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1 ARTICLE 7

1.1 Text of Article 7

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

1.2 General

1.2.1 Importance of the terms of reference

1. The Appellate Body in *Brazil – Desiccated Coconut* explained the importance of the terms of reference in the following terms:

"A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute."¹

2. In *US – Carbon Steel*, the Appellate Body emphasized that the terms of reference "define the scope of the dispute".² Moreover, "pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request, unless the parties agree otherwise".³

3. In *EC and certain member States – Large Civil Aircraft*, the Panel observed that the jurisdiction of a panel is established by the panel's terms of reference, governed by Article 7 of the DSU.⁴

4. In *Australia – Apples*, the Panel observed that according to established jurisprudence, it is the panel's terms of reference that "define the scope of a dispute". The Panel also emphasized that "a panel's mandate or terms of reference are determined by the request for the establishment of the panel."⁵

1.2.2 A panel's jurisdiction

5. In *Argentina – Import Measures*, the Appellate Body clarified the function of a panel request:

¹ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22.

² Appellate Body Report, *US – Carbon Steel*, para. 126.

³ Appellate Body Report, *US – Carbon Steel*, para. 124. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.11.

⁴ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.88.

⁵ Panel Report, *Australia – Apples*, para. 2.244.

"According to Article 7 of the DSU, a panel's terms of reference are governed by the request for the establishment of a panel, unless the parties agree otherwise. ... The panel request ... defines the scope of the dispute and serves to establish and delimit the panel's jurisdiction."⁶

1.2.2.1 Duty to address jurisdictional issues

6. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body described two instances where a panel is obliged to address issues that affect its own jurisdiction:

"We believe that a panel comes under a duty to address issues in at least two instances. First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute. Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings.' For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.

...

[O]ur task is simply to determine whether the 'objections' that Mexico now raises before us are of such a nature that they could have deprived the Panel of its authority to deal with and dispose of the matter. If so, then the Panel was bound to address them on its own motion."⁷

7. 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. The Appellate Body made this finding in the absence of the European Communities having raised this issue, and it stated that:

"Although the European Union did not raise procedural objections, under Article 6.2 of the DSU, against the United States' challenge to an unwritten LA/MSF Programme before the Panel or in its appellee's submission, 'certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding.' In this case, we have deemed it necessary to consider these issues on our own motion."⁸

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

"In spite of the parties' views, we consider that it is necessary for us to examine this issue as it touches upon our jurisdiction. In this respect, the Appellate Body has cautioned panels that there are certain inherent powers to their adjudicative function and that 'panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction.' The Appellate Body has

⁶ Appellate Body Report, *Argentina – Import Measures*, para. 5.11. See also Appellate Body Reports, *US – Carbon Steel*, para. 124, *US – Countervailing Measures (China)*, para. 4.6, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6, Panel Report, *Colombia – Ports of Entry*, para. 7.30.

⁷ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 791.

also clarified that 'it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative'. We shall therefore examine whether we would be exceeding our terms of reference if we include regular cigarettes in the likeness analysis."⁹

9. The Panels in *EU – Energy Package*¹⁰ and in *Morocco – Hot-Rolled Steel (Turkey)*¹¹ also considered it appropriate to examine certain jurisdictional issues on their own initiative.

1.2.2.2 Objections to the panel's jurisdiction

1.2.2.2.1 Timing of objections to the panel's jurisdiction

10. In *US – 1916 Act*, the Appellate Body agreed with the Panel that objections to the Panel's jurisdiction should not be raised at the interim review stage for the first time, although it also agreed with the Panel that certain jurisdictional issues may need to be addressed by the Panel at any time:

"We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that 'some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time.' We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply 'procedural objections'. The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner."¹²

11. In *US – Offset Act (Byrd Amendment)*, the Appellate Body recalled that "[a]n objection to jurisdiction should be raised as early as possible"¹³ and clarified that "it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal."¹⁴

12. In *EC – Fasteners (China)*, the Appellate Body found that the European Communities' failure to raise a terms of reference claim before the Panel did not bar the European Communities from raising the issue on appeal:

"Regarding the Panel's terms of reference, the European Union acknowledges that it did not raise its challenge in this respect before the Panel. The Appellate Body has found that parties are required to raise procedural objections 'promptly', but also that matters going to the jurisdiction of a panel are 'fundamental' and can therefore be raised at any stage in a proceeding, including on appeal. If a claim is not within a panel's terms of reference, the panel does not have the jurisdiction to hear the claim. Moreover, a party's failure to raise a timely jurisdictional objection cannot operate to cure such a jurisdictional defect. We therefore find that the European Union's failure to raise its terms of reference claim promptly before the Panel does not bar it from bringing this challenge on appeal."¹⁵

⁹ Panel Report, *US – Clove Cigarettes*, para. 7.134.

¹⁰ Panel Report, *EU – Energy Package*, paras. 7.200, 7.215 and 7.221.

¹¹ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.54-7.57.

¹² Appellate Body Report, *US – 1916 Act*, para. 54.

¹³ The Appellate Body referred to its Report in *US – 1916 Act*, para. 54.

¹⁴ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 208.

¹⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 561.

1.3 Article 7.1

1.3.1 "the matter referred to the DSB"

13. In *Guatemala – Cement I*, the Appellate Body addressed the term "matter" and held that the "matter referred to the DSB" consists of two elements, namely the specific measures at issue and the legal basis of the complaint (claims):

"The word 'matter' appears in Article 7 of the DSU, which provides the standard terms of reference for panels ... when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a 'matter' to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a panel' (a 'panel request'). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out 'the matter referred to the DSB'. Thus, 'the matter referred to the DSB' for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the 'matter' identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, 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.' (emphasis added) The 'matter referred to the DSB', therefore, consists of two elements: the *specific measures at issue* and the *legal basis of the complaint* (or the *claims*)."¹⁶

14. In *Brazil – Desiccated Coconut*, Brazil argued that the issue of consistency of its countervailing duty measures with Articles I and II of GATT 1994 was not within the special terms of reference of the Panel, and, therefore, should not have been addressed by the Panel. The Appellate Body ultimately found that Articles I and II of GATT 1994 did not apply to the dispute before it, and as a result declined to make a finding on whether claims relating to these provisions were included in the Panel's terms of reference. However, the Appellate Body made the following general statement concerning this issue:

"We agree, furthermore, with the conclusions expressed by previous panels under the GATT 1947, as well as under the *Tokyo Round SCM Code* and the *Tokyo Round Anti-dumping Code*, that the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference."¹⁷

15. In *Australia – Apples*, the Panel stated that the panel request constitutes the "matter referred to the DSB", which in turn forms the basis of a panel's terms of reference under Article 7.1 of the DSU.¹⁸

1.3.1.1 Measures not sufficiently identified in the panel request

1.3.1.1.1 General

16. In *Indonesia – Autos*, the Panel, in a preliminary ruling, considered that the measure at issue was not sufficiently identified in the request for establishment of the Panel and thus it was not within the Panel's terms of reference. See paragraph 21 below.

¹⁶ Appellate Body Report, *Guatemala – Cement I*, para. 72. See also *ibid.* para. 76 which states "the word 'matter' has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: the specific 'measure' and the 'claims' relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU."

¹⁷ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22.

¹⁸ Panel Report, *Australia – Apples*, para. 2.244.

17. In *Australia – Automotive Leather II (Article 21.5 – US)*, Australia argued that a certain loan granted by the Australian Government to a domestic enterprise (the "1999 loan") was not within the scope of the panel's terms of reference. Australia argued that the 1999 loan was not part of the implementation of the DSB's ruling and recommendation in the original case. The Panel stated:

"A 'matter' before a panel consists of the 'measure(s)' at issue, and the claims relating to those measures, as set out in the request for establishment. In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the measures at issue. For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling.

... The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference."¹⁹

18. In *Brazil – Aircraft (Article 21.5 – Canada II)*, Canada contended that a financing programme created by the Government of Brazil, PROEX, was a prohibited export subsidy since it appeared to be offered not only in the form of traditional PROEX payments, but also in conjunction with, or as part of, export financing packages provided by Brazil's development bank. Brazil responded that this was not within the terms of reference of this Panel. The Panel agreed with Brazil that such financing was not identified in Canada's request for establishment of a panel and was thus outside its terms of reference.²⁰

1.3.1.1.2 Ambiguous, vague and unclear measures

19. The Panel in *Turkey – Textiles* dismissed certain arguments that terms used to identify measures in the panel request were too vague, ambiguous or unclear to fall within a panel's terms of reference, indicating that its "terms of reference [were] sufficiently clear":

"On 25 September 1998 the Panel issued the following ruling on this point:

'In assessing Turkey's claim that India's request for the establishment of a panel was not sufficiently precise, we consider that it is important that a panel request, which defines the terms of reference, meets this criterion so as to inform the defending party and potential third parties both of the measures at issue, including the products they cover, and of the legal basis of the complaint. This is necessary to ensure due process and the ability of the defendant to defend itself.'

