

***CANADA – MEASURES GOVERNING THE SALE OF WINE***

**(DS537)**

**COMMENTS OF THE UNITED STATES OF AMERICA ON  
CANADA'S PRELIMINARY RULING REQUEST**

**April 26, 2019**

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**TABLE OF REPORTS**..... ii

**I. INTRODUCTION**..... 1

**II. CANADA’S REQUEST FOR A PRELIMINARY RULING** ..... 1

**A. Australia’s Panel Request Allegedly Includes Measures that Were Not Identified in the Consultations Request**..... 1

**B. Australia’s Panel Request Allegedly Does Not Identify the Specific Measures at Issue or the Legal Basis of Certain Claims** ..... 2

**III. CONCLUSION** ..... 4

### TABLE OF REPORTS

<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<i>China – HP-SSST (AB)</i>	Appellate Body Reports, <i>China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan and the European Union</i> , WT/DS454/AB/R; WT/DS460/AB/R adopted 28 October 2015
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Countervailing Measures (China) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – Shrimp (Thailand) / US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views regarding Canada’s request for a preliminary ruling. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

## II. CANADA’S REQUEST FOR A PRELIMINARY RULING

2. In its preliminary ruling request, Canada alleges that Australia’s request for the establishment of a panel does not meet the requirements of Article 6.2 of the DSU because the request: (i) refers to measures that were not adequately identified in the consultations request, and (ii) does not adequately identify the specific measures at issue or the legal basis of certain claims.<sup>1</sup> The United States will provide comments regarding each of these allegations in turn.

### A. Australia’s Panel Request Allegedly Includes Measures that Were Not Identified in the Consultations Request

3. Canada claims that Australia’s panel request does not meet the basic requirements of DSU Article 6.2 because it “refers to measures maintained by the governments of Quebec and Ontario that were not adequately identified in the consultations request.”<sup>2</sup> In particular, Canada alleges that certain Quebec bottling requirements and Ontario taxation measures fall outside the scope of Australia’s consultations request, and thus are not within the Panel’s terms of reference.<sup>3</sup> While the United States takes no position on the factual merits of Canada’s assertions, the United States provides the following observations regarding the relevant provisions of the DSU.

4. Consultations play an important role in helping to resolve a dispute. Members agreed in the DSU that a measure must be the subject of consultations prior to requesting a panel to review that measure.<sup>4</sup> Article 4.4 of the DSU provides that a request for consultations must state the reasons for the request, “including identification of the measures at issue and an indication of the legal basis for the complaint.” Article 4.7 of the DSU then provides that, if “the consultations fail to settle a dispute,” a complaining party may request establishment of a panel. As the Appellate Body stated in *Brazil – Aircraft*:

Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.<sup>5</sup>

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<sup>1</sup> Canada’s Preliminary Ruling Request, para. 7.

<sup>2</sup> Canada’s Preliminary Ruling Request, para. 7.

<sup>3</sup> Canada’s Preliminary Ruling Request, paras. 28, 41.

<sup>4</sup> *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293.

<sup>5</sup> *Brazil – Aircraft (AB)*, para. 131.

5. Under DSU Article 6.2, a panel request must “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint[.]” By contrast with Article 4.4, then, Article 6.2 requires that the measures at issue be identified with specificity. That is, the panel request is to be more “specific” but the “measures at issue” are the same. Therefore, a complaining party may narrow the scope of the dispute in its panel request, but may not include additional measures not previously identified in the consultations request. As the Appellate Body has noted, the panel request may neither “expand the scope”<sup>6</sup> nor change the “essence” of a consultations request.<sup>7</sup>

6. Thus, to the extent the Panel concludes that the Quebec and Ontario measures cited by Canada are within the “scope” or of the same “essence” as those set forth in Australia’s consultation request, the Panel should find that those measures are properly within its terms of reference. For example, the Panel might consider whether Quebec’s bottling requirement constitutes a measure that “maintain[s] barriers to access for imported wine,” as described in the consultation request.<sup>8</sup>

#### **B. Australia’s Panel Request Allegedly Does Not Identify the Specific Measures at Issue or the Legal Basis of Certain Claims**

7. Canada also alleges that Australia’s panel request does not meet the requirements of DSU Article 6.2 because it: (i) “does not adequately identify the specific measures at issue or provide a clear basis for its claim against Ontario’s measures governing the sale of wine in grocery stores,” and (ii) does not “adequately identify Nova Scotia’s measures beyond its reference to Nova Scotia’s Emerging Wine Region Policy.”<sup>9</sup>

8. Article 6.2 of the DSU requires that the complainant “identify the specific measures at issue” and “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly” in its panel request. These two distinct requirements “constitute the ‘matter referred to the DSB,’ which forms the basis of a panel’s terms of reference under Article 7.1 of the DSU.”<sup>10</sup> That is, the identification of the measure and brief summary of the legal basis of the complaint together serve to demarcate the scope of a panel’s jurisdiction and allow parties to engage in the subsequent panel proceedings.<sup>11</sup>

9. Article 6.2’s specificity requirement “means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.”<sup>12</sup> The Appellate Body has stated that “the identification of a measure

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<sup>6</sup> *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (quoting *US – Upland Cotton (AB)*, para. 293).

