CHINA – PROVISIONAL ANTI-DUMPING DUTIES ON BRANDY FROM THE EU

REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 25 November 2024, from the delegation of the European Union 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 4 and 1.1, first sentence, of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) concerning the imposition of provisional anti-dumping duties on imports of spirits made from distilled wine in containers of less than 200 litres originating in the European Union (EU). Those duties adversely affect the respective imports.

Measures at issue

The measures that the EU would like to address in the consultations ("measures at issue") are the provisional anti-dumping duties imposed by China on imports of spirits made from distilled wine in containers of less than 200 litres (commonly referred to as "brandy"), classified under tariff sub-heading 22082000, originating in the European Union ("product concerned"). The measures at issue include, and are evidenced by, the following instruments or documents:

- Notice No. 35 (2024) of 29 August 2024 of the Ministry of Commerce of China[1];
- Notice No. 42 (2024) of 8 October 2024 of the Ministry of Commerce of China[2];
- Notice No. 50 (2024) of 11 November 2024 of the Ministry of Commerce of China[3].

For the measures at issue, this request also covers any amendment, supplement, replacement, renewal, extension, implementing measures or other related measures, including any adjustments as to its form, level, product scope or otherwise.

The EU is concerned that the measures at issue are unfounded and retaliatory in nature. China imposed these measures right after the EU Member States' vote in favour of definitive measures in the context of the EU anti-subsidy investigation into battery electric vehicles ("BEV") from China, while the verification visits of the EU sampled companies in the context of China's anti-dumping investigation on brandy were ongoing. It appears that China makes a link between the measures at issue and the EU's investigation on BEV. Moreover, China's anti-dumping investigation on brandy is one of three trade defence investigations initiated by the Chinese authorities in 2024 against EU products within few months since the EU initiated the anti-subsidy investigation on BEV. The EU is

[1] Weblink: www.mofcom.gov.cn/zcfb/zc/art/2024/art_ad51f0c19d774d69b71354bcd52cf9a9.html, last accessed on 19 November 2024.

[2] Weblink: http://www.mofcom.gov.cn/syxwfb/art/2024/art_4dd73b640b53458b802fab30ce2c9df7.html, last accessed on 19 November 2024.

[3] Weblink: www.mofcom.gov.cn/zcfb/zc/art/2024/art_925a9cb7829e4ab9b293b353c3f66c2b.html, last accessed on 19 November 2024.

concerned that a pattern of abuse of trade defence measures is emerging. It is in those specific circumstances that the EU has decided to act with respect to the provisional measures on brandy, which disrupt the normal trade flows of brandy from the EU to China in an unlawful manner.

This request is limited in scope to inconsistencies regarding in particular the initiation of the investigation and the provisional determination of a threat of material injury. The scope of the request is without prejudice to potential claims regarding any dumping determinations, at a later stage.

Legal basis for the complaint in respect of the measures at issue

The measures at issue described above appear to be inconsistent with China's obligations under the Anti-Dumping Agreement, and in particular with the following provisions:

1. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the provisional determination by China is not based on an objective assessment based on positive evidence as regards the volume of the allegedly dumped imports and the effect of the allegedly dumped imports on prices in the domestic market for the like product. In particular, China wrongly considered that the allegedly dumped imports increased significantly, and that there was significant price undercutting and price suppression by the allegedly dumped imports.

2. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the provisional determination by China is not based on an objective assessment based on positive evidence as regards the impact of the dumped imports on the domestic industry concerned. In particular, China wrongly compared incomparable periods over the injury investigation period for the purposes of evaluating trends, and failed to adequately evaluate all relevant economic factors and indices having a bearing on the state of the industry.

3. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because China failed to properly determine a genuine and substantial relationship of cause and effect between the allegedly dumped imports and the threat of injury to the domestic industry and, in addition, failed to ensure that injury caused by other factors was not attributed to the allegedly dumped imports. Most notably, but not exclusively, China did not adequately separate and distinguish any future injurious effects by other factors than the allegedly dumped imports, such as, among others, the changes in demand and in the pattern of consumption, and China unduly attributed any likely injurious effects to the allegedly dumped imports.

