

**CHINA – CERTAIN MEASURES AFFECTING
ELECTRONIC PAYMENT SERVICES**

Communication from the Chairman of the Panel

The following communication, dated 30 September 2011, from the Chairman of the Panel to the Chairperson of the Dispute Settlement Body, is circulated to Members for their information.

On 5 July 2011, China submitted to the Panel a request for a preliminary ruling concerning the consistency of the United States' request for the establishment of the Panel (WT/DS413/2) with Article 6.2 of the Dispute Settlement Understanding.

On 7 September 2011, the Panel issued the enclosed preliminary ruling to the parties and third parties. The preliminary ruling will be incorporated as an integral part of the Panel's final report.

After consulting the parties to the dispute, the Panel decided to inform the Dispute Settlement Body 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/DS413/4.

PRELIMINARY RULING OF THE PANEL

7 September 2011

I. PROCEDURAL BACKGROUND

1. On 5 July 2011, China submitted to the Panel a request for a preliminary ruling requesting that the Panel rule, as early as possible, that the United States' request for the establishment of a panel (panel request)¹ is inconsistent with the requirements of Article 6.2 of the DSU. In its request, China asked the Panel to issue a preliminary ruling before the due date of the complaining party's first written submission on the grounds that the deficiencies in the panel request are central to all of the United States' claims in this dispute.² The United States requested the Panel to decline China's request, asserting that the timing and process requested by China would depart from past WTO practice, would be unnecessary for purposes of addressing China's concern, would be unduly burdensome for the Panel and the United States, would likely delay the proceedings, and would be inconsistent with basic due process considerations.³

2. After consultations with the parties regarding the procedural implications of China's preliminary ruling request, the Panel decided to issue a preliminary ruling before the due date of the United States' first written submission because, *inter alia*, of the far-reaching consequences that agreeing with the substance of China's request might have, and because in this case proceeding in this way did not cause additional delays. The Panel gave an opportunity to the United States to submit additional written comments on China's request and also invited the third parties to submit any written comments they might have in response to the views expressed by the parties.⁴ Moreover, as neither China nor the United States requested a hearing on the preliminary ruling issue, the Panel gave the parties the opportunity to submit further written comments to respond to each other's comments.⁵ The Panel issued its ruling to the parties and third parties on 7 September 2011.

II. SUBSTANCE OF CHINA'S REQUEST FOR A PRELIMINARY RULING

3. As already pointed out, China bases its request for a preliminary ruling on Article 6.2 of the DSU, which provides as follows:

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.

4. In its request, China submits that, contrary to the requirements of Article 6.2, the United States' panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. China points out that the United States' panel request provides a definition of the services at issue in this dispute – "electronic payment services" – and identifies three relevant subsectors in China's Schedule.⁶ China recalls that the nature and extent of its

¹ See WT/DS413/2.

² China's preliminary ruling request, para. 14.

³ Letter from the United States dated 6 July 2011, p. 1.

⁴ The United States filed its comments on 29 July 2011. None of the third parties submitted comments on the first set of submissions.

⁵ On 25 August 2011, China submitted written comments on the United States' comments and the third parties' comments. On 30 August 2011, the United States submitted views on China's comments and the third parties' comments.

⁶ China's preliminary ruling request, para. 2.

market access and national treatment obligations depend not only on the particular subsector but also on the mode(s) of supply. China submits that the United States' panel request fails to explain, "even concisely"⁷, how the definition of "electronic payment services" relates to China's specific commitments in any of the three subsectors identified in the panel request, and further, that the panel request fails to indicate which mode or modes of supply the United States considers to be at issue. China considers that, due to these two deficiencies, the United States' panel request "fails to connect the challenged measures to the provisions of the covered agreements that the United States relies upon as the legal basis for its claims"⁸, which amounts to a failure to "present the problem clearly" as required by Article 6.2 of the DSU.

5. The United States considers that China's preliminary ruling request lacks merit. According to the United States, its panel request identifies the specific measures being challenged, the specific commitments at issue in China's Schedule, and the specific obligations that are the subject of the United States' complaint. In addition, the United States' panel request specifies, "with precision",⁹ the services at issue: "electronic payment services for payment card transactions".¹⁰ The United States further points out that its panel request provides "a detailed narrative"¹¹ of the claims it is making as an additional basis for China to understand "the legal basis of the complaint". The United States submits that nothing more is required and that its panel request contains information "sufficient to present the problem clearly". The United States adds in this regard that its panel request "does not merely list the articles alleged to have been violated. The request also sets forth facts and circumstances describing the substance of the dispute".¹² The United States therefore considers that its panel request is fully consistent with Article 6.2 and, accordingly, requests that the Panel reject China's request in its entirety.

6. The Panel begins its consideration of the substance of China's request for a preliminary ruling with a review of how Article 6.2 has been interpreted in WTO dispute settlement. Next, the Panel will recall the main elements of information that the panel request already provides to China and the third parties. Finally, the Panel will address the specific concerns raised by China in its request for a preliminary ruling.

