers on the other hand.

II.3 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the Anti-Dumping Agreement, because:

- the EU selected the EU producers' sample in the absence of requisite data which is normally solicited in a sampling form, is essential for the selection of the sample, and was requested from non-complainant EU producers who made themselves known;

- the EU producers' sample selected was neither statistically valid nor represented the largest percentage of volume that could reasonably be investigated and the EU failed to cover the largest percentage of volume that could be investigated;

- the EU producers' sample included a producer that outsourced its entire production of the product concerned to a third country in the review investigation period; and

[4]OJ L 352, 30.12.2009, p. 1.

- the EU used an incorrect product classification methodology and suddenly reclassified the footwear categories in the middle of the investigation.

II.4 Articles 3.1, 3.4 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to make an objective examination, on the basis of positive evidence, of the factors having a bearing on the state of the domestic industry because several key injury indicators were analysed on the basis of the data of the whole EU production as termed by the EU, that included data pertaining to EU producers not part of the EU industry.

II.5 Articles 3.1, 3.5 and 17.6(i) of the Anti-Dumping Agreement because the EU failed to make an objective examination, on the basis of positive evidence, that dumped imports are, through the effects of dumping, causing injury; and because the EU failed to ensure that injury caused to the EU industry by other factors was not attributed to dumped imports.

II.6 Article 6.1.2 of the Anti-Dumping Agreement because the EU failed to provide other interested parties prompt access to the information in the non-confidential questionnaire responses filed by sampled EU producers.

II.7 Articles 6.2 and 6.4 of the Anti-Dumping Agreement because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests concerning but not limited to sampling of EU producers, selection of the analogue country and other procedural issues.

II.8 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement because the EU failed to ensure among others, the disclosure of the names of the complainants; and the provision of summaries of confidential information relating to the EU industry, and sampled EU producers in the expiry review request and questionnaire responses respectively; and data used for selecting the sample of EU producers, or, where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

II.9 Articles 6.2 and 6.5.2 of the Anti-Dumping Agreement because the EU failed to determine that the request for the confidentiality of the names of the complainants is not warranted; and failed to reject the confidential information provided by the sampled EU producers, the non-confidential summaries of which were not provided.

II.10 Articles 3.1 and 6.8 of the Anti-Dumping Agreement because the EU did not apply facts available when faced with incorrect and deficient information, including but not limited to the product classification information, provided by sampled EU producers in the injury questionnaire responses.

II.11 Article 11.3 of the Anti-Dumping Agreement because the EU's determination that expiry of the measure is likely to lead to a continuation of dumping and injury is based on determination of continued dumping and injury in violation of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.8, 6.10 and 17.6(i) of the Anti-Dumping Agreement.

II.12 Article 12.2.2 of the Anti-Dumping Agreement because the EU failed to provide sufficiently detailed explanations in the Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009, regarding matters of fact and law and reasons which led to the extension of the measures; and of reasons which led to the acceptance or rejection of the arguments of the interested parties.

II.13 Article 17.6(i) of the Anti-Dumping Agreement because the analogue country selection process by the EU did not amount to a proper establishment of the facts and an unbiased and objective evaluation of those facts.

II.14 In consequence, Articles 1 and 18.1 of the Anti-Dumping Agreement because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the Anti-Dumping Agreement.

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III. Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with uppers of leather from *inter alia* China[5]

China submits that Council Regulation (EC) No. 1472/2006 of 5 October 2006 leading to the imposition of an anti-dumping duty of 16.5% on the imports of certain footwear with uppers of leather from China with the exception of one Chinese producer-exporter, is inconsistent, at least, with the obligations of the EU under the following provisions of the *Anti-Dumping Agreement*, the GATT 1994 and Part I, paragraph 15 of China's Protocol of Accession:

III.1 Part I, paragraph 15 (a) (ii) of China's Protocol of Accession, Paragraph 151(e), (f) of the Report of the Working Party on the Accession of China, Articles 2.4 and 6.10.2 of the *Anti-Dumping Agreement* because the EU did not examine the non-sampled cooperating Chinese exporting producers' Market Economy Treatment and Individual Treatment applications.

III.2 Article 2.2.2 of the *Anti-Dumping Agreement* because the amounts for administrative, selling and general costs and profits established by the EU for the company granted Market Economy Treatment were not calculated on the basis of a reasonable method as the EU used the administrative, selling and general costs and profits of Chinese exporters in other anti-dumping cases involving products other than the product concerned.

III.3 Article 2.4 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because the EU precluded a fair comparison between the export price and the normal value:

- on account of the analogue country selection procedure and the selection of Brazil as the analogue country;
- by using the PCN methodology established; and
- by making adjustments for differences in production costs when normal value was based on prices or constructed values in the analogue country, on the basis of the data of Chinese exporters that were not granted market economy treatment.

III.4 Article 2.6 of the *Anti-Dumping Agreement* read together with Articles 3.1 and 4.1 of the *Anti-Dumping Agreement* because the EU wrongly established the like product/product concerned by not excluding STAF below €7.5/pair even though conceptually and technically there is no difference between STAF below and above €7.5/pair.

