WORLD TRADE ORGANIZATION

WT/DS437/4

21 February 2013

(13-0934)

Page: 1/13

Original: English

UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

COMMUNICATION FROM THE PANEL

The following communication, dated 14 February 2013, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body ("DSB").

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On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling concerning the consistency of China's request for the establishment of a Panel (WT/DS437/2) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

On 8 February 2013, the Panel issued the enclosed preliminary ruling to the parties. The preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties during Interim Review.

After consulting the parties to the dispute, the Panel decided to inform the DSB of the content of its preliminary ruling. Therefore, I would be grateful if you would circulate the body of this letter and the enclosed preliminary ruling as document WT/DS437/4.

COMMUNICATION FROM THE PANEL
PRELIMINARY RULING

1 PROCEDURAL BACKGROUND

1.1. On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling concerning the consistency of China's request for the establishment of a Panel (WT/DS437/2) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

1.2. The United States requested that the Panel rule on the preliminary issue before the filing of first written submissions. In contrast, China argued that the Panel should rule on the preliminary request at a later stage of proceedings. Ultimately, the Panel decided it would issue a communication to the parties on the preliminary ruling request prior to the filing of first written submissions. As a result of this decision, some third parties communicated concerns to the Panel about their rights to participate in the preliminary ruling process. The Panel sought the views of the parties on this issue, and both the United States and China supported third parties being given the opportunity to comment during the preliminary ruling process.

1.3. The Panel decided to allow third parties the opportunity to comment on the preliminary ruling request. In reaching this decision, the Panel reasoned that, while Article 10.2 of the DSU provides third parties with an "opportunity to be heard", it does not explicitly state whether this extends to commenting on a preliminary review process, in circumstances where a panel has decided to make its ruling prior to the receipt of the first written submissions of the parties and third parties. Therefore, the Panel was of the view that it had some discretion in this regard. The Panel decided to exercise its discretion in favour of the third parties in this dispute for a number of reasons. In particular, the Panel noted that neither party had objected to this course of action. Further, the Panel was of the view that the jurisdictional issue before it was a systemic one and that the consequences of the Panel accepting the United States' request not to assume jurisdiction on a particular issue would be serious.[1] Finally, in the particular circumstances of this dispute, the Panel noted that one of the United States' arguments in its preliminary ruling request was that Article 6.2 protects the rights of third parties, and that these third party rights had been prejudiced due to China's allegedly deficient panel request.[2] In the Panel's view, given that the issues of substance relate to third party rights, it was particularly important that third parties be given the opportunity to comment on the preliminary ruling request.

1.4. Finally, although the United States proposed that the Panel meet with the parties to consider the preliminary ruling request, the Panel did not consider this necessary.

2 ARGUMENTS OF THE PARTIES

2.1 United States

2.1. The United States requests the Panel to find that China's "as applied" challenge to "instances" in which the United States Department of Commerce ("USDOC") "used facts available" is not within its terms of reference because China's panel request does not meet the requirements of Article 6.2 of the DSU.

2.2. The United States' request relates to the section of China's panel request that sets out the "legal basis of the complaint" in relation to China's "as applied" claims. This section of the panel request commences with the following paragraph:

> China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States specified below.

[1] In this regard, see also Panel Report, *Canada – Wheat Exports and Grain Imports,* para. 6.6.
[2] United States' preliminary ruling request, para. 29.

2.3. The United States' position is that subparagraph (d), following the above introductory paragraph, does not satisfy Article 6.2 of the DSU. It provides:

> In connection with all the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
>
> (1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[10]
>
> _____
>
> [10] This claim arises in respect of each instance in which the USDOC used facts available, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.

2.4. The United States' principal complaint is that China's panel request does not adequately identify the "instances" of the use of facts available by USDOC that China is challenging and consequently, does not present the problem clearly. According to the United States, the reference to each "instance" in which facts available were used could refer to any of the hundreds of applications of facts available by USDOC in support of its findings of financial contribution, benefit and specificity, at any stage of the investigation, wherever made, and whether the determination was preliminary or final in nature. The United States contends that China's decision to present a panel request with an extremely broad scope in relation to the multiple stages of each investigation contributes to the panel request's lack of clarity.

