

**CHINA – MEASURES RELATED TO THE EXPORTATION
OF VARIOUS RAW MATERIALS**

Communication from the Panel

The Panel has asked the Chairman of the Dispute Settlement Body to circulate to the Members for their information, the following communication dated 7 May 2010 from the Panel to the Parties.

By means of this communication, the Panel hereby responds to China's request for a preliminary ruling dated 30 March 2010, regarding the compliance of the Complainants' panel requests with the requirements of Article 6.2 of the DSU in the above-mentioned disputes.

The Panel has carefully examined the views expressed by all Parties and Third Parties with respect to China's request. The Panel has decided to rule today on some parts of China's request and to reserve its decision on other parts.

In sum, the Panel today rules as follows:

- The Panel finds that its terms of reference are limited to those measures explicitly identified by bullet points in each of the three sections of the Complainants' panel requests.
- Of these measures, the Panel finds that the term "related measures" as referred to in the last bullet point in each of the listed measures, is too broad and undefined a term and therefore falls outside the Panel's terms of reference.
- The Panel decides that its terms of reference are not limited to those products falling under the tariff lines described in footnotes one to nine of the panel requests. The Panel concludes that these tariff lines are only indicative of the broad scope of the challenge.
- The Panel rules that the panel requests include the two corrected tariff lines regarding zinc.
- The Panel finds that the Complainants' claims under paragraph 342 of the Report of the Working Party on the Accession of China fall outside its terms of reference.
- The Panel will not consider the preliminary ruling submitted by the Complainants from a separate, ongoing panel proceeding.

Until it has examined the Complainants' first written submissions and in order to preserve fully China's ability to defend itself, the Panel decides to reserve its decision on:

- Whether the Complainants' panel requests sufficiently identify the measures at issue and the products possibly affected by such measures.
- Whether the Complainants' panel requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

The Panel's detailed analysis of the issues under consideration and rulings with respect to these issues is hereby annexed.

For purposes of transparency and due process, and having consulted the Parties, the Panel intends to send a copy of this communication to all Third Parties in the proceedings and will also request that this communication be circulated to all WTO Members.

ANALYSIS AND RULINGS BY THE PANEL

1. On 30 March 2010, China filed a request before this Panel for a preliminary ruling.¹ China asserted that specific sections of the Complainants' panel requests² for the establishment of this Panel (panel requests) are inconsistent with Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).³ The Parties presented preliminary written submissions. China commented on the Complainants' Joint Response to China's preliminary ruling request whereas the Complainants did not comment on China's comments.⁴ On 29 April 2010, the Panel held a hearing with the Parties and a separate session with the Third Parties on China's request. On the same date, the Panel sent written questions to the Parties on China's request. The Parties responded to the Panel's questions on 3 May 2010 and submitted comments on 5 May 2010 on each other's responses.

2. Essentially, China argues that the Complainants' panel requests do not comply with the requirements of Article 6.2 of the DSU because they do not identify clearly and specifically enough which measures are challenged and for which specific products. China also argues that the panel requests do not provide a brief summary of the legal basis sufficient to present the problem clearly, as the measures identified in Section III of the panel requests are not plainly connected to the list of provisions that the Complainants consider to be infringed.

3. The Panel recalls that the DSU does not provide for preliminary rulings requests by parties although their occurrence has increased recently, notably in challenging the jurisdiction of panels traditionally based on the Complaining party's panel request.

4. Article 6.2 of the DSU requires, *inter alia*, that a panel request identifies the "specific measures at issue" and provides "a brief summary of the legal basis (...) sufficient to present the problem clearly". The need for precision in the panel requests flows from the two essential purposes of the terms of reference, namely, to define the "scope of the dispute" and to serve the "due process" objective of notifying the parties and third parties of the nature of the complainants' case.⁵ Compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole and the parties' first written submission if necessary, and in the light of attendant circumstances.⁶

¹ China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010 (China's request).

² Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

³ For instance, see China's request, paras. 3 and 30, as well as the Annex of China's request.

