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EUROPEAN UNION – MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES

REQUEST FOR CONSULTATIONS BY CHINA

The following communication, dated 12 December 2016, from the delegation of China to the delegation of the European Union and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

1. My authorities have instructed me to request the European Union ("the EU") to enter into consultations pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 17 of the *Agreement on Implementation of Article VI of the GATT 1994* ("*Anti-Dumping Agreement*").

2. This request identifies the measures at issue in Section A, and indicates the legal basis for China's complaint in Section B.

A. Measures at issue

3. The measures at issue in this request include Articles 2(1) to 2(7) of Regulation (EU) 2016/1036 ("the Basic Regulation").¹ Articles 2(1) to 2(6) of the Basic Regulation set out rules in EU law for determining normal value in anti-dumping proceedings. Article 2(7) of the Basic Regulation sets out a different regime that applies to the calculation of normal value for imports from so-called "non-market economy" countries. Article 2(7)(b), which expressly names China, provides that the rules set forth in Articles 2(1) to 2(6) for calculating normal value for a specific producer shall apply only if that producer is able to substantiate that so-called "market economy" conditions prevail in respect of the manufacture and sale by that producer of the like product concerned. To do so, the producer must establish that it meets the criteria set out in Article 2(7)(c). Article 2(7)(b) provides that, for all producers unable to make this showing, the normal value calculation rules set forth in Article 2(7)(a) shall apply. Under Article 2(7)(a), normal value shall be determined on the basis of prices or constructed value in a surrogate "market-economy" third country.

B. Legal basis of the complaint

4. When China acceded to the WTO, China and other WTO Members agreed that, for a transitional period of fifteen years, China-specific treaty provisions would apply to the determination by other Members of certain elements of "price comparability" in anti-dumping proceedings involving Chinese imports. Specifically, under paragraph 15(a)(ii) of the *Protocol on the Accession of the People's Republic of China* ("*Accession Protocol*"), importing WTO Members were, subject to certain conditions, exceptionally permitted to use a methodology not based on a strict comparison with domestic prices or costs in China. Paragraph 15(d) provides that "[i]n any

¹ The full title of the Basic Regulation is: Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, published in the Official Journal of the European Union, L 176, 30.6.2016, p. 21. The Basic Regulation was preceded by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, published in the Official Journal of the European Union, L 343, 22.12.2009, p. 51.

event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession", namely, on 11 December 2016. Accordingly, from that date, the WTO rules that govern the determination by WTO Members of all elements of price comparability now apply to imports from China. However, the European Union continues to determine normal value on the basis of a special calculation methodology unless the producer establishes that it meets certain criteria, as set forth below. Thus, the European Union is in violation of its international obligations.

5. Specifically, following the expiry of paragraph 15(a)(ii), China is concerned that: (i) Articles 2(1) to 2(7) of the Basic Regulation are inconsistent with Article I:1 of the GATT 1994, and (ii) Article 2(7) is inconsistent with Articles 2.1 and 2.2 of the *Anti-Dumping Agreement*, Article VI:1 of the GATT 1994, and the second paragraph of the Ad Note to Article VI:1 of the GATT 1994 (the "Ad Note").

6. Articles 2(1) to 2(7) of the Basic Regulation provide for differential treatment of Chinese imports, as compared to imports from other WTO Members. Specifically, in contrast to the treatment afforded imports from other WTO Members, Chinese imports are denied the advantage of the rules set forth in Articles 2(1) to 2(6) regarding the determination of normal value, and instead face the less favourable rules set forth in Article 2(7), unless Chinese producers satisfy a requirement in Article 2(7)(b) to demonstrate that "market economy" conditions prevail. As a result, the European Union denies Chinese imports an advantage that is enjoyed by imports from other WTO Members, contrary to Article I:1 of the GATT 1994. This differential treatment ceased to be justifiable when paragraph 15(a)(ii) of China's *Accession Protocol* expired on 11 December 2016.

7. Article VI:1 of the GATT 1994 provides that normal value is normally to be determined based on domestic prices of the like product or, in the absence of such prices, prices for export to a third country or prices constructed from the costs of production in the country of origin. Likewise, Article 2.1 of the *Anti-Dumping Agreement* provides that normal value is normally the price for the like product when sold, in the ordinary course of trade, in the home market of the producer/exporter; Article 2.2 of the *Agreement* provides for departure from home market prices in certain circumstances. Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 prohibit the determination of normal value on the basis of third country prices and/or costs; doing so is inconsistent with the obligation under these provisions to, *inter alia*, determine normal value on the basis of domestic prices or on the basis of a producer's costs of production in the country of origin. Article 2(7) of the Basic Regulation is inconsistent with Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 because, when a producer does not satisfy the requirement in Article 2(7)(b) to demonstrate that "market economy" conditions prevail pursuant to the criteria in Article 2(7)(c), Article 2(7) improperly requires the EU investigating authority to reject Chinese market prices and costs when calculating normal value in favour of third country prices and costs.

8. The only exception to the rule in Articles 2.1 and 2.2 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 is found in the Ad Note, which permits a Member to depart from a strict comparison with domestic prices if the Member satisfies the two conditions set forth in the Ad Note. Article 2(7) of the Basic Regulation, however, requires the European Union, in defined circumstances, to depart from such a strict comparison without satisfying the relevant conditions in the Ad Note. In particular, Article 2(7) does so when a producer does not satisfy the requirement in Article 2(7)(b) to demonstrate that "market economy" conditions prevail.

9. The treatment afforded Chinese imports under Article 2(7) of the Basic Regulation ceased to be justifiable when paragraph 15(a)(ii) of China's *Accession Protocol* expired on 11 December 2016 and is inconsistent with the WTO covered agreements.

10. As a result of the foregoing, the measures at issue appear to nullify or impair benefits accruing to China directly or indirectly under the cited agreements.

11. This request for consultations also concerns any modification, replacement or amendment to the measure identified above, and any closely connected, subsequent measures.²

² At present, China is aware of two legislative processes implicating potential changes to relevant provisions of the Basic Regulation: (i) the legislative process initiated by the European Commission's Proposal

12. China looks forward to receiving a reply from the European Union to this request, and to fixing a mutually convenient date for consultations.

for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union, dated 9 November 2016 (COM(2016) 721 final); and, (ii) the legislative process initiated by the European Commission's Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community (COM(2013) 192 final). This request includes any changes made to the Basic Regulation pursuant to the legislative processes initiated by these proposals.