2.5. The United States variously complains that China has failed to "plainly connect" the cited WTO obligation and the measures listed in the panel request[3]; has failed to "provide a brief summary" of the legal basis of its claim "sufficient to present the problem clearly"[4]; and has failed to explain "how or why" the measure at issue is considered by China to be inconsistent with Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[5] The United States contends that each of these deficiencies in the panel request arises because of the failure to identify the "instances" of the use of facts available challenged by China.

2.6. We note that in its preliminary ruling request, the United States submits that an explanation of "how or why" the measures at issue violates Article 12.7 of the SCM Agreement required China to "indicate what portions of the various documents … are the alleged breach of the facts available obligations in Article 12.7".[6] However, in response to a Panel question, the United States adds that in order to explain "how or why" a measure has breached Article 12.7, a complainant could state, for example, that "a Member has breached Article 12.7 because it improperly rejected necessary information provided by an importer in an investigation".[7]

2.7. The United States also refers to "another source of ambiguity in China's panel request", namely that China did not specify which of the obligations found within Article 12.7 of the SCM Agreement USDOC is alleged to have breached.[8] However, in its preliminary ruling request, the United States "does not assert that this lack of clarity, standing alone, necessarily renders this or any other panel request deficient".[9]

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[3] United States' preliminary ruling request, paras. 23 and 25 and United States' comments on China's response to the preliminary ruling request, paras. 13 and 16.

[4] United States' preliminary ruling request, paras. 3, 23, 25, 26 and 27 and United States' comments on China's response to the preliminary ruling request, paras. 1, 3 and 17.

[5] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.

[6] United States' preliminary ruling request, para. 26.

[7] United States' response to Panel question 4, para. 7.

[8] United States' preliminary ruling request, para. 22.

[9] United States' preliminary ruling request, para. 22. In response to China's rebuttal about whether it needed to specify which obligations under Article 12.7 of the SCM Agreement it is challenging, the United States again reiterates that it does not assert the "lack of clarity" surrounding the obligations at issue under Article 12.7 necessarily renders the panel request inconsistent with Article 6.2 of the DSU (United States' comments on China's response to the preliminary ruling request, para. 14).

2.8. Finally, in relation to China's submissions on the preliminary ruling request, the United States argues that China provides new descriptions of its facts available claims, which only serve to demonstrate that the claims, as described in the panel request, fail adequately to present the problem. The United States also refutes the suggestion from China that it should be able to discern the content of the facts available claims on the basis of the content of the United States' claims in *China – GOES*. According to the United States, the claims in *China – GOES* have no relationship to China's claims in this dispute.

2.2 China

2.9. China argues that the United States' preliminary ruling request is essentially based upon the proposition that the large number of instances in which USDOC used facts available in the determinations at issue imposed an enhanced obligation under Article 6.2 of the DSU. China contends that the United States has no authority for this proposition. Rather, China's position is that the instances in which USDOC used facts available are identified within each of the determinations at issue. Further, the panel request plainly states that "each" such instance is inconsistent with Article 12.7 of the SCM Agreement. Therefore, China has met its obligations under Article 6.2 of the DSU.

2.10. In its first submission to the Panel, many of China's submissions refer to USDOC's use of "adverse" facts available. However, in its second submission, China clarifies that its position is that the panel request states that China is challenging "each instance" in which USDOC used facts available, "including so-called 'adverse' facts available". However, virtually all of the instances in which USDOC used facts available involved the use of "adverse" facts available, as is evident on the face of the determinations at issue. This is why it is China's principal concern.

2.11. According to China, the specific instances in which USDOC used "adverse" facts available are simple to discern. The only measures at issue in which USDOC would have used "adverse" facts available for any purpose are the 19 final determinations and the three preliminary determinations listed in Appendix 1 to the panel request. China notes that USDOC releases an "Issues and Decision Memorandum" and a Federal Register notice to explain its reasoning in relation to final and preliminary determinations respectively. These documents set forth USDOC's rationale for the use of facts available, including "adverse" facts available. Therefore, China argues that it is preposterous for the United States to argue that "it is not possible to discern" the "instances" in which China considers USDOC to have used facts available.

