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UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA

Request for the Establishment of a Panel by China

The following communication, dated 9 December 2008, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 September 2008, the People's Republic of 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 XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). This request for consultations concerned the anti-dumping and countervailing duties imposed by the United States pursuant to certain final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce, as described below.

Consultations were held on 14 November 2008 with a view to reaching a mutually satisfactory solution. These consultations clarified certain issues pertaining to this matter, but failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 30 of the SCM Agreement, and Article 17 of the AD Agreement, that the Dispute Settlement Body ("DSB") establish a Panel to examine this matter. China asks that this request be placed on the agenda of the DSB meeting to be held on 22 December 2008. China further requests that the Panel have the standard terms of reference, as set forth in Article 7.1 of the DSU.

A. SPECIFIC MEASURES AT ISSUE

This request for establishment of a Panel concerns the following measures, which include the definitive anti-dumping and countervailing duties imposed pursuant to their authority, the conduct of the underlying anti-dumping and countervailing duty investigations, and the combined effect of the anti-dumping and countervailing duty determinations and duties in each of the specified investigations:

Investigations A-570-910 and C-570-911 ("CWP")

- Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: *Circular Welded Carbon Quality*

Steel Pipe from the People's Republic of China, 73 Federal Register 31970 (5 June 2008).

- Notice of Antidumping Duty Order: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Federal Register 42547 (22 July 2008).

- Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 Federal Register 31966 (5 June 2008).

- *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 Federal Register 42545 (22 July 2008).

Investigations A-570-912 and C-570-913 ("OTR")

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Final Affirmative Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 40485 (15 July 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 Federal Register 51624 (4 Sept. 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Federal Register 40480 (15 July 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Countervailing Duty Order, 73 Federal Register 51627 (4 Sept. 2008).

Investigations A-570-914 and C-570-915 ("LWRP")

- Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: *Light–Walled Rectangular Pipe and Tube from the People's Republic of China,* 73 Federal Register 35652 (24 June 2008).

- Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders, 73 Federal Register 45403 (5 Aug. 2008).

- *Light-Walled Rectangular Pipe and Tube From People's Republic of China*: Final Affirmative Countervailing Duty Investigation Determination, 73 Federal Register 35642 (24 June 2008).

- *Light–Walled Rectangular Pipe and Tube from the People's Republic of China*: Notice of Countervailing Duty Order, 73 Federal Register 45405 (5 Aug. 2008).

Investigations A-570-916 and C-570-917 ("LWS")

- *Laminated Woven Sacks from the People's Republic of China*: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 35646 (24 June 2008).

- Notice of Antidumping Duty Order: *Laminated Woven Sacks From the People's Republic of China*, 73 Federal Register 45941 (7 Aug. 2008)

- *Laminated Woven Sacks from the People's Republic of China*: Final Affirmative Countervailing Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 Federal Register 35639 (24 June 2008).

- *Laminated Woven Sacks From the People's Republic of China*: Countervailing Duty Order, 73 Federal Register 45955 (7 Aug. 2008).

In certain of the investigations specified above, the US Department of Commerce stated that US law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the US non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. The measures therefore include, as an omission, the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product.

B. LEGAL BASIS OF THE COMPLAINT

China considers that the measures specified above are inconsistent with the obligations of the United States under, *inter alia*, Articles I and VI of the GATT 1994, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the SCM Agreement, Articles 1, 2, 6, 9, 18, and Annex II(1) of the AD Agreement, and Article 15 of the *Protocol on the Accession of the People's Republic of China* (the Protocol of Accession).

1. As Applied Claims

China considers that the CWP, OTR, LWRP, and LWS anti-dumping and countervailing duty investigations, determinations and orders, the definitive anti-dumping and countervailing duties imposed pursuant thereto, as well as the combined effect of the anti-dumping and countervailing duty determinations, orders, and duties in each such investigation, are inconsistent, at a minimum, with the following obligations of the United States under the covered agreements:[1]

[1] Unless otherwise noted, all inconsistencies relating to the GATT 1994, the SCM Agreement, and the Protocol of Accession arise in connection with each of the CVD measures in the four identified investigations, while all inconsistencies relating to the AD Agreement arise in connection with each of the anti-dumping measures in the four identified investigations.