⁴ See China's request; Response of the United States, European Union, and Mexico to China's request (Joint response on 21 April 2010) and China's Comments on the Joint Response (China's comments) (23 April 2010). The Complainants sent emails on 25 April informing the Panel that they chose not to comment in writing on China's comments. This was an optional procedure in the Panel's timetable for the Preliminary ruling proceedings.

⁵ Appellate Body Report on *EC – Chicken Cuts*, para 155 referring to Appellate Body Report on *US – Carbon Steel*, para. 126 (quoting Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, 167, at 186 (emphasis omitted); and referring to Appellate Body Report on *EC – Bananas III*, para. 142).

⁶ Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also, Appellate Body Report on *US – Carbon Steel*, para. 127

5. The Panel has given due consideration to the Parties' requests and arguments. It has carefully examined the Complainants' panel requests in light of both the letter and the spirit of Article 6.2 of the DSU⁷, as they define its jurisdiction and terms of reference. The Panel has also taken into account the need to ensure China's ability to defend itself⁸ and its right to be well informed of the Complainants' case, as well as the right of the Complainants to have a prompt resolution of the disputes⁹ in accordance with Article 3.3 of the DSU, while keeping in mind that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."¹⁰

6. Taking into account all these elements, the Panel issues its preliminary ruling on the following aspects.

THE MEASURES CHALLENGED

7. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge.¹¹ China's main focus is on the alleged lack of defined products covered by each challenged measure. Before addressing this argument from China, the Panel will discuss two sets of terms used by the Complainants in their panel requests of concern to the Panel itself:¹² the use of "among others" preceding the lists of challenged measures and the reference to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" to any of the listed measures, as identified in the last bullet point of each of the listed measures in each of the three sections of the Complainants' panel requests.

8. The Panel recalls that within the meaning of Article 6.2 of the DSU, a panel request must specify the measures challenged. The Panel is aware that the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request. Instead, the Appellate Body found that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."¹³ A measure may thus be identified by its substance or nature¹⁴, so long as what is referred for adjudication by a panel may be discerned from the panel request.¹⁵

9. As the goal of such requirements is, *inter alia*, to ensure that the defendant is well aware of the scope of the challenge it faces in a dispute, the Panel believes that the defendant in any panel procedure must know clearly which of its measures are challenged. So "as a general rule, the

⁷ Appellate Body on *EC – Bananas III*, para. 142.

⁸ Appellate Body Report on *US – Carbon Steel*, para. 127. See also, Appellate Body Report on *Korea – Dairy*, para. 127.

⁹ Regardless of the fact that there are three complaints (DS394, DS395 and DS398) which implies three different disputes, the Panel will refer in its subsequent communications to "dispute" when referring to the process of this current Panel.

¹⁰ Appellate Body Report on *US – FSC*, para. 166.

¹¹ For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

¹² The Panel has the right and obligation to address issues even if the parties to the dispute remain silent on those issues. Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 35.

¹³ Appellate Body Report on *US – Continued Zeroing*, para. 169.

¹⁴ Panel Report on *Argentina – Footwear (EC)*, para. 8.40. See also, Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.47.

¹⁵ Appellate Body Report on *US – Continued Zeroing*, para. 168.

measures included in a panel terms' of reference must be measures that are in existence at the time of the establishment of the panel".¹⁶

1. "among others"

10. The panel requests contain an introductory paragraph and then three sections. Each section refers to a generic type of measure – export quotas, export duties and additional restraints imposed on exportation. Each section is composed first of narrative paragraphs describing what the complainants' consider generally to be the "problem", second, of a list of challenged legal instruments and finally, of a list of the WTO obligations alleged to have been violated by the listed measures.

11. The Panel is concerned with certain aspects of the three lists of challenged measures. After the narrative paragraph(s) in each of the three sections, the Complainants identify the lists of measures with the following phrase: "...these Chinese measures are reflected in, *among others*" (emphasis added). This phrase indicates that the measures listed by bullet points in the panel requests are not the only measures allegedly inconsistent with WTO obligations and leaves open the possibility that the Complainants might include additional measures in subsequent submissions.