We have examined India's request for establishment of the panel (WT/DS34/2). While not identified by place and date of publication, the measures are specified by type (i.e. quantitative restrictions), by effective date of entry into force (1 January 1996) and by product coverage (textiles and clothing, a well defined class of products in the WTO). In our view the panel request meets the minimum requirements of specificity of Article 6.2 of the DSU as interpreted by the Appellate Body in Bananas III and LAN. Even if we agree that India's request could have been more detailed, we conclude that Turkey is sufficiently informed of the measures at issue and the products they cover, and that our terms of reference are sufficiently clear. Consequently, we reject Turkey's claim that the Panel should refuse to accept India's

¹⁹ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.4-6.5.

²⁰ Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.5, fn 24.

request *in limine litis* for its failure to respect the basic requirements of Article 6.2 of the DSU."²¹

20. In *Canada – Aircraft*, the Panel considered Canada's argument that certain provisions in Brazil's panel request were too vague. The Panel dismissed the argument on the basis that while the measures may not have been described with sufficient clarity or precision, they had put Canada on notice that, at the very least, such provisions would be an issue in the dispute. The Panel relied on the Appellate Body's findings on "prejudice" in *EC – Computer Equipment* to justify this conclusion, indicating that the requirements of Article 6.2 had been met because Canada had not suffered any prejudice during the course of the panel proceedings. The Panel commented as follows when referring to the Appellate Body's decision in *EC – Computer Equipment*:

"We consider it appropriate to apply a similar standard in determining whether Brazil's request for establishment meets the requirements of Article 6.2 of the DSU in the present case. In particular, we shall consider whether any alleged imprecision in Brazil's request for establishment affected Canada's due process rights of defence in the course of the Panel proceedings. Indeed, we understand Canada to advocate a similar interpretation of Article 6.2, since Canada asserts that Brazil's 'lack of precision prejudices Canada's due process right to know the case against it. These claims are *therefore* inconsistent with Article 6.2 of the DSU.'²² (emphasis supplied). Thus, we understand Canada to argue that Brazil's request for establishment would not be inconsistent with Article 6.2 of the DSU if the alleged lack of precision did not prejudice Canada's due process right to know the case against it."²³

21. In contrast, the Panel in *Indonesia – Autos* indicated that a loan that had not yet been made at the time of the panel request was not covered by the Panel's terms of reference:

"At the first meeting of the Panel with the parties, on 3 December 1997, Indonesia raised a preliminary objection to the United States' claim with respect to a \$US 690 million loan to PT TPN, on the basis that this loan was not within the Panel's terms of reference. ... After hearing the arguments of the parties, the Chairman announced the following ruling on behalf of the Panel:

'... We note that this Panel has standard terms of reference. Therefore, in determining whether a measure is before us, we must examine the United States' request for establishment of a panel,...Consistent with the findings of the Appellate Body in Bananas III, we have carefully examined that request to ensure its compliance with both the letter and spirit of Article 6.2 of the Dispute Settlement Understanding. We conclude that the \$690 million loan was not 'identified as a specific measure' in that document as required by Article 6.2 of the DSU. Indeed the United States states that the loan was not identified in the U.S. request, because it had not yet been made. Rather, the United States suggests that the loan is properly before the Panel because it is one aspect of the National Car Programme, which the United States considers to be the subject of its request. In our view, however, the United States in its request has clearly identified the measures to be considered by the Panel, and those measures do not include this loan. Accordingly, we conclude that the loan in question is not within the terms of reference of this Panel.'

Consequently, we do not address any claims related to the said \$ 690 million in our findings."²⁴

²¹ Panel Report, *Turkey – Textiles*, para. 9.3.

²² Canada's preliminary submission regarding the jurisdiction of the Panel, dated 23 October 1998, para. 37.

²³ Panel Report, *Canada – Aircraft*, para. 9.31.

²⁴ Panel Report, *Indonesia – Autos*, paras. 14.3-14.4.

1.3.1.1.3 Temporal limitations of the panel's terms of reference

1.3.1.1.3.1 General

22. In *EC – Chicken Cuts* the Appellate Body 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."²⁵

23. In *EC – Selected Customs Matters*, the Appellate Body further elaborated on this issue and explained the two exceptions to the requirement that measures be in force at the time of the establishment of the panel, as identified in its prior jurisprudence:

"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. (footnote omitted)

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 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."²⁶

24. In *EC – IT Products*, the Panel highlighted three key elements that must be present for a panel to find that amendments or revisions to the original measures challenged in a complainant's panel request are within its terms of reference: (i) the terms of reference must be broad enough; (ii) the new measure does not "change the essence" of the original measures included in the request; and (iii) the inclusion of the amendments within the panel's terms of reference is necessary to secure a positive resolution to the dispute:

"In light of the Appellate Body's earlier enunciations in its reports on *Chile – Price Band System* and *EC – Chicken Cuts*, we understand that a panel's terms of reference may be considered to include 'amendments' to measures that are listed in the panel request as long as the terms of reference are broad enough and second, the new measure does not 'change the essence' of the original measures included in the request or have legal implications overly different from those of the original measures. Moreover, it may be relevant to consider whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute."²⁷

25. The complainants in *EC – IT Products* incorporated the phrase "any amendments, or extensions and any related or implementing measures" into 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

²⁵ Appellate Body Report, *EC – Chicken Cuts*, para. 156.

²⁶ Appellate Body Report, *EC – Selected Customs matters*, para. 184.

²⁷ Panel Report, *EC – IT Products*, para. 7.139

procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. The Panel stated:

"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."²⁸

26. In *China – Raw Materials*, the complainants' panel requests referred, in addition to the measures specifically identified, to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures". The Panel stated:

"Thus, *a priori* this Panel has the authority to consider within its terms of reference amendments and replacement measures adopted after the Panel's establishment. In other words, the Panel is entitled to examine measures that existed at the time of its establishment as well as measures that came into effect after that date if they are of the *same essence* as the original ones that formed the basis of the Panel's terms of reference."²⁹

1.3.1.1.3.2 Terminated measures

27. The Panel in *Japan – Film* gave the following overview of the treatment of terminated measures in GATT/WTO dispute settlement practice:

"GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn. In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past."³⁰

a. Before agreement on the panel's terms of reference

28. The Panel in *US – Gasoline*, in a finding not addressed by the Appellate Body, analysed the question of terminated measures with respect to the "agreement on the panel's terms of reference" and the point in time when the terms of reference had been established. The Panel addressed a particular aspect of the United States' measure at issue and noted that "the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference." The Panel also mentioned that the measure was not "likely to be renewed" and also found that its findings on the WTO-inconsistency of other aspects of the measure would in any case have made unnecessary the examination of that specific aspect of the measure:

"The Panel observed that it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective. In the 1978 *Animal Feed Protein* case, the Panel ruled on a discontinued measure, but one that

²⁸ Panel Report, *EC – IT Products*, para. 7.140.

²⁹ Panel Reports, *China – Raw Materials*, para. 7.15.

³⁰ Panel Report, *Japan – Film*, para. 10.58.

had terminated after agreement on the panel's terms of reference. In the 1980 *Chile Apples* case, the panel ruled on a measure terminated before agreement on the panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction. In the present case, the Panel's terms of reference were established after the 75 percent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 percent rule was a measure that, although currently not in force, was likely to be renewed. Finally, the Panel considered that its findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1. The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement."³¹

29. In *Argentina – Textiles and Apparel*, one of the measures at issue was specific duties on footwear. These duties were included in the Panel's terms of reference, but were withdrawn by Argentina between the request for consultation and the establishment of the Panel. The Panel declined to make a preliminary determination on this matter and made the respective findings in its final Report.³² In the final Report, the Panel decided not to examine these specific duties on footwear and stated:

"Panels and their terms of reference are established by the DSB and panels are not authorized to amend unilaterally their mandate. On the other hand, panels have often been required to determine their jurisdiction over a matter (See for instance *United States – Standards for Reformulated and Conventional Gasoline*, *Japan – Taxes on Alcoholic Beverages*, *Brazil – Measures Affecting Desiccated Coconut*, and *EC – Regime for the Importation, Sale and Distribution of Bananas ('Bananas III')*). ...