2.12. According to China, it is apparent that the United States' actual concern is not its ability to *identify* the instances in which USDOC used "adverse" facts available, but rather the *number of instances* in which USDOC did so. However, China notes that regardless of the number of instances of a violation involved in a claim, a Member is only ever required to connect the challenged measures to the provision of the covered agreements claimed to have been infringed. China has fulfilled this requirement by indicating that "each instance" of the use of "adverse" facts available infringes Article 12.7 of the SCM Agreement, where the ordinary meaning of "each" is "every".

2.13. China asserts that it was not required to explain in its panel request which *aspects* of Article 12.7 it considers the United States to have violated. This would amount to *arguments,* which are not required in a panel request.

2.14. According to China, the United States fails to identify any prior decision under Article 6.2 of the DSU that is even remotely analogous to what the United States is requesting from the Panel in this case. Further, China submits that the United States should understand China's "adverse" facts available claim, given that it recently successfully litigated the same issue against China in *China – GOES.* Therefore, it should have been obvious to the United States that China's claim in subsection (d)(1) of the panel request relates, at least in part, to the issue of whether an investigating authority may resort to "adverse" facts available under Article 12.7 of the SCM Agreement.

3 ARGUMENTS OF THE THIRD PARTIES

3.1 Australia

3.1. In Australia's view, due process requires that responding parties receive details about the complaint that are sufficient to enable them to frame their response, particularly in the light of the tight timeframes associated with panel proceedings.

3.2 Brazil

3.2. Brazil contends that in order for a panel request to comply with Article 6.2 of the DSU, it must identify the measure targeted in the dispute and must provide a brief summary of the legal basis of the claims. There is no obligation under Article 6.2 for the complaining party to develop in the panel request the legal arguments that support its claims or to provide a detailed explanation of why and how the measures at issue are inconsistent with a provision of a covered agreement. However, Brazil does not advocate that permissive standards of specificity should prevail in DSU proceedings and notes that greater precision and clarity in panel requests would contribute to better define the boundaries of a panel's jurisdiction.

3.3. In Brazil's view, China's panel request identifies the measures at issue with sufficient particularity to allow the defendant to identify their "nature and the gist of what is at issue".[10] Brazil notes that merely listing the provisions of the covered agreements allegedly violated may not always satisfy Article 6.2 of the DSU. However, in the circumstances of this case, the language of Article 12.7 of the SCM Agreement raises no doubt regarding the legal problem identified by China.

3.3 European Union

3.4. The European Union provides detailed submissions regarding why, in its view, third parties have a right to be heard on a preliminary ruling request before any communication on the request is issued by the panel.

3.5. Regarding the substance of the preliminary ruling request, the European Union notes that it is not persuaded that the mere fact that the scope of a particular proceeding is broad is relevant to the analysis under Article 6.2 of the DSU.

3.6. The European Union observes that there are different issues that might arise under Article 12.7 of the SCM Agreement in connection with the use of facts available. According to the European Union, if at the time of submitting the panel request the complaining member has already worked out which of the issues best describes the problem, it might indicate this in the panel request. In relation to China's panel request, the European Union notes that China expressly referred to the use of "adverse" facts available and indicated that this was inconsistent with Article 12.7. Therefore, in the European Union's view, China's challenge to the use of adverse facts available falls within the Panel's jurisdiction. However, with respect to the use of facts available other than the use of adverse facts available, the European Union is of the view that "some further effort to specify the problem … might have been reasonable".[11]

4 EVALUATION BY THE PANEL

4.1 The provision at issue

4.1. Article 6.2 of the DSU provides, relevantly:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[10] Brazil's comments on the preliminary ruling request, para. 8.
[11] European Union's comments on the preliminary ruling request, para. 17.

4.2 The measures at issue

4.2. At the outset, we note that the "specific measures at issue" in relation to China's claims under Article 12.7 are identified in the panel request. While the introduction to the "as applied" section of China's panel request refers to the initiation and conduct of investigations, the determinations, orders and definitive duties, it is clear that for the purposes of a facts available claim under Article 12.7 of the SCM Agreement, the only measures in which USDOC could have applied facts available are the final and preliminary countervailing duty determinations. Therefore, the "specific measures at issue" are the 19 final and the three preliminary countervailing duty determinations listed in Appendix 1 to the panel request.