III. CONSIDERATION BY THE PANEL

A. INTERPRETATION OF ARTICLE 6.2 OF THE DSU

7. The Appellate Body has explained that Article 6.2 of the DSU imposes four requirements, namely, a panel request must (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.¹³ The Appellate Body has indicated that compliance with these requirements "must be demonstrated on the face of the request" and "must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".¹⁴

⁷ China's preliminary ruling request, para. 3.

⁸ China's preliminary ruling request, para. 3.

⁹ United States' response to China's preliminary ruling request, para. 15.

¹⁰ United States' response to China's preliminary ruling request, para. 15; WT/DS413/2, p. 1 and footnotes 1 and 2.

¹¹ United States' response to China's preliminary ruling request, para. 15.

¹² United States' response to China's preliminary ruling request, para. 15; see also Panel Report, *Mexico – Corn Syrup*, para. 7.15. For full case titles and citations, see Annex A to this document.

¹³ Appellate Body Report, *Korea – Dairy*, para. 120.

¹⁴ Appellate Body Report, *US – Carbon Steel*, para. 127; see also Appellate Body Reports, *Korea – Dairy*, paras. 124-127; *Australia – Apples*, para. 418.

8. As indicated, China's request concerns the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body has explained that the term "legal basis" in Article 6.2 of the DSU refers to the claim made by the complaining party.¹⁵ A claim "sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".¹⁶

9. According to the Appellate Body, Article 6.2 calls for sufficient clarity with regard to the "legal basis", i.e. with regard to the claim or claims made by a party, because the responding party "is entitled to know what case it has to answer, and what violations have been alleged so that it can begin to prepare its defence".¹⁷ The "legal basis", which must be provided in a panel request, must be distinguished from the arguments of a party, which are "adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".¹⁸ The Appellate Body has explained that arguments in support of a claim are adduced to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision.¹⁹

10. The Appellate Body has clarified 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".²⁰ This brief summary must be sufficient to present the problem clearly.

11. Regarding the phrase "present the problem clearly", the Appellate Body has observed that in order for a panel request to "present the problem clearly", a complaining party must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits".²¹ In the Appellate Body's view, "[o]nly by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and ... begin preparing its defence'".²²

12. With regard to the requirement that a panel request allow the responding party to "begin" to prepare its defence, the panel in *Australia – Apples* observed that this requirement:

[D]oes not amount to a requirement for allowing the defendant to fully develop its defence on the sole basis of the complainant's panel request. Such an interpretation would wipe out any distinction between claims and arguments. It would also reduce to futility the subsequent phases of WTO dispute settlement. It is during the exchange of written submissions and the presentation of oral arguments that the parties confront each other's arguments and counterarguments.²³

¹⁵ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

¹⁶ Appellate Body Report, *Korea – Dairy*, para. 139.

¹⁷ Appellate Body Report, *Thailand – H-Beams*, para. 88.

¹⁸ Appellate Body Report, *Korea – Dairy*, para. 139; see also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

¹⁹ Appellate Body Report, *Korea – Dairy*, para. 139; see also Appellate Body Report, *EC – Bananas III*, para. 141.

²⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

²¹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162. See also Appellate Body Report, *US – Continued Zeroing*, para. 160.

²² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162, quoting Appellate Body Report, *Thailand – H-Beams*, para. 88.

²³ Panel Report, *Australia – Apples*, para. 7.929.

B. INFORMATION PROVIDED IN THE UNITED STATES' PANEL REQUEST

13. Having reviewed how the relevant requirements of Article 6.2 have been interpreted in WTO dispute settlement, we now turn to consider the United States' panel request. It is useful at this point to recall the main elements of information that the panel request provides to China and the third parties.

14. To begin with, the United States' panel request describes the services at issue as "electronic payment services for payment card transactions". The description is accompanied by two separate footnotes that provide, respectively, a definition of those services and an illustrative list of payment cards.²⁴

15. The panel request also identifies a number of measures at issue that are said to affect trade in, and suppliers of, the relevant services – that is to say, it refers to the requirements allegedly imposed by China as well as the "instruments" through which these requirements are claimed to be imposed. The requirements are identified and described as follows:²⁵

- (a) ChinaUnionPay (CUP) is the "only entity"²⁶ that China permits to supply electronic payment services for payment card transactions denominated and paid in RMB in China;
- (b) China requires handling by CUP of all RMB transactions in Macao or Hong Kong, China using payment cards issued in Mainland China, as well as any RMB transactions in Mainland China using RMB payment cards issued in Hong Kong, China or Macao, China;
- (c) China requires all payment card processing devices at merchant locations, all ATMs, and all point of sale (POS) terminals in China to be compatible with CUP's system and capable of accepting CUP payment cards;
- (d) China requires that all acquiring institutions post the CUP logo and be capable of accepting all payment cards bearing the CUP logo;
- (e) China requires that all payment cards, including "dual currency" cards, issued in China capable of being used for transactions denominated and paid in RMB bear the CUP logo; and
- (f) China requires that all cross-bank or inter-bank transactions involving payment cards be handled through CUP, and similarly, China prohibits the use of non-CUP payment cards for cross-region or cross-bank or inter-bank transactions.