4. Article 3.7 of the Anti-Dumping Agreement because China did not base its provisional determination of a threat of injury on facts but merely on allegation, conjecture and remote possibility, and failed to determine a change in circumstances which would create a situation in which the dumping would cause injury and that such a change is clearly foreseen and imminent. In addition, China failed to properly consider, amongst other:

    a. Whether there was a significant rate of increase of allegedly dumped imports into the domestic market indicating the likelihood of substantially increased importation, and wrongly considered that there is likelihood of substantially increased importation;
    b. Whether there was sufficient freely disposable, or an imminent, substantial increase in, capacity indicating the likelihood of substantially increased dumped imports to China, taking into account the availability of other export markets to absorb any additional exports, and on the basis of the relevant facts;
    c. Whether imports were entering at prices that will have a significant depressing or suppressing effect on domestic prices in China, and would likely increase demand for further imports, on the basis of the relevant facts;
    d. The inventories of the product concerned, on the basis of facts and objective examination such as specificities of the inventories.

5. Article 3.8 of the Anti-Dumping Agreement because in respect of the threat of material injury determination, China failed to consider and decide with special care the application of the provisional anti-dumping measures. In particular, China decided to apply provisional measures in disregard of available evidence that do not support any existence of a threat of material injury, even though China had an ample opportunity to take into account interested parties' comments prior to finalising its decision to proceed with the application of the provisional measures.

6. Articles 5.2, 5.3 and 5.8 in conjunction with Articles 2.1 and 3 of the Anti-Dumping Agreement because the application did not include sufficient evidence of dumping, injury and causal link, and in any event China failed to examine the accuracy and adequacy of the evidence provided in the application on dumping, injury and causal link to determine whether there is sufficient evidence to justify the initiation of an investigation, and failed to reject the application or did not terminate that investigation promptly, even though there was no sufficient evidence of either dumping or of injury to justify proceeding with the case. In particular, the allegations of dumping in the application were merely based on a choice of normal value which was neither appropriate, nor adequately justified in terms of their evidentiary value vis-a-vis domestic sales prices.

7. Article 7.4 of the Anti-Dumping Agreement because China did not limit the application of the provisional measures to as short a period as possible, not exceeding four months. In particular, the notice imposing the provisional measures is silent as regards their duration, while the notice of the preliminary determination is extremely ambiguous as regards their potential application.

8. Articles 7.5 and 9.4 of the Anti-Dumping Agreement because China failed to ensure that the provisional anti-dumping duty applied to imports from exporters or producers not included in the examination, limited in accordance with Article 6.10 of the Anti-Dumping Agreement, does not exceed the weighted average margin of dumping established with respect to the selected exporters or producers.

9. Articles 12.2 in conjunction with 12.2.1 of the Anti-Dumping Agreement because China did not disclose, in a public notice, essential information on injury and failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority, as well as all relevant information on the matters of fact and law and reasons which have led to the imposition of provisional measures. China also failed to provide a public notice or a separate report with the relevant information on the matters of fact and law and the reasons which have led to the imposition of provisional measures, most notably but not exclusively sufficient data relating cost of production which also significantly impeded the proper exercise of rights of defence.

The European Union also considers, including for the detailed reasons stated above, taken individually and collectively, that the imposition of provisional measures was taken contrary to Article 7.1 of the Anti-Dumping Agreement.

As a result of these inconsistencies, China's measures, also appear to nullify or impair the benefits accruing to the European Union, directly or indirectly, under the Anti-Dumping Agreement.

The European Union reserves the right to address additional measures and claims, including under other provisions of the covered agreements, regarding the above matters during the course of the consultations in light of the information that China might provide.

The European Union looks forward to receiving China's reply to this request and express its readiness to consider a mutually convenient format and date for the consultations.

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