

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes*

**AUSTRALIA – MEASURES AFFECTING THE
IMPORTATION OF APPLES FROM NEW ZEALAND
(DS367)**

**Written Submission of Australia
in response to third parties:**

**Request for a preliminary procedural ruling in relation
to the consistency of New Zealand's panel request with
Article 6.2 of the DSU**

Geneva, 9 May 2008

Cases cited in this submission

Short Title	Full Case Title and Citation
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2887
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 589
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701

A. Introduction

1. Australia welcomes the submissions¹ made by the European Communities and Chile on the preliminary procedural issue of whether New Zealand’s panel request meets the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). The submissions recognise the importance of the issues before the Panel in this matter. Both the European Communities and Chile have expressed their support for an early ruling by the Panel on Australia’s claim.² Australia notes that the Panel has undertaken to issue its decision prior to the due date of the parties’ first written submissions, and Australia appreciates the Panel’s efforts to resolve the matter speedily to enable all parties to respond as may be required to the Panel’s decision.

B. The European Communities’ submission

2. The arguments advanced by the European Communities accord with those of Australia. The European Communities has argued forcefully that “New Zealand’s panel request appears to fulfil the requirement of identifying the specific measures challenged ... only with regard to the seventeen measures listed in that request”³, and also that “in the present case the complaining member [New Zealand] has not even attempted to present the [legal] problem, let alone doing it ‘clearly’”.⁴

3. The European Communities correctly highlights that the uncertain identification of the specific measures at issue in New Zealand’s panel request had the effect of “*de facto* shifting the burden of identifying the specific measures attacked onto Australia.”⁵ According to the panel in *Canada – Wheat Exports and Grain Imports*, “[d]ue process requires that the complaining party fully assume the burden of identifying the specific measures under challenge.”⁶ Australia

¹ Written Submission of the European Communities, *Third party submission of the European Communities on Australia’s request for a preliminary ruling*, DS367, 30 April 2008 (“European Communities’ third party submission”); Chile, Letter to the Chair of the Panel regarding Australia’s request for a preliminary procedural ruling in *Australia – Apples*, DS367, 2 May 2008 (“Chile’s third party submission”).

² European Communities’ third party submission, paras. 5-7; Chile’s third party submission, para. 5.

³ European Communities’ third party submission, para. 24.

⁴ European Communities’ third party submission, para. 36.

⁵ European Communities’ third party submission, para. 23.

⁶ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 24 of para. 6.10.

submits that a complainant must also fully assume the burden of setting out “the legal basis of the complaint sufficient to present the problem clearly.” That panel also observed that, “it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.”⁷

4. There is no basis upon which the respondent, third parties or the Panel itself should be expected to assume the burden placed on the complainant under Article 6.2 of the DSU as a result of the complainant failing to meet its obligations.

C. Chile’s submission

5. Chile appears to suggest in its submission that what may have passed between the main parties *prior* to the initiation of a WTO dispute could have a bearing on whether a panel request should be considered sufficiently clear for the purposes of Article 6.2 of the DSU.⁸ With respect, Australia disagrees. Australia referred to the decision by the Appellate Body in *Thailand – H-Beams* in its original submission⁹, where the Appellate Body overturned the panel’s suggestion that the underlying domestic anti-dumping investigation in that dispute may have helped to render the claims being made on the face of the panel request in the WTO dispute sufficiently clear for the purposes of Article 6.2 of the DSU.¹⁰

6. Australia notes that the purpose of a panel request is not only to inform the *respondent* adequately of the measures at issue and the legal claims, but also to inform third parties¹¹ and to establish a panel’s terms of reference.¹² Australia fails to see how prior interactions between the main parties on certain issues could help to inform the third parties or a panel as to its terms of reference. Australia has previously submitted that New Zealand was not constrained in its ability

⁷ Panel Report, *Canada – Wheat Exports and Grain Imports*, sub-para. 25 of para. 6.10.

⁸ Chile’s third party submission, para. 3.

⁹ Written Submission of Australia, *Request for a preliminary procedural ruling in relation to the consistency of New Zealand’s panel request with Article 6.2 of the DSU*, DS367, 13 March 2008 (“Australia’s original submission”), para. 54.

¹⁰ Appellate Body Report, *Thailand – H-Beams*, para. 94.

¹¹ Appellate Body Report, *Thailand – H-Beams*, para. 88.

¹² Appellate Body Report, *EC – Bananas III*, para. 142.

to identify adequately the measures at issue.¹³ Similarly, there is no reason why New Zealand could not have “provide[d] a brief summary of the legal basis of [its] complaint sufficient to present the problem clearly”, as required by Article 6.2 of the DSU.

D. Conclusion

7. Australia accordingly requests the Panel to make the rulings and provide relief in the form sought by Australia in its original submission.¹⁴

¹³ Written Submission of Australia, *Response to New Zealand’s submission: Request for a preliminary procedural ruling in relation to the consistency of New Zealand’s panel request with Article 6.2 of the DSU*, DS367, 14 April 2008, para. 18.

¹⁴ See: Australia’s original submission, paras. 68-69.