(a) in connection with the alleged provision of goods for less than adequate remuneration –

(i) the US authorities' determination that certain state-owned enterprises (SOEs) are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement;

(ii) in the absence of a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that China "entrusts or directs" SOEs to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;

(iii) even assuming a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that SOEs "entrust or direct" trading companies to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;[2]

(iv) the US authorities' determination that the sale of goods by trading companies to producers of subject merchandise confers a countervailable subsidy within the meaning of Article 1 of the SCM Agreement and a benefit under the guidelines set forth in Article 14(d) of the SCM Agreement;

(v) the US authorities' failure to determine whether the alleged benefit received by trading companies was passed through to producers of subject merchandise, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement;

(vi) the US authorities' inclusion in subsidy benefit calculations of only those transactions that produced a positive benefit, while excluding transactions that yielded no benefit, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement;

(b) in connection with the alleged provision of land and land use rights for less than adequate remuneration –

(i) the failure of the US authorities to demonstrate specificity under Articles 2.1 and 2.2 of the SCM Agreement, and to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;[3]

(c) in connection with the alleged provision of loans on preferential terms –

(i) the US authorities' determination that certain state-owned commercial banks (SOCBs) are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement;[4]

(ii) in the absence of a valid determination that certain SOCBs are public bodies, the US authorities' failure to make a determination that China "entrusts or

[2] The inconsistencies set forth in paras. a(iii) – a(v) do not arise in connection with the LWS CVD measures.

[3] The inconsistency set forth in para. b(i) does not arise in connection with the CWP CVD measures.

[4] The inconsistencies set forth in paras. c(i) – c(iii) do not arise in connection with the LWRP CVD measures.

directs" SOCBs to provide loans to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;

(iii) the failure of the US authorities to demonstrate specificity under Articles 2.1 and 2.2 of the SCM Agreement, and to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

(d) in connection with each instance in which the US authorities resorted to a benchmark outside of China for the purpose of determining the existence and amount of any alleged subsidy benefit –

(i) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement;

(ii) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, producers of subject merchandise received a subsidy benefit, without making a finding of "special difficulties" as required under Article 15 of the Protocol of Accession;

(iii) the US authorities' use of benefit methodologies that the United States did not notify to the Committee on Subsidies and Countervailing Measures, as required by Article 15(c) of the Protocol of Accession;

(e) in connection with all countervailing duty investigations, determinations and orders specified above –

(i) the failure of the US authorities to take all necessary steps to ensure that the imposition of countervailing duties was in accordance with Article VI of the GATT 1994 and the SCM Agreement, as required by Article 10 of the SCM Agreement;

(ii) the use of a specific action against alleged subsidies other than in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement, in violation of Article 32.1 of the SCM Agreement;

(iii) the imposition of countervailing duties in a manner inconsistent with the requirements of Article VI:3 of the GATT 1994;

(f) in connection with the US authorities' use of its NME methodology for the purpose of a determination of dumping and the imposition of anti-dumping duties under Article VI of the GATT 1994 and the AD Agreement, simultaneously with a determination of subsidization and imposition of countervailing duties on the same product –

(i) the US authorities' levying of countervailing duties in excess of the amount of the subsidy found to exist, in violation of Article 19.4 of the SCM Agreement;[5]

[5] The inconsistencies set forth in paras. f(i) – f(vii) relate to each of the CVD and AD measures in the four identified investigations, as well as to the combined effect of the CVD and AD measures in each of the identified investigations.

(ii) the use by the US authorities of a specific action against subsidization that is not in accordance with the GATT 1994, as interpreted by the SCM Agreement, in violation of Article 32.1 of the SCM Agreement;

(iii) the US authorities' failure to take all necessary steps to ensure that the imposition of countervailing duties was in accordance with Article VI of the GATT 1994 and the SCM Agreement, as required by Article 10 of the SCM Agreement;

(iv) the US authorities' levying of anti-dumping and countervailing duties in excess of the "appropriate amounts," in violation of Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement, respectively;

(v) the US authorities' failure to make a fair comparison between the export price and normal value, in violation of Article 2.4 of the AD Agreement;

(vi) the US authorities' imposition of anti-dumping duties in excess of the amount of dumping found to exist, in violation of Article 9.3 of the AD Agreement;

(vii) in violation of Article I of the GATT 1994, the failure of the United States to accord to imports from China, immediately and unconditionally, the same unconditional entitlement to the avoidance of a double remedy for the same unfair trade practice that it accords to imports of like products from the territories of other WTO Members. This benefit is evidenced, *inter alia*, by the presumption that the US Department of Commerce has consistently applied concerning the effects of domestic subsidies on export prices, and by the consistent position of the US Department of Commerce that it will adjust neither the costs of production nor the export prices in an anti-dumping duty investigation in a manner that would produce a double remedy for the same unfair trade practice.

