UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

(AB-2014-4 / DS449)

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Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States appeals the Panel's conclusion that Section D of China's panel request met the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in relation to presenting the legal basis of China's request. While aspects of the Panel's preliminary ruling findings reflect the requirements of the DSU and evince an awareness that Section D of China's request did not fully meet those requirements, the United States considers that the Panel erred in its legal approach to reviewing China's request in the light of Article 6.2 of the DSU and in its resulting legal conclusion.[1] The Panel failed to apply Article 6.2 according to its plain meaning (read in context and in light of the agreement's object and purpose) and failed to heed clarifications provided by the Appellate Body in past reports – in particular, that where an Article sets out multiple distinct obligations, a panel request should cite with precision which obligations are at issue;[2] that the requirements of Article 6.2 must be "demonstrated on the face" of the panel request;[3] and that claims must be made explicitly so that a responding party knows the case it must answer and third parties may understand the specific claims being made.[4] Therefore, the United States requests the Appellate Body to reverse the Panel's finding, as described below.

2. In relation to legal claims, Article 6.2 requires that a panel request provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Section D of China's panel request fails to meet this requirement, and as such, the Panel should have concluded that claims raised in this section were outside the Panel's terms of reference. The legal claims identified in Section D were vague and imprecise, as China merely listed breaches of several articles, each containing numerous distinct obligations, of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the *Agreement on Implementation of Article VI of the GATT 1994* ("AD Agreement") and Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") in relation to over 60 U.S. countervailing and antidumping proceedings. Specifically, China alleged that:

> In light of the failure of the U.S. authorities to investigate and avoid double remedies in the identified investigations and reviews, China considers that the resulting countervailing duty measures, including any countervailing duties collected pursuant to their authority, are inconsistent with Articles 10, 15, 19, 21, and 32 of the SCM Agreement and Article VI of the GATT 1994. China further considers that the associated anti-dumping measures in each such instance, including any anti-dumping duties collected pursuant to their authority, are

[1] In its preliminary ruling request, the United States also challenged Section C of China's panel request. The Panel chose to exercise judicial economy with respect to this challenge based upon China's statement to the Panel that it would not pursue any claims in Section C as part of this dispute. Preliminary Ruling by the Panel, para. 3.15. As China advanced no arguments in relation to Section C and the Panel made no findings on those claims, the United States does not appeal the Panel's exercise of judicial economy with respect to the U.S. challenge to Section C of China's Panel Request.

[2] *Korea – Dairy (AB)*, para. 124; *See also EC – Fasteners (China) (AB)*, para. 598.

[3] *US – Carbon Steel (AB)*, para. 127.

[4] *Chile – Price Band System (AB)*, para. 164.

> inconsistent with Articles 9 and 11 of the AD Agreement and Article VI of the GATT 1994.[5]

As the Appellate Body has previously explained, a listing of articles containing multiple, distinct obligations does not clearly present which legal obligations are at issue.

3. On May 7, 2013, the Panel issued a preliminary ruling that found that, despite the lengthy list of provisions set out in the request, Section D of China's panel request permitted "sufficiently clear inferences" that the specific obligations at issue should be Articles 10, 19.3, and 32.1 of the SCM Agreement, and *only* these provisions.[6] The Panel considered that the panel request, after the drawing of such "inferences," was sufficient to meet China's obligations under Article 6.2 of the DSU to provide the legal basis of the complaint in a manner sufficient to "present the problem clearly." The Panel erred in creating a new standard of "sufficiently clear inferences" to evaluate a panel request's consistency with Article 6.2 of the DSU, rather than the standard set out in Article 6.2 itself. In other words, Article 6.2 requires that a panel evaluate whether the face of the panel request provides the legal basis sufficient to present the problem clearly,[7] instead of the Panel engaging in the drawing of inferences to determine what the problem could or should have been. The responsibility to draft a clear panel request rests with the complaining party, not the panel.

4. The Panel correctly stated that it should consider the panel request as a whole – that is, the references to certain Articles together with the narrative explanation of the problem. In so doing, however, the Panel erred in engaging in a preliminary interpretation of paragraphs of those Articles to determine which would be "potentially relevant." This approach inappropriately considered China's panel request not in terms of its text (whether the Articles listed or narrative) but in terms of the Panel's own view of what claims China might have a "plausible basis" to advance. This inquiry is erroneous and finds no basis in Article 6.2 or previous clarifications of that provision.

5. The Panel erroneously relied on a reference to the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties* (DS379) (in a footnote describing the measures within the scope of China's challenge) to find that a general reference to SCM Agreement Article 19 could be understood and must be limited to Article 19.3. China's reference in a footnote to external sources cannot make sufficient the summary of the legal basis presented in the panel request itself. To find otherwise would have required the Panel and parties to review other documents (in this case, WTO reports) to seek to understand which particular WTO provisions (of the many potentially cited or discussed in those reports) inform the legal basis of the current complaint.[8] Moreover, the Panel failed to consider the full text and

[5] Section D of China's panel request.