16. As regards the WTO obligations that are the subject of the United States' complaint, the panel request identifies China's market access and national treatment obligations under Article XVI:1 and XVI:2 and Article XVII of the General Agreement on Trade in Services (GATS).²⁷

17. Lastly, the United States' panel request identifies three separate subsectors – Subsectors (d), (k) and (l) from Section II, 7 (Financial Services), B (Banking and Other Financial Services) of

²⁴ For further discussion about the United States' use of the term "electronic payment services for payment card transactions", see in particular paras. 31 and 32 below.

²⁵ See WT/DS413/2, pp. 2-3.

²⁶ See WT/DS413/2, p. 2.

²⁷ See WT/DS413/2, pp. 2-4.

China's Schedule²⁸ – for which China undertook commitments under Articles XVI and XVII of the GATS. These are:

Banking services as listed below: ... All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement);

Other financial services as listed below: ... Provision and transfer of financial information, and financial data processing and related software by supplier of other financial services; and

Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.²⁹

18. Bearing these elements in mind, we now turn to consider whether the United States' panel request provides any explanations as to how or why the measures at issue are considered to breach China's GATS obligations, or to put it another way, whether it in any way connects those measures with the cited legal provisions.

19. In considering this issue, we observe, first of all, that the text of the panel request makes it clear that each of the requirements³⁰ allegedly imposed by China is considered by the United States to be in breach of Articles XVI:1 and XVI:2 and Article XVII of the GATS. In this respect, there is consequently no confusion as to the connection the United States seeks to make between the measures at issue and the cited legal provisions.

20. As noted, the text of the panel request also supplies a description, albeit a brief one, of what the impugned measures are, and it indicates that they are considered to constitute, or result in, market access restrictions (Article XVI) and to result in less favourable treatment (Article XVII) to the detriment of foreign suppliers of relevant services. To that extent, in the Panel's view, the panel request provides an explanation both as to how and why the challenged measures are considered to breach the two legal provisions. Specifically, the panel request describes the nature of the requirements China allegedly imposes and their effects, thus informing China and third parties about how the measures give rise to the claimed violations of the cited provisions.³¹ The request addresses the issue of why the measures result in a breach of China's GATS obligations, inasmuch as it suggests that they constitute market access restrictions or give rise to less favourable treatment.³²

21. Finally, we recall that the United States' panel request identifies the subsectors that are deemed relevant. This provides a further explanation of why China is considered by the United States to have breached its GATS obligations. Essentially, what this tells China and third parties is that the challenged measures are considered to be in breach of Articles XVI:1 and XVI:2 and Article XVII of the GATS because, in the United States' view, China has undertaken commitments in subsectors which cover the specific services allegedly affected by the measures at issue.

²⁸ See WT/ACC/CHN/49/Add.2 and WT/MIN(01)/3/Add.2.

²⁹ See WT/DS413/2, pp. 1-2.

³⁰ See para. 15 above.

³¹ For example, after describing a certain requirement, the panel request goes on to discuss its effect: "This means that issuing banks must have access to the CUP system ..." (WT/DS413/2, p. 2).

³² For instance, the panel request alleges that CUP is "the only entity" that China permits to supply relevant services. Similarly, the request alleges that China imposes certain requirements regarding CUP payment cards, but that no similar requirements are imposed regarding non-CUP payment cards (WT/DS413/2, p. 2).

22. Notwithstanding this, China submits that still more clarity and explanation are needed before the United States' panel request can be deemed to "present the problem clearly" as required by Article 6.2. In particular, and as indicated, China raises concerns over the alleged failure of the United States' panel request to connect the measures and services at issue to China's commitments in a particular subsector, and to indicate the mode(s) of supply at issue. Accordingly, before forming an overall view as to the consistency of the United States' panel request with the requirement to provide a brief summary of the legal basis, we proceed to examine whether the two concerns put forward by China are well founded. We will address these concerns in turn.

C. CONNECTION BETWEEN THE SERVICES AT ISSUE AND PARTICULAR SUBSECTORS IN CHINA'S SCHEDULE

23. With regard to the connection of the services at issue to China's commitments in a particular subsector, China argues that the United States' panel request falls short because it does not explain how or why the United States considers the challenged measures to be inconsistent with China's specific commitments in any of the three identified subsectors.

24. China submits that, in order to "present the problem clearly, a panel request must identify the specific sector or subsector that allegedly covers the service at issue, or, if there are multiple services at issue, plainly associate the services at issue with the specific sector or subsector."³³ China submits that it is well established that sectors and subsectors in a member's schedule are mutually exclusive, and that therefore, any service that is the subject of a claim under the GATS can fall into only one sector or subsector of the member's schedule.

25. China points out that the United States' panel request provides a singular definition of the services at issue – "electronic payment services" – yet relies on China's commitments in three different subsectors. China observes that the term "electronic payment services" is of the United States' own making and does not correspond to any of the subsectors that appear in China's Schedule. China argues that the United States' panel request does not provide an explanation of how the services at issue as defined by the United States relate to the specific commitments in any of the identified subsectors.³⁴ Because of this, the United States' panel request in China's view does not plainly connect the services at issue with the specific sector or subsector in its Schedule. According to China, the result is that it must prepare its defence based on speculation about the nature and extent of those claims.

