

***EUROPEAN COMMUNITIES –
PROTECTION OF TRADEMARKS AND GEOGRAPHICAL INDICATIONS
FOR AGRICULTURAL PRODUCTS AND FOODSTUFFS***

(WT/DS174 and WT/DS290)

**Comments by Australia
on the Request by the European Communities
for a Preliminary Ruling regarding the Panel's Jurisdiction
under Article 6.2 of the DSU**

Geneva, 15 March 2004

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TABLE OF CASES REFERRED TO IN THIS REQUEST

Short Title	Full Title
<i>US – Carbon Steel</i>	<i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Appellate Body, WT/DS213/AB/R.</i>
<i>EC - Bananas</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, WT/DS27/AB/R.</i>
<i>Guatemala – Cement I</i>	<i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, Report of the Appellate Body, WT/DS60/AB/R.</i>
<i>Korea - Dairy</i>	<i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Appellate Body, WT/DS98/AB/R.</i>
<i>Thailand – H-Beams</i>	<i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Report of the Appellate Body, WT/DS122/AB/R.</i>
<i>Canada - Wheat</i>	<i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, Preliminary Ruling of the Panel, WT/DS276/12.</i>

I. INTRODUCTION

1. The EC has requested that the Panel issue a preliminary ruling that Australia’s request for the establishment of a panel does not meet the requirements of Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (the “DSU”). Arguments put forward by the EC in support of its request are without merit. Australia has explicitly identified the specific measure at issue and provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Consequently, Australia’s request for the establishment of a panel in this dispute fully complies with the requirements of DSU Article 6.2. Australia submits that, in the circumstances of this dispute, the EC is effectively asking the Panel to find that DSU Article 6.2 requires a complaining party to provide a summary of its legal argument in its panel establishment request. Such a finding would not be consistent with the terms of DSU Article 6.2 being given their ordinary meaning in light of the object and purpose of the DSU.

II. THE REQUIREMENTS OF DSU ARTICLE 6.2

2. DSU Article 6.2 requires, in relevant part, that the request for the establishment of a panel “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”.

3. In *US – Carbon Steel*, the Appellate Body recapped and clarified its previous findings in relation to DSU Article 6.2. The Appellate Body said in that dispute:

125. There are ... two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the “matter referred to the DSB”, which forms the basis for a panel’s terms of reference under Article 7.1 of the DSU.^[...]

126. The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant’s case.^[...] When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel “to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU”.^[...]

127. ... [C]ompliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be “cured” in the subsequent submissions of the parties during the panel proceedings.^[...] Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the

ability of the respondent to defend itself was prejudiced.^[...] Moreover, 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 in the light of attendant circumstances.^[...]

...

130. ... [A]lthough the listing of treaty provisions allegedly violated is always a *necessary* “minimum prerequisite” for compliance with Article 6.2, whether such a listing is *sufficient* to constitute a “brief summary of the legal basis of the complaint sufficient to present the problem clearly” within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.^[...] ...¹ (*emphases in original*)

4. Notwithstanding that the EC has cited several potentially relevant statements by the Appellate Body from *EC – Bananas, Guatemala – Cement I, Korea – Dairy, Thailand – H-Beams* and *US – Carbon Steel*,² the EC’s choice of Appellate Body statements is selective. In particular, nowhere in its submission does the EC cite the full text of the Appellate Body’s statement at paragraph 127, or the statement at paragraph 130, of *US – Carbon Steel*.

5. The relevant requirements for compliance are encapsulated in the statement by the Appellate Body: “... compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. ... [C]ompliance ... must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances”³ (*emphasis added*).

III. AUSTRALIA’S PANEL REQUEST IDENTIFIES THE “SPECIFIC MEASURE AT ISSUE” AS REQUIRED BY DSU ARTICLE 6.2

6. DSU Article 6.2 requires that the request for establishment of a panel “identify the specific measures at issue”. The Panel in *Canada – Wheat* has stated that the ordinary meaning of the phrase “identify the specific measures at issue” is “to establish the identity of the precise measures at issue”.⁴

7. Australia’s panel establishment request establishes the identity of the precise measure at issue in this dispute, and therefore conforms to the requirements of DSU Article 6.2. As set out in the fourth paragraph of Australia’s request, the specific measure at issue is composed of three principal elements: (1) Council Regulation No. 2081/92 itself; (2) any amendments to that Regulation; and (3) related implementing and enforcement measures. That all three elements constitute the specific measure at issue is confirmed by the second sentence in that paragraph: “[t]he EC measure lays down and

¹ *US – Carbon Steel*, paragraphs 125-130.