4.3 Did China adequately identify the "instances" of the use of facts available that it is challenging?

4.3. The United States' principal complaint is that China's panel request does not adequately identify the "instances" of the use of facts available by USDOC that China is challenging and therefore does not "present the problem clearly". The United States variously complains that China has failed to "plainly connect" the cited WTO obligation and the measures listed in the panel request[12]; has failed to "provide a brief summary" of the legal basis of its claim "sufficient to present the problem clearly"[13]; and has failed to explain "how or why" the measure at issue is considered by China to be inconsistent with Article 12.7 of the SCM Agreement.[14] The United States contends that each of these deficiencies in the panel request arises because of the failure to identify the "instances" of the use of facts available that are challenged by China.

4.4. The Panel notes that the measures at issue in relation to the facts available claims include the Issues and Decisions Memoranda and Federal Register Notices, which are incorporated by reference into the final and preliminary determinations respectively.[15] The Panel has examined the memoranda and notices which are incorporated into the determinations listed in Appendix 1 to the panel request, and which are publicly available. In our view, in these documents the "instances" in which USDOC applied facts available are readily identifiable. Consequently, we are not persuaded by the United States' argument that "it is not possible to discern what are those 'instances' in which China considers the investigating authority used facts available".[16]

4.5. The United States' complaint that China did not adequately identify the "instances" of the use of facts available at issue appears to be premised upon an assumption that China is not intending to challenge *every* application of facts available by USDOC. For example, the United States argues that China fails to indicate "which of the potentially hundreds of applications of facts available are of concern for purposes of the dispute".[17] However, the panel request states that China will challenge "each" instance of the use of facts available and China insists that this should be read literally. In particular, China argues that it will challenge "each", in the sense of "every", use of facts available by USDOC.[18] If the panel request were to state that China challenges "some" or "numerous" applications of facts available, we would consider the United States to have a valid argument. However, in our view, the panel request is clear that all "instances" of the use of facts available will be challenged, and China confirms this in its submissions to the panel.

4.6. Therefore, in our view, it is possible to identify the specific aspects of each measure that will be challenged by China under Article 12.7 of the SCM Agreement, namely, all instances of the use of facts available, as found in the relevant Issues and Decisions Memoranda and Federal Register notices. Although the number of applications of facts available is indeed large, as argued by the

[12] United States' preliminary ruling request, paras. 23 and 25 and United States' comments on China's response to the preliminary ruling request, paras. 13 and 16.

[13] United States' preliminary ruling request, paras. 3, 23, 25, 26 and 27 and United States' comments on China's response to the preliminary ruling request, paras. 1, 3 and 17.

[14] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.

[15] The panel request expressly states that the preliminary and countervailing duty measures include "any notices [and] decision memoranda … issued by the United States in connection with the … measures" ("WT/DS437/2, p.1, part A).

[16] United States' preliminary ruling request, para. 18.

[17] United States' preliminary ruling request, para. 3.

[18] See China's response to the United States' preliminary ruling request, para. 4.

United States, this does not prevent the United States, third parties and the Panel from being able to identify all of the "instances" in which USDOC applied facts available.

4.7. The Panel is not convinced that the situation before the Panel is equivalent to that before the Appellate Body in *China – Raw Materials.* In that case, it was not clear on the face of the panel request which of the listed measures allegedly violated which of the listed provisions of the covered agreements. However, in the case before the Panel, it is clear that every final and preliminary determination listed in Appendix 1 to the panel request is alleged to be inconsistent with a single provision of the SCM Agreement, namely 12.7. Therefore, in our view, the panel request "plainly connects" the measures to the provision at issue.

4.4 Did China otherwise "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"?

4.8. In its preliminary ruling request and its comments on China's response to the request, the United States' argument that China did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is based upon the contention that China did not adequately identify the "instances" of the use of facts available that are at issue. For example, the United States' reliance on the Appellate Body's statement in *EC – Selected Customs Matters,* namely that Article 6.2 of the DSU requires a succinct explanation of "how or why" the measure at issue is considered to be violating the WTO obligation in question, is rather limited.[19] It does not suggest that, in order to explain "how or why" the measure was inconsistent with Article 12.7 of the SCM Agreement, China was required to include further details of which aspects of the obligations under Article 12.7 it would be challenging in the dispute. Rather, the United States argues that "by failing to indicate what portions of the various documents in the 22 covered investigations are the alleged breach of the facts available obligations in Article 12.7, China's panel request includes no explanation - succinct or otherwise - on how or why these measures violate Article 12.7".[20]

