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Page: 1/8

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CHINA - CERTAIN MEASURES CONCERNING IMPORTS OF SUGAR

REQUEST FOR CONSULTATIONS BY BRAZIL

The following communication, dated 16 October 2018, from the delegation of Brazil to the delegation of China, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 14 of the *Agreement on Safeguards*, Article 6 of the *Agreement on Import Licensing Procedures*, and Article 19 of the *Agreement on Agriculture* concerning:

1. China's 22 May 2017 safeguard measure on imported sugar;
2. China's administration of its tariff-rate quota ("TRQ") for sugar; and
3. China's so-called "automatic import licensing" system ("AIL System") for out-of-quota sugar.

These measures are further identified and described below. An indication of the legal basis for the complaint is equally provided.

I. China's safeguard measure

A. Identification of the measure

On 22 September 2016, the Ministry of Commerce of the People's Republic of China ("MOFCOM") initiated a safeguard investigation into imports of sugar. This investigation was notified to the WTO Committee on Safeguards (the "Committee") on the same day.¹ The investigation covered both raw and refined sugar.²

On 26 April 2017, China notified the Committee of "findings of serious injury or threat thereof caused by increased imports" of sugar.³

¹ Notification under Article 12.1(a) of the *Agreement on Safeguards on Initiation of an Investigation and the Reasons for it. China (Sugar)*. G/SG/N/6/CHN/2, circulated on 26 September 2016.

² According to China's notification to the Committee on Safeguards, "This product is classified under the following code of the *Customs Import and Export Tariff of the People's Republic of China*: 17011200, 17011300, 17011400, 17019100, 17019910, 17019920, 17019990 (among which code 17011300 and 17011400 is classified under code 17011100 in the 2011 version of the *Customs Import and Export Tariff of the People's Republic of China*"). G/SG/N/6/CHN/2.

³ Notification under Article 12.1(b) of the *Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports. China (Sugar)*. G/SG/N/8/CHN/2, circulated on 27 April 2017.

On 22 May 2017, MOFCOM adopted and applied a safeguard measure by publishing its determination to apply a safeguard measure with respect to imports of sugar (the "Determination")⁴. On the same day, China notified the safeguard measure, as laid out in the Determination, to the Committee.⁵

China's safeguard measure on sugar takes the form of an additional *ad valorem* duty of 45% for the first year, followed by 40% in the second year and 35% in the third year of its implementation.

The safeguard duty applies to imports outside the existing TRQ for sugar. When China acceded to the WTO in 2001, it established a TRQ of 1,945,000 tons for sugar, covering raw and refined sugar.⁶ The in-quota rate for this sugar is 15%. The out-of-quota rate had been 50%, but with the imposition of the sugar safeguard, the out-of-quota rate was significantly increased. The three-year safeguard thus applies as follows:

Duration	Additional <i>ad valorem</i> safeguard duty	Total duties on out-of-quota sugar
May 22, 2017 – May 21, 2018	45%	95%
May 22, 2018 – May 21, 2019	40%	90%
May 22, 2019 – May 21, 2020	35%	85%

China's notification to the Committee also included an extensive list of developing countries that were exempt from the safeguard measure, as the "import shares of these countries (regions) collectively are about 2.48%".⁷

On 17 July 2018, China notified the Committee that the "list of developing countries (regions) exempted from the safeguard measure should be revoked" and that the safeguard measure "will apply to the imports of sugar from all developing countries (regions) as from 1 August 2018".⁸

This part of the consultations request concerns China's safeguard measure on sugar, including all decisions and notifications of China mentioned above; any related or implementing measures; and amendments, successor or replacement measures taken by the authorities in relation to this investigation and/or the imposition of the safeguard. The measures at issue are referred to below as "China's safeguard measure".