On several occasions, panels have considered measures that were no longer in force. It appears that in each of those cases, however, there was no objection raised by either party to the panel's consideration of the expired measure. ...

[T]he Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudication process. The *Gasoline* panel report would argue in favour of not considering the Argentine specific duties on footwear. Moreover, as noted by the Appellate Body in the *Shirts and Blouses* case, the aim of dispute settlement is not

'to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute'.³³

30. The Panel in *Argentina – Textiles and Apparel* also held that it would not make a finding on the terminated Argentine measure solely because there might be a possibility of a re-introduction of the terminated measure:

"[T]he United States claims that there is a serious threat of recurrence since Argentina could easily reintroduce the previous import measures, and the United States suggests that Argentina is likely to do so because there is only a weak justification for its safeguard measure on footwear. We cannot evaluate the justification or likely duration of that safeguard measure. Moreover, in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and

³¹ Panel Report, *US – Gasoline*, para. 6.19.

³² Panel Report, *Argentina – Textiles and Apparel*, para. 6.7.

³³ Panel Report, *Argentina – Textiles and Apparel*, paras. 6.11-6.13.

by international law. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced."³⁴

31. While it ultimately decided that it would not examine the measure withdrawn by Argentina before the establishment of the Panel, the Panel in *Argentina – Textiles and Apparel* nevertheless reserved the right to "refer to some examples of transactions" under the terminated measure:

"Consequently, we will not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked. However, since these specific duties on footwear were in force for a long period until 14 February 1997, and for our understanding of the type of duties used by Argentina, we may, when reviewing the import regime applied to textiles and apparel, refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same."³⁵

32. In *EC – Poultry*, Brazil claimed that the allocation by the European Communities of import licences on the basis of export performance was inconsistent with certain provisions of the Licensing Agreement. The European Communities responded, *inter alia*, that the alleged measure was no longer in place. The Panel, in a statement not addressed by the Appellate Body, noted that "Brazil claims that there are certain lingering effects. Therefore, we do not reject this claim on the grounds of mootness."³⁶

33. In *US – Certain EC Products*, the Panel had ruled that the "increased bonding requirements as of 3 March on EC listed products", which was a measure no longer in existence, infringed WTO rules.³⁷ However, the Appellate Body considered that "there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that "the United States bring its 3 March Measure into conformity with its WTO obligations." The Appellate Body accordingly concluded that the Panel had erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations, a measure that the Panel had found no longer existed."³⁸

34. The Panel in *China – Agricultural Producers* declined to make findings on a measure, included in the complaining party's panel request, but which had expired before the establishment of the Panel.³⁹

35. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* declined to make findings on measures that had expired prior to the establishment of the Panel, finding that the issues raised by the complainant's claims had become "largely academic":

"For the reasons set forth above, the Panel concludes that the Thai Customs Department terminated at least 796 of the 1,052 revised NoAs before DSB established the Panel; that the Thai Customs Department may have also withdrawn the remaining 256 revised NoAs prior to the Panel's establishment, and in any event terminated them no later than 30 August 2018; that there is no reason to consider that any future NoAs which the Thai Customs Department may issue, whether to implement the Supreme Court Ruling which modifies the November 2012 BoA Ruling or otherwise, would use either the same valuation methodology, or the same CK-21A information, as was used in the withdrawn NoAs; that even if Thai Customs did reintroduce some or all of the NoAs using that same methodology and information, separate findings by the Panel concerning the WTO-consistency of the withdrawn NoAs would provide no guidance beyond the findings that the Panel has already made on the Philippines' identical substantive claims in relation to the 2002-2003 Charges; and that, in the light of those findings above in this Report, the issues raised by the

³⁴ Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.

³⁵ Panel Report, *Argentina – Textiles and Apparel*, para. 6.15.

³⁶ Panel Report, *EC – Poultry*, paras. 250-252.

³⁷ Panel Report, *US – Certain EC Products*, para. 7.1.

³⁸ Appellate Body Report, *US – Certain EC Products*, para. 81.

³⁹ Panel Report, *China – Agricultural Producers*, paras. 7.82-7.92.

Philippines' procedural claims in relation to the revised NoAs are rendered largely academic.

Taken together, the foregoing considerations lead the Panel to decline to rule on the 1,052 revised NoAs that have now all been terminated."⁴⁰

b. After agreement on the panel's terms of reference

36. In *US – Wool Shirts and Blouses*, the United States withdrew the measure at issue shortly before the Panel's final report was circulated, but well after the agreement on the Panel's term of reference. The Panel issued the report anyways and stated:

"We note that the United States stated that the restraint, which is the object of the present dispute, was to be withdrawn 'due to a steady decline in imports of woven wool shirts and blouses from India and the adjustment of the industry'. ... In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate, as referred to in paragraph 1.3 of this report, notwithstanding the withdrawal of the US restraint. A number of GATT panels have done so."⁴¹

37. In *Indonesia – Autos*, the Panel noted that "in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure."⁴²

38. In *Turkey – Rice*, the measure at issue, a tariff quota on rice, had expired more than four months after the establishment of the Panel. Turkey had thus requested that the Panel refrain from making findings on the measures related to Turkey's tariff quota regime or otherwise abstain from making recommendations to the DSB. The Panel, further to considering the possibility that Turkey enforces a similar TRQ, concluded that it was obliged by the DSU to examine the terminated measure:

"The Panel notes the United States' argument that, given the fact that the TRQs have expired before and then been reopened on previous occasions, a finding on this matter is 'critical for achieving a definitive resolution'. The Panel also notes that the legislative framework which has allowed for the establishment of the earlier TRQs (Decree No. 2004/7333 of 10 May 2004 on the *Administration of Quotas and Tariff Quotas*) is still in force.

...

Accordingly, and despite the United States' arguments on the likelihood of Turkey reintroducing a TRQ regime for the importation of rice, and with it a domestic purchase requirement, the Panel must not lightly assume that Turkey will not abide by its stated intentions and its WTO commitments. Indeed, as stated by the Panel on *Argentina – Textiles and Apparel*, panels 'must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law.'

Notwithstanding these considerations, and regardless of whether Turkey reintroduces a domestic purchase requirement in the future in the context of a new TRQ, the Panel notes that it is confined to the mandate it has received from the WTO Members, through the DSB and in accordance with the DSU. That mandate consists of performing the tasks defined in Article 11 of the DSU ...

...

⁴⁰ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), paras. 7.505-7.506.

⁴¹ Panel Report, *US – Wool Shirts and Blouses*, para. 6.2.

⁴² Panel Report, *Indonesia – Autos*, para. 14.9.

In the light of the above, and in particular of its terms of reference as approved by the DSB, the requirements set out in Article 11 of the DSU, and in the absence of an agreement by the parties to terminate the proceedings as regards this contested measure, the Panel concludes that, it would be inappropriate to abstain from making findings with respect to the domestic purchase requirement, a measure that has been properly brought before it. In addition, the Panel notes at this stage that it would be appropriate for it to consider the subsidiary request made by Turkey (i.e., that it abstain from making any recommendation to the DSB regarding this measure), only if the Panel determines that the domestic purchase requirement is inconsistent with any of the provisions cited by the United States."⁴³

39. In *US – Poultry (China)*, the United States' measure challenged by China, Section 727, expired two days after the deadline for China's first written submission. This raised the question of whether the Panel should make findings on a measure that was no longer in force. The Panel noted the circumstances in past cases where the panel had ruled on expired measures and decided to make findings on Section 727, but not recommendations. The Panel stated:

"The Panel will therefore determine whether it should rule on an expired measure. The Appellate Body explained in *EC – Bananas III (Article 21.5 – Ecuador II)*, 'once a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference.' The Appellate Body thus concluded that it is 'within the discretion of the panel to decide how it takes into account ... a repeal of the measure at issue.' It is therefore within our discretion to decide whether to make findings on Section 727.

We note that, in the past, panels have decided to make rulings on expired measures where the respondent Member had not conceded the WTO inconsistency of the measure and the repealed measure could be easily re-imposed. In our view, this is precisely the case of Section 727 since the United States does not concede the alleged WTO inconsistency of Section 727 and the appropriations legislation in the United States is of an annual nature. As explained in Section II.D above, Section 727 reiterated the language of a previous annual appropriations provision with identical wording, Section 733, and it has now expired and a new provision, Section 743, has been adopted to address FSIS access to appropriated funds for activities regarding China's equivalence application. Although we acknowledge that Section 743 does not share the same language as Section 727 and its predecessor, Section 733, we consider that if we were to refuse to make findings on the expired measure – Section 727 – the Panel might be depriving China of any meaningful review of the consistency of the United States' actions with its WTO obligations, while allowing the repetition of the potentially WTO- inconsistent conduct. This would certainly call to mind the 'moving target' scenario which the Appellate Body in *Chile – Price Band System* stated that a complainant should not have to face.