12. The Panel is of the view that the Complainants cannot be allowed to include additional measures other than those listed and identified by bullet points in the panel requests. Such an "open ended" list would not contribute to the "security and predictability" of the WTO dispute settlement system as required by Article 3.2 of the DSU.

13. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests fall within the Panel's terms of reference and will thus be examined by the Panel.

2. "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures"

14. In response to the Panel's questions during the preliminary ruling hearing, the Complainants suggested that they do not intend to introduce new measures and that the phrase "among others" is intended to cover the same situations as those envisaged by the last bullet point of each of those three lists which reads "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures".

15. The Complainants add that the purpose of the "among others" phrase, as well as the last bullet in the list of legal instruments referring to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" is to make clear that the Chinese legal instruments that the Complainants have been able to identify to date may not be the only ones through which China maintains the measures at issue, and to specifically include such instruments within the Panel's terms of reference.¹⁷

16. The Panel shares the concern that a respondent should not be allowed to unilaterally modify one or more of the initially challenged measures with a view to avoiding a Panel's jurisdiction. At the same time, measures to be included in the Panel's terms of reference should generally exist at the time of the filing of the panel request. There are nonetheless situations where new governmental actions were considered to be so closely linked to the challenged measure that they were also considered to

¹⁶ Appellate Body Report on *EC – Chicken Cuts*, paras. 156.

¹⁷ Complainants' answer to the Panel's questions after the preliminary ruling hearing, para. 19.

have been captured by the Panel's initial terms of reference. Amendments to challenged legislation that do not change the "essence" of the initial measure bring the amended measure under the initial terms of reference.¹⁸ The same was said when the initial measure expired and was replaced by a new one or when the effect of the new (implementing) measure is the same as the expired one.¹⁹ However, in *EC – Chicken Cuts* two related measures were adopted during the panel process but were considered to be excluded from the terms of reference because, although related to the same matter and having the same effect, they were not amendments to the original measures with the same essence as the original measures.

17. In the Panel's view, undefined "related measures" is too broad a term and does not allow China to know clearly what specific measures are being challenged in the current disputes. For this reason, the Panel believes that the Complainants cannot add to their list of challenged measures a broad scope of "related measures".²⁰

18. Therefore, the Panel will not read the last bullet point of each of the three lists of specific measures as referring to any "related measures".

19. With regard to the reference to "implementing measures", it is not clear whether the Complainants refer to domestic implementing measures or whether they seek to include the measures that China may have to implement if the Complainants were to succeed in this current challenge. The Panel reads these terms to refer to actions taken by China to implement existing challenged measures.²¹

20. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests - as well as any future amendment(s) or extensions, replacement measures, renewal measures and implementing measures, as described above by the Panel - fall within the Panel's terms of reference and will thus be examined by the Panel.

3. Whether the identification of the measures requires the specification of the products concerned

21. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge because the Complainants do not adequately specify which specific products are covered by each challenged measure.²² In order to properly identify the challenged measures, and since many of the listed measures are laws of general application, China argues that the Complainants should have identified the specific products for each of the measures. In response, the Complainants assert that they have clearly listed the basic products concerned by the dispute.²³ The Complainants argue that the reference to "various forms" of the nine materials mentioned in the introductory paragraph of the panel requests, as well as the descriptive list of tariff lines included through footnotes one to nine, seek to provide examples of the broad scope of their challenge.²⁴ In turn, China

¹⁸ Appellate Body Report on *Chile – Price Band System*, para. 139.

¹⁹ Appellate Body Report on *US – Upland Cotton* (21.5), para. 270.

²⁰ The Appellate Body noted in a case that the phrase "implementing measures and other related measures" does not identify the specific measures at issue as required in Article 6.2 of the DSU. Appellate Body Report on *EC – Selected Customs Matters*, para. 152, footnote 369.

²¹ The Panel will not read this phrase as involving a measure subject to proceedings under Article 21.5 of the DSU.