4.9. However, in response to a Panel question, the United States perhaps presents a broader view of how the "instances" of application of facts available could have been identified. In particular, the United States notes that:

> China might have described the uses of facts available (e.g., the specific proceeding, respondent, and type of fact) that it wished to challenge and the bases for challenging those uses. Or, perhaps China could have described a specific class or type of facts available determination that it intended to challenge and the basis for that challenge.[21]

Further, in responding to a Panel question regarding the distinction between, on the one hand, "how and why" a measure violates a WTO obligation and, on the other hand, the arguments supporting a claim of violation, the United States argues:

> A complaining party bringing a facts available claim could summarize it in a number of ways, depending on the facts and legal theories at issue. For example, a complainant could state that a Member has breached Article 12.7 because it improperly rejected necessary information provided by an importer in an investigation, or because it applied facts available to an importer who was not a respondent in an investigation. Such a description would explain how or why a Member is alleged to have breached Article 12.7 but does not involve argumentation.[22]

4.10. The United States' responses to these panel questions appear to be related to the United States' submission in its preliminary ruling request in which it refers to "another source of ambiguity in China's panel request", namely that China did not specify which of the obligations found within Article 12.7 of the SCM Agreement USDOC is alleged to have breached.[23] However,

[19] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.
[20] United States' preliminary ruling request, para. 26.
[21] United States' response to Panel question 3, para. 6.
[22] United States' response to Panel question 4, para. 7.
[23] United States' preliminary ruling request, para. 22.

this argument is not forcefully pursued by the United States. In particular, the United States "does not assert that this lack of clarity, standing alone, necessarily renders this or any other panel request deficient".[24]

4.11. We note that the Appellate Body has articulated various means by which a panel request is able to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In particular, the Appellate Body has noted that a panel request must "plainly connect" the challenged measures with the provisions of the covered agreements at issue.[25] Further, the Appellate Body has stated that a brief summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[26] However, the Appellate Body has consistently held that "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel".[27] Finally, the Appellate Body has noted that whether a particular panel request meets the requirements of Article 6.2 must be assessed on a case-by-case basis.[28]

4.12. While the Appellate Body has articulated these broad statements, the precise manner in which they should be applied is not entirely clear. In particular, it is not always clear how a summary of claims should be distinguished from arguments in support of a claim. In our view, some guidance on the application of these statements, and the requirement to "provide a brief summary of the legal basis of a complaint" can be found by examining the Appellate Body's own application of Article 6.2 in specific cases.

4.13. In *US – Carbon Steel,* the Appellate Body noted that whether merely listing a treaty provision is sufficient to constitute a brief summary of the legal basis of the complaint under Article 6.2 of the DSU "will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue".[29] In *US – Certain EC Products,* the panel request stated that the "European Communities considers that this US measure is in flagrant breach of…Article 23 of the DSU".[30] The Appellate Body held that this was sufficient to include a claim of violation of Article 23.2(a) of the DSU within the panel's terms of reference. The Appellate Body reasoned that there is a close link between the all the obligations listed in the sub-paragraphs of Article 23, in that they all concern the obligation on WTO members not to have recourse to unilateral action, and so concluded that the general reference to Article 23 of the DSU was sufficient to include a claim under Article 23.2(a) of the DSU within the panel's jurisdiction.[31] Therefore, it seems the Appellate Body accepted the reference to the "flagrant breach of Article 23" as sufficient to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Similarly in *Thailand – H-Beams,* both the Panel and the Appellate Body held the panel request at issue to be consistent with Article 6.2 of the DSU. The panel request provided, relevantly, that "Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of … Article 5 … of the Anti-Dumping Agreement".[32] Ultimately, Poland's claims under Article 5 were brought under Articles 5.2, 5.3 and 5.5 of the Anti-Dumping Agreement. However, the Appellate Body held that due to the "interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to 'the procedural…requirements' of Article 5 was sufficient to meet the minimum requirements of Article 6.2".[33]

4.14. In a more recent case, *EC – Fasteners (China),* the Appellate Body held that although a complainant need not provide arguments in a panel request, in the circumstances of the case before it, it did not consider the mere listing of Articles 6.2 and 6.4 of the Anti-Dumping

[24] United States' preliminary ruling request, para. 22 and United States' comments on China's response to the preliminary ruling request, para. 14.
[25] Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162 and *China – Raw Materials,* para. 220.
[26] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[27] See, for example, Appellate Body Report, *EC – Bananas III,* para. 143.
[28] See, for example, Appellate Body Report, *Korea – Dairy,* para. 127.
[29] Appellate Body Report, *US – Carbon Steel,* para. 130.
[30] See, Appellate Body Report, *US – Certain EC Products,* para. 109.
[31] Appellate Body Report, *US – Certain EC Products,* para. 111.
[32] See Appellate Body Report, *Thailand – H-Beams,* para. 89.
[33] Appellate Body Report, *Thailand – H-Beams,* para. 93.

