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1 ARTICLE 6

1.1 Text of Article 6

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.⁵

*(footnote original)*⁵ If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, 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 case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

1.2 Article 6.1

1.2.1 Multiple panels

1.2.1.1 Two panels established, same parties and same claims

1. In *Australia – Automotive Leather I and II*, pursuant to requests made by the United States, two panels were established regarding the same matter. In the later request for the establishment of a panel, the United States asked that its earlier request be withdrawn. Australia argued that the United States did not have the right to have a second panel established, and requested that the panel terminate its work immediately. The Panel denied Australia's request:

"The establishment of a panel is the task of the DSB. It is by no means clear that, once the DSB has established a panel, as it did in this case at its meeting of 22 June 1998, the panel so established has the authority to rule on the propriety of its own establishment. Nothing in our terms of reference expressly authorizes us to consider whether the DSB acted correctly in establishing this Panel.

...

In our view, Australia is asking this Panel to read into the DSU an implicit prohibition on multiple panels between the same parties regarding the same matter that does not exist in the text of the DSU. Australia's arguments in support of its position arise out of policy considerations and address the object and purpose of the DSU. In light of the fundamental importance in the WTO dispute settlement system of the right to have a panel established to examine a matter, in the absence of a consensus not to do so, we do not consider it appropriate in this dispute to read such an implicit prohibition into the DSU. This is particularly true given that the policy concerns expressed by Australia are purely theoretical and do not arise in this case. Specifically, this is not a case where a complainant is actively pursuing two proceedings with respect to the same matter -- the United States has made it very clear that it is not pursuing the first dispute. To the contrary, the United States has sought to terminate the first dispute, and it is Australia which has sought to prevent that result. Nor is this a case where a complainant has sought a second panel before a first panel has completed its work with respect to the same matter because it was dissatisfied with developments in the first panel. Although the first panel in this case was established, it was never composed and thus never began its work.

For the foregoing reasons, we deny Australia's request to terminate this Panel, and will continue our work in accordance with our terms of reference."¹

1.2.1.2 Same panel members, different parties and a measure in common

2. On 21 November 2006, a month after the establishment of the panel in *US – Shrimp (Thailand)*, the DSB established a separate panel in *US – Customs Bond Directive*. The terms of reference of both panels included the application of the Enhanced Bond Requirements by the United States to imports of shrimp.² At that meeting of the DSB, Thailand stated that it had expected the establishment of a single panel for both proceedings in accordance with Article 9.1 of the DSU. In the absence of that single panel, Thailand indicated that, pursuant to Article 9.3 of the DSU, it expected that the same persons would be appointed as panelists in the two disputes and that the timetables would be harmonised. The representative of the United States responded that, although the panel in *US – Shrimp (Thailand)* had already been established, the same persons could be appointed to serve as panelists in the two proceedings and the timetables of the separate panels could be harmonised. The meetings to appoint the same members for both panels were held jointly between the two separate complainants, Thailand and India, and the common respondent, the United States. Since the parties were unable to agree on panelists to serve for these proceedings, on 19 January 2007, Thailand and India, requested in separate letters, that the Director-General determine the composition of the panel pursuant to Article 8.7 of the DSU, and

¹ Panel Report, *Australia – Automotive Leather II*, paras. 9.12 and 9.14-9.15.

² The terms of reference of the panel in *US – Shrimp (Thailand)* included a zeroing measure while the panel in *US – Customs Bond Directive* was asked to examine the Enhanced Bond Directive *as such*.

select the same persons to serve as panelists for both proceedings, pursuant to Article 9.3 of the DSU. On 26 January 2007, the DG composed the two separate panels consisting of the same members.³

1.2.2 Relationship with other provisions of the DSU

1.2.2.1 Article 12.12

3. In *EU – Fatty Alcohols (Indonesia)*, the Appellate Body addressed the issue of whether panel proceedings may be suspended before panel composition has been completed. The Appellate Body stated that:

"Article 6.1, for instance, provides that a panel shall be established by the DSB if certain conditions are met. However, this provision does not refer to any action to be taken by the panel at that point in time. We consider that this, along with the fact that Article 12.12 envisages that discretion be exercised, as well as the placement of Article 12.12 in the overall structure of the DSU, suggests that it is a composed panel that is to take the decision to suspend panel proceedings."⁴

1.2.2.2 Article 22.6

4. In *US – COOL (Article 22.6 – United States)*, the Arbitrator examined the issue of whether referral of a matter to arbitration under Article 22.6 of the DSU requires specific action by the DSB, as in the case of establishment of a panel pursuant to Article 6.1:

"[W]e find it difficult to equate the arbitration referral procedure under Article 22.6 with that of panel establishment under Article 6 in light of the decision-making rule in Article 2.4, which states that '[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.' The establishment of panels authorized under Article 2.1 is based on negative consensus, as stipulated in Article 6.1. Similarly, adoption of panel and Appellate Body reports under Articles 16.4 and 17.14, respectively, is achieved through negative consensus decisions by the DSB, as is the authorization of suspension of concessions under Articles 22.6 and 22.7. Interpreting Article 22.6 to include a requirement of referral by the DSB implicates the decision-making rule that would apply to such action, yet there is no explicit reference to such a decision in the text of Article 22.6."⁵

1.3 Article 6.2

1.3.1 Task of panels to examine requests for establishment

5. In *EC – Bananas III*, the Appellate Body "recognize[d] that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda." Thus, the Appellate Body concluded that "[a]s a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".⁶

6. In rejecting the Panel's standard of review in the interpretation of the text of the panel request, the Appellate Body, in *EC – Selected Customs Matters* noted the danger of a panel interpreting the term "measure at issue" in light of the substance of the specific WTO obligation allegedly being violated:

"Interpreting the term 'measure at issue' in Article 6.2 of the DSU in the light of the substance of the specific WTO obligation that is allegedly being violated would generate uncertainty and complexity in WTO dispute settlement proceedings. When drafting a request for the establishment of a panel, the complainant would have to

³ Panel Reports, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 7.1-7.2.

⁴ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.226.

⁵ Decision of the Arbitrators, *US – COOL (Article 22.6 – United States)*, para. 2.14.

⁶ Appellate Body Report, *EC – Bananas III*, para. 142.

foresee the possible restrictions that the substance of the legal provisions might impose on the type of measure that could be challenged. The identification of the measures at issue in the panel request might prove to be even more complex where the challenge concerns a plurality of provisions of the covered agreements. Moreover, the existence, nature, and scope of possible restrictions would depend on the panel's interpretation of the substance of those legal provisions. The respondent might also be placed in an uncertain situation in presenting its defence because it would have to guess what the panel would identify as the measure at issue on the basis of the panel's interpretation of the substance of the alleged violation. This could lead to unnecessary litigation on a panel's terms of reference, as the responding party may choose to contend at a preliminary stage that, in the light of the substance of the legal provision on which a specific claim is based, the measure identified in the panel request does not fall within the panel's terms of reference."⁷

1.3.2 Request must be sufficiently precise

7. In *EC – Bananas III*, the Appellate Body held that there were two reasons why a panel request must be "sufficiently precise":

"As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."⁸

8. In *US – Carbon Steel*, the Appellate Body reiterated that the underlying requirements of Article 6.2 are first, to define the scope of a dispute, and second, to "serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case."⁹

"The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'

As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submission of the parties during the panel proceedings. Nevertheless in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, 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 light of the attendant circumstances."¹⁰

9. The Appellate Body in *EC – Large Civil Aircraft* explained why a panel request must be "sufficiently precise":

⁷ Appellate Body Report, *EC – Selected Customs Matters*, para. 136.

⁸ Appellate Body Report, *EC – Bananas III*, para. 142.

⁹ Appellate Body Report, *US – Carbon Steel*, para.126.

¹⁰ Appellate Body Report, *US – Carbon Steel*, paras. 126 and 127.

"In our view, the requirement that a complainant identify in its panel request the specific measures at issue ... assists in determining the scope of the dispute in respect of those measures, and, consequently, establishes and delimits the jurisdiction of the panel. In so doing, the panel request fulfils the objective of providing notice to the respondent and the third parties regarding the nature of the dispute. This due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction. The principal task of the adjudicator is therefore to assess what the panel's terms of reference encompass, and whether a particular measure or claim falls within the panel's remit."¹¹

10. The Appellate Body in *EC – Large Civil Aircraft* pointed out that a determination of whether a panel request is "sufficiently precise" shall be conducted on a case-by-case basis:

"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."¹²

11. In *Indonesia – Chicken*, Brazil argued that a respondent that alleges an impairment of its right of defence must provide evidence to support such impairment. Brazil submitted, in this regard, that Indonesia had failed to present any evidence relating to the prejudice that it alleged it had suffered. The Panel rejected Brazil's argument:

"We note that Appellate Body statements in recent cases contradict Brazil's argument. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body emphasized that 'this due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction'. In *US – Countervailing and Anti-Dumping Measures (China)*, the Appellate Body, referring back to this statement, explicitly ruled out the need for any demonstration that a respondent's ability to defend itself was effectively impaired:

[A] determination of whether due process has been respected does not necessitate a separate examination of whether the parties suffered prejudice, considering that '[t]his due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction'.¹³

12. In *US – Continued Zeroing*, the European Union, the complainant, challenged the continued use of the zeroing methodology in 18 cases. The Panel found that the European Union's panel request was not sufficiently clear, among other things, because it did not distinguish between the 18 cases and the related 52 proceedings where zeroing had allegedly been used. The Appellate Body disagreed, noting that:

"[S]o long as each measure is discernible in the panel request, the complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 of the DSU."¹⁴

13. In *Russia – Traffic in Transit*, the Panel found that the part of Ukraine's panel request challenging a *de facto* measure failed to meet the specificity requirement of Article 6.2:

"[T]he Panel does not consider that Ukraine's identification of the *de facto* measure in its panel request satisfies Article 6.2 of the DSU. As the Panel will explain further below, the panel request in this dispute does not identify with sufficient precision: (a) *the destinations of the goods* that are subject to the *de facto* measure, (b) the

¹¹ Appellate Body Report, *EC – Large Civil Aircraft*, para. 640. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.27.

¹² Appellate Body Report, *EC – Large Civil Aircraft*, para. 641.

¹³ Panel Report, *Indonesia – Chicken*, para. 7.15.

¹⁴ Appellate Body Report, *US – Continued Zeroing*, para. 170.

nature of the *de facto* measure as an *unwritten* measure, (c) the nature of the *de facto* measure as a *single* measure, (d) the '*as such*' character of its challenge concerning the *de facto* measure, and (e) the *legal instruments* underpinning the *de facto* measure. These aspects of Ukraine's panel request, taken together, lead to the conclusion that Ukraine has not identified the *de facto* measure with requisite sufficient particularity."¹⁵

14. In *US – Zeroing (Japan)* the Appellate Body recalled that a panel request must be "sufficiently precise" for two reasons:

"First, it forms the basis for the terms of reference of the panel, pursuant to Article 7 of the DSU; and, secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response."¹⁶

15. In *China – Intellectual Property Rights*, the Panel concluded that the request for establishment of a panel had been unclear, finding that "the United States' submissions to the substantive meetings with the Panel did not clarify that a claim was being made under Article 2(6) of the Berne Convention (1971)."¹⁷ On this basis, the Panel found that a claim under Article 2(6) of the Bern Convention (1971) "lies outside the Panel's terms of reference."¹⁸ The Panel stated that it had "carefully reviewed the United States' request for establishment of a panel and its submission"¹⁹ and observed that "at no point has the United States actually asserted that Article 4 of China's Copyright Law, in fact, applies to performances and phonograms or sound recordings and is, in fact, inconsistent with Article 14 of the TRIPS Agreement".²⁰ The Panel concluded that it could not "discern a claim on which it may rule."²¹

16. In *Argentina – Import Measures*, the Appellate Body reversed the Panel's finding that the European Union's panel request, "on its face", did not identify any specific instance of application of trade-related requirements as a measure on the grounds that a panel request that requires a reader to access information from a website and deduce from that information what the challenged measures are, cannot be said to be "sufficiently precise" in identifying the specific measures at issue for the purpose of Article 6.2 of the DSU. The Appellate Body noted that "[t]he term 'on its face' ... must not be so strictly construed as to preclude automatically reference to sources that are identified in its text, but the contents of which are accessible outside the panel request document itself".²² The Appellate Body reasoned:

"Understanding the need to scrutinize a panel request 'on its face' as limiting the examination of that request to the words appearing in the document would, in our view, be too formalistic an approach. It could, moreover, encourage complainants to incorporate entire texts of identified measures into the body of their panel requests. So long as a panel request seeks to identify the specific measure at issue through reference to a source where that measure's contents may readily be found and accessed, such contents may be the subject of scrutiny in assessing whether that request identifies the specific measures at issue within the meaning of, and in conformity with, Article 6.2 of the DSU.

At the same time, we do not mean to suggest that the identification of measures at issue by simple reference to external sources will always suffice to meet the requirements of Article 6.2 of the DSU. This is something that must be determined on a case-by-case basis, bearing in mind whether the specific measures at issue can be discerned from the panel request. A complainant whose panel request simply refers to external sources runs the risk that such request may fall short of the requirements of

¹⁵ Panel Report, *Russia – Traffic in Transit*, para. 7.301.

¹⁶ Appellate Body Report, *US – Zeroing (Japan)*, (Article 21.5), para. 108.

¹⁷ Panel Report, *China – Intellectual Property Rights*, para. 7.14.

¹⁸ Panel Report, *China – Intellectual Property Rights*, para. 7.15.

¹⁹ Panel Report, *China – Intellectual Property Rights*, para. 7.159.

²⁰ Panel Report, *China – Intellectual Property Rights*, para. 7.159.

²¹ Panel Report, *China – Intellectual Property Rights*, para. 7.159.

²² Appellate Body Report, *Argentina – Import Measures*, para. 5.48.

Article 6.2. We observe, in this connection, that the contents of webpages may not always be static. Moreover, a complainant may encounter more difficulty complying with Article 6.2 where its panel request refers to press releases or news articles about measures, rather than to the contents of the measures themselves. Yet, in circumstances where a complainant is confronted with measures that are, for example, unwritten, unpublished, or otherwise publicly inaccessible, reference to such secondary sources may be the only available means of identifying the measure at issue."²³

1.3.3 Title of the dispute

17. In the *EC – Selected Customs Matters*, the Panel stated that the title of the case has no bearing upon the scope of a Panel's terms of reference. According to the Panel:

"[A] panel's terms of reference are defined by the measures and claims that have been identified in the request for establishment of a panel. Neither Article 7 of the DSU, which defines the panel's terms of reference, nor the linked requirements of Article 6.2 of the DSU, make any reference to the title of the case. Ultimately, the breadth or narrowness of a particular challenge will be governed exclusively by the terms of the relevant request for establishment of a panel."²⁴

1.4 Basic requirements under Article 6.2

1.4.1 General

1.4.1.1 The distinct elements of Article 6.2

18. In *Korea – Dairy*, the Appellate Body analysed the requirements imposed by Article 6.2:

"The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."²⁵

19. In *US – Carbon Steel*, the Appellate Body summarized its previous jurisprudence on the requirements of Article 6.2. The Appellate Body noted the importance of the two distinct requirements, namely, identification of the specific measures at issue, and the provision of a brief summary of the claims. Referring to *Guatemala – Cement I*, it concluded that both requirements "together, they 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":

"There are, therefore, two distinct requirements, namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they 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.

The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of

²³ Appellate Body Report, *Argentina – Import Measures*, paras. 5.51-5.52.

²⁴ Panel Report, *EC – Selected Customs Matters*, para. 7.43.

²⁵ Appellate Body Report, *Korea – Dairy*, para. 120. See also Panel Report, *China – Intellectual Property Rights*, para. 7.4

reference, a panel must scrutinize carefully the request for establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'

As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, 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."²⁶

20. In *China – Publications and Audiovisual Products*, the Panel examined what is required of a party to satisfy the obligations to (i) identify the specific measure at issue; (ii) provide a brief summary of the legal basis of the complaint; (iii) sufficient to present the problem clearly; and (iv) relationship between the panel request and the Panel's term of reference.²⁷

21. The Appellate Body in *EC – Selected Customs Matters* explained that Article 6.2 contains two distinct requirements that relate to different aspects of the complainant's challenge of a measure taken by another Member, namely identification of the *specific measures at issue* and, the provision of a brief summary of the legal basis of the complaint (or the claims). Being mindful of the due process considerations underlying the DSU, the Appellate Body subsequently emphasized the purpose of these requirements:

"The 'specific measure' to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is *what* is being challenged by the complaining Member. In contrast, the legal basis of the complaint, namely the 'claim' pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly. Taken together, these different aspects of a panel request serve not only to define the scope of a dispute, but also to meet the due process requirements."²⁸

22. The Appellate Body in *EC – Selected Customs Matters* went on to rule that questions pertaining to the identification of the "measures at issue" and the "claims" relating to alleged violation of WTO obligations, set out in a panel request, should be addressed separately since the requirements under Article 6.2 of the DSU are conceptually different and should not be confused:

"[T]he panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings. The question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether a measure is consistent or not with the legal provision(s) of the covered agreement(s) to which the panel request refers. Therefore, questions pertaining to the identification of the 'measures at issue' and the

²⁶ Appellate Body Report, *US – Carbon Steel*, paras. 125-127. See also Appellate Body Report, *Russia – Railway Equipment*, paras. 5.29 and 5.38.

²⁷ Panel Report, *China – Publications and Audiovisual Products*, paras. 7.17-7-32.

²⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 130. See also Appellate Body Reports, *China – Raw Materials*, para. 226; and *Russia – Railway Equipment*, para. 5.28; and Panel Report, *EU – PET (Pakistan)*, para. 7.17.

'claims' relating to alleged violations of WTO obligations, set out in a panel request, should be analyzed separately."²⁹

23. The Appellate Body reiterated the point in *Australia – Apples*, where it found that the Panel had conflated the requirement to identify the measure at issue with the requirement to identify the legal basis of the complaint (the claim). The Appellate Body began its analysis of this issue by recalling that:

"[T]he two requirements in Article 6.2 of the DSU are distinct and 'should not be confused'. In *Guatemala – Cement I*, the Appellate Body indicated that, because the panel read the word 'measure' in Article 6.2 of the DSU 'as synonymous with allegations of *violations*' of the covered agreements, the panel in that dispute had 'blur[red] the distinction between a 'measure' and 'claims' of nullification or impairment of benefits'. Similarly, in *EC – Selected Customs Matters*, the Appellate Body determined that the panel—by reading the term 'measure at issue' in Article 6.2 in the light of the obligation allegedly violated—had blurred the distinction between measures and claims. Accordingly, the measure at issue and the claim are two distinct elements that a complainant must identify in order to bring a matter properly within the terms of reference of a panel. In checking that a complainant has complied 'with both the letter and the spirit of Article 6.2 of the DSU', a panel must satisfy itself that both of these elements have been properly identified in the panel request."³⁰

24. Turning to the Panel's approach in that case, the Appellate Body stated that:

"[I]t appears to us that the Panel has conflated the requirement to identify the measure at issue with the requirement to identify the legal basis of the complaint (the claim). The Panel began its analysis by formulating the question before it as whether the *measures* relating to New Zealand's claims under Annex C(1)(a) and Article 8 were within the Panel's terms of reference. The Panel further considered that the 17 requirements, on the one hand, and 'their development', on the other hand, are separate measures. The Panel explained that its findings regarding the measures within the Panel's terms of reference did not cover 'the procedure through which the requirements were developed in the IRA process'. The Panel then considered ways in which New Zealand could have identified the *measure* alleged to infringe the obligation in Annex C(1)(a) and Article 8 of the *SPS Agreement*. However, having focused its analysis entirely on which *measures* were or should have been identified by New Zealand, the Panel went on to find that 'New Zealand's Annex C(1)(a) *claim* and its consequential *claim* under Article 8 of the *SPS Agreement* are outside of the Panel's terms of reference in this dispute'.

As previously noted, *measures* and *claims* are distinct, and Article 6.2 sets out separate requirements that must each be satisfied in a panel request in order for a matter to form part of a panel's terms of reference. The Panel failed to take proper account of this key distinction between *measures* and *claims* by, on the one hand, undertaking an analysis as to whether New Zealand had identified the specific *measure at issue* in its panel request and, on the other hand, finding that it was New Zealand's *claims*, not the *measure*, that were outside the Panel's terms of reference."³¹

25. In *EU – Energy Package*, the Panel clarified that Article 6.2 limits the scope of a panel's jurisdiction with regard to the measures at issue and the claims presented by the complainant, but not with regard to the evidence that the complainant relies on in presenting its claims:

"Turning to our consideration of this issue, we observe that, pursuant to Articles 7.1 and 6.2 of the DSU, we are bound by our terms of reference only with respect to our review of measures and claims, but not evidence. In order to fall within our terms of reference, measures and claims must be included in a panel request in accordance with Article 6.2 of the DSU. However, Article 6.2 of the DSU does not require that

²⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 131.

³⁰ Appellate Body Report, *Australia – Apples*, para. 417.

³¹ Appellate Body Report, *Australia – Apples*, paras. 420-421.

evidence a complainant relies on in advancing its claims be included in a panel request. Thus, while our terms of reference limit the scope of our review to those measures and claims that have been included in a panel request, they do not limit the scope of our review of evidence."³²

26. The Appellate Body in *Korea – Pneumatic Valves (Japan)* examined whether Japan's panel request "provide[d] a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU. Firstly, the Appellate Body stated that while the summary of the legal basis may be "brief", the degree of brevity that is permissible under Article 6.2 is a function of its clarity in presenting the problem. Moreover, "in light of the requirement to consider the sufficiency of a panel request on its face and on a case-by-case basis, what is sufficient to 'plainly connect' the measure with the provision of the covered agreements claimed to have been infringed will also depend on the circumstances of each case. Such circumstances may include the nature of the measure at issue and the way it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached. In addition, a panel request need only provide the 'legal basis of the complaint', that is, the *claims* underlying this complaint and not the *arguments* in support thereof."³³ Finally, the Appellate Body recalled the use of the phrase "how or why" in previous cases and concluded that it does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU and did not suggest that complainants are required to include more details beyond the legal basis of their complaint in their panel requests.³⁴ Rather, "the applicable legal standard, which requires a 'brief summary of the legal basis ... sufficient to present the problem clearly', entails the consideration of whether the panel request plainly connects the measure with the provision of the covered agreements claimed to have been infringed. The sufficiency of a panel request under this standard is to be assessed on a case-by-case basis."³⁵ Turning to the specifics of the case at hand, the Appellate Body found that "the fact that the narrative of Japan's claims, as set out in its panel request, paraphrases the language of Article 3.1, in and of itself, is not dispositive of whether the panel request complies with Article 6.2 of the DSU"³⁶, contrary to the Panel's observations.

1.4.1.2 Objective determination of conformity

25. The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* pointed out that the determination of conformity with Article 6.2 "must be done on an objective basis, such that any circumstances taken into account may not contemplate those that are relevant only to a party to the panel proceedings."³⁷

1.4.1.3 The distinction between jurisdictional issues and issues to be resolved on the merits

26. In *EU – PET (Pakistan)*, the Panel rejected the European Union's argument that by omitting provisions in the SCM Agreement directly addressing the issue of the calculation of benefit or the amount of subsidisation (such as Articles 14 or 19.4), Pakistan failed to present the problem clearly as required by Article 6.2 of the DSU. The Panel held that "the panel request presents the problem clearly, and the issue of whether the conduct described by Pakistan violates the provisions it cites goes to the merits of the case and not to the issue of whether we have jurisdiction to reach the merits."³⁸ The Panel further explained:

"If respondents are allowed to convert arguments that complainants' claims cannot succeed under a given provision into an objection under Article 6.2 of the DSU in this manner, it is difficult to see what argument could not be readily converted into an objection under Article 6.2 of the DSU, and thus become subject to a request for a preliminary ruling. We further emphasize that even if we were to construe this objection as one properly raised under Article 6.2 of the DSU, we would reject it for

³² Panel Report, *EU – Energy Package*, para. 7.152.

³³ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.6.

³⁴ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.77.

³⁵ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.7. See also paras. 5.12 and 5.33.

³⁶ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.15.

³⁷ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

³⁸ Panel Report, *EU – PET (Pakistan)*, para. 7.24.

reasons discussed further below when we discuss the substance of Pakistan's MBS claims (i.e. the panel request presents the problem clearly under Article 1.1(a)(1)(ii))."³⁹

27. In *Australia – Apples*, the Appellate Body found that the Panel erred by conflating the question of whether certain measures were identified in the panel with the question of the merits of the claim:

"The Panel further asked '*what* does New Zealand challenge under Annex C(1)(a)? *What*, according to New Zealand, causes the violation of Annex C(1)(a)?' The Panel, therefore, seems to have understood that the question of whether the 17 measures identified in the panel request *can violate, or cause the violation of*, the obligation in Annex C(1)(a) and Article 8 of the *SPS Agreement* was a jurisdictional question. We disagree with this approach by the Panel. For a matter to be within a panel's terms of reference—in the sense of Articles 6.2 and 7.1 of the DSU—a complainant must identify 'the specific measures at issue' and the 'legal basis of the complaint sufficient to present the problem clearly'. Moreover, 'a complaining Member enjoys certain discretion in the identification of the specific measure at issue' and '[a]s long as the specificity requirements of Article 6.2 are met, [there is] no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue'. Article 6.2 of the DSU does not impose any additional requirement, as the Panel's analysis implies, that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue *causes the violation of, or can violate*, the relevant obligation.

In this dispute, the Panel's analysis under Article 6.2 should have been confined to determining what New Zealand had identified as the specific measures at issue and, separately, what New Zealand had identified as the legal basis for its complaint (its claims). The Panel had already found in its preliminary ruling that New Zealand's panel request identified the 17 measures, and Annex C(1)(a) and Article 8 of the *SPS Agreement* as the basis for New Zealand's claims, and that, therefore, this matter was within the Panel's terms of reference.

By contrast, the question of whether the measures identified in the panel request can violate, or cause the violation of, the obligation in Annex C(1)(a) and Article 8 is a substantive issue to be addressed and resolved on the merits."⁴⁰

27. In *US – Continued Zeroing*, the Appellate Body explained that the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures:

"[T]he specificity requirement under Article 6.2 is intended to ensure the sufficiency of a panel request in 'present[ing] the problem clearly'. The identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the 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. The Panel, however, appeared to attribute a more substantive meaning to the specificity requirement, whereby the existence and precise content of a measure must be demonstrated for a panel request to fulfil this requirement.

Yet, the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a

³⁹ Panel Report, *EU – PET (Pakistan)*, fn 68

⁴⁰ Appellate Body Report, *Australia – Apples*, paras. 423-425.

measure 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. Thus, an 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."⁴¹

28. Similarly, the Panel in *Russia – Traffic in Transit* considered that the existence of the measure identified in the complainant's panel request concerned the merits of the case and the Panel's terms of reference.⁴²

1.4.2 First requirement: The request must be in writing

1.4.2.1 Relevance of the text of the panel request

29. In *EC – Bananas III*, the Appellate Body referred to the Panel's task to carefully examine the request for its establishment to ensure that it complies with Article 6.2 requirements:

"We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda. As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with the both the letter and the spirit of Article 6.2 of the DSU."⁴³

30. In *Japan – DRAMS (Korea)*, the Panel, referring to the Appellate Body's findings in *US – Carbon Steel* and the panel's findings in *Canada – Wheat Exports and Grain Imports*, observed that the due process objective of the second sentence of Article 6.2 of the DSU could only be properly upheld if panels apply that provision on the basis of the text of the panel request:

"We agree with the approach adopted by the Appellate Body in *US – Carbon Steel*, as subsequently applied by the panel in *Canada – Wheat Exports and Grain Imports*. In our view, the due process objective of the second sentence of Article 6.2 of the DSU may only properly be upheld if panels apply that provision on the basis of the text of the Request for Establishment. We believe that consideration of an actual prejudice suffered during the panel process undermines that due process objective, since it allows a Member to correct any lack of clarity in its request during the panel proceedings, even though the request may not have been sufficiently clear for the respondent to being preparing its defence at the beginning of the panel process."⁴⁴

31. In *Australia – Apples*, the Appellate Body confirmed that subsequent submissions by parties during the panel proceedings may only be used to "confirm the meaning of the words used" in the panel request:

"It is also well established that compliance with the requirements of Article 6.2 must be determined on the face of the request for the establishment of the panel and that "[d]efects [therein] cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings". Such submissions may be used only to confirm the

⁴¹ Appellate Body Report, *US – Continued Zeroing*, paras. 168 -169.