The Panel will thus proceed to make findings on the WTO consistency of Section 727 which is within its terms of reference. Nevertheless, the Panel recognizes that it would not be appropriate to make recommendations pursuant to Article 19 of the DSU with respect to a WTO-inconsistent repealed measure that has ceased to have legal effect. Indeed, if the Panel finds that Section 727 was inconsistent with any of the provisions of the covered agreements within its terms of reference, it would be pointless to ask the United States to bring Section 727 into conformity with those covered agreements since the measure is no longer in force."⁴⁴

40. The Panel in *India – Iron and Steel Products* made findings on a measure which existed at the time of the Panel's establishment but expired during Panel proceedings:

"We have already noted that the measure at issue was in force at the time when this Panel was established and expired only during the Panel proceedings. Moreover, as noted above, Japan has continued to request the Panel to make findings with respect

⁴³ Panel Report, *Turkey – Rice*, paras. 7.170, 7.174-7.175 and 7.180.

⁴⁴ Panel Report, *US – Poultry (China)*, paras. 7.54-7.56.

to the measure at issue despite its expiry. The Appellate Body has noted that, pursuant to Articles 3.3 and 3.7 of the DSU, a complaining Member's continued request for findings following the expiry of a measure at issue is a relevant consideration for a panel in deciding whether to proceed to make findings in a dispute. Despite the expiry of the measure, there continues to exist a dispute between the parties on the 'applicability of and conformity with the relevant covered agreements' as regards the Indian competent authority's findings underpinning the measure at issue. Therefore, the 'matter' within the jurisdiction of the Panel has not been fully resolved by the expiry of the measure. Finally, as indicated, despite the termination of the measure at issue there are potential lingering effects of the measure with respect to imports that occurred before that date.

For the reasons indicated, in the circumstances of the present case, the expiry of the measure at issue after the Panel was established does not excuse us from exercising our function under Article 11 of the DSU to make findings with respect to the matter raised by Japan."⁴⁵

41. The Panel in *US – Pipes and Tubes (Turkey)* declined to make findings on a final determination that had been amended and ceased to exist prior to the establishment of the Panel:

"We see no basis to make findings on the benefit determination in the USDOC's initial OCTG Final Determination in the context of addressing Turkey's 'as applied' claims in this dispute. We agree with the United States that the benefit determination in the initial OCTG Final Determination ceased to have legal effect under US law following the publication of the amended OCTG Final Determination on 10 March 2016. Thus, the initial OCTG Final Determination ceased to have legal effect well in advance of the Panel's establishment on 19 June 2017. We recall that panels may exercise discretion on whether to make findings regarding expired measures, particularly with respect to measures that expired *before* panel establishment.

...

In reaching this decision, we also agree with the United States that potential subsequent US domestic litigation or a risk that the USDOC would revert to using the out-of-country benchmark, should not factor into our assessment of whether to make 'as applied' findings on the initial OCTG Final Determination. First, the mere potential for a subsequent appeal to the United States Supreme Court does not alter the fact that the initial OCTG Final Determination was replaced under US law and ceased to have legal effect. Moreover, that any potential subsequent legal action might have allowed the USDOC to further amend the duty rates or alter the legal basis of those rates does not mean that the initial OCTG Final Determination continued to have legal effect."⁴⁶

1.3.1.1.3.3 Amended measures

a. Measures amended before the establishment of the Panel

42. In *Brazil – Aircraft*, a question arose as to the identity of the measure since regulatory changes relevant to the measure were put in place after consultations were held, but before the panel was established. The Appellate Body determined that the regulatory changes "did not change the essence" of the measure:

"We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments

⁴⁵ Panel Report, *India – Iron and Steel Products*, paras. 7.24-7.25. The Panel also made recommendations about this measure. See the Section on Article 19 of the DSU.

⁴⁶ Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.105 and 7.107.

that came into effect in 1997 and 1998 did not change the essence of the export subsidies for regional aircraft under PROEX."⁴⁷

b. Measures amended during the panel proceedings

43. In *Indonesia – Autos*, the Panel considered that, according to GATT/WTO practice, in those cases where a measure was amended (or withdrawn) during the Panel proceedings, the Panel had nevertheless continued its work and made findings on the measure.⁴⁸

44. The Panel in *Argentina – Footwear (EC)*, in a finding not subsequently reviewed by the Appellate Body, had to address a situation whereby Argentina had imposed a safeguard measure on footwear and subsequently made several modifications to this measure after the request for establishment had been filed. The Panel stated 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". The Panel then linked the issue before it to Article 3.3 of the DSU and saw the risk that "Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB":

"[A]n interpretation whereby these subsequent Resolutions are considered to be measures separate and independent from the definitive safeguard measure, and thus outside our terms of reference, could be contrary to Article 3.3 of the DSU. Such an interpretation could allow a situation where a matter brought to the DSB for prompt settlement is not resolved when the defendant changes the legal form of the measure through a separate but closely related instrument, while the measure in dispute remains essentially the same in substance. In this way, Members could always keep one step ahead of any WTO dispute settlement proceeding because in such a situation, the complaining Member would indeed, challenge a 'moving target', and panel and Appellate Body's findings could already be overtaken by events when they are rendered and adopted by the DSB."⁴⁹

45. The Panel in *Argentina – Footwear (EC)* therefore found that the modifications in question did "not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint".⁵⁰

46. In *Chile – Price Band System*, the Appellate Body referred to the above finding by the Panel in *Argentina – Footwear (EC)* and indicated that "[a]lthough we were not asked to review that particular finding on appeal, we agree with that panel's approach, which is based on sound reasoning and is consistent with our reasoning here."⁵¹ The Appellate Body considered that, as in *Argentina – Footwear (EC)*, Chile's price band system remained "essentially" the same after the amendment and concluded that the measure before it in this appeal included the Law amending the system because "that law amends Chile's price band system without *changing its essence*".⁵² The Appellate Body further referred to Articles 3.7 and 3.4 of the DSU as well as its decision in *Australia – Salmon*⁵³ as support for its conclusion and indicated that "[it] consider[ed] it appropriate ... to rule on the price band system as currently in force in Chile, ..., to 'secure a positive solution to the dispute' and to make 'sufficiently precise recommendations and rulings so as to allow for prompt compliance'".⁵⁴

47. In *Chile – Price Band System*, however, the Appellate Body indicated that it was not condoning the practice of amending measures and turning them into "moving target[s]":

⁴⁷ Appellate Body Report, *Brazil – Aircraft*, para. 132.

⁴⁸ Panel Report, *Indonesia – Autos*, paras. 4.97-4.99.

⁴⁹ Panel Report, *Argentina – Footwear (EC)*, para. 8.41.

⁵⁰ Panel Report, *Argentina – Footwear (EC)*, para. 8.45.

⁵¹ Appellate Body Report, *Chile – Price Band System*, para. 138.

⁵² Appellate Body Report, *Chile – Price Band System*, para. 139.

⁵³ Appellate Body Report, *Australia – Salmon*, para. 223.

⁵⁴ Appellate Body Report, *Chile – Price Band System*, para. 143.

"We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If 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 measure *as amended* in coming to a decision in a dispute."⁵⁵

48. In *EC – Chicken Cuts*, the complainants had argued that two measures fell within the Panel's terms of reference, namely, EC Regulations 1871/2003 and 2344/2003. These measures had been adopted after EC Regulation 1223/2002 and EC Decision 2003/97/EC, which were the original measures within the terms of reference. Relying on the Appellate Body Report in *Chile – Price Band System*, the complainants argued that the two subsequent measures would be "in essence the same" as the two original measures and would have the "same effect" as the two original measures in that they result in the same violation as the two original measures.⁵⁶ However, while recognizing that subsequently adopted measures may constitute "measures" pursuant to Article 6.2, the Appellate Body found that the requirements set out in *Chile – Price Band System* would not have been met in this case. In addition, the Appellate Body rejected the complainants' concept that a subsequent measure having the "same effect" as the original measure would be a valid test for consideration if it falls within the terms of reference:

"In our view, the case before us is characterized by circumstances different from those in *Chile – Price Band System*. The two subsequent measures in this dispute make no explicit reference to the two original measures, which continue to remain in force. Moreover, the two subsequent measures have legal implications different from those of the two original measures: the first of the original measures—EC Regulation 1223/2002—specifies a certain classification for a particular product—namely, frozen boneless chicken cuts with a salt content of 1.2 to 1.9 per cent—and the second—EC Decision 2003/97/EC—requires the withdrawal of BTIs providing for a different classification of a product considered to be a similar product—namely, frozen boneless chicken cuts with a salt content of 1.9 to 3 per cent. In contrast, the two subsequent measures amend the European Communities' Combined Nomenclature and cover all types of salted meat falling under heading 02.10 of the Combined Nomenclature, whereas the two original measures are limited to frozen boneless salted chicken cuts.

