

***UNITED STATES – CERTAIN MEASURES AFFECTING  
IMPORTS OF POULTRY FROM CHINA***

***(WT/DS392)***

**REQUEST BY THE UNITED STATES OF AMERICA  
FOR A PRELIMINARY RULING**

**October 1, 2009**

*\*Public Version:*

*Statements made by a party during WTO consultations have been redacted*

## Table of Reports

<b>Short Form</b>	<b>Full Citation</b>
<i>Brazil – Desiccated Coconut (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/R, adopted 20 March 1997, as modified by the Appellate Body Report, WT/DS22/AB/R
<i>Canada – Wheat Exports (Panel)</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
<i>China – Services &amp; Market Access</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, circulated 12 August 2009
<i>EC – Bananas III (AB)</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
<i>Mexico – Corn Syrup (Article 21.5 – US) (AB)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001
<i>Mexico - Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – 1916 Act (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
<i>US – FSC (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 20 March 2000
<i>US – Offset Act (Byrd Amendment) (AB)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003

*United States – Certain Measures Affecting Imports of Poultry from China (DS392)*

**Request for a Preliminary Ruling**

October 1, 2009

1. In its panel request in the present dispute, the People’s Republic of China (“China”) purports to invoke the consultation and dispute settlement provisions of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”). However, China cannot invoke the consultations and dispute settlement provisions of the SPS Agreement at the panel stage since China failed to request consultations pursuant to the consultation and dispute settlement provisions of the SPS Agreement.
2. As explained in detail below, Article 1.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) requires a complaining party to request consultations pursuant to the consultation and dispute settlement provisions of each of the covered agreements under which its complaint arises. China’s failure to request consultations pursuant to the consultation and dispute settlement provisions of the SPS Agreement therefore legally preclude it from making claims under that agreement in its panel request, as such claims would fall outside the Panel’s terms of reference.
3. Consistent with the admonition of the Appellate Body that “responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes,”<sup>1</sup> the United States pointed out this deficiency in China’s consultations request in this dispute from the earliest possible moment. The United States has repeatedly made clear that it is willing to engage in dispute settlement with China on the measures identified by China, consistent with the rules and procedures of the DSU. Its interest in this matter is not to deny China the opportunity to have the Panel hear China’s claims under the SPS Agreement or any other covered agreement. Rather, the U.S. interest in this matter is to ensure that “corrections, if needed, can be made” as quickly as possible in order to resolve this dispute as expeditiously as possible.
4. Had China acted promptly to correct its consultations request by submitting an amended consultations request when the United States first pointed out the deficiency – as the United States and other Members have done in numerous comparable situations – this dispute could have moved forward with minimal delay and complete clarity as to the legal basis of China’s claims. Unfortunately, China chose not to do so. The United States therefore brings this matter to the attention of the Panel at the earliest moment, so that this matter can be resolved promptly in the interests of the speedy resolution of this dispute.
5. The United States therefore respectfully requests the Panel to make a preliminary ruling at the outset that China’s claims under the SPS Agreement are not within the Panel’s terms of

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<sup>1</sup> *US – FSC (AB)*, para. 166.

reference. Should the Panel agree with the United States that China's failure to invoke the consultation and dispute settlement provisions of the SPS Agreement in its consultations request precludes the Panel from having jurisdiction over China's SPS Agreement claims, the United States offers a way forward that would resolve the problem expeditiously and allow the multilateral resolution of any claims under the SPS Agreement that China may wish to make.

## **I. Procedural History**

6. China requested consultations with the United States on April 17, 2009. China's request for consultations explained that the request was made:

pursuant to Article 4 of the [DSU], Article XXII of the [GATT 1994], and Article 19 of the [Agriculture Agreement] with regard to certain measures taken by the [United States] affecting the import from [China] of poultry products.<sup>2</sup>

After identifying the measures at issue and identifying the legal basis for China's complaint under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Agriculture* ("Agriculture Agreement"), the consultations request further stated:

In addition, although China does not believe that the US measures at issue restricting imports of poultry products from China constitute sanitary and phytosanitary measures ("SPS measure[s]") within the meaning of the [SPS Agreement], if it were demonstrated that any such measure is an SPS measure, China also requests consultations with the US pursuant to Article 11 of the SPS Agreement.<sup>3</sup>

7. On April 27, 2009, the United States accepted China's request for consultations pursuant to the DSU, the GATT 1994, and the Agriculture Agreement.<sup>4</sup> In its letter, the United States explained that:

it appears that China is not requesting consultations pursuant to Article 11 of the [SPS Agreement] since China does not believe that the SPS Agreement applies to the measures at issue. China provides that it would request consultations under the SPS Agreement, only if a particular condition were met. That condition is that "it were demonstrated that any [measure at issue] is an SPS measure." Yet there is no avenue or mechanism for such a demonstration to occur, and China's belief that none of the measures at issue is an SPS measure continues to govern China's

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<sup>2</sup> Request for Consultations by China, WT/DS392/1, circulated 21 April 2009 ("Consultations Request").

<sup>3</sup> Consultations Request, para. 6 (emphasis added).

<sup>4</sup> Letter from the United States to China, April 27, 2009, at 1 (Exhibit US-1).

request. The United States therefore understands from your letter that China is not, in fact, requesting consultations pursuant to Article 11 of the SPS Agreement.<sup>5</sup>

8. In a letter to the United States on April 28, 2009,<sup>6</sup> China asserted that the U.S. understanding of its consultations request was not correct. However, China did not revise its consultations request in order to clarify that it was, in fact, requesting consultations pursuant to Article 11 of the SPS Agreement. Nor did China assert that the condition for such a request for consultations set forth in its consultations request – namely, that “it were demonstrated” that a measure at issue is an SPS measure – had been met.

9. On May 15, 2009, the United States and China held consultations pursuant to the relevant provisions of the DSU, the GATT 1994, and the Agriculture Agreement. In the consultations, the United States explained [\*\*\*]. Further, in informal discussions with China [\*\*\*], the United States explained that it did not, in principle, object to consulting with China pursuant to Article 11 of the SPS Agreement, provided that China properly requested such consultations in conformity with the DSU. The United States made clear, however, that in the absence of a proper consultations request – as opposed to a conditional request where the condition was not fulfilled – it was not in a position to consult pursuant to the SPS Agreement.

10. On June 23, 2009, China requested the establishment of a panel.<sup>7</sup> In its panel request, China stated – incorrectly – that it had requested consultations with the United States pursuant to Article 11 of the SPS Agreement.<sup>8</sup> Although China also stated that there had been an “exchange of letters” between the United States and China with respect to the issue of the provisions pursuant to which consultations had been requested,<sup>9</sup> this “exchange of letters” apparently refers simply to the letters of April 27 and April 28 in which the United States and China, respectively, set forth their disagreement over the interpretation of China’s consultations request. No resolution of this disagreement is contained in those letters. Finally, the panel request states – incorrectly – that the consultations on May 15, 2009 were held pursuant to “each” of the DSU, the GATT 1994, the Agriculture Agreement, and the SPS Agreement.<sup>10</sup>

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<sup>5</sup> Letter from the United States to China, April 27, 2009, at 1 (Exhibit US-1).

<sup>6</sup> China attached a copy of this letter to its September 28, 2009 letter to the Panel.

<sup>7</sup> Request for the Establishment of a Panel by China, WT/DS392/2, circulated 30 June 2009 (“Panel Request”).

<sup>8</sup> Panel Request, para. 1.

<sup>9</sup> Panel Request, footnote 1.

<sup>10</sup> Panel Request, para. 2.

11. The panel request claims that:

to the extent that some or all of the US measures at issue restricting imports of poultry products from China constitute [SPS measures] within the meaning of the *SPS Agreement*, the measures are inconsistent with the US obligations under the *SPS Agreement*, including Articles 2.1-2.3, 3.1, 3.3, 5.1-5.7, and 8 thereof.<sup>11</sup>

China expressed no view in the panel request as to whether the measures at issue are, in fact, “SPS measures” within the meaning of the *SPS Agreement*.