[6] The Panel's preliminary ruling "forms an integral part" of the Panel's findings in its final report. Panel Report, para. 7.5.

[7] *US – Carbon Steel (AB)*, para. 127.

[8] Indeed, China could have as readily referred to an article in a law journal and left it up to the responding party to infer from that document the legal basis for China's otherwise vague claims.

context of the footnote. For example, the footnote indicated only why China was not pursuing claims against particular measures; it did not indicate what claims China would pursue against the measures at issue in this dispute, or how those claims were linked to particular measures.[9] China's argument and approach contravene the requirements of Article 6.2 of the DSU, which are intended to ensure that the summary of the legal basis in the panel request is "sufficient to present the problem clearly."

6. While the Panel considered the reference to the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties* to be significant, the Panel failed to consider that reference fully. In particular, the recommendations and rulings relate to claims that are within the terms of reference of the dispute. In the panel request in that dispute, however, China not only listed the paragraphs of Article 19 of the SCM Agreement at issue (Article 19.3 and Article 19.4), but also described how the measures were allegedly breaching each specific obligation.[10] Thus, to the extent the reference to the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties* were relevant to understanding the claims within the scope of the current dispute, the Panel should have considered how China had identified the legal basis in each dispute. Because China's panel request here listed articles in a general fashion and did not clarify which aspect of multiple obligations was at issue, an objective reader could have reasonably understood that China intended to claim potentially different breaches, under different legal theories, than those claimed in *US – Anti-Dumping and Countervailing Duties*.

7. In addition, the Panel allowed subsequent submissions by China and other documents to "cure" the deficiencies in China's panel request. Such allowances fail to meet the requirements of Article 6.2 of the DSU that an examination of a panel request "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[11] The Panel focused its analysis solely on Article 19 following China's letter to the Panel of March 25, 2013, in which it abandoned the majority of its claims,[12] but to read one article in isolation in evaluating the sufficiency of the legal basis is in error. China's subsequent letter cannot be used to cure the deficiencies in or modify its original panel request.

8. Because China has failed to meet the requirements of Article 6.2 of the DSU, the United States requests that the Appellate Body reverse the Panel's finding that Section D of China's panel request is not inconsistent with Article 6.2 of the DSU. The United States requests the Appellate Body to find, instead, that Section D of the panel request does not comply with Article 6.2 and any claims presented in this section are not within the terms of reference of the panel and this dispute. Consequently, the United States requests the Appellate Body to reverse

[9] China's Panel Request, p. 4, n.6.

[10] China's Panel Request in *US – Anti-Dumping and Countervailing Duties*, pp. 3, 6-7.

[11] *EC – Large Civil Aircraft (AB)*, para. 642; *US – Carbon Steel (AB)*, para. 127.

[12] In total, China abandoned 15 out of 18 claims outlined in Parts C and D of its panel request.

the Panel's findings with respect to Articles 10, 19.3, and 32.1 of the SCM Agreement made pursuant to China's claims under Section D as these claims are outside the terms of reference.

II. THE PANEL ERRED IN FINDING THAT SECTION D OF CHINA'S PANEL REQUEST WAS NOT INCONSISTENT WITH ARTICLE 6.2 OF THE DSU

A. Introduction

9. Article 6.2 of the DSU sets forth the requirements for panel requests. It requires the complaining party to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Together, these two elements constitute the "matter referred to the DSB." If either of these elements is not properly identified, the matter would not be within the panel's terms of reference.[13]

10. In this dispute, the Panel denied, in part, a request by the United States to find that Section D of China's panel request failed to present a brief summary of the legal basis of the complain sufficient to present the problem clearly and exercised judicial economy with respect to part of the request on Section D and with respect to the request on Section C.[14] This appeal focuses on the denial of the U.S. request with respect to Section D of China's panel request. Specifically, the Panel applied an incorrect legal standard that China's panel request need only provide as much information on the legal basis as to "permit[ ] sufficiently clear inferences" to China's legal claims.[15] By using the term "inference"[16] the Panel understood it to be sufficient for the panel request to permit a reader to draw an implication as to the specific obligation challenged. The responding party and the Panel would bear the responsibility of inferring the scope of the problem being presented. Such an approach does not ensure that the panel request satisfies the requirements of Article 6.2 of the DSU.

11. In denying the U.S. request, the Panel failed to apply Article 6.2 according to its plain meaning. Not only did the Panel depart from the text, it also ignored Appellate Body guidance with respect to Article 6.2 of the DSU. The Panel's approach, which involved examining the panel request to determine what specific obligation China could have meant with its general reference to Article 19 of the SCM Agreement, was legally erroneous. The Panel also committed legal error in relying on footnote 6 to derive an inference that China intended to only raise a substantive claim under Article 19.3 of the SCM Agreement. And the Panel's conclusion that China's panel request was limited to Article 19.3 of the SCM Agreement contradicted statements made by China, the drafter of the panel request. Thus, the Panel's conclusion that Section D of China's complaint met the requirements of DSU Article 6.2 should be reversed.