We are, therefore, not persuaded that the two subsequent measures in this case can be considered as amendments to the two original measures—as were the measures at issue in *Chile – Price Band System*—or that the two sets of measures are, in essence, the same.

Brazil and Thailand also argue that the two subsequent measures fall within the Panel's terms of reference, because they have the 'same effect' and bring about the same result as the two original measures, namely the (re)classification of the products at issue. Even assuming that Brazil and Thailand are correct that the two subsequent measures have the 'same effect' as the two original measures insofar as frozen boneless chicken cuts are concerned, we fail to see a legal basis for applying such a test. In our view, the notion of measures having the 'same effect' is too vague and could undermine the requirement of specificity and the due process objective enshrined in Article 6.2."⁵⁷

49. In *Argentina – Textiles and Apparel*, one of the Argentine measures at issue, a statistical tax, was amended during the appeal proceedings. The Appellate Body noted the amendment but

⁵⁵ Appellate Body Report, *Chile – Price Band System*, para. 144.

⁵⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 154.

⁵⁷ Appellate Body Report, *EC – Chicken Cuts*, paras. 158-160.

proceeded on the basis of the tax as it existed at the time of the request for establishment of the panel.⁵⁸

50. In *EC – IT Products*, the Panel highlighted the three key elements that must be present for a panel to find that amendments or revisions to the original measures challenged in a complainant's panel request are within its terms of reference. See paragraph 24 above.

51. In *EU – PET (Pakistan)*, the challenged measure expired after the establishment of the Panel. At the request of the complainant, the Panel decided to make findings on the measure's consistency with the covered agreements. The Panel did not, however, issue recommendations because the measure had expired. On appeal, the European Union argued that the Panel had acted inconsistently with the obligation laid down in Article 11 of the DSU by making findings on an expired measure, and that this rendered the panel proceeding moot. The Appellate Body disagreed. In its finding, the Appellate Body noted that panels have discretion to decide how to take into account subsequent modifications to the challenged measures. According to the Appellate Body, in cases such as this, a panel should decide whether the "matter" before it has been fully resolved:

"We recall that a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. We recall that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, among its inherent adjudicative powers is the authority of a panel to assess objectively whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue. Hence, we would draw a distinction between a situation in which a WTO panel declines to exercise its jurisdiction entirely at the outset of a proceeding in favour of a different adjudicative forum and a situation in which a panel, in the exercise of its jurisdiction, objectively assesses whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue."⁵⁹

52. The Panel in *US – Renewable Energy* recalled the earlier case law setting out the three requirements for a panel to rule on claims on amended measures, and added that a panel could, in such a case, also make findings about these measures as they existed at the time of panel establishment:

"As an additional and closely related issue, we note that, even if an amendment falls within a panel's terms of reference, the panel retains jurisdiction over the measure as it existed at the time of panel establishment. In principle, therefore, a panel with jurisdiction over amended measures could address the measure as they existed at the time of panel establishment as well. The question of which version or versions of an amended measure a panel addresses, and the precise recommendations that it makes, will depend first and foremost on the complainant's specific request and on what is necessary to secure a positive solution to the dispute."⁶⁰

53. On this basis, the Panel in *US – Renewable Energy* decided to make findings on the original version of one of the three measures that had been amended after the establishment of the Panel. In deciding not to make findings on the original versions of the other two measures, the Panel took into consideration the fact that such findings were not necessary to secure a positive resolution to the dispute and that the complainant had not made such a request.⁶¹

54. The Panel in *US – Renewable Energy* stated that India, the complainant, bore the burden to prove that a repealed measure had ongoing effects in order for the Panel to make findings on that measure:

⁵⁸ Appellate Body Report, *Argentina – Textiles and Apparel*, Section V.

⁵⁹ Appellate Body Report, *EU – PET (Pakistan)*, para. 5.19.

⁶⁰ Panel Report, *US – Renewable Energy*, para. 7.17.

⁶¹ Panel Report, *US – Renewable Energy*, paras. 7.51-7.53.

"We recall that, having requested us to make findings and recommendations on the Minnesota solar thermal rebate, India bears the burden of showing that this repealed program has ongoing effects. In light of the limited evidence before us, we are not in a position to determine whether payments under the Minnesota solar thermal rebate program continue following its repeal. Accordingly, we find that India has not made a *prima facie* case that the Minnesota solar thermal rebate has ongoing effects, and therefore, constitutes a 'matter' before us which 'still requires to be examined' in order to provide a positive solution to the dispute. As a result, we conclude that India has not demonstrated that we need to make findings and recommendations on the Minnesota solar thermal rebate in order to secure a positive resolution to this dispute."⁶²

55. After recalling the case law on whether a panel can make recommendations on a repealed measure, the Panel in *US – Renewable Energy* described its understanding of that case law as follows:

"In our view, therefore, a panel's decision whether to make recommendations in respect of a repealed measure must depend on a careful examination of the nature of the subsisting 'matter', and whether there are concrete actions or steps that a respondent could take, beyond repeal, to ensure that the repealed measure is no longer impairing benefits accruing to a Member under the covered agreements."⁶³

1.3.1.1.3.4 Measures not in existence at the time the matter is referred to the Panel

56. In *Japan – Apples (Article 21.5 - US)*, the United States requested a preliminary ruling that Japan's Operational Criteria, which were administrative instructions Japan claimed were part of its actions taken to comply, were not within the Panel's terms of reference because they had not been adopted at the time of the Panel's establishment.⁶⁴ The Panel stated that it would consider these Operational Criteria to the extent that they informed an objective assessment of the matter. The Panel was of the view that disregarding them would violate the principle of prompt settlement of disputes found in DSU Article 3.3:

"The Panel is not of the view that the binding or non-binding nature of the Operational Criteria should play a role in determining whether they should be reviewed in this proceeding. As soon as the Operational Criteria were brought to the attention of the United States and the Panel, they became an official statement of how Japan intended to implement its legislation on fire blight on which the United States and the Panel could rely. As such, the Operational Criteria are a fact. The duty of the Panel to make an objective assessment of the facts pursuant to Article 11 of the DSU implies that the Operational Criteria, as a fact, be taken into account by the Panel if they are properly before it.

...

... [T]otally disregarding the Operational Criteria in this case would go against the principle of prompt settlement of disputes contained in Article 3.3 of the DSU. The Operational Criteria obviously provide a statement of how Japan intends to implement the recommendations and rulings of the DSB at the time this Panel was called upon to review the 'measures taken to comply' by Japan.

... As a result, the Panel will consider the Operational Criteria to the extent that they inform an objective assessment of the matter."⁶⁵

57. In *EC – Trademarks and Geographical Indicators*, the Panel was called upon to decide if certain individual registrations, which were effected under the contested EC Regulation after the establishment of the Panel, were within the terms of reference. The European Communities had argued that these measures did not exist at the time the Panel was established and were therefore

⁶² Panel Report, *US – Renewable Energy*, para. 7.76.

⁶³ Panel Report, *US – Renewable Energy*, para. 7.59.

⁶⁴ Panel Report, *Japan – Apples (Article 21.5 – US)*, paras. 8.13 and 8.18.

⁶⁵ Panel Report, *Japan – Apples (Article 21.5 – US)*, paras. 8.19, 8.25-8.26.

outside the terms of reference.⁶⁶ The Panel found it unnecessary to rule on these measures as they were not being challenged by the United States. However, the Panel did find these subsequent registrations to be useful indicators as to how the Regulation was applied and interpreted:

"The Panel begins by noting that Council Regulation (EEC) No. 2081/92 (referred to in this report as the 'Regulation') has not been amended in any relevant respects during this panel proceeding. It was last amended in April 2003, prior to the date of the request for establishment of a panel. However, certain individual registrations were effected under the Regulation after the date of establishment of the Panel and prior to the date of the complainant's first written submission, and registrations continue to be made after that date.

