

Before the World Trade Organization
Panel Proceedings

CHINA – MEASURES CONCERNING TRADE IN GOODS

(DS610)

**AUSTRALIA'S COMMENTS ON CHINA'S REQUEST FOR A PRELIMINARY
RULING**

22 September 2023

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| <i>EC – Chicken Cuts</i> | Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157 |
| <i>EC – Computer Equipment</i> | Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851 |
| <i>EC – Selected Customs Matters</i> | Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791 |
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LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

| Abbreviation | Full Form or Description |
|---------------------|--|
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| WTO | World Trade Organization |

I. INTRODUCTION

1. Australia welcomes this opportunity to provide its views as a third party on China's preliminary ruling request and on the European Union's response. Australia exercises its right to participate because of its systemic interest in the correct and consistent interpretation, and application, of key requirements of the DSU.

2. Australia presents its views on the proper interpretation of Article 6.2 of the DSU, as relevant to China's preliminary ruling request. In particular, Australia will address the legal standard and analysis applicable to the requirement to identify the "specific measures at issue" in a request for the establishment of a panel, as relevant to the "unwritten measures".¹ Australia does not present any position on the facts of this dispute.

II. ARGUMENTS OF THE PARTIES

3. China contends that both unwritten measures (an unwritten import restriction and an unwritten overarching measure) identified by the European Union are outside the Panel's terms of reference. Relevantly, according to China, the European Union's panel request "fails to identify [...] these measures to the standard required in Article 6.2 of the DSU".²

4. China argues that the unwritten import restriction in the European Union's first written submission is "not the same as the measure identified in its panel request" because of an alleged inconsistency in the product scope between the two documents.³ As Australia understands China's arguments, such inconsistency is alleged to fall short of the requirements of Article 6.2 because:

- i. "product scope" is an essential component of how the unwritten import measure is identified, on the basis of the European Union's panel request;⁴ and

¹ Australia uses the term "unwritten measure(s)" throughout this document for convenience of identification only and as it is the term used by both principal parties. This submission focusses on the unwritten import restriction and the unwritten overarching measure.

² China's preliminary ruling request, para. 136.

³ China's preliminary ruling request, para. 146.

⁴ See China's preliminary ruling request, para. 161: "[...] the EU's panel request [...] seeks to identify a measure by reference to the measure's product scope. Having done so, the EU cannot now pursue claims against a measure with a different – significantly broader – product scope."

- ii. the applicable legal standard for the identification of unwritten measures under Article 6.2 of the DSU requires identification "as clearly as possible"⁵ within the panel request.

5. China's claim under Article 6.2 of the DSU with respect to the unwritten *overarching* measure is effectively consequential on its arguments in relation to the unwritten *import restriction*. This arises from China's characterisation of the factual overlap between those measures.⁶ Australia observes that, to the extent that the Panel is unpersuaded by China's interpretation or arguments with respect to the unwritten import restriction, the linked claim under Article 6.2 of the DSU in relation to the unwritten overarching measure will be similarly affected.

6. The European Union rejects China's submission in its entirety.⁷ It clarifies that,

As is evident from [its] first written submission [...] the European Union challenges a complex of interrelated measures attributable to China which, taken individually and collectively, affect the importation of goods from the European Union and restrict the trade in such goods.⁸

7. In connection with China's challenges regarding the identification of the unwritten measures, the European Union argues that specific identification of the products to which the relevant measure applies is not required under Article 6.2 of the DSU and that China's submission is therefore without merit.⁹ It further argues that in any event: i) its panel request describes the products to which the import restriction measure applies "in the same terms as in the European Union's first written submission";¹⁰ and ii) footnotes 1 and 2 of the panel request do not relate to the unwritten measures.¹¹

8. The European Union's rebuttal with respect to the unwritten overarching measure relies upon its arguments regarding the unwritten import restriction measure. This flows from

⁵ China's preliminary ruling request, paras. 162 – 163.