⁴² Panel Report, *Russia – Traffic in Transit*, paras. 7.331-7.339.

⁴³ Appellate Body Report, *EC – Bananas III*, para. 142.

⁴⁴ Panel Report, *Japan – DRAMS (Korea)*, paras. 7.8 and 7.9.

meaning of the *words used* in the panel request and in assessing whether there has been prejudice to the responding Member's ability to prepare its defence."⁴⁵

32. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body emphasized that a panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing:

"[A] party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing."⁴⁶

1.4.3 Second requirement: The request must indicate whether consultations were held

33. In *Brazil – Desiccated Coconut*, the Panel examined the request of the Philippines to make a finding that Brazil's refusal to hold consultations was inconsistent with Articles 4.1, 4.2 and 4.3 of the DSU. The Panel recalled that Article 6.2 of the DSU requires that a request for the establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Panel stated:

"The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to consult ... However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult ... We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference."⁴⁷

34. In *Brazil – Aircraft*, the Panel considered that a preliminary objection could properly be sustained if a party established that the required consultations had not been held with respect to a dispute:

"A party is not entitled to request establishment of a panel unless consultations have been held. Specifically, Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if 'consultations fail to settle a dispute'. Similarly, Article 4.4 of the SCM Agreement allows a 'matter' to be referred to the DSB for establishment of a panel only if consultations have failed to lead to a mutually agreed solution. Given that Article 6.1 of the DSU and Article 4.4 of the SCM Agreement essentially require the DSB to establish a panel automatically upon request of a party, a panel cannot rely upon the DSB to ascertain that requisite consultations have been held and to establish a panel only in those cases. Accordingly, we consider that a panel may consider whether consultations have been held with respect to a 'dispute', and that a preliminary objection may properly be sustained if a party can establish that the required consultations had not been held with respect to a dispute. We do not believe, however, that either Article 4.7 of the DSU or Article 4.4 of the SCM Agreement requires a precise identity between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested."⁴⁸

35. In *Mexico – Corn Syrup (Article 21.5 US)*, the Appellate Body addressed the requirement to indicate in a panel request "whether consultations were held" in a situation where this

⁴⁵ Appellate Body Report, *Australia – Apples*, para. 418.

⁴⁶ Appellate Body Report, *EC – Large Civil Aircraft*, para. 642.

⁴⁷ Panel Report, *Brazil – Desiccated Coconut*, para. 290. See also Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 28.

⁴⁸ Panel Report, *Brazil – Aircraft*, para. 7.10.

procedural step was not executed. Drawing from the fact that the failure to hold consultations does not deprive the panel of its authority to rule on the case before it, the Appellate Body stated:

"Article 4.7 ... relates the conduct of the responding party concerning consultations to the complaining party's right to request the establishment of a panel. This provision states that the responding party may agree with the complaining party to forgo the potential benefits that continued pursuit of consultations might bring. Thus, Article 4.7 contemplates that a panel may be validly established notwithstanding the shortened period for consultations, as long as the parties agree. Article 4.7 does not, however, specify any particular form that the agreement between the parties must take.

In addition ... pursuant to Article 6.2 of the DSU, one of the requirements for requests for establishment of a panel is that such requests must 'indicate whether consultations were held'. The phrase '*whether* consultations were held' shows that this requirement in Article 6.2 may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations.

Thus, the DSU explicitly recognizes circumstances where the absence of consultations would *not* deprive the panel of its authority to consider the matter referred to it by the DSB. In our view, it follows that where the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had."⁴⁹

36. In *Mexico – Corn Syrup (Article 21.5 US)*, the Appellate Body explained that the authority of a panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication 'whether consultations were held':

"In assessing the importance of the obligation 'to indicate whether consultations were held', we observe that the requirement will be satisfied by the inclusion, in the request for establishment of a panel, of a statement as to whether consultations occurred *or not*. The purpose of the requirement seems to be primarily informational – to inform the DSB and Members as to whether consultations took place. We also recall that the DSU expressly contemplates that, in certain circumstances, a panel can deal with and dispose of the matter referred to it even if no consultations took place. Similarly, the authority of the panel cannot be invalidated by the absence, in the request for establishment of the panel, of an indication 'whether consultations were held'. Indeed, it would be curious if the requirement in Article 6.2 to inform the DSB whether consultations were held was accorded more importance in the dispute settlement process than the requirement actually to hold those consultations."⁵⁰

1.4.4 Third requirement: The request must identify the specific measures at issue

1.4.4.1 General

37. The Appellate Body has found that the degree of specification required in identifying the measure at issue must be assessed on a case-by-case basis.⁵¹ Whether the specific measure at issue has been sufficiently identified in the request for establishment will depend upon the ability of the respondent to defend itself given the description of the measure in the request.⁵²

38. The Appellate Body in *EC – Selected Customs Matters* noted that questions pertaining to the identification of the "measures at issue" and the "claims" relating to alleged violation of WTO obligations, set out in a panel request, should be addressed separately since the requirements under Article 6.2 of the DSU are conceptually different and should not be confused.

⁴⁹ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 61-63.

⁵⁰ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 70.

⁵¹ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁵² Appellate Body Report, *EC – Computer Equipment*, para. 70.

39. In *Canada – Wheat Exports and Grain Imports*, the Panel stated that the ordinary meaning of the phrase "identify the specific measures at issue" is to establish the identity of the precise measures at issue.⁵³ The Panel stated that:

"In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 'depends ... upon whether they satisfy the purposes of [those] requirements'. We also find relevant the statement by the Appellate Body that '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'.

...

We consider that in the absence of an explicit identification of a measure of general application by name, ... sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue."⁵⁴

40. In *Colombia – Ports of Entry*, Colombia argued that "Panama's request for establishment fails to identify the specific measures at issue as required in Article 6.2 of the DSU, in respect of the use of indicative prices by Colombia's customs authorities".⁵⁵ Panama, on the other hand, argued that "its request for establishment makes clear that the measure at issue is the use of 'indicative prices', which 'apply to specific goods from all countries except those with which Colombia has signed free trade agreements' for the purpose of determining the value of those goods to be used as the basis for levying (a) import duties and (b) sales tax."⁵⁶ The Panel noted that "Colombia's ability to defend itself does not appear to have been impaired by Panama's definition of the measures at issue".⁵⁷ On this basis, the Panel found that "Panama's request for establishment complies with the requirements of Article 6.2 of the DSU as far as the definition of the measures at issue regulating Colombia's use of indicative prices is concerned."⁵⁸

41. In *China – Publications and Audiovisual Products*, the Panel concluded that it was "reasonable for China to reasonably infer that the exclusion of the Film Distribution and Exhibition Rule from Part I of the panel request was deliberate in view of its explicit inclusion in Part III"; therefore "China could infer in good faith that the omission of reference to the Film Distribution and Exhibition Rule in Part I meant that the United States was not challenging the Film Distribution and Exhibition Rule under this claim". The Panel further concluded that the Film Distribution and Exhibition Rule was "outside its terms of reference in the context of the U.S. claims regarding China's trading rights commitments under the Accession Protocol."⁵⁹

1.4.4.2 "identify"

1.4.4.2.1 Identification of measure

42. In *EC – Bananas III*, the "basic EC regulation at issue" was identified in the request for establishment of the Panel. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime". The Panel found that for purposes of Article 6.2 this reference was sufficient to cover all European Communities legislation dealing with the importation, sale and distribution of bananas because the measures that the complainants were contesting were

⁵³ Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, sub-para. 14.

⁵⁴ Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, sub-paras. 17 and 20.

⁵⁵ Panel Report, *Colombia – Ports of Entry*, para. 7.24.

⁵⁶ Panel Report, *Colombia – Ports of Entry*, para. 7.24.

⁵⁷ Panel Report, *Colombia – Ports of Entry*, para. 7.35.

⁵⁸ Panel Report, *Colombia – Ports of Entry*, para. 7.36.

⁵⁹ Panel Report, *China – Publications and Audiovisual Products*, para. 7.17-7.60.

"adequately identified", even though they were not explicitly listed.⁶⁰ The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".⁶¹

43. In *Japan – Film*, Japan requested the Panel to exclude eight measures from consideration because they were not set forth in either the request for consultations or the request for the establishment of a panel. Although the measures in question had not been "explicitly described" in the panel request, the Panel considered those measures to be within its terms of reference because they were 'implementing measures' based on a basic framework law specifically identified in the Panel request, which specified the form and circumscribed the possible content and scope of such implementing measures. The Panel established a *clear relationship* standard:

"The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that 'the specific measures at issue' be identified in the panel request, can be met if a 'measure' is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing 'measures' is specified in a panel request, implementing 'measures' might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing 'measures'."⁶²

44. The Panel in *Argentina – Footwear (EC)* found that "it is the identification of [the] measures which is primarily relevant for the purposes of Article 6.2 of the DSU":

"[W]e consider that the EC's request primarily and unambiguously identifies the provisional and definitive measures (rather than only the cited resolutions and promulgations as such). In our view, it is the identification of these measures (rather than merely the numbers of the resolutions and the places of their promulgation in the Official Journal) which is primarily relevant for purposes of Article 6.2 of the DSU. Therefore, we consider that it is the provisional and definitive measures in their substance rather than the legal acts in their original or modified legal forms that are most relevant for our terms of reference. In our view, this is consistent with the Appellate Body's findings in the *Guatemala – Cement* case."⁶³

45. The Panel in *US – Carbon Steel* noted the findings of the Panel in *Japan – Film* and indicated that the expedited review procedure concerned was not a "measure" that was "subsidiary" or "closely related" to "any of the measures specifically identified":

"The United States explains that, upon automatic initiation by the DOC of a sunset review within five years of the date of publication of a CVD order, a review can follow one of three basic paths: (i) revocation of the order; (ii) an expedited sunset review; and (iii) a full sunset review. We do not consider that the European Communities' general discussion of the automatic initiation of sunset reviews by the DOC is sufficient to put the United States – as well as other Members – on notice that the expedited review procedure was also under challenge. We note that the European Communities' request refers to 'certain aspects of the sunset review procedure which led to [the DOC decision not to revoke the CVDs on carbon steel]'. The challenge is

⁶⁰ Panel Report, *EC – Bananas III*, para. 7.27.

⁶¹ (*footnote original*) Appellate Body Report on *European Communities – Bananas III*, para. 140.

⁶² Panel Report, *Japan – Film*, para. 10.8.

⁶³ Panel Report, *Argentina – Footwear (EC)*, para. 8.40.

thus apparently to those aspects of the sunset review procedure that have some relevance to the carbon steel case, which is not true of the expedited review procedure, because the carbon steel case involved a full, not expedited, review. We do not consider the expedited review procedure to be 'a 'measure' that is subsidiary, or so closely related to' any of the measures specifically identified, 'that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party'. We, therefore, find that the expedited review procedure is not sufficiently related to a measure or measures that are specifically identified in the request for establishment as to properly bring it within our terms of reference."⁶⁴

46. In *EC – Export Subsidies on Sugar*, the European Communities argued that the identification of the measure at issue in the panel requests as the export subsidies granted under Regulation No. 1260/2001 or, even more vaguely, under the "EC sugar regime" was not sufficient for purposes of complying with the requirement of Article 6.2 of the DSU, because that provision requires not just the identification of a "measure, but of the "specific measure at issue".⁶⁵ In particular, the European Communities contended that sales of C beet at prices below the minimum prices for A and B beet were not identified as a "payment" in the panel requests of the Complaining Parties and that, therefore, this "payment" fell outside the Panel's terms of reference.⁶⁶ The Appellate Body, however, confirmed the finding of the Panel by reasoning that although the panel requests did not specifically identify that low-priced sales of C beet by growers to producers was one form of such alleged "payments", the panel requests would have sufficiently informed and alerted the European Communities about this practice:

"We note, first, as did the Panel, that the panel requests of all the Complaining Parties have clearly identified the 'specific measures at issue' as the subsidies accorded under EC Regulation 1260/2001 and related instruments (the 'EC sugar regime'), and the alleged violations as the European Communities' exports of subsidized sugar in excess of the European Communities' commitment levels in contravention of Articles 3 and 8 of the Agreement on Agriculture.

...

We agree with the European Communities that the panel requests did not specifically identify that low-priced sales of C beet by growers to producers was one form of such alleged 'payments'. Nevertheless, we consider that, taken as a whole, the panel requests should have informed the European Communities that the Complaining Parties were alleging in their panel requests that C sugar exports below total average cost of production were being enabled by subsidies in the form of 'payments' within the meaning of Article 9.1(c) of the Agreement on Agriculture. C beet being a critical input for C sugar production, and C beet not being eligible for a minimum guaranteed price, unlike A and B beet, the panel requests should have alerted the European Communities that one form of such alleged 'payments' could be low-priced sales of C beet by growers to producers."⁶⁷

47. The Appellate Body in *EC – Selected Customs Matters* discussed the requirement to properly identify the measures at issue when drafting a panel request:

"Interpreting the term 'measure at issue' in Article 6.2 of the DSU in the light of the substance of the specific WTO obligation that is allegedly being violated would generate uncertainty and complexity in WTO dispute settlement proceedings. When drafting a request for the establishment of a panel, the complainant would have to foresee the possible restrictions that the substance of the legal provisions might impose on the type of measure that could be challenged. The identification of the measures at issue in the panel request might prove to be even more complex where the challenge concerns a plurality of provisions of the covered agreements. Moreover, the existence, nature, and scope of possible restrictions would depend on the panel's

⁶⁴ Panel Report, *US – Carbon Steel*, para. 8.11.

⁶⁵ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 137.

⁶⁶ Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 133 and 137.

⁶⁷ Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 149-152.

interpretation of the substance of those legal provisions. The respondent might also be placed in an uncertain situation in presenting its defence because it would have to guess what the panel would identify as the measure at issue on the basis of the panel's interpretation of the substance of the alleged violation. This could lead to unnecessary litigation on a panel's terms of reference, as the responding party may choose to contend at a preliminary stage that, in the light of the substance of the legal provision on which a specific claim is based, the measure identified in the panel request does not fall within the panel's terms of reference."⁶⁸

48. In *US – FSC (Article 21.5 – EC II)*, the panel addressed the issue of an alleged failure by the European Communities to identify a measure at issue. The panel held that the measure at issue would be within its terms of reference to the extent that it was *adequately identified* in the panel request as required by Article 6.2:

"The issue before us does not involve the omission of a legal basis for a claim. Rather, it concerns an alleged failure to identify a *measure at issue* (Section 5 of the ETI Act, grandfathering original FSC subsidies).

This measure would be within our terms of reference to the extent that it is *adequately identified* in the EC request for the establishment of the Panel, as required by Article 6.2 of the *DSU*.

In general, when faced with a question relating to the scope of its terms of reference, a panel must 'examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*.' The task of assessing the sufficiency of a panel request for the purpose of Article 6.2 may be undertaken on a case-by-case basis, in consideration of the panel request as a whole, and in the light of the attendant circumstances. There may be a need to consider whether the defendant's ability to defend itself was prejudiced in light of the text of the panel request."⁶⁹

49. In *US – Zeroing (EC) (Article 21.5 – EC)*, the United States alleged that certain measures were outside the terms of reference because they were not properly identified in the panel request. The Panel stated that it would "determine whether the EC panel request sufficiently put the United States on notice that it was bringing a challenge against the measures listed in the Annex to that panel request". Additionally, the Panel asserted "[t]he other consideration is, in our view, whether the EC panel request clearly defines the scope of this compliance dispute," that is, "whether the EC Article 21.5 panel request creates uncertainty as to the measures that are the subject of this compliance proceeding". The Panel further asserted that the EC panel request "sufficiently identifies the 'subsequent reviews' as 'measures at issue' in this dispute" and it therefore "decline[d] to make the ruling under Article 6.2 of the DSU requested by the United States."⁷⁰

50. Amongst other procedural objections relating to the Panel's terms of reference, the Panel in *China – Publications and Audiovisual Products* examined China's arguments that certain aspects of the measures identified in the panel request were outside the terms of reference as they had not been identified in the narrative portion of the US panel request. The Panel accepted China's argument ruling that only those measures identified in the narrative portion of the US panel request were within its terms of reference:

"Reading the panel request as a whole, we do not find that the mere reference to the legislative instruments in which the disputed requirements were contained identified the pre-establishment legal compliance, the process for becoming approved as a distributor, or the decision making criteria applied by the approving agency as specific measures at issue such that China could reasonably conclude that they were included within the US claims. The United States did not inform China that it was challenging every possible discriminatory requirement in its measures, but rather the specific ones described in the narratives. Just as the European Communities did in *US – Carbon*

⁶⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 136.

⁶⁹ Panel Report, *US – FSC (Article 21.5 – EC II)*, paras. 7.72 -7.74.

⁷⁰ Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 8.20-8.32

Steel, the United States has, through its description of its claim in the panel request, only notified China that its claim concerned the specific requirements set forth in the panel request. Therefore, we find that these additional requirements (pre-establishment legal compliance, approval process requirements, and decision-making criteria) are outside our terms of reference."⁷¹

51. In *Australia – Apples*, Australia raised a procedural concern regarding the consistency of the New Zealand panel request with Article 6.2 of the DSU. In its panel request, New Zealand asserted that the measures specified in and required by Australia pursuant to the *Final import risk analysis report for apples from New Zealand* (FIRA) were inconsistent with the obligations of Australia under the SPS Agreement. New Zealand then proceeded to spell out 17 specific requirements set out in the IRA. In a preliminary ruling, the Panel, placing emphasis on the text of the panel request and the length and complexity of the FIRA, decided that the FIRA as a whole was not a measure at issue in this dispute and that only the 17 measures identified in the panel request fell within the Panel's terms of reference:

"Looking at the text of New Zealand's panel request, the Panel finds that, with respect to the 17 items identified by New Zealand through 17 separate bullet points, the request is sufficiently precise in identifying the specific measures at issue with respect to those 17 items, pursuant to Article 6.2 of the DSU.

On the other hand, given the length and complexity of Australia's *FIRA*, the Panel finds that the broad reference in New Zealand's panel request to the 'measures specified in and required by Australia pursuant to the [*FIRA*]' fails to satisfy the requirement of sufficient clarity in the identification of the specific measures at issue set forth in Article 6.2 of the DSU. Accordingly, the Panel finds that its terms of reference are limited to the 17 measures specifically identified by New Zealand in its panel request and do not encompass other measures that may be contained in Australia's *FIRA*, but which were not identified with sufficient precision in the panel request."⁷²

52. In *China – Raw Materials*, the panel requests contained an introductory paragraph and then three sections. Each section referred to a generic type of measure – export quotas, export duties and additional restraints imposed on exportation. Under each section, the complainants identified a list of measures prefaced with the phrase "among others". The Panel, in its preliminary ruling, found this phrase to be too "open ended" and that permitting the use of this phrase to expand the list of measures at issue would not contribute to the "security and predictability" of the WTO dispute settlement system. The Panel therefore restricted the measures at issue to those explicitly identified in the panel request:

"The Panel is concerned with certain aspects of the three lists of challenged measures. After the narrative paragraph(s) in each of the three sections, the complainants identifying the lists of measures with the following phrase: '... these Chinese measures are reflected in, **among others**' (emphasis added). This phrase indicates that the measures listed by bullet points in the panel requests are not the only measures allegedly inconsistent with WTO obligations and leaves open the possibility that the Complainants might include additional measures in subsequent missions.

The Panel is of the view that the Complainant cannot be allowed to include additional measures other than those listed and identified by the bullet points in the panel requests. Such an 'open ended' list would not contribute to the 'security and predictability' of the WTO dispute settlement system as required by Article 3.2 of the DSU.

⁷¹ Panel Report, *China – Publications and Audiovisual Products*, para. 7.104.

⁷² Panel Report, *Australia – Apples*, para. 7.1449 citing the Preliminary Ruling by the Panel (WT/DS367/7), paras. 8-9.

For this reason, the Panel considers only the listed measures expressly identified by bullet points in the three sections of the Complainant's panel requests fall within the Panel's terms of reference and will thus be examined by the Panel."⁷³

53. The Panel in *Indonesia – Chicken* considered that the Appellate Body's point of view that the arguments included in a panel request "should not be interpreted to narrow the scope of the measures or the claims"⁷⁴ also applies to situations "where the description of the measure varies slightly throughout different sections of a panel request".⁷⁵

54. In *Ukraine – Ammonium Nitrate*, the Appellate Body concluded that in assessing a panel request, panels must "scrutinize carefully the panel request, read as a whole", which includes footnotes. It also pointed out that "footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint."⁷⁶ Ukraine contended that the specific measures at issue should be listed clearly in the portion of the panel request said to identify the measures at issue and suggested that if footnotes are to be relied on, they must adopt explicit language that clarifies what measures and claims are being brought, and on what conditions. While acknowledging that footnote 2 mentioned the relevant decisions, Ukraine argued that such decisions were not identified as measures at issue.⁷⁷ The Appellate Body stated:

"We recall that Article 6.2 of the DSU requires that measures at issue must be identified with sufficient precision such that they are discernible from a panel request, reading the panel request as a whole. While the location of certain information in a panel request – and, in particular, whether such information is in the body text or in a footnote – may have some relevance for understanding whether the measures at issue are discernible, it is unlikely to be dispositive given the need to read the panel request as a whole."⁷⁸

55. Contrary to Ukraine's argument that background information is not capable of assisting with the identification of a specific measure at issue, the Appellate Body in *Ukraine – Ammonium Nitrate*, understood the Appellate Body Report in *Indonesia – Iron or Steel Products* to indicate that whether information is capable of contributing to the identification of the specific measures at issue will depend on the circumstances and facts of each case.⁷⁹

1.4.4.2.2 Identification of products

56. In *EC – Computer Equipment*, the Appellate Body considered whether the measures in dispute and the products affected by such measures were identified with sufficient specificity by the United States in its request for the establishment of a panel. The United States' request for the establishment of panel referred to "all types of LAN equipment" and "PCs with multimedia capability". The Appellate Body considered whether these terms sufficiently defined the products at issue:

"Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute.

LAN equipment and PCs with multimedia capacity are both generic terms. Whether these terms are sufficiently precise to 'identify the specific measure at issue' under Article 6.2 of the DSU depends, in our view, upon whether they satisfy the purposes of the requirements of that provision.

⁷³ Communication from the Panel in *China – Raw Materials* (Preliminary Ruling) of 7 May 2010 (WT/DS/394/9, WT/DS395/9 and WT/DS398/8), paras. 11-13.

⁷⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

⁷⁵ Panel Report, *Indonesia – Chicken*, para. 7.52.

⁷⁶ Appellate Body Report, *Ukraine – Ammonium Nitrate*, paras. 6.37 and 6.20. See also Appellate Body Report, *Russia – Railway Equipment*, paras. 5.29 and 5.38.

⁷⁷ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.30.

⁷⁸ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.32.

⁷⁹ Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.35.

...

The European Communities argues that the lack of precision of the term, LAN equipment, resulted in a violation of its right to due process which is implicit in the DSU. We note, however, that the European Communities does not contest that the term, LAN equipment, is a commercial term which is readily understandable in the trade. The disagreement between the European Communities and the United States concerns its exact definition and its precise product coverage. We also note that the term, LAN equipment, was used in the consultations between the European Communities and the United States prior to the submission of the request for the establishment of a panel and, in particular, in an 'Information Fiche' provided by the European Communities to the United States during informal consultations in Geneva in March 1997. We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities *in the course* of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel."⁸⁰

57. In *EC – Chicken Cuts*, Brazil and Thailand appealed the Panel's finding on the identification of the products at issue arguing that, although Article 6.2 of the DSU does not explicitly require that the products at issue be identified in the panel request, in the past, the Appellate Body (in *EC – Computer Equipment*) has relied on the product description contained in the panel request to determine the scope of the measure at issue. Moreover, Brazil and Thailand argued 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.⁸¹ The Appellate Body rejected these arguments and stated:

"We are not persuaded by these arguments. Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue."⁸²

58. In *Australia – Salmon*, the Appellate Body examined whether the Panel had interpreted correctly its terms of reference with respect to the measure and the product at issue in this dispute. Australia argued that the Panel had exceeded its terms of reference both in terms of products and in terms of the measure at issue. In its request for the establishment of a panel, Canada had identified the measure and the product at issue as follows: "The Australian Government's measures prohibiting the importation of fresh, chilled or frozen salmon ... and any amendments or modifications to it."⁸³ The Panel stated that the product coverage of this dispute was limited, in accordance with the request for the establishment of a panel, to "fresh, chilled or frozen salmon" and held explicitly that the product coverage "does exclude heat-treated product"⁸⁴ and that "heat-treated product falls outside the product coverage of this dispute".⁸⁵ As a result, the Appellate Body rejected Australia's claim that the Panel had exceeded its terms of reference with respect to the *product* at issue.⁸⁶ However, the Appellate Body reversed the Panel's conclusions with respect to the *measures* at issue. One of the Australian measures at issue was an import prohibition on *all* salmon; another measure, however, allowed imports which had been subject to "heat treatment". The Panel interpreted this latter measure to mean that the heat treatment required applied not only to smoked salmon, but also to other categories of salmon,

⁸⁰ Appellate Body Report, *EC – Computer Equipment*, paras. 67-68 and 70. See also Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.40, where the Panel found that the term "export credits" was "readily understandable" in the context of a dispute under Article 3.1(a) of the *SCM Agreement*.

⁸¹ Appellate Body Report, *EC – Chicken Cuts*, para. 164.

⁸² Appellate Body Report, *EC – Chicken Cuts*, para. 165.

⁸³ WT/DS18/2.

⁸⁴ Panel Report, *Australia – Salmon*, para. 8.24.

⁸⁵ Panel Report, *Australia – Salmon*, para. 8.24.

⁸⁶ Appellate Body Report, *Australia – Salmon*, para. 96.

including fresh, chilled or frozen salmon; specifically, the Panel had held that the "heat treatment" requirement was merely the corollary ("two sides of a single coin") of the import prohibition contained in another measure. The Panel had concluded that imports of fresh, chilled or frozen salmon were prohibited under one measure, unless they received the required "heat treatment" provided for in another measure:

"We recall that the Panel stated that the measure at issue in this dispute 'is QP86A as implemented or confirmed by the 1988 Conditions, the 1996 Requirements and the 1996 Decision, and this in so far as it prohibits the importation into Australia of fresh, chilled or frozen salmon'. As indicated above, the Panel interpreted its terms of reference to include the 1988 Conditions, by considering them to constitute a measure 'prohibiting the importation of fresh, chilled or frozen salmon' unless heat-treated as prescribed. We recall that in the context of its examination of whether Australia's measure was consistent with Article 5.1, the Panel treated the import prohibition and the heat-treatment requirement as 'two sides of a single coin'. It said that a consequence of Australia's sanitary requirement that salmon be heat-treated before it can be imported is that imports of fresh, chilled or frozen salmon are prohibited.