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[13] *US – Carbon Steel (AB)*, para. 125.

[14] Preliminary Ruling by the Panel, paras. 4.1-4.2.

[15] *See* Preliminary Ruling by the Panel, paras. 3.2 (undertaking an analysis of "Does China's panel request permit sufficiently clear inferences as to the WTO obligations at issue in its Part D?"), 3.35, 3.42, 3.47, 3.48, 3.51, 4.1.

[16] The Oxford English Dictionary defines "inference" as "[a] conclusion drawn from data or premises; an implication." *The New Shorter Oxford English Dictionary* (1993), p. 1361.

B. The Panel Erred in Finding that "Sufficiently Clear Inferences" Satisfied the Requirements of Article 6.2 of the DSU

12. Article 6.2 of the DSU states that a panel request must "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The term "clearly" is defined as "plainly, manifestly, obviously … without deduction."[17]

13. The Appellate Body has clarified that, at a minimum, a complaining party must clearly identify the specific provision of the covered agreement alleged to have been violated by the responding party. In *Korea – Dairy*, the Appellate Body explained that:

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all.[18]

14. The Appellate Body further explained in *China – Raw Materials* that to "the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[19] A "complaining Member should therefore be particularly vigilant in preparing its panel request, especially when numerous measures are challenged under several different treaty provisions."[20]

15. The Appellate Body has also stressed that "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[21] Such an examination "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[22]

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[17] *The New Shorter Oxford English Dictionary* (1993), p. 415. The Spanish language version of Article 6.2 of the DSU refers to "claridiad," and the French language version of Article 6.2 refers to "clairement." The definitions of these terms correspond to the English definition of "clearly." *Diccionario de la Lengua Española, Real Academia Española*, Vigésima Segunda Edición (2001), p. 564; *Le Petit Larousse Illustre*, Larousse (2002), p. 222.

[18] *Korea – Dairy (AB)*, para. 124.

[19] *China – Raw Materials (AB)*, para. 220 (*citing Korea – Dairy (AB)*), para. 124. *See also EC – Fasteners (China) (AB)*, para. 598.

[20] *Id.*

[21] *EC – Bananas III (AB)*, para. 142.

[22] *US – Carbon Steel (AB)*, para. 127.

16. The Panel's approach with respect to Section D of China's panel request departs from the plain meaning of Article 6.2 and Appellate Body guidance. In accordance with the plain meaning of presenting the problem "clearly", in reviewing a panel request against the requirements of Article 6.2, a panel should determine if the legal claim was presented "plainly, manifestly, obviously" or "without deduction." Instead, the Panel determined that the relevant standard was to determine if "China's panel request permit[ted] sufficiently clear inferences as to the WTO obligations at issue in its Part D."[23] Thus, the Panel did not undertake an analysis of whether the problem itself was presented clearly. The Panel's articulation of the legal standard was in error and contrary to previous Appellate Body guidance. The Panel's application of that erroneous standard vitiated its evaluation of the panel request; as set out in the next section, that evaluation was flawed, and the panel request failed to satisfy the requirement of DSU Article 6.2.

C. The First Basis for the Panel's Conclusion, that Certain Provisions of the Cited Articles Were the Only "Plausible Basis" for China's Challenge, Was Legally Erroneous

17. As noted, instead of applying the text of Article 6.2 and following Appellate Body guidance, the Panel adopted a different approach and articulated a new standard. Specifically, the focus of the Panel in making its preliminary ruling was whether the general references to Articles 10, 19 and 32 of the SCM Agreement in Section D of China's panel request permitted "sufficiently clear inferences" in order to satisfy the requirements of Article 6.2 of the DSU. Noting that the Appellate Body has treated claims under Articles 10 and 32 of the SCM Agreement as "consequential" claims,[24] the Panel devoted the bulk of its examination to whether China's general reference to Article 19 of the SCM Agreement "warrant[s] the inference"[25] that China intended to raise a claim under Article 19.3 of the SCM Agreement.

18. In undertaking such an examination, the Panel failed to evaluate whether China's general reference to Article 19 in the context of its narrative was sufficient to present the problem clearly. The Panel bypassed this analysis in order to determine what specific obligation China could have meant with its general reference to Article 19. The Panel then made findings on the meaning of China's panel request that directly contradicted the statements made by China, the drafters of the panel request, confirming that Article 19.3 was not the only specific obligation at issue in its panel request.