B. Legal basis for the complaint

China's safeguard measure appears to be inconsistent with China's obligations under the GATT 1994 and the Agreement on Safeguards, including but not limited to the provisions listed below. In particular, China appears to have acted inconsistently with:

- (a) Article XIX:1(a) of the GATT 1994 because China failed to make a determination consistent with that provision with respect to the existence of alleged unforeseen developments, and how those alleged unforeseen developments resulted in increased imports of the sugar products covered by China's safeguard measure.

⁴ *Announcement No.26 [2017] of the Ministry of Commerce — Announcement on the Application of Safeguard Measures against Imported Sugar*. The Ministry of Commerce of the People's Republic of China, 22 May 2017.

⁵ *Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports. Notification Pursuant to Article 12.1(c) of the Agreement on Safeguards. Notification Pursuant to Article 9, Footnote 2 of the Agreement On Safeguards. China (Sugar)*. G/SG/N/8/CHN/2/Suppl.1; G/SG/N/10/CHN/2; G/SG/N/11/CHN/2, circulated on 23 May 2017.

⁶ Trade Policy Review Body, *Report by the Secretariat: China*. WT/TPR/S/342, 15 June 2016, Table 4.2. See also Trade Policy Review Body, *Report by the Secretariat: China*. WT/TPR/S/375, 6 June 2018, Table 4.4.

⁷ G/SG/N/8/CHN/2/Suppl.1; G/SG/N/10/CHN/2; G/SG/N/11/CHN/2; circulated on 23 May 2017.

⁸ *Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports. Notification Pursuant to Article 12.1(c) of the Agreement on Safeguards. Notification Pursuant to Article 9, Footnote 2 of the Agreement on Safeguards. China (Sugar). Supplement*. G/SG/N/8/CHN/2/Suppl.2; G/SG/N/10/CHN/2/Suppl.1; G/SG/N/11/CHN/2/Suppl.1, circulated on 18 July 2018.

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- (b) Article XIX:1(a) of the GATT 1994 because China failed to make a determination consistent with that provision with respect to the effect of obligations incurred by China under the GATT 1994, and how that effect resulted in the alleged increase in imports of the sugar products under investigation.
 - (c) Articles 2.1, 3.1 and 4.2(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China failed to make a determination consistent with those provisions with respect to alleged increase in imports of the sugar products under investigation.
 - (d) Articles 2.1, 4.1(a), 4.1(c), 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China failed to define the domestic industry in accordance with those provisions, among other reasons by excluding producers of the like or directly competitive products, and by failing to ensure that the domestic industry is limited only to those producers of products that are like or directly competitive with the subject imports, thus also failing to make a proper determination as to whether the alleged increased imports caused serious injury to the relevant domestic industry.
 - (e) Articles 2.1, 4.1(a), 4.1(c), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China failed to make a determination consistent with those provisions with respect to the existence of an alleged serious injury to the domestic industry.
 - (f) Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China failed to establish the existence of a causal link between the alleged increased imports and the alleged serious injury to the domestic industry, and failed to determine that the alleged serious injury caused by factors other than the increased imports was not attributed to increased imports.
 - (g) Articles 5.1 and 7.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China's safeguard measure was not imposed only to the extent necessary to prevent or remedy the alleged serious injury and to facilitate adjustment.
 - (h) Articles 3.1 and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 because China failed to set forth adequate findings and reasoned conclusions reached on all pertinent issues of fact and law and to provide a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined.
 - (i) Article 8.1 of the Agreement on Safeguards because China did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and Brazil.
 - (j) Article 12.3 of the Agreement on Safeguards because China failed to provide adequate opportunity for prior consultations with Brazil, which has a substantial interest as one of the main exporters of sugar to China prior to the safeguard measure.
 - (k) Article 11.1(a) of the Agreement on Safeguards because China imposed the safeguard measure in violation of Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 8.1 and 12.3 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994.
 - (l) Article II:1(a) and (b) of the GATT 1994 because in applying its safeguard measure, China failed to accord treatment no less favourable to sugar products from Brazil than that provided for in the appropriate part of China's Schedule.