²² For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

²³ Joint Response, paras. 13-22.

²⁴ *Ibid.*

seeks to have the scope of the disputes limited to the explicit tariff lines listed in footnotes one to nine regarding each product mentioned in the introductory paragraph of those panel requests.²⁵

22. The Panel notes that the Complainants identified in their panel requests nine "materials"²⁶: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.²⁷ The Complainants added a footnote to each of these materials. In each footnote, the Complainants stated that each material "includes but is not limited to" a series of tariff lines.²⁸ The Panel understands that the introductory paragraph of the Complainants' panel requests serves to describe generally the scope of the Complainants' challenge. In that introductory paragraph, the Complainants state, in a general manner their concerns over export-related restrictions alleged to be imposed by China through measures concerned with those nine materials. Then, in each of the following three sections in their panel requests, the Complainants submit the legal description or framework of their challenge against the specific measures imposing generally "export quotas", "export duties" and "additional restraints imposed on exportation", alleged to be maintained by China on (some of) those nine products. Accordingly, the Panel understands that each of the listed measures identified in each of the three sections of the panel requests will cover one, some or all of the nine materials mentioned in the introductory paragraph of the panel requests.

23. The Panel considers that the Complainants could also have identified for the nine materials at issue, each and every potentially relevant tariff line, or they could have stated that their claims target "all" tariff lines between X,Y or Z HS lines concerned by each of the nine products identified. But the Complainants chose to only announce the broad scope of their challenge and seem to have wanted to provide more specificity only in the following three sections of their panel requests. Indeed, the following three sections of each panel request then list the specific measures covering, one or more of the nine materials listed in the introductory paragraph.

24. In the Panel's view, the introductory paragraph offers a general presentation of the dispute and the more specific elements of the challenge are included in Sections I, II and III of the panel requests. If the first general listing of products mentioned in the introductory paragraph does not fully inform China of the exact scope of the products concerned by the dispute, the measures listed in the following sections - the Chinese legal instruments - are alleged to provide more specificity. In other words, each of these Chinese legal instruments has a specific product application that covers one, some or all of the products listed in the introductory paragraph of the panel request.²⁹

25. The Panel, therefore, rejects China's claim that the terms of reference of this Panel are limited to the measures represented by the tariff lines listed in the footnotes to the products mentioned in the introductory paragraph of the Complainants' panel requests.

26. The Panel agrees with China that the claims need to be as clear as possible and as early as possible in the panel process so as to allow China to defend itself fully. The Panel is also aware that pursuant to Article 19 of the DSU, it can ultimately only make recommendations on specific provisions of specific measures and therefore may need to consider and examine the specific situation of specific challenged instruments as they apply to specific products or group of products.

²⁵ China's request, paras. 13-19. See also, China's comments, para. 31.

²⁶ By "materials", the Panel also understands "products".

²⁷ As noted in para. 29 of China's request, the Complainant's panel requests are nearly identical. Therefore, any reference to the panel requests refer to any of the documents referred to in footnote 2.

²⁸ See footnotes one to nine of the panel requests.

²⁹ Appellate Body Report on *EC – Chicken Cuts*, para. 165-66.

27. Even if, as noted above, the Complainants' panel requests could have been more detailed, in that the Complainants could have identified the measures and the materials they referred to³⁰, the Panel is of the view that when it is requested to assess the clarity of a panel request, with reference to the requirements of Article 6.2 of the DSU, it has to consider the panel request as a whole³¹ and as part of an integrated and evolving panel process. The Panel believes that there is a possibility that the parameters of some challenged measures will be clarified by the Complainants' first written submissions. Therefore, in the Panel's view, the overall sufficiency of a panel request and whether the right of the respondent to defend itself adequately was or was not prejudiced, may be better determined in light of the Parties' first written submissions.³²

28. In that context, the Panel notes in particular the undertaking by a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

29. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage once it has examined the Parties' first written submissions and is able to take full account of China's ability to defend itself. In that context, the Panel notes that it has provided China with a long period of time to respond to the Complainants' first written submissions. The Panel is not saying that all flaws in a panel request can be cured by a first written submission³³ but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

4. The specific problem of the typographical error of the HS line regarding the zinc

30. China requested that the Panel exclude from its terms of reference any claims concerning two tariff lines erroneously identified by the Complainants in the context of zinc.³⁴ As soon as they became aware of this error, the Complainants admitted that these two tariff lines were typographical errors and referred (the Panel and the complainants) to the correct tariff lines.³⁵ In response to a Panel question and at the request of the Panel, China accepted the correction of these two typographical errors and it made clear that China's understanding of the panel requests includes the "corrected tariff lines".³⁶

31. In light of China's response, the Panel will also read the panel requests as including the two corrected tariff lines.

³⁰ Appellate Body Report on *EC – Chicken Cuts*, para. 165-66. However, in paragraph 167 of this same ruling, the Appellate Body recognized that under some circumstances it may be necessary to identify the products at issue.

³¹ Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also: Appellate Body Report on *US – Carbon Steel*, para. 127.

³² Appellate Body Report on *US – Carbon Steel*, para. 127.

³³ Appellate Body Report on *EC – Bananas III*, para. 143.

³⁴ China's request, para. 66 and China's comments, para. 32.

³⁵ Footnote 15 and para. 18 of the Joint Response. During the hearing for the preliminary ruling request, a representative of the Complainants admitted that they became aware of it in the course of the proceedings.

³⁶ China's answer to the Panel's questions after the preliminary ruling hearing, paras. 4-5.

THE REQUIREMENT TO PROVIDE A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY WITH REGARD TO SECTION III OF THE PANEL REQUESTS

32. China submits that the Section III of the Complainants' panel requests do not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, contrary to the requirements of Article 6.2 of the DSU. For China, this is because in Section III there is no clear connection between the listed measures, the list of WTO provisions claimed to be violated and the narrative paragraphs that describe generally how "some" of the listed measures are inconsistent with "some" WTO disciplines.³⁷ China claims that this lack of clarity is exacerbated by the Complainants' subsequent contradictory argument that "all" 37 listed measures are inconsistent with "all" 13 listed WTO obligations. According to China, such a "double listing" approach is contrary to the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.³⁸

33. In the Panel's view, whether the mere listing of articles of a particular WTO agreement is sufficient to comply with the requirement to provide a summary of the legal basis of the complaint³⁹, is to be determined on a case-by-case basis.⁴⁰ In some instances, especially if a provision contains multiple obligations within it, a mere listing would not be sufficient to satisfy the obligation in Article 6.2.⁴¹

34. In that context, the Panel notes in particular that:

"a 'brief summary of the legal basis of the complaint' required by Article 6.2 of the DSU 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. This brief summary must be sufficient to present the problem clearly. Taken together [with the identification of the measures at issue], these different aspects of a panel request serve not only to define the scope of a dispute, but also to meet the due process requirements."⁴²

35. The Panel recalls that Section III of the panel requests, entitled "Additional Restraints Imposed on Exportation", comprises three sub-parts: first, it contains narrative paragraphs, then a list of measures and, finally, the WTO provisions that the Complainants consider are infringed by the listed measures. The narrative paragraphs describe generally the types of measures that the Complainants are challenging and points to some of their WTO inconsistency. In the Panel's view, these narrative paragraphs aim at explaining succinctly how and why some of the challenged measures at issue are inconsistent with some of the WTO principles. Then, the listed legislative instruments identified by bullet points appear to be the more specific measures alluded to in the narrative paragraphs; the final part provides a list of all WTO obligations that would be violated by one or all of the listed measure.

³⁷ For instance, see China's request, paras. 48-58.

³⁸ For instance, see China's comments, paras. 48-63.

³⁹ Appellate Body Report on *Korea – Dairy*, para. 124.

⁴⁰ Appellate Body Report on *Korea – Dairy*, para. 127.