19. To elaborate, the Panel began its analysis on Article 19 by agreeing with the United States that "Article 19 contains four paragraphs, which, in the Panel's view, contain multiple distinct obligations."[26] From this, however, the Panel did not conclude it was incumbent on China to identify which obligation contained in which paragraph was the basis for its claim. Rather, the Panel then examined each of these four paragraphs and determined that it was

[23] Preliminary Ruling by the Panel, para. 3.2.

[24] Preliminary Ruling by the Panel, para. 3.40.

[25] Preliminary Ruling by the Panel, paras. 3.51, 4.1.

[26] Preliminary Ruling by the Panel, para. 3.34.

"clear" to the Panel that the only "potentially relevant obligations" on which China could have based its claim was "set forth in Articles 19.3 and 19.4."[27] This approach was legal error.

20. In examining each paragraph of Article 19 for whether it was a "potentially relevant obligation", the Panel was no longer examining the face of the panel request to discern whether the legal basis had presented sufficient to present the problem clearly. Rather, the Panel was engaging in a legal interpretation (however limited) of those paragraphs of Article 19 and seeking to discern whether China as a complaining party would have a "plausible basis" to assert a claim in relation to an alleged failure to investigate and avoid double remedies under those provisions. Such an analysis goes to the merits of a claim and has nothing to do with whether the request has presented the problem clearly.

21. The Panel applied its erroneous approach to Article 32 as well, examining its provisions and concluding Article 32.1 "is relevant" to the issue of "double counting" and "it would be plausible" for China to claim a consequential breach of Article 32.1 following a finding under another provision. The Panel excluded any claim under Article 32.5 because "there is no suggestion" in Part D of a challenge to a law, regulation, or administrative procedure. Again, such an evaluation goes to the merits, or whether China could make out a claim, but not whether such a claim has been included in the legal basis set out in the panel request. Simply put, in its effort to find some clarity on the legal basis of the complaint, the Panel interpreted and applied potential legal provisions, making a preliminary assessment of whether such a claim would be "plausible" or "potentially relevant". In so doing, the Panel erred in its analysis of whether the panel request satisfied the requirements of DSU Article 6.2.

D. The Second Basis for the Panel's Conclusion, that Footnote 6 Referred to the DSB Recommendations and Rulings in DS379, Was Legally Erroneous and Did not Support the Inference the Panel Drew

22. Following its conclusion that an examination of the substance of provisions under Article 19 supported the inference that the only relevant obligations at issue under Section D were Articles 19.3 and 19.4 of the SCM Agreement, the Panel made an additional inference to further narrow the scope of the claim to Article 19.3.[28] The Panel reached its conclusion by relying heavily on the last two sentences of footnote 6 of China's panel request, which, in relevant part, state:

> China has also excluded the four sets of parallel AD/CVD investigations that were the subject of the recommendations and rulings of the DSB in *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* (DS379). The DSB has already found that the United States acted inconsistently with its obligations under the covered agreements by failing to investigate and avoid double remedies in those investigations.[29]

[27] Preliminary Ruling by the Panel, para. 3.39.

[28] Preliminary Ruling by the Panel, paras. 3.43, 3.45.

[29] China's Panel Request, p. 5, n.6.

The Panel found that, from this statement in a footnote, it was "possible to draw sufficiently clear inferences" that China intended to only raise a substantive claim under Article 19.3 of the SCM Agreement. In addition to relying on an erroneous legal standard, the Panel erred in looking to an external source to inform the legal basis in the panel request, and its reading of the reference in the footnote was in any event partial and not placed in the context of the request.

23. The Panel further recognized the U.S. view that the footnote "serves to explain why China excluded certain investigations from the scope of the measures at issue in this dispute, and does not directly relate to the legal basis of China's complaint as set out in Part D."[30] It also acknowledged that Part D of China's panel request also references "Articles 15 and 21 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the Anti-Dumping Agreement."[31] The Panel concluded that such references mean "that the claims set forth in Part D of the panel request cannot be understood as corresponding in their entirety to only those provisions in respect of which inconsistencies were found in *US – Anti-Dumping and Countervailing Duties* (*China*) (DS379)."[32]

24. Despite these considerations, the Panel found that the reference to DS379 provided "useful context" for determining whether it was possible to find sufficiently clear inferences to a specific obligation.[33] It then examined "the Appellate Body's findings (and any findings in the panel report, as appropriate) on the matter of double remedies."[34] In other words, the Panel took it upon itself to examine the 280-page panel report and 166-page Appellate Body report in *US – Anti-Dumping and Countervailing Duties* (*China*) to analyze their discussion on so-called "double remedies."[35] Following this examination, the Panel treated the findings of these reports as definitive evidence that China could only have alleged a violation of Article 19.3 of the SCM Agreement in Section D of its panel request.[36]

25. Thus, rather than providing "context" for the Panel's analysis, the particular findings of the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties* (*China*)

[30] Preliminary Ruling by the Panel, para. 3.42.

[31] Preliminary Ruling by the Panel, para. 3.46.