We do not share the Panel's position. In our view, the SPS measure at issue in this dispute can *only* be the measure which is *actually* applied to the product at issue. The product at issue is fresh, chilled or frozen salmon and the SPS measure applicable to fresh, chilled or frozen salmon is the import prohibition set forth in QP86A. The heat-treatment requirement provided for in the 1988 Conditions applies only to smoked salmon and salmon roe, not to fresh, chilled or frozen salmon."⁸⁷

59. In *Korea – Alcoholic Beverages*, Korea requested the Panel to issue a preliminary ruling with respect to the specificity of the panel requests of the complainants, in this case, the European Communities and the United States. Korea considered that the phrases used by the European Communities ("certain alcoholic beverages falling within HS heading 2208") and the United States ("other distilled spirits such as whisky, brandy, vodka, gin and ad-mixtures") were not specific enough to satisfy Article 6.2. Korea sought this preliminary ruling in order to limit the products at issue in the dispute. The Panel disagreed with Korea:

"The question of whether a panel request satisfies the requirements of Article 6.2 is to be determined on a case by case basis with due regard to the wording of Article 6.2 ... the question is whether Korea is put on sufficient notice as to the parameters of the case it is defending ...

...

Korea argues that each imported product must be specifically identified in order to be within the scope of the panel proceeding. The complainants argue that the appropriate imported product is all distilled beverages. They claim, in fact, that for purposes of Article III, there is only one category in issue. They claim to have identified specific examples of such distilled alcoholic beverages for purposes of illustration, not as limits to the category.

The issue of the appropriate categories of products to compare is important to this case. In our view, however, it is one that requires a weighing of evidence. As such it is not an issue appropriate for a preliminary ruling in this case. This is particularly so in light of the Appellate Body's opinion in *Japan – Taxes on Alcoholic Beverages II*, that all imported distilled alcoholic beverages were discriminated against. That element of the decision is not controlling on the ultimate resolution of other cases involving other facts; however, it cannot be considered inappropriate for complainants to follow it in framing their request for a panel in a dispute involving distilled alcoholic beverages. While it is possible that in some cases, the complaint could be considered so vague and broad that a respondent would not have adequate notice of the actual nature of the alleged discrimination, it is difficult to argue that such notice was not provided here in light of the identified tariff heading and the Appellate Body decision in the *Japan – Taxes on Alcoholic Beverages II*. Furthermore, we note that the

⁸⁷ Appellate Body Report, *Australia – Salmon*, paras. 102-103.

Appellate Body recently found that a panel request based on a broader grouping of products was sufficiently specific for purposes of Article 6.2. We find therefore, that the complainants' requests for a panel satisfied the requirements of Article 6.2 of the DSU."⁸⁸

60. In *US – FSC*, the United States argued that the European Communities' request for the establishment of a panel failed to identify the specific measures at issue because the European Communities did not identify the specific products in question, and "the nature of export subsidy obligations imposed by the Agreement on Agriculture differ depending on the products at issue and commitments made by the United States thereunder."⁸⁹ The Panel found that the request for the establishment satisfied the requirements of Article 6.2 of the DSU and stated:

"In its request for establishment of a panel, the European Communities states that in its view the FSC is an export subsidy and that 'the United States has declared that the [FSC] Scheme is not taken into account for the purpose of compliance with their commitments under the AA' Accordingly, given the inherently all-encompassing nature of this claim, it constitutes a claim that the FSC could give rise to violations of the Agreement on Agriculture with respect to any agricultural product. Consequently, and in the absence of any specification as to the products at issue, this request puts the United States and third parties on notice that the European Communities asserts the existence of violations of the Agreement on Agriculture with respect to all agricultural products."⁹⁰

61. In *EC – IT Products*, the Panel recalled the observations of the Appellate Body in *EC – Chicken Cuts* and *EC – Computer Equipment* regarding the question of identifying the products at issue for the purpose of meeting the requirements of Article 6.2. The Panel observed that the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather it is the measure at issue that generally will define the product at issue. However, the Panel also recognized that it may be necessary to identify products at issue when dealing with decisions of customs authorities, in order to identify the specific measures at issue:

"Article 6.2 of the DSU does not refer to the identification of the products at issue, but instead, only refers to the identification of the specific *measures* at issue. The Appellate Body has explained that under DSU Article 6.2, 'the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather it is a consequence of the scope of application of the specific measures at issue'. Thus, it concluded, that it is 'the *measures* at issue that generally will define the *product* at issue.' At the same time though, it is recognized that it may be necessary to identify the products at issue, in instances where decisions of customs authorities are under challenge, in order to identify the specific measures at issue.

...

... At this stage the Panel confines itself to the issue of whether the products were sufficiently identified for the purposes of Article 6.2. ...

We note here that the contested measures are not individual classification decisions by customs authorities, but rather, as was the case in *EC – Chicken Cuts*, are generally applicable legal instruments. In our view, the joint panel request focuses on particular aspects of the measures at issue, which in turn identify the products at issue sufficiently for the purposes of Article 6.2 of the DSU. ... Thus, for the purposes of fulfilling the requirements of Article 6.2 of the DSU, we conclude there has been sufficient identification of the products for us to proceed with the dispute at hand."⁹¹

62. In *US – Clove Cigarettes*, both parties considered that the Panel would not be exceeding its jurisdiction if it included regular cigarettes in the "likeness" analysis under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, notwithstanding that Indonesia's panel request

⁸⁸ Panel Report, *Korea – Alcoholic Beverages*, paras. 10.14-10.16.

⁸⁹ Panel Report, *US – FSC*, para. 7.23.

⁹⁰ Panel Report, *US – FSC*, para. 7.29.

⁹¹ Panel Report, *EC – IT Products*, paras. 7.194-7.197.

specified that the imported and domestic "like products" in this case were clove cigarettes and menthol cigarettes. The Panel disagreed, and explained that:

"The Panel acknowledges that Article 6.2 of the DSU does not mention the need to specify the products concerned in a panel request. We do however think that the absence of such an obligation should not be taken to mean that, when the particular products affected by the measure at issue are specified in a panel request, such specification is deprived of all relevance. We note that prior panels share our understanding.

We are well aware that, as argued by the United States, the Appellate Body has made a distinction between 'claims' and 'arguments' in reviewing a panel request pursuant to Article 6.2 of the DSU. Indeed, as explained by the Appellate Body, 'Article 6.2 of the DSU requires that the *claims*, but not the *arguments* must all be specified sufficiently in the request for the establishment of a panel'.

However, we disagree with the United States in that the identification of the like domestic product in a panel request merely amounts to argumentation. It seems to us that in certain instances, such as the present one, the identification of the specific products at issue in a panel request pertains to the claim at issue, i.e., providing 'a brief summary of the legal basis of the complaint', rather than to the arguments relating to that claim. Indeed, Article 2.1 of the *TBT Agreement* defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of 'providing a brief summary of the legal basis to the complaint' than purely to argumentation.

The Panel acknowledges that, as explained by the Appellate Body in *EC – Computer Equipment*, 'Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified'. Furthermore, the Appellate Body in *EC – Chicken Cuts* noted that 'the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference'.

We do not disagree with these prior findings and we should not be misinterpreted as saying that a complainant must in all cases identify the products to which the measure at issue applies in order to comply with Article 6.2. We are saying that when the complainant has specified the products in its panel request, as in the present case, and when the claim pertains to a WTO obligation that requires a comparison of particular products, as in the present case, such identification becomes an integral part of the panel's terms of reference, and cannot be 'cured' through argumentation.

Indonesia has argued that its reference to menthol cigarettes in its Panel Request is just an example. The wording of its Panel Request does not seem to coincide with that view. Indeed, as explained above, Indonesia's Panel Request states that 'banning clove cigarettes in the United States while exempting *menthol cigarettes* from the ban is inconsistent', *inter alia*, with 'Article III:4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is 'less favourable' than that accorded to a like domestic product, *menthol cigarettes*' (emphasis added). Similarly, Indonesia's Panel Request claims that the measure at issue is inconsistent with 'TBT Article 2.1 because the measure results in treatment that is 'less favourable' to imported clove cigarettes than that accorded to a like domestic product, *menthol cigarettes*' (emphasis added). This wording does not seem to us to be referring to menthol cigarettes simply as an example, but rather as identifying menthol cigarettes as the domestic like product at issue. If it were to serve only as an example, we would have expected Indonesia to say so or at least include language implying it. Moreover, if the domestic product identified in Indonesia's Panel Request should be treated as a mere example, then given how the claim is phrased, it would necessarily follow that the imported product identified in the Panel Request (i.e., clove cigarettes) should also be treated as a mere example, meaning that Indonesia would have been in principle free to expand the scope of its

national treatment claim in its subsequent submissions to include not only clove cigarettes, but also one or more other types of imported products."⁹²

1.4.4.2.3 Identification of industry

63. In *Canada – Aircraft*, Canada asserted before the Panel that the term "civil aircraft industry" was too broad for the purposes of Article 6.2 of the DSU because "[i]t includes firms ranging from machine shops and metal treatment facilities to those involved in advanced instrumentation and communications equipment."⁹³ The Panel, referring to the Appellate Body report in *EC – Computer Equipment*, stated:

"We do not consider that the mere fact that the scope of a measure is identified in the request for establishment by reference to a broad product or industry grouping necessarily renders that request for establishment inconsistent with Article 6.2 of the DSU. We believe that the Appellate Body was of a similar opinion in *LAN Equipment*, where it shared the US concern that:

if the EC arguments on specificity of product definition are accepted, there will inevitably be long, drawn-out procedural battles at the early stage of the panel process in every proceeding. The parties will contest every product definition, and the defending party in each case will seek to exclude all products that the complaining parties may have identified by grouping, but not spelled out in 'sufficient' detail.⁹⁴

Although the Appellate Body's remarks were made in the context of a reference to a broad product grouping in the complaining party's request for establishment, we can see no basis for not adopting a similar approach when the request for establishment refers to a broad industry sector, such as the 'civil aircraft industry'. If a complaining party believes that a measure affects a broad industry sector, in our view that complaining party should be entitled to challenge that measure insofar as it affects the totality of the industry concerned, without having to spell out the individual components of that industry, and without running afoul of Article 6.2 of the DSU."⁹⁵

1.4.4.2.4 Availability of public information regarding measure

64. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained 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. In that case, the Appellate Body focused in particular on whether information regarding several programmes was readily available in the public domain at the time of the panel request:

"Whether a measure can be identified in conformity with the requirements of Article 6.2 may, as is the case here, depend on the extent to which that measure is specified in the public domain. We do not understand Article 6.2 to impose a standard that renders it more difficult to challenge a measure simply because information in the public domain concerning that measure is of a general character. Additionally, the lack of specification in the public domain should not shield this particular measure from challenge simply because greater detail in the form of, for example, an identifiable programme name was publicly available in respect of the other measures specified in sections (6)(b), (6)(c), and (6)(d). We note that, even after reviewing the Panel record in this case, and questioning the participants at the oral hearing, it is still not clear to us what additional degree of specificity could reasonably have been expected regarding the identification of R&TD funding allocated through the French Government's budgetary process. Taking into account the public information that existed regarding the French R&TD funding at the time of the United States' panel request, we consider that the description set out in section (6)(e) was sufficiently

⁹² Panel Report, *US – Clove Cigarettes*, paras. 7.137-7.142.

⁹³ Panel Report, *Canada – Aircraft*, para. 9.23.

⁹⁴ (footnote original) Appellate Body Report, *EC – Computer Equipment*, para. 71.

⁹⁵ Panel Report, *Canada – Aircraft*, paras. 9.36-9.37.

precise to establish that the French R&TD funding challenged by the United States was within the Panel's terms of reference."⁹⁶

65. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* stated that followed the Appellate Body's reasoning in *EC and certain member States – Large Civil Aircraft* and concluded that whether the complainant is able to obtain from the respondent information needed for the identification of its claims in its panel request will have a bearing on the specificity that could reasonably be expected pursuant to Article 6.2 of the DSU:

"The Panel considers that in cases where the complaining party is unable to obtain from the respondent certain information regarding the content of the measures at issue, this will naturally have a bearing on the degree of specificity that could reasonably be expected in identifying the legal basis for the complaint for purposes of Article 6.2 of the DSU. The Appellate Body has confirmed that this is so with respect to the degree of specificity expected with respect to the identification of the specific measures at issue, and the Panel sees no reason why the same logic would not apply in the context of assessing whether a panel request identifies 'the legal basis of the complaint sufficient to present the problem clearly'.⁹⁷ In the Panel's view, while a complainant must always comply with this requirement, regardless of any difficulties it faces in obtaining relevant information, such difficulties in obtaining relevant information may be highly germane to the appraisal of what is 'sufficient' to present the problem 'clearly' in the circumstances of a particular case.

...

[I]n the circumstances of this case it is not clear what additional degree of specificity could reasonably have been expected from the Philippines in terms of identifying the 'relevant valuation rules' in Articles 2 through 7 with sufficient precision, taking into account the limited information that was communicated to it regarding the basis for calculating the 'actual' value/price in the challenged measures. Therefore, the Panel is not persuaded that the Philippines was required to specify which one of the different customs valuation methods in Articles 2 through 7 constituted the basis of its claim. It sufficed for the panel request to state that the 2002-2003 Charges 'are inconsistent with ... Articles 2, 3, 4, 5, 6 and 7 of the CVA', without further specification as to which of one of these different articles was applicable. *A fortiori*, if such specification was not required at the level of these different articles, then the Panel is not persuaded that the Philippines had to go even further and specify which of the three subparagraphs and obligations *within* Article 7 it was invoking."⁹⁸

1.4.4.3 "specific"

66. As regards the specificity requirement, the Appellate Body in *EC – Selected Customs Matters* emphasized the purpose of the word "specific" in Article 6.2 of the DSU before noting that a complainant could make statements in the panel request that clarify its request, in which case, the Panel is entitled to take those statements into account:

"The word 'specific' in Article 6.2 establishes a specificity requirement regarding the identification of the measures that serves the due process objective of notifying the parties and the third parties of the measure(s) that constitute the object of the complaint."⁹⁹

⁹⁶ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 648.

⁹⁷ (footnote original) In *EU – Energy Package*, the panel recalled the Appellate Body's analysis above, and stated that "[w]e similarly consider that, a complainant's ability to 'provide a brief summary of the legal basis of the complaint in order to present the problem clearly' might be affected by the availability of relevant information in the public domain. In our view, it may well be open to a complainant to argue, with due substantiation, that information pertinent to its claim was not publicly available and that, as a consequence, its ability to comply with the requirements of Article 6.2 of the DSU was affected." (Panel Report, *EU – Energy Package*, para. 7.213.)

⁹⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.67 and 7.71.

⁹⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 152.

67. In *EC – Bananas III*, the Appellate Body considered the adequacy of a panel request is a matter that could be dealt with early on in a case:

"[T]his kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, *inter alia*, for preliminary rulings."¹⁰⁰

68. In *EC – Trademarks and Geographical Indications (Australia)*¹⁰¹, the European Communities argued that Australia's reference to Regulation 2081/92 in its Panel request was not specific enough to allow it to understand which specific aspects of the Regulation Australia intended to raise as an issue.¹⁰² The Panel, in a preliminary ruling, rejected this argument finding that requests for establishment do not require the "specific aspects" of the "specific measures" to be identified. In this regard, the Panel stated:

"The Panel considers the ordinary meaning of the terms of the text in Article 6.2 of the DSU, read in their context and in the light of the object and purpose of the provision, to be quite clear. They require that a request for establishment of a panel 'identify the specific measures at issue'. They do not require the identification of the 'specific aspects' of these 'specific measures'."¹⁰³

69. Also, in *EC – Trademarks and Geographical Indications (Australia)*, the Panel found, in a preliminary ruling, that Australia's reference to "related implementing and enforcement measures" did not lack certainty as it expressly referred to measures implementing and enforcing Regulation (EEC) No. 2081/92. In this regard, the Panel stated:

"All of the Regulation's implementing and enforcement measures form a group of specific measures which, although they may be a large group, are identified by Australia's request for establishment of a panel."¹⁰⁴

70. In *EC – Approval and Marketing of Biotech Products*, the European Communities, in a preliminary ruling request, complained that none of the three panel requests clearly distinguished between the alleged suspension and the failure to act and that therefore it was in the dark as to the meaning of these requests.¹⁰⁵ The Panel found that it was unclear whether the United States could have identified the measure more clearly than it had, but that even if it could, that its request sufficiently identified the specific measure being challenged when read together with the introductory paragraph.¹⁰⁶ It also found that neither Canada nor Argentina's panel requests failed to meet the requirements of Article 6.2 in this regard.¹⁰⁷ With regard to the United States' panel request, the Panel stated:

"In the present case, it is unclear whether the United States could have identified the alleged *de facto* moratorium with more specificity than it has. ...

Even assuming that the United States could have provided further details on the alleged *de facto* moratorium, we consider that the description of the first measure covered in the panel request, when read together with the introductory paragraph, adequately identifies the specific measure that is being challenged. In our view, the information provided is sufficient to meet the due process objective inherent in Article 6.2 of the DSU."¹⁰⁸

71. In *EC and certain member States – Large Civil Aircraft*, the European Communities challenged a number of measures as being outside the Panel's terms of reference. The challenge was based on the grounds that, in its request for the establishment of a panel, the United States

¹⁰⁰ Appellate Body Report, *EC – Bananas III*, para. 144.

¹⁰¹ See also Panel Report, *EC – Trademarks and Geographical Indications (US)*.

¹⁰² Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

¹⁰³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

¹⁰⁴ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.

¹⁰⁵ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

¹⁰⁶ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

¹⁰⁷ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

¹⁰⁸ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

had described these measures in an overly broad, ambiguous or overly inclusive manner. According to the European Communities, the United States had thereby failed to comply with the basic obligation under Article 6.2 of the DSU to identify the "specific measures at issue" in its request for the establishment of a panel.¹⁰⁹ In rejecting the European Communities' preliminary ruling request, the Panel noted that compliance with the requirements of Article 6.2 must be determined after the consideration of the panel request as a whole and in light of attendant circumstances, giving examples, in a footnote, of what may be considered to be "attendant circumstances". The Panel stated:

"A panel's terms of reference are based on the request for establishment of a panel. We recall that, when faced with an issue relating to the scope of its terms of reference, a panel is required to scrutinize carefully the request for establishment of a panel to ensure its compliance with both the letter and spirit of Article 6.2 of the DSU.

...

[C]ompliance with the requirements of Article 6.2 must be determined on the merits of each case, after a consideration of the panel request as a whole, and in light of attendant circumstances. Moreover, such compliance must be determined on the merits of each case, after a consideration of the panel request as a whole, and in light of attendant circumstances.

...

In the Panel's view, Section (6) (e) of the panel request, considered as a whole and in light of attendant circumstances, identifies the measures at issue in a manner sufficient to present the problem clearly."¹¹⁰

1.4.4.4 "measures at issue"

1.4.4.4.1 Nexus between "measure" and "Member"

1.4.4.4.1.1 General

72. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body referred to Article 3.3 of the DSU when defining which type of measures can be the subject of dispute settlement proceedings. The Appellate Body emphasized the nexus existing between the "measure" and a "Member" taking such measure:

"Article 3.3 of the DSU refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member'. (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'.¹¹¹

1.4.4.4.1.2 Any act or omission attributable to a Member

73. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body clarified that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."¹¹²

74. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body also indicated that those "acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."¹¹³

¹⁰⁹ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.138

¹¹⁰ Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.143-144 and 7.150

¹¹¹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

¹¹² Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

¹¹³ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

75. In *EC – Selected Customs Matters*, the Appellate Body, citing its finding in *US – Corrosion-Resistant Steel Sunset Review*, emphasized that a measure may be any act or omission attributable to a WTO Member:

"In our view, a complainant is entitled to include in its panel request an allegation of inconsistency with a covered agreement of any measure that may be submitted to WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided guidance on the types of measures that may be the subject of dispute settlement. Relying on, *inter alia*, Article 3.3 of the DSU, which refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member', the Appellate Body stated that '[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.' As long as the specificity requirements of Article 6.2 are met, we see no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue."¹¹⁴

76. In *EC – Approval and Marketing of Biotech Products*, the Panel ruled that an EC moratorium was the measure at issue on the basis of three different elements:

"[T]he Panel considers that the measure which is being challenged by the Complaining Parties is the alleged EC moratorium on the approval of biotech products. The essential elements characterizing the alleged EC moratorium, which the Complaining Parties say was in effect between October 1998 and the date of establishment of this Panel (i.e., 29 August 2003), are the following: (a) It was not adopted through a formal EC rule- or decision-making process, but it nonetheless constitutes a measure attributable to the European Communities. (b) It was applicable to all applications for approval of biotech products which were pending or newly submitted during the relevant time period. (c) It involved the effective suspension by the European Communities of final approval decisions with regard to the applications mentioned in the preceding sub-paragraph."¹¹⁵

1.4.4.4.1.3 Challenging legislation taken by a customs union

77. The Panel in *Turkey – Textiles* considered, *inter alia*, whether measures involving quantitative restrictions on imports from India should be properly regarded as measures imposed by Turkey or rather as measures taken collectively by the customs union between the European Communities and Turkey. In its analysis, the Panel made the following statement:

"We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied, can be challenged by another WTO Member."¹¹⁶

1.4.4.4.1.4 Criminal charges as a "measure"

78. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the Panel found that criminal charges filed by the Thai Public Prosecutor constituted a distinct measure for purposes of WTO dispute settlement:

"In our view, upon being filed by the Public Prosecutor and issued by the competent Thai Criminal Court on the same day, the Charges 'do' something concrete, independently of any other instruments or subsequent actions taken by the executive,

¹¹⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 133. The Appellate Body upheld its findings in *US – Corrosion-Resistant Steel Sunset Review* where it provided guidance on the types of measures that may be the subject of dispute settlement.

¹¹⁵ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.456.

¹¹⁶ Panel Report, *Turkey – Textiles*, para. 9.37.

administrative or judicial organs of Thailand. Specifically, the Charges have the direct legal consequences of: (i) the accused becoming subject to the mandatory jurisdiction of the criminal court; (ii) the accused being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; (iii) the accused having to apply for and pay bail to secure temporary release during the proceedings; (iv) the accused having an officially recorded indictment and accusations; and (v) the accused having to pay the costs of a defence for criminal proceedings. Finally, the Charges deploy negative reputational effects to which the accused is being exposed. Accordingly, the Charges 'operate' in 'some concrete way in its own right' as 'an instrument with a functional life of its own'. In other words, it is an instrument that has 'autonomous status'

...

We note that the issuance of criminal charges and arrest warrants have been treated as challengeable measures before other international courts and tribunals.

Based on the foregoing, we conclude that the Charges constitute a distinct 'measure' for purposes of WTO dispute settlement. We next turn to the question of whether the Charges constitute a 'determination' under the CVA."¹¹⁷

1.4.4.4.1.5 Private action as a "measure"

79. The Panel in *Japan – Film* characterized the problem of classifying private action as a governmental "measure" in the following terms:

"As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."¹¹⁸

80. Within the context referred to in paragraph 79 above, the Panel in *Japan – Film* had to determine whether an "administrative guidance" in Japan amounted to a governmental "measure". The Panel began by considering the ordinary meaning of the term "measure":

"The ordinary meaning of *measure* as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments. At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.

In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls 'regulatory administrative guidance', which it concedes effectively

¹¹⁷ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), paras. 7.580, 7.583-7.584. See also Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II), paras. 7.225 and 7.230.

¹¹⁸ Panel Report, *Japan – Film*, para. 10.52.

substitutes for formal government action. It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged 'measure' to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes."¹¹⁹

81. The Panel in *Japan – Film* subsequently reviewed GATT practice with respect to this subject-matter and defined "sufficient government involvement" as the decisive criterion for whether a private action may be deemed to be a governmental "measure":

"[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."¹²⁰

82. In *Canada – Autos*, the Panel examined the GATT-consistency of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehicles. Referring to the GATT Panel Reports on *Canada – FIRA* and *EEC – Parts and Components*¹²¹, the Panel analysed whether the action of private parties is subject to Article III:4 as follows:

"[T]o qualify a private action as a 'requirement' within the meaning of Article III:4 means that in relation to that action a Member is bound by an international obligation, namely to provide no less favourable treatment to imported products than to domestic products.

A determination of whether private action amounts to a 'requirement' under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on *Canada – FIRA*, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on *EEC – Parts and Components*. We note in this respect that the word 'requirement' has been defined to mean '1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.' The word 'requirements' in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of 'requirements' in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties."¹²² (footnotes omitted)

83. In *Argentina – Hides and Leather*, the European Communities claimed that an Argentine resolution, which authorized the presence of representatives of the Argentine domestic leather tanning industry during customs clearance of exports of hides and leather, operated as a *de facto* export restriction in violation of Article XI:1 of GATT 1994. The European Communities admitted that the Argentine measure did not expressly limit exports; however, the European Communities

¹¹⁹ Panel Report, *Japan – Film*, paras. 10.43-10.44.

¹²⁰ Panel Report, *Japan – Film*, paras. 10.55-10.56.

¹²¹ GATT Panel Reports on *Canada – FIRA*, para. 5.4 and *EEC – Parts and Components*, para. 5.21.

¹²² Panel Report, *Canada – Autos*, paras. 10.106-10.107.

claimed that the presence of the industry associations during the export clearance process allowed access to exporters' confidential business information, which was subsequently used – by virtue of the existence of a tanners cartel in the Argentine market – to exercise pressure on hides and leather producers not to export their products. The Panel ultimately rejected the European Communities' arguments on the basis of a lack of evidence:

"We agree with the view expressed by the panel in *Japan – Film*. However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.

...

The European Communities acknowledges that the representatives of the tanning industry do not have the *de jure* ability to halt bovine hide exports. However, according to the European Communities, having such representatives present during the export clearance process in itself restricts exports in the context of the facts of the case. The European Communities has advanced several reasons why this might be so. The European Communities refers to the GATT dispute of *Japan – Semiconductors* for the proposition that there can be export restrictions without overt actions by the government to physically stop exports. According to the European Communities, in that case it was sufficient for the government to set up a system where peer pressure was used to discourage exports. ...

...

[I]t is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility."¹²³

84. In *Argentina – Hides and Leather*, the Panel observed that "as an additional matter, the European Communities would also need to prove that this private action was attributable to the Argentinean government under the doctrine of state responsibility, but because the initial factual point has not been established, we do not need to reach that issue here".¹²⁴

1.4.4.4.2 Nexus between "measure" and "alleged impairment"

85. In *US – Gambling*, the Appellate Body identified two elements in the concept of measures that can be subject to dispute settlement: (i) a nexus must exist between the Member and the measure and (ii) the measure must be the source of the alleged impairment:

"The DSU provides for the 'prompt settlement' of situations where Members consider that their benefits under the covered agreements 'are being impaired by *measures* taken by another Member'. Two elements of this reference to 'measures' that may be the subject of dispute settlement are relevant. First, as the Appellate Body has stated, a 'nexus' must exist between the responding Member and the 'measure', such that the 'measure' – whether an act or omission – is 'attributable' to that Member. Secondly, the 'measure' must be the *source* of the alleged impairment, which is in turn the *effect* resulting from the existence or operation of the 'measure'."¹²⁵

86. The Appellate Body in *US – Gambling* then considered whether an alleged "total prohibition" on the cross-border supply of gambling and betting services constituted a "measure" that could be challenged under the GATS. In upholding the Panel's finding that it was not a

¹²³ Panel Report, *Argentina – Hides and Leather*, paras. 11.17, 11.22 and 11.51.

¹²⁴ Panel Report, *Argentina – Hides and Leather*, fn 342.

¹²⁵ Appellate Body Report, *US – Gambling*, para. 121.

measure, the Appellate Body stressed the importance of distinguishing between the measure and its effect:

"[C]onsultations at the outset of a dispute are based on:

... measures affecting the operation of any covered agreement taken within the territory [of the responding Member].