The Panel notes that the United States does not challenge any individual registrations in this dispute. It is therefore unnecessary to rule on these measures. It suffices to note that individual registrations made after the date of the request for establishment of a panel can be among the best evidence of the way in which certain provisions of the Regulation itself, which are at issue, are interpreted and applied. The Panel may therefore refer to them, as factual evidence, in the course of its assessment of the matter before it."⁶⁷

58. In *EC and certain member States – Large Civil Aircraft*, the Panel stated: "[w]e do not understand there to be a dispute over the question whether measures included in a panel's terms of reference must be in existence at the time of the establishment of the panel. What the parties do dispute is the factual issue of whether or not LA/MSF for the A350 was in existence at the time of the establishment of this Panel."⁶⁸

1.3.1.2 Legal basis of the complaint (claims)

1.3.1.2.1 General

59. As regards the concept of claim, its scope, and the requirement to identify the claims in the request for establishment of a panel pursuant to Article 6.2 of the DSU, see the Section on Article 6.2.

1.3.1.2.2 Claims not included in the panel request

60. When considering the United States' claim under Article 63 of the TRIPS Agreement which had not been included in the request for the establishment of the panel, the Appellate Body in *India – Patents (US)* stated:

"The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have. In this case, Article 63 was not within the Panel's jurisdiction, as defined by its terms of reference. Therefore, the Panel had no authority to consider the alternative claim by the United States under Article 63.

The United States argues that, in the consultations between the parties to this dispute in this case, India had not disclosed the existence of any administrative instructions' for the filing of mailbox applications for pharmaceutical and agricultural chemical products. Therefore the United States asserts that it had no way of knowing that India would rely on this argument before the Panel. The United States maintains that, for this reason, it had not included a claim under Article 63 in its request for the establishment of a panel. All that said, there is, nevertheless, no basis in the DSU for a complaining party to make an additional claim, outside of the scope of a panel's

⁶⁶ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.17.

⁶⁷ Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.19-7.20.

⁶⁸ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.116.

terms of reference, at the first substantive meeting of the panel with the parties. A panel is bound by its terms of reference."⁶⁹

61. In *India – Patents (US)*, the Appellate Body found the Panel's ruling that "all legal claims would be considered if they were made prior to the end of [the first substantive] meeting" inconsistent with the letter and spirit of the DSU. The Appellate Body stated:

"Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. To be sure, Article 12.1 of the DSU says: 'Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute'. Yet that is *all* that it says. Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have."⁷⁰

62. In *US – Hot-Rolled Steel*, the issue arose of whether the "general practice" of the US investigating authorities regarding best facts available was within the terms of reference of the Panel. The Panel, which did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based, concluded that Japan's claim in this regard was outside its terms of reference because there was no mention of such claim in Japan's request for the establishment of a panel.⁷¹

63. In *India – Quantitative Restrictions*, India raised before the Panel the issue of the extent to which the Panel should consider the provisions of Article XVIII:B and the 1994 Understanding on Balance-of-payments Provisions in its analysis of the United States' claims since it had not raised any claim regarding violations of those provisions. The Panel decided that it would not address any claims by the United States based on those provisions⁷², however it considered that:

"[T]he provisions of Article XVIII:B (other than Article XVIII:11) and the 1994 Understanding are part of the context of those provisions alleged by the United States to have been violated. In addition, India also refers to various provisions of Article XVIII:B in its defence. In our view, the defending party is not restricted in the provisions of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter 'WTO Agreement') that it can invoke in its defence. In these circumstances, we find it relevant to consider the provisions of Article XVIII:B and the 1994 Understanding as part of the context in deciding on the claims of the United States and to examine them in relation to the defence raised by India."⁷³

64. In *China – Broiler Products*, China objected to the United States' inclusion of additional provisions in its request for establishment for a panel that were not in the consultations request. The Panel evaluated the relationship between the claims in the request for consultations and those set out in the panel request, stating that, pursuant to Article 7.1 of the DSU, "a panel's terms of reference are defined on the basis of the panel request." However, tracing prior Appellate Body decisions, the Panel noted "it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the 'legal basis' in the panel request may reasonably be said to have evolved from the 'legal basis' that formed the subject of consultations; the addition of provisions must not have the effect of changing the essence of the complaint." Rather, the Panel characterized the question before it as whether the additional claim in the US's panel request "may reasonably be said to have evolved" from the claims included in its request for consultations. To answer, the Panel assessed whether there was "some connection ... between the claims set forth in the panel request and those identified in the request for consultations in terms of either the provisions cited, the obligation at issue or issue in dispute, or the factual circumstances leading to the alleged violation." It conducted the analysis on

⁶⁹ Appellate Body Report, *India – Patents (US)*, paras. 92-93.

⁷⁰ Appellate Body Report, *India – Patents (US)*, para. 92.

⁷¹ Panel Report, *US – Hot-Rolled Steel*, para. 7.22.

⁷² Panel Report, *India – Quantitative Restrictions*, para. 5.18.

⁷³ Panel Report, *India – Quantitative Restrictions*, para. 5.19.

the "basis of the text of these documents without inquiring into the actual consultations that took place between the parties". The Panel found the connection between the claims in the consultations request and the panel request "tenuous at best" and the additional claim outside its terms of reference.⁷⁴

1.3.1.2.3 Claims included in the panel request

1.3.1.2.3.1 Late presentation of claims

65. In *EC – Bananas III*, the Panel held that certain claims under GATS made by Guatemala, Honduras and Mexico were not within the scope of the case. While these claims had been included in the panel request, the Panel decided not to address them because they had not been elaborated in the three parties' first written submission.⁷⁵ The Appellate Body reversed the Panel's conclusion, holding that nothing in the DSU or GATT practice suggested that all claims must be set out in a complaining party's first written submission:

"There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.

...

We do not agree with the Panel's statement that a 'failure to make a claim in the first written submission cannot be remedied by later submissions or by incorporating the claims and arguments of other complainants'. Pursuant to Articles 6.2 and 7.1 of the DSU, the terms of reference of the Panel in this case were established in the request for the establishment of the panel, WT/DS27/6, in which the claims specified under the GATS were made by all five Complaining Parties jointly."⁷⁶

66. The Panel in *Japan – Apples* referred to the findings of the Appellate Body in *EC – Bananas III* and observed that "it is well established that a complainant is not prevented, as a matter of principle, from developing in its second submission arguments relating to a claim that is within the terms of reference of the panel, even if it did not do so in its first written submission."⁷⁷ However, in this particular case, the complainant, the United States, only made arguments with respect to certain claims during the Panel's substantive hearings with the parties. The Panel noted the dangers of permitting such presentation of claims, warning that it could significantly limit the possibility for the defending party to argue in response:

"In the present case, the United States made arguments in relation to its claims under Article XI GATT 1994 and Article 4.2 of the Agreement on Agriculture only during our two substantive hearings with the parties. Such a tactic may seem questionable since nothing prevented the United States from presenting arguments on these claims in its first submission, and such an approach may significantly limit the possibility for the defending party to argue in response, depending on the circumstances of the case, or at least could unduly delay the proceedings.

Taking into account the established practice on issues such as this, and having given due consideration to Japan's request, we decided that the most appropriate way to deal with this issue was to give Japan sufficient opportunity to reply."⁷⁸

67. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* declined to rule on a claim presented by Turkey for the first time in its responses to the Panel's questions following the first substantive meeting with the parties:

⁷⁴ Panel Report, *Broiler Products*, paras. 7.213 and 7.218-7.233.

⁷⁵ Panel Report, *EC – Bananas III*, paras. 7.57-7.58.

⁷⁶ Appellate Body Report, *EC – Bananas III*, paras. 145 and 147. See also Appellate Body Report, *Chile – Price Band System*, para. 158.

⁷⁷ Panel Report, *Japan – Apples*, para. 8.64.

⁷⁸ Panel Report, *Japan – Apples*, paras. 8.65-8.66.

"In this instance, Turkey asserted its claim under Article VI:6(a) only in response to our written questions. It articulated this claim only after the parties had provided us with written submissions, had attended a substantive meeting and orally responded to the same questions which later prompted Turkey in its written reply to advance an Article VI:6(a) claim. A statement of claim made so late in the proceedings does not comply with the due process requirement of paragraph 6 of our Working Procedures. Similarly, the Appellate Body in *EC – Fasteners (China)* found that '[w]e do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law'.

