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CHINA – MEASURES CONCERNING THE IMPORTATION OF CANOLA SEED FROM CANADA

REQUEST FOR CONSULTATIONS BY CANADA

The following communication, dated 9 September 2019, from the delegation of Canada to the delegation of China, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

The Government of Canada hereby requests 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*, Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 11.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), and Article 24.8 of the *Agreement on Trade Facilitation* ("TFA") concerning measures affecting the importation of canola seed¹ from Canada.

I. Background

1. This request relates to China's suspension of canola seed imports from two Canadian companies and China's application of enhanced inspections to canola seed imports from other Canadian companies.
2. China suspended the importation of canola seed from two Canadian companies on 1 March, 2019 and 26 March, 2019, respectively. Other Canadian companies remain eligible to export canola seed to China but these imports are subject to enhanced inspections, including increased testing. China cites detection of quarantine pests in canola seed shipments as the reason for its measures affecting the importation of Canadian canola seed.
3. Canada has repeatedly attempted to obtain information from China regarding the scientific basis for its measures and on the process to restore full market access for Canadian canola seed. Canada has employed numerous and varied formal and informal mechanisms at its disposal to solicit this information. To date, these efforts have failed to produce satisfactory results.
4. For example, because Canada believes that China's measures constrain Canadian exports of canola seed and that the measures do not appear to be based on the relevant international standards, guidelines, or recommendations, Canada requested on 13 June 2019, pursuant to Article 5.8 of the SPS Agreement, that China provide an 'explanation of the reasons' for its measures. China's response of 12 July 2019 fails to address the majority of questions posed by Canada in its request, including *inter alia* an explanation of the nature and scope of the enhanced inspections that are being conducted on all imports of Canadian canola seed.

¹ The term 'seed' in this Request for Consultations is a reference to seeds intended for processing or consumption and not for planting.

II. Measures at Issue

5. China's measures to suspend imports of canola seed from two Canadian companies, and its measures applying enhanced inspections to Canadian canola seed imports are evidenced by, and/or are reflected in, *inter alia*,:
 - a. Letter from the General Administration of Customs of the People's Republic of China (GACC) to the Canadian Food Inspection Agency (CFIA) dated 1 March 2019 regarding the suspension of canola seed imports from Richardson International Limited;
 - b. *Warning Notice on Strengthening the Inspection and Quarantine on Imported Canadian Canola*, General Administration of Customs, P.R. China (7 March 2019);
 - c. Letter from GACC to CFIA dated 26 March 2019 regarding the suspension of canola seed imports from Viterra Inc.;
 - d. *Notice Concerning the Cancellation of Rapeseed Registration by Viterra Inc. of Canada*, General Administration of Customs, P.R. China (26 March, 2019);
 - e. Notifications of Non-Compliance (NNC) issued by the GACC to the CFIA including NNCs numbered 2019G001 (dated 4 January 2019), 2019G002 (dated 4 January 2019), 2019G003 (dated 4 January 2019), 2019G004 (dated 30 January 2019), 2019G005 (dated 30 January 2019), 2019G006 (dated 30 January 2019), 2019G007 (dated 30 January 2019), 2019G008 (dated 1 March 2019), 2019G009 (dated 1 March 2019), 2019G020 (dated 26 March 2019), 2019G021 (dated 26 March 2019), and 2019G022 (dated 26 March 2019); and
 - f. Letter, including Annex 1, from the Permanent Representative of the People's Republic of China to the WTO to the Permanent Representative of Canada to the WTO, dated 12 July 2019.
6. Canada understands that China's suspension of imports of canola seed from two Canadian companies and the enhanced inspections of all imports of Canadian canola seed that are the subject of this Request for Consultations implement and/or were adopted on the basis of, *inter alia*, the following:
 - a. *Administrative Measures for Inspection, Quarantine, and Supervision of Entry and Exit Grain*, General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China, AQSIQ Decree No. 177 (Revised in November 2018);
 - b. *Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine*, Standing Committee of the National People's Congress, Order No.53 of the President of the People's Republic of China (Revised in August 2009);
 - c. *Regulations for the Implementation of the Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine*, State Council, Decree of the State Council of the People's Republic of China, No.206;
 - d. *Measures for the Administration of the Inspection and Quarantine of Genetically Modified Products Entering and Exiting the Territory*, General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China, AQSIQ Decree No.62 (Revised in November 2018);
 - e. *Law of the People's Republic of China on Imported and Exported Commodities Inspection*, Order of the President of the People's Republic of China No.14, (Revised in December 2018);
 - f. *Regulations for the Implementation of the Law of the PRC on Import and Export Commodity Inspection*, State Council, Decree 447 (Revised in March 2019);