² EC Request for a Preliminary Ruling, paragraphs 7-13.

³ *US – Carbon Steel*, paragraph 127.

⁴ *Canada – Wheat*, paragraph 14.

implements rules on the protection of designations of origin and geographical indications for agricultural products and foodstuffs, excluding wines and spirits". This statement is in fact an adaptation of Article 1.1 of Regulation No. 2081/92, a copy of the current version of which has been provided by the EC as Exhibit EC-1.

A. *Regulation No. 2081/92*

8. Australia agrees that what can be considered a "specific measure" will depend on the circumstances of the particular case, and in particular on the characteristics of the measure in question.⁵

9. Here, a legislative instrument establishes an integrated regulatory framework to govern a defined package of issues. Thus, nomination of that instrument alone is in this dispute sufficient to establish the identity of the specific measure at issue within the meaning of DSU Article 6.2 and to encompass all of the provisions of that legislative instrument within the scope of the specific measure at issue. The complexity of a legislative instrument does not preclude the nomination of that instrument as such or of the regime which it governs as the specific measure at issue within the meaning of DSU Article 6.2. Indeed, the EC itself acknowledges that "name, number, or date of adoption of the act" can identify the "specific measure at issue".⁶

10. Regulation No. 2081/92 is not a circumstance where identifying a legislative instrument is not sufficient. It is not a "miscellaneous issues" legislative instrument covering a broad range of activities. Neither is it a legislative instrument establishing a regulatory framework governing a range of measures intended to be applied in the context of a broad spectrum of activities. If it established a comprehensive tax regime, for example, it is possible that a complaining party's failure to identify the specific provision(s) could legitimately be said in some circumstances not to establish the precise identity of the measure at issue.

11. The EC itself does not seem to have considered that DSU Article 6.2 requires explicit linkages between the detailed provisions of the measure(s) at issue and the provisions of the WTO Agreement in its own panel establishment requests. For example, the EC's panel requests in *US – Anti-Dumping Act of 1916*⁷, *US – FSC*⁸, *Indonesia – Autos*⁹ and *Canada – Autos*¹⁰ did not make such linkages.

⁵ EC Request for a Preliminary Ruling, paragraph 17.

⁶ EC Request for a Preliminary Ruling, paragraph 17.

⁷ *United States – Anti-Dumping Act of 1916*, Request for the Establishment of a Panel by the European Communities, WT/DS136/2.

⁸ *United States – Tax Treatment for "Foreign Sales Corporations"*, Request for the Establishment of a Panel by the European Communities, WT/DS108/2.

12. The EC argues that “[t]he unspecific reference to ‘Regulation 2081/92’ made in the Panel requests does not permit the EC to understand which specific aspects among those covered by Regulation 2081/92 the complainants intend to raise in the context of the present proceedings”.¹¹ However, to apply DSU Article 6.2 in a way that requires explicit linkages between the detailed provisions of the measure at issue and the provisions of the WTO Agreement in a panel establishment request could have a range of immediate potential effects. It could preclude claims based on the general design and architecture of a measure, such as national treatment claims based on arguments of systemic bias. Complaining parties could be required to provide a summary of their legal arguments in the panel establishment request in the event of a claim based on a measure’s design and architecture, and possibly in respect of other claims, else the linkages could be argued not to have been sufficiently identified. Moreover, in such a case, a failure to identify even one provision of the measure in the panel establishment request could void the panel’s mandate, an outcome which Australia considers would be totally at odds with the intent of the DSU generally and of Article 6.2 in particular. The EC’s argument is not sustainable given that DSU Article 6.2 requires that panel establishment request provide a “brief summary of the legal basis of the complaint sufficient to present the problem clearly”, not a summary of the legal argument.

B. Any amendments to Regulation No. 2081/92

13. As the EC has not challenged the inclusion of amendments to Regulation No. 2081/92 in the specific measure at issue, Australia assumes the EC does not dispute that they form part of the specific measure at issue.

C. Related implementing and enforcement measures

14. Read in context, the phrase “related implementing and enforcement measures” is specific. It clearly and precisely identifies actions connected to the implementation and enforcement of Regulation No. 2081/92 as being part of the measure at issue in this dispute.