⁶ See footnote 116 of China's preliminary ruling request: "In short, since the overarching measure is apparently evidenced by the first import restriction, the product scope should necessarily be the same." Australia also observes that China points to no evidence which might confirm that "product scope" is an essential part of how the unwritten *overarching* measure is described (consistent with its arguments for the unwritten import restriction), and appears to rely on linkages with the unwritten import restriction measure in that regard.

⁷ European Union's response to China's preliminary ruling request, paras. 146, 156, 158, 169 and 208 – 209.

⁸ European Union's response to China's preliminary ruling request, para. 8. (footnote omitted)

⁹ European Union's response to China's preliminary ruling request, para. 157. (footnote omitted)

¹⁰ European Union's response to China's preliminary ruling request, para. 163.

¹¹ European Union's response to China's preliminary ruling request, para. 168.

the structure of China's own arguments, as described at paragraph 5 above.¹² Accordingly, should the Panel find the European Union's arguments on the import restriction measure persuasive, it should also make the same determination with respect to the unwritten overarching measure.

9. A touchstone for the Panel in assessing a terms of reference challenge based on Article 6.2, is whether the panel request sufficiently sets out the case that the respondent has to answer, and which the panel must consider.¹³ In Australia's view a strict comparison of product scope as between the first written submission and the panel request, as engaged by China, is not dispositive of whether a measure is adequately identified. As Australia examines in detail below, two key questions for the Panel's analysis under Article 6.2 should be: first, *what* is the relevant "measure at issue"? Second, is that measure set out in the panel request with sufficient precision, consistent with Article 6.2 of the DSU? Considerations relevant to each of these questions are addressed in turn, at Sections III and IV, below.

III. ASCERTAINING THE "MEASURE AT ISSUE"

10. Article 6.2 sets out "two distinct requirements" for a panel request, and which "[t]ogether [...] 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":

[...] identification of the *specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint (or the claims)*".¹⁴

11. A panel is tasked with ascertaining and understanding the measure at issue, to facilitate its subsequent assessment of the sufficiency of the panel request under Article 6.2. At the outset, Australia observes that it is the *complainant* which frames the measure at

¹² See paras. 207 – 208 of the European Union's response to China's preliminary ruling request.

¹³ This is derived from the well-accepted dual purpose of Article 6.2, both to define the panel's jurisdiction and to meet due process requirements. It is critical. For example, the Appellate Body in *EC and certain member States – Large Civil Aircraft* observed that "[t]he clear identification of the specific measures in the panel request is therefore central to define the scope of the dispute to be addressed by a panel" (see para. 786; emphasis added), while the Panel in *Korea – Alcoholic Beverages* stated that "[t]he question for determination before us, therefore, is whether [certain phrases] are specific enough to satisfy the letter and spirit of Article 6.2. **In other words, the question is whether Korea is put on sufficient notice as to the parameters of the case it is defending.**" (See para. 10.14) (emphasis added; footnote omitted).

¹⁴ Appellate Body Report, *US – Carbon Steel*, para. 125. (emphasis original; footnote omitted)

issue,¹⁵ and it has considerable discretion in doing so.¹⁶ It is not for the respondent to frame the parameters of the complainant's case.

12. The panel's analysis of compliance with Article 6.2 is a case-specific task,¹⁷ and some measures may indeed warrant "identif[ication of] the products subject to the measures in dispute", so as to "identify 'the specific measures at issue'", in satisfaction of the "purposes of the requirements of that provision".¹⁸ Such examples are rare. Indeed, the Appellate Body in *EC – Chicken Cuts* rejected the argument that "if the products at issue are in fact described in the panel request, then those products constitute the products within the panel's terms of reference".¹⁹ That dispute affirms the general position that "it is the *measure* at issue that generally will define the *product* at issue",²⁰ and not the other way around.