This provision contemplates that 'measures' themselves will 'affect' the operation of a covered agreement. Finally, we note that this distinction between measures and their effects is also evident in the scope of the application of the GATS, namely, to 'measures by Members affecting trade in services'.

We are therefore of the view that the DSU and the GATS focus on 'measures' as the subject of challenge in WTO dispute settlement. To the extent that a Member's complaint centers on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the measure that is the *source* of the alleged effects.

...

We note also that, if the 'total prohibition' were a measure, a complaining party could fulfil its obligation to identify the 'specific measure at issue' pursuant to Article 6.2 of the DSU, merely by explicitly mentioning the 'prohibition'. Yet, without knowing the precise source of the 'prohibition', the responding party would not be in a position to prepare adequately its defence, particularly where, as here, it is alleged that numerous federal and state laws underlie the 'total prohibition'.

Therefore, we conclude that, without demonstrating the source of the prohibition, a complaining party may not challenge a 'total prohibition' as a 'measure' *per se*, in dispute settlement proceedings under the GATS."¹²⁶

1.4.4.4.3 Temporal scope of "measures at issue"

1.4.4.4.3.1 General

87. In *EC – Selected Customs Matters*, the Appellate Body discussed the temporal limitations of the Panel's terms of reference after the European Communities challenged the Panel's interpretation in respect of "steps and acts of administration that pre-date or post-date the establishment of a panel."¹²⁷ The Appellate Body began by discussing the exceptions to the general rule that the measures in a panel's terms of reference must be measures in existence at the time of the establishment of the panel:

"We begin our analysis by recalling the Appellate Body's statement in *EC – Chicken Cuts*:

The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.

This general rule, however, is qualified by at least two exceptions. First, in *Chile – Price Band System*, the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure. Secondly, in *US – Upland Cotton*, the Appellate Body held that panels are allowed to examine a measure 'whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing

¹²⁶ Appellate Body Report, *US – Gambling*, paras. 122-126.

¹²⁷ Panel Report, *EC – Selected Customs Matters*, para. 7.37.

to the requesting Member under a covered agreement' at the time of the establishment of the panel. The summary presented by the Panel in paragraph 7.36 of the Panel Report is in line with what the Appellate Body said in *EC – Chicken Cuts, Chile – Price Band System*, and *US – Upland Cotton*. Therefore, we see no error in the Panel's legal interpretation contained in paragraph 7.36 of the Panel Report."¹²⁸

88. The Appellate Body, in *EC – Selected Customs Matters*, with respect to the temporal limitations of the Panel's term of reference, emphasized the difference between the measure at issue and the pieces of evidence in support of the claims, which can be invoked after the establishment of the Panel:

"[I]t is important to distinguish between, on the one hand, the measures at issue and, on the other hand, acts of administration that have been presented as evidence to substantiate the claim that the measures at issue are administered in a manner inconsistent with Article X:3(a) of the GATT 1994. The Panel failed to make the distinction between *measures* and pieces of *evidence*. While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment. In this case, the United States was not precluded from presenting evidence relating to acts of administration before and after the date of Panel establishment. A panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment."¹²⁹

89. The Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* held that "Article 6.2 [does not] categorically prohibi[t] the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested."¹³⁰

90. In *US – Zeroing (Article 21.5 – Japan)* the Appellate Body stated that Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request:

"We recall that Article 6.2 of the DSU provides that the request for the establishment of a panel 'shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.' Apart from the reference in the present tense to the fact that the complainant must identify the measures 'at issue', Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US – Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that 'nothing inherent in the term 'at issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired'.¹³¹ In *EC – Chicken Cuts*, the Appellate Body stated that '[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.' Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".¹³²

¹²⁸ Appellate Body Report, *EC – Selected Customs matters*, para. 184.

¹²⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

¹³⁰ Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 125.

¹³¹ Appellate Body Report, *US – Upland Cotton*, para. 269.

¹³² Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, para. 121.

1.4.4.4.3.2 Amendment to a measure enacted after establishment of Panel

91. In *Chile – Price Band System*, the Appellate Body considered that the amendment of a measure enacted after the Panel had been established may be considered as within the Panel's terms of reference.¹³³ The Appellate Body determined that "the amendment at issue should be considered as part of the measure at issue since it clarified the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment".¹³⁴ The Appellate Body explained that:

"[I]f the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measures *as amended* in coming to a decision in a dispute."¹³⁵

92. In *Colombia – Ports of Entry*, the Panel agreed with the Appellate Body's rationale in *Chile – Price Band System* and stated that "this determination was considered consistent with earlier jurisprudence and was found to be consistent with the object and purpose of the WTO dispute settlement system, as set forth in Article 3.7 of the DSU."¹³⁶ The Panel stated that:

"The Panel agrees with the Appellate Body's rationale. In the dispute before the Panel, Colombia enacted the aforementioned Resolutions 11414, 11412 and 11415 after the Panel was established. In the Panel's view, the terms of the Panama's request for establishment include the relevant amendments and replacements. The Panel therefore finds that Resolutions 11414, 11412 and 11415 are properly part of the measure at issue and within the Panel's terms of reference. In the Panel's view, a failure to consider these additional resolutions would inhibit the Panel from securing a positive solution to the dispute."¹³⁷

93. In *EC – Fasteners (China)*, the Panel found that a Council Regulation repealing and replacing the earlier Council Regulation identified in China's panel request fell within its terms of reference. The Panel reviewed the minor textual differences between the two Regulations, and then emphasized that the later Regulation did not come into effect until after China submitted its panel request and this Panel was established. The Panel stated that:

"We note that one of the objectives of Article 6.2 of the DSU is to ensure the due process rights of the respondent in dispute settlement proceedings. It is clear that those rights would be undermined where the text of the panel request does not sufficiently inform a responding Member of the measure at issue and the nature of the claims raised by the complaining Member. This, however, clearly is not the case in the present proceedings. China raised certain claims in connection with a specific provision of Council Regulation No. 384/96 in both its request for consultations and its panel request. While it is true that this Regulation was subsequently repealed, it was immediately replaced by Council Regulation No. 1225/2009 which contains, in almost identical terms, and in identical substance, the same provision as was specifically identified in China's panel request. This repeal and replacement took place after China submitted its panel request, and after this Panel was established. To require China in such circumstances to restart the dispute settlement process, potentially requiring a new request for consultations, would defeat the purpose of the DSU to provide for the 'prompt settlement of situations in which a Member considers that benefits accruing to it' under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU. Thus, we consider the European Union's objection to be formalistic, rather than substantive. In the circumstances of this dispute, the due process rights of the European Union cannot be considered to have been undermined by allowing the dispute to go forward challenging the replacement measure rather than the measure named in the panel request. Indeed, to sustain the

¹³³ Appellate Body Report, *Chile – Price Band System*, para. 137.

¹³⁴ Appellate Body Report, *Chile – Price Band System*, para. 137.

¹³⁵ Appellate Body Report, *Chile – Price Band System*, para. 138.

¹³⁶ Panel Report, *Colombia – Ports of Entry*, paras. 7.53-7.54.

¹³⁷ Panel Report, *Colombia – Ports of Entry*, paras. 7.53-7.54.

European Union's objection would not be consistent with the effective functioning of the WTO dispute settlement system, as it might lead to inappropriate legal manoeuvres to avoid dispute settlement, inconsistent with the obligation of Members to engage in dispute settlement 'in good faith in an effort to resolve the dispute'. We therefore consider that Council Regulation No. 1225/2009 is properly before us and will base our findings and recommendations on China's 'as such' claims on the relevant parts of that Regulation."¹³⁸

94. The Panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* summarized the case law regarding subsequent amendments made to a measure explicitly identified in a panel request:

"We read the Appellate Body Reports in *Chile – Price Band System*, *EC – Chicken Cuts*, and *US – Zeroing (Japan) (Article 21.5 – Japan)* as clarifying: (a) that the requirements of Article 6.2 of the DSU are such that the measures included in a panel's terms of reference will ordinarily be in existence at the time of the establishment of the panel; and (b) that there are particular, limited circumstances in which measures coming into existence subsequent to the panel request are within a panel's terms of reference. These circumstances, in one way or another, involve new measures that amend, modify, supplement, extend, replace, renew, relate to, or implement the measures that were explicitly identified in the panel request without changing their essence, in light of the claims made by the complaining party. The Appellate Body has thus interpreted the requirements of Article 6.2 of the DSU in a manner that prevents a measure evading review merely because of amendments or modifications to the legal form of the measure during the course of dispute settlement proceedings that do not change its essence in light of the nature of the claims at issue, while still fully respecting the due process rights of responding parties and potential third parties to be informed of the specific measures at issue and the nature of the claims raised by the complaining party."¹³⁹

95. The Panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* explained that "[t]his is also borne out by the approach taken by a number of panels"¹⁴⁰:

"For example, in *EC – IT Products*, the complaining parties had identified a number of measures imposing duties on flat panel displays, including Council Regulation No. 2658/87, as amended. Footnote 4 of the panel request noted that the Council Regulation included amendments adopted pursuant to Commission Regulation No. 1214/2007, which contained the CN2008. In addition, the panel request identified as part of the measures at issue 'any amendments or extensions and any related or implementing measures'. The panel explained that the Commission adopted a complete updated version of the CN each year, as an amendment to annex I of Council Regulation No. 2658/87. The CN had been updated twice, by CN2009 and CN2010, since the complaining parties had filed their panel request. The panel noted that the subsequent amendments to the Council Regulation No. 2658/87 strictly prolonged its period of application without modifying any of the terms or headings at issue in the dispute. Thus, the subsequent amendments, including the 2008-2010 versions, did not change the essence of the CN2007 version set forth in Council Regulation No. 2658/87 that was identified in the panel request. The panel said:

'While we do not consider that the mere incantation of the phrase 'any amendments or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute

¹³⁸ Panel Report, *EC – Fasteners (China)*, para. 7.34. See also Panel Report, *EU – Footwear*, para. 7.23.

¹³⁹ Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.524.

¹⁴⁰ Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.524.

settlement result in a situation where measures could completely evade review. This is especially true with the type of measures we have before us, which are amended annually."¹⁴¹

96. The Panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* rejected the European Union's argument that the Washington State tax measures explicitly identified in the European Union's panel request remained "essentially unchanged" following the enactment of SSB 5952:

"In the original proceeding, the Washington State tax measures enacted under HB 2294 were part of a package of measures designed to retain and attract the aerospace industry to Washington State, specifically by providing tax incentives conditioned on Boeing assembling the 787 in Washington State. SSB 5952 extends the availability of those tax incentives later in time, conditioned, however, on Boeing producing wings and fuselages for a different aircraft, the 777X, in Washington State and using them in the final assembly of the 777X in Washington State. In addition, Boeing will only be entitled to claim the B&O tax rate reduction in respect of future revenues related to the 777X for so long as it conducts wing assembly and final assembly of the 777X exclusively in Washington State. [T]he amendments effected by SSB 5952 change the nature of the Washington State tax measures that will operate from 1 July 2024 in a significant respect, in that their availability post 1 July 2024 is subject to a contingency that does not condition their availability prior to 1 July 2024. Moreover, the availability of the B&O tax rate reduction in respect of future 777X revenues is now subject to a condition that did not previously apply. This is in marked contrast to the new measures in cases such as *Chile – Price Band System*, *Argentina – Footwear (EC)*, *US – Zeroing (Japan) (Article 21.5 – Japan)*, *EC – IT Products*, and *EC – Fasteners (China)*, where the new measures either "clarified" the measure or essentially replicated the explicitly identified measures through new legislative action, and thus concerned the same measure (in a substantive sense) that was either the subject of panel request or that had been found WTO-inconsistent in the original proceeding."¹⁴²

92. In *Russia – Pigs (EU)*, the European Union asserted that the individual import bans with respect to Estonia and Latvia extended the product coverage of the EU-wide ban and thus fell within the category of "amendments, supplements, extensions and implementing measures" referred to in its panel request. The Panel found that the measures regarding Estonia and Latvia were closely related to the measures identified explicitly in the European Union's panel request, in such a manner that Russia had adequate notice of the nature of the claims that the European Union might have raised during the Panel proceedings:

"[T]he Panel finds that there is (i) an identity of the regulatory purpose; (ii) proximity of design, structure and impact; and (iii) close geographic and temporal relation of the import restrictions on the products at issue from Estonia and Latvia with those of the import restrictions of the products at issue from Lithuania and Poland as well as from the rest of the European Union. We consider these factual findings to strongly support the preliminary conclusion that the import restrictions on the products at issue from Estonia and Latvia are closely related to the measures explicitly described in the European Union's panel request."¹⁴³

93. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* considered whether it should address the amended versions of the measures at issue adopted following the establishment of the Panel, the original versions of the measures identified in the panel request, or both versions.¹⁴⁴

94. The Panel began its discussion by taking into account the nature of the parties' specific requests, as well as the nature and objectives of the dispute settlement proceedings:

¹⁴¹ Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.525.

¹⁴² Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.537.

¹⁴³ Panel Report, *Russia – Pigs (EU)*, para. 7.160.

¹⁴⁴ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.3.

"We note at the outset that neither party has contested the Panel's jurisdiction to review both the versions of the measures that existed at panel establishment and the amended ones. Nor do we see any reason to doubt that our mandate covers either version of the measures. In the absence of jurisdictional obstacles, our decision will be guided by the parties' specific requests and the overarching objective of the dispute settlement system to secure a positive solution to the dispute. We shall also take account of the specific nature of compliance proceedings."¹⁴⁵

95. The Panel then turned to a discussion of the merits of assessing each version of the measures, beginning with the amended versions. The Panel noted that assessing the amended versions of the measures would "contribute to the prompt settlement of the dispute" for multiple reasons:

"Starting with the amended versions of the measures, the parties concur that considering them would 'contribute to the prompt settlement of the dispute'. We agree that findings on the recent amendments would be particularly conducive to solving this dispute and note that the parties have extensively argued about the alleged inconsistency of the amended measures. Addressing the amended measures would also be useful if Indonesia is found to have achieved compliance with respect to some or all of them. This is particularly relevant in the context of compliance proceedings. Leaving unresolved new developments that have been properly argued before a panel in such proceedings could not only lead to additional litigation, but also to unnecessary suspension of concessions or other obligations, running counter to the DSU objective of prompt settlement of disputes."¹⁴⁶

96. The Panel then noted that, while a complainant would not always be "entitled" to findings on an original version of a measure, it agreed with Brazil as to why additional findings on the original version would be necessary:

"We would not subscribe to a view whereby a complainant would always and necessarily be 'entitled' to findings that are in addition to findings on a later version of the same measure. There may well be situations where such additional findings would simply not be necessary because the findings already made address all relevant issues.

Regarding the first [reason], we understand Brazil to be making a point about the importance of the RPT. Indonesia was required to achieve substantive compliance by the end of the RPT and there is disagreement between the parties whether Indonesia has done so. To bypass this disagreement and focus only on the current situation would undermine the role of the RPT. It could create an incentive for responding Members to wait for Article 21.5 proceedings to start before implementing the DSB's recommendations and rulings. Therefore, we accept that, to give full effect to the RPT agreed between the parties, it may well be necessary to make a finding whether substantive compliance was achieved by the end of the RPT."¹⁴⁷

97. The Panel thus concluded that it would review both the original versions and the amended versions of the challenged measures. The Panel determined that it would first address the amended measures and then the original versions in place at the time of Panel's establishment.¹⁴⁸

98. In *US – Tariff Measures*, the Panel examined whether the increase in the initially imposed additional duties on List 2 products (one of the challenged sets of measures) introduced after the establishment of the Panel, was covered by its terms of reference. The Panel considered the observations made by prior WTO adjudicators, in particular those by the Appellate Body in *Chile – Price Band System* (see para. 91 above), and noted:

"[T]he examination whether an amendment changes the essence of a measure identified in a panel request must remain circumscribed by the specific circumstances

¹⁴⁵ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.5.

¹⁴⁶ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.6.

¹⁴⁷ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, paras. 7.8-7.9.

¹⁴⁸ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, para. 7.11.

of the case at hand and cannot rely on pre-established factors. Prior WTO adjudicators have considered various factors, including the type of trade-restrictive effect sought (ban/additional duties); the range of products subject to duties; the operation of the measure and the amendment; their legal implications; the identity of their regulatory purpose; the proximity of design, structure and impact; the existence of an explicit reference in the amendment to the original measure; the title of the amendment; the authority that issued the measure and the amendment and the legal basis cited, as well as whether the original measure remained in force 'in substance'. Prior WTO adjudicators have also put emphasis on the question whether the complaining party has requested findings on the measure as amended. In contrast, they have considered that facts such as the 'apparent' consistency or inconsistency of a measure, have limited bearing in this examination."¹⁴⁹

99. The United States insisted that the increase of the additional duties on List 2 products had its "own, particular rationale"¹⁵⁰, different from the rationale behind the adoption of the initial additional duties. The United States held that the rationale behind a Member's decision to adopt a measure cannot be disentangled from the measure's essence. The Panel disagreed, and pointed out that "the rationale (or the policy justification) behind the increase of the rate of additional duties on List 2 products from 10% to 25% does not alter the nature or the essence of the measure."¹⁵¹

1.4.4.4.3.3 Prospective measures

100. In *US – Continued Zeroing*, the Panel found that "Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment unless they come into existence during the panel's proceedings".¹⁵² The Appellate Body disagreed with the Panel's view, noting that it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect:

"The Panel appeared to consider that, because the remedy sought by the European Communities was prospective in nature, the 'measures' with respect to which such remedy was sought could not be regarded as specifically identified in the panel request. In our view, the remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint. As discussed, we are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the 18 cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments."¹⁵³

101. In *EC – IT Products*, the complainants used the phrase "*any amendments, or extensions and any related or implementing measures*" in their joint Panel request. The Panel addressed the issue of whether measures that came into force after the establishment could properly be considered to have been included in the part of the panel's terms of reference. In addressing this issue, the Panel noted that while the mere incantation of the phrase "any amendments, or extensions and any related or implementing measures" in a panel request does not permit Members to bring in measures that were clearly not contemplated in the Panel request, the phrase is a useful tool to include certain amendments and prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. The Panel stated:

¹⁴⁹ Panel Report, *US – Tariff Measures*, para. 7.48.

¹⁵⁰ Panel Report, *US – Tariff Measures*, para. 7.52.

¹⁵¹ Panel Report, *US – Tariff Measures*, para. 7.53.

¹⁵² Panel Report, *US – Continued Zeroing*, para. 7.59.

¹⁵³ Appellate Body Report, *US – Continued Zeroing*, para. 171.

"We note that the complainants incorporated the phrase 'any amendments, or extensions and any related or implementing measures' into their joint Panel request. We recall that the complainants, in the joint Panel request, identifies as the specific measure at issue Council Regulation No. 2658/87, '*as amended*' (emphasis added). While we do not consider that the mere incantation of the phrase 'any amendments, or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. This is especially true with the type of measures we have before us, which are amended annually."¹⁵⁴

95. The Panel in *US – Anti-Dumping Methodologies (China)* found that the phrase "any closely connected, subsequent measures" in China's panel request should be construed as encompassing the six determinations that were found to be closely related to the measures identified in that request:

"The six determinations before this Panel are 'closely connected' to the determinations explicitly listed in China's panel request, and form part of a chain of measures or a continuum wherein the six determinations were made in administrative reviews that superseded previous administrative reviews or original investigations. Moreover, the six determinations are linked to anti-dumping duty orders on the basis of which anti-dumping duties were originally imposed and, therefore, 'involv[e] the same products, from the same countries'. In addition, the six determinations are 'subsequent measures' because they were issued after, and hence succeeded, the determinations explicitly listed in China's panel request."¹⁵⁵

96. The Panel in *US – Washing Machines* rejected the United States' argument that the USDOC's remand determination fell outside the Panel's terms of reference because it did not exist at the time the Panel was established. In particular, the Panel observed that:

"[T]here is a very close nexus between the remand determination and the measures expressly cited in the request for the establishment of the Panel. In particular, the remand determination supplements and reaffirms the USDOC's original determination of disproportionality, and is restricted to that issue. In these particular circumstances, we consider that the remand determination is covered by our terms of reference, despite the fact that it was not in existence at the time that this Panel was established."¹⁵⁶

97. The Panel in *US – OCTG* found that the USDOC's remand determination that was not in existence at the time of panel establishment fell out of the Panel's terms of reference because the underlying facts and the methodology used in the determination of normal value were different and changed the essence of the original determination:

"These changes in the evidentiary record and in the USDOC's evaluation of that record and consequent determinations in our view show that the remand determination changed the essence of the USDOC's final determination. We do not consider that the remand determination can be said to retain the essence of the final determination simply because the USDOC reached the same ultimate conclusions, albeit at different rates, as to the existence of dumping as it did in the final determination. We recall that a determination of the existence of dumping requires a calculation which must be based on the evidence before the investigating authority, and carried out consistently with the requirements of the Anti-Dumping Agreement. Where, as here, the underlying facts and the methodology used in the determination of normal value are

¹⁵⁴ Panel Report, *EC – IT Products*, para. 7.140.

¹⁵⁵ Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.260.

¹⁵⁶ Panel Report, *US – Washing Machines*, para. 7.249.

different, resulting in different margins of dumping, we do not agree that the essence of the original determination is unchanged."¹⁵⁷

1.4.4.4.4 Type of measure

1.4.4.4.4.1 General

98. In *Japan – Agricultural Products II*, the Appellate Body interpreted the term "measure" within the meaning of Annex B of the SPS Agreement. According to its terms, Annex B applies to all "measures" and lists "laws, decrees and ordinances" as three examples of such measures. The Appellate Body found that the list in Annex B was not exhaustive in nature and held that the term "measure" also included "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to". In the case before it, the Appellate Body found that the Japanese "varietal testing requirement" was a "measure" within the meaning of Annex B of the SPS Agreement.¹⁵⁸

99. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body clarified in a footnote that the scope of "laws, regulations and administrative procedures" cannot be determined by reference to how they are labelled in the Member's domestic law:

"We observe that the scope of each element in the phrase 'laws, regulations and administrative procedures' must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 [of the Anti-Dumping Agreement] would vary from Member to Member depending on each Member's domestic law and practice."¹⁵⁹

1.4.4.4.4.2 Challenging a system as a whole

100. In *EC – Selected Customs Matters*, the Appellate Body noted that the DSU permits a Member to challenge a responding Member's system - cumulatively containing a vast number of provisions - as a whole:

"[W]e agree with the Panel that 'there is nothing in the DSU nor in the other WTO agreements that would prevent a complaining Member from challenging a responding Member's system as a whole or overall.' We also agree with the Panel that a challenge that a system 'as a whole or overall' is WTO-inconsistent must be presented in a manner that meets the two distinct requirements in Article 6.2 of the DSU. ... We also recognize, as the Panel did, that, in this case, the legal instruments referred to by the United States in the panel request, 'cumulatively, contain' a vast number of provisions that relate to a variety of customs areas and that 'entail administration in ... diverse ways'. However, the essence of the United States' claim was not the administration or application of individual provisions of these legal instruments, but the absence of any mechanism or procedure at the European Communities level to reconcile divergences in the administration of these instruments by the member States of the European Communities. Therefore, we do not think that the due process rights of the European Communities were infringed merely because the claim of the United States related to the manner of administration of the European Communities customs law as a whole or overall. ... [T]he claim of the United States in this dispute is not an 'as such' claim, in the sense that it does not challenge the substantive content of the measures at issue. ... [T]he United States' contention on the 'design and structure' of the European Communities' system of customs administration was made as an argument to substantiate its 'as a whole' challenge set out in the panel request."¹⁶⁰

¹⁵⁷ Panel Report, *US – OCTG*, para. 7.132.

¹⁵⁸ Appellate Body Report, *Japan – Agricultural Products II*, paras. 105-108.

¹⁵⁹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87.

¹⁶⁰ Appellate Body Report, *EC – Selected Customs Matters*, paras. 166, 174 and 175.

101. The Panel in *Indonesia – Chicken* considered "that for a panel request to properly challenge a regime as a whole, it should clearly indicate that the whole regime is a measure at issue."¹⁶¹

1.4.4.4.3 Independent operational status test

102. In *US – Export Restraints*, Canada argued that each of the elements cited in its request for establishment of a panel (a US statute, a Statement of Administrative Action, a Preamble and US practice) individually constituted a measure and that "taken together" as well, these elements constituted a measure.¹⁶² In its analysis of these measures, the Panel came up with the *independent operational status test*:

"In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i. e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations. To determine whether each measure is operational on its own, we consider the status of each under US law."¹⁶³

1.4.4.4.4 Can a "practice" be challenged as a "measure"?

103. In *US – Export Restraints*, Canada claimed that the United States "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement was a measure and could be challenged as such. Canada defined the United States' "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations" and claimed that this "practice" has an "operational existence in and of itself".¹⁶⁴ The Panel considered whether the alleged United States practice required the United States' authorities to treat export restraints in a certain way and therefore had "independent operational status". The Panel, which concluded that there was no measure in the form of a United States practice, indicated:

"[W]hile Canada may be right that under US law, 'practice must normally be followed, and those affected by US [CVD] law ... therefore have reason to expect that it will be', past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC 'normally' follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives 'legal effect to that 'practice' as determinative of the interpretations and methodologies it applies'. US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."¹⁶⁵

104. In *US – Steel Plate*, the United States, in reference to the Panel Report in *US – Export Restraints*, argued that the United States' "practice" (in this case its practice as regards total facts available)¹⁶⁶ could not be the subject of a claim because it did not have "independent operational status" and therefore it was not a "measure".¹⁶⁷ India, on the contrary, claimed that a "practice"

¹⁶¹ Panel Report, *Indonesia – Chicken*, para. 7.39.

¹⁶² Panel Report, *US – Export Restraints*, para. 8.82.

¹⁶³ Panel Report, *US – Export Restraints*, para. 8.85.

¹⁶⁴ Panel Report, *US – Export Restraints*, para. 7.120.

¹⁶⁵ Panel Report, *US – Export Restraints*, para. 8.126.

¹⁶⁶ In *US – Hot-Rolled Steel*, Japan had also challenged the "general" practice of the United States' investigating authorities regarding total facts available. The Panel did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based because it concluded that Japan's claim in this regard was outside its terms of reference. Indeed, the Panel found that there was no mention of such a claim in Japan's request for the establishment of a panel. Panel Report, *US – Hot-Rolled Steel*, para. 7.22.

¹⁶⁷ Panel Report, *US – Steel Plate*, para. 7.14.

becomes a "measure" through repeated similar responses to the same situation.¹⁶⁸ The Panel concluded:

"That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice ..."¹⁶⁹

[T]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something."¹⁷⁰

105. In *US – Oil Country Tubular Goods Sunset Reviews*, Argentina brought conditional appeals with respect to: (1) Article X:3(a) of the GATT 1994; and (2) the "practice" of the USDOC regarding its likelihood determinations in sunset reviews. The Appellate Body declined to make a finding on whether a "practice" can be challenged as a "measure", ruling instead that the Panel's record of the dispute did not allow the Appellate Body to complete its analysis of Argentina's conditional appeal with respect to the "practice" of the USDOC regarding the likelihood determination in sunset reviews.¹⁷¹

106. The Panel in *US – Zeroing (Japan)* considered that "a measure may be found to have general and prospective application if it reflects a deliberate policy, going beyond the mere repetition of the application of that measure in specific instances."¹⁷²

107. In *US – Gambling*, in the course of examining what measures Antigua was challenging in that dispute, the Panel relied on certain Appellate Body decisions to support its view that "practice" can be considered as an autonomous measure that can be challenged in and of itself. The Panel then observed that certain acts identified by Antigua could constitute "practices", as that term had been understood by the panel in *US – Corrosion Resistant Sunset Steel Review*. However, based on Antigua's clarification in its comments to the United States' request for preliminary rulings, the Panel concluded that Antigua was not challenging any practice as such.¹⁷³ The Appellate Body noted that the Panel's statement on "practice" was a mere *obiter dictum* and found no need to rule on it. The Appellate Body however disagreed with the Panel's understanding of the Appellate Body's jurisprudence and reaffirmed that "[t]he Appellate Body has not, to date, pronounced upon the issue of whether 'practice' may be challenged, as such, as a 'measure' in WTO dispute settlement."¹⁷⁴

108. In *EC and certain member States – Large Civil Aircraft*, the United States challenged not only individual instances of launch aid / member State financing (LA/MSF), but also the LA/MSF "programme" as a whole. The Panel agreed with the European Communities that the United States failed to demonstrate the existence of an unwritten LA/MSF "programme". On appeal, the Appellate Body found that the alleged measure was not actually identified in the panel request, and therefore fell outside of the Panel's terms of reference. However, the Appellate Body observed that, as a general proposition, it did not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement:

"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

¹⁶⁸ Panel Report, *US – Steel Plate*, para. 7.15.