15. The phrase brings within the scope of this dispute any actions – whether regulatory, administrative or judicial – for which Regulation No. 2081/92 constitutes the legislative basis, that is, any measures which are applied within the legal framework of Regulation No. 2081/92. The EC’s isolated analysis of the word “related” is misleading.¹² As the EC itself concedes,¹³ the phrase

⁹ *Indonesia – Certain Measures Affecting the Automobile Industry*, Request for the Establishment of a Panel by the European Communities, WT/DS54/6.

¹⁰ *Canada – Certain Measures Affecting the Automotive Industry*, Request for the Establishment of a Panel by the European Communities, WT/DS142/2.

¹¹ EC Request for a Preliminary Ruling, paragraph 22.

¹² EC Request for a Preliminary Ruling, paragraph 28.

“enforcement and implementing measures” narrows the measures at issue to those that implement and/or enforce Regulation No. 2081/92.

16. Neither DSU Article 6.2 – nor any other provision of the DSU – limits the number of actions that may constitute the measure(s) at issue. The fact that there are by now 640 geographical indications or designations of origin registered under Regulation No. 2081/92,¹⁴ or that implementation and enforcement may occur through a mix of legislative or administrative means at Community and Member State level or for some aspects through judicial review,¹⁵ does not preclude those actions forming part of the specific measure at issue in this dispute.

17. By arguing that the phrase “related implementing and enforcement measures”, read in the context of Australia’s panel establishment request in this dispute, is not sufficiently specific, the EC is effectively asking the Panel to find that DSU Article 6.2 requires a complaining party: to provide a “statement of available evidence” in the sense of Articles 4.2 and 7.2 of the *Agreement on Subsidies and Countervailing Measures*; to provide a list of exhibits; and/or to inform the EC – through the panel establishment request – whether Australia is intending to pursue legal argument based on all elements of the measure. DSU Article 6.2 requires none of these things.

18. Australia notes that the EC itself has on a number of occasions considered that similar language was sufficiently specific to identify the precise measures at issue, for example, “any other implementing measures”,¹⁶ “other relevant documents”,¹⁷ “any implementing measures thereof and all other related measures”,¹⁸ “any implementing decrees and other regulations”,¹⁹ and “any implementing measures taken thereunder”²⁰.

¹³ EC Request for a Preliminary Ruling, paragraphs 29-32.

¹⁴ EC Request for a Preliminary Ruling, paragraph 32.

¹⁵ EC Request for a Preliminary Ruling, paragraph 30.

¹⁶ *Canada – Certain Measures Affecting the Automotive Industry*, Request for the Establishment of a Panel by the European Communities, WT/DS142/2.

¹⁷ *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Request for the Establishment of a Panel by the European Communities, WT/DS248/12.

¹⁸ *United States – Tariff Increases on Products from the European Communities*, Request for the Establishment of a Panel by the European Communities, WT/DS39/2.

¹⁹ *Korea – Measures Affecting Trade in Commercial Vessels*, Request for the Establishment of a Panel by the European Communities, WT/DS273/2.

²⁰ *Indonesia – Certain Measures Affecting the Automobile Industry*, Request for the Establishment of a Panel by the European Communities, WT/DS54/6.

D. Conclusion

19. The specific measure at issue is composed of Council Regulation No. 2081/92, any amendments to that Regulation, and related implementing and enforcement measures. Australia submits that EC arguments that Australia’s identification of the specific measure at issue in this dispute is insufficiently specific are without merit and do not provide a basis for a finding by the Panel that Australia has not identified the specific measure at issue.

IV. AUSTRALIA’S PANEL REQUEST PROVIDES “A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY” AS REQUIRED BY DSU ARTICLE 6.2

20. The Appellate Body has said:

... whether ... a listing [*of treaty provisions allegedly violated*] is sufficient to constitute a “brief summary of the legal basis of the complaint sufficient to present the problem clearly” within the meaning of Article 6.2 will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue.^{[...] ...}²¹

21. The EC has characterised this and other relevant Appellate Body statements as “the identification of the treaty provisions alleged to have been violated is a necessary, but not a sufficient condition under Article 6.2 DSU”²² (*emphasis in original*). This is not an accurate characterisation of the relevant Appellate Body statements because it suggests that such identification is always insufficient. In fact, as the above quotation demonstrates, the Appellate Body has said that whether such identification is sufficient will depend on the circumstances of the case.

22. The issue before the Panel is whether Australia’s request for the establishment of a panel provides “a brief summary of the legal basis of the complaint sufficient to present the problem clearly” as required by DSU Article 6.2. “Basis” is defined as “the foundation” and “[a] thing on which anything is constructed and by which its constitution or operation is determined; ... a determining principle; a set of underlying or agreed principles”.²³ Thus, DSU Article 6.2 requires that a request for the establishment of a panel set out the legal principles that underpin the complaint sufficient to present the problem clearly.