13. Finally, Australia also recalls that the requirement to identify the measure at issue in a panel request is "conceptually different" to the summary of the claims, and "they should not be confused".²¹ As a corollary of this conceptual separation, the relevant content²² of the measure itself should not generally be identified in "light of the substance of the specific *WTO obligation* that is allegedly being violated" as this would "generate uncertainty and complexity in WTO dispute settlement proceedings".²³ The Appellate Body has also stated:

Nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do

¹⁵ Appellate Body Report, *EC – Selected Customs Matters*, para. 130: "[...] the measure at issue is *what* is being challenged by the complaining Member." (emphasis original)

¹⁶ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. (footnote omitted): "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."

¹⁷ Appellate Body Report, *US – Carbon Steel*, para. 127: "[...] 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." (footnote omitted)

¹⁸ Appellate Body Report, *EC – Computer Equipment*, paras. 67 – 68. In that dispute, the Appellate Body did not, in fact, find that the term "LAN equipment" failed to satisfy the requirements of Article 6.2 (see para. 73). The Appellate Body in *EC – Chicken Cuts* explained its reasoning in that dispute as case-specific: "We believe that, in circumstances in which a series of decisions of customs authorities are under challenge, it may be necessary to identify the products at issue in order to distinguish the contested measures (for example, individual classification decisions by customs authorities) from other measures (different individual classifications by customs authorities). By contrast, in the present dispute, the contested measures are not individual classification decisions by customs authorities [...]" (see paras. 166 – 167).

¹⁹ Appellate Body Report, *EC – Chicken Cuts*, paras. 164 – 165.

²⁰ Appellate Body Report, *EC – Chicken Cuts*, para. 165. (emphasis original)

²¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 132. The Appellate Body has described a "claim" for the purposes of Article 6.2 as "an allegation that 'the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'" and "arguments" as "statements put forth by a complaining party 'to demonstrate the responding party's measure does indeed infringe upon the identified treaty provision.'" (Appellate Body Report, *China – HP-SSST (EU)*, para. 5.14, citing Appellate Body Report, *Korea – Dairy*, para. 139).

²² Australia refers to the "content" of the measure in the context of ascertaining *what* the measure at issue is, rather than in the sense of "precise content", as discussed below.

²³ Appellate Body Report, *EC – Selected Customs Matters*, para. 136. (footnote omitted; emphasis added).

so, these arguments should not be interpreted to narrow the scope of the measures or the claims.²⁴

IV. THE PROPER INTERPRETATION OF ARTICLE 6.2 OF THE DSU

14. The following submissions address certain relevant legal principles applicable to the identification of measures in a panel request.

15. Australia agrees with China that the requirement to identify the "specific measures at issue" under Article 6.2 can be characterised as a requirement for "*sufficient precision* so that what is referred to adjudication by a panel may be discerned from the panel request."²⁵ However, the concept of "precision" should be read together with the requirement for "sufficiency", and in light of the relevant context.

16. These concepts should also not be confused with the *separate* requirement to demonstrate the "precise content" of a measure, as part of the task of establishing the measure at the substantive stage of the dispute.²⁶ As the Appellate Body has stated:

[...] the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. [...] [A]n examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, ***we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure.***²⁷

17. Put another way, the "specificity" requirement under Article 6.2 does not necessitate product specificity where it is otherwise not warranted.²⁸ The *relevant* standard for identification of a measure – whether written or unwritten – under Article 6.2 requires that:

²⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

²⁵ Appellate Body Report, *US – Continued Zeroing*, para. 168 (emphasis added), as cited in China's preliminary ruling request, paras. 10, 139.

²⁶ For example, see the European Union's statement of this standard at paragraph 570 of its first written submission.

²⁷ Appellate Body Report, *US – Continued Zeroing* para. 169. (emphasis added)

²⁸ In that regard, Australia refers to its submissions at paragraph 12, above.