¹⁶⁹ Panel Report, *US – Steel Plate*, para. 7.22.

¹⁷⁰ Panel Report, *US – Steel Plate*, para. 7.23.

¹⁷¹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 216-221.

¹⁷² Panel Report, *US – Zeroing (Japan)*, para. 7.34. See also Panel Reports, *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97; *US – Shrimp (Viet Nam)*, paras. 7.110-7.111; and *US – Shrimp (Viet Nam) II*, para. 7.34.

¹⁷³ Panel Reports, *US – Gambling*, para. 6.197 (citing Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 97; *US – Carbon Steel*, para. 157; and *US – Countervailing Measures on Certain EC Products*, para. 162).

¹⁷⁴ Appellate Body Report, *US – Gambling*, para. 129.

expect complaining parties to identify such measures in their panel requests as clearly as possible. We would also expect that complaining parties state unambiguously the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Panel requests should give respondents and third parties sufficient notice of the specific measures that the complainant intends to challenge in WTO dispute settlement proceedings.

...

The Appellate Body has addressed, in several cases, the scope of 'measures' that may properly form the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that, 'in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.' The scope of measures that can be challenged in WTO dispute settlement is therefore broad. As a general proposition, we do not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement. Nor do we consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists. In the present case, however, we are unable to discern in the United States' panel request a challenge to an alleged LA/MSF Programme as a specific measure 'separate from the individual instances of {LA/MSF}', and, as noted, a complainant's subsequent submissions during panel proceedings cannot cure such a defect in a panel request."¹⁷⁵

1.4.4.4.5 Challenging "ongoing conduct" as a measure under the DSU

109. The Appellate Body in *US – Supercalendered Paper* reiterated that "in order to prove the existence of an 'ongoing conduct' measure, a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, its repeated application, and that it is likely to continue to be applied in the future."¹⁷⁶

110. In *US – Supercalendered Paper*, the Appellate Body examined the Panel's assessment regarding the precise content of the measure at issue, as one of the elements necessary to prove the existence of an "ongoing conduct" measure. The Appellate Body considered that the Panel was right in focusing its analysis on the substance of the USDOC's conduct and approved the Panel's findings:

"The Panel concluded that Canada had provided sufficient evidence to establish the precise content of the alleged measure. The Panel considered that variations in language in Canada's examples did not detract from the fact that the substance of the questions and the USDOC's subsequent reactions were the same in each example. ...

...

Overall, we consider that the Panel was correct to focus on the substance of the USDOC's conduct for each element of the alleged OFA-AFA measure, as evidenced by the USDOC questionnaires and determinations before the Panel. Thus, we see no error in the Panel's finding that Canada had established the precise content of the alleged OFA-AFA measure as the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies."¹⁷⁷

111. In *US – Supercalendered Paper*, the Appellate Body agreed with the Panel's examination of the "'repeated application' by reference to the elements of the alleged measure in this dispute, and

¹⁷⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 792-794.

¹⁷⁶ Appellate Body Report, *US – Supercalendered Paper*, para. 5.17. See also Appellate Body Report, *Argentina – Import Measures*, paras. 5.107-5.108.

¹⁷⁷ Appellate Body Report, *US – Supercalendered Paper*, paras. 5.20 and 5.24.

not against the particular elements of the measure in *US – Continued Zeroing*.¹⁷⁸ The Appellate Body then pointed out that the panel's and Appellate Body's analysis in *US – Continued Zeroing* reflected the circumstances surrounding that dispute and did not establish a general standard on how to demonstrate "repeated application" in disputes involving measures in the form of "ongoing conduct":

"We recall that, in *US – Continued Zeroing*, the European Communities challenged the 'use of the zeroing methodology in a string of connected and sequential determinations' in 18 cases, by which anti-dumping duties were being maintained. The Appellate Body understood the 'string of connected and sequential determinations' to mean successive proceedings in the 18 anti-dumping duty cases. Having reversed the relevant panel findings in *US – Continued Zeroing*, the Appellate Body examined whether there were sufficient factual findings and undisputed facts on the record for it to complete the legal analysis, as requested by the European Communities. In this respect, the Appellate Body found that in only 4 of the 18 cases were there sufficient factual findings indicating the repeated use of the zeroing methodology in a string of determinations, made sequentially over an extended period of time.

In our view, the Appellate Body's analysis concerning the strings of anti-dumping determinations in *US – Continued Zeroing* did not qualify the legal standard of 'repeated application' generally. Rather, the Appellate Body's examination related to the European Communities' characterization of the alleged 'ongoing conduct' measure in that dispute. Indeed, the panel and the Appellate Body in that dispute examined the evidence submitted by the European Communities in light of the manner in which the European Communities had characterized the challenged measure. Thus, we do not understand the Appellate Body to have suggested that a complainant must always show repetition in a string of connected and sequential determinations in successive proceedings pertaining to the same order to demonstrate successfully the 'repeated application' of an alleged 'ongoing conduct' measure.

Unlike in *US – Continued Zeroing*, Canada does not characterize the alleged OFA-AFA measure as occurring in 'a string of connected and sequential determinations' or 'successive proceedings'. Rather, before the Panel, Canada submitted that the alleged OFA-AFA measure consists in the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question, applying AFA to determine that the discovered information amounts to countervailable subsidies. As before the Panel, Canada contends on appeal that this alleged measure has been repeatedly applied since 2012 whenever the relevant circumstances arose."¹⁷⁹

112. The Appellate Body in *US – Supercalendered Paper* clarified, *inter alia*, on what basis a complainant can demonstrate the likelihood of continued application of the measure challenged as "ongoing conduct":

"We disagree with the United States' suggestion that a complainant is required to establish that a Member has 'adopted' a decision to follow particular conduct in the future. While such an adopted decision may suffice, in certain cases, to show that particular conduct is likely to continue in the future, a complaining Member need not rely on a formal decision by the responding Member to demonstrate the existence of 'ongoing conduct'. Rather, we consider that likelihood of continued application may be demonstrated through a number of factors. In this respect, we agree with the Panel that Canada was not required to prove 'certainty' of future application of the alleged OFA-AFA measure.

...

... We see no error in the Panel's conclusion that the evidence adduced by Canada sufficiently establishes that the challenged conduct is likely to continue. In particular,

¹⁷⁸ Appellate Body Report, *US – Supercalendered Paper*, para. 5.31.

¹⁷⁹ Appellate Body Report, *US – Supercalendered Paper*, paras. 5.28-5.30.

we agree with the Panel that the consistent manner in which the USDOC refers to the alleged OFA-AFA measure, the frequent reference to previous applications of the alleged measure in USDOC determinations, the fact that the USDOC refers to the alleged measure as its 'practice', and the USDOC's characterization of a departure from the alleged measure as an 'inadvertent error' all support the conclusion that the alleged measure is likely to continue to apply."¹⁸⁰

1.4.4.4.4.6 De jure versus de facto governmental measure

113. In *EC – Approval and Marketing of Biotech Products*, the Panel, pointing at the requirement to properly identify the measures at issue, made a distinction between formal (*de jure*) governmental measures and informal (*de facto*) governmental measures:

"[T]he panel in *Canada – Wheat Exports and Grain Imports* distinguished between measures of general application and particular actions taken pursuant to such measures.¹⁸¹ We consider that another appropriate distinction is that between formal (*de iure*) governmental measures and informal (*de facto*) governmental measures. In our view, the informal nature of a governmental measure may affect the degree of precision with which such a measure can be set out in a panel request. Notably, it will often not be possible to identify informal measures by their name, date of adoption and/or legal status."¹⁸²

1.4.4.4.4.7 Application of tariffs as a measure

114. In *EC – Computer Equipment*, the Appellate Body opined that not only measures of general application, but also the application of tariffs by customs authorities were "measures" within the meaning of Article 6.2. The Appellate Body agreed that the request for establishment of the Panel did identify the measures properly:

"We consider that 'measures' within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU."¹⁸³

1.4.4.4.4.8 Anti-dumping measures

115. As regards the scope of a "measure" under the Anti-Dumping Agreement, see the Section on Article 17 of that Agreement.

1.4.4.4.4.9 Unwritten measures

116. In *Russia – Railway Equipment*, the Appellate Body found that Ukraine had not established that the Panel erred in its objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.¹⁸⁴

117. Part of Ukraine's challenge concerned the Panel's assessment of the evidence in its analysis of the existence and systematic nature of the alleged unwritten measure.¹⁸⁵ The Appellate Body outlined the following considerations before reviewing the Panel's assessment:

"At the outset, we recall that, in principle, any act or omission attributable to a WTO Member can be challenged as a measure under the WTO dispute settlement

¹⁸⁰ Appellate Body Report, *US – Supercalendered Paper*, paras. 5.44 and 5.47.

¹⁸¹ Panel Report, *Canada – Wheat Exports and Grain Imports*, Article 6.2 ruling, paras. 20 and 27.

¹⁸² Panel Report, *EC – Approval and Marketing of Biotech Products*, Article 6.2 Ruling, para. 22.

¹⁸³ Appellate Body Report, *EC – Computer Equipment*, para. 65.

¹⁸⁴ Appellate Body Report, *Russia – Railway Equipment*, paras. 5.249 and 5.251.

¹⁸⁵ Appellate Body Report, *Russia – Railway Equipment*, para. 5.229.

system. The measure at issue in WTO dispute settlement proceedings may include either acts setting forth rules or norms that are intended to have general and prospective application, such as legislation, or 'particular acts applied only to a specific situation', such as an administrative decision to impose anti-dumping duties on certain imports. In *US – Zeroing (EC)*, the Appellate Body recognized that an 'as such' challenge can, in principle, be brought against a measure that is not expressed in the form of a written document, and there is nothing in the covered agreements or in WTO jurisprudence to suggest that a measure must be in written form. The Appellate Body emphasized, however, that 'a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document.'

In *Argentina – Import Measures*, the Appellate Body further elaborated on the standard for establishing the existence of an unwritten measure and in particular observed that 'the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant.' In particular, the Appellate Body considered that, depending on the characteristics of the measure challenged, other elements in addition to attribution to a WTO Member and precise content may need to be substantiated to prove its existence. For instance, a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.

In contrast to a written measure, the existence of unwritten measures cannot be established by submitting to a panel the text of a legal instrument. Instead, the existence and content of an unwritten measure must be established based on other, often circumstantial, evidence and arguments. Moreover, the specific measure challenged and the way in which it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must establish, in order to determine the existence of the challenged measure. A complainant seeking to prove the existence of an unwritten measure will invariably be required to establish the attribution of that measure to a Member and its precise content. Moreover, additional elements may need to be established. For instance, in *Argentina – Import Measures*, the complainants challenged the existence of a single measure consisting of a combination of one or more of the five trade-related requirements (TRRs) in pursuance of a specific policy objective. Therefore, as part of its examination of the precise content of the TRRs measure, the panel was required to assess whether the measure was composed of the five individual elements identified by the complainants, and whether the individual TRRs applied and operated as part of a single measure in furtherance of an underlying policy of 'managed trade' with the specific objectives of substituting imports and reducing trade deficits."¹⁸⁶

118. The Appellate Body considered that as part of its assessment of the existence of the unwritten measure, the Panel had to examine evidence relating to the constituent components of the measure, as well as to the way in which the different components interact, in order to achieve a particular objective.¹⁸⁷

119. In *US – Softwood Lumber VII*, the complainant challenged the Maritimes Stumpage Benchmark as "a measure" of present and continued application. The Panel noted that, in examining whether Canada had established that the Maritimes Stumpage Benchmark had present and continued application, it must consider whether Canada had established three constituent elements for such a measure of present and continued application:

- "a. the measure is attributable to the United States;
- b. the measure has precise content; and

¹⁸⁶ Appellate Body Report, *Russia – Railway Equipment*, paras. 5.232-5.234.

¹⁸⁷ Appellate Body Report, *Russia – Railway Equipment*, para. 5.236.

c. the measure has present and continued application, which is to say, it currently applies and will continue to be applied in the future."¹⁸⁸

120. The Panel noted that, in submitting that the Maritimes Stumpage Benchmark existed as "a [m]easure" of present and continued application, the complainant was challenging a single measure. Thus, the Panel considered that, to establish the precise content of the Maritimes Stumpage Benchmark as a single measure, the complainant would need to show that the two benchmarks are applied and operate together or collectively advance some underlying policy, and thus, operate as part of a single measure:

"Canada submits that the Maritimes Stumpage Benchmark exists as 'a [m]easure' of present and continued application. The phrase 'a measure' shows that Canada is challenging a single measure. We consider that to establish the precise content of the Maritimes Stumpage Benchmark as a single measure, Canada needs to show that the two benchmarks operate as part of a single measure. To demonstrate that the two benchmarks operate as part of a single measure, the complainant may have to show that the benchmarks are applied and operate together, or collectively advance some underlying policy. In our view, simply asserting that two types of benchmarks comprise 'a [single] measure', without showing for instance how they apply or operate together, or collectively advance some underlying policy, would not be sufficient to establish that they form part of a single measure. We consider that the Appellate Body's findings in *Argentina – Import Measures* offer some useful guidance in this regard."¹⁸⁹

121. The Panel noted the Appellate Body's finding in *Argentina – Import Measures* that the panel had evaluated whether five trade-related requirements (TRRs) applied and operated as part of a single measure. The Appellate Body noted that the panel had analyzed how the individual TRRs had operated together to further an underlying policy of managed trade, and that the combined operation of the individual TRRs was a defining element of the content of the single TRRs measure:

"In *Argentina – Import Measures* the complainants challenged the existence of a single (unwritten) measure consisting of a combination of one or more of five trade-related requirements or TRRs. In that dispute, the Appellate Body stated that, as part of its examination of the precise content of this single measure, the panel was also required to evaluate whether the individual TRRs applied and operated as part of a single measure. The Appellate Body concluded that the panel had done so. In reaching this conclusion, the Appellate Body noted that the panel analysed how the individual TRRs operated together to further an underlying policy of managed trade, and that the content of the single measure consisted of the combined operation of the individual TRRs as one of the tools that Argentina used to implement this policy, noting that the combined operation of the individual TRRs was a defining element of the content of the TRRs measure (as a single measure)."¹⁹⁰

122. The Panel considered the Appellate Body's finding in *Argentina – Import Measures* in this regard to support the view that when a complainant challenges different instruments (or different benchmarks used to determine the existence of a subsidy), the complainant would have to demonstrate that such different instruments operate as part of a single measure. In the Panel's view, this demonstration could be made by showing that the instruments apply and operate together, or collectively advance some underlying policy:

"We consider that the Appellate Body's finding in this regard supports the view that when a complainant challenges different instruments (or as here, different benchmarks used to determine the existence of subsidy), the complainant would have to demonstrate that such different instruments operate as part of a single measure. This demonstration could be made by showing that the instruments apply and operate together, or collectively advance some underlying policy. Neither the complainant, nor a panel could simply assume that different instruments form part of a single measure.

¹⁸⁸ Panel Report, *US – Softwood Lumber VII*, paras. 7.747 and 7.750.

¹⁸⁹ Panel Report, *US – Softwood Lumber VII*, para. 7.754.

¹⁹⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.755.

Otherwise, the requirement to examine whether a complainant has established the precise content of a measure may well be superfluous."¹⁹¹

123. The Panel noted that, while variations in the underlying facts and circumstances in which a measure is applied may exist, the substance of the acts or omissions at issue must nevertheless remain the same across those different facts and circumstances:

"To be sure, this does not mean that a single measure could not be applied in varying facts and circumstances. There may well be variations in the underlying facts and circumstances in which a measure is applied. However, those variations in the underlying facts and circumstances must not detract from the fact that the substance of the actions or omissions at issue remain the same across those different facts and circumstances, such that its precise content is discernible."¹⁹²

124. In this dispute, the Panel highlighted that the complainant had not shown that the two benchmarks either had operated and applied together or had advanced an underlying policy of the USDOC to use the Maritimes Stumpage Benchmark in its assessment of the adequacy of remuneration:

"In this particular case, Canada has neither advanced any argument nor presented any evidence showing that the different benchmarks utilized by the USDOC operate as a single measure. Canada has not shown for example that these two benchmarks operate and apply together, or collectively advance an underlying policy of the USDOC to use the Maritimes Stumpage Benchmark when it assesses the adequacy of remuneration of Crown-origin standing timber prices in Alberta, Ontario, or Québec. In addition, while in describing the content of the measure, Canada contends that irrespective of the evidence presented, the USDOC finds that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec, the evidence Canada relied upon undermines its description of the measure."¹⁹³

125. The Panel then turned to address the evidence submitted by the complainant in support of its argumentation that the Maritimes Stumpage Benchmark has present and continued application, i.e. that the benchmark currently applies and will continue to apply in the future. The Panel considered ultimately that the Maritimes Stumpage Benchmark did not satisfy these two criteria:

"The evidence presented by Canada to support its arguments again comprise extracts from the USDOC's determinations, which, according to Canada, demonstrate that the Maritimes Stumpage Benchmark currently applies and will continue to apply in the future. In order to ascertain whether the measure currently applies or will continue to apply in the future, we address the following questions: What measure currently applies? What measure will continue to apply in the future? For Canada, it is the Maritimes Stumpage Benchmark that currently applies and will continue to apply in the future.

However, we consider that the evidence presented by Canada does not show that a Maritimes Stumpage Benchmark (assuming the precise content of such a benchmark is established) is being currently applied or will continue to be applied in the future."¹⁹⁴

126. As to whether the Maritimes Stumpage Benchmark currently applied as of the time of the *US – Softwood Lumber VII* dispute, the Panel considered that the complainant had not shown that the USDOC's decision to use the Nova Scotia prices in two investigations from 2017 to 2018 was part of a policy to use prices from the Maritime Provinces. Rather, in the Panel's view, the USDOC's decision to use a price from Nova Scotia was driven by other considerations:

"Based on the above, we consider that Canada has not shown that the USDOC's decision to use the prices in Nova Scotia in the softwood lumber

¹⁹¹ Panel Report, *US – Softwood Lumber VII*, para. 7.756.

¹⁹² Panel Report, *US – Softwood Lumber VII*, para. 7.757.

¹⁹³ Panel Report, *US – Softwood Lumber VII*, para. 7.758.

¹⁹⁴ Panel Report, *US – Softwood Lumber VII*, paras. 7.762-7.763.

investigation in 2017 or the uncoated groundwood paper investigation in 2018, was part of a policy to use prices from the Maritime Provinces. Instead, we consider that the evidence shows that the USDOC's decision to use a price from Nova Scotia was driven by (a) the requirement under its domestic regulations to use as a tier-one benchmark 'market-determined prices from actual transactions of the good within the country under investigation'; and (b) the underlying facts and circumstances of the case in question.

We conclude that the USDOC's use of a price from Nova Scotia in the softwood lumber investigation in 2017 or the uncoated groundwood paper investigation in 2018 does not show that a Maritimes Stumpage Benchmark is a measure that is being currently applied."¹⁹⁵

127. As to whether the Maritimes Stumpage Benchmark was likely to be continued in the future, the Panel rejected the complainant's arguments on the basis of its reasoning provided above with respect to the current application of the relevant benchmark:

"For the same reasons that we provided above when concluding that Canada has not established that the Maritimes Stumpage Benchmark is a measure that is being currently applied, we also conclude that Canada has not established that (a) the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time; and (b) the uninterrupted application of the measure has continued despite differences in the facts in the underlying proceedings. In addition, we disagree with Canada's argument that the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. For instance, in support of its view that the USDOC consistently refers to precedents from previous determinations, Canada notes that the USDOC referred to its earlier determination in Lumber IV in the preliminary and final determination of the countervailing duty investigation on softwood lumber products from Canada in 2017. However, the evidence presented by Canada shows that the USDOC relied on earlier determinations in Lumber IV to reinforce the conclusions reached in these determinations."¹⁹⁶

128. Therefore, the Panel concluded that the complainant had not established that the Maritimes Stumpage Benchmark was a measure of present and continued application.¹⁹⁷ The Panel pointed, in particular, to the Appellate Body's finding in *Argentina – Import Measures* that a measure of present and continued application would "currently appl[y]" and would "continue to be applied in the future *until the underlying policy ceases to apply*". In the Panel's view, the complainant had not produced sufficient evidence to demonstrate that the Maritimes Stumpage Benchmark operated in this manner:

"Therefore, based on the above, we conclude that Canada has not established that the Maritimes Stumpage Benchmark has present and continued application. In support of our finding, we note that in *Argentina – Import Measures*, a dispute where the measure was also characterized as having present and continued application, the Appellate Body found that the panel correctly concluded that the measure had 'present and continued application, in the sense that it currently applies and it will continue to be applied in the future *until the underlying policy ceases to apply*'. Canada has not pointed to any evidence that demonstrates the application, or existence, of an underlying policy of the USDOC in relation to the alleged measure. In addition, we consider that Canada has not established the existence of a policy to apply the Maritimes Stumpage Benchmark through the extracts from the USDOC's determinations that it relies upon as evidence."¹⁹⁸

129. In *US – Softwood Lumber VII*, the complainant had also challenged the Maritimes Stumpage Benchmark as a measure of ongoing conduct. This type of measure contains four

¹⁹⁵ Panel Report, *US – Softwood Lumber VII*, paras. 7.768-7.769.

¹⁹⁶ Panel Report, *US – Softwood Lumber VII*, para. 7.771.

¹⁹⁷ Panel Report, *US – Softwood Lumber VII*, para. 7.774.

¹⁹⁸ Panel Report, *US – Softwood Lumber VII*, para. 7.773.

constituent elements: (a) the attribution of the measure to the United States, (b) the precise content of the measure, (c) the repeated application of the conduct, and (d) the likelihood that such conduct will continue.¹⁹⁹

130. With respect to the likelihood of continuation of the USDOC's conduct, the Panel considered that the complainant essentially relied on the same type of arguments as it did when contending that the Maritimes Stumpage Benchmark was a measure of continued application. The Panel rejected the complainant's argumentation for the same reason as it did above:

"Regarding the likelihood of continuation of the conduct, we consider that Canada essentially relies on the same type of arguments as it does when contending that Maritimes Stumpage Benchmark is a measure of continued application. ... [W]e concluded [above] that Canada has not established that (a) the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time; (b) the uninterrupted application of the measure has continued despite differences in the facts underlying a proceeding; or (c) the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. Therefore, for the same reasons, we conclude that Canada has also not established the likelihood of continuation of the conduct, i.e. likelihood of continued application of the Maritimes Stumpage Benchmark."²⁰⁰

131. In *EU – Cost Adjustment Methodologies II (Russia)*, the complainant challenged the Cost Adjustment Methodology as an unwritten measure of "general and prospective application". The Panel understood this measure to consist of two elements:

"the rejection of the input costs reflected in the records of the producer or exporter under investigation on the grounds that they do not reasonably reflect the costs associated with the production and sale of the product under consideration, when such recorded input prices are significantly low, or affected by government regulation or other situations considered by the investigating authorities as 'distortions' in the country of origin; and

the subsequent replacement or adjustment of the recorded input prices by using out-of-country input cost data, without ensuring that the established or adjusted costs represent the cost of production in the country of origin."²⁰¹

132. The Panel began its analysis by determining whether the complainant had demonstrated the existence of the Cost Adjustment Methodology as an unwritten measure of "general and prospective application".²⁰² With this in mind, the Panel considered the precise content of this measure, its attribution to the European Union, and whether any such methodology has general and prospective application.²⁰³

133. With respect to the alleged precise content of the Cost Adjustment Methodology, the Panel noted that the complainant had submitted a set of 17 anti-dumping determinations issued by the European Commission from between 2005 and 2019 as part of different types of investigations and reviews concerning various products.²⁰⁴ The Panel considered that these anti-dumping determinations establish the precise content of the Cost Adjustment Methodology as described by the complainant.²⁰⁵ After outlining the precise content of the Cost Adjustment Methodology,²⁰⁶ the Panel emphasized that the different facts underlying the various anti-dumping determinations did not detract from the fact that the substance of the Cost Adjustment Methodology was replicated in each determination:

¹⁹⁹ Panel Report, *US – Softwood Lumber VII*, para. 7.775.

²⁰⁰ Panel Report, *US – Softwood Lumber VII*, para. 7.778.

²⁰¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.28.

²⁰² Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.11.

²⁰³ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.27.

²⁰⁴ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.38.

²⁰⁵ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.39.

²⁰⁶ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.40-7.43.

"While, as pointed out by the European Union, the various anti-dumping determinations concern different underlying facts, we consider that such differences do not detract from the fact that the substance of the Cost Adjustment Methodology, i.e. the rejection of the input costs reflected in the records of the producer or exporter under investigation in the specific set of circumstances described by Russia, and the subsequent use of out-of-country input price data in calculating the costs of production in the above-mentioned terms, was replicated in each determination."²⁰⁷

134. With respect to the alleged general and prospective application of the Cost Adjustment Methodology, the Panel considered this methodology was a measure of "general application". As noted by the Panel, the application of the methodology spanned over 15 years and affected an unidentified, varied number of economic operators, as opposed to specified economic operators from a specific WTO Member:

"Turning to our analysis of the Cost Adjustment Methodology, we consider that the anti-dumping determinations of the European Commission advanced by Russia show that the European Commission has invariably engaged in the same conduct for a period that spans over 15 years, in anti-dumping proceedings covering a wide range of products originating in various WTO Members. We note that the European Union has advanced no evidence of any European Commission anti-dumping determination where, in the calculation of the costs of production, input prices were not rejected and replaced with an external benchmark in the circumstances described by Russia. We also note that the specific companies that were subject to the Cost Adjustment Methodology varied greatly. In our view, this suggests that the Cost Adjustment Methodology is a measure of 'general application' because it affects an unidentified number of economic operators. The Cost Adjustment Methodology does not concern specified economic operators from a specific WTO Member, in the sense that the companies that will be subject to the Cost Adjustment Methodology can be identified independently of any specific application of this norm."²⁰⁸

135. As to the purported "prospective application" of the measure, the Panel agreed with the view of the Appellate Body in *US – Anti-Dumping Methodologies (China)* that a complainant need not show with "certainty" that a given measure will apply in future situations.²⁰⁹ The Panel recalled that, according to the Appellate Body, where prospective application is not sufficiently clear from the constitutive elements of the measure, it may be demonstrated through a number of factors:

"The existence of an underlying policy, which is implemented by the rule or norm, is a relevant element in establishing the prospective nature of that rule or norm. In addition, the more frequent, consistent, and extended the repetition of conduct is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy. In this regard, the Appellate Body has explained that relevant evidence may include proof of the systematic application of the challenged rule or norm. Where ascertainable, the design, architecture, and structure of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm."²¹⁰

136. Having examined the evidence adduced by the complainant, the Panel considered that the Cost Adjustment Methodology had "prospective application". The Panel drew this conclusion on the basis of several factors, including the consistent, systematic and extended application of the methodology; the endorsement of the methodology by the General Court of the European Union and the European Commission's reliance on that endorsement in a particular manner; and the

²⁰⁷ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.44.