12. China’s panel request was considered at the Dispute Settlement Body (DSB) meetings on July 20, 2009 and July 31, 2009. On both occasions, the United States expressed concern that China’s panel request made claims under a covered agreement pursuant to which consultations were neither requested nor held. China did not respond to these U.S. statements. The DSB established the Panel on July 31, 2009.

13. By letter of September 25, 2009, the United States notified the Panel, China, and the third parties in advance of the organizational meeting of the Panel with the parties that it intended to submit this request for a preliminary ruling. On September 28, 2009, China and the European Communities (“EC”) submitted comments on the U.S. notification.

## **II. China’s Claims Under the SPS Agreement Are Outside the Panel’s Terms of Reference**

### **A. A Member Must Request Consultations Pursuant to a Particular Covered Agreement in Order to Make Claims in a Panel Request Under Provisions of That Agreement**

14. Article 7.1 of the DSU provides that the terms of reference of a panel are established with reference to the complaining Member’s panel request. In turn, Article 4.7 of the DSU provides that a panel request may be submitted after consultations have first been requested. Thus, in the absence of a consultations request, there can be no legitimate panel request and therefore no “matter” within the terms of reference of a panel.<sup>12</sup>

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<sup>11</sup> Panel Request, para. 11.

<sup>12</sup> Although the Appellate Body found that the absence of consultations in the *Mexico – Corn Syrup* compliance proceedings did not deprive the compliance panel in that dispute of its jurisdiction, that situation is also quite different from the situation here. The Appellate Body’s report addressed a compliance proceeding under Article 21.5 of the DSU, and there was no disagreement that consultations were properly requested and held under the relevant covered agreements in the original proceeding. Moreover, in that compliance proceeding the Appellate Body noted that, if “the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.” *Mexico –*

15. The first sentence of Article 1.1 of the DSU provides (emphasis added):

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”).

16. Thus, in order for a Member to bring a dispute under the DSU with respect to the SPS Agreement, that Member must bring the dispute “pursuant to the consultation and dispute settlement provisions of” the SPS Agreement. The Member bringing the dispute has the burden of bringing it “pursuant to” the SPS Agreement’s consultations and dispute settlement provisions. The Member is not free to leave the Member to whom the request is addressed, nor other Members who may wish to request to join the consultations, guessing as to whether the Member is invoking the SPS Agreement or not.

17. This is a simple matter of jurisdiction. The focus in China’s letter to the Panel of September 28 as to whether the “due process rights” of the United States had been jeopardized is therefore misplaced. The issue is whether the Panel has jurisdiction to consider claims under the SPS Agreement.<sup>13</sup> As the Appellate Body has observed: “The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.”<sup>14</sup> Thus, it is appropriate for the Panel to consider this issue at this stage and to make a preliminary ruling.

**B. In This Dispute, China Failed to Invoke the Consultation and Dispute Settlement Provision of the SPS Agreement in Its Consultations Request**

18. Article 11 of the SPS Agreement is entitled “Consultations and Dispute Settlement.” In particular, Article 11.1 provides:

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*Corn Syrup (Article 21.5 – US) (AB)*, para. 63. Even if that principle also were considered to apply to original disputes as well as compliance proceedings, it would not excuse any failure to observe the requirements of Article 1.1 of the DSU in this dispute, where the United States objected to the deficiency in China’s consultations request immediately and at every opportunity.

<sup>13</sup> No previous panel has addressed this issue. The recently circulated panel report in the *China – Services and Market Access* dispute concluded that “the legal basis that formed the subject of consultations under one provision of a covered agreement can evolve into the legal basis for a claim under another provision, whether of the same or another agreement, without changing the ‘essence’ of the complaint.” *China – Services and Market Access*, para. 7.122. However, there was no disagreement in that dispute that the United States, as the complaining Member, had invoked the consultations and dispute settlement provisions of each of the covered agreements under which claims were brought in both the consultations and panel requests, and so the issue presented in this request did not arise.

<sup>14</sup> *US – 1916 Act (AB)*, para. 54; *see also US – Offset Act (Byrd Amendment) (AB)*, para. 207; *Mexico – Corn Syrup (Article 21.5 - US) (AB)*, para. 36.

