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CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 5 August 2020, 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") and Article 19 of the *Agreement on Agriculture*, 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 – Domestic Support for Agricultural Producers* (DS511), 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 26 April 2019, the DSB adopted the report of the panel in *China – Domestic Support for Agricultural Producers* (DS511). The report found that, in the years 2012, 2013, 2014 and 2015, China had provided domestic support in the form of market price support to producers of wheat, Indica rice and Japonica rice that, expressed in terms of its Current Total AMS, exceeded China's commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods CLII. The report concluded that China had acted inconsistently with its obligations under Articles 3.2 and 6.3 of the *Agreement on Agriculture*. In accordance with the report, the DSB recommended that China bring its measures into conformity with its obligations under the *Agreement on Agriculture*.¹

II. The matter at issue: China's measures taken to comply have achieved compliance

3. On 18 June 2020,² China notified the DSB that it had implemented the recommendations and rulings of the DSB by adopting the following measures taken to comply:

- a. For wheat, China promulgated, on 12 October 2019, the *Notice on Announcing the Minimum Procurement Price for Wheat for 2020* (Fa Gai Jia Ge [2019] No. 1617), and the *Notice on Improving the Wheat Minimum Procurement Price Policy* (Guo Liang Liang [2019] No.284).

¹ Minutes of 26 April 2019 DSB Meeting, WT/DSB/M/428, para. 7.5; Panel Report, *China – Domestic Support for Agricultural Producers*, WT/DS511/R, paras. 8.1-8.3.

² Status Report Regarding Implementation of the DSB Recommendations and Rulings by China, Addendum, WT/DS511/15/Add.2.

- b. For rice, China promulgated, on 28 February 2020, the *Notice on Announcing the Minimum Procurement Price for Rice for 2020* (Fa Gai Jia Ge [2020] No.290) and the *Notice on Improving the Rice Minimum Procurement Price Policy* (Guo Liang Liang [2020] No.41).

4. As set forth in these measures taken to comply, starting from 2020, maximum procurement amounts for wheat and rice shall be fixed each year under the Minimum Procurement Price ("MPP") policies for those products, and the amount of production that is eligible to receive the minimum procurement price shall be limited to the maximum procurement amount.

5. The maximum procurement amounts and minimum procurement prices for wheat and rice, fixed each year in advance of the respective planting seasons, are designed to work together to ensure that China provides domestic support, in the form of market price support to producers of wheat, Indica rice and Japonica rice, within the limit of applicable *de minimis* level (*i.e.*, 8.5% of the total value of production of a basic agriculture product during the relevant year), and that is, therefore, consistent with China's obligations under Articles 3.2 and 6.3 of the *Agreement on Agriculture*.

6. Therefore, as of 31 March 2020, the date of expiry of the originally agreed reasonable period of time ("RPT") for China to implement, China had complied with the DSB's recommendations and rulings through the adoption of the measures identified in paragraph 3, above.

III. Procedural developments since China's adoption of measures taken to comply

7. 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 end on 31 March 2020. Before the expiry of the originally agreed RPT, the United States asked China to agree to extend the RPT to 30 June 2020, so as to "allow the United States additional time to evaluate China's actions".³ China, in good faith, agreed to the request from the United States.⁴ Moreover, China has been frequently updating the DSB and the United States on the implementation status of this dispute.⁵

8. Nonetheless, the United States 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, in the amount of US\$ 1.3 billion for 2020.⁶ The United States filed this request despite China's good faith cooperation with the United States, and despite China's adoption and notification of measures taken to fully comply with the DSB's recommendations and rulings. While the United States acknowledges the existence of those "actions" by China, in the form of the measures identified in paragraph 3, above,⁷ the United States filed its Article 22.2 request without formally addressing those actions, though its request reveals the United States' disagreement with China that those actions achieve compliance.

9. China has objected to the level of suspension of concessions or other obligations, as proposed by the United States, and the DSB referred the matter to arbitration under Article 22.6 of DSU.⁸

10. 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.⁹ As the Appellate Body explained in *US – Continued Suspension*, "before obtaining the DSB's authorization to suspend concessions, a Member must initiate a dispute

³ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS511/16.

⁴ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS511/16.

⁵ Status Report Regarding Implementation of the DSB Recommendations and Rulings by China and Addenda thereto, WT/DS511/15, WT/DS511/15/Add.1, WT/DS511/15/Add.2.

⁶ Recourse to Article 22.2 of the DSU by the United States, WT/DS511/17.

⁷ Modification of the Agreement under Article 21.3(b) of the DSU, WT/DS511/16.

⁸ Recourse to Article 22.6 of the DSU by China, WT/DS511/18.

⁹ 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).

settlement process in which it challenges the consistency with the covered agreements of a measure taken by another Member".¹⁰ 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.¹¹

11. 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 what it explicitly acknowledged as "actions" 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"¹² in light of the apparent US disagreement that China's measures taken to comply have achieved compliance.

12. 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.¹³ 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 Article 21.5 proceedings. Prompt findings under Article 21.5 will, therefore, assist the parties in securing a positive solution to the dispute.¹⁴

¹⁰ Appellate Body Report, *US – Continued Suspension*, para. 374.

¹¹ 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").

¹² Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.9.

¹³ China continues to be open to hold consultation with the United States on the implementing measures if requested by the United States.

¹⁴ DSU, Art. 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to the dispute").