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Page: 1/3

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CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 15 July 2021, from the delegation of China to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. My authorities have instructed me to request the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), with standard terms of reference, as set out in Article 7 of the DSU. China's request for the establishment of a panel relates to the "disagreement", within the meaning of Article 21.5 of the DSU, "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the Dispute Settlement Body ("DSB") in *China – Tariff Rate Quotas for Certain Agricultural Products* (DS517), as identified in Section II, below. Pursuant to Article 21.5 of the DSU, China requests that the DSB refer the matter to the original panel wherever possible.

I. BACKGROUND

2. On 28 May 2019, the DSB adopted the report of the panel in DS517. The report concluded that the basic eligibility criteria, allocation principles, reallocation procedures, and public comment process used in China's administration of its TRQs for wheat, rice, and corn; administration of State Trading Enterprise ("STE") and non-STE portions of China's wheat, rice, and corn TRQs; and usage requirements for wheat and corn used in China's administration of its TRQs, were inconsistent with China's obligations under Paragraph 116 of China's Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol. In accordance with the report, the DSB recommended that China bring its measures into conformity with its obligations under Paragraph 116 of China's Working Party Report, as incorporated into the WTO Agreement pursuant to Paragraph 1.2 of China's Accession Protocol.¹

II. THE MATTER AT ISSUE: CHINA'S MEASURES TAKEN TO COMPLY HAVE ACHIEVED COMPLIANCE

3. On 17 February 2020, China notified the DSB that it had fully implemented the recommendations and rulings of the DSB as of 31 December 2019 by adopting the following measures taken to comply:²

- On 29 September 2019, the National Development and Reform Commission of the People's Republic of China ("NDRC") promulgated the *Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020* (Gonggao 2019 No.9).

¹ Panel Report, China – Tariff Rate Quotas for Certain Agricultural Products, WT/DS517/R and WT/DS517/R/Add.1.

² Status Report Regarding Implementation of the DSB Recommendations and Rulings by China, WT/DS517/12.

- On 30 November 2019, the Ministry of Commerce of the People's Republic of China ("MOFCOM") promulgated the MOFCOM *Decision to Abolish and Modify Some Rules* (Ling 2019 No.1), which modified the *Provisional Measures on the Administration of Import Tariff Rate Quotas for Agricultural Products* (Ling 2003 No.4).

4. The *Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020* and the modified *Provisional Measures on the Administration of Import Tariff Rate Quotas for Agricultural Products* are consistent with the recommendations and rulings of the Panel in DS517 and the WTO covered agreements, including China's commitments under its Protocol of Accession to the WTO.

5. As set forth in the *Detailed Rules for Application and Allocation of Import Tariff-Rate Quotas for Grains in 2020*, the overall objective of China's administration of the TRQs is to achieve full utilization of both the STE and non-STE portions of each TRQ, consistent with market conditions. China's TRQs for wheat, rice and corn for the year 2020 have been fully allocated to end-users.

6. Therefore, as of 31 December 2019, China had complied with the DSB's recommendations and rulings through the adoption of the measures identified in paragraph 3, above.

7. The process of administering the TRQs unfolds over the course of a year. On 10 August 2020, the NDRC and MOFCOM publishes the annual *Reallocation Notice for Import Tariff-Rate Quotas for Agricultural Products* (Gonggao 2020 No.4). The Reallocation Notice is consistent with the recommendations and rulings of the Panel in DS517 and the WTO covered agreements, including China's commitments under its Protocol of Accession to the WTO.

III. PROCEDURAL DEVELOPMENTS SINCE THE ADOPTION OF CHINA'S MEASURES TAKEN TO COMPLY

8. China has engaged, and continues to engage, in good faith with the United States on its implementation of the DSB's recommendations and rulings. To recall, the parties originally agreed an RPT for China to implement those recommendations and rulings. That RPT was to expire on 31 December 2019.³

9. As of 31 December 2019, China had fully implemented the recommendations and rulings of the DSB. Nevertheless, before the expiry of the originally agreed RPT, the parties notified the DSB of their agreement to extend the previously notified RPT to 29 February 2020 to allow the United States additional time to evaluate China's compliance measures.⁴