For procedural grounds, we therefore decline to rule on Turkey's Article VI:6(a) claim, and we will neither consider it further nor resolve it."⁷⁹

68. In *Thailand - Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the Panel noted that even though it may be desirable that a complainant assert all claims and advance all pertinent arguments in its first written submission so as to allow the respondent to respond to them as early as possible, nothing in the DSU or in WTO practice requires that in all cases. Consequently, the Panel found that Thailand still had sufficient opportunity to address the Philippine's argumentation and to exercise its due process rights:

"While it may in general be desirable that a complainant assert all claims and advance all pertinent arguments in its first written submission so as to allow the respondent to respond to them as early as possible, nothing in the DSU or in WTO practice requires this in all cases. In the circumstances of this case, the Philippines was arguably not in any position to do so. Of greater importance, however, is the fact that Thailand still had ample opportunity to address the Philippine's detailed argumentation under Article 7.1 in its own second written submission, in its responses to the pre-hearing written questions from the Panel, at the hearing with the Panel, and in its responses to the Panel's post-hearing questions. In these circumstances, the Panel is of the view that Thailand's due process rights would not be breached if it were to entertain the Philippines' alternative claim under Article 7.1. Indeed, it was Thailand, not the Philippines, that sought to rely on Article 7 in the first place."⁸⁰

1.3.1.2.3.2 Abandoned claims

69. In *US – Steel Plate*, India indicated in its first written submission that it would not pursue several claims that had been set out in its request for establishment of the Panel. However, India changed its view later on and informed the Panel of its intention to pursue one of these claims during the first substantive meeting of the Panel with the parties and in its rebuttal submission. In spite of the lack of specific objection by the United States which had noted that the claim was within the Panel's terms of reference, the Panel decided that it was not going to rule on India's abandoned and later recovered claim:

"This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment. One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of

⁷⁹ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.64-7.65.

⁸⁰ Panel Report, *Thailand - Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.86.

Appendix 3 to the DSU provide that parties shall 'present the facts of the case and their arguments' in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.

With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim. Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under AD Agreement Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition."⁸¹

70. In *China – Raw Materials*, the complainants abandoned claims in respect of certain measures. The Panel observed that:

"As noted above, a complainant's Panel Request determines the scope of a panel's terms of reference. It is for complainants to decide what claims they present to a panel. By the same logic, a complainant can unilaterally withdraw a claim, or the complaint in its entirety, or seek to settle a particular dispute. On numerous occasions, panels have not examined claims abandoned by complainants in the course of panel proceedings."⁸²

1.3.1.2.3.3 Whether a party has made a specific claim

71. In *US – Certain EC Products*, the United States asked the Appellate Body to reverse the Panel's finding under Article 23.2(a) on the basis that, *inter alia*, the European Communities had "never requested or argued for" findings under Article 23.2(a). The Appellate Body considered that the fact that a claim of inconsistency with a given provision may be within the Panel's terms of reference does not necessarily mean that the complainant has actually made arguments in support of that claim. The Appellate Body further ruled that in the absence of specific arguments of inconsistency by the complainant, the burden to present a *prima facie* case of violation would not be met:

"[A]s the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference.

However, the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim. An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings, the European Communities did not refer *specifically* to Article 23.2(a) of the DSU. Furthermore, in response to a request from the United States to clarify the scope of its claim under Article 23, the European Communities asserted only claims of violation of Articles 23.1 and 23.2(c) of the DSU; no mention was made of Article 23.2(a). Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made arguments relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU.

...

⁸¹ Panel Report, *US – Steel Plate*, paras. 7.27-7.29.

⁸² Panel Reports, *China – Raw Materials*, para. 7.23.

... As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it did not adduce any evidence or arguments to demonstrate that the United States made a 'determination as to the effect that a violation has occurred' in breach of Article 23.2(a) of the DSU. And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and did not establish, a *prima facie* case of violation of Article 23.2(a) of the DSU."⁸³

72. In *Chile – Price Band System*, Chile asked the Appellate Body to reverse the Panel's finding on 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. The Appellate Body concluded that, although Argentina's request for the establishment of a panel was phrased broadly enough to include a claim under both sentences of Article II:1(b) of the GATT 1994, a close examination of Argentina's submissions revealed that the only claim made by Argentina was under the first sentence of that Article.⁸⁴ The Appellate Body further stated:

"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."⁸⁵

73. In *Korea – Commercial Vessels*, Korea asked the Panel to issue a preliminary ruling that the European Communities had extended the scope of the dispute settlement proceedings by arguing beyond the measures specified in the request for consultations.⁸⁶ The Panel rejected Korea's request, stating:

"We do not consider that the scope of the request for establishment need be identical to the scope of the request for consultations. Rather, the scope of the request for establishment is governed by, and may not exceed, the scope of the consultations that actually took place between the parties. Provided the request for establishment concerns a dispute on which consultations had been requested, there is no need for the matter identified in the request for establishment to be identical to the matter on which consultations were requested.

...

Since consultations took place in respect of all of the abovementioned measures [Article 5/ serious prejudice claims regarding assistance given under the KEXIM APRG and PSL programs and Article 3/ prohibited export subsidy claims regarding restructuring assistance and tax programs], in the context of the dispute concerning the application to those measures of certain disciplines under the SCM Agreement, we consider that the European Communities was entitled to formulate its request for

⁸³ Appellate Body Report, *US – Certain EC Products*, paras. 111-112 and 114.

⁸⁴ Appellate Body Report, *Chile – Price Band System*, para. 165.

⁸⁵ Appellate Body Report, *Chile – Price Band System*, paras. 167-168.

⁸⁶ Panel Report, *Korea – Commercial Vessels*, para. 7.2.

establishment on the basis of any combination of those measures and legal provisions."⁸⁷

74. In *EC – Commercial Vessels*, Korea requested the Panel to make a preliminary ruling on whether "disbursements of funds" were within the Panel's terms of reference.⁸⁸ The Panel declined to make a ruling on this issue, stating:

"In order to decide on Korea's request, we would have to determine whether 'individual instances of application' or 'disbursements of funds' were somehow implicitly identified in the request for establishment, and if not, whether the request otherwise covers such disbursements either because they are 'application' of the cited measures or because they are 'directly related' to those measures. The Panel is not persuaded, however, that it is necessary or appropriate for it to pronounce on these questions.

...

... [E]ven if we agreed that disbursements of funds are applications of the measures identified in Korea's request for the establishment of a panel, Article 19.1 of the DSU would preclude us from making the kind of specific recommendation requested by Korea [that the EC cease further disbursements of funding].

... [T]he Panel ... **decides** that it is neither necessary nor appropriate to clarify the status of disbursements of funds in the manner requested by Korea."⁸⁹

75. The Panel in *Ukraine – Ammonium Nitrate* found certain claims to fall outside its terms of reference on the ground that, while such claims appeared in the complainant's panel request, they could not reasonably be said to have evolved from the complainant's consultations request.⁹⁰

76. In *Morocco – Hot-Rolled Steel (Turkey)*, Turkey, the complainant, included in its panel request claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement that it had not included in its consultations request. Morocco, the respondent, argued that these claims fell outside the Panel's terms of reference because they had not been subjected to consultations. Turkey submitted that the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement had evolved from the claim under Article 3.1 of the same Agreement, identified in Turkey's consultations request.⁹¹ In ascertaining whether there was a connection between the claims set forth in the consultations request and those identified in the panel request, the Panel made the following observation:

"In respect of a 'connection' in terms of the obligations at issue, Article 6.5 contains the requirement that any information which is by nature confidential or which is provided on a confidential basis shall be treated as confidential upon good cause shown. According to Article 6.5.1, an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof. Articles 6.5 and 6.5.1 thus relate to *procedural* obligations concerning the treatment of confidential information in anti-dumping investigations. In contrast, Article 3.1 concerns the obligation that a determination of injury shall be based on positive evidence and shall involve an objective examination of the volume and price effects of dumped imports and their impact on the domestic industry. This provision establishes a *substantive* obligation concerning the determination of injury. It follows that the obligations of the claims in the panel request and in the request for consultations are of different nature and apply in respect of different actions of the investigating authority.

⁸⁷ Panel Report, *Korea – Commercial Vessels*, para. 7.2, sub-paras. 10 and 13.

⁸⁸ Panel Report, *EC – Commercial Vessels*, paras. 7.13 and 7.15.

⁸⁹ Panel Report, *EC – Commercial Vessels*, para. 7.20, 7.24-7.25.

⁹⁰ Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.58.

⁹¹ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.32-7.33.