26. The United States requests the Panel to reject China's arguments. The United States argues that its description of the services at issue should not be considered "confusing" or "prejudicial"³⁵ as the term "electronic payment services" is drawn from industry sources and reflects the broad and common understanding within this sector of the services at issue. According to the United States, suppliers of the services who work within this sector are described as supplying, or characterize themselves as supplying, "electronic payment services" and as operating within the "global payments industry".³⁶ Further, the sector that serves credit, charge, debit and other payment card transactions characterizes itself as providing "electronic payment services".³⁷ In addition, the United States takes issue with China's assertion that the term "electronic payment services for payment card transactions" does not correspond to any of the subsectors in China's Schedule. The United States submits that the language in Subsector (d) of China's Schedule makes clear that the term "electronic payment services" falls within the definition of "all payment and money transmission services, including credit, charge

³³ China's preliminary ruling request, para. 8.

³⁴ China's preliminary ruling request, para. 9.

³⁵ United States' response to China's preliminary ruling request, paras. 17 and 34.

³⁶ United States' response to China's preliminary ruling request, paras. 17, 33, and 35-61.

³⁷ United States' response to China's preliminary ruling request, paras. 17 and 33.

and debit cards ..."³⁸ The United States also notes that the phrase "all payment and money transmission services" in China's Schedule is modified with an illustrative list stating that it "include[s] credit, charge and debit cards".³⁹

27. The United States further submits that identifying potentially mutually exclusive claims in the United States' panel request is not a failure under Article 6.2 to provide a summary of the legal basis of the complaint. In its view, whether a complaining party can prevail on separate claims advanced under potentially mutually exclusive subsectors is a substantive legal issue to be decided on the merits based on arguments and evidence that are presented in the course of proceedings. The United States contends that by identifying the three subsectors in question, the United States' panel request puts China on notice that its market access and national treatment commitments undertaken in its Schedule that cover "electronic payment services for payment card transactions" are before the Panel.⁴⁰

28. The United States also observes that China seeks a detailed explanation of the US legal arguments as to exactly how China's measures put it in breach of its commitments. The United States recalls in this respect that it is not required by Article 6.2 to present its legal arguments in advance of the US first written submission.⁴¹

29. China responds that the United States' explanation of its position underscores the lack of clarity in the United States' panel request. According to China, the explanation that the services at issue fall within Subsector (d) of Section II.7.B of China's Schedule suggests that the references to Subsectors (k) and (l) were a "distraction, at best".⁴² In the absence of any explanation, one could imagine any number of ways in which to relate "electronic payment services" to China's commitments in Subsectors (d), (k) and (l). China considers, therefore, that it was not self-evident that the United States intended to encompass all "electronic payment services" in Subsector (d).⁴³ China further notes that the United States' panel request does not identify "separate claims" under any of the three identified subsectors. China considers that if the United States intended to advance "separate claims" under three different and mutually exclusive subsectors, the time for setting forth these "separate claims" was in the panel request.⁴⁴

30. The United States responds that China offers no response to the evidence it has put forth to rebut China's argument that the term "electronic payment services" is "somehow confusing".⁴⁵ Furthermore, the United States once again rejects China's suggestion that a reference to three mutually exclusive subsectors would render a panel request defective. The United States notes that this argument would mean that whenever a complaining party advances mutually exclusive claims, such as a claim under Article II of the GATT 1994 and a claim under Article III of the GATT 1994, this would render its panel request inconsistent with Article 6.2.⁴⁶ According to the United States, China is also wrong to assert that the United States would be required to set forth "separate claims" that certain aspects of the measures are inconsistent with one subsector while other aspects are inconsistent with other subsectors.⁴⁷ The United States recalls in this regard its argument that China is not entitled to

³⁸ United States' response to China's preliminary ruling request, para. 19 (emphasis original); see also United States' response to China's preliminary ruling request, paras. 24, 135.

³⁹ United States' response to China's preliminary ruling request, para. 20.

⁴⁰ United States' response to China's preliminary ruling request, paras. 136-138.

⁴¹ United States' response to China's preliminary ruling request, paras. 21 and 23.

⁴² China's reply to United States' response, para. 17.

⁴³ China's reply to United States' response, paras. 16-17.

⁴⁴ China's reply to United States' response, paras. 19-20.

⁴⁵ United States' comments to China's reply, para. 5.

⁴⁶ United States' comments to China's reply, paras. 5 and 15.