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- g. *Food Safety Law of the People's Republic of China*, Order of the President of the People's Republic of China, No.9(Revised in December 2018);
 - h. *Frontier Health and Quarantine Law of the People's Republic of China*, Order No.46 of the President of the People's Republic of China (Revised in April 2018);
 - i. *Provisions on the Jurisdictions, Department and Staffing of the State Administration for Market Regulation*;
 - j. *Measures for the Supervision and Administration of Import and Export Food Safety*, Decree of the State Administration of Quality Supervision, Inspection and Quarantine, No.144 (Revised in November 2018);
 - k. *Implementation Regulations for the Food Safety Law of the People's Republic of China*, State Council of the People's Republic of China Order No.557 (Revised in February 2016);
 - l. *Administrative Regulations for the Safety of Genetically Modified Organisms in Agriculture*, State Council, Decree No.304 of the State Council (Revised in October 2017);
 - m. *Special Rules of the State Council on Strengthening Supervision and Administration of the Safety of Food and Other Products*, State Council, Decree of the State Council No.503;
 - n. *Law of the People's Republic of China on Quality and Safety of Agricultural Products*, Order No.49 of the President of the People's Republic of China (Revised in December 2018);
 - o. *13th Five Year Plan of National Food Safety*, State Council, Guofa [2017] 12;
 - p. *Regulations on Plan Quarantine*, State Council, Guofa [1983] 2 (Revised in October 2017);
 - q. *Customs Law of the People's Republic of China*, Order of the President of the People's Republic of China No.51 (Revised in November 2017);
 - r. *Customs Inspection Regulations of the People's Republic of China*, State Council, Decree of the State Council No.209 (Revised in June 2016);
 - s. *P.R. China National Standard: Rapeseed*, General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China and the Standardization Administration of China (GB/T 11762-2006);
 - t. *Notice on the Implementation of Emergency Quarantine Measures for Imported Rapeseed*, General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China, AQSIQ Decree No.2009-101;
 - u. *Notice Concerning the Cancellation of Rapeseed Registration by Viterra Inc. of Canada*, General Administration of Customs, P.R. China (26 March, 2019);
 - v. *Warning Notice on Strengthening the Inspection and Quarantine on Imported Canadian Canola*, General Administration of Customs, P.R. China (7 March 2019);
 - w. *Provisions Concerning the Implementation of the National Standards for Grain and Oil Quality*, State Development and Reform Commission, State Grain Commission, Ministry of Finance, and General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China;
 - x. *Chinese Customs Tariff – 1205.10*, General Administration of Customs;
 - y. Letter from GACC to CFIA dated 4 January 2019 regarding detection of quarantine pests in shipments of canola seed from Richardson International Limited and Viterra Inc.;

- z. Letter from GACC to CFIA dated 30 January 2019 regarding detection of quarantine pests in shipments of canola seed from Richardson International Limited and Viterra Inc.;
 - aa. Notifications of Non-Compliance issued by the GACC to CFIA, as set out in paragraph 5(e) of Section II of this Request; and
 - bb. China's *International Plant Protection Convention* (IPPC) Pest List and China's pest list included as Annex 1 of the letter dated 12 July 2019 referred to in paragraph 5(f) above.
7. With respect to paragraphs 5 and 6, this Request covers any amendments, replacements, renewals, extensions, implementing measures, exemptions, or other related measures or instruments.