<sup>7</sup> *US – Shrimp (Thailand) / US – Customs Bond Directive (AB)*, para. 293 (emphasis omitted) (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 137 (other citations omitted)).

<sup>8</sup> Consultations Request, p. 1, third bullet.

<sup>9</sup> Canada’s Preliminary Ruling Request, para. 45.

<sup>10</sup> *Argentina – Import Measures (AB)*, para. 5.39.

<sup>11</sup> *US – Continued Zeroing (AB)*, para. 168.

<sup>12</sup> *US – Continued Zeroing (AB)*, para. 168.

within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.”<sup>13</sup> The “legal basis of the complaint” is the specific provision the complainant alleges to have been breached.<sup>14</sup> The identification of the covered agreement provision claimed to have been breached is thus the “minimum prerequisite” for presenting the legal basis of the complaint.<sup>15</sup> Further, the requirement of a “brief summary” sufficient to “present the problem clearly” entails connecting the challenged measure with the provisions alleged to have been infringed.<sup>16</sup> Thus, to demonstrate that a particular measure or claim falls outside a panel’s terms of reference, the responding party must show that the panel request did not identify the measure at issue with sufficient precision or did not clearly identify the obligation or provision alleged to be breached by the challenged measure.

10. With respect to Ontario, Australia’s panel request identified measures that “place conditions on the sale of wine in grocery stores that govern the type of wine that can be sold in grocery stores and the display of wine in grocery stores” and that “operate so as to favour domestic Ontario wines in grocery stores and exclude or limit imported wine from being displayed and sold in grocery stores”; as well as measures “with respect to ‘wine boutiques’ in grocery stores [that] favour domestic wine and exclude or limit the sale of imported wine” by, *inter alia*, requiring local content and the performance of certain winemaking steps in Ontario, and mandating display requirements and sales targets that favor domestic wines.<sup>17</sup> With respect to Nova Scotia, Australia identified measures that “provide a reduced product mark-up on wine, through the Nova Scotia Liquor Corporation, for local wine producers.”<sup>18</sup> The request then states that these measures “are reflected in legal and policy instruments and practices,” including, for the Ontario wine measures, “Ontario Regulation 232/16: Sale of Liquor in Government Stores under the Liquor Control Act,” the “Ontario Liquor Licence Act,” and the “Ontario Liquor Control Act.”<sup>19</sup>

11. In its preliminary ruling request, Canada claims that Australia’s identification of the Ontario measures is insufficient because “[i]nstead of identifying ‘specific measures’, Australia has merely listed three lengthy and complex pieces of provincial legislation or regulations,” referring to Ontario Regulation 232/16, the Ontario Liquor Licence Act, and the Ontario Liquor Control Act.<sup>20</sup> Canada ignores, however, the narrative description of the Ontario wine measures that *precedes* the listing of these three instruments in the panel request, and which specifically

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<sup>13</sup> *US – Continued Zeroing (AB)*, para. 169.

<sup>14</sup> *China – HP-SSST (AB)*, para. 5.14; *US – Countervailing Measures (China) (AB)*, para. 4.12; *EC – Selected Customs Matters (AB)*, para. 130.

<sup>15</sup> *China – HP-SSST (AB)*, para. 5.14; *Korea – Dairy (AB)*, para. 124.

<sup>16</sup> *China – HP-SSST (AB)*, para. 5.15; *China – Raw Materials (AB)*, para. 220; *US – Countervailing Measures (China) (AB)*, para. 4.8.

<sup>17</sup> Panel Request, section III.a.

<sup>18</sup> Panel Request, section V.

<sup>19</sup> Panel Request, section III.a.

<sup>20</sup> Canada’s Preliminary Ruling Request, para. 49.

identifies the actions Australia challenges.<sup>21</sup> Canada’s arguments regarding Nova Scotia similarly focus on three legal instruments and practices that reflect Nova Scotia’s alleged wine mark-up, to the exclusion of the narrative description of the measures at issue in the panel request.<sup>22</sup> In reviewing Australia’s panel request under Article 6.2, however, the Panel’s evaluation should take into consideration the entirety of Australia’s request, including the narrative description Australia provides for each measure.

### **III. CONCLUSION**

12. The United States thanks the Panel for providing an opportunity to comment on the issues raised in this proceeding.

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<sup>21</sup> Canada’s Preliminary Ruling Request, paras. 49-53; *see also* Australia’s Response to Canada’s Preliminary Ruling Request, paras. 41-53, 56-64.

<sup>22</sup> *See* Canada’s Preliminary Ruling Request, paras. 47-52, 54-58; *see also* Australia’s Response to Canada’s Preliminary Ruling Request, paras. 41-53, 56-64.