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise provided herein.

Thus, as explained above, in order to pursue dispute settlement under the DSU with respect to claims under the SPS Agreement, Article 1.1 of the DSU requires that the complaining party bring the dispute pursuant to Article 11 of the SPS Agreement.

19. In this dispute, however, China did not request consultations pursuant to Article 11 of the SPS Agreement. Instead, China requested consultations pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, and Article 19 of the Agriculture Agreement. Separately, China conditionally requested consultations pursuant to Article 11 of the SPS Agreement, “if it were demonstrated” that a measure at issue is an SPS measure.<sup>15</sup> For several reasons, this conditional invocation of Article 11 does not amount to an actual request for consultations pursuant to Article 11.<sup>16</sup>

20. First, China stressed in its consultations request that “China does not believe that the US measures at issue” in this dispute are SPS measures.<sup>17</sup> Accordingly, China clearly stated in its consultations request that it does not believe that the condition China imposed on a consultations request pursuant to Article 11 of the SPS Agreement is fulfilled. Further, it is unclear what entity could be empowered to determine whether the measures at issue had been “demonstrated” to be SPS measures, and thus whether China’s purported condition had been fulfilled. As the United States explained in its April 27, 2009 letter to China, then, China’s belief that none of the measures at issue were SPS measures is the only basis upon which one could ascertain whether China was in fact requesting consultations pursuant to the SPS Agreement. Based on that belief, the conclusion could only be that the condition was not fulfilled and that China’s consultations request did not include a request pursuant to Article 11 of the SPS Agreement.

21. Second, the Panel cannot be the entity that determines whether the measures at issue have been “demonstrated” to be SPS measures, for purposes of interpreting China’s consultations request. If that were the case, then the scope of China’s consultations request – and therefore of the Panel’s terms of reference – would depend on the substantive findings of the Panel. This is not possible. The Panel cannot alter its terms of reference by its findings; to the contrary, the

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<sup>15</sup> Consultations Request, para. 6.

<sup>16</sup> The United States notes that the EC also reads China’s consultations request under the SPS Agreement to be conditional. EC Letter to the Panel, Sept. 28, 2009, at 2 (“The European Communities considers that it might therefore have been preferable if China’s claims under the *SPS Agreement* had not been conditional . . .”).

<sup>17</sup> Consultations Request, para. 6.

terms of reference set the boundaries of the Panel’s work. They thus cannot be expanded by virtue of findings that the Panel makes.

22. Third, the DSU confirms that the complaining Member must clearly specify the scope of its consultations request and cannot make that scope conditional on future events or demonstrations of particular factual and legal conclusions. For example, Article 4.3 of the DSU makes it clear that the obligation to consult under a particular covered agreement is based on a request for consultations “made pursuant to” that covered agreement. Under China’s approach, the request for consultations is not “made pursuant to” the covered agreement until some date after the request was provided to the responding Member. But in that case Article 4.3 would not yet have become operative with respect to that covered agreement.

23. Similarly, Article 4.2 provides (emphasis added):

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.

In this case, China’s consultations request did not make any “representations” as to whether the measures at issue were “affecting the operation” of the SPS Agreement. Indeed, the consultations request states the opposite. The consultations request makes the representation that China believes the measures at issue are not affecting the operation of the SPS Agreement.

24. In fact, the obligation of Members “to accord sympathetic consideration to and afford adequate opportunity for consultation” at the request of another Member itself demands that the complaining Member be clear as to the nature and scope of its request. As the panel in *Brazil – Desiccated Coconut* observed, “Members’ duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member.”<sup>18</sup> If a Member is permitted to impose conditions on its own request for consultations, without specifying how one might determine whether the conditions had been fulfilled, the responding Member cannot know the extent of its own obligations to consult.

25. In its letter to the Panel of September 28, 2009, China asserts the reason it framed its consultations request conditionally was to elicit information and views from the United States that might “demonstrate” whether the measures at issue are SPS measures within the meaning of the SPS Agreement.<sup>19</sup> According to China:

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<sup>18</sup> *Brazil – Desiccated Coconut (Panel)*, para. 287.

