CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON WINE FROM AUSTRALIA

(DS602)

COMMENTS ON CHINA'S PRELIMINARY REQUEST

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I. INTRODUCTION

1. The United States welcomes the opportunity to comment on China's preliminary ruling request (PRR), and presents its views on two issues: (i) the proper legal interpretation of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and (ii) the evolution in the legal basis identified in the request for consultations compared to the panel request.

2. That the United States limits its comments to these issues does not mean that it agrees with the other positions expressed in China's PRR.

II. THE PROPER INTERPRETATION OF ARTICLE 6.2 OF THE DSU

3. China argues that fourteen of Australia's claims "are vague and/or imprecise" such that they do not present the problem clearly.[1] Specifically, China argues that Article 6.2 of the DSU required that Australia go beyond the "mere listing of provisions alleged to have been violated", since that would not "grant China the required clarity to understand the case that China is required to answer."[2] In this regard, China argues that previous DSB reports have "established a clear standard" that claims explain "how or why" a provision of a WTO agreement was breached.[3] To demonstrate that Australia did not satisfy this "how or why" approach, China relies upon a panel's application of that approach in *Korea – Pneumatic Valves (Japan)*.[4]

4. In response, Australia argues that its claims sufficed to "present the problem" clearly under Article 6.2 of the DSU,[5] and that in any event China's description of the applicable legal framework omitted the Appellate Body's reasoning and findings in *Korea – Pneumatic Valves (Japan)*.[6] China's omission is significant because, among other things, the Appellate Body "explicitly disagreed with the reasoning of the panel on which China relies throughout its PRR."[7]

5. Article 6.2 of the DSU sets forth the requirements for a request for the establishment of a panel to bring a "matter" (in the terms of Article 7.1 of the DSU) within a panel's terms of reference. In relevant part, Article 6.2 of the DSU provides that a request to establish a panel:

> [S]hall indicate whether consultations were held, identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

6. The relevant text of Article 6.2 is that a panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Neither of the terms "how" nor "why" appears in Article 6.2.

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[1] China PRR, para. 6.
[2] China PRR, paras. 18, 21.
[3] China PRR, para. 23 (emphasis original).
[4] *See*, *e.g.*, China PRR, paras. 20-21, 26, 92, 95, and 107 (citing *Korea – Pneumatic Valves (Panel)*).
[5] *See*, *e.g.*, Australia PRR response, paras. 6-35.
[6] Australia PRR response, paras. 9-25.
[7] Australia PRR response, para. 3 (citing *Korea – Pneumatic Valves (AB)*).

Instead, to provide the brief summary required by Article 6.2, it is sufficient for a complaining Member to specify in its panel request the legal claims under the WTO provisions with respect to the identified measures.

7. According to the text, two basic requirements in Article 6.2 are that the panel request (i) identify the specific measure at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. To provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, the panel request need only specify the legal claims under the WTO provisions that it considers are breached by the identified measure. Article 6.2 does not require that a panel request include arguments. Instead, the DSU indicates that a complaining party's arguments are to be made in the submissions, oral statements, and other filings with a panel.

8. Past references in Appellate Body reports of a requirement to explain "how" or "why" a measure is inconsistent were unsupported by the text of Article 6.2. Under the Appellate Body's approach, a complaining party would be required to include in a panel request the arguments that the complaining party will present to the panel regarding each claim of inconsistency with a provision of a covered agreement. But Article 6.2 plainly does not require the inclusion of arguments in a panel request.

9. Before the Appellate Body read these requirements into Article 6.2, this provision had never been understood this way. It is notable that the text for Article 6.2 was drawn from, and does not differ materially from, the 1989 GATT Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These Montreal Rules provided: "The [panel request] shall indicate whether consultations were held, and provide a brief summary of the factual and legal basis for the complaint sufficient to present the problem clearly."

10. The fact that the Article 6.2 language comes from the Montreal Rules suggests that its incorporation in the DSU was not meant to change the standard that would be applied to panel requests. Panel requests subsequent to the Montreal Rules did not include an explanation of "how or why" the measure at issue was inconsistent with the GATT 1947 provision at issue. Rather, GATT panel requests identified the relevant GATT legal provision, or one of its obligations. The practice of Contracting Parties under the GATT 1947 with respect to panel requests therefore also demonstrates that the "how or why" approach is in error.

11. A panel recently attempted to faithfully apply the "how" or "why" approach of the Appellate Body to a panel request, and in so doing, rejected several claims as outside its terms of reference. The complaining party appealed, arguing that the panel had effectively required that it present the arguments supporting its claims that certain legal provisions were breached, and the appellate report reversed the panel's application of the Appellate Body's own approach. The appellate report stated that "the reference to the phrase 'how or why' in certain past disputes does not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis . . . sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU." The United States would agree that Article 6.2 – and not a requirement without textual basis – presents the legal requirements for a panel request, and Article 6.2 does not require a complaining party to explain "how" or "why" a measure breaches an identified WTO commitment.

12. The "legal framework" proposed by China is devoid of any discussion of the actual text of Article 6.2 of the DSU.[8] Although China quotes Article 6.2 at the outset,[9] it immediately abandons the text in favor of requirements that are not found in Article 6.2 – namely, the "how or why" approach.[10] China in turn relies upon those extra-textual requirements to argue that fourteen of Australia's claims do not satisfy Article 6.2.[11]

13. Because China's requests concerning Article 6.2 depend on legal requirements that are not in the text, they do not provide a basis for the Panel to reject Australia's claims.

