*CHINA – MEASURES CONCERNING TRADE IN GOODS*

**(DS610)**

**COMMENTS OF THE UNITED STATES OF AMERICA ON CHINA'S REQUEST FOR PRELIMINARY FINDINGS**

**September 22, 2023**

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## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on China's request for preliminary findings by the Panel ("preliminary finding request") and the response of the European Union ("EU") to China's request, to which the Panel invited the third parties to comment in its August 2, 2023, communication.

2. This submission addresses (1) the proper legal interpretation of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and China's argument that the EU failed to "properly" identify certain measures in its panel request and failed to "present the problem clearly" with respect to the legal bases of certain claims; and (2) the proper legal interpretation of Articles 4.4 and 6.2 of the DSU with respect to the measures and legal bases provided in the request for consultations compared to the panel request.

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

## II. THE PROPER LEGAL INTERPRETATION OF ARTICLE 6.2 OF THE DSU

4. China argues that EU failed to "properly" identify certain measures in its panel request; however, the term "properly" is not found in the text of the DSU.[1] In addition, with respect to certain other issues, China argues that the EU failed to present the problem clearly because the EU failed to sufficiently link the legal basis for the claim to the identified measure.[2] However, China's argument relies on an erroneous "how or why" approach that has no basis in the DSU. To the extent that China's arguments depend on legal requirements that are not found in the text of the DSU, they do not provide a basis for the Panel to reject the EU's claims.

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. In turn, when the DSB establishes a panel, its terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. As noted, 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."

7. According to the text, two basic requirements in Article 6.2 are that the panel request (i) identify the specific measures at issue and (ii) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. Contrary to China's argument,

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[1] *See* China's Request for a Preliminary Finding ("China's PFR"), paras. 135-203.

[2] *See* China's PFR, paras. 204-224.

nothing in the relevant DSU provisions imposes a third, additional requirement to identify the specific measures in a so-called "proper" way.

8. China also asserts that the EU's panel request falls short of the requirement in the DSU to "present the problem clearly" because the EU has not plainly connected certain measures to a violation of specific WTO provisions.[3] However, the legal approach proposed by China is devoid of any discussion of the actual text of Article 6.2 of the DSU. Although China quotes Article 6.2 at the outset, it immediately abandons the text in favor of requirements that are not found in Article 6.2 – namely, the "how or why" approach developed in certain Appellate Body reports.[4] China in turn relies upon those extra-textual requirements to argue that certain EU claims do not satisfy Article 6.2. 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 the EU's claims.

9. As explained above, under Article 6.2 of the DSU, 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.

10. 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.[5]

11. 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.

12. 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."

13. 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

[3] China's PFR, sec. V.

[4] *See* China's PFR, paras. 207-28.

[5] *See, e.g.,* DSU Article 12 (Panel Procedures) and Appendix 3 (Working Procedures) ("Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.").

"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.

14. The panel in the *Korea – Pneumatic Valves (Japan)* dispute 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.[6] Japan, 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."[7] 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.

15. Pursuant to Article 6.2 of the DSU, if the EU's panel request has identified the specific measures at issue as well as the legal claims under the WTO provisions that the EU considers are breached by the identified measures, the Panel should find that the EU has met the requirement to present the problem clearly.

## III. THE PROPER LEGAL INTERPRETATION OF ARTICLES 4.4 AND 6.2 OF THE DSU

16. China argues that the EU impermissibly expanded the scope of the dispute beyond its request for consultations by using different or more specific terms to describe the measures in the EU's subsequent panel request and first written submission.[8] China also argues that the EU advances a different legal basis for its claims in its first written submission compared to the legal basis included in its consultations request.[9]

17. With respect to the measures, the EU asserts that the "essence" of the SPS measures as submitted in its consultations request and panel request has been consistent because the measures identified in its panel request merely formalized the "unwritten" SPS measures and import restrictions previously identified in its consultations request.[10] The EU argues that formalization of the SPS measures in a generally applicable import ban does not render them legally distinct from the measures identified in its consultations request.[11]

18. The question for the Panel to decide is whether the challenged measures are, in effect, the same measures the EU identified in its consultations request, panel request, and first written

[6] *Korea – Pneumatic Valves (Japan) (Panel)*, paras. 7.24 and 7.34-7.36.

[7] *Korea – Pneumatic Valves (Japan) (AB)*, para. 5.12; *see also* paras. 5.7 and 5.10-5.15.

[8] *See* China's PFR, paras. 6-7 and 24-87.

[9] *See* China's PFR, paras. 88-127.

[10] EU Response to China's PFR, para. 22.

[11] EU Response to China's PFR, paras. 75-79.

submission as the DSU contemplates identity, and greater specificity, in the measures subject to a dispute.

19. Together, Articles 4 and 6 of the DSU set out the procedures for consultations and the establishment of panels.[12] Articles 4.4 and 6.2 set out the requirements for a consultations request and panel request, respectively, and contain different obligations with respect to the identification of the measures and claims at issue. With respect to measures:

- For a consultations request, Article 4.4 of the DSU requires an "identification of the measures at issue".