III. WTO Obligations at Issue

8. China's measures relating to the importation of Canadian canola seed appear to be inconsistent with China's obligations under the WTO Agreement. In particular:
- a. The measures suspending the importation of canola seed from two Canadian companies appear to be inconsistent with China's obligations under:
 - i. Article 2.2 of the SPS Agreement because the measures are not based on scientific principles; are not applied only to the extent necessary to protect plant life or health, and are maintained without sufficient scientific evidence;
 - ii. Articles 5.1, and 5.2 of the SPS Agreement because the measures are not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;
 - iii. Article 5.7 of the SPS Agreement, because the measures are not adopted or maintained in a case where relevant scientific evidence is insufficient, not adopted provisionally, not based on available pertinent information, and not reviewed within a reasonable period of time;
 - iv. Article 2.3 of the SPS Agreement because the measures arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail;
 - v. Article 2.3 of the SPS Agreement because the measures are applied in a manner that constitutes a disguised restriction on international trade;
 - vi. Article 5.5 of the SPS Agreement because the measures entail arbitrary or unjustifiable distinctions in the levels of protection in different situations that result in discrimination or a disguised restriction on international trade;
 - vii. Article 5.6 of the SPS Agreement because the measures are more trade-restrictive than required to achieve China's appropriate level of protection, taking into account technical and economic feasibility;
 - viii. Article 5.4 of the SPS Agreement because China has not taken into account the objective of minimizing negative trade effects when determining the appropriate level of protection;
 - ix. Article 3.1 of the SPS Agreement because the measures are not based on international standards, guidelines, or recommendations, in particular the International Standards for Phytosanitary Measures (ISPMs) under the IPPC;
 - x. Article 3.3 of the SPS Agreement as there does not appear to be a scientific justification for departing from the relevant international standards, guidelines, or recommendations, nor would the measures at issue appear to be a consequence of the level of phytosanitary protection sought by China;

- x. Article 7 and paragraphs 1, 2, 5, and 6 of Annex B to the SPS Agreement because China has failed to publish or notify its measures; in particular, China has failed to provide sufficient information to allow Canada to know the specific principles and methods that apply to the products at issue;
 - xii. Article 8 and paragraphs 1(a), 1(b), 1(c), 1(e) and 1(g) of Annex C to the SPS Agreement because the relevant procedures have not been undertaken and completed in no less favorable manner for Canadian canola seed than for like domestic products; the results of the procedure have not been transmitted in a precise and complete manner; the information requirements for control, inspection and approval procedures are not limited to what is necessary; the requirements for control, inspection and approval of individual specimens are not limited to what is reasonable and necessary; and, the criteria used in the siting of facilities are not the same and do not minimize the inconvenience to applicants, importers, exporters or their agents;
 - xiii. Article I:1 of the GATT 1994 because China has failed to extend immediately and unconditionally to Canada any advantage, favor, privilege, or immunity granted by China with respect to the rules and formalities in connection with the importation of canola seed;
 - xiv. Article III:4 of the GATT 1994 because China has failed to accord no less favourable treatment to Canadian canola seed than that accorded to Chinese 'like' products;
 - xv. Article X:3(a) of the GATT 1994 because China has failed to administer its laws, regulations, decisions, and rulings in relation to the measures at issue in a uniform, impartial, and reasonable manner;
 - xvi. Article XI:1 of the GATT 1994 because the measures operate as a prohibition on the importation of canola seed into China;
 - xvii. Article 1.1 of the TFA because China has failed to promptly publish information on the measures in a non-discriminatory and easily accessible manner in order to enable Canada and traders to become acquainted with them;
 - xviii. Article 5.1 of the TFA because the notifications or guidance issued by China to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, or feedstuffs covered under the notification or guidance for protecting plant life or health within its territory, are not based on risk and have not been properly terminated or suspended;
 - xix. Article 7.4.2 of the TFA because China has failed to design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade; and
 - xx. Article 7.4.4 of the TFA because China has failed to base risk management on an assessment of risk through appropriate selectivity criteria.
- b. The measures applying enhanced inspections on all imports of Canadian canola seed appear to be inconsistent with China's obligations under:
- i. Article 2.2 of the SPS Agreement because the measures are not based on scientific principles, are not applied only to the extent necessary to protect plant life or health, and are maintained without sufficient scientific evidence;
 - ii. Articles 5.1, and 5.2 of the SPS Agreement because the measures are not based on an assessment, as appropriate to the circumstances, of the risks to plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;
 - iii. Article 5.7 of the SPS Agreement because the measures are not adopted or maintained in a case where relevant scientific evidence is insufficient, not adopted provisionally,