China's safeguard measure therefore nullifies or impairs benefits accruing to Brazil directly or indirectly under the Agreement on Safeguards and the GATT 1994.

II. China's administration of its tariff rate quota for sugar

A. Identification of the measure

China's Schedule of Concessions and Commitments on Goods provides for a TRQ to permit the importation of specified volumes of sugar at lower in-quota duty rates.⁹ However, China appears to administer the TRQ for sugar inconsistently with its WTO obligations. In particular, China's administration of its TRQ for sugar appears to be inconsistent with its commitments specified in paragraph 1.2 of Part I of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol") which incorporates the commitments in paragraph 116 of the *Report of the Working Party on the Accession of China* (WT/MIN(01)/3) ("Working Party Report"), as well as with Articles X:3(a), XI:1, XIII:2 and XIII:3(b) of the GATT 1994.

The legal instruments through which China has established its TRQ for sugar include, but are not limited to, the following, operating separately or collectively:

- *Foreign Trade Law of the People's Republic of China* (Adopted at the 7th Session of Standing Committee of the Eighth National People's Congress on May 12, 1994; revised at the 8th Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004; and amended in accordance with the Decision on Amending Twelve Laws Including the Foreign Trade Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Twelfth National People's Congress on November 7, 2016);
- *Customs Law of the People's Republic of China* (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended at the 30th Meeting of the Standing Committee of the Twelfth National People's Congress on 4 November 2017);
- *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods* (Decree of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective 1 January 2002); and
- *Regulation of the People's Republic of China on Import and Export Duties* (Decree of the State Council No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, amended 1 March 2017, in Decree No. 676).

The legal instruments through which China administers its TRQ for sugar include, but are not limited to, the following, operating separately or collectively:

- *Directory of State-Trading Importing Enterprises* (published by the Ministry of Commerce on 17 January 2003);
- *Provisional Measures on the Administration of Import Tariff-Rate Quotas for Agricultural Products* (Decree of the Ministry of Commerce and the National Development and Reform Commission [2003] No. 4, 27 September 2003, effective 27 September 2003);
- *Public Notice on Authorized Agencies for Agricultural Product Import Tariff-Rate Quotas* (Announcement of the Ministry of Commerce and the National Development and Reform Commission, [2003] No. 54, 15 October 2003);
- *Detailed Rules on the Application and Allocation of Sugar Import Tariff-rate Quotas in 2018* (Announcement of the Ministry of Commerce [2017] No. 59, 30 September 2017);

⁹ China's most recent notification of tariff rate quotas to the WTO Committee on Agriculture, dated 2 February 2016 (G/AG/N/CHN/30), states that the TRQ for sugar applies to these products:

- Raw cane sugar, in solid form 17011300 17011400
- Raw beet sugar, in solid form 17011200
- Cane or beet sugar, chemically pure sucrose, containing added flavouring or colouring 17019100
- Granulated sugar 17019910
- Superfine sugar 17019920
- Other cane or beet sugar, chemically pure sucrose, in solid form, n.e.s. 17019990

- *Notice on the Publication of Applicant Enterprises for Import Tariff-Rate Quotas for Sugar in 2018*, (published by the Ministry of Commerce on 29 November 2017); and
- *Public Notice on the Reallocation of Import Tariff-Rate Quotas for Agricultural Products in 2018* (Announcement of the Ministry of Commerce and the National Development and Reform Commission [2018] No. 9, 8 August 2018).

This part of the consultations request concerns China's administration of its TRQ for sugar, including all measures, decisions and notifications of China mentioned above; any related or implementing measures; and amendments, successor or replacement measures taken by the authorities in relation to China's administration of its sugar TRQ.