⁴⁷ In support of its argument, the United States refers to the panel report in *EC – Trademarks and Geographical Indications (US)*, para. 7.2.

have specific legal arguments presented as to how the measures at issue breach commitments identified in the United States' panel request.⁴⁸

31. The Panel begins its consideration with some preliminary remarks about the term "electronic payment services for payment card transactions", which appears in the United States' panel request. The term refers to various services that the United States has identified as being covered by its complaint, namely those elaborated in two definitional footnotes of the panel request.⁴⁹ The term was also used by the United States in its request for consultations, but the Panel has no information as to whether that term was discussed in that context.⁵⁰ China observes that the term is "of the United States' own making" and does not appear in China's Schedule.⁵¹ The United States responds that the term is "drawn from industry sources and reflects the broad and common understanding within this sector"⁵², and that the term "electronic payment services" clearly falls within the definition of Subsector (d), in Section II.7.B of China's Schedule, which concerns "all payment and money transmission services, including credit, charge and debit cards".⁵³

32. China does not appear to assert that the meaning of the term in question is unclear. Nor does it assert that the use of that term in itself gives rise to an inconsistency with Article 6.2; China's complaint rather seems to be that the term does not appear in its Schedule. We therefore need not dwell on the meaning of the term, except to recall the clarification provided by the Appellate Body to the effect that "the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the measure at issue that generally will define the product at issue".⁵⁴ It is useful to note also that the Appellate Body has cautioned against requiring the complaining party to provide an overly detailed definition of the product that forms the basis of the complaint.⁵⁵ For these reasons, and in the absence of a specific objection from China on the use of the term in question, we see no grounds, in the context of this inquiry under Article 6.2, to question its use in the United States' panel request or the accompanying definitions.

33. Having broached the matter of product identification, we now turn to consider China's assertion that the United States' panel request fails to "present the problem clearly" by failing to connect the services at issue with the three subsectors in China's Schedule. In considering this assertion, it is important to recall once more that the requirement to "present the problem clearly" concerns the connection between the challenged measures and the cited legal provisions. As elaborated above⁵⁶, by identifying three subsectors, the United States' panel request connects these two elements, inasmuch as it makes clear that the measures are claimed to breach the cited provisions because there are relevant commitments in subsectors that are considered to cover the measures and services at issue.

34. Having said this, we note that the United States' panel request does not state explicitly how "electronic payment services for payment card transactions" relate to each of the three identified subsectors in China's Schedule. For instance, the request does not say whether the United States

⁴⁸ United States' comments to China's reply, paras. 16 and 18.

⁴⁹ See WT/DS413/2, footnotes 1 and 2.

⁵⁰ See WT/DS413/1. The Panel notes that at the first meeting of the DSB at which the United States' panel request was discussed, China referred to the United States' request for consultations, but only regarding a different concern. See WT/DSB/M/293, pp. 15 and 16.

⁵¹ China's preliminary ruling request, paras. 2 and 9.

⁵² United States' response to China's preliminary ruling request, paras. 17, 33, and 35-61.

⁵³ United States' response to China's preliminary ruling request, para. 19.

⁵⁴ Appellate Body Report, *EC – Chicken Cuts*, para. 165. This case concerned trade in goods. The Panel sees no reason, however, why the same reasoning should not apply in the services context as well.

⁵⁵ Appellate Body Report, *EC – Computer Equipment*, para. 71.

⁵⁶ See para. 21 above.

considers that each, or some, of the services at issue fall(s) within each of the three identified subsectors, and/or whether each, or some, of the services fall(s) within only one subsector, and if so, which one in particular. But it can be reasonably inferred from the panel request that, in the United States' view, each of the services at issue is covered by at least one of the three subsectors, and that none of them is alleged to fall within any other subsector.

35. China seems to consider that the services at issue could be covered by only one of the three subsectors, because the Appellate Body has found that subsectors are mutually exclusive.⁵⁷ However, even if the three relevant subsectors in China's Schedule were mutually exclusive in relation to particular services at issue, we do not consider that the mere fact of including these subsectors in the United States' panel request without further explanation would constitute a failure to "present the problem clearly".⁵⁸ It is also noteworthy that Subsectors (k) and (l) are related to Subsector (d) of Section II.7.B of China's Schedule. Subsector (d) is listed within "banking services", whereas Subsectors (k) and (l) concern "[o]ther financial services". More specifically, Subsector (l) concerns "auxiliary financial services on all activities listed in subparagraphs (a) through (k)".⁵⁹ As a result, it may not be immediately clear which of the identified subsectors covers a particular service at issue.

36. In support of its assertion, China also refers to the Appellate Body report in *Korea – Dairy*.⁶⁰ In our view, China's reliance on this report is misplaced. In that case, the Appellate Body found that the listing of WTO treaty articles might not satisfy the requirement to "present the problem clearly" if any of the cited articles contains distinct obligations.⁶¹ The argument that China appears to deduce from this is that if there are multiple services at issue that are claimed to be covered by mutually exclusive subsectors, it is not sufficient to list those services without associating them with particular subsectors in its Schedule.⁶² It is not apparent to us, however, that the facts of our case can be analogized to those in *Korea – Dairy*. The United States' panel request does not rest solely on a single-term description of the services at issue. Rather, as China itself says, it supplies a "lengthy" definition of that term and the services it encompasses.⁶³ Moreover, the United States' panel request does not merely specify the relevant services sector (financial services), but in addition details all relevant subsectors in China's Schedule. To that extent, we consider that China's reliance on the Appellate Body report in *Korea – Dairy* is misplaced. However, there remains the issue of whether in the case of the United States' panel request additional explanations were required as to the relationship between specific services and subsectors in order to "present the problem clearly".