²⁰⁸ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.54.

²⁰⁹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.55.

²¹⁰ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.55 (quoting Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132 (referring, in turn, to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187)).

respondent's inability to identify any instance of non-application of the methodology. The Panel elaborated upon these factors in the following manner:

"In the light of our examination of the evidence advanced by Russia, we are of the view that the Cost Adjustment Methodology has 'prospective application'. We base this conclusion on the following factors: (i) the methodology has been consistently and systematically applied for an extended period of time; (ii) it has been endorsed by the General Court of the European Union; and (iii) the European Commission has relied on that endorsement as a 'principle of law' to continue to apply the methodology until at least 2019.

Finally, our conclusion that the Cost Adjustment Methodology has prospective application is also based on the fact that the European Union has not been able to identify any instance of non-application. In response to a panel question on whether there have been cases in which the challenged methodology has not been applied in the specific set of circumstances described by Russia, the European Union stated that '[i]f there are verified distortions in the price of inputs, the European Commission would have the right to have recourse to an appropriate proxy to establish the undistorted cost of production in the country of origin'. In our view, this statement suggests that the Cost Adjust Methodology, as described by Russia, is likely to be applied in the future."²¹¹

1.4.4.4.5 Whether several instruments may be treated as a single measure

137. In *US – Tuna II (Mexico)*, the Panel decided to consider several measures jointly in its analysis of Mexico's claims, and make findings based on their combined operation, rather than on the basis of each individual measure separately. In the course of its analysis, the Panel took into account prior jurisprudence on this issue. The Panel began by noting that:

"In addressing this issue, we first note that it has not been suggested in these proceedings that any of these legal instruments taken in isolation would not constitute an 'act or omission of the organs of the state' attributable to the United States. We further note that the DPCIA and the implementing regulations constitute legislative or regulatory acts of the federal authorities, while the court ruling constitutes an act of the judicial branch. Each of these normative instruments is *a priori* capable of constituting a measure attributable to the United States, which may be challenged in dispute settlement proceedings under the DSU."²¹²

138. After reviewing how the various instruments cited by Mexico function and relate to each other, the Panel concluded that:

"To summarize, together and collectively, the various provisions in the different legal instruments identified by Mexico, including the *Hogarth* ruling, set out the terms of the US 'dolphin-safe' labelling scheme, as currently applied by the United States. We also note that the United States does not object to Mexico's request to consider the various instruments together and that it has articulated its defence in these proceedings on the basis of the measures taken together. In light of these elements, we see merit in considering these closely related instruments together as a single measure for the purposes of this dispute.

We also note that a comparable issue has arisen in two cases relating to SPS measures (*Japan – Apples* and *Australia – Apples*), where the panels considered whether various requirements imposed by Japan and Australia respectively, and embodied in different instruments, should be treated as a single measure or as a combination of several individual measures. In these cases, in addition to considering whether the different requirements might constitute a single measure for the purposes of dispute settlement under the DSU, the panel also had to consider whether they constituted a 'phytosanitary measure' within the meaning of the *SPS Agreement*, an issue that is not before this Panel. Nonetheless, we find that the test developed by

²¹¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.62-7.63.

²¹² Panel Report, *US – Tuna II (Mexico)*, para. 7.20.

the panel in *Japan – Apples* provides useful guidance for our analysis. The panel in that case considered that the various requirements were interrelated and cumulatively constituted the measures actually applied by Japan to the importation of US apple fruit to protect against the entry, establishment or spread of fire blight within its territory. That panel therefore saw no legal, logical or factual obstacle to treating the requirements identified by the United States as a single phytosanitary measure within the meaning of the SPS Agreement.

Similarly, we see no 'legal, factual or logical obstacle' to treating the various interrelated legal instruments identified by Mexico as the basis for its claims in these proceedings as a single measure for the purposes of our findings. Accordingly, we will consider them together throughout these findings. These measures taken together are hereafter referred to as 'the US dolphin-safe labelling provisions'.²¹³

139. The Appellate Body in *Russia – Railway Equipment* recalled the following legal considerations when determining whether several components may be viewed as a single measure:

"We recall that 'a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components.' In the present case, it was therefore Ukraine's burden to establish that the separate instances of suspensions, rejections, and non-recognition functioned together and formed a single overarching measure, distinct from its parts, in pursuance of an import prevention policy."²¹⁴

1.4.4.5 Effect of "as such" and "as applied" claims on the identification of measures at issue

1.4.4.5.1 General

140. The Panel, in *US – Continued Zeroing*, noted that the distinction between claims that take issue with measures of general and prospective application ("as such" claims) and claims targeting acts that apply to specific situations ("as applied" claims) was "developed as an analytical tool to facilitate the understanding of the nature of the measure at issue."²¹⁵ In agreeing with the Panel, the Appellate Body noted the relevance of this distinction in the identification of the measures at issue:

"We share the Panel's view that the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm."²¹⁶

1.4.4.5.2 Distinction to be drawn between laws "as such" and "as applied" when assessing measures

141. The Appellate Body observed in *US – 1916 Act* the existence of a long line of GATT cases that "firmly established" the principle that complaining parties were permitted to challenge measures "as such", and noted how, since the entry into force of the WTO, numerous panels had dealt with claims "as such":

²¹³ Panel Report, *US – Tuna II (Mexico)*, paras. 7.24-7.26.

²¹⁴ Appellate Body Report, *Russia – Railway Equipment*, para. 5.239.

²¹⁵ Appellate Body Report, *US – Continued Zeroing*, para. 179.

²¹⁶ Appellate Body Report, *US – Continued Zeroing*, para. 179.

"Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such, independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such. In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations. We consider the application of this distinction to the present cases in section IV(B) below.

Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement*, provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'. We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances."²¹⁷

142. On the basis of the aforementioned finding of the Appellate Body in *US – 1916 Act*, the Panel in *Argentina – Import Measures* concluded that "challenges against a measure 'as such' can be brought independently or simultaneously with challenges against a measure 'as applied'."²¹⁸

1.4.4.5.3 "As such" claims

1.4.4.5.3.1 General

143. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body discussed the characteristics of measures that would be subject to "as such" claims:

"In our view, 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims."²¹⁹

144. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained how the analysis should be conducted when a measure is challenged "as such":

"When a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required."²²⁰

²¹⁷ Appellate Body Report, *US – 1916 Act*, paras. 60-61. See also Panel Report, *Argentina – Import Measures*, para. 6.317.

²¹⁸ Panel Report, *Argentina – Import Measures*, para. 6.316.

²¹⁹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

²²⁰ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

119. The Appellate Body in *EC – Selected Customs Matters* held that "an 'as such' claim in WTO parlance challenges the substantive content of the measure at issue regardless [of] its application in individual instances."²²¹

1.4.4.5.3.2 Instruments with normative value

120. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that instruments containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance:

"[I]n GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."²²²

121. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stressed the importance of an examination of the normative nature of the legal instrument at issue, the Sunset Policy Bulletin, when determining whether it is a measure subject to dispute settlement:

"The Panel adopted a similar narrow approach in finding that the Sunset Policy Bulletin is not an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement*. Having adopted the view that an administrative procedure is 'a pre-established rule for the conduct of an anti-dumping investigation', the Panel assumed that a 'rule' means a 'mandatory rule' and used its previous finding that the Sunset Policy Bulletin is not a mandatory legal instrument to come to the conclusion that it therefore cannot be an administrative procedure. Again, the Panel did not consider the normative nature of the provisions of the Sunset Policy Bulletin, nor compare the type of norms that USDOC is required to publish in formal regulations with the type of norms it may set out in policy statements. These inquiries would have assisted the Panel in determining whether the Sunset Policy Bulletin is, in fact, an 'administrative procedure' within the meaning of Article 18.4 of the *Anti-Dumping Agreement*."²²³

122. In *US – Oil Country Tubular Goods Sunset Reviews*, another anti-dumping case dealing with the United States Sunset Policy Bulletin (see *US – Corrosion-Resistant Steel Sunset Review*, paragraphs 120 and 121 above), the Appellate Body stressed that whether an instrument has legal value under domestic law is immaterial when establishing whether it can be a measure subject to dispute settlement. The Appellate Body, referring to its findings in *US – Corrosion-Resistant Steel Sunset Review*, explained that what matters is that the instrument has normative value, in the sense of providing administrative guidance, creating expectations among the public and among private actors, and intended to have general and prospective application:

"We note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may

²²¹ Appellate Body Report, *EC – Selected Customs Matters*, fn 404

²²² Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

²²³ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 98.

be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC and that the USDOC 'is entirely free to depart from [the] SPB at any time'. However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that 'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement. We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm—once again—that the SPB, as such, is subject to WTO dispute settlement."²²⁴

123. In *EC – IT Products*, the Panel noted that, in general, measures challenged "as such" should have general and prospective application, and "necessarily" result in a breach of WTO obligations.²²⁵ The Panel observed that the legal effect of a measure is not a primary issue in an assessment of whether a measure can be challenged "as such". Rather, the issue is whether the measure sets forth rules or norms that are intended to have general and prospective application, and whether the measure has normative value in providing administrative guidance and creating expectations among the public and among private sectors:

"[I]n the Panel's view, the legal effect of CNEN on the CN is not the primary issue before it. The issue before it is whether CNEN set forth rules or norms that are intended to have general and prospective application, and whether CNEN have normative value in providing administrative guidance, and create expectations among the public and among private actors. Stated another way, the issue is whether CNEN are 'authoritative' such that 'per se' requirements set out in the CNEN could validly form the basis of an 'as such' claim of a breach of Article II of the GATT."²²⁶

124. In *US – Zeroing (EC)*, the Appellate Body addressed whether the United States' zeroing methodology could be challenged as such as a measure in dispute settlement proceedings.²²⁷ The European Communities asserted that, in this case, "overwhelming" evidence exists demonstrating that the zeroing methodology is a "norm".²²⁸ In reaching its findings, the Appellate Body first reiterated, as related to the concept of "measure", that "rules or norms" could be challenged, as such, even if they are *not* expressed in the form of a written instrument.²²⁹ Subsequently, the Appellate Body upheld the Panel's determination (although for separate reasons) that the United States' zeroing methodology could be challenged, as such, due to its "general and prospective application" under the specific circumstances of the dispute:

"In our view, when bringing a challenge against such a 'rule or norm' that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the 'rule or norm' may be challenged, as such. This evidence may include proof of the systematic application of the challenged 'rule or norm'. Particular rigour is required on the part of

²²⁴ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

²²⁵ Panel Report, *EC – IT Products*, para. 7.154.

²²⁶ Panel Report, *EC – IT Products*, para. 7.157.

²²⁷ The Appellate Body noted that the Panel had not focused in its report on the Standard Zeroing Procedures as a measure *per se*, but instead considered that the procedures as "'relevant evidence to ascertain the existence of a methodology.'" (See Appellate Body Report, *US – Zeroing (EC)*, para. 176).

²²⁸ Appellate Body Report, *US – Zeroing (EC)*, para. 194.

²²⁹ Appellate Body Report, *US – Zeroing (EC)*, para. 193. In this regard, the Appellate Body referred to Article 3.3 of the *DSU* (Ibid. para. 187), Article 17.4 of the *Anti-Dumping Agreement* (Ibid. para. 191), and Article 18.4 of the *Anti-Dumping Agreement* (Ibid. *US – Zeroing (EC)*, para. 192).

a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such.

...

[W]e believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract. We therefore cannot agree with the United States that the Panel's approach, in this case, would mean that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an 'as such' challenge, at least if the Member repeats the action with some indeterminate frequency.

In the light of these considerations, we conclude, albeit for reasons different from those set out by the Panel, that the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement."²³⁰

125. The Appellate Body in *US – Zeroing (EC)* also determined that a separate measure, the United States' "Standard Zeroing Procedures", was not an "act or instrument that sets forth rules or norms intended to have general and prospective application" to be challenged, as such, due to the fact that such procedures are only applicable in particular anti-dumping proceedings.²³¹ The Appellate Body referred to the Panel's analysis in this regard:

"The Panel found that 'to characterize the 'Standard Zeroing Procedures' as an act or instrument that sets forth rules or norms intended to have general and prospective application is somewhat difficult to reconcile with the fact that the 'Standard Zeroing Procedures' are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer program[] used in that particular proceeding.' According to the Panel, 'the need to incorporate these lines of computer code into each individual program[] indicates that it is not the 'Standard Zeroing Procedures' *per se* that set forth rules or norms of general and prospective application.' We agree with the Panel. Therefore, we find that the Standard Zeroing Procedures are not a measure that can be challenged, as such, in WTO dispute settlement."²³²

126. In *US – Zeroing (Japan)*, the Panel was faced with the question of whether a measure described as "the standard zeroing line" could be challenged as such along with the "zeroing procedures". In a finding upheld by the Appellate Body, the Panel concluded that, while the "standard zeroing line" was not a measure that could be subject to dispute settlement, "the zeroing procedures" could indeed be a measure challengeable as such:

"We now turn to the issue of whether what Japan terms 'zeroing procedures' can be considered to be a measure that can be challenged as such in light of the criteria enunciated by the Appellate Body, particularly in *US – Zeroing (EC)*. It is our understanding that by 'zeroing procedures', Japan means the zeroing methodology *per se*, as distinguished from the standard zeroing line. The concept of zeroing procedures, as used by Japan in this proceeding, does not correspond to a provision of legislation or regulation of the United States or to any other type of written instrument adopted by the United States that explicitly provides for zeroing as a rule or norm of general and prospective application. This raises the question of whether a procedure not to be found in legislation or regulation or in some other form of written instrument

²³⁰ Appellate Body Report, *US – Zeroing (EC)*, paras. 198 – 205. See also Panel Report, *Argentina – Import Measures*, para. 6.318.

²³¹ Appellate Body Report, *US – Zeroing (EC)*, para. 231.

²³² Appellate Body Report, *US – Zeroing (EC)*, para. 231.

may nevertheless constitute a measure challengeable as such in WTO dispute settlement. A closely related question that arises is whether it is of any consequence that the term 'zeroing procedures' is not employed in the anti-dumping legislation and practice of the United States but has been created by Japan for the purpose of this dispute settlement proceeding.

We consider, consistent with the reasoning of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, that the fact that a norm to act in a given way in a given situation is not contained in legislation or regulation does not entail that such a norm cannot be challenged as such in WTO dispute settlement. In order for a measure to have the 'normative value' necessary to render it susceptible of being challenged as such, the measure must meet certain requirements. Its content must be clear and it must be understood by those to whom it will apply that it will be applied generally and prospectively. We also concur with the observation of the panel in *US – Zeroing (EC)* that a finding regarding the WTO-inconsistency of a norm as such must be based on solid evidence enabling a panel to determine the precise content of the norm and the future conduct to which it will necessarily give rise. It stands to reason that a measure can only have these properties if it has a legal basis and that a measure is unlikely to be capable of being challenged as such in WTO dispute settlement if it is not grounded in the relevant domestic legal framework. However, this does not mean that the measure must necessarily be in the nature of legislation or regulation. ...

[T]he evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessment rates."²³³

127. In arriving at the conclusion discussed in paragraph 126 above, the Panel in *US – Zeroing (Japan)* acknowledged the difficulties of providing evidence when the rule or norm is not contained in a written instrument:

"We also do not consider that the fact that there exists no written instrument that explicitly lays down a rule or norm of zeroing is of decisive importance. We can see no logical basis in the GATT and WTO dispute settlement practice for the proposition that an 'as such' claim is only possible where a rule or norm of general and prospective application is recorded in a written instrument. ...

We recognize that an analysis of an 'as such' claim regarding a measure not embodied in legislation or regulation or other type of written instrument raises particular problems with respect to the evidence required to establish that the measure constitutes a rule or norm of general and prospective application, especially because, in our view, consistent practice is to be distinguished from the notion of a rule or norm of general and prospective application."²³⁴

1.4.4.5.4 Discretionary versus mandatory legislative rule

1.4.4.5.4.1 Reference to previous GATT practice

128. In *US – 1916 Act (EC)*, the United States argued, *inter alia*, that, according to established GATT practice, the measure at issue, referred to as the 1916 Act, could not be challenged "as such", i.e. independently of its application in a specific case, because it was "discretionary legislation". Specifically, the United States argued that the 1916 Act was non-mandatory because "(i) with respect to both civil and criminal proceedings, United States' courts had in the past interpreted and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the United States Department of Justice had discretion

²³³ Panel Report, *US – Zeroing (Japan)*, paras. 7.47-7.50.

²³⁴ Panel Report, *US – Zeroing (Japan)*, paras. 7.49 and 7.50.

whether to initiate criminal proceedings under the 1916 Act."²³⁵ The Appellate Body recalled GATT practice in respect of this subject-matter. See paragraph 141 above.

1.4.4.5.4.2 Relevant type of discretion for distinguishing between discretionary and mandatory legislation

129. Referring to the GATT Panel Report on *US – Tobacco*, the Appellate Body in *US – 1916 Act* emphasized that the type of discretion relevant for the distinction between discretionary and mandatory legislation was discretion vested with the executive branch. Also, the Appellate Body agreed with the Panel in *US – 1916 Act* in rejecting the argument that the United States Department of Justice enjoyed discretion within the meaning of established GATT practice:

"The practice of GATT panels was summed up in *United States – Tobacco* as follows:

'... panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.' (emphasis added)

Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government.

The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion accorded to the executive branch of the United States' government with respect to such action. These civil actions are brought by private parties. A judge faced with such proceedings must simply *apply* the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation."²³⁶

1.4.4.5.4.3 Assessment of whether or not legislation "mandates" action

130. In *US – Upland Cotton*, Brazil challenged section 1207(a) of the FSRI Act of 2002 mandating user marketing payments to exporters of upland cotton as a per se export subsidy in violation of relevant provisions of the Agreement on Agriculture. Brazil argued that the text of this measure clearly indicates that the user marketing programme is mandatory in that the United States Secretary of Agriculture did not have discretion to apply it in a WTO-consistent manner. The United States argued that the relevant question under a mandatory/discretionary analysis is whether the provisions establishing the export credit guarantee programmes mandate a breach of any WTO obligation. The Panel in *US – Upland Cotton* considered the use of "shall" in the language of the statute of the measure at issue, and the fact that payments must be made to all those who meet the conditions for eligibility in determining that the measure was mandatory and not discretionary. The Panel explained:

"We are of the view that section 1207(a)(1) of the FSRI Act of 2002 mandates the granting of subsidies in that the United States authorities have no discretion not to allow it if exporters fulfil certain conditions. This is not a situation in which the United States executive enjoys a discretion to somehow grant user marketing (Step 2)

²³⁵ Panel Report, *US – 1916 Act (EC)*, para. 6.82. See also Panel Report, *US – 1916 Act (Japan)*, para. 6.95.

²³⁶ Appellate Body Report, *US – 1916 Act*, paras. 88-90. See also, Panel Report, *US – Steel Plate*, paras. 7.88-7.89 and 8.3. In this case, the Panel concluded that the "practice" of the US authorities concerning the application of "total facts available" (Article 6.8 *Anti-Dumping Agreement*) is not a measure that can give rise to an independent claim of violation of the *Anti-Dumping Agreement*. See also, Panel Report, *US – Section 129(c)(1) URAA*, para. 6.22.

payments to exporters in a WTO-consistent manner. Every user marketing (Step 2) payment to an exporter constitutes a prohibited export subsidy.

The fact that the actual payment of subsidies is triggered only if certain market conditions prevail does not impact upon our analysis of the normative nature and operation of the measure within the United States legal system. The operation of the world upland cotton market, and the underlying determinative prices for the level of user marketing (Step 2) payments to upland cotton, are not exclusively within the control of the United States government. When certain market conditions exist, the Secretary of Agriculture has no discretion: the payments are automatically triggered."²³⁷

131. In *US – DRAMS*, Korea challenged certain certification requirements under the United States' anti-dumping law. The provision challenged by Korea required exporters to certify, upon removal of anti-dumping duties, that they agreed to the reinstatement of the anti-dumping duties on the products of their company if, after revocation of the original anti-dumping duties, the United States' authorities found dumping. The Panel rejected the Korean arguments, noting that the certification requirement was not a mandatory requirement for revocation under United States' anti-dumping law in general. The Panel held that other provisions of United States anti-dumping law and regulations of the United States authorities made revocation of an anti-dumping order possible contingent upon a different set of requirements, not including the certification requirement:

"We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of 'changed circumstances'. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement."²³⁸

132. In *Canada – Aircraft*, Brazil argued that a programme of the so-called Export Development Corporation (EDC) mandated the grant of subsidies and challenged the programme as such, rather than merely specific applications of this programme. However, the Panel noted that Brazil had conceded that the EDC programme had been *interpreted* as requiring the programme to give Canadian exporters an "edge" and rejected Brazil's claim:

"[W]e find nothing in Brazil's various submissions in support of this argument. The only factual evidence proffered by Brazil in support of its argument is the quote from EDC's mandate that EDC was established 'for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.' This statement by itself clearly cannot be viewed as a *requirement* to provide prohibited export subsidies. Nor has Brazil demonstrated otherwise that such support and development necessarily involves subsidization. Although such support and development might conceivably take the form of subsidization, there is nothing to suggest that this will necessarily be the case. In our view, a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since such support and development could be provided in a broad variety of ways.

... We again recall that the panel in *US – Tobacco* recollected 'that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the

²³⁷ Panel Report, *US – Upland Cotton*, paras. 7.745 – 7.746.

²³⁸ Panel Report, *US – DRAMS*, para. 6.53.

discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such ... [.]²³⁹

1.4.4.5.4.4 Whether the mandatory or discretionary question should be determined before a substantive finding

133. In *US – Export Restraints*, the question arose whether the Panel should first determine whether the measure at issue was mandatory or discretionary, and make a substantive finding only if it found the measure to be mandatory. The Panel declined to consider the mandatory/discretionary distinction as a threshold question. In the Panel's view, identifying and addressing the relevant WTO obligations first would facilitate its assessment of the manner in which the legislation at issue addressed those obligations, and whether any violation arose therefrom. In its analysis the Panel referred to the test developed by the GATT Panel in *US – Tobacco*:

"We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary *before* examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered *in light of those findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied *in a given substantive context*.

We consider such an approach to be appropriate in this case. In particular, identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.

Finally, we note that, whether or not a panel sees the mandatory/discretionary question as a necessarily threshold issue or, as suggested by Canada, as an issue that may arise as part of a panel's examination of the legal claims, it remains true – at least under the classical test which we shall be employing – that legislation as such cannot be found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. Thus, in any event, the order in which the two issues – the question of the type of legislation and the substance of the case – are addressed would not alter any eventual finding of consistency or lack thereof."²⁴⁰

134. In *US – Section 129(c)(1) URAA*, the Panel did not follow the approach of the Panel in *US – Export Restraints*²⁴¹ and preferred to analyse first whether the United States' legislation at issue

²³⁹ Panel Report, *Canada – Aircraft*, paras. 9.127-9.128. See also the Panel in *Canada – Aircraft Credits and Guarantee* which considered that, to prove that a given programme "as such" provides export subsidies, the complainant must establish, on the basis of the pertinent legal instruments, that the programmes at issue "mandate subsidization, in particular, the conferral of a benefit". Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.76-7.77. The Panel further clarified that "to satisfy the 'benefit' element of Article 1 of the *SCM Agreement* for the purposes of a challenge to [the programme at issue] as such, [the complainant] would have to show that the program requires conferral of a benefit, not that it could be used to do so, or even that it is used to do so ..." Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.107. See also paras. 7.123 -7.125 and Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 5.43 and 5.50.

²⁴⁰ Panel Report, *US – Export Restraints*, paras. 8.11-8.13.

²⁴¹ The Panel justified the different approach as follows: "We note that the Panel in *United States – Measures Treating Exports Restraints as Subsidies* first considered whether certain action was in conformity with WTO requirements and only then addressed whether the measure at issue mandated such action. ... In the circumstances of the case at hand, where there is a major *factual* dispute regarding whether section 129(c)(1) requires and/or precludes certain action, we think that a panel is of most assistance to the DSB if it examines the factual issues first. Moreover, we do not see how addressing first whether certain actions identified by Canada would contravene particular WTO provisions would facilitate our assessment of whether section 129(c)(1) mandates the United States to take certain action or not to take certain action.

was mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.²⁴²

1.4.4.5.4.5 Rejection of the mandatory versus discretionary distinction

135. The Panel in *US – Section 301 Trade Act* did not accept the distinction between discretionary and mandatory legislation in the context of a claim made pursuant to Article 23 of the DSU. In this case, the United States was defending the measure at issue with reference to the traditional doctrine that only mandatory laws can violate GATT law "as such". In contrast, the European Communities argued that certain discretionary legislation could also violate GATT law "as such". The Panel did not accept the United States' argument:

"[W]e believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation? Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.

We can express this view in a different way:

- (a) Even if we were to operate on the legal assumption that, as argued by the US, only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, can violate WTO provisions; and
- (b) confirm our earlier factual finding in paragraph 7.31(c) that the USTR enjoys full discretion to decide on the content of the determination,

we would still disagree with the US that the combination of (a) and (b) *necessarily* renders Section 304 compatible with Article 23, since Article 23 may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. In other words, rejecting, as we have, the presumption implicit in the US argument that no WTO provision ever prohibits discretionary legislation does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions. Indeed that is the very test we shall apply in our analysis. It simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language of Section 304 would presumptively preclude WTO consistency."²⁴³

136. In *US – 1916 Act*, the Appellate Body, further to referring to GATT practice (see paragraphs 141 and 128 above), declined to answer the question of whether the mandatory/discretionary distinction continued to be relevant under WTO law:

Finally, we have taken into account the fact that, in the present case, our ultimate conclusions with respect to Canada's claims would not differ depending on the order of analysis we decided to follow". Panel Report, *US – Section 129(c)(1) URAA*, footnote 72.

²⁴² Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.22-6.25.

²⁴³ Panel Report, *US – Section 301 Trade Act*, paras. 7.53-7.54. See also, Panel Report, *US – Section 129(c)(1) URAA*, para. 6.22.

"We note that answering the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement* would have no impact upon the outcome of these appeals, because the 1916 Act is clearly not discretionary legislation, as that term has been understood for purposes of distinguishing between mandatory and discretionary legislation. Therefore, we do not find it necessary to consider, in these cases, whether Article 18.4, or any other provision of the *Anti-Dumping Agreement*, has supplanted or modified the distinction between mandatory and discretionary legislation. For the same reasons, the Panel did not, in the Japan Panel Report, need to opine on this issue."²⁴⁴

137. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body, when examining the question whether Section 1677(5)(F) was inconsistent *per se* with the WTO obligations of the United States because it mandated a particular WTO-inconsistent method of determining the existence of a "benefit", clarified in a footnote that: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect."²⁴⁵

138. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, in the context of an anti-dumping dispute, for the first time, did not follow the traditional mandatory versus discretionary rule and found that it saw no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such". In this case, the measure at issue was the United States Sunset Policy Bulletin which the Panel had found not to be challengeable as such because it was not mandatory for the competent authorities. The Appellate Body stated:

"We also believe that the provisions of Article 18.4 of the *Anti-Dumping Agreement* are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the *Anti-Dumping Agreement*. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measure could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of 'conformity' set forth in Article 18.4.

This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'. To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements'.²⁴⁶ As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at

²⁴⁴ Appellate Body Report, *US – 1916 Act*, para. 99.

²⁴⁵ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, fn 334.