[32] Preliminary Ruling by the Panel, para. 3.42.

[33] Preliminary Ruling by the Panel, para. 3.42.

[34] Preliminary Ruling by the Panel, para. 3.42.

[35] The Appellate Body has stated in relation to a claim under Article 11 of the DSU that "[i]n our view, it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position." *See Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

The same rationale applies for an analysis under Article 6.2 of the DSU. It is incumbent on the complaining party to explicitly identify the relevance of citations to documents outside of the dispute at issue. It is not sufficient for China to cite to the findings in DS379 and expect the Panel to discover on its own the relevant analysis on so-called "double remedies" as well as the specific obligations at issue in that dispute.

[36] Preliminary Ruling by the Panel, paras. 3.41-48.

became an integral part of China's panel request. The United States considers such an approach to a reference to an external source to be legally erroneous. Under the Panel's approach, it is not the panel request that sets out the legal basis sufficient to present the problem clearly; rather, through reference to some other document, it is the clarity of that other document that determines whether a particular provision will be included in the legal basis and the terms of reference of the dispute. This is contrary to the text of Article 6.2 and previous Appellate Body guidance that a panel request should be examined on its face to determine if the requirements of Article 6.2 are met.[37]

26. And while the Panel appeared to draw some comfort from a reference to the DSB's recommendations and rulings, which could have unfortunate consequences for the drafting of future panel requests in the context of Article 21.5 proceedings, the logic of the Panels' approach would not be limited to recommendations and rulings. Rather, a panel request could refer to any extrinsic source, such as a book, law review article, or legal blog post, and whether the legal basis is set out sufficient to present the problem clearly will depend on the clarity of any references to relevant WTO legal provisions in that source. Such an approach subverts the requirements of DSU Article 6.2.

27. As the Appellate Body observed in *Chile – Price Band System* in relation to a claim under Article 11 of the DSU, "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement…"[38] This rationale applies with special force in the context of Article 6.2 of the DSU. China must state its claim clearly and explicitly in its panel request so that the panel and parties to the dispute are not left wondering as to the scope of the claims at issue, particularly if they have to incorporate the findings and analysis from unrelated panel and Appellate Body reports.

28. The Panel also failed to read the footnote and its reference to the DSB's recommendations and rulings according to the text of the reference in its context. As noted, the footnote as a whole refers to the DSB's recommendations and rulings to explain certain measures China was challenging and certain measure it was not. This also corresponds to the placement of the footnote at the end of the paragraph explaining which investigations or reviews were being challenged, and prior to the paragraph setting out China's legal claims. Footnote 6 also makes no reference to any legal claims, much less a reference to Article 19.3. And while the Panel inferred that China intended to raise a claim under any provision resulting in the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties* (*China*), the footnote text refers to findings in the context of investigations while this dispute covers both investigations and reviews. Thus, it is not even the case that the legal basis could be the same or could be assumed to be the same.

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[37] *US – Carbon Steel (AB)*, para. 127.

[38] *Chile – Price Band System (AB)*, para. 164.

29. Further, the Panel ignored other context for footnote 6, in particular, that Section C of the panel request did not contain an equivalent footnote. Section C also involved claims relating to "double remedies" (in that case, an alleged absence of legal authority to identify and avoid double remedies). Section C also alleged inconsistencies with the *identical list* of Articles in the SCM Agreement, GATT 1994, and AD Agreement as set out in Section D. The identical list in Section C suggests that the reference to overarching Articles and not specific paragraphs and obligations was deliberate. And the absence of an equivalent to footnote 6 in Section C suggests that, as the plain text of footnote 6 indicates, the footnote was not intended to and did not set out the legal basis for the complaint.

30. Finally, while the Panel considered the reference to the DSB's recommendations and rulings to be significant, the Panel failed to consider that reference fully. In particular, the recommendations and rulings relate to claims that are within the terms of reference of the dispute. In the *US – Anti-Dumping and Countervailing Duties* (*China*) panel request, China did more than provide a reference to Article 19 in the context of a claim on "double remedies". This panel request not only listed the paragraphs of Article 19 of the SCM Agreement at issue (specifically, Article 19.3 and Article 19.4), but also described how the measures were allegedly breaching each specific obligation.[39] Similarly, the *US – Anti-Dumping and Countervailing Duties* (*China*) panel report contained references to particular paragraphs of other Articles containing multiple obligations (*e.g.*, SCM Agreement Article 32.1; AD Agreement Article 2.4 and Article 9.3).