- For a panel request, Article 6.2 of the DSU requires a Member to "identify the specific measures at issue" (emphasis added).

20. These provisions of the DSU contemplate that a measure may be described in more general terms in the consultations request and in more "specific" terms in the panel request. In other words, if the measure in each request is the same measure (even if described in more specific or clearer terms in the panel request), then the identified measure has not changed and is within the scope of the panel's terms of reference.

21. Following a request for consultations, a formally later in time measure may be included in the panel request as a "specific measure at issue" if it is, in effect, the same as a "measure at issue" identified in the consultations request. For example, if a Member challenges an import prohibition in substance and identifies in its consultations request the current legal instrument through which the prohibition is imposed, the Member may include in its panel request a subsequent legal instrument (which is also a "measure") through which the prohibition (the measure at issue) is maintained as of that date. By citing the subsequent measure (legal instrument), the Member has not changed the "measure at issue" or the scope of its challenge, for the original and subsequent measure (legal instrument) are, in effect, the same.

22. For these reasons, if the Panel concludes that any newly cited measures (legal instruments) that purportedly appear in the EU's panel request are, in effect, the same as those set forth in the EU's consultations request, the Panel should find that such measures are properly within its terms of reference.

23. The EU argues that when a panel is confronted with the question of whether a dispute has been impermissibly expanded from the consultations request, a panel must consider whether the "essence" of the challenged measures as set forth in the panel request is consistent with that submitted in the consultations request.[13] Both China and the EU rely on this so-called "essence" test, which is derived from certain Appellate Body reports and is unsupported by the text of the

[12] 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.

[13] European Union's Response to China's Request for a Preliminary Finding ("EU Response to China's PFR"), para. 33 (citing Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138; *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293).

DSU. The text of the DSU (Articles 7.1, 4.4, and 6.2) controls the Panel's terms of reference in this dispute, and it is on that basis that the Panel must consider the scope of the matter the DSB referred to it for examination.

24. Under Articles 4.4 and 6.2 of the DSU, precise and exact identity is not required between the measures submitted in the consultations request and the specific measures identified in the panel request.[14] Thus, if the measures identified in the EU's panel request (and first written submission) are merely more specific versions – or more precisely described versions (as in a legal instrument) – of the measures identified in the EU's consultations request, as the EU suggests, the Panel should find that the EU has not expanded or otherwise changed the scope of this dispute.

25. As noted, the central question in comparing the measures is whether the measures in the EU's panel request and first written submission can reasonably be understood to be the same as the measures in the consultations request, even if they are described in more specific or clearer terms or re-characterized as their formalized versions in the panel request and/or the first written submission.

26. In addressing this question, the Panel should consider the broader context surrounding the measures at issue. For instance, it is inherently challenging to locate and present documentary evidence with regard to unwritten measures, especially in the early days of their implementation even as they are having real-world impacts. The United States shares the EU's view that China should not be advantaged by its use of informal, unwritten measures and "a persistent and pervasive lack of transparency."[15] Members are aware of and concerned with the increasing use of trade measures in an opaque or pretextual manner, which benefit from plausible deniability.[16] In light of this current environment, the Panel should consider the contextual information provided by the EU and the relationship between unwritten measures and subsequent written measures.

27. This is not to say that merely stating in a consultations request that the request relates to amendments, replacement or renewal measures, implementing measures, or other measures related to the specific measures identified in the consultations request means any measure post-dating and arguably "related to" the identified measures should automatically be considered to be within the scope of the dispute. As explained above, the measures identified in a panel request and the complainant's first written submission are within the scope of the dispute if they can reasonably be understood to be the same as the measures identified in the consultations request in that dispute.

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[14] The United States notes that several past reports have found that Articles 4 and 6 do not "require a precise and exact identity between the specific measures and WTO provisions included in the request for consultations and the specific measures and WTO provisions identified in the request for the establishment of a panel." As discussed above, this conclusion is consistent with the text of the DSU.

[15] EU Response to China's PFR, paras. 4, 13.

[16] *See, e.g.*, WTO Council for Trade in Goods, Minutes of Meeting held 3-4 April 2023, Item 40 ("China – Implementation of Trade Disruptive and Restrictive Measures – Request from Australia"); *see also, e.g.*, WTO Council for Trade in Goods, Proposed Agenda for 6-7 July 2023 (G/C/W/828) 30 June 2023, Item 9 ("China – Implementation of Trade Disruptive and Restrictive Measures – Request from Australia").

28. Finally, with respect to the legal basis for the EU's claims, Articles 4.4 and 6.2 contain different obligations with respect to the legal basis of the 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 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 consultations request.

29. 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]

30. 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 consultations request. The elaboration could have the effect of altering the claim or producing more claims as they are identified with greater specificity.

31. 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.

32. China's approach 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 a measure cannot be identified with greater specificity, and if claims under a covered agreement cannot be clarified (whether added or dropped) between consultations and panel requests, consultations cannot serve this function.

[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] DSU Article 4.5.

[19] DSU Article 7.1.

## IV. CONCLUSION

33. The United States appreciates the opportunity to submit its views in connection with this dispute on China's preliminary finding request and the proper interpretation of relevant provisions of the DSU.