Agreement as adequate to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Appellate Body reasoned that the obligations in Articles 6.2 and 6.4 of the Anti-Dumping Agreement are "relatively broad in scope and apply on a continuous basis throughout an investigation".[34]

4.15. Therefore, the Appellate Body has held that merely listing the provision that forms the legal basis of the complaint will not always be sufficient to meet the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint, but that in some circumstances it may be. We note that many panels have made similar statements and in certain circumstances have found that the listing of a provision is sufficient to satisfy the obligations encompassed in Article 6.2 of the DSU.[35]

4.16. In the circumstances of this case, we note that China has provided more detail than the complainants in, for example, *US – Certain EC Products* and *Thailand – H-Beams,* in that it has not merely listed the Article at issue, but has referenced the specific sub-paragraph of Article 12 under which it brings its claim (namely, 12.7 of the SCM Agreement). In our view, in the circumstances of this case, the reference to Article 12.7 sheds sufficient "light on the nature of the obligation at issue" to satisfy Article 6.2 of the DSU.[36] Article 12.7 sets out a relatively limited range of circumstances in which it is permissible for an investigating authority to apply "facts available". In addition, the panel request indicates that China will challenge the manner that USDOC resorted to and used facts available. It also provides a higher level of precision with respect to one aspect of its claim, namely that China will challenge USDOC's use of "adverse" facts available.

4.17. While we have some sympathy for the United States' position, namely that more detail could have been provided in the panel request regarding what in particular about the manner in which the United States resorted to and used facts available is allegedly inconsistent with Article 12.7 of the SCM Agreement, we are not convinced that Article 6.2 of the DSU requires this. We also note that the United States itself concedes that this is not necessarily required under Article 6.2.[37] Our analysis of the application of Article 6.2 in previous cases seems to suggest that relatively general summaries of the "legal basis of complaint" have been accepted as sufficient to "present the problem clearly". Further, providing more precise details regarding what aspects of the resort to and use of facts available are challenged under Article 12.7 of the SCM Agreement could perhaps best be characterized as the arguments in support of the claim, rather than the summary of the claim itself.

4.18. We note that Article 6.2 of the DSU has been characterized by the Appellate Body as serving the due process objective of notifying the parties and third parties of the nature of the complainant's case[38]. We concur with this view and believe that Article 6.2 serves an important function in this regard. In the circumstances of this case, in our view, China has met the minimum requirements to fulfil this due process objective. While more precision in the panel request may have allowed the United States to prepare a detailed defence prior to receiving China's first written submission, we are of the view that the summary of the legal basis of the complaint provided by China was sufficient to put the United States on notice of the case against it to allow the United States to "begin" preparing its defence.[39] Therefore, we are not convinced that the United States' ability to defend itself has been prejudiced.

4.19. Finally, we note that the Appellate Body in *EC – Selected Customs Matters* held that the summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[40]

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[34] Appellate Body Report, *EC – Fasteners (China),* paras. 597-598.

[35] See, for example, Panel Reports, *EC – Approval and Marketing of Biotech Products,* para. 7.47 (sub-paragraphs 51-86) and *EU – Footwear,* para. 7.50.

[36] Appellate Body Report, *US – Carbon Steel,* para. 130.

[37] United States' preliminary ruling request, para. 22 and United States' comments on China's response to the preliminary ruling request, para. 14.

[38] See, for example, Appellate Body Reports, *US – Carbon Steel,* para. 126 and *EC – Selected Customs Matters,* para. 130.

[39] See, for example, Appellate Body Report, *Thailand – H-Beams,* para. 88. In particular, in our view the United States was in a position to "begin" preparing a defence to an allegation that the manner in which it applies "adverse" facts available is inconsistent with Article 12.7 of the SCM Agreement and to consider the consistency of its other uses of facts available with Article 12.7.

