ANNEX H

PANEL'S DECISION CONCERNING EXHIBIT CHN-65

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1. The European Union, in its first written submission, argued that a number of claims raised by China fell outside the Panel's terms of reference because they were not subject to consultations between the parties. In response, China, during the first substantive meeting of the Panel with the parties, sought to submit a document allegedly sent by China to the European Union prior to the consultations and used during the consultations. The European Union objected to the submission of this document, arguing that it would violate Article 4.6 of the DSU, which provides that consultations are confidential. At the meeting, the Panel declined to receive the document at issue and stated that if China wished to submit this document to the Panel it could make a written request to that effect and the Panel would decide whether to accept it.

2. China subsequently submitted the document at issue as Exhibit CHN-65 to its second written submission on 19 April 2010. On 22 April 2010, the European Union objected, asserting that China had failed to follow the procedures established by the Panel with respect to possible submission of this document, and asking the Panel to indicate whether "Exhibit CHN-65" and references to it in China's second written submission were part of the record, or if not, how this issue should be dealt with. This was followed by further letters from both parties to the Panel on 23 and 26 April 2010. The parties disagree as to the procedures for possible submission of the document in question, and as to the significance of Article 4.6 of the DSU in this context.

3. We recall that the European Union has raised preliminary jurisdictional objections to certain of China's claims on the ground that those claims were not subject to consultations, either because they were not identified in China's request for consultations and/or because no consultations took place between the parties to the dispute with respect to them.[1] Thus, it is clear to us that the European Union asserts, as a matter of fact, that certain of China's claims were not the object of the consultations between the parties. China, on the other hand, seeks to rebut this factual assertion by submitting Exhibit CHN-65, which sets out a "List of Questions for the consultations" which allegedly was sent to the European Union prior to the consultations and formed the basis for the consultations.[2]

4. In these circumstances, we consider it appropriate to accept Exhibit CHN-65. While it is true that China did not make a separate written request to submit the document in question as an exhibit, we do not consider this to preclude its submission as an exhibit in this dispute, as it is clear that the European could, as it did, object to the submission.

5. We see nothing in Article 4.6 of the DSU that would preclude accepting this document as an exhibit in this dispute. Article 4.6 of the DSU provides:

> "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings."

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[1] See, e.g., First Written Submission of the European Union, paras. 244, 248, 488, 491.

[2] See, e.g., Second Written Submission of China, para. 418. The EU has not disputed that this document was provided to it prior to the consultations.

We do not consider that submission of Exhibit CHN-65 to the panel called upon to resolve the same dispute that was the subject of the consultations is inconsistent with the confidentiality requirement of Article 4.6. In this regard, we recall the view expressed by the panel in *Korea – Alcoholic Beverages* that:

> "this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. ... It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings."[3]

If information obtained during consultations may be used in the ensuing proceedings, we see no reason to exclude *a priori* an exhibit purporting to set out a list of questions the complaining party considers should be discussed during consultations.

6. The statement of the Appellate Body in *US – Upland Cotton*, relied upon by the European Union, does not apply to this issue. In that case, the Appellate Body expressed agreement with the views of the panel in *Korea – Alcoholic Beverages* that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel".[4] We do not read either the panel in *Korea – Alcoholic Beverages* or the Appellate Body in *US – Upland Cotton* to have concluded that in determining the scope of the consultations a panel is precluded from considering evidence submitted by a party as to what it believes to have been subject to those consultations. We recall the Appellate Body's statement in *US – Shrimp (Thailand) / US – Customs Bond Directive* that "whether a complaining party has "expand[ed] the scope of the dispute" or changed the "essence" of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis".[5] Evidence of a party's intention to discuss certain questions may well be relevant in making such a case-by-case determination as to the scope of the consultations. This is not, in our view, the same as "[e]xamining what took place in the consultations", which was the focus of the Appellate Body statement relied upon by the European Union.

7. We emphasise that our decision to accept Exhibit CHN-65 in this dispute is without prejudice to our consideration of its relevance to, or the weight we may accord to it in our consideration of the preliminary jurisdictional objections raised by the European Union.

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[3] Panel Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44, para. 10.23. We note that this approach was subsequently also followed by the panel in *Mexico – Corn Syrup*. See, panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345, para. 7.41.

[4] Appellate Body Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3, para. 287.

[5] Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* ("*US – Shrimp (Thailand) / US – Customs Bond Directive*"), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008, para. 293.