²⁴⁶ (footnote original) Article 3.2 of the DSU.

all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."²⁴⁷

139. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, referring to its previous report in *US – 1916 Act* where it did follow mandatory/discretionary rule, indicated that it had yet to pronounce itself generally upon the continuing relevance of such a distinction and warned against its "mechanistic application":

"We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such. As the Panel seemed to acknowledge, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."²⁴⁸

140. In *US – Zeroing (EC)*, the Appellate Body relied on its view expressed in *US – Corrosion-Resistant Steel Sunset Review* that the mandatory/discretionary distinction should not be applied mechanistically. In the context of assessing whether a Panel violated Article 11 of the DSU by failing to apply the mandatory/discretionary distinction in analyzing and finding a violation of Article 2.4.2 of the Anti-Dumping Agreement, the Appellate Body reiterated that "the import of the 'mandatory/discretionary distinction' may vary from case to case."²⁴⁹

1.4.5 Fourth requirement: The request must provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.4.5.1 General

141. In *Korea – Dairy*, the Appellate Body noted that the fourth requirement has two distinct elements:

"[I]n its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'. "²⁵⁰

142. In *India – Patents (US)*, the Appellate Body stressed the importance of the parties' duty to be "fully forthcoming" and to clearly state their claims:

"All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly."²⁵¹

143. The Appellate Body in *Korea – Pneumatic Valves (Japan)* disagreed with the Panel's findings that Japan's panel request had failed to meet the requirements under Article 6.2 of the DSU by merely paraphrasing the language in part of the relevant article, without any additional narrative description of the issues in order to explain "how or why" Japan considered the breach of the provisions. The Appellate Body found that the Panel had erred in determining the scope of their terms of reference and noted:

"In our view, the Panel focused too narrowly on the part of the narrative of Japan's claim paraphrasing the language of Article 3.1. In doing so, the Panel failed to assess

²⁴⁷ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 87-89.

²⁴⁸ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

²⁴⁹ Appellate Body Report, *US – Zeroing (EC)*, para. 214.

²⁵⁰ Appellate Body Report, *Korea – Dairy*, para. 120.

²⁵¹ Appellate Body Report, *India – Patents (US)*, para. 94.

whether the narrative, in its entirety and in light of the nature of the measure and the nature of the obligations established by Article 3.1 *and* Article 3.2 of the Anti-Dumping Agreement sufficed to meet the requirements of Article 6.2 of the DSU. Therefore, we consider that the Panel's overemphasis on the reference to Article 3.1 in Japan's panel request undermined its analysis under Article 6.2 of the DSU.

...

Thus, by referring to Articles 3.1 and 3.2 as the provisions of the covered agreement alleged to have been breached by Korea, and by indicating specifically which of the elements in Article 3.2 it concerns, namely the consideration of the volume of dumped imports, Japan's claim, while brief, plainly connects the challenged measure with the obligation in question.

...

As we see it, Japan's later allegations, on which the Panel relied, all relate to the different ways in which the Korean investigating authorities failed to conduct the required examination properly. Therefore, these allegations appear to us to be arguments setting out the reasons why Japan considers that Korea has breached the obligation established by Articles 3.1 and 3.2 concerning the volume of the dumped imports."²⁵²

144. On a similar note, the Appellate Body in *Korea – Pneumatic Valves (Japan)* found that the Panel had erred in finding that Japan's claim concerning the price effects of dumped imports was not within of its terms of reference and explained, noting that a complainant does not have to elaborate on the reasons for alleged violation of a covered agreement:

"In our view, all the steps of an investigating authority's analysis under Article 3 of the Anti-Dumping Agreement, leading to its overall determination of injury, are likely to entail a certain degree of complex economic analysis. At the same time, we recall that Article 6.2 of the DSU requires only 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. We do not share the view that, beyond such a brief summary, a panel request must also spell out precisely which elements of the investigating authority's price-effects analysis are concerned by a claim of inconsistency with Article 3.2.

...

In our view, while the boundary between a claim and an argument need not be rigid, it does not follow that a complainant should, in a panel request, elaborate on the reasons for which it believes the respondent has breached a provision of the covered agreements beyond what is required to provide the legal basis of the complaint sufficient to present the problem clearly. This is because Article 6.2 demands only 'a *brief* summary' of the legal basis of the complaint and not the arguments in support of the complaint."²⁵³

145. Further, the Appellate body in *Korea – Pneumatic Valves (Japan)* pointed out that, in respect of claims under Articles 3.4 and Article 3.1 of the Anti-Dumping Agreement, "a complainant is not required to identify or otherwise refer to the different factors that it considers an investigating authority would have failed to consider, or failed to consider properly."²⁵⁴

²⁵² Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.69-5.77.

²⁵³ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, paras. 5.91 and 5.93.

²⁵⁴ Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.108.

1.4.5.2 Concept of "claim"

146. The Appellate Body in *Guatemala – Cement I* noted that "the legal basis of the complaint" could also be referred to as "the claims".²⁵⁵

147. In *Korea – Dairy*, when distinguishing between claims and arguments, the Appellate Body emphasized that "[b]y 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."²⁵⁶

1.4.5.3 Identification of the claims

1.4.5.3.1 General

148. In *Thailand – H-Beams*, the Appellate Body stressed the importance of the request for establishment of a Panel while outlining the complaining parties' duty to be precise in identifying the legal basis of the complaint:

"In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission."²⁵⁷

1.4.5.3.2 Availability of public information regarding claims

149. The Panel in *EU – Energy Package* considered that the extent of the specificity in the description of claims might depend on the amount of information available in the public domain:

"We observe that, as confirmed by the Appellate Body, whether a measure can be identified in conformity with the requirements of Article 6.2 of the DSU may depend on the extent to which that measure is specified in the public domain. We similarly consider that, a complainant's ability to 'provide a brief summary of the legal basis of the complaint in order to present the problem clearly' might be affected by the availability of relevant information in the public domain. In our view, it may well be open to a complainant to argue, with due substantiation, that information pertinent to its claim was not publicly available and that, as a consequence, its ability to comply with the requirements of Article 6.2 of the DSU was affected."²⁵⁸

1.4.5.3.3 Identification of treaty provisions

150. In *Korea – Dairy*, the Appellate Body stated that the identification of the treaty provisions is always necessary for purposes of defining the terms of reference of a panel and for informing the respondent of the claims:

"Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but

²⁵⁵ Appellate Body Report, *Guatemala – Cement I*, para. 72.

²⁵⁶ Appellate Body Report, *Korea – Dairy*, para. 139.

²⁵⁷ Appellate Body Report, *Thailand – Steel*, para 97.

²⁵⁸ Panel Report, in *EU – Energy Package*, para. 7.213.

rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."²⁵⁹

151. In *EC – Bananas III*, the Panel indicated that making references to a WTO agreement without mentioning any provisions or alluding to unidentified "other" provisions would be insufficient to meet the requirements of Article 6.2:

"The panel request alleges an inconsistency with the requirements of the Agreement on Agriculture, without specifying any provision thereof. It also states that 'the EC's measures are inconsistent with the following Agreements and provisions *among others*', suggesting that there may be inconsistencies with unspecified agreements and inconsistencies with unspecified provisions of the specified agreements. In these two situations, it is not possible at the panel request stage, even in the broadest generic terms, to describe what legal 'problem' is asserted. While a reference to a specific provision of a specific agreement may not be essential if the problem or legal claim is otherwise clearly described, in the absence of some description of the problem, a mere reference to an entire agreement or simply to 'other' unspecified agreements or provisions is inadequate under the terms of Article 6.2. Accordingly, we find that references to a WTO agreement without mentioning any provisions or to unidentified 'other' provisions are too vague to meet the standards of Article 6.2 of the DSU."²⁶⁰

152. The Panel in *EC – Bananas III* also held that "[a] request [for the establishment of a panel] is sufficiently specific to comply with the minimum standards established by the terms of Article 6.2 of the DSU", if it lists the provisions of the specific agreements which the complaining party alleges to have been violated. The Appellate Body agreed:

"We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, the rebuttal submissions and the first and second panel meetings with the parties."²⁶¹

153. In *India – Patents (US)*, India argued that the Panel exceeded its authority under the DSU by ruling on the United States' subsidiary claim under Article 63 of the TRIPS Agreement after having first accepted the principal claim by the United States of a violation of Article 70.8 of the TRIPS Agreement. The request for the establishment of the panel by the United States reads in pertinent part: "India's legal regime appears to be inconsistent with the obligations of the *TRIPS Agreement*, including but not necessarily limited to Articles 27, 65 and 70." The Appellate Body considered that the phrase "including but not necessarily limited to" could not bring in other claims:

"[A] claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case.

With respect to Article 63, the convenient phrase, 'including but not necessarily limited to', is simply not adequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the DSU. If this phrase incorporates

²⁵⁹ Appellate Body, *Korea – Dairy*, para. 124. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.28.

²⁶⁰ Panel Report, *EC – Bananas III (Guatemala and Honduras)*, para. 7.30.

²⁶¹ Appellate Body Report, *EC – Bananas III*, para. 141; See also *EC – Approval and Marketing of Biotech Products*, para. 7.47 where the Panel agreed with the Appellate Body's statement in making its finding that although it was desirable for a complaining party to include an explanation of the substantive aspects or effects of measures which allegedly breach the provisions in its panel request, that this kind of information was not necessary to meet the requirements of Article 6.2 of the DSU.

Article 63, what Article of the *TRIPS Agreement* does it not incorporate? Therefore, this phrase is not sufficient to bring a claim relating to Article 63 within the terms of reference of the Panel."²⁶²

154. The Appellate Body in *Korea – Dairy* confirmed its finding in *EC – Bananas III*, but cautioned that this finding represented only the minimum requirements under Article 6.2 and that the "mere listing of the articles of an agreement alleged to have been breached" may not necessarily be sufficient for the purposes of Article 6.2. The Appellate Body opined that the latter case may arise "where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2". Ultimately, the Appellate Body set forth the standard of the "ability of the respondent to defend itself":

"[W]e did not purport in *European Communities – Bananas* to establish the mere listing of the articles of an agreement alleged to have been breached as a standard of precision, observance of which would *always* constitute sufficient compliance with the requirements of Article 6.2, *in each and every case*, without regard to the particular circumstances of such cases. If we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel '*very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*'. Close scrutiny of what we in fact said in *European Communities – Bananas* shows that we, firstly, restated the reasons why precision is necessary in a request for a panel; secondly, we stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and thirdly, we agreed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.

...

[W]e consider that whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."²⁶³

155. In *US – Lamb* the United States requested the Panel to rule that the panel requests of the complainants were insufficiently specific as they had merely listed the provisions of the Safeguard Agreements alleged to have been violated by the United States, which was insufficient in accordance with the Appellate Body's decision in *Korea – Dairy*. The Panel observed that while the Appellate Body in *Korea – Dairy* found that there are occasions when a mere listing of articles, in and of itself, may fall short of the standard of DSU Article 6.2, it gave examples of such situations thus implying that the listing of articles may in fact suffice in other situations. According to the

²⁶² Appellate Body Report, *India – Patents (US)*, paras. 89-90.

²⁶³ Appellate Body Report, *Korea – Dairy*, paras. 123 and 127. In *Argentina – Ceramic Tiles*, Argentina raised as a defence the concept of harmless error and argued that the complainant, the European Communities, had failed to demonstrate that the exporters concerned were prejudiced by the failure to determine an individual dumping margin. Argentina defined the concept of harmless error as "an error that does not cause injury or affect the rights of one of the parties" and contended that this concept has been accepted in WTO law through the Report of the Appellate Body in the *Korea – Dairy*. The Panel noted "however, that the Appellate Body Report in the *Korea – Dairy Safeguards* case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining party. Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law." Panel Report, *Argentina – Ceramic Tiles*, paras. 6.102-6.103.

Panel, the situations where a mere listing of articles would be insufficient is one in which "the paragraphs and subparagraphs of the articles at issue involve not only one single obligation, but rather *multiple* obligations in a 'complex multi-phased process [in which] every phase must meet with certain legal requirements and comply with the legal standards set out in the agreement'." In this particular dispute, the Panel found that the listing of the articles did, in light of the attendant circumstances, ensure sufficient clarity.²⁶⁴

156. In *EC – Tube or Pipe Fittings*, the European Communities requested the Panel to make a preliminary ruling that some of Brazil's claims were not within its terms of reference. The Panel noted that among the said claims, were several provisions cited by Brazil in its first written submission that were not mentioned in its request for establishment. The Panel considered that Brazil's claims under those provisions were not within its terms of reference. The Panel cautioned against the use of the expression "especially, but not exclusively" when identifying the claims in a request for establishment of a panel:

"We note that the Panel request refers generally to the Articles of the *Anti-Dumping Agreement* in question (i.e. Articles 6, 9 and 12) and contains the phrase 'especially (but not exclusively)' when enumerating selective provisions (not including the provisions concerned here) under these Articles. However, we do not view such a general reference as sufficiently clear to identify the specific provisions at issue. This is particularly so in view of the fact that Articles 6, 9 and 12 of the *Anti-Dumping Agreement* contain multiple and diverse obligations, which relate to different subject-matters than the obligations contained in the specific provisions that are cited in the Panel request.⁷ The phrase 'especially, but not exclusively' may be convenient, but is inadequate to 'identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly' as required by Article 6.2 of the *DSU*. Furthermore, even assuming *arguendo* that the obligations in these provisions may be 'inter-linked' with or 'dependent' upon a provision that is identified in the Panel request, we do not consider that this consideration is relevant here. The mere fact that a claim may be legally dependent upon another claim does not mean that it is subsumed within, or encompassed by, that claim. If a claim is not identified in the Panel request, the fact that it may be 'inter-linked' with an identified claim is not determinative."²⁶⁵

157. As regards the other claims in *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to find that they were not within its terms of reference. The Panel considered that the European Communities had failed to demonstrate any prejudice to its interests by the way these "claims" appeared in the Panel request:

"We consider that it is not necessary for us to rule on whether these allegations constitute 'claims' or 'arguments'. If they are arguments, there would be no need for them to be set out in the Panel request. Even assuming that all of the allegations identified above are 'claims' in respect of which the text of the Panel request may be somewhat deficient in describing the nature of the complaint, the European Communities has failed in any event to demonstrate to us any prejudice to its interests throughout the course of these Panel proceedings by the way these 'claims' appeared in the Panel request."²⁶⁶

158. In *EC – Trademarks and Geographical Indications (Australia)*, the European Communities argued that a number of the provisions listed by Australia in its request for establishment did not provide a brief summary of the legal basis of the complaint in sufficient detail to present the problem clearly. The Panel disagreed, finding, in a preliminary ruling, that a reference to a common obligation in the provisions may meet the standard of Article 6.2 in certain circumstances:

"The Panel considers that the mere listing of provisions of the relevant covered agreements may not satisfy the standard of Article 6.2 of the *DSU*, for instance, where the listed provisions establish multiple obligations rather than one single,

²⁶⁴ Panel Report, *US – Lamb*, paras. 5.18-5.31.

²⁶⁵ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.14.

²⁶⁶ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.22. See also paras. 7.26-7.27.

distinct obligation. However, where the multiple obligations are closely related and interlinked, a reference to a common obligation in the specific listed provisions may be sufficient to meet the standard of Article 6.2 of the DSU under certain circumstances in a particular case."²⁶⁷

159. In *EC – Approval and Marketing of Biotech Products*, the Panel stressed that the sufficiency of a panel request is to be determined on the circumstances of each case and "there is no requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph"²⁶⁸:

"We do not consider that, for the purposes of an Article 6.2 inquiry, the structure of the provisions contained in the WTO agreements constitutes some kind of 'safe haven', such that it would always be sufficient to specify sub-paragraph numbers in cases where a provision has several sub-paragraphs, etc. In our view, whether a particular manner of citing provisions is sufficient will depend on the circumstances of each case, and in particular on the extent to which the particular citation sheds light on the nature of the obligation at issue. Having said this, we think that the fact that two or more distinct obligations are set out, e.g., in one and the same sub-paragraph may provide a strong indication that those obligations are very similar in nature. In such cases, specification of the relevant sub-paragraph number may shed sufficient light on the nature of the obligation at issue to meet the minimum standard of precision required under Article 6.2."²⁶⁹

160. In *EC – Approval and Marketing of Biotech Products*, with respect to the European Communities arguments that the complainants had listed provisions which were mutually exclusive or subject to other provisions, the Panel noted that nothing in Article 6.2 of the DSU prevents the listing of mutually exclusive provisions or those subject to other provisions:

"Neither the text of Article 6.2 nor relevant jurisprudence suggests that a complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements. Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions. Nor do we consider that the panel requests are defective because they do not make it clear whether all of the provisions listed are alleged to apply to the same aspect of a particular measure, or whether some provisions are alleged to apply to different aspects of the same measure. It is sufficient to recall in this regard that a panel request need not set out arguments 'as to which specific aspects of the measures at issue relate to which specific provisions of the agreements alleged to have been violated."²⁷⁰

161. In *Korea – Commercial Vessels*, Korea argued that the European Communities had failed to meet Article 6.2's requirements by failing to choose between prohibited and actionable subsidies claims regarding the measures at issue.²⁷¹ The Panel decided, in a preliminary ruling, that complementary or alternative claims under multiple provisions is not only permitted but also required by Article 6.2. In this regard, it stated:

"[W]e can only conclude that if a complaining party wishes to pursue claims in respect of a given measure under multiple provisions, whether complementarily or alternatively, not only is it *permitted* by Article 6.2 of the DSU to refer to all of those provisions in its request for establishment, but it is *required* to do so. In this respect, we find that the European Communities' request for establishment meets this requirement, as it identifies quite clearly which provisions are at issue... and it explicitly states the European Communities' view that, pursuant to these provisions,

²⁶⁷ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2, sub-para. 35

²⁶⁸ Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 78.

²⁶⁹ Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 79.

²⁷⁰ Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, para. 88.

²⁷¹ Panel Report, *Korea – Commercial Vessels*, para. 7.2.

the relevant measures are specific subsidies that are export contingent, and that cause serious prejudice to the interests of the European Communities. There is thus no doubt as to which provisions are cited by the European Communities in respect of which measures, and on what basis".²⁷²

162. In *Mexico – Anti-Dumping Measures on Rice*, the Panel considered, in a preliminary ruling, that when examining the consistency of a request for establishment with Article 6.2 of the DSU, the request must be considered as a whole and the claims read in their context:

"While we consider that the US request for establishment could have been clearer in identifying precisely which of the paragraphs of Article VI of the GATT 1994 the United States claims to have been violated, we do not agree with Mexico that the request for establishment in this respect did not provide a brief summary of the legal basis of the claim sufficient to present the problem clearly. We consider that it is important when examining the consistency of part of the request for establishment with Article 6.2 of the DSU, not to examine parts of this request in isolation. Rather, in our view, the request must be considered as a whole, and the different claims in the request for establishment must be read in their context. In our view, the accompanying narrative and the provisions of the AD Agreement also alleged to have been violated make it clear that the US claims in this respect concern the determination of injury caused by dumped imports."²⁷³

1.4.5.3.4 Indication of which measures violate which provisions

163. The Panel in *EC – Approval and Marketing of Biotech Products* agreed that the respondent's ability to defend itself is not prejudiced by the fact that the panel request merely states that each of the measures listed violates each of the provisions within a listing:

"[T]he three panel requests as worded indicate that each of the measures at issue in these requests is alleged to violate each of the provisions identified. We consider, therefore, that the claims that may be pursued are 'sufficiently identified in the panel request[s]' and that the European Communities knows what case it may have to answer and that it can begin to prepare its defence based on that knowledge."²⁷⁴

164. In *Canada – Wheat Exports and Grain Imports*, the Panel tackled the issue whether a particular panel request made it clear which measures were alleged to violate which provisions:

"We do not agree with Canada's assertion that the panel request does not make it clear which laws, regulations or actions are inconsistent with which obligation. The panel request states that 'the laws, regulations *and* actions of the Government of Canada and the CWB related to exports of wheat appear to be ... inconsistent with paragraph 1(b) of Article XVII of the GATT 1994 ...'. This wording suggests to us – and we consider that it should suggest to Canada and the third parties as well – that the United States may have wished to claim before us that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b). This way of presenting the Article XVII claim does not, in our view, have as a consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States' complaint."²⁷⁵

²⁷² Panel Report, *Korea – Commercial Vessels*, para. 7.2.

²⁷³ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31.

²⁷⁴ The Panel also indicated in footnote 93 of its preliminary ruling, that the third-parties due-process rights were not prejudiced. "We note, in addition, that just like we do not consider that the summaries of the legal basis of the complaints provided in the Complaining Parties' panel requests result in the European Communities not knowing what case it has to answer and hence being unable to begin preparing its defence, so also we do not consider that those summaries result in the third parties being uninformed as to the legal basis of the Complaining Parties' complaints and thus unable effectively to respond to these complaints. We recall in this regard that none of the third parties has offered any comments on the European Communities' objections to the Complaining Parties' panel requests."

²⁷⁵ Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.8.

1.4.5.3.5 Identification of claims vs. applicability of the relevant legal provisions

165. In *Indonesia – Iron or Steel Products*, the Appellate Body stated that Article 6.2 does not require an explanation on the applicability of the cited legal provisions to the challenged measures:

"By contrast, Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the *applicability* of a given covered agreement. These provisions are not directly part of the 'legal basis of the complaint', for they are not 'claimed to have been *violated*' by the respondent'. Instead, the fact that a panel request contains claims of violation under the substantive provisions of a covered agreement logically *presupposes* that the complainant considers that such provisions are applicable and relevant to the case at hand.

... Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement. The examination regarding the 'applicability' of certain provisions logically precedes the assessment of a measure's 'conformity' with such provisions. Indeed, as noted by the Appellate Body, a panel may be required to 'determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure' with that provision or covered agreement."²⁷⁶

1.4.5.3.6 Relationship between claims raised in an anti-dumping investigation and claims raised in a panel request

166. As regards the claims that a WTO Member chooses to bring before a WTO dispute, in *Thailand – H-Beams*, the Appellate Body ruled on the relationships between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO:

"[I]t cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not. Thus, the underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel. We, therefore, are of the view that, in this case, the Panel erred to the extent that it relied mainly on issues raised in the underlying anti-dumping investigation in assessing the sufficiency of Poland's panel request under Articles 2 and 5."²⁷⁷

1.4.5.3.7 Distinction between claims and arguments

167. After agreeing with the Panel that the request for the establishment of the panel contained sufficient identification of the specific measures at issue to fulfil the requirements of Article 6.2 of the DSU, the Appellate Body in *EC – Bananas III* set out the difference between claims and arguments, and furthermore rejected the notion of "curing" a faulty panel request where claims had not been included in the panel request:

"In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If

²⁷⁶ Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.30-5.31.

²⁷⁷ Appellate Body Report, *Thailand – H-Beams*, para. 94.

a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."²⁷⁸

168. In *EC – Hormones*, the European Communities argued on appeal that since the Panel was not entitled to make findings beyond what has been requested by the parties, it had erred by basing the main part of its reasoning on Article 5.5 of the SPS Agreement on a claim that the complainants had not made. The Appellate Body rejected the European Communities' argument and emphasised the distinction between claims and arguments:

"Considering that in its request for the establishment of a panel in the proceeding initiated by the United States, as well as in the proceeding started by Canada, both complainants have included a claim that the European Communities ban is inconsistent with Article 5 of the *SPS Agreement*, we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by the complainant to sustain its legal claims.... Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the *DSU* limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the *DSU*, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the European Communities measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties."²⁷⁹

169. The Panel in *Thailand – H-Beams* discussed the sufficiency of a panel request, stressing the distinction between claims and arguments:

"Thailand argues that 'a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings.' According to Thailand, 'this would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request.' We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that 'there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the *DSU*, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.' Article 6.2 *DSU* does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings."²⁸⁰

²⁷⁸ Appellate Body Report, *EC – Bananas III*, paras. 141-143. See also Appellate Body Reports, *US – Lead and Bismuth II*, paras. 72 and 73, and *US – Anti-Dumping Measures on OCTG*, paras. 7.16-7.17.

²⁷⁹ Appellate Body Report, *EC – Hormones*, para. 156. In *US – Certain EC Products*, the Appellate Body ruled that "the Panel was not obliged to limit its legal reasoning in reaching a finding to arguments presented by the [complainant]". See Appellate Body Report, *US – Certain EC Products*, para. 123.

²⁸⁰ Panel Report, *Thailand – H-Beams*, para. 7.43. This passage was cited with approval by the Panel in *US – Gambling*, Annex B, para. 39 which rejected the US request to conclude that Antigua and Barbuda had failed to make its *prima facie* case in a preliminary ruling, since "Antigua and Barbuda ha[d] two sets of written submissions and two panel hearings to convince the Panel that it ha[d] established a *prima facie* case".

170. In *Chile – Price Band System*, Chile had asked the Appellate Body to reverse the Panel's finding on the inconsistency of Chile's price band system with Article II:1(b) second sentence on the ground that Argentina had not actually made a claim under that second sentence. Argentina referred to paragraph 156 of the Appellate Body Report in *EC – Hormones* in support of its argument that "even if none of the parties had advanced arguments regarding the second sentence of Article II:1(b) of the GATT 1994, the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim." The Appellate Body considered that, in this case, the Panel "had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence" and stressed that "the Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue":

"In *EC – Hormones*, and in *US – Certain EC Products*, we affirmed the capacity of panels to develop their own legal reasoning in a context in which it was clear that the complaining party had made a claim on the matter before the panel. It was also clear, in both those cases, that the complainant had advanced arguments in support of the finding made by the panel—even though the arguments in support of the claim were not the same as the interpretation eventually adopted by the Panel. The situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.

Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a 'right' nor a 'duty' to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue."²⁸¹

171. In *India – Patents (US)*, on the issue of claims and arguments, the Appellate Body stated:

"[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as a case proceeds."²⁸²

172. In *Korea – Dairy*, Korea argued in its appeal that the Panel had erred by failing to consider Korea's argument that parties to a dispute settlement procedure cannot introduce new claims at, or subsequent to, the rebuttal stage. The Appellate Body emphasized the difference between claims and arguments as follows:

"[W]e agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request. By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties. In *European Communities – Hormones*, we emphasized the substantial latitude enjoyed by panels in treating the *arguments* presented by either of the parties and said:

'... Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to

²⁸¹ Appellate Body Report, *Chile – Price Band System*, paras. 166-168.

²⁸² Appellate Body Report, *India – Patents (US)*, para. 88.

develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. '

Both 'claims' and 'arguments' are distinct from the 'evidence' which the complainant or respondent presents to support its assertions of fact and arguments."²⁸³

173. In *Canada – Autos*, the Panel considered whether Japan's claim that it could "[reserve] its right to elaborate during the course of the panel deliberations" had prejudiced Canada's ability to defend itself. The Panel indicated that Canada had suffered no prejudice:

"First, the Panel does not consider that this is a situation where, as argued by Canada, the complaining party is permitted 'to eke out its claims incrementally during the various stages of the case'. In making this argument, Canada refers to the Appellate Body decision in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*. However, the situation here is unlike that in *EC – Bananas III*, where the Appellate Body stated that 'Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint' (WT/DS27/AB/R, para. 143). In the case before us there is no Article 6.2 issue of specificity of the measures identified in the panel request. Japan in this dispute has not attempted to reserve a right to present a new claim at a later stage of the proceedings; rather, it appears that Japan has simply indicated that it may wish to further elaborate its arguments as to claims already set out in the panel request and in its initial arguments. As such, the Panel does not consider, at this stage, that Canada is likely to be prejudiced in its ability to defend itself in this action.

Second, to the extent any issue of procedural fairness should arise, for example, as to the right of rebuttal by Canada should Japan wait until a later stage of these proceedings to develop its arguments as to its GATT Article III:4 and TRIMS Article 2.1 claims with respect to the 'manufacturing requirement' (production-to-sales ratio requirement), the Panel will ensure such procedural fairness by providing Canada with adequate opportunity to respond to any such further elaboration by Japan of its arguments under these claims.