<sup>19</sup> Letter from China to the Panel, Sept. 28, 2009, at 1-2.

Obviously, in the context of China’s consultation request, the consulting party that would “demonstrate” during the consultation process that its own measures are “SPS measures” is the United States.<sup>20</sup>

However, this is not what China’s consultation request says. Rather, it states that China would request consultations pursuant to the SPS Agreement only “if it were demonstrated” that the measures at issue are SPS measures. According to the express words of the consultations request, the “demonstration” that the measures are SPS measures comes first, and only then would the request for consultations pursuant to the SPS Agreement follow. It is not at all “obvious” that China’s consultations request was intended to convey the opposite. Indeed, it is difficult to know how a consultations request could ever be made conditional on information to be provided in the consultations themselves.

26. In addition, we note the implicit but incorrect assumption in China’s argument that only the responding Member bears an obligation to provide information during consultations. To the contrary, as noted above, Article 4.2 of the DSU requires Members to “accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representation made by another Member concerning measures affecting the operation of any covered agreement.” Furthermore, Article 4.4 of the DSU requires the Member requesting consultations to “give the reasons for the request, including . . . an indication of the legal basis for the complaint.” Nothing suggests that the Member requesting consultations can place the burden on the responding Member to make representations about which covered agreements, if any, the measures at issue may be “affecting.”

27. Indeed, China’s comment misconstrues the nature and purpose of consultations. Consultations are a process of bilateral diplomatic dialogue that is entirely different from the adjudicative process of a panel proceeding. As the Appellate Body noted in *Mexico – Corn Syrup*:

Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them.<sup>21</sup>

Consultations thus provide a process for parties to reach a better common understanding, or if possible a complete or partial agreement, as to the measures and the dispute. Consultations are

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<sup>20</sup> Letter from China to the Panel, Sept. 28, 2009, at 2.

<sup>21</sup> *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 54.

not, however, a process of “demonstration,” and – even apart from the point that a demonstration made *during* consultation could not logically be the basis for the previously-submitted *request* for consultations – China’s argument therefore fails.

28. Finally, China’s letter to the United States on April 28, 2009 cannot cure the deficiencies in its consultations request. The Appellate Body has long stressed that a deficiency in a panel request “cannot be subsequently ‘cured’ by a complaining party’s argumentation in its first written submission to a panel or statement made later in the panel proceeding,” at least to the extent that the deficiency is one that affects the panel’s terms of reference.<sup>22</sup> Where, as here, the deficiency in the consultations request affects, *inter alia*, the scope of the Panel’s terms of reference, such deficiency likewise cannot be cured through subsequent clarifications in communications between the parties, but only through the submission of a new or revised consultations request. But China’s April 28 letter does not purport to be a new or revised consultations request, nor does it meet the requirements set forth in the DSU for consultations requests.<sup>23</sup>

29. One might argue that China’s consultations request was sufficient to invoke the SPS Agreement because it was clearly referenced in that consultations request. However, the consultations request is in fact structured to make clear that China was not bringing its dispute pursuant to the SPS Agreement. Indeed, if it “were demonstrated” that the U.S. measures at issue are not SPS measures, then it is clear that China would not want to invoke the SPS Agreement. China cannot now claim that despite the structure of its consultations request and its clear statement that it was not invoking the SPS Agreement, it was somehow clear that China was invoking the SPS Agreement all along.

30. Clarity in the request for consultations is important for the overall operation of the dispute settlement system. Each dispute progresses on the basis of the consultations and then the panel request (if one is made). Either a Member has requested consultations under a particular covered agreement or it has not. The requesting Member is not free to leave other Members (and any eventual panel) guessing as to whether consultations have been requested under a particular covered agreement, or to indicate that it is making a request that is conditioned on subsequent events. In this latter case, the Member would be retroactively requesting consultations under a covered agreement. Nothing in the DSU permits this. And China’s approach suffers from another significant flaw as well. China appears to be claiming that the scope of its consultations request would only become clear during the course of the consultations. But consultations are confidential and other Members would thus not be in a position to know whether a condition has

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<sup>22</sup> *EC – Bananas III* (AB), para. 143.