B. Legal basis for the complaint

China's administration of its TRQ for sugar appears to be inconsistent with China's obligations under the Accession Protocol and the GATT 1994, including but not limited to the provisions listed below. In particular, China appears to have acted inconsistently with:

- (a) Paragraph 1.2 of Part I of the Accession Protocol, which incorporates the commitments in paragraph 116 of the Working Party Report¹⁰, because:
 - China has failed to ensure that it administers its sugar TRQ on a transparent, predictable, uniform, fair and non-discriminatory basis.
 - China has failed to ensure that it administers its sugar TRQ using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities and reflect consumer preferences and end-user demand.
 - China has failed to ensure that it administers its sugar TRQ using administrative procedures and requirements that would not inhibit the filling of the TRQ.
 - China has failed to apply its sugar TRQ in full accordance with WTO rules and principles and with the provisions set out in China's Schedule of Concessions and Commitments on Goods.
- (b) Article X:3(a) of the GATT 1994, because China has failed to administer its sugar TRQ in a uniform, impartial and reasonable manner.
- (c) Article XI:1 of the GATT 1994, because China institutes or maintains restrictions on importation of sugar, including those made effective through quotas.
- (d) Article XIII:2 of the GATT 1994, because China has failed to aim at a distribution of trade in sugar approaching as closely as possible the shares which the various WTO Members might be expected to obtain in the absence of such restrictions.
- (e) Article XIII:3(b) of the GATT 1994, because China has failed to give public notice of the total quantity or value of sugar which will be permitted to be imported during a specified future period and of any change in such quantity or value.

China's administration of its sugar TRQ therefore nullifies or impairs benefits accruing to Brazil directly or indirectly under the Accession Protocol and the GATT 1994.

III. China's Automatic Import Licensing System for Sugar (the "AIL System")

A. Identification of the measure

With respect to imports of sugar not covered by the TRQ, MOFCOM requires that importers and refiners obtain an import license, which China labels as an "automatic" import license. However, before such requests for import licenses are made, MOFCOM provides verbal instructions to importers and refiners, informing each of them of the maximum amount of sugar that they will be

¹⁰ As specified in China's Accession Protocol, Part I, paragraph 1.2 (incorporating commitments referenced in paragraph 342 of China's Working Party Report, including paragraph 116).

permitted to import outside of the TRQ. Importers and refiners make their import requests based on such instructions, and they refrain from requesting authorization to import sugar above the pre-determined amounts.

Despite its name, the AIL System is thus not an "automatic" licensing system. Approval is granted only up to the maximum level approved by MOFCOM. China makes this restriction effective through import licenses, which are granted only if the request presented by the importer does not exceed the amount set by MOFCOM. Furthermore, under the AIL System, if imports increase too rapidly, MOFCOM can reduce or stop the issuance of licenses to import sugar at any time. China is thus restricting the importation of out-of-quota sugar.

The measure being challenged consists of the AIL System and the requirements imposed by China in the context of its AIL System that limit the amount of sugar for which importers and refiners may request an import license. The relevant legal provisions include those identified in Section II.A of this request, plus those that implement the AIL System:

- *Administrative Licensing Law* (adopted at the 4th Meeting of the Standing Committee of the Tenth National People's Congress on 27 August 2003, effective 1 July 2004);
- *Administrative Measures for Automatic Import License of Goods* (Decree of the Ministry of Commerce and the General Administration of Customs [2004] No. 26, 10 November 2004, effective 1 January 2005);
- *Measures for the Administration of Issuing Authorities of Import and Export Commodity Licenses* (Decree of the Ministry of Commerce [2010] No. 3, 12 September 2010, effective 12 September 2010);
- *Measures on the Administration of the Certificates of Import and Export Licenses* (Decree of the Ministry of Commerce [2012] No. 1, 4 February 2012, effective 5 March 2012);
- *Public Notice on the Inclusion of Sugar in the Catalogue for Commodities Subject to Automatic Import Licenses* (Announcement of the Ministry of Commerce and the General Administration of Customs and Commerce Ministry [2014] No. 71, 13 October 2014, effective 1 November 2014);
- *Detailed Rules on the Administration of Automatic Import Licenses of the Foreign-Invested Enterprises* (Decree of the Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, [2002] No. 4, 8 February 2002, amended by Decree of the Ministry of Commerce [2015] No. 2, 28 October 2015, effective 28 October 2015);
- *Catalogue for Commodities Subject to Automatic Import Licenses in 2018* (Announcement of the Ministry of Commerce, the General Administration of Customs, and the General Administration of Quality Supervision, Inspection and Quarantine, [2017] No. 87, 10 December 2017, effective 1 January 2018); and
- *Tariff Adjustment Program for 2018* (Notice of the Customs Tariff Committee of the State Council [2017] No. 27, 12 December 2017, effective 1 January 2018).

as well as any amendments, or successor, replacement or implementing measures.