23. The six claims set out in Australia’s panel establishment request provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Notwithstanding that those

²¹ *US – Carbon Steel*, paragraph 130.

²² EC Request for a Preliminary Ruling, paragraph 37.

²³ *The New Shorter Oxford English Dictionary*, Ed Lesley Brown, Clarendon Press, Oxford, 1993, Vol. 1, page 188.

claims might restate the essential elements of the relevant provisions of the WTO Agreement, that reference is sufficient in this dispute to shed light on the nature of the obligations at issue in relation to the specific measure at issue.

A. The legal bases of Australia's claims are clear

24. The EC alleges that Australia's use of the term "and/or" makes unclear the legal bases of Australia's claim in relation to Articles 41 and 42 of the *TRIPS Agreement*. The expression "and/or" in fact applies to all of the provisions cited. This is not idiomatic Australian linguistic usage. Australia notes, for example, the usage of "and/or" in the context of three or more options in a number of WTO panel and Appellate Body reports.²⁴ Thus, consistent with common linguistic usage of the expression "and/or", Australia's claim is that the EC measure diminishes, or lessens, the legal protection for trademarks under the *TRIPS Agreement*, contrary to the provisions cited, considered individually and collectively.²⁵ The use of the expression "and/or", understood in its common usage, does not make the legal bases of Australia's claim unclear.

25. The EC also alleges that the legal bases of Australia's claim in relation to Articles 10, 10bis and 10ter of the Paris Convention, in conjunction with Article 2 of the *TRIPS Agreement*, are unclear.²⁶ The EC argues that these provisions of the Paris Convention are complex, being divided into various subparagraphs and imposing numerous distinct obligations. Irrespective of the accuracy of the EC's portrayal of those provisions, Australia's claim is that the EC measure diminishes the legal protection for trademarks under the *TRIPS Agreement*, contrary to the cited provisions. Thus, Australia's claim is that the EC measure diminishes the legal protection for trademarks under the *TRIPS Agreement*, contrary to all aspects of those cited provisions. The EC has not offered any argument as to why this can not or should not be clearly understood from the claim.

B. Australia's claims satisfy the legal standard established by DSU Article 6.2

26. The EC seems to be alleging in relation to Australia's claim concerning the legal protection for trademarks under the *TRIPS Agreement* that Australia has not provided "a meaningful description

²⁴ For example: *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel, WT/DS135/R, paragraph 3.83; *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Panel, WT/DS121/R, paragraph 8.298; *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Report of the Panel, WT/DS155/R, paragraphs 2.43, 8.138 and 11.6; *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Panel, WT/DS139/R, WT/DS142/R, paragraph 6.1022; *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Report of the Panel, WT/DS219/R, paragraph 7.335; and *US – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, WT/DS248/AB/R & others, paragraph 484.

²⁵ Australia notes that the EC seems to have understood the usage of the expression "and/or" in relation to Australia's claims under Article 2 of the *TBT Agreement*.

²⁶ EC Request for a Preliminary Ruling, paragraph 58.

of the claim”.²⁷ However, DSU Article 6.2 does not require such a description: it requires a “brief summary of the legal basis of the complaint sufficient to present the problem clearly”. In the circumstances of the present dispute, Australia’s statement that the EC measure diminishes the protection for trademarks under the *TRIPS Agreement* contrary to the cited provisions meets this requirement. Australia has clearly set out the legal principle underpinning its claim as required by DSU Article 6.2.

27. Similarly, DSU Article 6.2 does not require Australia to set out in its panel establishment request precisely how it believes the EC measure violates fundamental national treatment and most favoured nation principles under GATT 1994, the *TRIPS Agreement* and the *TBT Agreement*.²⁸ The obligation on Australia is to provide a brief summary of the legal basis, or the legal principles, of the complaint sufficient to present the problem clearly, which Australia has done. It is not credible that the language used in Australia’s panel establishment request does not provide to the EC a brief summary of the fundamental principles of national treatment and most favoured nation sufficient to present the problem clearly.