... We are thus not convinced that Turkey has established, in this case, a 'close connection' between the obligations in Articles 6.5 and 6.5.1 and the 'objective examination' obligation under Article 3.1."⁹²

77. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* also rejected Turkey's contention that the claims at issue had naturally evolved from Turkey's injury claims identified in its consultations request because during consultations the important role of the break-even threshold in the Moroccan investigating authority's injury determination became clear. The Panel limited its assessment of this jurisdictional matter to the text of the request for consultations, and declined to take into account what happened during the actual consultations. On this basis, the Panel concluded that the claims under Articles 6.5 and 6.5.1 of the Anti-dumping Agreement changed the nature and substance of the dispute and fell outside the Panel's terms of reference.⁹³

78. The Panel in *US – Pipes and Tubes (Turkey)* found that claims identified in Turkey's panel request regarding an alleged practice on the benefit determinations made by the US investigating authorities in countervailing duty investigations fell within its terms of reference even though the mentioned practice had not been identified with the same level of precision in Turkey's consultations request:

"Therefore, we disagree with the United States that Turkey's panel request improperly expanded the scope of the dispute by including as a new measure, an alleged 'practice' of rejecting in-country prices as benchmarks 'based solely on evidence that the government owns or controls the majority or a substantial portion of the market for the good'. Rather, we consider that, while the panel request identifies the challenged 'practice' measures with greater specificity, the manner in which this was done did not expand the scope or essence of the dispute as these 'practice' measures were set forth in the request for consultations. Accordingly, we reject the United States' request to exclude the alleged benefit practice measure from our terms of reference.

...

We also recall that the 'legal basis' for a complaint in a panel request may reasonably evolve from the consultations request, so long as the addition of provisions does not have the effect of changing the essence of the complaint. In our view, the basis for Turkey's 'as such' claim against the alleged benefit practice measure reasonably evolved from the description and reference to Articles 1.1(b) and 14(d) in the section discussing the 'Legal Basis of the Complaint' in Turkey's consultations request, as well as reference to 'ongoing practices' therein, demonstrating that Turkey's 'as such' claim in its panel request is clearly connected to its request for consultations."⁹⁴

1.4 Article 7.2

1.4.1 "Panels shall address ..."

79. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body implied that expressly exercising judicial economy amounts to "addressing" a claim (or objection):

"[H]ad we been satisfied that Mexico did, in fact, explicitly raise its objections before the Panel, then the Panel may well have been required to 'address' those objections, whether by virtue of Articles 7.2 and 12.7 of the DSU, or the requirements of due process."⁴⁴

⁴⁴ We recall that, in a different context involving judicial economy, we said that:

⁹² Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.37-7.38. See also *ibid.* paras. 7.39-7.42.

⁹³ Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.43-7.45. See also *ibid.* para. 7.53.

⁹⁴ Panel Report, *US – Pipes and Tubes (Turkey)*, paras. 7.94 and 7.97.

... for purposes of transparency and fairness to the parties, a panel should, ... in all cases, address expressly [even] those claims which it declines to examine and rule upon ... Silence does not suffice for these purposes.

Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 117."⁹⁵

80. In *Mexico – Taxes on Soft Drinks*, Mexico requested that the Panel decline to exercise its jurisdiction in the circumstances of the dispute. The Panel declined Mexico's request, and the Appellate Body upheld the Panel's decision. In the course of its analysis, the Appellate Body stated that:

"The second paragraph of Article 7 further stipulates that '[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.' The use of the words 'shall address' in Article 7.2 indicates, in our view, that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."⁹⁶

1.4.2 "the relevant provisions"

81. In *Argentina – Footwear (EC)*, Argentina had claimed that the Panel had violated Article 7.2 of the DSU and exceeded its terms of reference, because it had relied on alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*.⁹⁷ In this case, the Appellate Body did not consider that the Panel was wrong to rule on Article 3 of the *Agreement on Safeguards* and stated:

"We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."⁹⁸

1.4.3 "covered agreement or agreements"

82. In *EC – Hormones (US) (Article 22.6 – EC)*, the Arbitrators stated that:

"The autonomous quota rights claimed by the US – irrespective of their legal status and consistency with WTO rules -- are not rights under any of the WTO agreements covered by the DSU. The rights thus alleged are derived from bilateral agreements that cannot be properly enforced on their own in WTO dispute settlement."⁹⁹

83. In *EC and certain member States – Large Civil Aircraft*, the Panel noted that Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". The Panel proceeded to rule that it did not have the jurisdiction to make findings with respect to a bilateral Agreement between the United States and the European Communities signed in 1992, as it was not a covered agreement:

⁹⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 49 and fn 44.

⁹⁶ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

⁹⁷ Appellate Body Report, *Argentina – Footwear (EC)*, para. 71.

⁹⁸ Appellate Body Report, *Argentina – Footwear (EC)*, para. 74.

⁹⁹ Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 50.

"Article 7.2 of the DSU requires panels to 'address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute.' The 'covered Agreements' cited by the United States in document WT/DS316/2 [the panel request] include the DSU, the GATT 1994 and the SCM Agreement. As the 1992 Agreement is not a covered Agreement cited by the United States in document WT/DS316/2, or contained in the list of covered Agreements in Appendix 1 to the DSU, or one of the instruments included in the GATT 1994, we do not have jurisdiction to determine the rights and obligations of the parties under the 1992 Agreement."¹⁰⁰

84. The Panel in *EC and certain member States – Large Civil Aircraft* also considered the meaning of the expression "covered agreement or agreements" in Article 7.2:

"[I]t is clear to us that the word 'agreements' in Article 7.2, which is joined to the words 'covered agreement' that immediately precede it by the conjunction 'or', refers to the plural of a 'covered agreement'. Therefore, it should not, as the European Communities suggests, be understood as referring to international agreements that are not WTO covered agreements. As we have already noted in our preliminary ruling, Article 7.2 does not give us jurisdiction to determine the rights and obligations of the parties under non-covered agreements for the purpose of the recommendations or rulings envisaged under Article 11 of the DSU. Such recommendations or rulings must relate to the parties' rights and obligations under the WTO covered agreements, not the rights and obligations of parties under international agreements that are not WTO covered agreements."¹⁰¹

1.5 Article 7.3

1.5.1 Special terms of reference

85. In *Brazil – Desiccated Coconut*, upon a request from Brazil for consultations on the terms of reference, the DSB authorized the DSB Chairman to "draw up terms of reference in consultation with the parties, in accordance with Article 7.3 of the DSU". The Philippines and Brazil agreed on the following special terms of reference:

"To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."¹⁰²

1.6 Relationship with other provisions of the DSU

1.6.1 Article 3.3

86. The Panel in *Argentina – Footwear*, in discussing the concept of a "moving target" with respect to a panel's terms of reference, linked this issue with the principle of prompt settlement of disputes set out in Article 3.3.¹⁰³

1.6.2 Article 4

87. In *Korea – Commercial Vessels*, Korea asked the Panel to issue a preliminary ruling that the European Communities had extended the scope of the dispute settlement proceedings by arguing beyond the measures specified in the request for consultations.¹⁰⁴

¹⁰⁰ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.89

¹⁰¹ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.324.

¹⁰² Panel Report, *Brazil – Desiccated Coconut*, para. 10. See also WT/DS22/6.

¹⁰³ Panel Report, *Argentina – Footwear*, para. 8.41.

¹⁰⁴ See Panel Report, *Korea – Commercial Vessels*, para. 7.2.

1.6.3 Article 6.2

88. See the Section on Article 6.2.

1.6.4 Article 19.1

89. In *China – Raw Materials*, the Appellate Body clarified that the "measures" that form part of the "matter" referred to the DSB are the "measures" that may be the subject of recommendations in Article 19.1:

"A panel is required, under Article 7 of the DSU, to examine the 'matter' referred to the DSB by the complainant in the request for the establishment of a panel, and to make such findings as will assist the DSB in making recommendations. The language in a complainant's panel request is therefore important because 'a panel's terms of reference are governed by the request for establishment of a panel'. Article 19.1 of the DSU establishes a link between a panel's finding that 'a measure is inconsistent with a covered agreement', and its recommendation that the respondent 'bring the measure into conformity'. The 'measures' that may be the subject of recommendations in Article 19.1 are limited to those measures that are included within a panel's terms of reference."¹⁰⁵

1.7 Relationship with other WTO Agreements

1.7.1 Anti-Dumping Agreement

1.7.1.1 Article 17.4

90. In *Guatemala – Cement I*, the Appellate Body discussed the phrase "the matter referred to the DSB", noting that it bears the same meaning in Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement.¹⁰⁶

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¹⁰⁵ Appellate Body Reports, *China – Raw Materials*, para. 251.

¹⁰⁶ Appellate Body Report, *Guatemala – Cement I*, para. 72. See also fn 16 above.