31. Thus, to the extent the reference to the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties* (*China*) were relevant to understanding the claims within the scope of the current dispute, the Panel should have considered the panel request on which those recommendations and rulings were based and the *differences* in how China had identified the legal basis in each dispute. Because China's panel request here differed by listing articles in a general fashion and not clarifying which aspect of multiple obligations was at issue, an objective reader could have reasonably understood that China intended to claim potentially different breaches, under different legal theories, than those claimed in *US – Anti-Dumping and Countervailing Duties* (*China*). That different Articles were cited in the panel request in the present dispute (*e.g.*, SCM Agreement Articles 15 and 21; AD Agreement Article 11) than in DS379 (AD Agreement Article 2.4; GATT 1994 Article I) further reinforces this conclusion. The Panel erred in not reading the footnote according to its terms and in its full context.

32. In sum, the Panel's reliance on the reference to DSB recommendations and rulings in footnote 6 to inform the legal basis of the complaint was legally erroneous. Therefore, the Panel's conclusion that Section D of China's complaint met the requirements of DSU Article 6.2 should be reversed.

[39] China's Panel Request in *US – Anti-Dumping and Countervailing Duties (China)*, pp. 3, 6-7.

E. The Panel's Reading of the Panel Request Contradicted That of the Complaining Party, Confirming the Lack of Clarity As to the Legal Basis

33. The Panel came to the conclusion that China's panel request was limited to (and that China wished to base its claim on) Article 19.3 over the express statement of China that it believed that Article 19 was one "interlinked"[40] obligation and that "the *entirety* of Article 19 establishes a set of principles that Members are to apply concurrently when they come to the final task of determining the amount of the countervailing duty to impose."[41] Specifically, China stated in its response to the U.S. request for a preliminary ruling that:

> These [Article 19 of the SCM Agreement] obligations are not 'distinct' in any way. On the contrary, these provisions are closely interlinked and all relate to a single issue: the determination of the amount of the countervailing duty to impose. The provisions of each paragraph are inextricably related to each other. For example, Article 19.4 makes clear that the 'appropriate' amount of a countervailing duty under Article 19.3 cannot be greater than the amount of the subsidy found to exist. Articles 19.1 and 19.2, along with Article 19.3 itself, operate together to establish that the "appropriate" amount of a countervailing duty should have some relationship to the injury that is being caused by subsidized imports.[42]

34. Based on China's statements, it is far from "clear" that China's general reference to Article 19 was unintentional. China in fact indicated that it intended to bring claims under Article 19 as an integrated whole,[43] but the Panel precluded such a possibility.

35. In limiting the relevant claim to Article 19.3, moreover, the Panel once again dismissed the express views of China, the complaining party, that its panel request was intended to raise substantive claims beyond only Article 19.3.[44] Specifically, the Panel stated that:

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[40] China's response to the U.S. preliminary ruling request, para. 26.

[41] China's response to the U.S. preliminary ruling request, para. 27 (emphasis added).

[42] China's response to the U.S. preliminary ruling request, para. 26 (internal citations omitted).

[43] The United States stated in its preliminary ruling request the mere listing of Article 19 of the SCM Agreement in China's panel request does not meet the requirements of Article 6.2 of the DSU because Article 19 contains multiple distinct obligations. U.S. preliminary ruling request, Section III.A. In relevant part, the United States stated that a mere invocation of Article 19 is not sufficient to clearly identify which of the multiple distinct obligations contained in the article is at issue in the dispute. *Id.* The Panel agreed with the United States that Article 19 of the SCM Agreement contains multiple distinct obligations. Preliminary Ruling by the Panel, para. 3.34 ("In contrast, Article 19 contains four paragraphs, which, in the Panel's view, contain multiple distinct obligations.").

[44] It is far from "clear" that China did not intend to raise Article 19.4 from its reference to DS379 in its panel request. In response to the Panel's questions on the Appellate Body's exercise of judicial economy on China's Article 19.4 claim in *US – Anti-Dumping and Countervailing Duties (China)*, China responded that "China does not consider that the Appellate Body's exercise of judicial economy in relation to its claims under Article 19.4 in DS379 should be determinative, because it does not reflect any views by the Appellate Body on the merits of China's claim in that dispute." China's Response to Questions from the Panel Regarding the U.S. Request for a Preliminary Ruling, para. 18. China further noted that "in DS379, the parties extensively litigated the interpretation

> We are aware that China in comments submitted to the Panel stated that Part D was intended to raise claims under both Articles 19.3 and 19.4. We are, however, unable to reconcile this view with the terms of the last sentence of footnote 6. Had China wished to raise claims under Article 19.4, it should not have referred to findings by the DSB that the United States had acted 'inconsistently' with its WTO obligations. As it is, the relevant sentence is not reasonably open to the reading apparently advanced by China.[45]

36. The Panel's dismissal of the complaining party's own explanation of the legal basis of its problem underscores the error in using an analysis based on inferences. The Appellate Body has stated that "[a] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defense," as are potential third-parties.[46] For this reason, the requirement of describing the legal basis of the complaint with sufficient clarity "is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[47] The problem cannot be considered as presented with sufficient clarity under Article 6.2 of the DSU if the Panel has to draw inferences about the meaning of a panel request, particularly when the complaining party states that it never intended such a meaning. If the drafter of the panel request and the Panel cannot agree as to the scope of the problem, it may be expected that an objective reader would not be able to discern the legal basis clearly, and it cannot be expected that the responding party would be able to understand the legal basis of the complaint with sufficient clarity as to mount a proper defense.