28. Equally, DSU Article 6.2 does not require Australia to set out in its panel establishment request precisely how it believes the EC measure has been prepared, adopted and/or applied with the effect of creating unnecessary obstacles to trade contrary to Article 2.2 of the *TBT Agreement*.²⁹ Australia notes, however, that the EC is also effectively alleging that Australia has provided too much information because Australia has informed the EC of its intention to demonstrate that the EC measure is inconsistent with provisions of the *TBT Agreement*.³⁰ Whether Point 1 of Annex 1 to the *TBT Agreement* “impose[s] any obligations which could have been violated by the EC”³¹ will of course be for the Panel to determine as part of its consideration of the substantive aspects of the dispute in response to arguments put forward by Australia and the EC.

29. In relation to Australia’s claims under TRIPS Articles 22.2³², and 63.1 and 63.3³³, Australia notes that the EC does not allege that it is unable to comprehend the legal basis of the complaint, that is, the legal principles at issue in the claims, from the information provided. Rather, it alleges that “the

²⁷ EC Request for a Preliminary Ruling, paragraph 61, referring to paragraphs 46-48.

²⁸ EC Request for a Preliminary Ruling, paragraph 61, referring to paragraphs 44-45, and paragraphs 62-64.

²⁹ EC Request for a Preliminary Ruling, paragraph 62.

³⁰ EC Request for a Preliminary Ruling, paragraph 63.

³¹ *Ibid.*

³² EC Request for a Preliminary Ruling, paragraph 61, referring to paragraph 49.

³³ EC Request for a Preliminary Ruling, paragraph 61, referring to paragraph 51.

claim is not comprehensible”,³⁴ and “Australia fails to explain in which way Regulation 2081/92 is not applied in a transparent way”.³⁵ DSU Article 6.2 requires that Australia’s panel establishment request “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly”. This Australia has done.

C. DSU Article 6.2 does not require a complaining party to include a summary of its legal argument in its panel establishment request

30. The EC has put forward many arguments in support of its Request for a Preliminary Ruling. In every case, however, the conclusion seems inescapable that these arguments are motivated by the EC’s desire to have the Panel find that DSU Article 6.2 requires that a complaining party provide a summary of its legal argument in its panel establishment request.

31. DSU Article 6.2 requires that a complaining party provide a “brief summary of the legal basis of the complaint sufficient to present the problem clearly”. This was confirmed by the Appellate Body when it said: “Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint” (*emphasis in original*).³⁶

32. Australia submits that it has met its obligations under DSU Article 6.2. EC arguments that Australia’s panel request does not provide “a brief summary of the legal basis of the complaint sufficient to present the problem clearly” are without merit and do not provide a basis for such a finding by the Panel.

V. THE EC HAS NOT SUFFERED SERIOUS PREJUDICE TO ITS ABILITY TO DEFEND ITSELF

33. Australia’s request for the establishment of a panel fully complies with the requirements of DSU Article 6.2: it identifies the specific measures at issue and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

34. However, in the event the Panel considers that DSU Article 6.2 technically requires more information than is provided in Australia’s panel establishment request, the Panel would also need to consider if it should address whether the EC’s ability to defend its interests has been prejudiced.

³⁴ EC Request for a Preliminary Ruling, paragraph 49.

³⁵ EC Request for a Preliminary Ruling, paragraph 61.

³⁶ *EC – Bananas*, paragraph 143.

35. Should the Panel decide to examine whether the EC’s ability to defend its interests has been prejudiced, Australia recalls that in *Korea – Dairy* the Appellate Body said:

... we consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.

...

In assessing whether the European Communities’ request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities’ request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant’s submission nor at the oral hearing. We, therefore, deny Korea’s appeal relating to the consistency of the European Communities’ request for the establishment of a panel with Article 6.2 of the DSU.³⁷

36. The EC alleges that Australia has prevented the EC from preparing its defence in a timely manner, thereby causing serious prejudice to the EC.³⁸

37. The EC argues that it is prejudiced by an alleged lack of clarity in Australia’s request for the establishment of a panel. “As a defending party, the EC has a right to know what the case is which it will have to defend. This information must be contained in the Panel request” and “... the ambiguity of the Panel request is such that the EC is ... not sure of the case which the United States and Australia are bringing before the Panel. As a consequence, the EC has been seriously hampered in its efforts to prepare its defence”³⁹ (*emphases added*).

38. The EC’s argument is premised in part on statements by the Appellate Body in *Thailand – H-Beams* when the Appellate Body said in relevant part: “Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the ‘claims’ that are being asserted by the complaining party.^[...] A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.^[...] ...”⁴⁰

39. However, the EC argument overlooks that the Appellate Body clarified those statements in its later report in *US – Carbon Steel* when it said that “the terms of reference, and the request for the

³⁷ *Korea – Dairy*, paragraphs 127-131.