<sup>23</sup> For example, China did not notify its April 28 letter to the DSB and the relevant councils and committees, as required by Article 4.4 of the DSU. Nor was this letter (or the U.S. letter of April 27 accepting China’s consultations request) circulated to Members. That these documents were not available to the Members is confirmed by the request of the EC in its September 28, 2009 letter to the Panel for copies of the letters.

been fulfilled. Nor would other Members necessarily have the relevant information in time to determine whether to request to join the consultations.

31. Indeed, there is nothing in China’s approach that limits it to consultations requests. China’s approach would apply to panel requests as well. A Member would be free to condition in its panel request its invocation of a particular covered agreement, thus leaving a panel unable to know the scope of its terms of reference and task assigned to it by the DSB. Yet that is inconsistent with the DSU. Article 7.1 of the DSU, for example, tasks a panel with examining the matter referred to the DSB in the panel request, yet if the panel request would only invoke the dispute settlement provisions of a covered agreement after some condition were fulfilled, then the “matter” has not been referred to the panel with respect to that covered agreement.

32. There is no basis in the DSU to subsequently “clarify” the scope of consultations or a panel request. Furthermore, it would mean that other Members and indeed a subsequent panel will not be provided key information. Thus it is critical that the request for consultations itself clearly define the scope of the matter subject to consultations.

33. In this instance, the United States approached this matter with a cooperative spirit, and very promptly alerted China to the issue in its consultations request. Many Members have, in prior disputes, submitted new or revised consultations requests when it became apparent to the complaining party that the consultations request needed to be supplemented. Indeed, the United States has done so, as a complaining party, in several prior disputes with China. However, China has not done so here. Thus, China’s consultations request must be examined as it was written – and as written it does not request consultations pursuant to the consultation and dispute settlement provision of the SPS Agreement. Accordingly, China may not pursue claims under the SPS Agreement in this dispute.

### **III. The Resolution of the Procedural Obstacles in *Canada – Wheat Exports* Offers a Model for the Effective Resolution of the Deficiencies in China’s Panel Request**

34. The United States wishes to reiterate that it is perfectly willing to respond in WTO dispute settlement to any claims that China may choose to make under the SPS Agreement with respect to the measures at issue in this dispute. The United States is confident that these measures are not inconsistent with the SPS Agreement and would welcome the opportunity to demonstrate this, provided that China properly invokes the relevant provisions of the DSU and the SPS Agreement. Unfortunately, as demonstrated above, China has not done so in this case. Thus, the question arises as to how best to proceed, in the light of these facts.

35. To be sure, the least preferable option – for all concerned, and not just for the United States – would be to conduct a full panel proceeding on the merits, only for the Panel or the Appellate Body to conclude ultimately that China’s claims are outside the Panel’s terms of reference. This would not be an effective use of the resources of the parties, the Panel, or the Secretariat. Nor would it lead to a prompt resolution of this dispute.

36. Moreover, China incorrectly asserts that the question raised by this preliminary ruling request is “premature” and cannot be resolved without taking into account the substantive submissions by the United States with respect to the SPS Agreement.<sup>24</sup> To the contrary, this request focuses solely on the consultations and panel requests submitted by China in this dispute and its effect on the terms of reference of the Panel. It can be resolved by the Panel promptly, on the basis of the consultations and panel requests themselves, without further development of evidence. Indeed, if the Panel rules that China’s affirmative claims under the SPS Agreement are outside the Panel’s terms of reference, the United States would not be expected to address any such claims in its substantive submissions.