(g) in connection with the conduct of the underlying anti-dumping and countervailing duty investigations –

(i) the US authorities' failure to invite China for consultations regarding new subsidy allegations, as required by Article 13.1 of the SCM Agreement;

(ii) the US authorities' failure to allow 30 days for responses to questionnaires issued in connection with subsidy allegations made after the initiation of the investigation, as required by Article 12.1.1 of the SCM Agreement;

(iii) the US authorities' failure to take due account of any difficulties experienced by interested parties in supplying information requested in questionnaires, as required by Article 12.11 of the SCM Agreement;

(iv) the US authorities' failure to provide notice to interested parties of the information which the US authorities required to make a determination with respect to whether certain entities are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, as required by Article 12.1 of the SCM Agreement;

(v) the US authorities' failure to inform interested parties of the essential facts under consideration with respect to whether certain entities are "public

bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, as required by Article 12.8 of the SCM Agreement;

(vi) the US authorities' failure to provide notice to interested parties of the information which the US authorities required to determine whether the simultaneous application of anti-dumping and countervailing duties results in a double remedy for the same unfair trade practice, as required by Article 12.1 of the SCM Agreement and Articles 2.4 and 6.1 of the AD Agreement, as well as Annex II(1) of the AD Agreement;

(vii) the US authorities' failure to inform interested parties of the essential facts under consideration with respect to whether the simultaneous application of anti-dumping and countervailing duties results in a double remedy for the same unfair trade practice, as required by Article 12.8 of the SCM Agreement and Article 6.9 of the AD Agreement; and

(viii) the US authorities' use of adverse inferences and facts available in a manner inconsistent with Article 12.7 of the SCM Agreement, including, in particular, those instances in which the US authorities drew "adverse inferences" or relied upon "neutral" or "adverse" facts available, having failed to request information from interested parties concerning the factual issue in question.

2. As Such Claims

Pursuant to Section 773(c) of the Tariff Act of 1930, 19 U.S.C. 1677b(c), the US Department of Commerce determines normal value in anti-dumping investigations involving products from countries it has designated as non-market economies using the values of factors of production in countries it has designated as market economies (so-called "surrogate values").

In those circumstances in which the US Department of Commerce uses surrogate values for a producer's costs of production in an anti-dumping investigation conducted in accordance with its NME methodology, the resulting price comparison under Article 2 of the AD Agreement will necessarily offset any subsidy received by the producer, at a minimum in those circumstances where the surrogate values are higher than a respondent producer's putatively subsidized costs of production. The United States has not provided the Department of Commerce with any legal authority to adjust either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product. The Department of Commerce has acknowledged the absence of any such legal authority.

China considers that the absence of any legal authority for the Department of Commerce to avoid the imposition of a double remedy is an omission that, as such, is inconsistent with the following obligations under the covered agreements:

- Article 19.4 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to levy countervailing duties in excess of the amount of subsidy found to exist;

- Article 32.1 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to make use of a specific action against subsidization that is not in accordance with the GATT 1994, as interpreted by the SCM Agreement;

- Article 10 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to fail to take all necessary steps to ensure that the imposition of countervailing duties is in accordance with Article VI of GATT 1994 and the SCM Agreement;

- Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement, respectively, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to levy anti-dumping and countervailing duties in excess of the "appropriate amounts";

- Article 2.4 of the AD Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities not to make a fair comparison between the export price and normal value; and

- Article 9.3 of the AD Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to impose anti-dumping duties in excess of the amount of dumping found to exist.

In addition, the United States, in all cases, ensures that it avoids the imposition of a double remedy for the same unfair trade practice in parallel trade remedy investigations involving imports from WTO Members that the United States has designated as market economies.[6] The United States extends this benefit automatically and unconditionally to imports from WTO Members that it has designated as market economies. To the extent that US law does not permit the Department of Commerce to avoid the imposition of a double remedy for the same unfair trade practice in parallel anti-dumping and countervailing duty investigations involving imports from WTO Members that the United States has designated as non-market economies, China considers that US law is, as such, inconsistent with Article I of the GATT 1994. This is because the United States fails to accord to imports from China, immediately and unconditionally, an advantage, favour, privilege or immunity with respect to the method of levying import duties or charges, and with respect to rules and formalities in connection with importation, that it accords to like products originating in the territories of other WTO Members.

For these reasons, China considers that the measures specified above nullify and impair benefits accruing to China under the GATT 1994, the SCM Agreement, the Protocol of Accession, and the AD Agreement.

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[6] *See, e.g., Tool Steel from the Federal Republic of Germany; Correction to Early Determination of Anti-dumping Duty*, 51 Fed. Reg. 10071 (24 March 1986); *Notice of Final Results of Antidumping Administrative Review: Low Enriched Uranium from France*, 69 Fed. Reg. 46501 (3 August 2004); *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390 (15 April 1997); *U.S. Steel Group v. United States*, 15 F.Supp. 2d 892 (Ct. Int' l Trade 1998); *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19153 (12 April 2004); *Wheatland Tube Co v.United States*, 495 F.3d 1355 (Fed. Cir. 2007).