B. Legal basis for the complaint

China's AIL System, a non-automatic import licensing system as described above, appears to be inconsistent with China's obligations under the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture and the Accession Protocol. In particular, China appears to have acted inconsistently with:

- (a) Article X:1 of the GATT 1994, because China has failed to publish this measure promptly in such a manner as to enable governments and traders to become acquainted with it.

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- (b) Article X:2 of the GATT 1994, because China has enforced this measure prior to publication.
 - (c) Article X:3(a) of the GATT 1994, because China has failed to administer this measure in a uniform, impartial and reasonable manner.
 - (d) Article XI:1 of the GATT 1994, because China institutes or maintains restrictions on the importation of sugar, including those made effective through import licenses.
 - (e) Article XIII:2 of the GATT 1994, because China has failed to aim at a distribution of trade in sugar approaching as closely as possible to the shares which the various WTO Members might be expected to obtain in the absence of such restrictions.
 - (f) Article XIII:3(a) of the GATT 1994, because in issuing import licences in connection with import restrictions, China has failed to provide all relevant information concerning the administration of the restrictions.
 - (g) Article 1.2 of the Agreement on Import Licensing Procedures, because China has failed to ensure that the administrative procedures used to implement this import licensing regime are in conformity with the relevant provisions of GATT 1994.
 - (h) Article 1.3 of the Agreement on Import Licensing Procedures, because China has failed to ensure that the rules for these import licensing procedures are neutral in application and administered in a fair and equitable manner.
 - (i) Article 2.2(a) of the Agreement on Import Licensing Procedures, because China has failed to ensure that that automatic licensing procedures are not administered in such a manner as to have restricting effects on imports subject to automatic licensing, should the AIL System be considered a form of automatic import licensing.
 - (j) Article 3.2 of the Agreement on Import Licensing Procedures, because China has failed to ensure that non-automatic licensing does not have trade-restrictive or trade-distortive effects on imports additional to those caused by the imposition of the restriction.
 - (k) Article 3.3 of the Agreement on Import Licensing Procedures, because China has failed to ensure that in the case of licensing requirements for purposes other than the implementation of quantitative restrictions, it has published sufficient information for other Members and traders to know the basis for granting and/or allocating licences.
 - (l) Article 4.2 and footnote 1 of the Agreement on Agriculture, because China has failed to ensure that it does not maintain, resort to, or revert to certain measures of the kind which have been required to be converted into ordinary customs duties, including quantitative import restrictions and discretionary import licensing.
 - (m) Paragraph 1.2 of Part I of the Accession Protocol, because China has failed to ensure that it has complied with the commitments in paragraphs 120, 122, 127 and 136 of the Working Party Report¹¹, as well as paragraphs 2(C)(1) and 8(1)(a) of the Accession Protocol.

The AIL System System therefore nullifies or impairs benefits accruing to Brazil directly or indirectly under the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture and the Accession Protocol.

For all of the measures identified in all parts of this request, Brazil reserves the right to raise additional claims and measures and address additional legal and factual issues under other

¹¹ As specified in China's Accession Protocol, Part I, paragraph 1.2 (incorporating commitments referenced in paragraph 342 of China's Working Party Report, including paragraph 116).

provisions of the covered agreements during the course of the consultations and in any future request for panel proceedings.

Brazil looks forward to receiving China's reply to this request and to determining a mutually convenient date for consultations.