³⁸ EC Request for a Preliminary Ruling, paragraph 74.

³⁹ EC Request for a Preliminary Ruling, paragraphs 67-68.

⁴⁰ *Thailand – Anti-Dumping Duties on Angles, shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R, paragraph 88.

establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant’s case”⁴¹ (*emphasis added*).

40. Further, and in any event, in *Thailand – H-Beams*, the Appellate Body referred to a responding party “[beginning to prepare] its defence”⁴² (*emphasis added*). A request for establishment of a panel pursuant to DSU Article 6.2 does not provide the basis for a responding party’s preparation of its defence, as the EC asserts. Indeed, such an interpretation would render meaningless the provisions of the DSU, for example, Article 12.4, concerning written submissions in panel proceedings. The EC will have the opportunity to present its defence in its written and oral presentations to the Panel, for which it has been granted the maximum three week period of preparation time envisaged under the Working Procedures at Appendix 3 to the DSU. Moreover, the EC implicitly admits when it subsequently says “... the EC cannot be expected to wait for the first written submission of the complainants to start preparing its defence”⁴³ (*emphasis added*) that DSU Article 6.2 does not provide the basis for a responding party’s preparation of its defence.

41. Accordingly, DSU Article 6.2 does not bestow on a responding party “a right to know what the case is which it will have to defend” or provide that “[t]his information must be contained in the Panel request”.⁴⁴ Nor has the Appellate Body suggested that DSU Article 6.2 provides such a right or sets out such a requirement. The EC has had all the information that DSU Article 6.2 provides that it should have to begin preparing its defence, and has had this information since Australia’s initial panel establishment request. As a consequence, the EC’s argument that it is prejudiced by the lack of clarity in Australia’s panel request is not sustainable.

42. The EC also argues that the alleged lack of clarity in Australia’s panel request is not acceptable from the point of view of the EC’s rights of due process. However, the issue for the Panel is whether Australia’s panel establishment request complies with DSU Article 6.2. There is no requirement for the Panel to consider whether DSU Article 6.2 in itself provides adequate due process rights to a responding party.

43. Australia notes too the EC’s statement at footnote 25 of its Request that “[t]he EC does consider it necessary, in the present case, to take a position as to whether the requirement of prejudice in Article 6.2 DSU constitutes an additional requirement to those set out in Article 6.2 DSU”. Australia submits that, since Australia’s panel establishment request fully complies with the

⁴¹ *US – Carbon Steel*, paragraph 126.

⁴² *Thailand – H-Beams*, paragraph 88.

⁴³ EC Request for a Preliminary Ruling, paragraph 69.

⁴⁴ EC Request for a Preliminary Ruling, paragraph 67.

requirements of DSU Article 6.2, the EC has not been prejudiced as a defendant. There is thus no need for the Panel to consider this issue in the context of this dispute. Should, however, the Panel consider it necessary to consider the issue, Australia reserves the right to put forward further argument on this issue in its First Written Submission.

44. In conclusion, the EC is clearly aware of the specific measure at issue in this dispute and the legal basis of the complaint. Australia submits that the EC's allegation that Australia has prevented the EC from preparing its defence in a timely manner, thereby causing serious prejudice to the EC, is without foundation.

VI. THE EC'S REQUEST FOR A PRELIMINARY RULING

45. As the Panel has indicated its intention to issue a preliminary ruling in response to the EC's Request, Australia does not offer any comment on procedural issues associated with the EC's Request.

VII. THE PANEL SHOULD FIND THAT AUSTRALIA'S PANEL REQUEST COMPLIES WITH DSU ARTICLE 6.2

46. EC arguments in support of its Request for a Preliminary Ruling that Australia's request for the establishment of a panel does not meet the requirements of DSU Article 6.2 are without merit. Australia's panel establishment request in this dispute fully satisfies the requirements of DSU Article 6.2 as these have been clarified by the Appellate Body, most recently in *US – Carbon Steel*. Australia has clearly identified the specific measure at issue and provided a brief summary of the legal basis of the complaint to the standard required by DSU Article 6.2. There are thus no deficiencies in Australia's panel establishment request.

47. However, should the Panel find that Australia's panel establishment request requires more information and then decide to consider whether the EC's ability to defend itself has been prejudiced, Australia submits that the EC has not substantiated its claim that any deficiencies in the panel establishment request have resulted in serious prejudice to the EC as a defendant.

48. Accordingly, the substantive basis of the EC's Request for a Preliminary Ruling should be denied in full.