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Page: 1/3

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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 CONSULTATIONS

The following communication, dated 10 May 2016, from the delegation of the United States to the delegation of China and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

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My authorities have instructed me to request consultations with the Government of the People's Republic of China ("China") with respect to 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 documents.

Paragraph 1 of the *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding*[1] reached between the United States and China states 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."[2] As set out below, the United States considers that China's measures taken to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") in the dispute *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* ("*China – Broiler Products*") (DS427) are not consistent with the covered agreements and therefore requests that China enter into consultations.[3]

On 25 September 2013, the DSB adopted its recommendations and rulings in *China – Broiler Products*. The DSB found that China imposed antidumping and countervailing duties on U.S. exports of broiler products in a manner that breached China's obligations under the AD Agreement and the SCM Agreement and 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 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. China's redetermination in relation to the duties at issue in this dispute, as set forth in MOFCOM's

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

[2] WT/DS427/9, para. 1. Footnote 1 following this sentence states: "The Parties agree that under Article 21.5 of the DSU, consultations are not obligatory."

[3] Notwithstanding the view of the parties that consultations are not required under Article 21.5 of the DSU, the United States takes note of the consultation provisions set out in Article 4 of the 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") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), which have been invoked in relation to this matter. *See* WT/DS427/1.

Announcement No. 44 [2014], including its annexes, states that it came into force as of 9 July 2014. This re-determination continues the imposition of antidumping and countervailing duties on imports of broiler products from the United States.

The United States considers that China has failed to implement the DSB's recommendations and rulings. In particular, it appears that China's continuing antidumping and countervailing measures on broiler products from the United States are imposed inconsistently with 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.

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.

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.

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.

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.

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.

8. Articles 2.2 and 2.2.1.1 of the AD Agreement because MOFCOM improperly calculated the cost of production for U.S. producers, failed to calculate costs on the basis of the records kept by the U.S. producers under investigation, and did not consider all available evidence on the proper allocation of costs.

9. Article 9.4 of the AD Agreement because MOFCOM applied to imports from producers and exporters not included in the examination an antidumping duty that exceeded the weighted average margin of dumping established with respect to the selected exporters or producers.

10. Article 6.8 and Annex II (including, *inter alia*, paragraphs 3, 5, 6) of the AD Agreement because MOFCOM made its determination on the basis of the facts available, rejected verifiable and appropriately submitted facts by exporters or producers during the reinvestigation, and failed to explain why it rejected evidence or information submitted by these exporters or producers.

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.

We look forward to receiving your reply to this request and to fixing a mutually convenient date for consultations, which, consistent with paragraph 1 of the *Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding*, the "[p]arties agree to hold … within 15 days from the date of receipt of the [consultations] request."

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