37. In this respect and as indicated above⁶⁴, the panel request already sets forth some explanations as to how and why the challenged measures are considered to be in breach of China's obligations under Articles XVI and XVII of the GATS. Taking into account the explanations provided in the United States' panel request as well as all other information that it contains or references, the additional explanations that China is seeking in relation to the identified subsectors are in our view not required, in the circumstances of this case, to allow China to "begin" to prepare its defence. It should also be remembered in this respect that Article 6.2 requires a "brief" summary of the legal

⁵⁷ China refers to the Appellate Body Report in *US – Gambling*, para. 180; China's preliminary ruling request, para. 8.

⁵⁸ Along similar lines, another panel expressed the view that panel requests are not inconsistent with Article 6.2 merely because they do not explain why legal provisions are cited as legal bases even though these provisions may be mutually exclusive (Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 88 of the Preliminary Ruling, reproduced at para. 7.47).

⁵⁹ Section II.7 (Financial Services), B (Banking and Other Financial Services) of the Schedule (circulated in WT/ACC/CHN/49/Add.2 and WT/MIN(01)/3/Add.2).

⁶⁰ China's preliminary ruling request, para. 7.

⁶¹ Appellate Body Report, *Korea – Dairy*, para. 124.

⁶² China's preliminary ruling request, paras. 7-8.

⁶³ China's preliminary ruling request, para. 2.

⁶⁴ See paras. 19 and 20 above.

basis, and China should not, therefore, expect to receive explanations so detailed that they would enable it to "finish" preparing its defence on the sole basis of the panel request.⁶⁵ Indeed, during the course of the panel proceedings, China will have further opportunities to prepare its defence, notably after receiving the US first written submission and in advance of submitting its own first written submission. At any rate, the United States' panel request identifies the specific measures at issue, including a list of the relevant "instruments", provides a detailed description of what is covered by the term "electronic payments services for payment card transactions", exhaustively circumscribes the relevant subsectors, and also allows certain inferences to be drawn as to the relationship between the services at issue and the relevant subsectors in China's Schedule. With that information, it should be possible for China and the third parties to make at least an initial determination as to whether the services at issue are covered by the identified subsectors.

38. Beyond this, we recall that a panel request needs to set out only the claims being put forward. A complaining party is not required to include in its panel request arguments and evidence to demonstrate that the responding party's measures infringe upon the identified WTO provisions. We consider that requiring the United States to explain in its panel request exactly how the services at issue relate to the three identified subsectors would, on the facts of this case, amount to requiring the United States to provide, in its panel request, precise arguments in support of its claims that the specific measures at issue are in breach of China's obligations under Articles XVI:1 and XVI:2 and Article XVII of the GATS.

D. LACK OF AN EXPLICIT INDICATION AS TO THE RELEVANT MODES OF SUPPLY

39. As indicated above, China alleges that the United States' panel request suffers from additional deficiencies in that the panel request fails to provide any indication of which mode, or modes, of supply the United States considers to be at issue. China notes in this respect that the nature and extent of China's market access and national treatment obligations in the three subsectors identified in the panel request depend, *inter alia*, on the mode of supply. China also asserts that the United States' panel request should have explained how the challenged measures are inconsistent with China's commitments under the relevant modes of supply. China submits that due to these deficiencies, the United States' panel request has failed to "present the problem clearly" as required by Article 6.2.⁶⁶

40. China submits that given the importance of the modes of supply to the architecture of the GATS, it is hard to see how a complaining party can "present the problem clearly" if it does not indicate in the panel request which modes of supply are at issue. According to China, this is especially true where, as in this case, the responding party has made different commitments in the different modes of supply. China notes that China's commitments under modes 1 and 3 concerning "payment and money transmission services" (Subsector (d) in Section II.7.B of China's Schedule) serve to illustrate this point. China observes that to assert a claim under mode 3, for instance, the United States would have to allege that what it calls "electronic payment services suppliers" are "foreign financial institutions" that meet the requirements specified in China's Schedule, and explain why it considers this to be true.⁶⁷

41. China further points out that in other disputes arising under the GATS, the complaining party identified in its panel request which modes of supply were at issue, and explained how the challenged measures related to those modes of supply.⁶⁸ China further cites an example of a case where the

⁶⁵ Panel Report, *Australia – Apples*, para. 7.929.

⁶⁶ China's preliminary ruling request, paras. 3, 11, and 13.

⁶⁷ China's preliminary ruling request, paras. 10-11.

⁶⁸ China refers to the following panel requests: *China – Publications and Audiovisual Products* (WT/DS363/5), *Mexico – Telecoms* (WT/DS204/3), *US – Gambling* (WT/DS285/2) and *Canada – Autos* (WT/DS142/2).

complaining party in its panel request explained how limitations or conditions on market access or national treatment in the relevant mode(s) of supply related to the claims at issue.⁶⁹ China contends that in the present dispute, the United States' panel request is silent on these aspects of the US claims.⁷⁰

42. China argues that due to the above-noted deficiencies, it had to begin preparing its defence based on nothing more than speculation about the nature and extent of the US claims. China submits that it should not be left to wonder what specific claims have been made against it.⁷¹