III.5 Articles 3.1 and 17.6(i) of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because the EU failed to objectively examine, based on positive evidence, both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like

[5]OJ L 275, 6.10.2006, p.1. This measure confirms, and incorporates reasoning from Commission Regulation (EC) No. 553/2006 of 23 March 2006 imposing provisional anti-dumping duty on imports of certain footwear with uppers of leather from *inter alia* China. OJ L 98, 6.4.2006, p.3.

products, and the consequent impact of these imports on domestic producers of such products; and Article 6.10 of the Anti-Dumping Agreement, because:

- the EU used different sampling procedures for Chinese exporters on the one hand, and EU producers on the other hand; and

- the EU made the injury assessment partially on the basis of the verified data of the sampled EU producers and partially on the basis of the unverified data pertaining to the EU industry provided by the complainant producers at the complaint stage, as cross-checked, where possible, with the overall information provided by the relevant associations throughout the EU.

III.6 Articles 3.1, 3.2, 9.1 and 17.6(i) of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because:

- the EU's underselling calculation was based on a very low quantity of exports of the sampled Chinese exporting producers; and

- the EU wrongly calculated the underselling margin by applying a volume-based reduction ratio to the originally calculated price-based margin and by allocating the non-injurious import value in relation to import values for a period outside the investigation period;

- the EU inappropriately established the profit margin for the EU industry.

III.7 Article 3.3 of the *Anti-Dumping Agreement* because the cumulative assessment of imports from China and Vietnam by the EU was inappropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

III.8 Articles, 3.1, 3.2 and 3.4 of the *Anti-Dumping Agreement* because the EU failed to examine the impact of the dumped imports on the domestic industry concerned by evaluating all of the relevant economic factors and indices having a bearing on the state of the EU industry, notably production capacity and capacity utilization.

III.9 Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* as the EU failed to objectively examine, based on positive evidence, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products because the EU failed to ensure that injury caused to the EU industry by other factors, including but not limited to the export performance of EU producers, the lifting of the quota on Chinese footwear, changes in pattern of consumption, the decline in EU demand and the effects of exchange rate fluctuations, was not attributed to dumped imports from China.

III.10 Articles 6.2, 6.4 and 6.5 of the *Anti-Dumping Agreement* because the EU failed to provide timely opportunities for all interested parties to see all non-confidential information relevant to the defence of their interests including, but not limited to, the identity and sampling of the EU producers, information on the adjustments for differences affecting price comparability.

III.11 Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement* because the EU failed to ensure the disclosure of the names of the complainants; the provision of non-confidential summaries of

confidential information relating to the EU industry and sampled EU producers in the complaint and questionnaire responses respectively; information used for sampling, among others or where provided, failed to ensure the provision by the EU industry and/or the sampled EU producers, of sufficiently detailed summaries to enable a reasonable understanding of the substance of that information.

III.12 Articles 6.2 and 6.5.2 of the *Anti-Dumping Agreement* because the EU failed to determine that the request for confidentiality of the names of the complainants is not warranted; and the EU failed to reject the confidential information provided by the sampled EU producers, the non-confidential summary of which was not provided.

III.13 Article 6.1.1 of the *Anti-Dumping Agreement* and Part I, paragraph 15 of China's Accession Protocol because Chinese exporting producers were granted only 15 days by the EU to submit their written reply to the Market Economy Treatment and Individual Treatment questionnaires.

III.14 Article 6.9 of the *Anti-Dumping Agreement* because the additional definitive disclosure issued on 28 July 2006 regarding a change in the form of the measures was not made by the EU in sufficient time for the interested parties to defend their interests.

III.15 Article 6.10 of the *Anti-Dumping Agreement* because the sample of the Chinese exporting producers selected by the EU was not based on the largest percentage of export volumes of the product concerned from China as:

- the sample was established before the exclusion of STAF from the product scope of the investigation; and

- the domestic sales volumes of the sampled companies were also taken into account for sample selection.

III.16 Articles 3.1 and 9.2 of the *Anti-Dumping Agreement* because the anti-dumping duty on Chinese exports was not imposed and collected by the EU on a non-discriminatory basis as the duty rate established for China was higher than that for Vietnam, although both the dumping and injury margins found for Vietnamese exporters were higher than those for Chinese exporters.

III.17 Articles 6.10, 6.10.2, 9.2 and 9.3 of the *Anti-Dumping Agreement* because although sampling was resorted to in the current case by the EU for Chinese exporting producers, a country-wide duty was imposed on the sampled Chinese exporting producers.

III.18 Articles 6.10, 6.10.2, and 9.2 of the *Anti-Dumping Agreement* because the EU applied additional conditions by way of the Individual Treatment criteria to deny individual dumping margins to cooperating Chinese exporting producers.

III.19 Article 12.2.2 of the *Anti-Dumping Agreement* because the EU failed to provide sufficiently detailed explanations in Council Regulation (EC) No. 1472/2006 of 5 October 2006 regarding matters of fact and law which led to the acceptance or rejection of the arguments of the interested parties, and on matters of fact and law and reasons which led to the imposition of final measures.

III.20 Article 17.6(i) of the *Anti-Dumping Agreement* because the analogue country selection process by the EU and the calculation of a dumping margin for the non-sampled cooperating Chinese exporting producers without the examination of their Market Economy Treatment and Individual Treatment applications, did not amount to a proper establishment of facts and an unbiased and objective evaluation of those facts.

III.21 In consequence, Articles 1 and 18.1 of the *Anti-Dumping Agreement* because an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the provisions of the *Anti-Dumping Agreement*.

The EU's measure therefore nullifies and impairs benefits accruing to China under the *Anti-Dumping Agreement*, the GATT 1994, the Marrakesh Agreement Establishing the World Trade Organisation and China's Protocol of Accession.

China asks that this request be placed on the agenda of the DSB meeting scheduled to take place on 20 April 2010.