⁴¹ Appellate Body Report on *Korea – Dairy*, para. 124.

⁴² Appellate Body Report on *EC – Selected Customs Matters*, para. 130.

36. The Panel agrees with China that the Complainants' argument that all the listed measures violate all the listed WTO obligations seems to contradict the substance of the narrative paragraphs that some (groups of) measures are inconsistent with some of the listed WTO obligations.

37. However, as noted before, the Panel is aware that WTO panel proceedings are an integrated and evolving process and the sufficiency of a panel request is to be determined by taking into account the Parties' first written submissions in order to assess fully whether the ability of the respondent to defend itself was prejudiced.⁴³

38. In that context, the Panel notes, in particular, the undertaking from a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

39. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage, once it has examined the Parties' first written submissions and is more able to take fully into account China's ability to defend itself. In that context, the Panel notes that it has provided China with an extensive period of time to respond to the Complainants' first written submissions. The Panel has already noted that it is not saying that all flaws in a panel request can be cured by a first written submission⁴⁴ but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

THE COMPLAINANTS' WITHDRAWAL OF THEIR CLAIMS UNDER PARAGRAPH 342 OF THE REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA

40. The Panel notes that the Complainants have informed China and the Panel that they do not intend to pursue any claims regarding China's obligations under paragraph 342 of the Working Party Report on the Accession of China and referred to in Section II of their panel request via Article 1.2 of China's accession Protocol.⁴⁵

41. Therefore, the Panel rules that these specific claims fall outside the Panel's terms of reference.

THE REFERENCE TO A PRELIMINARY RULING FROM ANOTHER PENDING CASE

42. The Complainants submitted in support of their allegations, a copy of a preliminary ruling issued by another panel in an ongoing case. Korea, as the respondent in this other dispute and a Third Party in the present one, requests the Panel to refrain from taking into account in any way this preliminary ruling. China shares Korea's concerns.⁴⁶

43. The Panel notes that this preliminary ruling was not circulated to WTO Members and is not yet an official WTO document within the meaning of the Decision on Derestriction.⁴⁷ The Panel notes also that WTO dispute proceedings are generally understood to be confidential unless otherwise determined by panels with the agreement of the parties.

⁴³ Appellate Body Report on *US – Carbon Steel*, para. 127.

⁴⁴ Appellate Body Report on *EC – Bananas III*, para. 143.

⁴⁵ Joint Response, para. 35.

⁴⁶ China's answer to the Panel's questions after the preliminary ruling hearing, para. 13.

⁴⁷ Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, adopted on 14 May 2002.

44. In light of this, the Panel will not consider this preliminary ruling issued in another ongoing panel process. The Panel also requests the Parties to omit any further reference to this preliminary ruling or any other document illustrating panel deliberations from pending cases.

CONCLUSION

45. The Panel has decided to issue its preliminary ruling in two stages.⁴⁸ In issuing the ruling in this manner, the Panel has kept in mind that according to Article 3.10 of the DSU, the Parties are required to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".

46. The Panel has ruled on issues which are relevant to its own jurisdiction and that could not be clarified by the parties' first written submission or at any other stage during this panel process. The Panel reserves its decisions on China's request that the Complainants' panel requests do not sufficiently identify the product coverage of each of the listed measure and do not comply with the requirements of Article 6.2 of the DSU. The Panel expects that the Complainants will clarify in their first written submissions which of the listed measures (or group thereof) for which specific products (or group thereof) are inconsistent with which specific WTO obligations among those listed in the last part of Section III of their panel requests. In ruling this way, the Panel wants to ensure that China is able to defend itself appropriately and that this panel process is not unduly delayed.

47. The Panel reserves its decision to develop its reasoning regarding each aspect of its preliminary ruling in a subsequent ruling or in its final report.

⁴⁸ We also note that there is no established jurisprudence nor is there any established practice as to whether a panel needs to rule on the scope of its terms of reference on a preliminary basis, i.e. before the issuance of its Report to the parties. See also Appellate Body Report, *US – Carbon Steel*, para. 123.