43. The United States counters that for each of the subsectors identified in the United States' panel request, China undertook both market access and national treatment commitments for modes 1 and 3 as specified in its Schedule. The United States also points out that the commitments for each mode of supply for Subsectors (d), (k) and (l) in Section II.7.B of China's Schedule are specified therein. According to the United States, the panel request thus puts China on notice as to which of China's market access and national treatment commitments, including the modes of supply, are before the Panel.⁷²

44. The United States argues that in its request for a preliminary ruling China appears to acknowledge the claims that are before the Panel in light of the United States' panel request, but in addition seeks a detailed legal explanation of exactly how China's measures put it in breach of its commitments. In the United States' view, China is not, however, entitled to see in advance of the US first submission how the United States will present its legal arguments.⁷³

45. With regard to the issue of identification of the modes of supply, the United States therefore considers that China's arguments are without merit. The United States contends that its panel request is fully consistent with Article 6.2.

46. China responds that the United States attempts to rectify a deficient panel request in a subsequent submission. According to China, the United States in its comments on China's preliminary ruling request appears to be explaining: (i) that it considers its claims to arise under modes 1 and 3; and (ii) that because modes 1 and 3 are among the four modes of supply, the panel request put China on notice as to which modes of supply were at issue. China points out, however, that the United States' panel request makes no reference to the modes of supply and that the United States supplied an explanation that is altogether absent from the panel request. Also, in China's view, the fact that modes 1 and 3 are among the four possible modes of supply did not, by itself, put China on notice as to which modes were at issue and provide a sufficient basis for China to begin preparing its defence.⁷⁴

47. The United States responds that there is no basis for any alleged confusion regarding the modes of supply at issue, as those modes are set out in the commitments explicitly identified in the United States' panel request. The United States considers "remarkable" the apparent position of China that it is uncertain as to the modes at issue with regard to the GATS commitments it has undertaken.⁷⁵ The United States notes that with regard to each of the subsectors identified in the United States' panel request, China undertook both market access and national treatment commitments for modes 1 and 3 as specified in its Schedule. According to the United States, the commitments for each mode of

⁶⁹ China refers to the panel request in *China – Publications and Audiovisual Products* (WT/DS363/5).

⁷⁰ China's preliminary ruling request, para. 11.

⁷¹ China's preliminary ruling request, paras. 13-14.

⁷² United States' response to China's preliminary ruling request, paras. 22 and 136.

⁷³ United States' response to China's preliminary ruling request, paras. 22 and 137.

⁷⁴ China's reply to United States' response, paras. 10-12.

⁷⁵ United States' comments to China's reply, para. 17.

supply for Subsectors (d), (k) and (l) in China's Schedule are specified therein, and the United States' panel request thus puts China on notice as to China's market access and national treatment commitments, including the modes of supply, that are before the Panel.⁷⁶

48. The Panel notes that the United States' panel request does not explicitly identify any modes of supply. It is clear from the request, however, that in the United States' view, China has undertaken market access and national treatment commitments in three identified subsectors that cover electronic payment services for payment card transactions.⁷⁷ The United States argues that China therefore has notice as to which of its market access and national treatment commitments, including the modes of supply, are before the Panel.

49. In considering this argument, we note that, on its face, the United States' panel request does not reveal an intention to limit claims to only certain modes of supply. In those circumstances, it is reasonable to infer that the United States wishes to be able to base its claims on relevant market access and national treatment commitments under any corresponding modes of supply. Consequently, where China's Schedule sets forth a relevant commitment in a relevant subsector, the corresponding mode of supply can on the facts of this case be assumed to be at issue, whether it is mode 1, 2, 3 or 4. We are therefore of the view that although the United States' panel request does not explicitly indicate which modes of supply the United States considers to be at issue, the modes at issue are nonetheless ascertainable from the request, notably via the reference to the relevant subsectors.

50. Accordingly, and due notably to the fact that the United States' panel request identifies three distinct subsectors, the request gives notice to China, and the third parties, that a substantial number of China's market access and national treatment commitments are at issue. This does not mean, however, that China is not in a position to begin preparing its defence. Rather, it means that in beginning that task, China may need to cover a lot of ground, or as China calls it, "permutations".⁷⁸ In the instant case, we do not consider that this is objectionable in and of itself.⁷⁹ Indeed, it must be remembered that the United States is not prohibited under Article 6.2 from including in its panel request claims on any of China's commitments that it considers to be applicable to the challenged measures, while remaining free to decide subsequently not to pursue claims based on certain of those commitments. It should also be recalled that the United States' panel request identifies the specific measures at issue, including a list of the relevant "instruments". This information should assist China in forming a view as to whether a particular measure is or is not subject to a market access or national treatment commitment concerning a particular mode of supply.

51. China submits that the United States' panel request is defective also because it fails to explain how the challenged measures are inconsistent with China's commitments under the relevant modes of supply.⁸⁰ We are not persuaded that the United States' panel request needs to provide this type of explanation in order for it to "present the problem clearly". As indicated above⁸¹, the panel request sets forth explanations as to how and why the challenged measures are considered to be in breach of China's obligations under Articles XVI and XVII of the GATS. Taking into account the explanations already provided in the United States' panel request as well as all other information that it contains or references, the additional explanations that China is seeking are in our view not required, in the

⁷⁶ United States' comments to China's reply, paras. 6 and 17.