37. A prior panel found that the "complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request."[48] In this dispute, however, China bore none of the risk for its lack of precision. The Panel allowed China to make vague references to an article with multiple, distinct obligations. The Panel then took it upon itself to use a series of inferences to essentially revise the panel request on behalf of China. Thus, the scope of the claim under Section D was not made clear, even to the complaining party, until the Panel issued its preliminary ruling in May 2013, almost six months after China had filed its panel request and just one month before the United States was required to provide the Panel with its first written submission. Under this standard, a complaining party will have every incentive to make its panel request as vague and imprecise as possible, knowing that a panel would be able to cure its deficiencies to the detriment of the responding party.

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of Article 19.4 as it relates to the issue of double remedies." *Id.* Such statements raise significant doubt that China could not have intended to raise a claim under Article 19.4 in Section D of its panel request.

[45] Preliminary Ruling by the Panel, para. 3.45.

[46] *Thailand – H-Beams (AB)*, para. 88.

[47] *Thailand – H-Beams (AB)*, para. 88.

[48] *Canada – Wheat Exports and Grain Imports*, Preliminary Ruling by the Panel dated 21 July 2003, WT/DS276/12, para. 25.

38. That is why the Appellate Body has observed, if a panel request fails to provide the basis on which "to determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures," the claimant has "failed to present the legal basis for [the] complaint[ ] with sufficient clarity to comply with Article 6.2 of the DSU."[49] Section D of China's panel request fails to provide the legal basis of the complainant with sufficient clarity, and as such, the Appellate Body should reverse the Panel's finding on Article 6.2 of the DSU.

F. The Panel Erred by Allowing Subsequent Statements to Cure China's Original Panel Request

39. Article 6.2 requires that a complaining party "shall … provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In numerous prior disputes, the Appellate Body has made clear that an examination for consistency under Article 6.2 "must be demonstrated on the face of the request for the establishment of a panel."[50] Further, "the panel's terms of reference must be objectively determined on the basis of the panel request *as it existed at the time of filing*."[51]

40. The Appellate Body has been similarly clear that subsequent submissions or statements by the complaining party "cannot cure a defect in a panel request." In other words, while such information could be used to "confirm[ ] the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request."[52]

41. The Panel, however, failed to examine China's panel request on the face of the request as it existed at the time of filing. Instead, the Panel sought to "cure" China's vague and deficient panel request by relying on subsequent statements from China. Rather than confirm the wording used in China's panel request, these subsequent statements entirely changed and reformed the legal claims of Section D.

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[49] *China – Raw Materials (AB)*, para. 231.

[50] *US – Carbon Steel (AB)*, para. 127; *see Australia – Apples (AB)* ("It is also well established that compliance with the requirements of Article 6.2 must be determined on the face of the request for the establishment of the panel and that '[d]efects [therein] cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings'". Such submissions may be used only to confirm the meaning of the *words used* in the panel request and in assessing whether there has been prejudice to the responding Member's ability to prepare its defence.") (emphasis in original).

[51] *EC – Large Civil Aircraft (AB)*, para. 642 (emphasis added).

[52] *EC – Large Civil Aircraft (AB)*, para. 642 (the Appellate Body emphasized that "a party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request."); *see also US – Carbon Steel (AB)*, para. 127 ("Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submission of the parties during the panel proceedings."); *EC – Bananas III (AB)*, para. 143 ("If a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.").

42. Specifically, as filed, Section D of China's panel request alleges that the more than 60 antidumping and countervailing duty proceedings listed in Annexes A and B of China's panel request were inconsistent with the following general obligations:

- Articles 10, 15, 19, 21, and 32 of the SCM Agreement;
- Article VI of the GATT 1994; and
- Articles 9 and 11 of the AD Agreement.

43. As a result of the Panel's finding in its preliminary ruling, Section D of China's panel request had been cured to pertain to approximately half of the proceedings originally cited by China and only for the following specific obligations:

- Articles 10, 19.3, and 32.1 of the SCM Agreement.