III. THE SCOPE OF THE DISPUTE UNDER ARTICLES 4 AND 6 OF THE DSU

14. China also argues that Australia's panel request improperly expanded the scope of the dispute because the phrase "and calculations", within the clause "its methodology and calculations relied upon to calculate export prices", was not included in Australia's request for consultations.[12] China argues that past DSB reports have used the terms "methodology" and "calculation" to mean different things[13] such that adding "and calculations" placed Australia's claim outside the Panel's terms of reference.[14]

15. Australia argues in reply that the essence of its claim – "the inconsistency of MOFCOM's determination of export price with Article 2.3" of the AD Agreement – did not change.[15] Rather, adding "calculations" was "a natural evolution from the legal basis indicated in the consultations request."[16]

16. China's arguments rely on a misunderstanding of the relevant provisions of the DSU. Together, Articles 4 and 6 of the DSU set out the procedures for consultations and the establishment of panels. Article 4 of the DSU contains procedures applicable to consultations, while Article 6 sets out the requirements for the establishment of panels. Article 4.7 provides an explicit link between these two stages of a dispute: "If the consultations fail to settle a dispute . . . the complaining party may request the establishment of a panel" to consider that dispute. It follows from these provisions that the panel request in Article 6 flows from the effort to resolve "a dispute" that is the subject of consultations under Article 4.

17. Articles 4.4 and 6.2 set out the requirements for a consultation request and panel request, respectively, and contain different obligations with respect to the identification of the measures and claims at issue. With respect to the claims, Article 4.4 requires "an indication of the legal basis for the complaint", while Article 6.2 requires "a brief summary of the legal basis of the

[8] *See* China PRR, paras. 8-17.
[9] China PRR, para. 9.
[10] *See* China PRR, paras. 18-28.
[11] *See*, *e.g.*, China PRR, paras. 30-31 (asserting that "merely paraphras[ing] the language of Articles 5.1, 5.2(i), and 5.4 of the ADA" is not enough to "satisfactorily explain[] *how* or *why* each of these provisions" have been breached) (emphasis original).
[12] China PRR, paras 111-112 (emphasis added).
[13] *See* China PRR, paras. 113-117.
[14] China PRR, paras. 118-119.
[15] Australia PRR Response, para. 260.
[16] Australia PRR Response, para. 260. Australia also argues that China's request "erroneously draws upon semantic differences between the terms 'methodology' and 'calculations'". Australia PRR Response, para. 261.

complaint sufficient to present the problem clearly."[17] The textual differences establish that the legal claims in a panel request do not need to be identical to those set out in the consultation request.

18. The difference between the two provisions reflects the normal evolution of a proceeding. A request for consultations is intended to give notice to the responding Member of the matter that is subject to consultations; the request must (1) identify the measures and (2) indicate the legal basis. The request need only provide an "indication" of the legal basis because the consultations afford the parties with an opportunity to reach a deeper understanding of the measures through an exchange of views. During consultations, certain concerns of a complainant may be resolved with further explanations by the respondent. Or, the consultations may clarify the nature of the complainant's concerns. In some instances, the parties are able to "obtain satisfactory adjustment of the matter."[18]

19. If the consultations fail to settle the dispute, the complainant may request the establishment of a panel in writing pursuant to Article 6.2. The panel request serves to establish the terms of reference of the panel.[19] The different standard of Article 6.2 – "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" – suggests a progression in the complainant's articulation of the claims. To meet the more exacting standard of Article 6.2, the complainant may need to elaborate upon the legal basis with greater precision than existed in the consultation request. The elaboration could have the effect of altering the claim or producing more claims as they are identified with greater specificity.

20. Article 6.2 recognizes that information received and clarifications made during the course of consultations could impact and alter the claims. In some cases, a complainant may simply reproduce in a panel request the claims presented in a request for consultations. But Article 6.2. does not require such an approach. Article 6.2 contemplates that a complainant's articulation of the legal basis of the complaint may evolve and be refined in light of the consultations between the parties.

21. China's interpretive argument collapses the distinction between the requirements in Articles 4.4 and 6.2 of the DSU and places the same burden on complaints to identify claims at issue with specificity in their consultations request. Such a result would frustrate one object of consultations: To foster a better understanding of the relevant measures and concerns of the various Members in order to promote a satisfactory adjustment of the matter. If the description of a measure cannot evolve or be reformulated between consultations and panel requests, consultations cannot serve this function.

22. Accordingly, consistent with the text of Article 6.2, the Panel should evaluate whether Australia "indicate[d] whether consultations were held," "identif[ied] the specific measure at

[17] With respect to the measures, Article 4.4 requires "identification of the measures at issue" while Article 6.2 requires that a complainant "identify the specific measures at issue." That is, while each document must identify the "measures at issue," the standard for a panel request requires more precision (the "specific" measures must be identified).
[18] Article 4.5.
[19] Article 7.1.

issue" and "provide[d] a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

23. The United States further notes the inherent logical inconsistency of China's position that Article 2.3 of the AD Agreement concerns only the two "methodologies" to construct export price.[20] If, as China posits, Article 2.3 only concerns the "export price methodology" and not the calculation of export price, then adding the word "calculation" would not expand the dispute.[21] By China's logic, Australia already captured Article 2.3 by referring to the methodology used to calculate export price. China fails to explain how, despite containing neither the word "methodology" nor "calculation", Article 2.3 nonetheless exclusively pertains to one but not the other. To the contrary, in describing a concern under Article 2.3 as relating to China's "methodology" applicable in the investigation of Australian wine, Australia must be referring to the calculations that China undertook in the context of that investigation. The United States therefore sees no basis for China's request for a preliminary finding.

IV. CONCLUSION

24. The United States appreciates the opportunity to submit its views in this dispute on the proper interpretation of Articles 4 and Article 6 of the DSU.

[20] *See* China PRR, para. 114.
[21] *See* China PRR, para. 114.