Third, in addition to ensuring procedural fairness, it is of course necessary to set a cut-off date beyond which no new argumentation as to the claims in issue may be accepted, except upon a showing of good cause. In the instant case, the Panel considers that no new argumentation should be introduced beyond the second panel meeting with the parties, except in response to any questions posed by the Panel or otherwise upon a showing of good cause."²⁸⁴

174. The Panel in *EC – Bed Linen (Article 21.5 – India)* noted the distinction drawn by the Appellate Body between claims and arguments and indicated that there existed "no obligation on a party to limit its arguments to only those treaty provisions about which claims have been identified in the request for establishment."²⁸⁵

175. In *EC – Approval and Marketing of Biotech Products*, the Panel, in a preliminary ruling, found that Article 6.2 did not require an explanation of the reasons for identifying certain treaty provisions and that panel requests did not have to set out arguments about which measures violated which obligations:²⁸⁶

"Neither the text of Article 6.2 nor relevant jurisprudence suggests that a complaining party needs to explain, in the panel request, the reasons for identifying particular treaty provisions. Such explanation is to be provided through arguments to be developed in the complaining party's written submissions and oral statements.

²⁸³ Appellate Body Report, *Korea – Dairy*, para. 139. See also Panel Report, *Egypt – Steel Rebar*, para. 7.58.

²⁸⁴ Panel Report, *Canada – Autos*, paras. 4.11-4.13.

²⁸⁵ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.63.

²⁸⁶ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

Accordingly, we do not consider that the Complaining Parties' panel requests are defective because they do not explain why certain provisions are listed even though they may be mutually exclusive or may apply subject to other provisions".²⁸⁷

176. In *EC – Selected Customs Matters*, the Appellate Body asserted that Article 6.2 requires the "claims" to be set out in a panel request in a way that is sufficient to present the problem clearly, not the "arguments".

"[A]rticle 6.2 of the DSU requires that the *claims*—not the *arguments*—be set out in a panel request in a way that is sufficient to present the problem clearly. 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 so, these arguments should not be interpreted to narrow the scope of the measures or the claims. Accordingly, we are of the opinion that the Panel erred when it found that the list of areas of customs administration in the third paragraph of the panel request limits the scope of the 'specific measures at issue'".²⁸⁸

177. In *Indonesia – Chicken*, Indonesia claimed that Brazil's panel request lacked sufficient clarity as to which aspects of the general prohibition were inconsistent with which provisions of the covered agreements listed by Brazil, including a brief indication of how and why. Although the Panel agreed with Indonesia that Brazil's request could have been structured in a clearer manner, it observed that the request did not fall short of the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly:

"[T]he amount of detail that Indonesia considers necessary would require Brazil to develop arguments in addition to setting out the claims. Indeed, Indonesia seems to expect Brazil's panel request to describe the precise and specific manner in which each of the constitutive elements of the general prohibition, not the measure itself, are inconsistent with the relevant articles of the covered agreements. The Appellate Body has been clear in acknowledging that Article 6.2 requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly. In our view, accepting Indonesia's arguments would require us to blur this distinction."²⁸⁹

178. The Panel in *US – Clove Cigarettes* rejected the United States' argument that the identification of the like domestic product in a panel request merely amounts to argumentation. According to the Panel, in certain circumstances, "the identification of the specific products at issue in a panel request pertains to the claim at issue, i.e., providing 'a brief summary of the legal basis of the complaint', rather than to the arguments relating to that claim":

"Article 2.1 of the TBT Agreement defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of 'providing a brief summary of the legal basis to the complaint' than purely to argumentation.

...

We do not disagree with these prior findings and we should not be misinterpreted as saying that a complainant must in all cases identify the products to which the measure at issue applies in order to comply with Article 6.2. We are saying that when the complainant has specified the products in its panel request, as in the present case, and when the claim pertains to a WTO obligation that requires a comparison of particular products, as in the present case, such identification becomes an integral

²⁸⁷ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

²⁸⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

²⁸⁹ Panel Report, *Indonesia – Chicken*, para. 7.27.

part of the panel's terms of reference, and cannot be 'cured' through argumentation."²⁹⁰

179. The Panel in *India – Agricultural Products* held that "the identification of a domestic measure as evidence for the purpose of demonstrating discrimination between imported and domestic products pertains to the argumentation of the discrimination claim, as opposed to constituting a distinct claim."²⁹¹ The Panel explained:

"[A] measure to which a party refers solely for the purpose of making a comparison with a challenged measure in respect of a discrimination claim may serve as evidence in the argumentation in support of that claim, and does not in itself constitute a measure that must be identified in a panel request by virtue of Article 6.2 of the DSU."²⁹²

180. In *China – Publications and Audiovisual Products*, the Panel, in a statement not modified by the Appellate Body, also noted that although a complainant must provide a "summary of the legal basis" of its complaint, this does not mean that the complainant is required, in its request for establishment, to set out the arguments in support of a particular claim. The Panel considered "that there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims."²⁹³

181. In *Australia – Apples*, the Panel applied the Appellate Body's distinction between claims and arguments set out in *EC – Bananas III* to rule that a comparison situation in the dispute relating to a Japanese product did not form part of New Zealand's claim, but rather formed part of New Zealand's arguments:

"The Panel does not view the comparison situation in this dispute, namely the one relating to Japanese nashi pears, as part of New Zealand's claim. Rather, it belongs to New Zealand's arguments. In *EC – Bananas III*, the Appellate Body established a clear distinction between claims and arguments. '[T]here is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under *DSU Article 7*, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."²⁹⁴

1.4.5.3.8 Considering a claim against the design of a system "as a whole" challenge

182. In *EC – Selected Customs Matters*, the Appellate Body agreed that a Member is allowed to challenge within the WTO dispute settlement proceedings another Member's system *as a whole* or *overall* and established that challenging the design or structure of a system is also permissible:

"By referring to the 'design and structure' of the European Communities' system of customs administration, the United States sought to demonstrate how and why the instruments identified in the first paragraph of the panel request, as a whole, are administered in a manner leading to a lack of uniformity in their administration. Thus, the United States' contention on the 'design and structure' of the European Communities' system of customs administration was made as an argument to substantiate its 'as a whole' challenge set out in the panel request. We therefore disagree with the Panel's characterization of the United States' contention on the 'design and structure' of the European Communities' system of customs administration as a claim in itself. We noted earlier that the 'as a whole' challenge of the United States is set out in the panel request consistently and according to the specificity requirements contained in Article 6.2 of the DSU. We therefore see no reason why the Panel was precluded from considering the United States' arguments

²⁹⁰ Panel Report, *US – Clove Cigarettes*, paras. 7.139 and 7.141.

²⁹¹ Panel Report, *India – Agricultural Products*, para. 7.50.

²⁹² Panel Report, *India – Agricultural Products*, para. 7.53.

²⁹³ Panel Report, *China – Publications and Audiovisual Products*, para. 7.23.

²⁹⁴ Panel Report, *Australia – Apples*, para. 7.926.

on the 'design and structure' of the European Communities' system of customs administration."²⁹⁵

1.4.5.3.9 Abandoned claims

178. The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* held that the existence of abandoned claims in a panel request does not affect the conformity with Article 6.2 of the DSU of the identification of the remaining claims:

"We do not agree with the United States that China's abandonment of its claims 'cured' the alleged lack of specificity of Part D of the panel request. The existence of the abandoned claims does not affect the conformity of the identification of the remaining claims with Article 6.2 of the DSU... While a panel request making general references to treaty provisions containing multiple claims may be viewed as being over-inclusive, it is important to note that abandoning one set of claims is an issue entirely different from attempting to cure deficiencies in the listing of the remaining set of claims in a panel request. A panel request may list multiple claims with sufficient specificity, and it may list few claims in a manner that does not comply with the requirements of Article 6.2. Subsequently dropping claims does not add to, or detract from, an independent assessment of whether the remaining claims are identified in a manner that is sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU."²⁹⁶

179. In *EU – Energy Package*, Russia decided not to pursue its claims with regard to certain measures that had been identified in its panel request, and the Panel decided not to address such claims.²⁹⁷

1.4.5.3.10 Distinction between "as such" claims and "as applied" claims:

1.4.5.3.10.1 General

180. The Appellate Body in *EU – Biodiesel* pointed out that "a claim that a measure is inconsistent 'as such' challenges a measure of a Member that has general and prospective application, whereas a claim that a measure is inconsistent 'as applied' challenges one or more specific instances of the application of such a measure."²⁹⁸

181. In *US – Carbon Steel*, the Appellate Body indicated that Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws:

"We note, first, that, in dispute settlement proceedings, Members may challenge the consistency with the covered agreements of another Member's laws, as such, as distinguished from any specific application of those laws..."

Thus, a responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."²⁹⁹

²⁹⁵ Appellate Body Report, *EC – Selected Customs Matters*, para. 175.

²⁹⁶ Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.49.

²⁹⁷ Panel Report, *EU – Energy Package*, paras. 7.20-7.22.

²⁹⁸ Appellate Body Report, *EU – Biodiesel*, para. 6.154.

²⁹⁹ Appellate Body Report, *US – Carbon Steel*, paras. 156-157.

182. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body warned about the seriousness of "as such" challenges and urged complainants to "be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible":

"We also expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged 'as such'. We would therefore urge complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible. In particular, we would expect that 'as such' claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Through such straightforward presentations of 'as such' claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings."³⁰⁰

183. In *EC – IT Products*, the Panel noted that the DSU does not expressly distinguish between "as such" or "as applied" claims of violation, nor does Article 6.2 of the DSU or any other provision of the DSU set forth a particular burden of proof that applies to complainants who raise "as such" claims of violation. The Panel was faced with the question of whether it was "necessary to identify specific product models in order to establish an 'as such' breach or is it sufficient to identify products that share a particular characteristic".³⁰¹ In answering this question, the Panel observed that what is required to establish an "as such" breach will vary from case to case depending on the particular circumstances of the case, including the nature of the measures and obligations at issue.³⁰²

1.4.5.3.10.2 WTO doctrine on "as such" claims contrasted with traditional public international law

184. In *US – Section 301 Trade Act*, although it eventually held that a statute "which ... reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a)" was a violation of Article 23.2(a) read together with Article 23.1, the Panel made the following general statement on State responsibility:

"[U]nder traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance."³⁰³

1.4.5.4 "present the problem clearly"

1.4.5.4.1 General

185. In *US – Oil Country Tubular Goods Sunset Review*, the Appellate Body, further to referring to its previous reports on *Thailand – H-Beams* and *Korea – Dairy*, considered that a request for establishment "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed" in order to present the problem clearly:

³⁰⁰ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 173.

³⁰¹ Panel Report, *EC – IT Products*, paras. 7.106 and 111.

³⁰² Panel Report, *EC – IT Products*, para. 7.112.

³⁰³ Panel Report, *US – Section 301 Trade Act*, para. 7.80.

"[I]n order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent 'know what case it has to answer, and ... begin preparing its defence'."³⁰⁴

186. The Panel in *US – Pipes and Tubes (Turkey)* found certain measures to be outside its terms of reference on the ground that Turkey, the complainant, had not plainly connected the relevant claim with those measures.³⁰⁵ In so finding, the Panel rejected Turkey's argument that the United States had not been prejudiced by this deficiency in Turkey's panel request:

"We further find irrelevant whether the United States was prejudiced or not by a lack of precision in Turkey's panel request. As we explain above, Article 6.2 of the DSU requires a complainant to 'identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. A panel's examination of whether a panel request complies with these requirements 'must be objectively determined on the basis of the panel request as it existed at the time of the filing' and be 'demonstrated on the face' of the request. Article 6.2 of the DSU does not separately require a finding of prejudice to a responding party in order to determine whether or not a given claim falls within a panel's terms of reference. Rather, as we explain above, a panel request forms the basis of a panel's terms of reference and establishes a panel's jurisdiction. Importantly, the panel request also serves a due process function by providing the respondent notice as to the nature of the complainant's case. We therefore reject Turkey's arguments."³⁰⁶³⁰⁷

1.4.5.4.2 Relevance of presenting the problem clearly

187. In *Thailand – H-Beams*, the Appellate Body explained the due process objectives behind the requirement for sufficient clarity in a panel request:

"Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the 'claims' that are being asserted by the complaining party. 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. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."³⁰⁸

188. Also, in *Thailand – H-Beams*, the Appellate Body explained further how claims of prejudice should be assessed (commenting particularly on the timing of challenging the sufficiency of a Panel request):

"Thailand argues that it was prejudiced by the lack of clarity of Poland's panel request. The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself. In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the *Anti-Dumping Agreement* at the time of filing of its first written submission, it did not do so at that

³⁰⁴ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162. See also Appellate Body Report, *Russia – Railway Equipment*, para. 5.27.

³⁰⁵ Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.236.

³⁰⁶ (*footnote original*) We note that Turkey has also argued that the United States could have asked for clarifications prior to filing its preliminary ruling request and asked for an extension of time to prepare its response, as doing so would avoid the need for Turkey to reinitiate consultations and file another dispute to address other subsidy programmes at issue in the WLP proceeding. (Turkey's response to the United States' preliminary ruling request, para. 31; response to Panel question No. 2, paras. 14-15). We also consider that these arguments are not relevant to our assessment.

³⁰⁷ Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.241.

³⁰⁸ Appellate Body Report, *Thailand – H-Beams*, para. 88.

time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand did not suffer any prejudice on account of any lack of clarity in the panel request."³⁰⁹

189. In *Chile – Price Band System*, the Appellate Body ruled that "[t]he requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement":

"Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement."³¹⁰

190. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States had made a request for a number of preliminary rulings regarding both the clarity of the request for establishment and the scope of the terms of reference of the Panel. The Panel, after declining all requests for preliminary rulings, clarified that it had undertaken a textual analysis of the Panel request and that, therefore, it did not need to enter into the issue of whether the United States had been prejudiced in its right to defend itself due to the alleged inconsistencies in Argentina's panel request:

"[W]e note that as our analysis with respect to the totality of the United States' request for preliminary rulings was based on a textual analysis of Argentina's panel request, we did not need to inquire into the issue of whether the United States had been prejudiced in its right to defend itself in the present proceedings due to the alleged inconsistencies in the panel request. We nevertheless note that the United States has not shown to the Panel that it had been prejudiced in its right to defend itself in these proceedings due to these alleged inconsistencies in Argentina's panel request. In several instances, the United States argued that it did not know what case it had to answer because of the lack of precision with respect to certain parts of Argentina's panel request. However, we consider that without supporting arguments, this simple allegation can not be taken to establish prejudice."³¹¹

191. In *EU – Energy Package*, the Panel made the following finding with regard to the reference to "the problem" in the text of Article 6.2:

"We consider that the reference to '*the problem*' in Article 6.2 of the DSU indicates a particular legal problem that a complainant is seeking to resolve through recourse to dispute settlement. Therefore, in our view, once a complainant has set out in its panel request a brief summary of the legal basis of the complaint that is 'sufficient' to clearly present a particular legal problem, a complainant may not assert, in the course of the panel proceedings, a claim that presents a different legal problem. If a complainant were allowed to do so it would mean that a panel could consider claims not included in a panel request – a result that is, in our view, manifestly incompatible with Articles 6.2 and 7.1 of the DSU and the due process objective they serve to protect."³¹²

³⁰⁹ Appellate Body Report, *Thailand – H-Beams*, para. 95. See also the Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.43, where the Panel also considered whether a lack of specificity in a panel request had prejudiced the respondent.

³¹⁰ Appellate Body Report, *Chile – Price Band System*, para. 164.

³¹¹ Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.71.

³¹² Panel Report, *EU – Energy Package*, para. 7.98.

1.4.5.4.3 Clarity of claims in written submissions

192. In *EC – Tube or Pipe Fittings*, the European Communities had requested the Panel to refuse to consider certain of Brazil's claims on the grounds that these claims were defective as they were too vaguely defined in Brazil's first written submission. In the view of the European Communities, admission of these claims would constitute an infringement of the European Communities' rights of defence and a departure from the good faith standard in Article 3.10 of the DSU and from the due process requirement that underlies the DSU. The Panel, in a preliminary ruling, rejected the European Communities' request on the grounds that the opportunity would still exist for Brazil to provide further supporting evidence and argumentation in its subsequent submissions with a view to clarifying those allegations in the course of the Panel proceedings:

"To the extent the European Communities is arguing that the first submission is determinative for the clarity of the claims for the purpose of the entire proceeding -- in the sense that if a claim is not clearly stated there, no further opportunity exists for clarification over any of the remaining portion of the proceedings -- we cannot accept this argument. In our view, it is in the nature of the Panel process that the claims made by a party may be progressively clarified and refined throughout the proceeding. This may occur through the submission of supporting evidence and argumentation by the parties, commencing with their first written submission, and followed by a round of rebuttal submissions, supplemented by oral statements and answers to questions. It is, of course, clear that this process of progressive clarification would not allow a party to add additional claims (which were not included in the request for establishment of the Panel) during the course of the proceedings. The fundamental due process rights of the parties are thereby preserved.

...

We find support for our ruling in the statement by the Appellate Body in its report on *US – FSC* that the 'procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes'.³¹³

1.4.6 Preliminary rulings under Article 6.2

Note: This sub-section provides information on preliminary rulings under Article 6.2 of the DSU. It should be noted that disputing parties have requested preliminary rulings in respect of a wide range of other issues, including but not limited to the adequacy of consultations, admissibility of claims with respect to new or expired measures, issues related to panel composition, alleged conflicts of interest, enhanced third party rights, admissibility of evidence, procedures for business confidential information and other confidentiality issues, participation of private counsel, the panel's timetable, amicus curiae briefs, open hearings, and consultations with scientific experts. Such rulings may be appealed with the final panel report along with any other legal issues subject to appeal.

1.4.6.1 Regulation of a request for a preliminary ruling in standard working procedures

193. In *EC – Bananas III*, the Appellate Body noted that the compliance of the Panel request with Article 6.2 could be decided early by a preliminary ruling if panels had detailed, standard working procedures allowing for this.³¹⁴ In *Colombia – Ports of Entry*, the Panel referred to the Appellate Body's statement in *EC – Bananas III* with regard to preliminary rulings and noted that "[w]hile the DSU does not expressly envision preliminary rulings by panels, it has become an occurrence in the past few years. The Appellate Body has commented that panel working procedures should allow for the possibility of requests for preliminary rulings."³¹⁵

³¹³ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.10.

³¹⁴ Appellate Body Report, *EC – Bananas III*, paras. 142 and 144.

³¹⁵ Panel Report, *Colombia – Ports of Entry*, para. 7.13.

1.4.6.2 Absence of a requirement to rule on a preliminary basis

194. In *Canada – Aircraft*, Canada asked the Panel to issue a preliminary ruling on its jurisdiction before the deadline for the parties' first written submission. The Panel denied the request on the grounds that there is no requirement nor established practice in that regard:

"Canada asked the Panel to issue the requested ruling on the Panel's jurisdiction prior to the deadline for the parties' first written submissions. In our view, there is no requirement in the DSU for panels to rule on preliminary issues prior to the parties' first written submissions. Nor is there any established practice to this effect, for there are numerous panel reports where rulings on preliminary issues have been reserved until the final report. Furthermore, there may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling. Indeed, we considered it necessary to request such clarification in the present case. In our view, the possibility for obtaining such clarification would be lost – or at least significantly undermined – if a panel were required to rule on preliminary issues before the deadline for the parties' first written submissions. For these reasons, we rejected Canada's request for a preliminary ruling on this issue prior to the deadline for the parties' first submissions."³¹⁶

195. In *India – Autos*, India made a "conditional" preliminary ruling request. The Panel denied the request. Noting the panel's statement in *Canada – Aircraft*, the Panel in *India – Autos* found also that it was appropriate to seek further clarifications on the nature of the matter before it.³¹⁷

1.4.6.3 Issuance and circulation of preliminary rulings under Article 6.2

196. In some cases, panels have circulated their preliminary rulings, as WTO documents, to the DSB.³¹⁸

197. In most cases to date, panels have issued preliminary rulings to the parties (and sometimes third parties) and reproduced the rulings in their final reports (where these have not already been circulated as a WTO document).³¹⁹

1.5 Relationship with other provisions of the DSU

1.5.1 Article 7.1

195. In *EC – Selected Customs Matters*, the Appellate Body, in considering the purpose of a panel request, resorted to the provisions of Article 7.1 inasmuch as they set out the Panel's terms of reference on the basis of the panel request. On a plain reading of Article 7.1, the Appellate Body linked its provisions with the requirements under Article 6.2 of the DSU:

"[A] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings."³²⁰

³¹⁶ Panel Report, *Canada – Aircraft*, para. 9.15. In contrast, see Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47 where the Panel decided to issue a preliminary ruling on whether the separate panel requests made by Canada, the United States and Argentina were inconsistent with DSU Article 6.2 prior to the date the Complaining Parties' first written submissions were due because of the preliminary ruling request's procedural implications.

³¹⁷ Panel Report, *India – Autos*, para. 7.7.

³¹⁸ For instance, Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 5.7; *Australia – Apples*, para. 1.10; and *China – Raw Materials*, para. 1.13.

³¹⁹ For instance, Panel Reports, *Guatemala – Cement II*, para. 8.11; *US – FSC (Article 21.5 – EC)*, para. 6.3; and *EC – Approval and Marketing of Biotech Products*, para. 7.47.

³²⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 131.

1.5.2 Article 19.1

196. In *EC – Selected Customs Matters*, the Appellate Body recalled its findings in *US – Upland Cotton*, and stressed that Article 19.1 does not place restrictions on the identification of measures at issue in a panel request:

"In *US – Upland Cotton*, the Appellate Body emphasized that the nature of a recommendation a panel may make under Article 19.1 of the DSU with respect to a measure 'is not ... dispositive of the preliminary question of whether a panel can address claims in respect of that measure'. In that case, the Appellate Body had to address the issue of whether an expired measure can be a 'measure at issue' within the meaning of Article 6.2 of the DSU. The Appellate Body rejected the United States' argument that, because an expired measure is not susceptible to a recommendation under Article 19.1 of the DSU, it cannot be a 'measure at issue' under Article 6.2. For the Appellate Body, the question of whether a panel can address claims in respect of an expired measure is to be distinguished from the question of whether that measure is susceptible to a recommendation under Article 19.1. Although the issue addressed by the Appellate Body in *US – Upland Cotton* is not identical to that raised by the United States' appeal in this case, the Appellate Body's reasoning in *US – Upland Cotton* supports our position that Article 19.1 of the DSU does not place restrictions on the type of measure that can be identified in a panel request under Article 6.2 of the DSU."³²¹

1.5.3 Article 21.5

197. The Appellate Body in *US – FSC (Article 21.5-EC I)* stated that the requirements of Article 6.2 need to be adapted to a panel request under Article 21.5, as they apply to an original panel request. The Appellate Body stated that it "has ... not been called to determine the precise scope of the phrase 'these dispute settlement procedures' in Article 21.5 and how it relates to Article 6.2 of the DSU."³²² The Appellate Body was of the view that the phrase "does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5."³²³ The Appellate Body went on to say that "given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5."³²⁴

198. In *US – FSC (Article 21.5 – EC II)*, the Appellate Body discussed the relationship between Articles 6.2 and Article 21.5:

"The Appellate Body has, to date, not been called upon to determine the precise scope of the phrase 'these dispute settlement procedures' in Article 21.5 and how it relates to Article 6.2 of the DSU. We do not consider it necessary, for purposes of resolving the present dispute, to determine the precise scope of this phrase. However, we are of the view that the phrase 'these dispute settlement procedures' does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5."³²⁵

199. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* rejected the European Union's argument that the "clear contrast" between the wording of the claims in the panel request in the original proceeding, and the wording of the claim in the Article 21.5 compliance panel request must be given meaning. The Panel disagreed, noting that since the two

³²¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 135.

³²² Appellate Body Report, *US – FSC*, para. 59 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 52-53 and 67)

³²³ Appellate Body Report, *US – FSC*, para. 59

³²⁴ Appellate Body Report, *US – FSC*, para. 59. See also Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 109; Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.506.

³²⁵ Appellate Body Report, *US – FSC (Article 21.5) II*, para. 59.

panel requests concerned two different proceedings, the language used in the original proceedings could not be determinative of the meaning of the compliance panel request:

"As to whether this conclusion should be altered in light of the different wording used by the United States in its panel request in the original proceeding and in the panel request for this compliance proceeding, we note that the two panel requests are distinct procedural documents. We are aware of situations where, within the same proceeding, panels have examined the terminology used in requests for consultations to confirm the interpretation of terms in the related panel request. However, in this instance the separate panel requests relate to separate proceedings. There does not, in our view, appear to be a basis for treating the language of the United States' original panel request as probative of the meaning to be attributed to the compliance panel request."³²⁶

200. The Panel in *Indonesia – Chicken (Article 21.5 – Brazil)* rejected Indonesia's arguments that Brazil's claims under Article 4.2 of the Agreement on Agriculture regarding the positive list requirement and under Article XI:1 of the GATT 1994 concerning the intended use requirement with respect to its enforcement provisions were outside of the Panel's terms of reference.³²⁷ After having evaluated the parties' arguments on this matter, the Panel considered that it was not in dispute between the parties that the positive list requirement and the intended use requirement were within its terms of reference. Rather, as noted by the Panel, Indonesia had argued that the *claims* pertaining to these *measures* could not be subject to review because these *claims* did not link back to any of the DSB recommendations and rulings in the original proceedings.³²⁸

201. The Panel considered that, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. The Panel also highlighted that a complainant in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding:

"In our view, while the proper identification of *measures* taken to comply in the panel request requires a link to the relevant rulings and recommendations, the proper provision of a legal basis, i.e. the proper presentation of *claims*, does not. Such a requirement would effectively limit the scope of Article 21.5 proceedings to claims on which a panel made findings of violations in the original proceedings. However, it is well-settled that Article 21.5 panels are not merely called upon to examine whether measures taken to comply effectively implement specific recommendations and rulings adopted by the DSB in the original proceeding. Instead, the mandate of Article 21.5 panels, according to the terms of that provision, is to examine either the existence of measures taken to comply or their consistency with a covered agreement. As rightly pointed out by Brazil, a complaining party in an Article 21.5 proceeding may thus raise claims, arguments, and factual circumstances different from those raised in the original proceeding."³²⁹

1.6 Relationship with other WTO Agreements

1.6.1 Anti-Dumping Agreement

1.6.1.1 Article 17

1.6.1.1.1 The term "matter" under paragraphs 4 and 5 of Article 17

202. In *Guatemala – Cement I*, the Appellate Body held that "[Article 1.2 of the DSU] states ... that ... special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions". In this case, the Appellate Body considered whether there is inconsistency between Article 6.2 of the DSU and Article 17.5 of the Anti-Dumping Agreement. The Appellate Body stated:

³²⁶ Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.217.

³²⁷ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, paras. 2.3 and 2.8.

³²⁸ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.6.

³²⁹ Panel Report, *Indonesia – Chicken (Article 21.5 – Brazil)*, Annex D-1, para. 2.7.

"In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a 'matter' is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the DSU."³³⁰

1.6.1.1.2 Anti-dumping measures

203. As regards the concept of anti-dumping measures, see Article 17 of the Section on the Anti-Dumping Agreement.

1.6.1.1.3 Legal basis for claims under Article 17

204. Article 17 of the Anti-Dumping Agreement provides for the dispute settlement procedures for matters under the Anti-Dumping Agreement. With respect to the legal basis for claims under the Anti-Dumping Agreement, see Article 17 of the Section on the Anti-Dumping Agreement.

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³³⁰ Appellate Body Report, *Guatemala – Cement I*, para. 75. See also the discussion on the special and additional rules above.