[40] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.

In our view, this is merely one articulation of a way in which a complainant can provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU and does not add a new element to the Article 6.2 obligation. For the foregoing reasons, we are of the view that China has indeed provided an adequate summary of its complaint.

4.20. Consequently, we conclude that China was not required under Article 6.2 of the DSU to provide more precision about its challenge to the United States' use of and resort to facts available in order to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

5 CONCLUSION

5.1. While we do not endorse a cursory approach to panel requests and acknowledge the important due process objectives served by Article 6.2 of the DSU, in the circumstances of this case, we are of the view that China has met the minimum requirements of the provision. For the foregoing reasons, we reject the United States' preliminary ruling request and conclude that China's panel request, as it relates to the facts available claim under Article 12.7 of the SCM Agreement, is consistent with Article 6.2 of the DSU.

6 DISSENTING OPINION ON WHETHER CHINA PROVIDED A SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

6.1. While I agree with the Panel majority that China adequately identified the "instances" of the use of facts available that it is challenging, in my view, China did not provide a summary of the legal basis of the complaint sufficient to present the problem clearly.

6.2. The Appellate Body has repeatedly noted that the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint sufficient to identify the problem clearly under Article 6.2 of the DSU are two "key" requirements because they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[41] It has explained further that these are distinct requirements that should not be confused.[42] Moreover, the fulfilment of these requirements is not a mere formality because a panel request forms the basis for the terms of reference of the panel and, serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case. Compliance with these two requirements is therefore *central* to defining the scope of the dispute.[43] Consequently, a panel "must scrutinize carefully the language used in the panel request".[44]

6.3. In the circumstances of this case, the United States does not contest that China has identified the specific measures at issue in its panel request. However, the United States alleges that China failed to present the problem clearly with respect to its "facts available" claims.

6.4. Since it is not contested that China has listed the measures at issue, we must ascertain, in light of the circumstances of this case:

a. if China has done more, by way of providing a brief summary of the legal basis of the complaint; and

b. if so, whether that brief summary is sufficient to present the problem clearly; or

c. whether the mere listing of the measures provides a brief summary sufficient to present the problem clearly.

6.5. The Appellate Body explained in *Korea – Dairy* that "Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint"[45]. In fact, what Article 6.2 demands is a "*brief summary*" which suggests that it can be minimal, but not insignificant. A summary is

[41] Appellate Body Report, *US – Carbon Steel,* para. 125.
[42] Appellate Body Report, *EC – Selected Customs Matters,* para. 132.
[43] Appellate Body Report, *China – Raw Materials,* para. 219.
[44] Appellate Body, *China – Raw Materials,* para. 220.
[45] Appellate Body Report, *Korea - Dairy,* para. 120.

already brief — a *brief* statement or account of the main points of something; an abstract, abridgment, or compendium of facts or statements — and Article 6.2 requires that the summary of the legal basis of the complaint contained in the request for the establishment of a panel be *brief*. However, the summary cannot be insignificant because it must be sufficient to present the problem clearly.

6.6. Article 6.2 requires a brief *summary* of the legal basis of the complaint; not simply that the legal basis of the complaint *be stated*. In other words, Article 6.2 requires *more* than simply stating the legal basis of the complaint or, put in other terms, *more* than simply stating the claim. Because Article 6.2 expressly requires a *summary* - albeit a brief one - it would be contrary to the principle of effectiveness (*ut res magis valeat quam pereat*) to strip that word of its meaning and equate the requirement to provide *a brief summary* of the legal basis of the complaint to a requirement to provide *a statement* of the legal basis of the complaint. Nonetheless, the Appellate Body has suggested that, depending on the circumstances of a case, a mere listing of the provisions of the covered agreement alleged to have been violated might serve as a brief summary of the complaint sufficient to explain the problem clearly. Thus, it would appear that in certain circumstances the Appellate Body would accept that stating the claim might also serve as a brief summary of the complaint sufficient to present the problem clearly. In my view, these must be rare cases and, per force, a model of clarity, in order to avoid depriving the words "brief summary" of any meaning, contrary to the principle of effectiveness. Thus, if there is doubt as to whether the mere listing of the provisions alleged to be breached constitutes a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in my view the conclusion would have to be that it does not.