[...] although a measure cannot be identified without some indication of its contents, [it] need be framed only with sufficient particularity so as to indicate *the nature of the measure and the gist of what is at issue*.²⁹

18. Finally, Australia seeks to clarify two points of systemic importance regarding the identification of "unwritten measures" under Article 6.2 of the DSU. First, the due process objective of Article 6.2 to which both parties refer³⁰ does not, of itself, justify a generally higher threshold of specificity for unwritten, as opposed to written, measures. As the Appellate Body has explained in relation to Article 6.2, the relevant due process standard is that "[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."³¹

19. Second, the unwritten nature of a measure does not of itself, engender a higher standard of specificity under Article 6.2, relative to written measures. Australia recalls³² that considerations relating to the "precise contours" of a measure, as referenced by the Appellate Body in *EC and certain member States – Large Civil Aircraft*,³³ pertain solely to the complainant's burden during the *substantive* panel proceedings and *not* the establishment of a panel. These two enquiries: i) as to the identification of a measure in a panel request; and ii) as to the establishment of the precise content of that measure - are analytically and procedurally separate. Therefore, given that the "precise contours" of a measure are not implicated in a complainant's task under Article 6.2, any *uncertainty* in those elements, as referred to in *EC and certain member States – Large Civil Aircraft*,³⁴ also cannot as a matter of logic, inform the *general* legal standard under Article 6.2.³⁵

²⁹ Appellate Body Report, *US – Continued Zeroing*, para. 169. (emphasis added)

³⁰ See China's preliminary ruling request, para. 143; European Union's response to China's preliminary ruling request, para. 149 and footnote 53.

³¹ Appellate Body Report, *Thailand – H-Beams*, para. 88 (emphasis added), as cited in Appellate Body Report, *Russia – Railway Equipment*, para. 5.27 and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

³² In particular, please see quote from *US – Continued Zeroing* at paragraph 16, above.

³³ See para. 792: "When a challenge is brought against an *unwritten measure*, the very existence and the precise contours of the alleged measure may be uncertain. We would therefore expect complaining parties to identify such measures in their panel requests as clearly as possible." (emphasis original)

³⁴ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 792, as relevantly quoted, *ibid*.

³⁵ Australia also observes that the relevant passages of the Appellate Body's analysis in that dispute did not concern the requirement for "sufficient precision" in the identification of a measure. Rather, by reference to the requirement to identify an unwritten measure "as clearly as possible", the Appellate Body concluded the complainant had simply "fail[ed] to *identify clearly* the alleged unwritten [measure]" as distinct from other measures - not that it had failed to identify the measure as clearly *as might have been possible*, by reference to the inclusion or omission of that measure's various constituent elements. The latter argument was not applicable on the relevant facts. See para. 793. (emphasis added)

20. Rather, as Australia understands, the requirement to "identify [unwritten] measures in [...] panel requests as clearly as possible"³⁶ is consistent with a *case-specific* enquiry under Article 6.2. In that sense, the "uncertainty" of a measure forms one of the contextual considerations of which a panel should take account. It does not of itself, form the basis of a dispositive rule requiring *more* detail in a panel request.

21. Consistent with Australia's understanding, the Appellate Body observed in the same report that:

An assessment of whether a complaining party has identified the specific measures at issue may depend on the *particular context* in which those measures exist and operate. ***Such an exercise involves, by necessity, a case-by-case analysis since it may require examining the extent to which those measures are capable of being precisely identified.***³⁷

22. The context surrounding an unwritten measure may explain and justify why a complainant is unable to provide the same degree of specificity as may be possible for written measures and why such specificity may therefore be factually unnecessary to satisfy Article 6.2. A complainant seeking to establish an unwritten measure will in any case bear the onus of proving its existence in the substantive phase. From a systemic perspective, the degree of specificity required of an unwritten measure in a panel request needs careful consideration, given the affront that such measures might present to a properly functioning rules-based system.³⁸

23. A panel request sets the parameters of a dispute and serves an important due process function. While it is a document that requires sufficient precision in order to satisfy the purposes of Article 6.2, it is not intended as a tool to constrain the complainant or unduly curtail the legitimate adjudication of a measure.

24. Australia thanks the Panel for the opportunity to submit its views on certain issues raised under this preliminary ruling request.

³⁶ Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 792.

³⁷ Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 641.

³⁸ Australia shares the European Union's views at paragraph 17 of its response to China's preliminary ruling request.