37. If China does wish to make affirmative claims under the SPS Agreement, the United States believes the approach taken by the panel in *Canada – Wheat Exports* when faced with a somewhat analogous procedural difficulty suggests a way forward that could be adapted to the present dispute. In that dispute, Canada asserted that three of the claims made by the United States were not within the panel’s terms of reference because they were not properly identified in the U.S. panel request, as required by Article 6.2 of the DSU.<sup>25</sup> The panel agreed with Canada that, with respect to one of those claims, the U.S. panel request failed to meet the requirements of Article 6.2.<sup>26</sup> Accordingly, the panel granted Canada’s request for a preliminary ruling that the claim was outside its terms of reference, and concluded that it would not consider the substance of that U.S. claim on the merits.<sup>27</sup> However, the panel went on to explain:

In reaching this conclusion, we wish to emphasise once again that disputing parties are required, under the provisions of Article 3.10 of the DSU, to engage in dispute settlement procedures “in good faith in an effort to resolve the dispute.” Accordingly, should the United States wish to see a panel address the substance of its Article XVII claim promptly, we believe that the procedures of the DSU are sufficiently flexible, if adhered to in good faith by both disputing parties, to allow the United States to do so. Thus, we consider that, in working with each other towards a resolution of this dispute, it may be possible for the parties to explore, and avail themselves of, the flexibility offered by the DSU. In our view, the options open to the parties include the possibility of the United States filing a new panel request and the parties agreeing to have a panel established at the first DSB meeting at which the panel request is on the agenda. The Panel, for its part, stands ready to assist the parties in their efforts to reach a fair, prompt and

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<sup>24</sup> Letter from China to the Panel, Sept. 28, 2009, at 3.

<sup>25</sup> *Canada – Wheat Exports (Panel)*, para. 6.10, no. 2.

<sup>26</sup> *Canada – Wheat Exports (Panel)*, para. 6.10, no. 32.

<sup>27</sup> *Canada – Wheat Exports (Panel)*, para. 6.10, no. 64.

effective resolution of this dispute.<sup>28</sup>

38. In that dispute, the United States – as the complaining party found to have committed the procedural fault in its panel request – requested and was granted a suspension of the work of the panel. During the period of the suspension, the United States submitted a new panel request, and – pursuant to an agreement by the parties – a new panel was established at the next meeting of the DSB.<sup>29</sup> The DSB agreed that the panelists that composed the first panel would also compose the second panel, and that the proceedings of the two panels would be harmonized pursuant to Article 9.3 of the DSU.<sup>30</sup>

39. In the same spirit of cooperation, the United States proposes that the same flexibility afforded by the DSU could also be relied upon to facilitate a way forward in the present dispute. Although the deficiency here lies in China's consultations request, and not in the panel request as in the *Canada – Wheat Exports* dispute, the principle is the same. Should China wish to see a panel resolve any claims it may make under the SPS Agreement, China could submit a new consultations request that plainly invokes the proper provisions of that agreement. The United States stands ready to hold consultations with China in an expedited manner. Should those consultations fail to resolve the dispute, China could submit a new panel request. The United States would be willing to work with China to ensure the prompt establishment of the panel by the DSB and the harmonization of the composition and procedures of the two panels pursuant to Article 9.3 of the DSU.

#### **IV. Request for Preliminary Ruling**

40. The United States therefore respectfully requests that the Panel find that any claims by China under the SPS Agreement are not within its terms of reference. In order to save the time of the Panel, Secretariat, and the parties, the United States would also respectfully request that the Panel issue its preliminary ruling prior to the filing of China's first written submission.

41. The United States further requests that the Panel's working procedures and timetable provide for the Panel to clarify its terms of reference by issuing a ruling on the present request prior to the filing of China's first written submission. The United States would welcome an opportunity to respond to any questions the Panel may have with regard to this request, or to respond to any submission by China or third parties on this matter, including in writing or at a meeting with the Panel.

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<sup>28</sup> *Canada – Wheat Exports (Panel)*, para. 6.10, no. 65 (footnote omitted).

<sup>29</sup> *Canada – Wheat Exports (Panel)*, para. 6.11.

<sup>30</sup> *Canada – Wheat Exports (Panel)*, para. 1.11.

**LIST OF U.S. EXHIBITS**

***United States – Certain Measures Affecting Imports of Poultry from China (DS392)***

<u>U.S. Exhibit</u>	<u>Description</u>
US-1.	Letter from the United States to China, April 27, 2009.