6.7. In this case, China specifically claims:

> China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States…
>
> > (d) In connection with all of the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
> >
> > (1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[10]

———————————

[10] This claim arises in respect of each instance in which the USDOC used facts available, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.

6.8. China's specific complaint is not a model of clarity. The chapeau is a general statement that serves to introduce all of China's claims, but the elements that it contains do not necessarily apply to all of them. In the instant case, for example, the reference to the "initiation … of the identified countervailing duty investigations" obviously does not apply to China's "facts available claim", because the resort to, and use of, facts available by the investigating authority would only come later in the investigation.

6.9. Thus, in order to scrutinize and fully understand China's claim, it would appear that it could be rephrased as follows:

> The conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, and any definitive countervailing duties imposed pursuant thereto, are inconsistent with Article 12.7 of the SCM Agreement, insofar as in each instance in which USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, it did so in a manner that was inconsistent with that provision.

6.10. It should be noted that China's claim is circular: in essence, its allegation is that the identified measures are inconsistent with Article 12.7 because certain actions of USDOC - the resort to, and use of, facts available, including so-called "adverse" facts available - are inconsistent with that provision. The footnote simply adds that this is the case of each instance in which the USDOC used (or resorted to) facts available. Thus, it appears that China is essentially stating its claim: in each instance that USDOC resorted to, and used, facts available, including so-called "adverse" facts available, it acted inconsistently with Article 12.7 of the SCM Agreement and, therefore, the identified measures are inconsistent with that provision.

6.11. A review of Appellate Body reports addressing Article 6.2 of the DSU reveals that in general there are three elements that the complaining party must meet to satisfy the second "key" requirement in Article 6.2 of the DSU (unless in the circumstances of the case the mere reference to the provision(s) alleged to be breached would suffice):

a. it must state "the legal basis of the complaint" or, put another way, state its claim that an obligation contained in a specific provision of a covered agreement has been violated[46];

b. it must provide a brief summary of the legal basis of the complaint, which is *more* than simply stating the claim as it requires the complaining party to explain succinctly how or why the measure at issue is considered to be violating the WTO obligation in question[47]; and

c. the brief summary must be sufficient to present the problem clearly, by plainly connecting the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[48]

6.12. In the circumstances of this case, China has certainly stated its claim: it alleges that the obligation contained in Article 12.7 of the SCM Agreement has been violated in each instance in which USDOC used or resorted to facts available. China has also plainly connected the challenged measures with Article 12.7 of the SCM Agreement, as found by the Panel majority. The question is whether in the circumstances of this case, by plainly connecting the challenged measures with Article 12.7 China has satisfied the requirement to "explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".

6.13. Article 12.7 of the SCM Agreement provides:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

6.14. It contemplates different situations that may justify making affirmative or negative preliminary and final determinations on the basis of facts available:

a. an interested Member or an interested party may refuse access to necessary information within a reasonable period;

b. an interested Member or an interested party may otherwise not provide necessary information within a reasonable period; or

c. an interested Member or an interested party may significantly impede the investigation.

6.15. With reference to the Appellate Body's decision in *EC – Fasteners (China),* I note that Article 12.7 of the SCM Agreement is not as broad in scope as Articles 6.2 and 6.4 of the Anti-

[46] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[47] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[48] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162.

Dumping Agreement. However, Article 12.7 does contemplate several situations and applies on a continuous basis throughout an investigation.[49]

6.16. In light of this: is China's statement in item B(1)(d) of its panel request, including the reference to Article 12.7 of the SCM Agreement, a brief summary of the claim sufficient to present the problem clearly?

6.17. Having carefully examined the Appellate Body cases, I find it difficult to conclude that China's statement that the identified measures are inconsistent with Article 12.7 of the SCM Agreement is anything other than simply stating the claim; and, in the light of the content of that provision, in my view that is not enough to serve as a summary of the legal basis of the complaint sufficient to present the problem clearly. I would add that in this respect, China's claim concerning facts available is different from the other claims included in its request for the establishment of the panel.

6.18. Consequently, I disagree with the Panel majority regarding whether China's panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In my view, China's panel request is not sufficient in this regard.

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[49] Appellate Body Report, *EC – Fasteners (China),* para. 598.