10. On 17 March 2020, the parties notified the DSB of their agreement to extend the previously notified RPT to 29 May 2020 to allow the United States additional time to evaluate China's compliance measures.⁵

11. On 1 June 2020, the parties notified the DSB of their mutual agreement to extend the previously notified RPT to 8 October 2020 to allow the United States additional time to evaluate China's compliance measures.⁶

12. On 19 October 2020, the parties notified the DSB of their mutual agreement to extend the previously notified RPT to 9 November 2020 to allow the United States additional time to evaluate China's compliance measures.⁷

13. On 13 November 2020, the parties notified the DSB of their mutual agreement to extend the previously notified RPT to 31 December 2020 to allow the United States additional time to evaluate China's compliance measures.⁸

³ Agreement under Article 21.3(b) of the DSU, WT/DS517/10.

⁴ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/11.

⁵ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/13.

⁶ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/14.

⁷ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/15.

⁸ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/16.

14. On 8 January 2021, the parties notified the DSB of their mutual agreement to extend the previously notified RPT to 31 March 2021 to allow the United States additional time to evaluate China's compliance measures.⁹

15. On 8 April 2021, the parties notified the DSB of their mutual agreement to extend the previously notified RPT to 29 June 2021 to allow the United States additional time to evaluate China's compliance measures.¹⁰

16. Despite China's adoption and notification of measures taken to comply in full with the DSB's recommendations and rulings before the expiry of the agreed RPT, and despite China's good faith cooperation in relation to the evaluation of those measures by the United States, the United States has filed a request under Article 22.2 of the DSU for authorization from the DSB to suspend concessions or other obligations under the GATT 1994 or other agreements listed in Annex 1A to the WTO Agreement.

17. China has objected to the level of suspension of concessions or other obligations, proposed by the United States. The DSB shall refer the matter to arbitration under Article 22.6 of DSU.¹¹

18. It is significant that the United States has filed its Article 22.2 request absent a multilateral finding that China's measures taken to comply fail to achieve compliance. Under the DSU, the United States was required to seek recourse to review of China's measures taken to comply under Article 21.5 of the DSU.¹² As the Appellate Body explained in *US – Continued Suspension*, "before obtaining the DSB's authorization to suspend concessions, a Member must initiate a dispute settlement process in which it challenges the consistency with the covered agreements of a measure taken by another Member".¹³ Indeed, absent a multilateral finding that measures taken to comply have failed to achieve compliance, there is no basis for an Article 22.6 arbitrator to determine a level of nullification or impairment resulting from such an alleged non-compliance. Moreover, the DSB cannot grant authorization to suspend concessions in any amount where the responding Member concerned has come into compliance.¹⁴

19. Nonetheless, in this dispute, the United States has failed to initiate compliance proceedings under Article 21.5 of the DSU to seek multilateral review of actions taken by China to comply. Moreover, the United States has not followed the established practice of seeking to agree a sequencing arrangement with China that would set out the "logical way forward" in light of the apparent U.S. disagreement that China's measures taken to comply have achieved compliance.¹⁵

20. In these circumstances, China, as the original respondent, is filing this request for the establishment of a compliance panel under Article 21.5 of the DSU.¹⁶ Irrespective of whether the parties reach, in future, a sequencing arrangement for purposes of this dispute, China considers that the arbitrator under Article 22.6 should suspend its work, pending resolution of the dispute under the Article 21.5 proceedings. Prompt findings under Article 21.5 will, therefore, assist the parties in securing a positive solution to the dispute.¹⁷

⁹ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/17.

¹⁰ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS517/18.

¹¹ DSU, Article 22.6 ("if the Member concerned objects to the level of suspension proposed, ... the matter shall be referred to arbitration").

¹² Article 21.5 states, in relevant part, that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute **shall** be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel" (emphasis added).

¹³ Appellate Body Report, *US – Continued Suspension*, para. 374.

¹⁴ DSU, Art. 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment").

¹⁵ Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.9.

¹⁶ China continues to be open to holding consultations with the United States on the implementing measures if such consultations are requested by the United States.

¹⁷ DSU, Art. 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to the dispute").