⁷⁷ See WT/DS413/2, p. 2, where it is stated that "[d]espite those commitments [of China]", China has imposed restrictions on electronic payment services suppliers of other Members that are considered to be in breach of China's GATS obligations.

⁷⁸ China's preliminary ruling request, para. 12.

⁷⁹ We note that a similar view was expressed by a previous panel. See para. 101 of the Preliminary Ruling, which is reproduced at para. 7.47 of the Panel Report in *EC – Approval and Marketing of Biotech Products*.

⁸⁰ China's preliminary ruling request, para. 11.

⁸¹ See paras. 19 and 20 above.

circumstances of this case, to allow China to "begin" preparing its defence. As we have said, China should not expect to be able to "finish" preparing its defence on the sole basis of the summary to be provided in the panel request.

52. Moreover, we recall that a panel request needs to set out only the complaining party's claims, not the arguments in support of those claims.⁸² We consider that requiring the United States to explain in its panel request how or why the challenged measures are inconsistent with China's commitments under the relevant modes of supply would, on the facts of this case, amount to requiring the United States to provide precise arguments in support of its claims.

53. Regarding the examples cited by China of other panel requests⁸³, we agree with China that they are more explicit in providing information on relevant modes of supply and commitments than the panel request submitted in this dispute.⁸⁴ As a general matter, we agree that it would be desirable for complaining parties to strive to provide explicit information about the GATS claims at issue where this is possible without compromising the case they plan to make.⁸⁵ Not least, this might go some way towards forestalling procedural objections under Article 6.2, which, as our case shows, impose additional work on panels and the parties that detracts from that to be devoted to addressing the substance of complaining parties' claims. However, the issue before us is not what is desirable, but what is necessary, on the merits of each case, to meet the requirements of Article 6.2. Applying those requirements to the panel request at hand and without prejudging whether it might in other cases be necessary to indicate the modes of supply at issue, we are satisfied that further details on relevant modes of supply and commitments are not necessary in this case.

54. For the reasons given above, we reject China's assertion that the United States' panel request fails to inform China as to which modes of supply are at issue. We also conclude that, contrary to China's assertion, the United States' panel request considered as a whole does not need to explain further how the challenged measures are inconsistent with China's commitments under the relevant modes of supply.

E. CONCLUSION

55. As is clear from the foregoing, we do not agree with China's assertion that on the facts of this case, the United States' panel request needs to (i) provide further explanation so as to connect plainly the measures and services at issue to China's commitments in a particular subsector; or (ii) indicate explicitly which modes of supply are at issue and explain how the measures are inconsistent with China's commitments under these modes.

56. In coming to this conclusion, we have taken into account, *inter alia*, the fact that the United States' panel request provides a substantial amount of relevant information. We recall in this regard that the United States' panel request establishes a connection between each of the challenged measures and each of the cited legal provisions. In our assessment, the United States' panel request connects these two elements "plainly"⁸⁶. Furthermore, as we have also observed, the United States' panel request offers explanations both as to how and why those measures are considered to put China in breach of its obligations under Articles XVI:1 and XVI:2 and XVII of the GATS. While the

⁸² Appellate Body Report, *EC – Bananas III*, para. 141.

⁸³ See China's preliminary ruling request, footnote 8.

⁸⁴ We note, though, that the panel request in the dispute *EC – Bananas III* did not specify the modes of supply at issue. See WT/DS27/6.

⁸⁵ See Appellate Body Report, *India – Patents (US)*, para. 94.

⁸⁶ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

explanations given are concise, the Appellate Body has clarified that the requirement in Article 6.2 is to explain "succinctly" how or why an inconsistency with WTO obligations is considered to arise.⁸⁷

57. In the light of these elements, we are unable to agree with China that without additional information and explanations on the issues of concern to it, the United States' panel request leaves China to speculate about the claims that are being made. In our view, the summary that the United States' panel request provides of the legal basis is sufficient to "present the problem clearly". In particular, we consider that it gives China adequate notice as to the case it has to answer and allows it to begin preparing its defence. We are not persuaded, therefore, that additional information or explanations of the kind China is seeking are needed for the US panel request to satisfy the requirement in Article 6.2 to provide a brief summary of the legal basis sufficient to present the problem clearly.

IV. OVERALL CONCLUSION

58. Overall, we thus conclude that China has failed to establish that the United States' panel request is inconsistent with Article 6.2 of the DSU on the grounds that it does not provide a brief summary of the legal basis sufficient to present the problem clearly. Accordingly, we reject China's preliminary objection of 5 July 2011 and will continue our consideration of this case in accordance with the timetable that has been set for these proceedings.

⁸⁷ Appellate Body Report, *EC – Selected Customs Matters*, para. 130. See also Appellate Body Report, *Korea – Dairy*, para. 120 (stating that the summary of the legal basis may be a brief one).

ANNEX A:

TABLE OF WTO CASES CITED IN THIS PRELIMINARY RULING

Short Title	Full Case Title and Citation
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, 3499
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009

Short Title	Full Case Title and Citation
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