- not based on available pertinent information, and not reviewed within a reasonable period of time;
- iv. Article 2.3 of the SPS Agreement because the measures arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail;
 - v. Article 2.3 of the SPS Agreement because the measures are applied in a manner that constitutes a disguised restriction on international trade;
 - vi. Article 5.5 of the SPS Agreement because the measures entail arbitrary or unjustifiable distinctions in the levels of protection in different situations that result in discrimination or a disguised restriction on international trade;
 - vii. Article 5.6 of the SPS Agreement because the measures are more trade-restrictive than required to achieve China's appropriate level of protection, taking into account technical and economic feasibility;
 - viii. Article 5.4 of the SPS Agreement because China has not taken into account the objective of minimizing negative trade effects when determining the appropriate level of protection;
 - ix. Article 3.1 of the SPS Agreement because the measures are not based on international standards, guidelines, or recommendations, in particular the International Standards for Phytosanitary Measures (ISPMs) under the IPPC;
 - x. Article 3.3 of the SPS Agreement as there does not appear to be a scientific justification for departing from the relevant international standards, guidelines, or recommendations, nor would the measures at issue appear to be a consequence of the level of phytosanitary protection sought by China;
 - xi. Article 7 and paragraphs 1, 2, 5, and 6 of Annex B to the SPS Agreement because China has failed to publish or notify its measures; in particular, China has failed to provide sufficient information to allow Canada to know the specific principles and methods that apply to the products at issue;
 - xii. Article 8 and paragraphs 1(a), 1(b), 1(c), 1(e) and 1(g) of Annex C to the SPS Agreement because the relevant procedures have not been undertaken and completed in no less favorable manner for Canadian canola seed than for like domestic products; the results of the procedure have not been transmitted in a precise and complete manner; the information requirements for control, inspection and approval procedures are not limited to what is necessary; the requirements for control, inspection and approval of individual specimens are not limited to what is reasonable and necessary; and, the criteria used in the siting of facilities are not the same and do not minimize the inconvenience to applicants, importers, exporters or their agents;
 - xiii. Article I:1 of the GATT 1994 because China has failed to extend immediately and unconditionally to Canada any advantage, favor, privilege, or immunity granted by China with respect to the rules and formalities in connection with importation of canola seed;
 - xiv. Article III:4 of the GATT 1994 because China has failed to accord no less favourable treatment to Canadian canola seed than that accorded to Chinese 'like' products;
 - xv. Article X:3(a) of the GATT 1994 as China has failed to administer its laws, regulations, decisions, and rulings in relation to the measures at issue in a uniform, impartial, and reasonable manner;
 - xvi. Article XI:1 of the GATT 1994 as the measures operate as a restriction on the importation of canola seed into China;

- xvii. Article 1.1 of the TFA because China has failed to promptly publish information on the measures in a non-discriminatory and easily accessible manner in order to enable Canada and traders to become acquainted with them;
 - xviii. Article 5.1 of the TFA as the notifications or guidance issued by China to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, or feedstuffs covered under the notification or guidance for protecting plant life or health within its territory, are not based on risk and have not been properly terminated or suspended;
 - xix. Article 7.4.2 of the TFA because China has failed to design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade; and
 - xx. Article 7.4.4 of the TFA because China has failed to base risk management on an assessment of risk through appropriate selectivity criteria.
- c. China's measures regulating the importation of canola seed to protect against the risk of entry, establishment, or spread of pests including *inter alia* *Amaranthus palmeri* and *Amaranthus tuberculatus* appear to be inconsistent with China's obligations under:
 - i. Paragraphs 1, 2, 5, and 6 of Annex B to the SPS Agreement because China has failed to publish or notify these measures.
9. Further, the violations described in paragraph 8 of Section III of this Request appear to nullify or impair the benefits accruing to Canada under the SPS Agreement, the GATT 1994, and the TFA. Moreover, the measures appear to nullify and impair the benefits accruing to Canada in the sense of Article XXIII:1(b) of the GATT 1994.
10. Canada reserves the right to address additional measures, and factual and legal claims in the course of consultations, and in any future request for panel proceedings.

IV. Consultations

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