44. Such a conclusion could not have resulted from a determination based on the face of the panel request at the time it was filed. Rather, the Panel came to its conclusion in part based on its analysis of Article 19 and *US – Anti-Dumping and Countervailing Duties (China)* described above, and in part on the reliance of statements made by China to the Panel regarding its intention to abandon certain claims following the submission of the U.S. preliminary ruling request. Specifically, on March 25, 2013, 10 days after the United States submitted its request for the Panel to determine that Sections C and D of China's panel request did not meet the requirements of Article 6.2 of the DSU, China submitted a letter to the Panel representing that it would no longer pursue any of its claims under Section C and that it would limit its claims under Section D to Articles 10, 19 and 32 of the SCM Agreement.[53]

45. In its preliminary ruling, the Panel treated China's statement of March 25, 2013, as the equivalent of a newly filed panel request, as the Panel conducted its analysis under Article 6.2 of the DSU analysis using the baseline established by China's letter of March 25, 2013. In other words, rather than look to the face of the panel request at the time it was filed, the Panel looked to China's panel request, as modified by its March 25, 2013 letter, to determine if it met the requirements of Article 6.2 of the DSU.

46. To be clear, the United States is not arguing that a complaining party is obligated to fully pursue each and every claim alleged in a panel request. However, the abandonment of claims in an attempt to cure a deficient panel request should not be relied upon by a panel when determining the sufficiency of a panel request on its face as it existed at the timing of filing. In this respect, it should be noted that China initially argued that the Panel should either issue a preliminary ruling "at the beginning of the first substantive meeting … or it may decide to defer its ruling on the U.S. request until the issuance of the Panel's report."[54]

47. Only after the Panel had issued a proposed timetable that included the issuance of a preliminary ruling prior to the first substantive written submission did China submit a

[53] China's letter to the Panel dated March 25, 2013, pp. 1-2.

[54] China's letter to the Panel dated March 19, 2013, p. 3.

subsequent letter to the Panel indicating its plans to abandon significant portions of its panel request.[55] China states in this letter that:

> China's decision to narrow the scope of its claims with respect to the issue of double remedies [Section D] would have become apparent with the filing of China's first written submission. It would have been clear, at that point, that much of the U.S. request for a preliminary ruling relates to claims that are now moot.[56]

48. Such tactics are the reason why Article 6.2 requires complaining parties to provide a brief summary of its legal claims with sufficient clarity at the outset of its panel request. In *India – Patents (US)*, the Appellate Body stressed that "[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly."[57] China's approach would entirely strip Article 6.2 of its meaning, as responding parties would have no clarity as to the claims in a dispute until, at the earliest, the first substantive written submission. In other words, China's approach would have forced the United States to prepare its defense based on general references to Articles 10, 15, 19, 21, and 32 of the SCM Agreement, Article VI of the GATT 1994, and Articles 9 and 11 of the AD Agreement for over 60 antidumping and countervailing duty proceedings. Only after the United States had received China's first substantive written submission would the United States have had clarity on the actual claims alleged by China – that is, all of its claims on the antidumping proceedings and the majority of the obligations cited in its Section C and D of China's panel request had been abandoned. Such an approach and China's panel request does not meet the requirements of Article 6.2.

III. CONCLUSION

49. In summary, while the United States appreciates the Panel's careful consideration of the parties' arguments, nonetheless, the United States considers that there are fundamental flaws in the Panel's analysis of Article 6.2 of the DSU. As explained above, Section D of China's panel request does not meet the requirement of Article 6.2 to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

50. Specifically, China's list of articles from the SCM Agreement, the AD Agreement and Article VI of the GATT 1994 in relation to over 60 antidumping and countervailing duty proceedings failed to present the problem clearly. Section D did not clearly present that the problem China sought to have addressed was the alleged inconsistency of approximately 30 countervailing duty proceedings with Articles 10, 19.3 and 32.1 of the SCM Agreement. Thus, the United States respectfully requests the Appellate Body to reverse the Panel's findings under Article 6.2 of the DSU, reflected in paragraphs 8.1(a) of the Panel Report and the Panel's

[55] *See* Draft Timetable of the Panel dated March 21, 2013.

[56] China's letter to the Panel dated March 25, 2013, p. 2.

[57] *India – Patents (US) (AB)*, para. 94.

preliminary ruling in WT/DS449/4, and find that Section D of China's panel request fails to meet the requirements of Article 6.2 of the DSU.

51. As the Appellate Body recently reaffirmed in *China – Raw Materials*, a deficient summary of the legal basis of the complaint means that a claim will not fall within the terms of reference of the dispute.[58] As a consequence of reversing the panel's conclusion under DSU Article 6.2 and finding that section D fails to meet the requirements of Article 6.2, the United States respectfully requests the Appellate Body to reverse the Panel's findings of inconsistency with respect to Articles 10, 19.3 and 32.1 of the SCM Agreement,[59] reflected in paragraphs 8.1(c), as these claims are outside the terms of reference of this dispute.

[58] *China – Raw Materials (AB)*, para 171; *see Dominican Republic – Import and Sale of Cigarettes (AB)*, para. 120 ("The Appellate Body has consistently maintained that, where a panel request fails to identify adequately particular measures or fails to specify a particular claim, then such measures or claims will not form part of the matter covered by the panel's terms of reference.").

[59] *US – Countervailing and Anti-Dumping Measures (China) (Panel)*, paras. 7.298-7.396.